SCRITTI DI DIRITTO PRIVATO EUROPEO
ED INTERNAZIONALE

Collana diretta da Ilaria Queirolo e Alberto Maria Benedetti

26

SCRITTI DI DIRITTO PRIVATO EUROPEO
ED INTERNAZIONALE

ESSAYS IN EUROPEAN AND INTERNATIONAL PRIVATE LAW

Direttori - Directors

Ilaria QUEIROLO (Università di Genova); Alberto Maria BENEDETTI (Università di Genova)

Comitato scientifico – Scientific Board

Maria Caterina BARUFFI (Università di Verona); Sergio Maria CARBONE (Università di Genova); Janeen MARGARET CARRUTHERS (University of Glasgow); Carlos ESPLUGUES MOTA (Universidad de Valencia); Samuel Fulli-Lemaire (Université de Strasbourg); Mauro GRONDONA (Università di Genova); Vincenzo ROPPO (Università di Genova); Bettina HEIDERHOFF (Westfälische Wilhelms-Universität Münster); Thalia KRUGER (Universiteit Antwerpen); Claudio SCOGNAMIGLIO (Università Roma Tor Vergata); Pietro SIRENA (Università Bocconi); Ilaria VIARENGO (Università degli Studi di Milano)

Comitato editoriale – Editorial Board

Francesca BARTOLINI (Link Campus); Laura CARPANETO (Università di Genova); Maria Elena DE MAESTRI (Università di Genova); Stefano DOMINELLI (Università di Genova); Francesca MAOLI (Università di Genova); (Università di Genova); Francesco PESCE (Università di Genova).

BETTINA HEIDERHOFF, ILARIA QUEIROLO (edited by)

NEW APPROACHES IN PRIVATE (INTERNATIONAL) LAW

CONTRIBUTORS
ALEKSANDRA BAR; ANDREA ALBERTO BELLOLI;
ANDREA BERGAMINO; ELISA COLLETTI; STEFANO DOMINELLI;
ESTEBAN GAVIRIA TOBÓN; ISABEL GÓMEZ FUSTER;
BETTINA HEIDERHOFF; JAKUB JANSA; FRANCESCA MAOLI;
PIETRO SANNA; CHRISTINE TOMAN.

EDITORIALE SCIENTIFICA
NAPOLI

This volume has been published with the financial support of the University of Genoa (Department of Law, of Political Science; International activities office).

All rights reserved

© 2021 Editoriale Scientifica srl
Via San Biagio dei Librai 39
Palazzo Marigliano
80138 Napoli
www.editorialescientifica.com
info@editorialescientifica.com

ISBN 979-12-5976-122-4

SCRITTI DI DIRITTO PRIVATO EUROPEO ED INTERNAZIONALE
Essays in European and International Private Law

Diritto privato, diritto europeo e diritto internazionale rivelano intrecci via via più significativi, chiamando docenti e studiosi dei diversi settori a confrontarsi e a collaborare sempre più intensamente. Da tale proficua osmosi scientifica origina la collana "*Scritti di diritto privato europeo ed internazionale*", con la quale si persegue l'obiettivo di raccogliere opere scientifiche – a carattere monografico e collettaneo – su temi di attualità in un'ottica interdisciplinare ed in una prospettiva di valorizzazione della stretta connessione tra le discipline coinvolte. Tale obiettivo trova un riscontro nelle specifiche competenze dei Direttori e dei membri del Comitato scientifico.

In "*Scritti di diritto privato europeo ed internazionale*" sono pubblicate opere di alto livello scientifico, anche in lingua straniera, per facilitarne la diffusione internazionale. I Direttori approvano le opere e le sottopongono a referaggio con il sistema del "doppio cieco" ("*double blind peer review process*"), nel rispetto dell'anonimato sia dell'autore, sia dei due revisori.

I revisori rivestono o devono aver rivestito la qualifica di professore ordinario nelle università italiane o una qualifica equivalente in istituzioni straniere. Ciascun revisore formula una delle seguenti valutazioni: a) pubblicabile senza modifiche; b) pubblicabile previo apporto di modifiche; c) da rivedere in maniera sostanziale; d) da rigettare. La valutazione tiene conto dei seguenti criteri: i) significatività del tema nell'ambito disciplinare prescelto e originalità dell'opera; ii) rilevanza scientifica nel panorama nazionale ed internazionale; iii) attenzione alla dottrina e all'apparato critico; iv) adeguato aggiornamento normativo e giurisprudenziale; v) rigore metodologico; vi) proprietà di linguaggio e fluidità del testo; vii) uniformità dei criteri redazionali. Nel caso di giudizio discordante fra i due revisori, la decisione finale è assunta di comune accordo dai Direttori, salvo casi particolari ove venga nominato tempestivamente un terzo revisore. Le schede di referaggio sono conservate in appositi archivi.

Contents

CONTRIBUTORS

Aleksandra Bar, MA, PhD Candidate, University of Wrocław, Faculty of Law, Administration and Economics

Andrea Alberto Belloli, Phd Candidate in Private law, University of Genoa

Andrea Bergamino, LLM, PhD Candidate in Logistics and Transports, University of Genoa

Dr. Elisa Colletti, PhD, Adjunt Professor, University of Palermo

Dr. Stefano Dominelli, PhD, Researcher in Public and private international law, University of Genoa

Esteban Gaviria Tobón, University of Valencia

Isabel Gómez Fuster, PhD Candidate, University of Valencia

Prof. Dr. Bettina Heiderhoff, Editor of this *Volume*, Director of the Institute for German and International Family Law and professor for Private Law, Private International Law and International Procedural law at the University of Münster

Jakub Jansa, PhD Candidate, Researcher in International commercial law, University of Silesia in Katowice

Dr. Francesca Maoli, PhD, Post-Doc contract research fellow and Adjunct Professor, University of Genoa

Prof. Dr. Ilaria Queirolo, Editor of this *Volume*, Professor of Internationla law, University of Genoa

Pietro Sanna, PhD Candidate, University of Genoa

Christine Toman, Research Associate, Max Planck Institute for Comparative and International Private Law, Hamburg

Preface

The Series of Essays '*Scritti di diritto privato europeo ed internazionale*' goals are to disseminate the results of academic research at European and international level, and to to contribute to the national and international scientific debate, with methodological rigor and openness to multi and intra-disciplinary approaches.

The *PEPP Programme*, which brings together PhD Candidates from different EU Member States to attend four seminars of advanced learning in a Programme in European Private Law for Postgraduates (PEPP), and the '*Series*', due to their common aims, have long established a cooperation in the dissemination of research studies.

This *Volume* comprises contributions from Lecturers and PhD candidates who participated in the 2019-2020 PEPP Session, coordinated by the University of Münster along with Universities and Research Centres in Germany (Bucerius Law School, the Max Planck Institute for Comparative and International Private Law Hamburg), Belgium (Catholic University of Leuven), Italy (University of Genoa), Poland (Silesian University at Katowice, University of Wroclaw, Jagiellonian University in Kraków), Spain (University of Valencia) and the United Kingdom (University of Cambridge).

The works of the Authors focus on their own research topics, connected to various aspects of contract law, international and EU commerce, private international law and human rights in the European Union. All contributions address most urgent issues in laws, many of them being devoted to the matter of regulation of new technolgies.

All contributions were subject both to a double-blind referee procedure, and to revision by an English native speaker.

Bettina Heiderhoff
Ilaria Queirolo
June 2021

BETTINA HEIDERHOFF

PRODUCER'S LIABILITY FOR AUTONOMOUS SYSTEMS AND AI IN EU PRIVATE INTERNATIONAL LAW

1. *Introduction*

1.1. *Private International Law regulating AI as unmapped territory*

While the discussion on how liability for damages caused by autonomous systems, or so-called "artificial intelligence" (AI), should be integrated into the substantive law is lively and controversial, the private international law (PIL) dimension of this issue has been largely overlooked.[1] Considering that such systems are often imported, and most likely operating internationally, this appears to be a serious blindspot. Any conceptualisation of a well-balanced approach to liability for such modern systems would be futile, if it did not apply to international cases, as well.

[1] However, a discussion may follow the recent resolution of the European Parliament - Resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence - P9_TA-PROV(2020)0276.

This problem is multi-layered. At first glance, the liability of the person who creates an autonomous system appears similar to product liability. This applies not only to the substantive law, but equally to the PIL dimension. Moreover, one must certainly consider that systems whose key element is software cannot simply be classified as products without further explanation; although it seems possible that the necessary adjustments could be made. Yet, on a second level, the question arises as to whether the determinations behind the existing European standard for product liability are appropriate for autonomous systems. Article 5, Rome II Regulation[2] has some profound and widely criticised weaknesses, which might be amplified in the context of autonomous systems. This is conceivable, for example, for liability for damage and injury to innocent bystanders, which is likely to become more important as autonomous systems become more widely used. Thirdly, even if one succeeded in tailoring Article 5, Rome II Regulation to such systems, the issue of the other participants' liability will also have to be resolved. It seems realistic to expect that the rules on liability for owners, operators, users and consumers, and possibly the system itself, will, at some point, have to be fundamentally realigned.[3] However, this paper will largely exclude this third issue.

In what follows, we will first specify in what sense the term "autonomous products" is used in this paper. Subsequently, we will examine the logic of the current solutions provided in the Rome II Regulation and the demands placed upon PIL in terms of AI. Finally, this article will show that autonomous systems require either some judicial reinterpretation of the existing provisions or, if possible, some amendment to the legislation.

1.2. *Autonomous systems as products?*

When discussing "product liability 4.0", one essentially contested issue concerns the extent to which the term "product" covers autonomous systems[4]. For the purpose of this paper, it is not necessary to take a par-

[2] Regulation (EC) 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), in OJ 2007 L199/40.

[3] The European Parliament Resolution of 20 October 2020 (cit.) focuses on the user's liability, P9_TA-PROV(2020)0276.

[4] With a broad overview M.A. CHINEN, *The Co-Evolution of Autonomous Machines and Legal Responsibility*, in 20 *Va. J.L. & Tech.*, 2016, p. 338; innovative K.A. CHAGAL-FEFERKORN, *Am I an Algorithm or a Product? When Products Liability Should Apply to Algorithmic Decision-Makers*, in 30 *Stan. L. & Pol'y Revue*, 2019, p. 61; for the German

ticular stance on this issue; rather, we presuppose that autonomous systems, or their codes, require different legal solutions. Assuming that different legal solutions are necessary, establishing ways of distinguishing classical products from autonomous systems becomes the crucial question. While this issue cannot be discussed in depth in this paper, we still need to clarify what kind of systems we will focus on. What degree of autonomy do devices require to be relevant to our discussion? Autonomy in a narrow sense would mean that the system is not only machine-learning, but also completely detached from human control.[5] If not entirely dystopian, such a scenario would appear to belong in a far distant future. By contrast, autonomy in a broad sense can be found in products currently on the market. Strictly speaking, such products are 'automated' in the sense that they are fully preprogramed and, therefore, work within clearly predetermined parameters.[6] In the present context of drafting preliminary guidelines regulating conflict-of-law rules, sketching a vague concept and drawing the line where automation becomes more complex is sufficient. The absence of predetermination, which is crucial to substantive law, can be defined in a non-technical manner and may – notwithstanding the knowledge that it will one day become the standard – not necessary imply deep learning as yet.[7] It shall, thus, be decisive that the software – integrated into a device – responds to the environment independently of an individual command by the user. The software simply operates in a manner, which is too sophisticated for the user to predict its possible "decisions".[8]

Autonomous cars are the most often cited example for such systems; however, this contribution shall deal less with cars, as there are many special rules regulating road traffic. Nevertheless, autonomous cars are good exemplars as they are commonly referred to and the risks of their operation are easy to conceive.

As more specific test-cases, two rather graphic examples shall help to visualise the object of our reflections. Both products are meant to be not

perspective T. RIEHM, S. MEIER, *Product Liability in Germany - Ready for the Digital Age?*, in *EuCML*, 2019, p. 161.

[5] Inspiring in terms of "true" autonomy only D.C. VLADECK, *Machines without Principals: Liability Rules and Artificial Intelligence*, in 89 *Wash. L. Rev.*, 2014, p. 117.

[6] Similar G. WAGNER, *Robot, Inc.: Personhood for Autonomous Systems?*, in 88 *Fordham L. Rev.*, 2019, p. 591; on the lack of complete predetermination as a core element of the definition G. BORGES, *Rechtliche Rahmenbedingungen für autonome Systeme*, in *NJW*, 2018, p. 977, at p. 978.

[7] On the conception of terms, see H. ZECH, *Künstliche Intelligenz und Haftungsfragen*, in *ZfPW*, 2019, p. 198; S.J. RUSSELL, P. NORVIG, *Artificial Intelligence: A Modern Approach*, Englewood Cliffs, 2014, p. 40.

[8] On this core element of the definition only G. BORGES, *Rechtliche Rahmenbedingungen für autonome Systeme*, cit., at p. 978.

only autonomous in the broad sense, as defined above, but can also be privately run and may prove dangerous for the user's life, health, or property.[9] As this paper focuses on international cases, the products require international connectivity and mobility.

With this in mind, the first example is a medical implant (such as a cardiac pacemaker or an "insulin pump 4.0") which helps patients with severe medical conditions live a normal life. Such a device could be entirely controlled by an AI system that makes decisions independently – e.g., regarding medication. Such a system may improve the user's quality of life or even save his or her life altogether. However, it could kill or severely injure the user, if it malfunctioned.

A second example might be a diving computer. Such gadgets already exist, but may soon turn into even more advanced, autonomous devices that can react to the condition of the diver and the underwater world. The computer enables users to dive more safely, at great depths and in unfamiliar surroundings. However, if it misjudged a situation, it could kill or severely injure the user – or, possibly, any innocent bystanders.

2. *Interdependence of private international law and evaluations of substantive law*

2.1. *Materialisation of private international law*

PIL has a very small, almost technical task: it determines the applicable national law in international cases. In doing this, PIL rules are based upon the basic principle that cases are drawn to the jurisdiction with which they have the closest connection.[10] To this day, PIL follows this basic concept developed by Savigny. As is well known, he said, in very

[9] Mostly, it is assumed that Article 5 Rome II Regulation, parallel to the Product Liability Directive, does not apply to mere economic loss P. STONE, *Product Liability under the Rome II Regulation*, in J. AHERN, W. BINCHY (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime*, Leiden, 2009, p. 175 ff, at p.182; R. PLENDER, M. WILDERSPIN, *The European Private International Law of Obligation*, London, 2015, paras. 19-040; unclear G. RISSO, *Product liability and protection of EU consumers: is it time for a serious reassessment?*, in 15 *Journal of Private International Law*, 2019, p. 210, (suggesting that it comprises non-material damages and damages to the property itself), at p. 216; opposed DICEY, MORRIS & COLLINS, *The Conflict of Laws*, London, 2012, 15th ed, para. 35-042 (all damages caused by the product); similar P. MACHNIKOWSKI, *Article 5*, in U. MAGNUS, P. MANKOWSKI (eds), *European Commentaries on Private International Law, Vol. 3: Rome II Regulation - Commentary*, Cologne, 2019, para. 29.

[10] In the context of Rome II, P. HAY, *European Conflicts Law after the American Revolution - Comparative Notes*, in *U. Ill. L. Rev.*, 2015, 2053.

graphic and simplistic language, every legal relation had its "universal seat"[11] governing the applicable law.[12] Even originating from this essentially neutral and unbiased standard, determining the appropriate connecting factors is by no means a simple task.[13]

However, PIL has not stopped at this point. It is important to realise that even PIL has gradually adopted a highly judgemental approach and replaced the original idea of the closest connection with that of meta-goals. In other words, PIL has not been spared from the overarching process of the so-called "materialisation" of law.[14] This is sometimes obvious, as in the case of consumer protection or employment law, in which the law of the consumer's or the employee's residence is more frequently applied than the law of the trader or employer's seat.

In some particularly sensitive fields of regulation, the whole idea of the "seat" has even been abandoned entirely – which is the case in the current data protection law and has, alarmingly, now also entered into the debate on AI-related liability.[15]

Leaving this extreme development aside for the moment, it may be more helpful to be aware that judgemental elements are not absent more generally in tort law either. Considering the discussion on whether the place where the event which gave rise to the harm occurred, the place where the harm arose, or both places are decisive as connecting factors to the relevant jurisdiction, it becomes apparent that complex evaluations are also required in general tort law.

Product liability law provides a good example of the difficulty of locating the "universal seat" of a legal relation with precision. With this in

[11] F.C. VON SAVIGNY, *A Treatise on the Conflict of Laws (System of the Modern Roman Law Volume VIII)*, translated by W. GUTHRIE, London, 1869, in particular p. 133; it should be mentioned that Savigny excluded tort law from this theory, because he understood it to be close to the criminal law and wanted to respect state regulatory interests, see p. 205.

[12] In detail G. KEGEL, K. SCHURIG, *Internationales Privatrecht*, München, 2004, p. 132, p. 183 f.; B. AUDIT, L. D'AVOUT, *Droit international privé*, Paris, 2018, para. 153.

[13] Puzzled (as far as Article 4 Rome II is concerned), R. FENTIMAN, *The Significance of Close Connection*, in J. AHERN, W. BINCHY (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime*, Leiden, 2009, p. 85.

[14] B. AUDIT, L. D'AVOUT, *Droit international privé*, cit., paras. 155 ff.; in the context of product liability J. FAWCETT, *Product Liability in Private International Law: A European Perspective*, in 238 *Recueil des cours*, 1993, p. 56.

[15] EU Parliament resolution (supra 2); very critical J. VON HEIN, *Forward to the Past: A Critical Note on the European Parliament's Approach to Artificial Intelligence in Private International Law*, https://conflictoflaws.net/2020/forward-to-the-past-a-critical-note-on-the-european-parliaments-approach-to-artificial-intelligence-in-private-international-law/.

mind, the legislator has identified several plausible connecting factors by following a judgemental approach and balancing the interests of the parties (producer/tortfeasor and victim of the damage). These factors must now be reviewed in light of AI.

Before we go into the detail, however, it is worth considering in the abstract which determinations PIL should support when it comes to the connecting factors. Here, without denying that there is room for a particular "PIL fairness" approach with its own principles, we must look at the substantive law in the first instance. Above all, it is coherence with the substantive law that is required: PIL should pick up and reflect the subjective determinations found in substantive law.[16] This may be problematic for liability relating to autonomous systems, with the law as it stands, as the elaboration of the substantive law is still in its early stages. Nevertheless, a brief examination of the substantive law is crucial when attempting to identify possible judgements stipulated therein.

2.2. Fundamental values of substantive law

2.2.a. Product Liability Directive

Proceeding from an assessment of the current EU law of product liability, set out in the Product Liability Directive,[17] one will find a strict liability of the producer. At first sight, this approach seems onerous for the producer and favourable to the user.[18] However, a closer look reveals that the producer's liability is restricted in multiple ways.[19] The restriction that is most relevant in the AI context concerns innovative products for which Article 7 (e), Product Liability Directive contains a special provision. According to this, the producer is not liable if the defect could not be discovered due to the state of science and technology at the time

[16] See with a profound analysis S. WITTAKER, *The Product Liability Directive and Rome II Article 5: 'Full Harmonisation' and the Conflict of Laws*, Cambridge Yearbook of European Legal Studies, Volume 13, 2011, p. 435.

[17] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, in OJ L 141, 4.6.1999, p. 20.

[18] The primary purpose certainly was not consumer protection but the harmonisation as such, P. MACHNIKOWSKI, *Conclusions*, in P. Machnikowski (ed), *European Product Liability*, Cambridge, 2016, p. 669, at p. 680.

[19] With more details G. RISSO, *Product liability and protection of EU consumers: is it time for a serious reassessment?*, cit., pp. 219 ff., who emphasizes the strongly consumer friendly general approach.

of putting the product into circulation. Also, the Directive does not provide for any product monitoring obligations that apply once the product has been put into circulation.

The rationale for such regulatory provisions is clear: the applicable product liability law is innovation-friendly[20] in that it rarely stipulates a liability for the producer but also – albeit only limited – imposes risks on the user.

2.2.b. *Plans for autonomous systems*

As stated above, it is doubtful whether the Product Liability Directive applies to autonomous systems. Where the autonomy of a system exceeds a certain level, it is necessary to scrutinise whether the Directive is still appropriate.[21] For software – which has not been "built" in a factory, but programmed by a computer scientist – neither the notion of a 'product' nor the term 'producer' seem fully adequate. A further problem concerns the understanding of what a "defect" is.[22] While this exact term does not appear in Article 5, Rome II Regulation, the core of it remains relevant also in the PIL context. A defect of a traditional product is usually caused in the production process. This is not the case for autonomous products, where the machine learning may have led to a malfunction. The application of the standards would thus require at least numerous modifications.

The European Union has taken several steps as regards outlining a legal framework for AI.[23] Such steps, and especially the distribution of liability, are, however, still quite vague.

Initially, a solution was attempted whereby the Product Liability Directive was to be modernised by way of additional guidelines, so as to include autonomous products.[24] However, this may not suffice. In the case of liability for autonomous systems, important decisions must be

[20] More details on the mix of interests involved when adopting the Directive OECHSLER in Staudinger BGB (2018) Einleitung PRODHAFTG § 1 paras. 1 ff., in particular paras. 17 ff.

[21] P. MACHNIKOWSKI, *Conclusions*, cit., pp. 691 ff.; also H. ZECH, *Künstliche Intelligenz und Haftungsfragen*, cit., p. 212 (arguing that the software controls a machine); K.A. CHAGAL-FEFERKORN, *Am I an Algorithm or a Product? When Products Liability Should Apply to Algorithmic Decision-Makers*, cit., *passim* (referring to innovative defining criteria).

[22] P. MACHNIKOWSKI, *Conclusions*, cit., p. 694.

[23] Whitebook COM(2020) 65; also Commission Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics, COM(2020) 64.

[24] https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/liability-defective-products_en; the EU Parliament Resolution (cit.) - P9_TA-PROV(2020)-0276 is based on this approach, see p. 6, para. 8.

taken that are more specifically shaped by macro-economic and ethical aspects when compared to general producer liability.[25] Striking a balance between user protection and developer support is even more complex when compared to traditional products. At the end of 2019, an expert group set up by the European Commission presented a report on liability for artificial intelligence.[26] The key message of this report is that victims of new digital technologies should not be provided with fewer protective mechanisms than victims in standard liability cases.[27] Existing liability regimes should, therefore, be adjusted to AI by considering the "functional equivalence"[28] between the autonomous system and the human assistant – or respectively the classical machine – it is replacing. If such equivalence exists, a corresponding liability is needed. This correlates with the principle of "technological neutrality".[29] In contrast, approaches that provide autonomous systems with some kind of legal capacity, leading to an independent liability[30] and thus relieve natural persons are clearly rejected.[31]

However, the White Book, published by the Commission on 19 February 2020, fails to mention the 2019 report.[32] Since questions of liability are certainly part of the "digital strategy", one could assume that this is due to legal policy reasons. One may also assume that the expert report

[25] Mentioning the ethical aspect H. EIDENMÜLLER, *The Rise of Robots and the Law of Humans*, in *ZEuP*, 2017, pp. 765, 774 f.; for the economic perspective G. WAGNER, *Robot Liability*, in S. LOHSSE, R. SCHULZE, D. STAUDENMAYER (eds), *Liability for Artificial Intelligence and the Internet of Things*, Baden-Baden, 2019, pp. 27, 37 ff.

[26] EC Expert Group on Liability and New Technologies – New Technologies Formation, Report Liability for Artificial Intelligence and other Emerging Digital Technologies, 2019, https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=36608; in the following "Report AI"; see also the expert opinion for German liability law H. ZECH, *Entscheidungen digitaler autonomer Systeme: Empfehlen sich Regelungen zu Verantwortung und Haftung?, Gutachten A zum 73. Deutschen Juristentag*, München, 2020.

[27] Report AI, cit., pp. 3, 34.

[28] Report AI, cit., in particular pp. 25, 34 f. and 45 f.

[29] Report AI, cit., p. 11.

[30] Suggesting such a construction, see e.g. European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics, EUR. PARL. Doc. P8_TA(2017)0051 (2017).

[31] Report AI, cit., pp. 37 ff.; in detail G. WAGNER, *Robot Liability*, cit., pp. 53 ff.; G. WAGNER, *Robot, Inc.: Personhood for Autonomous Systems; symposium: Rise of the Machines: Artificial Intelligence, Robotics, and the Reprogramming of Law*, in *Fordham Law Review*, 88 (2019), p. 591; G. TEUBNER, *Digitale Rechtssubjekte?*, in AcP, 218 (2018), p. 155, 160 ff.

[32] Only an indirect hint is made by referring to the report (COM(2020) 65 n. 37) which clarifies that the report i.a. draws upon contributions from the relevant expert groups (COM(2020) 64, p. 2).

with its strict regulations gave rise to further concerns, though a distinct approach by the Commission is not, as yet, apparent either.[33]

As the direction in which the substantive law will evolve is not yet clear, any considerations regarding PIL can also only be preliminary and must be based upon an independent assessment. Rather general propositions must suffice as a basis for establishing a balance of interests in PIL. The AI report pursues one objective, which can presumably be agreed upon by everyone: the objective of a "fair and efficient allocation of loss."[34] Additionally, it seems safe to assume that liability law governing AI shall have a significant gatekeeping function. Consequently, the EU is likely to have a strong interest in applying its own liability law to international cases.

Given the difficulty of reaching a consensus on principles of legal policy even within the European Union, provisions regulating the liability of autonomous systems will likely differ significantly from country to country outside the EU. Indeed, whether the manufacturer of the insulin pump 4.0 is liable beyond a specific fault may be viewed quite differently in Japan, Europe, or the US. Conflict of laws will determin on whether or not the manufacturer "will be hanged", as Silberman has put it.[35] Thus, a future PIL in the sphere of artificial intelligence (AI) must aim at reaching a coherent overall result despite the fact that foreign legal systems may assess risks quite differently.

3. *Current PIL and its compatibility*

3.1. *Basic principles of international tort law*

The general conflict-of-law rules for tort law contained in Article 4, Rome II Regulation could, to a large extent, easily be transferred to defects caused by AI. The law of the place where the tort was committed (*lex loci delicti*) or rather the law of the place where the damage occurred (*lex loci damni*) are decisive under Article 4, Rome II Regulation. Since the infringement of a right remains an infringement and the damage remains damage, this basic principle is applicable without further adjustment. However, Article 4, Rome II Regulation is only relevant to the

[33] The characteristic style is generally technology-friendly. The current White Book – COM(2020) 65, pp. 18 f. – highlights the requirement for liability even a little more than the Commission's statement – Künstliche Intelligenz für Europa COM(2018) 237, p. 19.

[34] Report AI, cit., p. 34.

[35] L.S. SILBERMAN, *Shaffer v. Heitner: The* End of an Era, in 53 *N.Y.U. L. Rev.*, 1978, p. 33, at p. 88.

user's responsibility for damage caused by an autonomous system. It does not apply to the producer's liability, since it is superseded by Article 5, Rome II Regulation.

3.2. Special provision for product liability

Article 5, Rome II Regulation, contains separate connecting factors for product liability that are seen as *lex specialis* and thus almost entirely override the general provision in Article 4, Rome II Regulation.

According to its wording, Article 5, Rome II Regulation is more easily applicable to autonomous systems than the provisions of the substantive law mentioned above. For instance, the provision not only applies to product liability in a narrow sense (i.e. strict liability under the ProdHaftG), but also covers any non-contractual product claims, such as a fault-based producer's liability that is found in many EU Member State jurisdictions. In the context of autonomous products, it is more relevant that the term "defect" does not appear in Article 5, Rome II Regulation.[36] Even though its scope of application is generally assumed to be restricted to liability of somehow "unsafe" and typically defective products[37], the absence of the term "defect" still makes it more flexible. Similarly, the term 'manufacturer' does not appear in the provision so that an adaption for "programmers" is easier than within the context of substantive law.[38] Thus, the simple term "product" needs to be understood in a broad sense in order to include autonomous systems. Altogether, the scope is a little wider and, as soon as or at least to the extent that an autonomous system can be considered as a product in terms of Article 5, Rome II Regulation, the provision shall undoubtedly be applicable to damage caused by an autonomous system.[39]

Should this step be taken, questions still remain, as clearly it is not only crucial to establish whether the wording of the legal norm is open to interpretation and analogy, but rather whether the legal norm actually contains the appropriate connecting factors.

In this regard, the objective of Article 5, Rome II Regulation, which is explained in Recital 20, may be helpful. The regulation aims at "fairly

[36] G. RISSO, *Product liability and protection of EU consumers: is it time for a serious reassessment?*, cit., at p. 216.

[37] The details are disputed; requiring a defect M. ILLMER, *Article 5*, in HUBER P. (ed), *Rome II Regulation*, München, 2011, para. 12; *Dickinson* para. 5.15; disagreeing DICEY, MORRIS & COLLINS, *The Conflict of Laws*, cit., para. 35-040 (any "feature or trait" suffices).

[38] DICEY, MORRIS & COLLINS, *The Conflict of Laws*, cit., 35-041.

[39] The provision also pursues to cover all cases that are included in the Directive, see COM (2003) 427, 13.

spreading the risks inherent in a modern high-technology society". Even though the provision initially mentions consumers' health", it then explicitly refers to "stimulating innovation [...] and facilitating trade".

Thus, Article 5, Rome II Regulation is a prime example for a conflict-of-law provision that does not remain totally neutral in finding the closest connection. On the contrary, it is clearly aimed at weighing interests in a material manner.

Looking more closely at the provision, and in particular when comparing it to the general provision in Article 4, Rome II Regulation, one cannot deny that Article 5, Rome II Regulation is aimed at privileging the producer over the "normal" tortfeasor. Of course, this does not happen unconditionally, and certainly, there are good reasons for such a weighting.[40] However, when using the principle of a "fair and efficient balance", there is admittedly a slight tendency in favour of the producer's interest. Therefore, even today, Article 5, Rome II Regulation has been the subject of criticism.[41] Apart from such arguable basic determinations, the provision brings about an unusual number of uncertainties and loopholes.

Those two issues – the possibly too one-sided determinations and the existing loopholes – must be taken into careful consideration when addressing the approach taken to autonomous systems. In view of the complexity of the requirements, we will proceed in three steps. Firstly, aided by hypotheticals, problem areas will be identified. Secondly, particular problems brought about by the autonomy of the systems will be examined in greater detail. Finally, we address possible solutions.

3.3. *The connecting factors in Article 5, Rome II Regulation and their application to autonomous products*

3.3.a. *Overview*

Article 5 sec. 1, Rome II Regulation stipulates a rather long list of connecting factors. These are listed in hierarchical order, and one may only move on to the next factor should the preceding ones not be fulfilled.[42] The first alternatives are quite straightforward, and should not require changes, independently of what kind of system caused the damage. This certainly accounts for the reference to Article 4 sec. 2, Rome II Regulation for cases, in which the person sustaining the damage and the

[40] M. ILLMER, *Article 5*, cit., para. 4 (speaks of spreading the risks "inherent in a modern high-technology society").

[41] G. RISSO, *Product liability and protection of EU consumers: is it time for a serious reassessment?*, cit., at p. 225 ff.

[42] M. ILLMER, *Article 5*, cit., para. 22.

producer have their habitual residence in the same country. The same seems true for sec. 1 s. 1 (a), which concerns the cases where the marketing of the product and the habitual residence of the person sustaining the damage coincide. Here, the closest connection can hardly be contested and this connecting factor appears just as apposite for autonomous systems as for classical products. Looking at the subsidiary alternatives in sec. 1 s. 1 (b) and (c), they too seem convincing in any context. Things become more difficult in cases in which none of those alternatives apply. This is especially true for sec. 1 s. 2, which refers to the producer's seat and whose scope is not clear. Such problematic alternatives shall therefore be analysed in more detail.

3.3.b. *Marketing as the central criterion*

All alternatives of Article 5 sec. 1 s. 1, Rome II Regulation require that marketing take place in the respective location as one of two criteria. Conversely put, the law of a country in which the product was not marketed is never applicable. At this point, it is worth mentioning that the meaning of the term "marketing" is disputed. While some authors assume it means that the product is brought into circulation in a planned and structured manner,[43] others understand it as covering any kind of (first hand) sale.[44] This ambiguity may be caused by different language versions. In German, for example, "marketed" is translated as "*in Verkehr gebracht*" (put into circulation). However, the logic behind the provision provides some guidelines. On the one hand, understanding the term marketing in a broad way seems to make sense as one avoids creating too many cases to which none of the alternative factors listed in s. 1 applies. Additionally, Article 5 sec. 1, s. 2, Rome II Regulation would hardly make sense if one followed the very narrow interpretation of the term. If only intentional sales were seen as instances of marketing, then

[43] C. SCHMID, T. PINKEL, *Art. 5 Rome II Regulation*, in CALLIESS G.-P.(ed), *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*, 2nd edition, Alphen aan den Rijn, 2015, para. 31, requiring a "commercial channel"; similar M. LEHMANN, in Hüßtege/Mansel, BGB, Rom-Verordnungen - EuErbVO – HUP, 3rd ed. 2019, Article 5 Rome II Regulation paras. 5, 77; going even further T.C. HARTLEY, *Choice of Law for Non-Contractual Liability*, in *ICLQ*, 2008, p. 898, at p. 904 (organised mass selling); for the term "put into circulation" used in the Product Liability Directive see Judgment of the Court (First Chamber) of 9 February 2006, Declan O'Byrne v Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA, Case C-127/04 ("put into circulation when it is taken out of the manufacturing process operated by the producer and enters a marketing process in the form in which it is offered to the public in order to be used or consumed").

[44] M. ILLMER, *Article 5*, cit., para. 29, alleging that every sale be a marketing, which would be compensated by applying Section 1 Sentence 1; P. STONE, *Product Liability under the Rome II Regulation*, cit., p. 189 is also very far-reaching.

there would be no unforeseeable marketing. On the other hand, it seems clear that mere second-hand sales cannot be comprised within the meaning of the term, as the wording of Article 5 sec. 1 s. 1 (b) distinguishes between "was acquired" and "was marketed". Marketing should, therefore, be defined as any first-hand distribution to the user – be it by sale or any other contract.[45] Moreover, the marketing should not have to be related to the specific object that caused the damage. On the contrary, it suffices that an identical product has been marketed in the respective country.[46] Despite this broad understanding, marketing within the scope of Article 5 sec. 1 s. 1 constitutes a substantial narrowing down of the connecting factors. The following example, which one could extend to any type of product, shall serve to illustrate the scope and the problems of the alternatives.

Potentially, a patient with habitual residence in the EU (e.g. Italy) who suffers from a rare disease could have a medical implant inserted in the United States. The implant was developed and built in Japan. Due to a faulty learning process, the device malfunctions and the patient falls into a coma. Which law should be applied to the patient's claim?

In this hypothetical, at least two connecting factors point to Italy: the place where the harm arose and the place of the patient's habitual residence.

Article 5 sec. 1, s. 1, Rome II Regulation, however, does not refer to this. Rather, as already explained, (a) to (c) point to marketing as an indispensable factor. Thus, Article 5, sec. 1, s. 1 (b) is applicable here, as the product was acquired and marketed in the US. Therefore, US law is applicable.

Initially, this appears to be convincing. That this connection parallels the connection regarding consumer contracts regulated in Article 6, Rome I Regulation is noteworthy. According to the latter, a consumer who buys an item abroad is generally subject to the law of the country in which he or she bought the product.

A further modification of our example may reveal the – in fact quite limited – extent of this parallel: what if the manufacturer had previously engaged in a massive advertising campaign for the medical implant in

[45] This would correspond with the Product Liability Directive, see Judgment of the Court (First Chamber) of 9 February 2006, Declan O'Byrne v Sanofi Pasteur MSD Ltd and Sanofi Pasteur SA, Case C-127/04.

[46] See e.g. F.J. GARCIMARTÌN ALFÉREZ, *The Rome II Regulation: On the way towards a European Private International Law Code*, in *The European Legal Forum*, 2007, p. 77 reflecting the understanding of the prevailing view; M. ILLMER, *Article 5*, cit., paras. 31 ff.; P. MACHNIKOWSKI, *Article 5*, cit., para. 26; C. SCHMID, T. PINKEL, *Art. 5 Rome II Regulation*, cit. paras. 35; dissenting J. VON HEIN, *Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung*, in *ZEuP*, 2009, p. 6, at p. 27.

Europe? This might explain why the patient had the idea of having the implant inserted, although the operation had to be performed in the US.

Within the framework of Article 6 sec. 1 (b), Rome I Regulation, this modification would be significant. Now, the law of the consumer's habitual residence would be applicable. Under Article 5 sec. 1 (b), Rome II Regulation, however, the producer's advertising activities might remain irrelevant. Once again, the debate revolves around the term "marketing". The German language version "put into circulation" (*Inverkehrbringen*) does not allow for the inclusion of advertising.[47] The English and French versions (*été commercialiser*) are broader and might cover advertising. However, whether advertising falls under "marketing" is still arguable. To add further doubt, the place of marketing for products ordered online is currently unclear as well. Mostly, the place of delivery is seen as decisive, though.[48]

At this point, in summary, the connecting factors for the seller's liability under a contract and the producer's liability diverge, if one does not apply a very broad interpretation of Article 5 sec. 1, (b). At least in comparison, one cannot neglect that Article 5, Rome II Regulation clearly favours the manufacturer over the user/consumer.

The situation in our example could easily be constructed even more one-sidedly. Digital maintenance of the system – i.e. the updating – may be necessary, and possibly not be provided from the US but from elsewhere. It seems a probable scenario that such procedures could be undertaken directly by the producer in Japan. Applying US law, therefore, would not be convincing; neither from the producer's nor from the patient's point of view. The digital maintenance might, in an equally realistic scenario, also be undertaken by a subsidiary based in the victim's country of habitual residence,[49] in which case yet another (the third!) criterion would point to this jurisdiction.

Here it becomes apparent that the current Article 5, Rome II Regulation completely disregards the important component of software support. Filling the gap by systematically applying the escape clause to these

[47] M. LEHMANN (cit.) Article 5 Rome II para. 77; J. VON HEIN, *Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung*, cit., p. 26; P. MACHNIKOWSKI, *Article 5*, cit., para. 25 (arguing, however, that advertising is marketing); C. SCHMID, T. PINKEL, *Art. 5 Rome II Regulation*, cit., para. 31.

[48] M. ILLMER, *Article 5*, cit., para. 29; differentiating C. SCHMID, T. PINKEL, *Art. 5 Rome II Regulation*, cit., para. 32 (arguing that the place of delivery is only decisive if the seller's activity was regularly directed towards the purchaser's country).

[49] It is not taken into account here that in the latter case a separate claim against the subsidiary must be considered under substantive law.

– actually quite normal – cases is a possible but unsatisfactory compromise. As a result, legal certainty would decrease, and the application of the law would become more difficult.

Before formulating any final conclusions, we shall look at further examples in which consumer-related connecting factors need to be revisited.

3.3.c. *The seat of the producer*

Further doubts arise when the product was not marketed at any location mentioned under Article 5 sec. 1, s. 1, Rome II Regulation.

The victim might now be a European diver, who is, for example, severely injured in an accident in a Brazilian diving complex, as a result of an autonomous diving computer malfunctioning. The computer had been manufactured in China. It was not marketed in the EU. The diver bought it second-hand in Germany from her diving instructor, who had acquired it during a visit to China.

Here, the product was marketed neither at the habitual residence of the injured person, nor in the country in which the product was acquired, nor in the country in which the damage occurred. Article 5 sec. 1, s. 1 (c), Rome II Regulation would only apply if the computer had been sold (almost by chance) in Brazil. Assuming that the product was not sold in Brazil, sec. 1 s. 2 is applicable. It determines the application of the legal regime at the producer's seat as a producer-friendly standard rule. Sec. 1 s. 2 explicitly only covers those cases in which the product was marketed in the respective state without the producer's knowledge. Additionally, according to established authority, cases in which none of the alternatives of sec. 1 s. 1 is applicable must be included. That accounts for all cases in which marketing had not (as yet) been intended at all.[50] This understanding of the provision, which clearly goes beyond its literal meaning, is inevitable. Alternatively, a comprehensive regulation would be missing. Recourse to Article 4, Rome II Regulation, which is sometimes advocated, would indeed be advantageous for the injured person, but would completely contradict the system of product liability as it stands.[51]

[50] R. PLENDER, M. WILDERSPIN, *The European Private International Law of Obligation*, cit., para. 19-104 ff.; C. SCHMID, T. PINKEL, *Art. 5 Rome II Regulation*, cit., para. 50; M. LEHMANN (cit.) Article 5 para. 94; G. RISSO, *Product liability and protection of EU consumers: is it time for a serious reassessment?*, cit., at p. 228; P. MACHNIKOWSKI, *Article 5*, cit., paras. 35, 63. How far reaching those "gaps" are, again depends on the understanding of the term "marketed" (see above #).

[51] In favour of applying Article 4 T.C. HARTLEY, *Choice of Law for Non-Contractual Liability*, cit., at p. 905; A. BRIGGS, *Private International Law in English Courts*, Oxford, 2014, para. 8.124; now rather in favour of sec. 1 s. 2, see P. TORREMANS, C. HEINZE, *Non-*

In effect, Article 5, sec. 1 s. 2 Rome II Regulation, although being the last step of "the ladder", is often applicable. Once we have taken recourse to s. 2, its connecting factor (seat of the producer) remains decisive, no matter how many other connecting factors point to the consumer. To clarify this further, the example can be modified once again: *The user of the diving computer has her habitual residence in France, where she had also bought the computer second-hand. She is severely injured in an accident in a French diving complex. The diving computer officially listed this place in its software. As before, the computer was produced in China and is officially marketed in Asia alone.*

In this case, none of the alternatives in Article 5 sec. 1 s. 1, Rome II Regulation apply. Under sec. 1 s. 2, the law at the producer's seat applies.

Sec. 1 s. 2 has always been controversial. Some regard it as the result of lobbying and find it too producer-friendly, whereas others highlight the producer's protection as perfectly fair.[52] It is evident that the provision emphasises the producer's interests. The only question is whether – in view of the overall economic benefits of international trade – this may be considered adequate. Ultimately, the regulation completely disregards any criteria that are either identifiable from the consumer's point of view or relevant from an objective perspective. Unlike in Article 4, Rome II Regulation, there is no preferential treatment of the injured person, but the producer can rely on the application of the law at their seat. Even if one perceives such a one-sided regulation that goes beyond the scope of the closest connection to be justified, disadvantages in its implementation can hardly be denied.

Against this background, how the provision will work for autonomous products will have to be analysed in more detail. If the system is permanently linked to the producer, will unpredictable marketing then still be possible? Will the producer's seat become more pliable? Can the producer of autonomous products be expected to accept the applicability of the law of the place where the harm arose?

Contractual Obligations, in J.J. FAWCETT, P. TORREMANS, U. GRUŠIĆ, C. HEINZE, L. MERRETT, A. MILLS, C.O. GARCÍA-CASTRILLÓN, Z.S. TANG, K. TRIMMINGS, L. WALKER (eds), *Cheshire, North & Fawcett: Private International Law*, Oxford, 15th ed., 2017, p. 776, at p. 822.

[52] Critical A. SPICKHOFF in Bamberger/Roth/Hau (eds.), BGB, vol. V, 4th ed. 2020, Art. 5 Rom II-VO para. 1; applying a more balanced approach C. SCHMID, T. PINKEL, *Art. 5 Rome II Regulation*, cit., para. 3; affirmative P. STONE, *Product Liability under the Rome II Regulation*, p. 195 who is convinced of applying the law of the defendant's seat/residence in case of doubt.

3.3.d. *Escape clause – and innocent bystanders*

Before analysing such issues, we should, however, also take a look at the escape clause under Article 5 sec. 2, Rome II Regulation. The hypothetical example was deliberately constructed in an asymmetrical manner in order to facilitate discussion of this very last step of the ladder, which functions as a „safety net". Article 5 sec. 2 must be interpreted narrowly, pursuant to its character as an escape clause. However, its rank in the provision shows that it also includes cases of sec. 1 s. 2. As such, it is, at least potentially, applicable in the hypothetical situation. Here, three factors point to France: The victim's habitual residence, the country of product purchase and the place where the damage occurred. Even without combining such criteria, this should suffice to apply the escape clause.

What happens, however, if just two factors point to one country, and the seat of the producer is located in a different country? Escape clauses always bring about uncertainty. Therefore, it is preferable to restrict their applicability to extreme cases and avoid using them extensively for whole groups of cases. However, this is exactly what happens, according to prevailing opinion, when innocent bystanders are injured.

Several scholars have pointed out that the case of the innocent bystander is insufficiently regulated in Article 5, Rome II Regulation. In general, one may say that, when innocent bystanders are harmed by a product or an autonomous system, it is necessary to balance the interests of both the producer and the injured party. Bearing this in mind, none of the alternatives under Article 5 sec. 1 s. 1, Rome II Regulation fits very well. This is due to the fact that the place of marketing is irrelevant to injured bystanders. Various solutions have been put forward: while some suggest sticking with Article 5 sec. 1 as long as possible, others suggest applying Article 5 sec. 2 and assuming there is an "exceptionally closer" connection to the place where the damage occurred.[53]

In conclusion, it should suffice to observe that, even with a broad interpretation, sec. 2 does not actually cover cases involving bystanders and that resorting to Article 4 contravenes the system set out under Articles 4 et seq., Rome II Regulation. This regulatory loophole has long been the subject of comment and criticism. Should cases involving the injury

[53] C. SCHMID, T. PINKEL, *Art. 5 Rome II Regulation*, cit., para. 48 (rejecting convincingly only the application of sec. 1 (b)); R. PLENDER, M. WILDERSPIN, *The European Private International Law of Obligation*, cit., paras. 19-060 ff. though consider even sec. 1 (b) to be applicable and try to minimize the problem by construing the term "acquired" as "obtaining physical possession" – however, this does not always help; in favour of applying only para. 2, see M. ILLMER, *Article 5*, cit., para. 44; M. LEHMANN, (cit.) Article 5 Rome II para. 108; K THORN in Palandt, BGB, 79th ed. 2020, Rome II Regulation, para. 13.

of innocent bystanders increase with relation to autonomous systems, Article 5 should, *de lege ferenda*, be supplemented by way of the introduction of clear and predictable solutions.[54]

3.3.e. *Interim summary and forecast*

We have seen that the legal assessments stipulated in Article 5, Rome II Regulation may today be challenged in various ways. The provision leaves many questions unanswered. In principle, however, it is convincing that Article 5 labels "marketing" as the central connecting factor. The place of marketing constitutes a typical connecting factor and has the advantage that both parties can foresee and even influence it. Moreover, one can explain why the provision considerably favours the producer's seat compared to the place where the harm arose or the habitual residence of the injured person. The producer should not be exposed to litigation in every conceivable jurisdiction.

It remains to be considered whether the increasing importance of autonomous systems will change this perception and whether the differences between conventional and autonomous products are of such importance that Article 5, Rome II Regulation requires textual amendment. In this debate, one should bear in mind that legal differences will continue to increase. In the context of AI, one might be confronted with foreign laws that are much more alien to the domestic system than the current product liability law. Not only may the safety standards for AI prove quite different, but it also seems possible, that the general limits to what software is allowed to do and what must remain under human control, will be very different. However, these are problems that can be solved in specific instances by way of existing tools – in extreme cases even through *ordre public* or, partially, by way of Article 17, Rome II Regulation.[55]

[54] S. SAMMECK, *Die internationale Produkthaftung nach Inkrafttreten der Rom II-VO im Vergleich zu der Rechtslage in den USA*, Tübingen, 2017, p. 46 f. referring to the place where the harm arose; E. JAYME, T. PFEIFFER, *Kurze Stellungnahme zu einigen zentralen Aspekten des Vorentwurfs eines Vorschlags für eine Verordnung des Rates über das auf außervertragliche Schuldverhältnisse anzuwendende Recht* (https://www.ipr.uni-heidelberg.de/md/jura/ipr/forschung/stellungnahme-ipr.pdf) suggesting the application of the regular connection criteria in tort law (as Art. 5 sec. II of their proposal); A. JUNKER, *Rome II Regulation*, in *Münchener Kommentar zum BGB, IPR II*, Vol. 10, 7th ed., München, 2018, paras. 38, 52 in favour of sec. I (a) and c) (and not sec. II); K. THORN in Palandt (cit.) Article 5 Rome II Regulation, para. 13, wants to apply sec. II.

[55] R. PLENDER, M. WILDERSPIN, *The European Private International Law of Obligation*, cit., paras. 19-121 understanding the "event giving rise to the liability" as the place of marketing.

In the following section, we shall focus on whether the risks and the structure of the production and marketing of autonomous products may change in such a way that Article 5, Rome II Regulation, despite all the (partly justified) criticism, is still appropriate for solving all possible case combinations in a balanced manner.

4. *Significant characteristics of autonomous products*

4.1. *Questions to be asked*

4.1.a. *Safe or dangerous?*

One initial – and currently unanswerable – question is whether AI in itself should be regarded as a blessing or a curse.

Some say that, as the core element of autonomous systems, AI brings about particular dangers, which call for the strict treatment of the producer by the lawmaker – not only under the substantive legal provisions, but also under PIL. Without taking a position in this technical debate, one may, nevertheless, point to the positive aspects of AI. One might then want to stress that autonomous systems hold the great promise of future opportunities and are likely to reduce many risks. Taking such an optimistic perspective, one would support lower liability standards and be less concerned by the potential application of foreign law. One could, then, also argue that a combined system of substantive norms and conflict-of-law rules which closes off the EU market, or makes the access to this market more difficult, would be disastrous.

The risks, great or small as they may be, are definitely quite different from the traditional, more conventional machine-induced dangers. As shown in the context of product liability, at least one factor may be identified in the fuzzy picture of future risk assessment. Whatever the risks, they will hardly be manageable by those who are present at the place where the harm arises. The place, from which the system is surveyed and updated thus gains in importance. Before calling for the additional or even overriding application of the law of this "country of control", a number of issues should be considered, these being: can the jurisdiction be subject to manipulation? And even without manipulation, might it not, in some cases, produce surprising results?

4.1.b. Different structure of production – economic situation and seat of the producer

Other aspects are more tangible though often equally unpredictable. For instance, we are, as yet, unable to predict whether the producers – or

possibly the programmers – of autonomous systems will in the future be similarly organised into economically powerful and corporate-like structures as today's manufacturers are. Even assuming that large enterprises will continue to be the main players, the risk that businesses will relocate to a country with lower standards of liability might increase. Whereas transferring the seat of the enterprise for legal purposes (e.g., to a tax haven) is currently a well-known phenomenon,[56] it may become even more tempting once hardware production becomes less important and the transfer of the seat under Article 23, Rome II Regulation no longer implies a split between decision making and production.

There is some uncertainty about how the market for autonomous technology will develop: will large firms continue to dominate, or will smaller firms and highly specialised, individual programmers come to dominate the technology? Nevertheless, it is worth looking at autonomous products in a global market of small, specialised programmers. In the latter scenario, would it not be entirely wrong to refer to the seat of the producer, when the producer is a programmer who works in the Bahamas because of its climate and beauty? It has been pointed out that in such a scenario, nobody, including the programmer himself, will understand the connection to the law of this country.[57] Possibly, one should rethink Article 5 sec. 1 s. 2, Rome II Regulation and merely refer to the seat, if marketing is also carried out in the country of the seat itself.

Even if the above does not become reality, one should be aware that the importance of the fall-back rule in Article 5 sec. 1 s. 2 might diminish. This would be the case, for example, if unpredictable marketing occurred less.

4.1.c. *Different channels of marketing?*

As seen above, the marketing of the product is the key connecting factor under Article 5 sec. 1 s. 1, Rome II Regulation. Changes to be expected for autonomous systems here, again, seem to be pointing in different directions.

Firstly, it is worth remembering that autonomous systems will often be less free in their mobility than traditional machines. They are frequently developed for specific local circumstances and require specific networking. Even with the diving computer, which is explicitly made for travelling, this shows: its scope of application may be limited in that it only holds data needed for the use in particular countries or regions.

[56] G. RISSO, *Product liability and protection of EU consumers: is it time for a serious reassessment?*, cit., p. 227.

[57] G. RISSO, *Product liability and protection of EU consumers: is it time for a serious reassessment?*, cit., p. 225.

Secondly, the issues of connectivity and of updating gain further importance: if the Japanese producer carries out monitoring and updating, it not only knows the device's location, but retains a certain degree of control over the system, which differs significantly from that held by the producer of more traditional devices. While this does not necessarily lead to the application of the law at the place where the accident occurs, one should still not disregard the fact that producers of autonomous systems often exercise greater influence over the system's area of use compared to traditional products. Therefore, unpredictability in a narrow sense will be much reduced.

On the other hand, a greater number of systems are being marketed via the internet, independently of location, where end-users may possibly only require an access code. Such codes allow for the download of both data relating to a 3D print of the hardware and any software needed to operate the device – possibly even as an open source. Such operations may then be performed anywhere, thus becoming an advantageous form of marketing. However, the place of marketing as a connecting factor would, in such cases, lose its narrowing function; thereby leaving the producer unprotected.

In summary, maintaining the balance established under Article 5 to protect producers, or software engineers, without exempting them completely from liability, the term "marketing" requires reconceptualisation or replacement. As stated above, a new connecting factor for product liability law might be advisable. Indeed, not simply the actual place of purchase, but rather the orientation of the trade towards a particular state, must take precedence and become decisive. From the consumer's point of view, this factor most clearly determines the applicable jurisdiction. Moreover it has, somewhat surprisingly, become clear, that this factor might be helpful for the producer, as well, if products are marketed worldwide. If a product is available on the internet, the criterion could even have a restrictive effect. Even where this is not the case, producers may reasonably be expected to be subject to the jurisdiction of any countries they intentionally targeted with advertising.

This readjustment of the "marketing" element is more prominent, if one revisits the issue of the seat of an enterprise. Additionally, it can be assumed that autonomous systems often have to undergo local admission procedures before marketing. Thus, the producer is somehow *already* subject to local legal regimes. In particular, when thinking of the futuristic simulations in which the autonomoussystems have assumed human characteristics and can be held directly liable, the place of marketing may be better suited as a connecting factor than any other criterion. The place of the systematic commercialisation of a system might, therefore, be more adequate even as the fall-back provision. This location is less open to ma-

nipulation than the seat of the producer and can more easily be recognised by the user/consumer. It must be admitted, however, that such a rule would often not lead to a distinct result in the search for the applicable law; systematic commercialisation may often not be restricted to one single country.

4.1.d. *Growing importance of damages to innocent bystanders?*

It has been shown above that Article 5, Rome II Regulation is notably vague regarding innocent bystanders. This is already an unfortunate circumstance, and would become unacceptable, were autonomous products to cause significantly higher levels of injury and loss to innocent bystanders. One day, this is likely to be the case.

To clarify this issue, reference can be made to the autonomous car. At a first glance, there seem to be strong parallels between an autonomous and a conventional car where bystanders are concerned. A bystander might be injured because the car's software overlooked a danger and failed to decelerate. The same occurs, however, if the brakes of a conventional car fail. In order to see that there is a significant difference, one needs to look at the role of the driver. Most accidents with a conventional car are caused by the driver, be it because of a driving mistake or a delayed repair. This gives the injured person a right to compensation from the driver. In this regard, great differences become visible. In terms of autonomous systems, human error takes the back seat. If accidents occur, they are not caused by the driver – who is now (almost) a "passenger" – but rather by software error. On the contrary, users of autonomous vehicles can, most probably, in no way prevent the accident. This lack of fault might lead to a situation where the bystander cannot claim compensation from the driver (or user), but must sue the producer instead. Concerning cars, the law solves the issue by stipulating the owner's liability. However, most other products do not recognise the liability of a person who is merely the owner or user of a product. Thus, the owner or user of a product who did not act culpably is not liable – and the number of these cases will increase as the autonomy of products increases. If one does not want to extend owner liability, which seems doubtful given that they usually have no control[58] over the product itself, then product liability gains importance for the victim.[59].

Yet these findings need to be put into perspective, as autonomous systems are usually quite safe. Nevertheless, examples can be visualised.

[58] In favour of such an approach for highly dangerous systems, see Article 3 of the European Parliament's Resolution of 20 October 2020 (cit.) - P9_TA-PROV(2020)0276.

[59] The keeper of a motor vehicle will be able to assert claims against the producer (or the seller) in all cases. Here, however, innocent bystanders take centre stage.

Even well programmed software may overlook or misjudge unusual or unpredictable events – events that may have seemed highly unlikely at the time of initial programming. A piece of autonomous farming machinery will hardly run over a playing child or an animal on a field, as it has been programmed to recognise such dangers. Possibly, however, the same unit may collide with a hot-air balloon, should the latter unexpectedly descend before it, as there might not be any sensors installed on its upper bodywork. An accident involving a diving computer and a third party is also conceivable. Should the computer fail to detect any unusual dangers, thereby causing the diver to faint or panic, other divers might be placed at risk or possibly get injured. Thus, there will be more cases wherein the injured persons will raise a claim against the producer, because they cannot raise a claim against the user of the product.

In this way product liability towards innocent bystanders will become more important at least in relative terms. Consequently, the current lack of regulation is likely to become increasingly problematic, especially in view of the fact that the frequently advocated application of the law of the place where the harm arose would be a great burden for the producer to bear, as it would result in the complete unpredictability of applicable law, an uncertainty from which Article 5, Rome II Regulation had intended to protect the producer.

Here too, the question naturally arises as to which legal regime would be appropriate for a new conflict-of-law rule. With all due caution, it can be assumed that a single-tier regulation is not feasible. Again, connecting factors must be combined. The place where the accident happened and the place of marketing appear particularly relevant. As usual, the rule must be completed with an escape clause.

4.2. *New dangers caused by a contractual choice of law*

Choice of law issues have so far not been taken into consideration. This seems appropriate in terms of product liability, since there is usually no contractual relation between the producer and the injured person where customary product liability is concerned. Therefore, choice of law issues rarely arise, despite their technical admissibility under Article 14, Rome II Regulation.

The position changes with autonomous products; where AI software is constantly interconnected and never "finished", as even outside the factory, such devices undergo continuous development. From a legal point of view, this necessarily implies some kind of advance maintenance agreement – in other words, a contract between the producer and the end-user.

The extent of such manufacturers' maintenance and update duties depends on the design of the prospective substantive law. If the producer

is responsible for monitoring the systems, then maintenance agreements will then be needed. From the current European legal status, a complete transfer to the seller of the obligation to update the software is also conceivable.[60] Such a regulation, though, would be inefficient in the long run, as sellers are often unqualified to update software, so that a parallel involvement of the producer is clearly to be expected.

If maintenance agreements become the rule, choice of law clauses shall also become common practice. Under Article 5 sec. 2, Rome II Regulation, choice of law in a "pre-existing" contract can lead to a manifestly closer connection and may, thus, affect the applicable law to the product liability claim. This places injured parties at further risk. As seen in choice of law clauses in guarantee contracts relating to product liability law, these – outside of consumer contracts – contractual choice of law clauses, may eliminate the objectively applicable product liability law. Producers will soon learn to draft such clauses in order to avoid the application of national laws that are particularly beneficial to injured parties. Therefore, one must be cautious where update contracts are concerned. One should not extend a valid choice of law made in an update contract too easily to product liability. This can also be achieved under current law by applying Article 5 sec. 2 with appropriate restraint.

4.3. *Excursus: liability of the system itself and Private International Law*

Another important issue is raised by those arguing that the orthodox, strict approach to product liability is no longer appropriate in the context of autonomous systems. This argument recognises the advantages of adopting autonomous systems for society in general and, at least in the medium term, the improved safety of the new technology when compared with traditional systems and machines. Therefore, one could argue that holding the producer, or even an individual user of the system, liable is no longer appropriate. This is even more the case, if one admits that the producer can often not control the final outcome which causes the damage.

There are different solutions to this dilemma. Occasionally, even today, forward-looking assessments are made concerning whether autonomous systems (narrowly defined) should themselves be liable. Although this is a contemporary and interesting development, it will not be taken

[60] Article 7 sec. 3 Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods stipulates that the seller is responsible for updating, in OJ L 136, 22.5.2019, p. 28.

into account here, as it is generally assumed that this path is currently unrealistic.[61]

Another idea, on the contrary, is more realistic. Suggestions have been put forward for some time now to provide autonomous systems with some form of insurance or, at least, with access to a new type of liability fund.[62] This would require payments from those who benefit from the development and marketing of the system. Such a "fund" would then cover any damages caused by the system. Typically, the contributors would include both producers and users, though other beneficiaries, including state authorities might participate as well. Of course, differentiation according to system type would be possible. The legal regime could possibly provide different liability laws to meet different degrees of autonomy. If this were to happen, PIL would have to respond accordingly. As things currently stand, exploring whether such insurance-style funds can be managed via the common tools of conflict-of-law rules should suffice and there is no cause for concern: If a claim were to be made against such a (future) fund, Article 18, Rome II Regulation should apply. Accordingly, claims could be made directly to an insurance company if the *lex causae* provides for this.

However, Article 18, Rome II Regulation, is not relevant for determining the applicable law in a liability case. The general rules apply. This, too, causes no great problems. Only when bravely looking into the far future, when autonomous systems might come to be regarded as responsible actors, may it become difficult to distinguish between Article 4 and Article 5, Rome II Regulation. In the nearer future, treating systems as individual entities would be a step too far. It will, therefore, still be possible to identify and separate the liability basis on which the claim against the fund stands and thereafter apply the appropriate conflict-of-law rule - i.e., Article 5, Rome II Regulation in the case of product liability.

There is a more specific question to consider when implementing possible fund solutions in national law. If the conflict-of-law rule points

[61] In more detail G. WAGNER, *Robot, Inc.: Personhood for Autonomous Systems; symposium: Rise of the Machines: Artificial Intelligence, Robotics, and the Reprogramming of Law*, cit., p. 591; G. WAGNER, *Robot Liability*, cit., pp. 53 ff.; being more open to this suggestion in the distant future D. POWELL, *Autonomous Systems as Legal Agents: Directly by the Recognition of Personhood or Indirectly by the Alchemy of Algorithmic Entities*, in 18 *Duke Law & Technology Review*, 2020, p. 306.

[62] G. WAGNER, *Robot, Inc.: Personhood for Autonomous Systems; symposium: Rise of the Machines: Artificial Intelligence, Robotics, and the Reprogramming of Law*, cit., p. 610 ff.; G. WAGNER, *Produkthaftung für autonome Systeme*, in 217 *AcP*, 2017, p. 707; D.C. VLADECK, *Machines without Principals: Liability Rules and Artificial Intelligence*, cit., at p. 150; H. ZECH, *Künstliche Intelligenz und Haftungsfragen*, cit., p. 216.

to the application of foreign law which still recognises liability of the producer, an unacceptable double burden might arise in cases where producers had believed themselves to be exempt from liability as they had previously paid into the insurance fund in accordance with local law. The same problem arises with greater consequence if a foreign title against the supposedly exempt domestic trader is obtained.[63]

This is a typical discrepancy that may arise between jurisdictions. It would hardly be appropriate to demand twice the payment from the party concerned. This problem, as far a foreign title is concerned, cannot be solved by adjustment, but must be addressed by the substantive law. In order to simplify the issues, one could say that a producer who has paid into the fund in accordance with the regulations, and who is later personally held liable by a foreign court, will have to be entitled to compensation from the fund. Conversely, and self-evidently: (foreign) traders, who have never paid into the fund, will not be granted exemption.

We shall now move away from these forward-looking, fund-based liability alternatives and return to the conflict-of-laws approach to product liability for autonomous systems.

5. *Coherence with data protection and consumer sales*

5.a. *Coherence with related rules*

Before addressing the issue of coherence, a caveat is appropriate. On the one hand, coherent law making is always helpful. When considering basic principles, consistency is a necessity. Product liability law for autonomous systems should, therefore, be consistent with conflict-of-law rules that govern related legal issues as far as their basic principles are concerned. On the other hand, consistency should not be overrated either. While it is desirable for general thoughts, it may often be unreasonable for any detailed regulation, because the differences of the subject outweigh the advantages of uniformity.

[63] At least in international procedural law, the ECJ even enlarges this problem as it names the place where the event which gave rise to the harm occurred "the place where the product in question was manufactured". It is to be hoped that the ECJ touches this up in cases that include autonomous devices produced in low-wage countries for European corporations. See Judgment of the Court (Fourth Chamber), 16 January 2014, Andreas Kainz v Pantherwerke AG, Case C-45/13, paras. 21 ff. The ECJ has pointed out that this decision does not account for the Rome II Regulation (para. 20) – which should in particular be considered when interpreting Article 17 Rome II Regulation (similar M. LEHMANN (cit.) Article 17 para. 54).

When, hereinafter, product liability is compared in two related fields, i.e., data protection and the sale of consumer goods, the intention is therefore not to copy any provisions, but with a view to checking whether basic principles match.

5.b. *Data protection*

For data protection breaches, the European Union has taken a very specific conflict-of-laws approach by making the GDPR unilaterally applicable for many international cases. This is typical for public law, but also applies to private liability in international data protection law. It seems that this area of law was seen as such a delicate issue that the EU intended to shape its legal framework in a fortress-like fashion. The EU Parliament seems to favour such an approach for AI, too. Article 2 of its current draft provides for the application of the place, "where a physical or virtual activity, device or process driven by an AI-system has caused harm or damage."[64]

Admittedly, there is a certain proximity between AI and data protection. Autonomous systems, on the one hand, are modern technologies the use of which one could fear in a similar way to the misuse of data. Furthermore, it is unavoidable for autonomous products to collect and utilise a vast amount of data. They only function on this basis. Often, numerous devices will be interconnected, so as to access both the purchaser's and other users' data. This could even apply to personal devices such as the medical pump in our example. If it is truly machine learning, the device might lead to progress in treatment – in the same way as doctors have always advanced medical science – through the analysis and comparison of other people's results.

Of course, one can separate claims under data protection violations caused by autonomous systems from other legal infringements caused by such systems. One does not need the same conflict-of-law rules for all collateral claims. Hence, a one-to-one transfer of conflict-of-law rules is not necessary.

Nevertheless, it is important to consider whether the judgements made in terms of data protection law should be adopted. Article 3 sec. 2 (b), GDPR could be especially relevant, as it prescribes – simply put – the application of the GDPR whenever behavioural monitoring of people present in the EU takes place.

[64] The draft, though, shall not be discussed in detail as it seems all too unfinished, if not fully unaware of the basic principles of private international law, see in detail J. VON HEIN, *Forward to the Past: A Critical Note on the European Parliament's Approach to Artificial Intelligence in Private International Law*, cit.

Parallel to this one could stipulate that EU law (or the law of the respective Member State) should apply, whenever the AI is used in the territory of the EU.

Scepticism is appropriate here. Article 3, GDPR is an extensive rule that should not be copied without scrutiny. It infringes the fundamentals of conflict of laws' analysis as it is not based upon the closest connecting factors, but creates a protective unilateral system. A worldwide system of such rules, would lead to great difficulties for international trade.[65] Similar rules in foreign countries are not desirable for European producers. As such, one should refrain from installing such restrictive provisions for autonomous systems.

Foreign rules that infringe truly important domestic principles are governed by standard regulations, in particular Article 16, Rome II Regulation and the above-mentioned *ordre public* in Article 26, Rome II Regulation.

5.c. *Sale of consumer goods*

Article 6, Rome I Regulation also significantly overlaps with product liability. It concerns, *inter alia*, the liability of the seller, or other contractual partner, to the consumer. If a consumer is harmed because of a defective product, they will usually take into consideration claims against the seller and the producer. The injured person under product liability law may not necessarily be a consumer, but product liability law mainly aims to safeguard private end-users.

Article 6 does not use the unilateral instruments of the GDPR, however, it, too, regulates the applicable law in a consumer-friendly manner. Article 6, Rome I Regulation deviates from Article 5, Rome II Regulation primarily if the seller "by any means, directs his or her commercial or professional activities to the country, in which the consumer has his or her habitual residence. This means in particular that it suffices if the product is deliberately and pointedly advertised in the respective country".[66]

However, one cannot simply denounce this difference as an inconsistency: product liability clearly needs to be distinguished from the

[65] B. AUDIT, L. D'AVOUT, *Droit international privé*, cit., paras. 177 ff. explaining the disadvantages of unilateralism in detail.

[66] Judgment of the Court (Grand Chamber) of 7 December 2010, Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09), Joined cases C-585/08 and C-144/09, paras. 65 ff. with further details.

seller's liability. The producer has far less influence on the place of marketing, while the seller makes a conscious decision when sending a product to the consumer's habitual residence.

It is, therefore, necessary to find an individual balance for product liability, which may not be simply copied from sales law. Nevertheless, Article 6, Rome I Regulation can make a good case for strengthening the factor of targeted advertising. By contrasting possible alternatives, one may identify, on the one hand, alternatives that clearly emphasise the connecting factors on the consumer's part – such as the place of acquisition – and on the other hand, alternatives that clearly favour the producer – such as its seat. Advertising, in contrast, reconciles both positions and might, therefore, also be integrated as a connecting factor into Article 5, Rome II Regulation. This commercial activity not only connects the two parties, but also leads to the presumption that a producer, who makes the decision to market his/her products in a certain country will have to face liability under that country's laws.[67]

6. *Conclusion*

Recent, preliminary considerations made by the European Parliament on possible conflict rules for AI liability are completely detached from the multilateral idea of modern PIL. Against this backdrop, it must be emphasized that autonomous products are neither threatening nor novel in such a way that the traditional conflict of laws rules must be rejected. Currently, there is no reason why the EU should seal off its markets through unilateral and territorial provisions. Rather, applying traditional multilateral conflict-of-law rules that both consider and react to substantive law determinations should be sufficient.

In terms of concrete proposals, we face the difficulty that the substantive rules of AI liability are still evolving. It is hardly possible to predict which determinations and judgements will come to dominate. In any case, a future regulation should balance producer and user interests through reflecting the current, substantive law of product liability.

Even without trying to predict the future, strengthening the place of marketing compared to the seat of the producer in the legal treatment of these issues seems a convincing strategy. The producer's seat becomes an increasingly random criterion in the virtual world, especially where the "manufacture" of AI is concerned. Both corporate organisation and manufacturing are increasingly detached from fixed locations.

[67] It cannot be denied that this leads to the same problems that occur under Article 6 Rome I Regulation if a commercial is placed on an internationally accessed site, such as youtube.com.

This orientation towards the place of marketing also seems appropriate when looking far ahead and imagining the scenarios we have considered in this piece, in which individual producer liability becomes increasingly less important, whereas fund and insurance systems might be more successfully implemented. Reference to the place of marketing also makes most sense here. Funds referring to the producer's seat, on the contrary, could potentially inhibit international trade. If a mandatory insurance policy through such a fund only applied to corporations established within the territory of a particular country (or the EU), this would lead to an enormous difference in the level of protection between domestic and foreign products. Instead, the duty to participate in such a fund could be designed, tailored and used as a precondition for market access. Applying the place of marketing appears even more persuasive when considering that a company's registered office often permanently diverges from the place of marketing. A Chinese corporation might, for instance, specifically produce systems to protect ancient artefacts housed inside European museums, or conversely, a European corporation might create systems to treat yellow fever in South America.

To this effect, a revision of Article 5, Rome II Regulation could both help to strengthen the place of marketing and remodel and remedy the inherent weaknesses of the existing regime.

In the event that EU legislative intervention were not forthcoming, a corresponding change in judicial interpretation might recommend itself. This could be achieved by equating the place at which the advertising is targeted with the place of marketing, or by applying the escape clause in cases of targeted advertising. In terms of innocent bystanders, Article 4 is fundamentally the most appropriate provision.

ALEKSANDRA BAR

AARON, AICAN AND EVERYTHING IN BETWEEN - DO LIMINAL WORKS MERIT RECOGNITION IN MODERN COPYRIGHT DISCOURSE IN THE REALM OF ARTIFICIAL INTELLIGENCE?

1. *Introduction*

Percolating through modern society, artificial intelligence (AI) is a phenomenon whose rapidly increasing role cannot be denied nor ignored. Gradually and steadily, sophisticated AI systems gain footholds in new industries, inevitably becoming a ubiquitous part of our everyday lives. At the same time, rapidly expanding commercial potential of AI systems pose significant legal and regulatory challenges.

Computer's ability to generate human-level creative products has long been explored by scientists in the field of AI. Spurring unprecedented development in "machine art", recent AI advances have enabled a number of widely publicized achievements. Artificial intelligence is increasingly prominent in journalism[1], poetry[2] and music[3]. This paper however, focuses solely on representative achievements in the field of visual

[1] CARLSON M., *The Robotic Reporter*, in *Digital Journalism*, 2015, Vol. 3 No. 3, pp. 416-431; PEISER J., *The Rise of Robot Reporter*, in *New York Times* (5 February 2019), https://www.nytimes.com/2019/02/05/business/ media/artificial-intelligence-journalism-robots.html (last accessed: 6 November 2020).

[2] ROBITZSKI D., *This AI wrote a poem that's good enough to make you think it's human*, in *Futurism* (30 April 2018), https://www.weforum.org/agenda/2018/04/artificial-intelligence-writes-bad-poems-just-like-an-angsty-teen (last accessed: 6 November 2020); ROCKMORE D., *What happens when machines learn to write poetry*, in *The New Yorker* (7 January 2020), https://www.newyorker.com/culture/annals-of-inquiry/the-mechanical-muse (last accessed: 6 November 2020);LAU J. H., COHN T., BALDWIN T., BROOKE J., HAMMOND A., *This AI Poet Mastered Rhythm, Rhyme, and Natural Language to Write Like Shakespeare*, in *IEEE SPECTRUM* (30 April 2020), https://spectrum.ieee.org/artificial-intelligence/machine-learning/this-ai-poet-mastered-rhythm-rhyme-and-natural-language-to-write-like-shakespeare (last accessed: 6 November 2020).

[3] KALEAGASI B., *A New AI Can Write Music as Well as a Human Composer. The future of art hangs in the balance*, in *Futurism* (9 March 2017), https://futurism.com/a-new-ai-can-write-music-as-well-as-a-human-composer (last accessed: 6 November 2020);

art, which not only appear to be most actively researched but also most impressive[4].

Numerous questions regarding legal status of AI-generated artworks have long been looming on the horizon of copyright discourse. Since the dawn of AI, scholars' interest in the question of copyrightability of AI outputs have waxed and waned just as AI researchers' hopes for success in designing a program capable of producing human-level creative products have. Allowing computers to reach a level of autonomy that could make the human contribution trivial to the creative process, AI's latest achievements, particularly in the field of deep learning, have recently drawn copyright scholars' close attention to a number of legal and regulatory issues related to AI-generated artworks.

First of all, it is questionable whether AI-generated works de lege lata enjoy copyright protection. Most copyright legislation across EU Member States depend strongly on human-centered approach with regard to, inter alia, the conditions for protection[5]. This anthropocentric approach

RALSTON W. T., *Copyright in computer-composed music: Hal meets Handel*, in *Journal of the Copyright Society of the U.S.A.* 2005/52, pp. 281-307; STURM B. L., BEN-TAL O., MONAGHAN Ú., COLLINS N., HERREMANS D., CHEW E., HADJERES G., DERUTY E., PACHET F., *Machine learning research that matters for music creation: A case study*, in *Journal of New Music Research*, 2019, Vol. 48, Issue 1, pp. 36-55.

[4] KUGEL P., *Artificial Intelligence and Visual Art*, in *Leonardo*, 1981, Vol. 14, No. 2, pp. 137-139; TAO F., ZOU X., REN D., *The Art of Human Intelligence and the Technology of Artificial Intelligence: Artificial Intelligence Visual Art Research*, in SHI Z., PENNARTZ C., HUANG T. (eds) *Intelligence Science II, Volume 539 (Third IFIP TC 12 International Conference, ICIS 2018, Beijing, China, November 2-5, 2018, Proceedings)*, Cham, 2018, pp. 146-155; HERTZMAN A., *Can Computers create art?*, in *Arts*, 2018, Vol. 7, Issue 2, p.18, https://www.mdpi.com/2076-0752/7/2/18 (last accessed: 6 November 2020).

[5] The criteria of what constitutes a copyrightable work, thoroughly harmonized on a European level by the Court of Justice of the European Union, also indicate, at least implicitly, that some form of human authorship is required. See: Judgment of the Court (Fourth Chamber) of 16 July 2009, Infopaq International A/S v Danske Dagblades Forening, Case: C-5/08; Judgment of the Court (Third Chamber) of 22 December 2010, Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury, Case: C-393/09; Judgment of the Court (Third Chamber) of 1 December 2011, *Eva-Maria Painer v Standard VerlagsGmbH* and Others, Case: C-145/10; Judgment of the Court, (ThirdChamber) of 1 March 2012, Football *Dataco* Ltd and Others v Yahoo! UK Ltd and Others, Case 604/10; See also: IGLESIAS, M., SHAMUILIA, S. ANDERBERG A., *Intellectual property and artificial intelligence. A literature review*, Luxembourg, 2019, p. 14; DE COCK BUNING M., *Autonomous Intelligent Systems as Creative Agents under the EU Framework for Intellectual Property*, in *European Journal of Risk Regulation*, 2016, Vol. 7, pp. 314-315; RAMALHO A., *Will robots rule the (artistic) world?: a proposed model for the legal status of creations by Artificial Intelligence systems*, in *Journal of Internet Law*, 2017, Vol. 21, pp. 15-16.

is also present in Polish copyright law. For it to be protected under Polish copyright law, a work has to manifest creative activity of an individual nature[6]. The creativity requirement is usually equated with originality and according to an opinion well established among polish copyright scholars, only humans can engage in the mental effort required to satisfy the originality criterion[7]. Vast majority of European and Polish copyright scholars thus argue that, under current copyright framework, AI-generated works are not eligible for copyright protection[8]. This conclusion however, gives rise a number of further questions. One could enquire, what are the possible consequences of denying AI-generated art copyright protection and whether AI outputs should be protected at all[9]? If it

[6] Article 1.1. of the Act of 4 February 1994 on Copyright and Related Rights (Journal of Laws of 1994, No. 24 item 83 with subsequent amendments) provides that the subject of *copyright* should be "any manifestation of creative activity of individual nature, established in any form".

[7] BARTA J., *Dzieło muzyczne i jego twórca w świetle przepisów prawa autorskiego*, in *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej*, 1980, Vol. 20, p. 68; BŁESZYŃSKI J., *Prawo autorskie*, Warszawa 1985, p. 59; FERENC- SZYDEŁKO E., *Art. 1*, in FERENC- SZYDEŁKO E. (ed) *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Warszawa 2016, LEGALIS, para. 12; SARBIŃSKI R. M., *Art. 1*, in MACHAŁA W. (ed) *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa 2019, LEX, para. 21; BARTA J., MARKIEWICZ R., *Art. 1*, in BARTA J., MARKIEWICZ R. (ed), *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Warszawa 2011, LEX para. 4; NOWICKA A., *Podmiot prawa autorskiego*, in BARTA J. (ed), *System Prawa Prywatnego, Vol. 13, Prawo autorskie*, Warszawa 2017, p. 87–88; FLISAK D., *Art. 8*, in FLISAK D. (ed), *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa 2015, LEX, para. 2.; MACHAŁA W., *Utwór. Przedmiot prawa autorskiego*, Warszawa 2012, p. 125; SARBIŃSKI R. M., *Utwór fotograficzny i jego twórca w prawie autorskim*, Kraków 2004, p. 205; JANKOWSKA M., *Autor i prawo do autorstwa*, Warszawa 2011, p. 334.

[8] See i.a.: IGLESIAS, M., SHAMUILIA, S. ANDERBERG A., *Intellectual property and artificial intelligence. A literature review*, cit., p. 14; MARKIEWICZ R., *Sztuczna inteligencja i własność intelektualna, Inauguracja roku akademickiego 2018/2019*, Kraków, 2018, p. 36-57; NOWICKA A., *Podmiot prawa autorskiego*, cit., p. 88; BARTA J., MARKIEWICZ R., *Główne problemy prawa komputerowego*, Warszawa 1993, p. 222-228; JANKOWSKA M., *Autor i prawo do autorstwa*, cit., p. 336.; OLEKSIUK J., *Założenia aksjologiczne autorskoprawnej ochrony twórczości w świetle rozwoju sztucznej inteligencji*, in *Acta Iuris Stetinensis*, 2017, Vol. 2(18), pp. 245- 262; FLISAK D., *Art. 1*, in FLISAK D. (ed), *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa 2015, LEX, para. 3; JUŚCIŃSKI P. P., Prawo autorskie w obliczu rozwoju sztucznej inteligencji, *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej*, 2019, Vol. 1, pp. 5-44.

[9] See for example: GUADAMUZ A., *Do androids dream of electric copyright? Comparative analysis of originality in artificial intelligence generated works*, in *Intellectual Property Quarterly*, 2017, Vol. 2, pp. 169-186; GUADAMUZ A., *Artificial intelligence and*

is concluded that AI outputs are worthy of protection, should a new exclusive right be introduced or current copyright system can be otherwise adapted to embrace AI-generated outputs, for instance through interpretation and case-law[10]? If it is concluded that AI outputs cannot be fitted into the existing copyright framework and that such new right should be created, further consideration should be given to how this right ought to be shaped[11].

This paper, however, does not address any of the above questions. Instead, it focuses on the nature of AI-generated works and the process by which they are produced. It is aimed at presenting general definitional problems that need to be confronted by scholars and policy makers prior to addressing uncertainties surrounding the legal status of works generated by AI from the copyright perspective. Whilst discussion on generative AI potential in the field of art and its implications for copyright law is fascinating and much needed, the term "AI- generated works" (or "computer-generated works") itself appears to have become obscured and overhyped. The fact that AI poses major challenge for current copyright framework is all but certain. It is the spectrum of systems indicated as challenging from the copyright perspective that I find somehow questionable. Without contesting the conclusion that works generated by autonomous AI systems, when no human creative contribution is reflected in the work, are de lege lata devoid of copyright protection under Polish copyright framework, I argue that this assumption cannot be applied to all systems commonly hailed as intelligent. This paper suggests that the analysis of representative AI methods employed to generate visual art in the context of Polish copyright doctrine leads to the conclusion that some of the works traditionally denied protection based on the fact that they were generated by AI, could potentially be deemed copyrightable subject matter. I hence conclude, that there is an important need for delimitation of the phenomenon of generative AI. This article attempts to provide a precise, albeit flexible working definition of AI-generated works, which would be useful for the purposes of copyright analysis.

copyright, in WIPO MAGAZINE, 2017, Vol. 5, https://www.wipo.int/wipo_magazine/en/2017-/05/article_0003.html (last accessed: 6 November 2020).

[10] See for example: GINSBURG J. C., BUDIARDJO L. A., *Authors and Machines*, in *Berkeley technology Law Journal,* 2019, Vol. 34, pp. 343-456.

[11] See for exaple: RAMALHO A., *Will robots rule the (artistic) world?: a proposed model for the legal status of creations by Artificial Intelligence systems*, cit., pp. 12-25.

2. *Artificial intelligence - beyond the buzzword*

In order to address the question of copyrightability of AI-generated works, one must understand what lies beneath the concept of artificial intelligence. The following section addresses the question of what is referred to by the term "AI".

In no way does this section claim the mantle of comprehensiveness. Bearing in mind, that there does not yet appear to be any universally accepted definition of AI, even among experts in the field, this section is not intended to provide a general definition of artificial intelligence, but rather to shade some light on few of the major definitional problems relevant to the objectives of this paper. Neither is this section aimed at exhaustively presenting the complexities of developmental history of research in the field of AI. Instead, it outlines representative methods and tools of AI to show that the term in question encompasses a wide variety of programs which enjoy various levels of autonomy.

For the sake of further analysis it needs to be noted, that whilst AI systems include both hardware and software components, the very essence of AI lies in the software. This paper, however, occasionally uses the term "computer" or "machine" to refer to the latter. Moreover, throughout the paper terms such as "AI system" and "AI program" are used interchangeably.

2.1. *What is artificial intelligence?*

Broadly speaking, AI is a study concerned with developing machines that exhibit intelligence, using the conceptual framework and tools of computer science[12]. The difficulty in determining what conditions must be met by a machine for it to be considered as exhibiting intelligence lies primarily in the conceptual ambiguity of intelligence itself[13].

There is no single concept of intelligence, nor one absolute measure thereof. Definitions of intelligence vary widely, focusing on myriad of human features which are themselves difficult to define[14]. John McCarthy, who coined the term "artificial intelligence" in 1956, explained that since

[12] RISSLAND E. L., *Artificial Intelligence and law: stepping stones to a model of legal reasoning*, in *Yale Law Journal*, 1990, Vol. 99, p. 1958; See also: RUSSELL S. J., NORVIG P., *Artificial Intelligence. A Modern Approach*, Upper Saddle River, 2010, p. 1 ("AI is the study of agents that exist in an environment and perceive and act").

[13] KAPLAN J., Artificial Intelligence: What Everyone Needs to Know, Oxford, 2016, p. 1-4; PEREIRA F. C., *Creativity and Artificial Intelligence: A Conceptual Blending Approach*, Berlin, 2007, p. 10.

[14] SCHERER M. U., *Regulating Artificial Intelligent Systems: Risks, Challenges, Competencies, and Strategies*, in *Harvard Journal of Law & Technology*, 2016, Vol. 29, p. 361.

we do not fully understand the mechanisms of human intelligence we cannot characterize in general what kinds of computational procedures we want to call intelligent[15]. In the lack of general consensus on what intelligence is, many competing definitions of artificial intelligence have been suggested. Stuart Russell and Peter Norvig, authors of the leading introductory textbook on AI, present eight different definitions of artificial intelligence, which vary along two main dimensions and can be organized into four categories: thinking like humans, acting like humans, thinking rationally, and acting rationally[16]. Whilst there does not appear to be one undisputed definition of intelligence, it seems that the approach most commonly used in the AI realm is the one tying the concept of intelligence to the ability to achieve goals, which is an underpinning component of "acting rationally" category in classification proposed by Russell and Norvig.[17] McCarthy himself argued that "intelligence is the computational part of the ability to achieve goals in the world"[18].

However, from a legal and regulatory perspective, linking intelligence to goal attainment does not seem particularly useful. Firstly, the notion of "goal" seems just as difficult to define as "intelligence"[19]. What does it mean, exactly, to have a goal? This notion, albeit intelligible, is ambiguous and, standing alone, devoid of practical meaning for the purposes of developing a working definition of AI. Definition of intelligence based on the concept of goal achievement is undoubtedly very broad. One could perceive this as an advantage and argue that such definition is broad enough to include a myriad of complex tasks that one might have and which are prevalent points of reference when defining AI, such as self-awareness, understanding, problem solving, decision-making and learning[20]. On the other hand it is difficult to resist the impression that the concept of "goal attainment" is somehow over-inclusive. If the notion of a "goal" is understood broadly, for instance as "the end toward which effort is directed"[21], we could then say that a simple pocket calculator arguably would be intelligent because it operates in order to achieve a

[15] See: MCCARTHY J., *What is Artificial Intelligence?*, Stanford, 2007, p. 2-3, http://-wwwformal.stanford.edu/jmc/ whatisai.pdf (last accessed: 6 November 2020).

[16] RUSSELL S. J., NORVIG P., *Artificial Intelligence. A Modern Approach*, cit., p. 4-8.

[17] SCHERER M. U., *Regulating Artificial Intelligent Systems: Risks, Challenges, Competencies, and Strategies*, cit., p. 362;

[18] MCCARTHY J., *What is Artificial Intelligence?*, cit., p. 2.

[19] SCHERER M. U., *Regulating Artificial Intelligent Systems: Risks, Challenges, Competencies, and Strategies*, cit., p. 362;

[20] TEGMARK M., *Życie 3.0. Człowiek w erze sztucznej inteligencji*, KRZYSZTOŃ T. (trans.), Warszawa, 2019, p. 72.

[21] See: https://www.merriam-webster.com/dictionary/goal (last accessed: 6 November 2020).

fixed result, such as adding, subtracting, multiplying or dividing given numbers. We can, however, intuitively conclude, that a machine as trivial as a pocket calculator is in no way intelligent. It thus appears reasonable to limit the conceptual scope of the notion of a "goal". This observation gives rise to a question of how could this be done. It has been argued that a system having a goal is not a property of the system at all, but rather it is a property of the relationship between the system and an observer - a standpoint that the observer takes with respect to the system[22]. This observation does not, however, yield a satisfactory solution to the problem of exclusion of trivial machines from the AI realm. It has also has been suggested that simple machines, such as calculators, cannot be regarded as intelligent systems since they are "programmed to carry out instructions and produce a result without any 'thought'[23]. It can be thus argued, that the definition of a "goal" must somehow pertain to the very human traits such as having a mind and self-awareness[24]. One could therefore enquire whether and when a machine really has a goal rather than just appearing to have one[25]? This perplexing question is inexorably linked to the most fundamental problems of the philosophy of artificial intelligence and relates with the distinction between so called "weak AI" and "strong AI"[26]. Weak AI refers to any system that creates the appearance of having a mind and mental states. By contrast, strong AI refers to any system that actually possesses a mind and thus truly has mental capabilities similar to humans[27]. All current AI systems, no matter how advanced,

[22] SUTTON R. S., *John McCarthy's Definition of Intelligence*, in *Journal of Artificial General Intelligence*, 2020, Vol. 11, Issue 2, p. 66.

[23] STIRRUP T., *The world's first A.I enabled calculator*, in *Medium* (3 January 2018), https://medium.com/@timstirrup/the-worlds-first-a-i-enabled-calculator-ae28fddc7c19 (last accessed: 6 November 2020).

[24] See: SCHERER M. U., *Regulating Artificial Intelligent Systems: Risks, Challenges, Competencies, and Strategies*, cit., p. 362 ("Whether and when a machine can have intent is more a metaphysical question than a legal or scientific one, and it is difficult to define goal in a manner that avoids requirements pertaining to intent and self-awareness without creating an over-inclusive definition.").

[25] Whether a machine can have real intention to achieve goals is debatable in light of John Searle's thought experiment known as the Chinese room argument. See: SEARLE J. R., *Minds, brains, and programs*, in *Behavioral and Brain Sciences*, 1980, Vol. 3, Issue 3, pp. 417-457, https://www.law.upenn.edu/live/files/3413-searle-j-minds-brains-and-programs-1980pdf (last accessed: 6 November 2020); See also: COLE D., *The Chinese Room Argument*, in ZALTA E. N. (ed), *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/chinese-room/ (last accessed: 6 November 2020).

[26] On the philosophy of artificial intelligence see: KAPLAN J., *Artificial Intelligence: What Everyone Needs to Know*, cit., p. 67-89.

[27] COLE D., *The Chinese Room Argument*, cit.

merely appear to possess mental abilities[28]. As strong AI has not yet been developed (and there is an ongoing debate among experts over whether that can ever change), we cannot say that that any of existing systems is truly capable of having a goal. Instead, it could be argued that they only appear capable of goal attainment, in the sense that they are unable of human-type thought processes commonly associated with achieving goals. These observations lead to the conclusion that all systems which appear capable of goal attainment in that sense arguably could be deemed intelligent. This conclusion appears to provide grounds for excluding from the AI realm simple automated machines capable of performing predefined sets of operations in order to complete strictly defined tasks, just like a pocket calculator performs arithmetic operations on given numbers. Nevertheless, appearing capable of human-type thought processes commonly associated with achieving goals is a trait that can be ascribed to an enormous number of systems. Take, for instance, computer programs for playing a simple game of noughts and crosses (also: TIC TAC TOE). Even if such a program is able to defeat human players, it is questionable whether anyone would proclaim that it possesses intelligence. Let us consider chess programs. Shortly after the initial sensationalist coverage in the press, the 1997 victory of the IBM's Deep Blue computer over world champion Chess Grandmaster Garry Kasparov, was diminished as scholars questioned whether the ability to win a game of chess is actually indicative of intelligence. "My God, I used to think chess required thought", reflected Douglas Hofstadter, a cognitive scientist: "Now, I realize it doesn't. It doesn't mean Kasparov isn't a deep thinker, just that you can bypass deep thinking in playing chess, the way you can fly without flapping your wings"[29]. Whilst the role of computer chess in defining the identity and research agenda of AI over the course of the previous half-century is of undoubted importance[30], there seems to be general consensus that the ability to beat a human in the game is not a representative measure of computer intelligence. Whether the ability to achieve a goal of winning a game of chess or a game of noughts and crosses is enough to recognize the system as intelligent is, at best, questionable. But why is that? The task of beating a chess grandmaster in the game is, after all, difficult to say the least. Relying on the concept of human intelligence when addressing a question of what kinds of computational procedures can be deemed intelligent proves to be misleading.

[28] FELDMAN R. C., *Artificial Intelligence: The Importance of Trust & Distrust*, in *Green Bag*, 2018, Vol. 21, No. 3, p. 203.

[29] Quoted in: ENSMENGER N., *Is Chess the Drosophila of Artificial Intelligence? A Social History of an Algorithm*, in *Social Studies of Science*, 2012, Vol. 42, No. 1, p. 22.

[30] ENSMENGER N., *Is Chess the Drosophila of Artificial Intelligence? A Social History of an Algorithm*, cit., p. 7.

Although it is only natural for people to rate the difficulty of tasks relative to how hard it is for humans to perform them, human performance and limitations do not prove to be adequate criteria in this regard. Max Tegmark, a physicist and a machine learning researcher, reflected that although it feels much harder to perform mathematical operations on large numbers than to recognize a person in a photo, computers creamed humans at arithmetic long time ago, while human-level image recognition has only recently become possible[31]. The fact that "it is comparatively easy to make computers exhibit adult level performance on intelligence tests or playing checkers, and difficult or impossible to give them the skills of a one-year-old when it comes to perception and mobility"[32] is known as Moravec's paradox-articulated in the 1980s. "In general, we're least aware of what our minds do best", Marvin Minsky, a cognitive and computer scientist, wrote, adding shortly after: "we're more aware of simple processes that don't work well than of complex ones that work flawlessly"[33]. That is because, as Hans Moravec himself once put it: "human potentials [...] are strong in areas long important for survival, but weak in things far removed"[34]. This problem was also well expressed in the 1990s by Steven Pinker, linguist and cognitive scientist: "The main lesson of thirty-five years of AI research is that the hard problems are easy and the easy problems are hard"[35].

Given the above, it appears that linking intelligence closely to goal attainment alone, does not provide a sufficient definition of AI. How can intelligent systems be distinguished from other human inventions if not by narrowing the conceptual scope of the notion of a "goal" by ranking particular goals relative to how hard it is for humans to achieve them? One possible solution to that issue is associated with another inherent problem which arises in the context of drawing a comparison between human and computational intelligence. It must be noted, that most of the experts in the field of AI would arguably agree that how given system achieves a goal is no less important than whether it reaches the goal or not[36].

[31] TEGMARK M., *Życie 3.0. Człowiek w erze sztucznej inteligencji*, cit., p. 75.

[32] MORAVEC H., *Mind Children: The Future of Robot and Human Intelligence*, *Cambridge*, MA,1988, p. 15.

[33] MINSKY M., *The Society of Mind*, New York, 1986, p. 29.

[34] MORAVEC H., *When will computer hardware match the human brain?*, in *Journal of Evolution and Technology*, 1998, Vol. 1, https://jetpress.org/volume1/moravec.htm (last accessed: 6 November 2020).

[35] PINKER S., *The Language Instinct*, New York, 2007, p. 190.

[36] KAPLAN J., *Artificial Intelligence: What Everyone Needs to Know*, cit., p. 17.

2.2. How do AI systems achieve goals?

If one looks at the complex history of AI, the research bifurcated in two distinct directions - symbolic AI and subsymbolic AI. Those two paradigms have long fought for supremacy in the field of artificial intelligence[37]. Whilst the former was a dominant paradigm for much of the 20th century, the latter has been predominating in the last decade.

Symbolic approaches to AI are based on the assumption that intelligence can be achieved by the manipulation of symbols[38]. Allen Newell and Herbert A. Simon formulated this paradigm best in their physical symbol system hypothesis: "The necessary and sufficient condition for a physical system to exhibit general intelligent action is that it be a physical symbol system"[39]. "What all this means in the practice of symbolic AI"- explained Paul Smolensky- "is that goals, beliefs, knowledge, and so on are all formalized as symbolic structures" which are operated on by symbol manipulation procedures[40]. "According to the symbolic paradigm, it is in terms of such operations that we are to understand cognitive processes"[41].

One form of symbolic AI is cognitive simulation, an approach adopted by Newell and Simon in developing their renowned Logic Theorist, a computer program that could prove mathematical theorems from North Whitehead and Bertrand Russell's *Principia Mathematica* and perhaps the first working system that somehow successfully simulated some aspects of humans' ability to solve complex problems[42]. In cognitive simulation models state space search methods-where problems are modeled as a state space, that is a set of possible configurations of a system usually represented in form of a graph- are used. Given problem is then solved

[37] GARNELO M., SHANAHAN M., *Reconciling deep learning with symbolic artificial intelligence: representing objects and relations*, in *Current Opinion in Behavioral Sciences*, 2019, Vol. 29, p. 17 ; In this paper AI paradigm will be understood as "a concept of intelligence and a methodology in which intelligent computer systems are developed and operated." See: ČAPLINSKAS A., *AI paradigms*, in *Journal of Intelligent Manufacturing*, 1998, Vol. 9, p. 493.

[38] BODEN, M., GOFAI, in FRANKISH K., RAMSEY W. (eds), *The Cambridge Handbook of Artificial Intelligence*, Cambridge, 2014, pp. 89-107.

[39] NEWELL A., SIMON. H. A., *Computer Science as Empirical Inquiry: Symbols and Search*, in *Communications of the ACM*, 1876, Vol. 19, Issue 3, p. 116; NEWELL, A., *Physical symbol systems*, in *Cognitive Science*, Vol. 4, Issue 2, 1980, p. 170.

[40] NEWELL, A., *Physical symbol systems*, cit., p. 98.

[41] NEWELL, A., *Physical symbol systems*, cit., p. 98.

[42] GUGERTY L., *Newell and Simon's Logic Theorist: Historical Background and Impact on Cognitive Modeling*, in *Human Factors and Ergonomics Society Annual Meeting Proceedings*, 2006, Vol. 50, Issue 9, p. 880.

by exploring the state space[43]. Another form of symbolic AI is knowledge-based approach, which is sometimes referred to by the name of systems developed using this approach, namely knowledge-based systems[44]. "A knowledge-based system is a computer program that uses a knowledge base with an inference engine in order to solve problems that usually require significant specialized human expertise. It embodies the problem-solving knowledge of a human expert in a narrowly defined domain and it is able to extend that body of knowledge through its inference engine or query system"[45]. Early knowledge-based systems were primarily rule-based expert systems where knowledge, represented in form of highly specific formal if–then rules, was applied by an automated reasoning system, to deduce conclusions[46].

Symbolic AI came to be known as GOFAI which stands for "Good Old-Fashioned AI," a term coined by John Haugeland[47]. GOFAI works quite well in "microworlds", that is small, circumscribed domains, where "the totality of the situation can be captured by a small number of facts"[48]. Symbolic AI methods, requiring the programmer to symbolically represent all necessary knowledge in a certain domain and then to painstakingly transfer it to a machine in this symbolic form, thus already being very demanding and laborious in microworlds, proved infeasible to extend to real-world problems, due to the vast amount of potentially relevant information thereon. "One reason for this is the 'combinatorial explosion' of possibilities that must be explored by methods that rely on something like exhaustive search"- reflected Nick Bostrom[49]. "Such methods work well for simple instances of a problem, but fail when things get a bit more complicated"[50]. Moreover, GOFAI can perhaps be characterized as somehow brittle" since even slightly erroneous assumption made by the programmer would result in the program generating nonsensical outcome[51]. It has thus turned out, as Hubert L. Dreyfus put it

[43] FLASIŃSKI M., *Wstęp do sztucznej inteligencji*, Warszawa 2018, p. 17-18.

[44] FLASIŃSKI M., *Wstęp do sztucznej inteligencji*, cit., p. 5-6 (at footnote13); See also RUSSELL S. J., NORVIG P., *Artificial Intelligence. A Modern Approach*, cit., p. 22-23.

[45] SWAIN M., *Knowledge-based System*, in DUBITZKY W., WOLKENHAUER O., CHO KH., YOKOTA H. (eds) *Encyclopedia of Systems Biology*, 2013, New York, https://link.springer.com/referenceworkentry/ 10.1007%2F978-1-4419-9863-7_596 (last accessed: 6 November 2020).

[46] FLASIŃSKI M., *Wstęp do sztucznej inteligencji*, cit., pp. 20- 21, 128- 142.

[47] HAUGELAND J., *Artificial intelligence: the very idea,* Cambridge, MA.,1993.

[48] RUSSELL S. J., NORVIG P., *Artificial Intelligence. A Modern Approach, cit.,* pp. 827-828.

[49] BOSTROM N., *Superintelligence: Paths, Dangers, Strategies*, Oxford, 2014, p. 6.

[50] BOSTROM N., *Superintelligence: Paths, Dangers, Strategies*, cit., p. 6.

[51] BOSTROM N., *Superintelligence: Paths, Dangers, Strategies*, cit., p. 7.

nearly three decades ago, that the "research program based on the assumption that human beings produce intelligence using facts and rules has reached a dead end"[52]. Symbolic AI, albeit perhaps a little passé, is by no means a bad or useless approach. It is simply not adequate for tasks that are easy for people to perform but hard for people to describe formally, like recognizing a face in a picture[53] or, for that matter, creating a work of art.

The alternative, subsymbolic (connectionist) AI paradigm, proved successful at overcoming some of the problems associated with symbolic AI. Subsymbolic AI methods can be perceived as an attempt to formalize, at some level of abstraction, the kind of processing which occurs in human nervous system[54]. Connectionist approach to AI make use of so-called connectionist networks. Artificial neural networks, that is connectionist networks with distributed representation, appear to be the most popular connectionist model today. A neural network is composed of large number of units connected by links[55]. "Units in a net are usually segregated into three classes: input units, which receive information to be processed, output units where the results of the processing are found, and units in between called hidden units"[56]. It shall be noted that there are many different types of neural networks' architectures. As it is difficult to understand and explain how and why the artificial neural networks system reaches given outcome, such systems are often referred to as "black boxes". Whilst with GOFAI, the output can be usually explained as a logical derivation, this is generally not possible in case of neural networks[57].

Neural networks are one of many approaches used in so called machine learning. The idea behind machine learning is that AI systems should be able to improve their ability to act in the future. Learning takes place as a result of the system studying its own experiences[58]. The capability to learn, to acquire knowledge, makes it possible to overcome the struggle to symbolically represent information about the world with

[52] DREYFUS H. L., *What computers still can't do: a critique of artificial reason*, Cambridge, MA.,1992, p. 11.

[53] GOODFELLOW I., BENGIO Y., COURVILLE A., *Deep learning*, Cambridge, MA, 2016 p. 1

[54] SMOLENSKY P., *Connectionist AI, Symbolic AI, and the Brain*, in *Artificial Intelligence Review*, 1987, Vol. 1, Issue 2, p. 99.

[55] RUSSELL S. J., NORVIG P., *Artificial Intelligence. A Modern Approach*, cit., p. 567.

[56] BUCKNER C., GARSON J., *Connectionism*, in ZALTA E. N. (ed), *The Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/connectionism/ (last accessed: 6 November 2020).

[57] RUSSELL S. J., NORVIG P., *Artificial Intelligence. A Modern Approach*, cit., p. 584.

[58] RUSSELL S. J., NORVIG P., *Artificial Intelligence. A Modern Approach*, cit., p. 525.

enough complexity and accuracy. Machine learning can be broadly categorized as supervised or unsupervised. Supervised learning algorithms require a dataset containing data samples, where each sample is also associated with a label or a target[59]. For instance, a dataset to train a network to recognize cats is comprised of labeled images with or without a cat in it. The labeling, usually undertaken by humans, is a very laborious process. Unsupervised learning algorithms do not require labeling as they are able to learn useful properties of the structure of given dataset by themselves[60].

A technique which underpins a myriad of currently thriving technologies with many practical applications is so called deep learning, a particular subfield of machine learning. The neural perspective on deep learning is driven by two ideas:

First is that "the brain provides a proof by example that intelligent behavior is possible, and a conceptually straightforward path to building intelligence is to reverse engineer the computational principles behind the brain and duplicate its functionality"[61]. Second is that, apart from their ability to solve engineering applications, machine learning models can shed light on scientific questions of how the brain works and what are the principles that underlie human intelligence[62]. Deep learning "achieves great power and flexibility by representing the world as a nested hierarchy of concepts, with each concept defined in relation to simpler concepts, and more abstract representations computed in terms of less abstract ones"[63]. The name "deep learning" comes from the use of multiple layers in the network ("deep neural network"), the depth of which enables it to progressively extract features from the raw input. Contrary to what one might believe, deep learning is anything but a novel technology. Having long and rich history, it has only recently become recognized as a useful technology[64]. Ian Goodfellow, Yoshua Bengio and Aaron Courville indicate two main reasons behind neural networks' remarkable success. Firstly, increasing digitization of our lives which led us into the age of "Big Data" resulted in dramatic increase in the amount of available training data[65]. Secondly, with the improvement of computer infrastructure, both hardware and software, the deep learning models

[59] GOODFELLOW I., BENGIO Y., COURVILLE A., *Deep learning*, cit., pp. 102-103.
[60] GOODFELLOW I., BENGIO Y., COURVILLE A., *Deep learning*, cit., pp. 102-103.
[61] GOODFELLOW I., BENGIO Y., COURVILLE A., *Deep learning*, cit., p. 13.
[62] GOODFELLOW I., BENGIO Y., COURVILLE A., *Deep learning*, cit., pp. 13-14.
[63] GOODFELLOW I., BENGIO Y., COURVILLE A., *Deep learning*, cit., p. 8.
[64] SEJNOWSKI T. J. *The Deep Learning Revolution*, Cambridge, MA, 2018, p. 37-48.
[65] GOODFELLOW I., BENGIO Y., COURVILLE A., *Deep learning*, cit., pp. 18-21.

were able to grow in size[66]. Larger datasets and more powerful computers proved to be a key for deep learning popularity and usefulness.

As the concepts of what constitutes artificial intelligence have shifted over time, McCarthy complained: "As soon as it works, no one calls it AI anymore"[67]. Yet, given the above, it appears that although there is an intuitive difference between a program capable of achieving given goal by choosing best possible solution from a finite number of options or by applying clearly defined set of rules[68] and a program which learns how to attain said goal by itself, improving its performance through experience, both of those programs would arguably be deemed artificial intelligence.

2.3. *The Autonomy spectrum*

By reflecting on some of the AI approaches and methods, it has been shown that level of autonomy among AI systems varies significantly. Gathering knowledge from experience, machine learning systems, unlike GOFAI, operate successfully without being explicitly programmed. Since there is no need for human programmers to formally specify all the knowledge that the program requires to achieve given task, learning systems can be viewed as more autonomous.

As will be argued in section 4.2, it is the notion of autonomy, rather than intelligence, that should be considered as crucial for assessment of the legal status of artworks generated by AI from the copyright perspective. The notion of autonomy does not appear obscure nearly as much as the notion of intelligence does. It is also much less difficult to assess and measure. One could wonder, whether it is even possible to quantify machine intelligence. How should we assess the performance of a program capable of generating artworks? Should we evaluate its outputs in terms of their plausibility, novelty or perhaps their aesthetic value? As it has been suggested above, the processes by which a program achieves given

[66] GOODFELLOW I., BENGIO Y., COURVILLE A., *Deep learning*, cit., pp. 21-22.

[67] VARDI M. Y., *Artificial Intelligence: Past and Future*, *Communications* of the *ACM*, 2012, Vol. 55, No. 1, p. 5.

[68] Consider computer programs for playing a games such as noughts and crosses or chess. There is a finite number of possible different ways each of these games can be played. For instance, the game of noughts and crosses can be played in exactly 255 168 different ways. (See: PICKOVER C. A., *The Math Book: From Pythagoras to the 57th Dimension, 250 Milestones in the History of Mathematics*, New York/ London, 2009, p. 38) A computer program "solves" the game by following a set of possible sequences of moves in search for the one that would guarantee the best possible outcome, that is a win or a tie. This is also true for chess-playing programs. Chess, albeit much more complex than the simple game of noughts and crosses, is also, after all, a formal system of pieces and strict rules for manipulating them. See also: KAPLAN J., *Artificial Intelligence: What Everyone Needs to Know*, cit., p. 17.

task is what should be taken into consideration. This conclusion brings us inevitably to the question of the level of autonomy.

AI's ability to act autonomously is one of the fundamental features that distinguishes it from prior human inventions[69]. But what exactly does it mean to say that a machine is "autonomous"? Autonomy cannot be described in terms of autonomous-non-autonomous dichotomy as it is not an all-or-nothing trait. Rather, autonomy should be regarded as a spectrum correlated with a proportional lessening of the degree of human intervention[70]. At the low end of this spectrum lie tools that are fully dependant on human involvement, whereas the top end is taken by fully autonomous AI systems[71]. The latter can be described as acting independently of direct human instruction, based on information the system itself acquires and analyzes[72]. What needs to be noted is that, as of yet, even the most sophisticated AI systems, albeit often capable of performing complex tasks without active human direction, control or supervision, usually require some level of human contribution. They need humans to develop them, feed them with volumes of data and set goals. It is reasonable to foresee that some time in the future, AI will become completely autonomous - not only able to operate free from human direction and control but also independently improve itself and create other systems. Nevertheless, as of now, the autonomy of the systems at the top extreme of the autonomy spectrum is not an absolute one. In between both ends of the spectrum there is a continuum of machine autonomy levels with no fixed distinction between them.[73] Generally all AI systems, regardless of the paradigm they were developed in, can be placed at the upper part of the spectrum, above ordinary tools and automated machines carrying out fixed functions.

[69] SCHERER M. U., *Regulating Artificial Intelligent Systems: Risks, Challenges, Competencies, and Strategies*, cit., pp. 362-364.

[70] Royal Academy of Engineering, *Autonomous systems: social, legal and ethical issues*, London, 2009, p. 2, *http://www.raeng.org.uk/publications/reports/autonomous-systems-report* (last accessed: 6 November 2020).

[71] Royal Academy of Engineering, *Autonomous systems: social, legal and ethical issues*, cit., p. 2.

[72] VLADECK D. C., *Machines Without Principals: Liability Rules and Artificial Intelligence*, in *Washington Law Review*, 2014, Vol. 89, No. 1, p. 121; SCHERER M., *Who's to Blame (Part 2): What is an "autonomous" weapon?*, in *Law and AI*, (10 February 2016), http://www.lawandai.com/2016/02/10/what-is-an-autonomous-weapon/ (last accessed: 6 November 2020).

[73] Royal Academy of Engineering, *Autonomous systems: social, legal and ethical issues*, cit., p. 2.

3. *AI in thrall to visual art*

Given the complex picture outlined in section 2, this section's objective is to shed some light on the processes employed to generate visual art through AI. For this purpose, representative examples of systems capable of generating plausible artworks will be briefly discussed.

3.1. *AARON*

Despite its serious limitations, some of which were mentioned above, GOFAI turned out to provide a useful experimental framework for image generation[74]. The prime example of an image painting machine developed using methods of symbolic AI is AARON, an art-creating program designed by Harold Cohen. Cohen started working on AARON in 1973, improving it year after year[75].

The images generated by AARON, are considered perfect examples of the GOFAI paradigm and its symbolic rule-based approach[76]. AARON is capable of creating different paintings, but it cannot do things it is not explicitly programmed to do. It needs to be provided with knowledge and rules to be able to produce works[77]. For instance, in order to draw a human figure AARON needs to be provided with specific, abstract rules that describe the anatomy of the human body, how different body parts look like from different points of view and what is the possible range of motion of the limbs. "The program can draw acrobats with only one arm visible (because of occlusion) but it cannot draw one-armed acrobats. Its model of the human body does not allow for the possibility of there being one-armed people"[78]- Margaret Boden wrote. Similarly, Cohen explained that since color choices are mandated by subject matter, AARON will never choose, for instance, to paint human skin green or

[74] POLTRONIERI F. A., HANSKA M., Technical *Images and Visual Art in the Era of Artificial Intelligence: From GOFAI to GANs*, ARTECH 2019 - 9th International Conference on Digital and Interactive Arts, Braga, Portugal, October 2019, p. 3, https://dora.dmu.ac.uk/handle/2086/18607 (last accessed: 6 November 2020).

[75] MOSS R., *Creative AI: The Robots That Would Be Painters*, NEW ATLAS (16 February 2015), https://newatlas.com/creative-ai-algorithmic-art-painting-fool-aaron/-36106/ (last accessed: 6 November 2020).

[76] POLTRONIERI F. A., HANSKA M., Technical *Images and Visual Art in the Era of Artificial Intelligence: From GOFAI to GANs*, cit., p. 4.

[77] RAMALHO A., *Will robots rule the (artistic) world?: a proposed model for the legal status of creations by Artificial Intelligence systems*, cit., 12.

[78] BODEN M., *Creativity and computers*, in DARTNALL T. (ed), *Artificial intelligence and creativity. An interdisciplinary approach*, Heidelberg, 1994, p. 10.

purple[79]. In order for AARON to be capable of painting aesthetically pleasing portraits, Cohen had to reduce the human figure to a set of highly abstract rules that could be followed in a symbolic order. "He descended the negative ladder of abstraction until its last step: the technical zero-dimensional image, an abstract mathematical semiotic index that is greatly removed from its real-world model"[80].

Hence, AARON's abilities only go so far as implementing rules defined by Cohen. AARON thus seems to have reached a limit in terms of figurative images, which are far too complex to be described in detail using GOFAI[81].

3.2. *AICAN*

Applying deep learning techniques made it possible to achieve what was beyond the reach of GOFAI methods. GAN (Generative Adversarial Network) is a framework proposed by Ian Goodfellow, and his associates, where two networks - a generator and a discriminator - pitted against each other, are present. GANs are based on a game scenario in which two networks compete against each other. The generator produces samples, for instance artworks, while its adversary, the discriminator attempts to distinguish between samples from the training data set and samples produced by the generator[82], "The generative model can be thought of as analogous to a team of counterfeiters, trying to produce fake currency and use it without detection, while the discriminative model is analogous to the police, trying to detect the counterfeit currency. Competition in this game drives both teams to improve their methods until the counterfeits are indistinguishable from the genuine articles"[83]. In 2018 a painting, *Portrait of Edmond Belamy*, generated by a

[79] COHEN H., *Coloring Without Seeing: A Problem in Machine Creativity*, http://www.aaronshome.com/aaron/publications/colouringwithoutseeing.pdf (last accessed: 6 November 2020).

[80] POLTRONIERI F. A., HANSKA M., Technical *Images and Visual Art in the Era of Artificial Intelligence: From GOFAI to GANs*, cit., p. 4.

[81] POLTRONIERI F. A., HANSKA M., Technical *Images and Visual Art in the Era of Artificial Intelligence: From GOFAI to GANs*, cit., p. 4.

[82] GOODFELLOW I., BENGIO Y., COURVILLE A., *Deep learning*, cit., p. 696.

[83] GOODFELLOW I., POUGET-ABADIE J., MIRZA M., XU B., WARDE-FARLEY D., OZAIR S., COURVILLE A., BENGIO Y., *Generative Adversarial Networks*, 2014, p. 1, https://www.researchgate.net/publication/263012109_Generative_Adversarial_Networks (last accessed: 6 November 2020).

generative adversarial network was sold at Christie's for $432,500 — nearly 45 times the estimated price[84].

Whilst GANs have shown the ability to learn to generate plausible images, it has been argued that their ability to generate creative, original products is limited[85]. Ahmed Elgammal and his associates suggested that the ability to generate original products can be achieved by deviating from established styles and from art distribution[86]. A modified type of generative adversarial networks, CANs (Creative Adversarial Networks), was therefore proposed. CANs are motivated by theory that art is best perceived by viewers when it is unique, but not too much[87]. Similar to GAN, CAN composes of two adversary networks, a discriminator and a generator. The discriminator accesses a training set of art associated with style labels and uses it to learn to discriminate between different artistic styles. The generator generates art, but unlike what happens in GAN, it receives two distinct signals from the discriminator. The first one signals whether the discriminator thinks the generated image is "real" art. The second signal is about how well the discriminator can classify the generated image into one of the established styles. On one hand the generator tries to trick the discriminator into thinking that the generated image is "real art", and on the other hand it tries to confuse the discriminator about the style of the work generated[88].CAN achieve outstanding results in generating outputs that look as if they were created by human artists, without emulating existing artworks.

CANs' results in the field of visual art generation are quite impressive. One such program, generating art through CAN, is AICAN (Artificial Intelligence Creative Adversarial Network), designed by Ahmed Elgammal and his associates. AICAN was fed with 80.000 images representing

[84] Is artificial intelligence set to become art's next medium?, CHRISTIE'S (12 December 2018), https://www.christies.com/features/A-collaboration-between-two-artists-one-human-one-a-machine-9332-1.aspx (last accessed: 6 November 2020).

[85] ELGAMMAL A., LIU B., ELHOSEINY M., MAZZONE M., *CAN: Creative Adversarial Networks, Generating "Art" by Learning About Styles and Deviating from Style Norms*, 2017, p. 1 https://arxiv.org/pdf/1706.07068.pdf (last accessed: 6 November 2020).

[86] ELGAMMAL A., LIU B., ELHOSEINY M., MAZZONE M., *CAN: Creative Adversarial Networks, Generating "Art" by Learning About Styles and Deviating from Style Norms*, cit., p. 1.

[87] ELGAMMAL A., LIU B., ELHOSEINY M., MAZZONE M., *CAN: Creative Adversarial Networks, Generating "Art" by Learning About Styles and Deviating from Style Norms*, cit., p. 4. ("Too little arousal potential is considered boring, and too much activates the aversion system, which results in negative response.").

[88] ELGAMMAL A., LIU B., ELHOSEINY M., MAZZONE M., CAN: Creative Adversarial Networks, Generating "Art" by Learning About Styles and Deviating from Style Norms, cit., p. 6-7.

5 centuries of Western art history in order for it simulate how artists digest prior artworks until, at some point, they break out of established styles and create something unique. Ahmed Elgammal and his associates then conducted an experiment, where they compared the response of human subjects to art created by human artists and art generated by AICAN by presenting them with images generated by AICAN and works from Art Basel 2016 (the flagship art fair in contemporary art). Seventy-five percent of the time, human subjects thought AICAN's works were created by human artists[89].

4. *Computer-Enabled Works*

Copyright law has always remained under strong influence of technological progress in the field of production, duplication and dissemination of works[90]. History of copyright law teaches us that copyright framework repeatedly accommodated technological achievements introduced within the artistic domain and that machines contributing to the creation of artistic artifacts have previously given rise to reflections on the copyright law requirement of human authorship[91]. Just like early photography gave rise to discussions as to "whether there is enough room for human creative input in the partially mechanical creation process of the capturing of light through camera obscura's lens", the concept of human authorship was again put to discussion when computers were first introduced to the creation process[92]. As modern AI systems' scope of autonomy increases and systems thus become more and more sophisticated in their role of assistants to human creative process or even exceed this role, objections stemming from the lack of human creative input are now voiced ever more strongly.

Two categories of computer-enabled works are usually juxtaposed in copyright literature: computer-assisted works and computer-generated works. This classification appears to come down to a division between programs which are merely tools and those which are something more than that. The division between computer-assisted and computer-generated works, which will be outlined in this section, appears to be based on

[89] ELGAMMAL A., MAZZONE M., *Art, Creativity, and the Potential of Artificial Intelligence*, in in *Arts*, 2019, Vol. 8, Issue 1, p.26, https://www.mdpi.com/2076-0752/8/1/26 (last accessed: 6 November 2020).

[90] GACHAGO R., *The Effect of Technology on Copyright*, Cape Town 2011.

[91] DE COCK BUNING M., *Autonomous Intelligent Systems as Creative Agents under the EU Framework for Intellectual Property*, cit., p. 318.

[92] DE COCK BUNING M., *Autonomous Intelligent Systems as Creative Agents under the EU Framework for Intellectual Property*, cit., p. 318.

a default assumption that all systems hailed as artificial intelligence produce outputs of the same legal status. In view of the foregoing observations on variety of AI approaches and methods, I argue that this classification is somehow over-simplistic. If we distinguish the category of computer-assisted works (where computer program is used merely as a tool) and subsequently put outputs of all programs which do not fall within the first category (where computer program is more than an inert instrument), we will inevitably, upon further examination, realize that the latter is anything but a homogeneous group.

I argue that the mere fact that given work was produced by an AI program, does not inherently prevent human authorship. Variety of different tools and methods used in AI makes it unreasonable to presuppose that in case of all AI programs no place is left for human creative input.

4.1. *Computer-Assisted Works*

Computer-assisted works are created with the use of machines which rely solely on the creative contributions of their users[93]. In that sense, the system is merely a tool, an inert instrument, activated and operated by human author.

Copyright's long acceptance of the use of technologically advanced tools, such as cameras, in the creative process is based on the idea that it would be rather ludicrous to suggest that using a pen to write down a literary work, or that using a painting brush to paint a painting on a canvas, prevents such works from being copyrightable subject matter for lack of a human author or that it supports granting exclusive rights to the pen or the paintbrush or to any person who made such tools. This reasoning has continued to hold in cases of much more sophisticated digital tools, which include, for instance, word processing software and graphic editing software[94]. Naturally, as the pace of digital technology development continues to accelerate, such digital instruments become more and more sophisticated. Not only do advanced digital tools accomplish goals quicker and more efficiently, but they are also able to accomplish otherwise impossible tasks[95]. There is a practical, albeit non-intuitive, equivalence between relatively primitive tools and more sophisticated ones. As long as it is the user of the digital tool who directs it and who determines the work's form, thus imprinting the work with creativity and individual character, the copyrightability of such work cannot be questioned. It is widely accepted that under Polish copyright framework that the user of the software should be considered to be the author of the work, just like

[93] GINSBURG J. C., BUDIARDJO L. A., *Authors and Machines*, cit., 409-410.
[94] BARTA J., MARKIEWICZ R., *Główne problemy prawa komputerowego*, cit., p. 223.
[95] GINSBURG J. C., BUDIARDJO L. A., *Authors and Machines*, cit., 410-411.

it is the photographer, not the camera manufacturer who is the author of any copyrightable photography taken with the camera[96].

4.2. *Computer-Generated Works*

As already mentioned above, there appears to be a general consensus among Polish and most European scholars that computer-generated works (in this paper also occasionally referred to as "AI-generated works") are not copyrightable subject matter. Nevertheless, it appears that no common understanding of the term "computer-generated works" has yet been developed. Given that recognizing particular output as computer-generated work is considered to entail such significant implications, the scope of this category requires a clear delimitation.

Systems' capability to generate unpredictable results is often emphasized when defining computer-generated works[97]. I argue that this criterion is somewhat misleading. Polish copyright law scholars generally accept the idea that incorporating randomness into the creation process does not deprive the work of copyright protection, insofar as randomness is incorporated intentionally[98]. Randomness can thus be the force shaping the work in a way that the author did not conceive in detail, but this mere fact does not deprive the work of copyright protection. For it to be viewed as a copyrightable subject matter particular work's creation does not necessarily need to be intended nor precisely planned in advance, as such requirements are not provided by Polish copyright law[99]. On the other hand, it has been argued that where the creation process is left en-

[96] BARTA J., MARKIEWICZ R., *Główne problemy prawa komputerowego*, cit., p. 223; JANKOWSKA M., *Autor i prawo do autorstwa*, cit., s. 336.; NOWICKA A., *Podmiot prawa autorskiego, cit., p. 89;* OLEKSIUK J., *Założenia aksjologiczne autorskoprawnej ochrony twórczości w świetle rozwoju sztucznej inteligencji*, cit., p. 252; FLISAK D., *Art. 1*, in FLISAK D. (ed), *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa 2015, LEX, para. 3.

[97] MATUSIAK I., *Gra komputerowa jaki przedmiot prawa autorskiego*, Warszawa 2013, p. 60; MCCUTCHEON J., *The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law*, in *Melbourne University Law Review*, 2013, Vol. 36, Issue 3, pp. 930-931 ("The significance of these methods of production is that while the programmer sets the rules and parameters in which the software operates, the actual form of the output is unpredictable.").

[98] See for example: BARTA J., *Dzieło muzyczne i jego twórca w świetle przepisów prawa autorskiego*, p. 58.; SARBIŃSKI R. M., *Utwór fotograficzny i jego twórca w prawie autorskim*, cit., p. 100.; FLISAK D., *Utwór multimedialny w prawie autorskim*, Warszawa 2008, p. 45.

[99] JANKOWSKA M., *Autor i prawo do autorstwa*, cit., s. 341- 342.

tirely to chance, the resulting output should not enjoy copyright protection[100]. One could hence ask where is the point at which the author surrenders to chance, so much control over the creation process, that the result of such process cannot be attributed to author's own creativity. I argue that in this case the borderline between what is copyrightable and what is not, runs where the human's input is nothing but a general idea, as under Polish legal framework ideas do not enjoy copyright protection[101].

Since AI systems may, in fact, act unforeseeably, both from a user and from a program designer's perspective, thus resulting in unpredictable outputs, one could argue that such results cannot be attributed to human creativity. But is it true for all AI systems? Is human authorship prevented by all AI's operating methods? Bearing in mind the above considerations with regard to legal consequences of incorporating randomness into the creation process, let us consider two previously mentioned examples representing different AI paradigms. Take AICAN, one of the newest achievements of deep learning in the field of image generation. The programmer exercises no control over such networks' actions. AICAN learns and improves itself with no human directions. The designer created the network, provided it with training data and sets a goal leaving its execution entirely to the system. It thus appears that there is no place for human creative contribution in the process of generating final results as designer's input is nothing but a general idea. I hence argue that CAN-based programs, such as AICAN, could potentially yield authorless outputs. Now, let us consider AARON, a fine example of the GOFAI paradigm use in the field of image generation. As it was already mentioned, AARON cannot do things it is not explicitly programmed to do. Its inability to change, to deviate from implemented rules, means that the unpredictability of AARON's actions is rather limited in scope. Marcus du Sautoy noted, that if one examines AARON's code carefully enough, at the heart of program's decision-making centre lies a pseudo-random number generator. The scope of AARON's actions is thus strictly determined by implemented set of rules on one hand, significantly enlarged by

[100] BŁESZYŃSKI J., *Prawo autorskie*, cit., p. 34.

[101] According to Article 1. 2[1] of the Act of 4 February 1994 on Copyright and Related Rights (Journal of Laws of 1994, No. 24 item 83 with subsequent amendments): "Protection may apply to the form of expression only and no protection shall be granted to discoveries, ideas, procedures, methods and principles of operation as well as mathematical concepts." This catalogue of exemptions is in no way exhaustive and other elements such as artistic techniques, style and manner are indicated as excluded from copyright protection. See: BARTA J., MARKIEWICZ R., *Art. 1*, in BARTA J., MARKIEWICZ R. (eds), *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz,* Warszawa 2011, LEX, para. 24.

introducing random variables on the other. The range of possible scenarios is hence immeasurably wide. When AARON paints human figures, it is not simply reproducing nor merging stored images previously drawn[102]. What it does is generate various outputs based on implemented set of rules. Nevertheless, AARON's outputs, however unique and unpredictable, are, after all, determined by Cohen's input. AARON's paintings are one of a kind, yet still, as they are all produced on the same basis, they share many common features. Notably, unlike in case of deep learning AI systems such as CAN-based AICAN, designer's input appears more than merely providing a general idea. One must remember that AARON is an explicitly programmed system, meaning that Cohen precisely described rules and instructions behind AARON's results. In the view of the above observations on incorporating randomness into the creation process, one could argue that even if Cohen did not hold in his mind a precise mental image of each of AARON's outputs, his creative input still manifests itself in the generated results making him the author of any works generated by the program.

Defining computer-generated works by their unpredictability fails to exclude from this category all products which essentially do not challenge existing copyright framework, at least, as it will be shown in section 4.3, not in the same way that works generated by autonomous AI systems where no human creative contribution is reflected, do.

Computer-generated works are sometimes defined as outputs created solely by the machine with no human input[103]. As it was already mentioned, even the most sophisticated AI systems usually require some level of human contribution. Extreme absolutisation of the notion of "lack of human input" appears to make the category of computer-generated works somehow under-inclusive. For it to be useful, the criterion of lack of human input, should be clarified. Under Polish legal framework this could be done by taking into account the fundamental condition for copyright protection: that human creative input should be reflected in the work. It would hence seem appropriate to claim that computer-generated works should not be defined as those created with no human input whatsoever, but rather as those where no human creative input manifests itself in the generated output.

[102] DAVIS R., *Intellectual Property and Software: The Assumptions are Broken,* in *World Intellectual Property Organization Worlswide Symposium on the Intellectual Property Aspects of Artificial Intelligence*, Geneva, 1991, p. 103, https://www.wipo.int-/edocs/pubdocs/en/wipo_pub_698.pdf (last accessed: 6 November 2020).

[103] FLISAK D., *Utwór multimedialny w prawie autorskim,* p. 44; See also: Yu R., *The Machine Author: what level of copyright protection is appropriate for fully independent computer-generated works?*, in *University of Pennsylvania Law Review*, 2017, Vol. 165, p. 1254.

I hence argue, that it is the notion of autonomy that should be considered crucial for assessment of the legal status of AI-generated artworks from the copyright perspective[104]. As it has already been determined, under Polish copyright law, for it to be protected, a work has to manifest creative activity of an individual nature. The author of a work is thus a human whose input in the creation process, reflected in the work, satisfies the originality criterion[105]. Under current legal framework, in the absence of such human input the work is not considered to be a copyrightable subject matter. It is the level of autonomy of the system, that affects whether there is enough place for human creative input or not. Thus the autonomy of the system determines whether the existing copyright framework can accommodate its results.

Given this conclusion, I argue that when defining AI-generated works for the purposes of copyright analysis one should answer two questions. Firstly, it should be assessed whether the AI's output would be eligible for copyright protection, had it been created by human. This stage comes down to the question: Would a person, unaware that given artwork was created with the use of a computer program, recognize it as a copyrightable subject matter[106]? Secondly, should it be concluded that given output would be recognized as a copyrightable subject matter, the system's degree of autonomy ought to be assessed. If the autonomy level is so high that no human creative input is reflected in the output, the assessed artwork should be deemed a computer- generated work.

4.3. *Liminalities*

There is a continuum between, computer-assisted works at one end, and computer-generated works at the other. In between, there is a broad

[104] Shlomit Yanisky-Ravid identifies ten features of AI systems that are important to the discussion of accountability of AI systems based on the copyright discourse. See: YANSKI-RAVID S., *Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A era--the human-like authors are already here--a new model*, in *Michigan State Law Review*, 2017, Issue 4, pp. 678-682.

[105] BARTA J., MARKIEWICZ R., *Art. 9*, in BARTA J., MARKIEWICZ R. (eds), *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Warszawa 2011, LEX, para. 8; MICHALAK A., Art. 9, in MICHALAK A. (ed), *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Warszawa 2019, LEGALIS, para. 4; NOWICKA A., *Podmiot prawa autorskiego*, cit., p. 93; FLISAK D., *Art. 9*, in FLISAK D. (ed), *Prawo autorskie i prawa pokrewne. Komentarz*, Warszawa 2015, LEX, para. 4.

[106] This stage can be regarded as a variation of a Turing Test. (On what the Turing Test is see: OPPY G., DOWE D., *The Turing Test*, in ZALTA E. N. (ed), *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/turing-test/ [last accessed: 6 November 2020]).

spectrum of methods of artwork production with varying degrees of human, both programmer's and user's, intervention[107].

Although AARON's paintings are often considered to be computer-generated works, with all the attendant consequences[108], I would argue, that images produced by AARON might be one example of such liminal artworks, which are neither computer-generated nor computer-assisted[109]. As mentioned already, in the view of the above observations, it can be argued that Cohen's creative input still manifests itself in AARON's results. Hence, on one hand, AARON's outputs are not computer-generated works. On the other, since AARON is not a mere tool, images produced by the program are not computer-assisted works either. As already mentioned, the basic feature of computer-assisted works is that the program's autonomy is nonexistent or minimal, and they reflect creative contributions of their users and not of the person who designed the program used. In AARON case, user's input is limited to turning the machine on. It can be thus argued, that it is Cohen, the machine's designer, whose algorithmic commands AARON carries out faithfully, who is the author of works generated by AARON.

This conclusion however does not mean that the legal status of liminal works, which are neither computer-generated nor computer-assisted, is clear. Quite frankly, it is anything but that. The conclusion that it is the designer of such system being the author of all of the system's outputs, gives rise to many doubts, resulting for instance from a fact, that such program, acting as the designer's faithful agent, can generate potentially copyrightable works long after the designer's death, just like AARON can still produce artworks although Cohen has been gone since 2016. One question could hence be that of how should copyright law address this problem, particularly troublesome due to the issue of moral rights. The problem of such liminal works' legal status is only further complicated when one takes into consideration that user's input might extend

[107] MCCUTCHEON J., *The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law*, cit., p. 930

[108] See for example: YANSKI-RAVID S., *Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A era--the human-like authors are already here--a new model*, cit., footnote 2; MCCUTCHEON J., *The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law*, cit., p. 930-932; RAMALHO A., *Will robots rule the (artistic) world?: a proposed model for the legal status of creations by Artificial Intelligence systems*, cit., p.12; BIRDY A., *Coding creativity: copyright and the artificially intelligent author*, in *Stanford Technology Law Review*, 2012, Issue 5, p. 51; DENICOLA R. C., *Ex machina: copyright protection for computer-generated works*, in *Rutgers University Law Review*, 2016, Vol. 69, p.263.

[109] It appears that this is the assumption adopted by Andres Guadamuz. See: GUADAMUZ A., *Do androids dream of electric copyright? Comparative analysis of originality in artificial intelligence generated works*, cit., p. 171.

beyond simply turning the system on. For instance, while operating the machine, the user might be able to choose from a range of given parameters. The scope of those choices might be more or less limited. There hence must be a point at which user's creative choices are reflected in the generated work. Another question to address would hence be that of how would user's creative contribution influence the designer's authorship claim[110]?

5. *Conclusions*

This paper discussed general definitional problems that need to be confronted by copyright scholars and policy makers prior to addressing pressing uncertainties surrounding the legal status of works generated by AI from the copyright perspective, in the context of Polish copyright framework. As shown above, it is the degree of autonomy of the AI system that shall be taken into consideration when assessing the legal status of any works generated by the system from the copyright perspective. If one reflects on some of the many AI methods and tools, one can clearly see that the level of autonomy among systems commonly recognized as AI varies significantly. Autonomy is a spectrum correlated with a proportional lessening of the degree of human intervention which corresponds with a continuum between computer-generated works at one extreme, and computer-assisted works at the other. In between those two categories, there is a broad spectrum of works generated using a number of different methods of artwork production with varying degrees of human intervention.

Yet, only two categories of computer-enabled works are usually described in copyright literature: computer-assisted works and computer-generated works. Whilst the scope of the former does not raise serious doubts among copyright scholars, the extent of the latter is somewhat questionable. Without contesting the conclusion that works generated by autonomous AI systems, when no human creative contribution is reflected in the work, are devoid of copyright protection under current Polish copyright law, I argue that this assumption cannot be applied by default to all systems commonly hailed as artificial intelligence. Variety of different tools and methods used in AI makes it unreasonable to pre-

[110] See for example: GINSBURG J. C., BUDIARDJO L. A., *Authors and Machines*, cit, p. 418- 439. It needs to be noted however, that classification proposed by Jane C. Ginsburg differs from the one described in this paper and it is based on the assumption that even the most autonomous systems' works are not authorless. See: GINSBURG J. C., BUDIARDJO L. A., *Authors and Machines*, cit, p. 408- 418.

suppose that in case of all AI programs no place for human creative contribution is left. The analysis of representative AI methods employed to generate visual art conducted from the perspective of Polish copyright doctrine lead to the conclusion that some of the works commonly denied protection based on the fact that they were generated by AI, could potentially be deemed copyrightable subject matter.

This paper argues that when defining computer-generated works, firstly, it should be assessed whether given output would be eligible for copyright protection, had it been created by human. Secondly, should it be concluded that given output would be recognized as a copyrightable subject matter, the system's degree of autonomy ought to be assessed. If the degree of autonomy prevents any human creative input from manifesting itself in the output, the assessed artwork should be deemed a computer-generated work. This solution would exclude from the category of computer-generated works all products which essentially do not challenge existing copyright framework in the same way that works generated by autonomous AI systems where no human creative contribution is reflected do. To recognize this fact, however, is not to say that the legal status of such liminal works, which are neither computer-generated nor computer-assisted, is clear. On the contrary, those works give rise to many questions, some of which have been mentioned above. Nevertheless, as the nature of such works differs significantly both from computer-assisted and computer-generated works, I argue that they merit to be recognized in the modern copyright discourse.

ANDREA BERGAMINO

BLOCKCHAIN AND THE LAW: MUCH ADO ABOUT NOTHING? THE CASE OF LOGISTICS AND SHIPPING INDUSTRY

CONTENTS: 1. Introduction. – 2. Some preliminary remarks on the technology. – 3. The rise of blockchain adoptions in the so-called "Logistics 4.0". – 4. *Lex cryptographica*: a *lex mercatoria* 4.0? – 5. Are bills of lading ready to become "blocks of lading"? – 6. Conclusions.

1. *Introduction*

Blockchain "fever" is, nowadays, at its highest all around the world.

Born several years ago as the technical ground of the famous (or, perhaps, infamous) Bitcoin[1] with the aim to create a financial system capable of by-passing commercial financial institutions and central banks, blockchain has gradually become a buzzword, shaping many sectors of human conduct in a wider process of digitalisation, which is currently testing legal systems and society at large.

Indeed, scholars have already observed[2] that advances in artificial intelligence (AI), biotechnology and distributed ledger technologies (such as blockchains) are changing existing social patterns thereby putting considerable pressure on the *status quo* of well-established legal institutions and arrangements.

In this context, the interest in multifunctional implementations of blockchain technology has risen exponentially, mainly because such a disruptive innovation is – by design – a global and transnational tool[3], acting in a fully decentralized system governed by protocols and other code-based rules that are automatically executed by the network itself, potentially without the need for intermediaries. In this vein, blockchains tend to create autonomous and self-regulating systems that have been

[1] KIVIAT T., *Beyond Bitcoin: Issues in Regulating Blockchain Transactions*, in *Duke Law Journal*, 2015, 65, p. 569; NAKAMOTO S., *Bitcoin: a peer-to-peer electronic cash system*, 2008, https://bitcoin.org/bitcoin.pdf.

[2] DIMITROPOULOS G., *The Law of blockchain*, in *Washington Law Review*, 2020, 95 (3), p. 1117.

[3] DIMITROPOULOS G., *The Law of blockchain*, cit, p. 1119; DE FILIPPI P., HASSAN S., *Blockchain Technology: from Code is Law to Law is Code*, in *First Monday*, December 5, 2016.

qualified – maybe in excessively emphatic terms – as "*the strongest challenge ever posed to the monopoly of the state over the promulgation, formation, keeping a verification of institutions and the public record*"[4].

Moving from a pure theoretical vision to a more concrete and practical one, it is of particular interest to understand how legislators and policymakers have to deal with this new technology and, in doing so, it is crucial to analyse how its spread can affect our society and the relevant relationships among individuals.

In this context, two possible approaches[5] seem to be available: on the one hand, a "self-restraint" regulation in which the legislator limits his activity in the way deemed sufficient to preserve and protect both technological innovation and the development of a system which creates order without law (the so-called *lex cryptographica*[6]); on the other hand, a "regulatory presence" approach, aimed at accompanying functionalities of this new rising technology and at boosting an interaction between the real world and the online world, through the creation of a *blockchain law*[7] which might act as the flip side of the coin with regards to the abovementioned *lex cryptographica.* More specifically, this second approach has been considered the most suitable to prevent the rise of the so-called "crypto-anarchy"[8], envisioned by the alleged creators of pure decentralised technological systems.

The aim of this paper is to critically evaluate both these approaches together with the possible influence thereof on the practical implementation of blockchain technology in every-day life. In this context, the crucial and barycentric importance of tailoring a new role for the "ordinary" law in its interaction with the *lex cryptographica* shall be duly explored

[4] MARKEY-TOWLER B., *Anarchy Blockchain and Utopia: A theory of political-socio-economic systems organized using blockchain*, in *The Journal of British Blockchain Association*, 2018, 1, pp. 1-14.

[5] CAPPIELLO B, CARULLO G., *Introduction: The Challenges and Opportunities of Blockchain Technologies*, in CAPPIELLO B, CARULLO G. (eds), *Blockchain, Law and Governance*, Berlin, 2020, p. 1.

[6] DE FILIPPI P., WRIGHT A., *Blockchain and the Law*, London, 2019, p. 5.

[7] BLEMUS S., *Law and Blockchain: A Legal Perspective on Current Regulatory Trends Worldwide*, in *Revue Trimestrielle De Droit Financier*, 2017, 4, p. 1; DIMITROPOULOS G., *Blockchain Law: between Public and Private, Transnational and Domestic*, in TRIDIMAS T., DUROVIC M. (eds), *The future of European Private Law*, 2020; DIMITROPOULOS G., *The Law of blockchain*, cit., p. 1123; QUINTAIS J.P., BODÒ B., GIANNOPOULOU A., FERRARI V., *Blockchain and the Law: A Critical Evaluation*, in *Stanford Journal of Blockchain Law & Policy*, 2019, 2 (1), p. 86.

[8] MAY T., *The Cyphernomicon*, 1994, available at https://nakamotoinstitute.org/static-/docs/cyphernomicon.txt; HUGES, *Cypherpunk's Manifesto*, 1997, available at https://-dl.acm.org/doi/10.5555/285692.285725; NAKAMOTO S., *Bitcoin: a peer-to-peer electronic cash system*, cit.

and stressed Indeed, the creation of a proper "law of blockchain" bridging the gap between the world of such a technology and the real landscape in which it would be supposed to operate ought to (i) enable such distributed ledgers to find a proper and functional use and, therefore, (ii) allow for trust in the blockchain not only by single "nodes" in the online world but, rather, by all the people living in the real world. Achieving such a goal is paramount if we wish to prevent all the evocative promises of a "blockchain revolution"[9] on real life from boiling down to what William Shakespeare defined as "*Much ado about nothing*".

In doing so, I shall examine some issues that may rise as a consequence of a pervasive application of blockchain technology in the logistics and shipping industry, *i.e.* one of the sectors of economy which is making the greatest efforts to embrace such a "revolution". As discussed in further hereafter, this is principally due, *firstly*, to the need by the maritime industry to find innovative ways of remaining competitive in a fast-changing world (especially after the recent and disruptive outbreak of Covid-19 pandemic[10]) while still addressing such longstanding concerns as intensive paperwork, tedious processes and data transparency[11]; *secondly*, to the potential that blockchain technology hold in addressing industry concerns regarding trust among operators, data integrity, traceability, timeliness ad transparency; and *thirdly*, to several underlying analogies that such a distributed ledger shares with the ancestors of the documents that still govern maritime shipments and any related contractual relationships[12].

2. *Some preliminary remarks on the technology*

At their core, blockchains have been defined as "*decentralised databases, maintained by a distributed network of computers. They blend*

[9] BAVASSANO G., FERRARI C., TEI A., *Blockchain: How shipping industry is dealing with the ultimate technological leap*, in *Research in Transportation Business and Management*, 2020, p. 34.

[10] See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *Review of Maritime Transport 2020*, available at https://unctad.org/webflyer/review-maritime-transport-2020.

[11] PU S., SIU LEE LAM L., *Blockchain adoptions in the maritime industry: a conceptual framework*, in *Maritime Policy and Management*, 2020, 47.

[12] MUNARI F., *Blockchain and smart contracts in shipping and transport. A legal revolution is about to arrive?*, in SOYER B., TETTENBORN A. (eds), *New Technologies, Artificial Intellingence and Shipping Law in the 21st Century*, London, 2019, p. 3.

together a variety of different technologies – including peer-to-peer networks, public private key cryptography, and consensus mechanism – to create a novel type of database"[13].

This being said, this paper does not intend to be a "practical handbook" on all the key technological components that are involved in the functioning of a blockchain. Indeed, such features have already been illustrated by more qualified scholars [14] and Institutions[15], in order to provide interested operators with the basic architecture of such a "*technology of technologies*" which is nevertheless still "*much discussed but little understood*"[16].

However, some preliminary remarks must be briefly sketched, in order to facilitate the comprehension of the considerations that will be articulated in the following paragraphs.

Firstly, blockchain works as a ledger, which is not centralised but distributed among units ("nodes") belonging to a relevant peer-to-peer network (blockchain is, indeed, a specific distributed ledger technology or "DLT"). That being said, in a "pure" ("permission-less") blockchain, the

[13] DE FILIPPI P., WRIGHT A., *Blockchain and the Law*, cit. p. 13 ss.

[14] ARTZT M., RICHTER T. (eds), *Handbook of Blockchain Law: a guide to understanding and resolving the legal challenges of blockchain technology*, Alphen aan den Rijn, 2020; ATTARAN M., GUNASEKARAN A., *Applications of Blockchain technology in Business – Challenges and Opportunities*, London, 2019; BOREIKO D., FERRARINI G., GIUDICI P., *Blockchain Startups and Prospectus Regulation*, in *European Business Organization Law Review*, 2019, 20, p. 665; CUCCURRU P., *Blockchain ed automazione contrattuale. Riflessioni sugli smart contract*, in *Nuova Giurisprudenza Civile*, 2017, 1, p. 107; DE FILIPPI P., WRIGHT A., *Blockchain and the Law*, cit. p. 13 ss; KRAUS D., OBRIST T., HARI O., *Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law*, Cheltenham, 2019; PRIETO MUNOZ J. G., VITERBO A., ODDENINO A., *International Economic Law in the Era of Distributed Ledger Technology*, in *Global Jurist*, 2020, p. 20; SZOSTEK D., *Blockchain and the law*, Baden-Baden, 2019; WALCH A., *The Bitcoin Blockchain as Financial Market Infrastructure: A Consideration of Operational Risk*, in *NYU Journal of Legislation and Public Policy*, 2015, 18 (4), p. 837.

[15] EUROPEAN COMMISSION, *Blockchain now and tomorrow - Assessing multidimensional impacts of distributed ledger technologies*, 2019, available at https://ec.europa.eu/jrc/en/facts4eufuture/blockchain-now-and-tomorrow; INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, *Maximizing the Opportunities of the Internet for International Trade*, 2016, available at http://www3.weforum.org/docs-/E15/WEF_Digital_Trade_report_2015_1401.pdf TECH LONDON ADVOCATES' (TLA) BLOCKCHAIN LEGAL AND REGULATORY GROUP, *Blockchain: legal and regulatory guidance*, 2020, available at https://www.lawsociety.org.uk/topics/research/blockchain-legal-and-regulatory-guidance-report; UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (UNECE), *White Paper on Blockchain in Trade Facilitation – Version 2*, 2020, available at http://www.unece.-org/fileadmin/DAM/cefact/GuidanceMaterials/WhitePaperBlockchain.pdf.

[16] DIMITROPOULOS G., *The Law of blockchain*, cit., p. 1127.

common database may be modified by each node, acting as a "miner" (*i.e.* performing a specific cryptographical task), proving all the other nodes in the network share the solution and electronically consent to this, again through cryptographical means (the so-called "proof of work" or "proof of stake"). After such a computational process has been completed, a new "block" is created as part of the ledger, providing the system with a high degree of security which generates *trust* among all the nodes. This is why "code" is considered as "law" by blockchain enthusiasts: acting by means of shared and monitored technological transactions, the system side-steps the participants' need to rely on external "authorities" or third parties expressly appointed to grant the integrity and truthfulness of the data exchanged (including, for example, notaries and lawyers).

Secondly, a blockchain is a chain of blocks. As tautological as it may seem, such a statement is actually less trivial than it sounds, as one of the cornerstones of the technology is, indeed, the fact that each block represents a transaction while also forming part of the chain in the sense that the output of one transaction becomes the input for the next. This feature should render the chain extremely difficult to force by someone acting from the outside, as any attempt to modify one block would have immediate (or real-time) and visible consequences on all the abovementioned "nodes".

Thirdly, the ledger is decentralised and distributed across the relevant network of computers. More specifically, each participant owns not only a copy, but *the* original ledger of all the digitally signed transactions exchanged through the network. In other words, all the computers store an exact copy of the blockchain, and the underlying software protocol ensures that all such copies are consistently and simultaneously updated. Moreover, no single party has the power to modify the transactions once they are stored on a blockchain, as a *consensus* mechanism would otherwise be required. These features make a blockchain electronic ledger potentially *tamper-proof* and almost[17] *immutable*, in the sense that any transactions generated within are generally irreversible.

Fourthly, blockchains are characterised by pseudonymity. By relying on digital signatures and public-private key cryptography, blockchains

[17] For sake of accuracy, it is preferable to make reference to temper-proof transactions rather than immutable, because blockchains are susceptible of the so-called "51% attack". In a nutshell, parties that control at least 51% of the verification power on blockchain can generally tamper with transactions. See FINCK M., *Blockchain Regulation and Governance in Europe*, Cambridge, 2018, p. 30.

allow a person to store information without revealing his/her true identity[18], without undermining his/her role of "trusted party" due to community reliance in the system itself.

Fifthly, alongside the abovementioned "pure" blockchains, which are open and accessible to each participant (among this type of blockchains there are the most famous ones, such as Bitcoin and Ethereum), a number of alternative "permissioned" blockchains are gradually emerging. Despite relying on a similar peer-to-peer network, this second type of DLT can be controlled by interested parties, who may decide who is or is not allowed to join the network. More specifically, a central authority or consortium selects which parties may enter the network, thereby imposing limitations even on who is allowed to record information on the shared database[19]. Indeed, this is the reason why some authors have already stated that once the requirement of decentralisation fails, private blockchains cannot be conceptually configured as real blockchains[20].

Sixthly, especially in the private sector, blockchain technology is increasingly being used as a layer supporting so-called "smart contracts", *i.e.* "*a set of promises, including protocols within which the parties perform other promises. The protocols are usually implemented with programs on a computer network, or in other forms of digital electronics, thus these contracts are 'smarter' than the paper-based ancestors. No use of artificial intelligence is implied*"[21]. In a nutshell, a smart contract is a self-executing protocol, whereby some the terms of an agreement between two parties are written directly into code, which activates itself when certain conditions occur in an "if … then" logic.

Such features together contribute to supporting the theoretical view according to which blockchain-based protocols and systems are able to implement an autonomous set of rules – the abovementioned *lex cryptographica* – which might be enforced through underlying protocols and

[18] DE FILIPPI P., WRIGHT A., *Blockchain and the Law*, cit. p. 38-39.

[19] BERKE A., *How safe are Blockchains? It depends*, in *Harvard Business Review*, March 7, 2017; DE FILIPPI P., WRIGHT A., *Blockchain and the Law*, cit. p. 31 ss.

[20] KONASHEVYCH O., *Why 'permissioned' and 'private' are not blockchains*, in *Ledger Journal*, 2019; WUST K., GERVAIS A., *Do you need a Blckchain?*, in *Cypto Valley Conf. on Blockchain Tech*, 2018, p. 45.

[21] SZABO N., *Smart Contracts: Building Blocks for Digital Markets*, reprinted in http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html. See also CONG L.W., HE Z., *Blockchain Disruption and Smart Contracts*, in *The Review of Financial Studies*, 2019, 32 (5), p. 1754.

smart contracts and, thus, not require "external" regulations whatsoever[22].

I shall return to this theory and attempt an evaluation thereof in the context of the already-mentioned logistics and shipping industry, which is still considered to be one of the most promising areas for the application of blockchain technology.

3. *The rise of blockchain adoptions in the so-called "Logistics 4.0"*

Despite operating in an historically conservative sector of industry[23], stakeholders of the logistics market are making great efforts to embrace the so-called "Industry 4.0"[24].

Indeed, in a global scenario interested in researching industrial automation through highly specialized cybernetic systems integrating each other, an extensive connectedness of processes may (i) allow machines, warehousing systems, logistics equipment and products to exchange information, prompt autonomous actions and enable same to control one another's activities; (ii) grant, on the one hand, complete transparency within the supply chain (from supplier to customer) and, on the other hand, enable decentralized management[25].

In the light of the above, it is a common feeling that the world of logistics is in the middle of a new revolutionary phase, as in the late 19th Century with the mechanisation of transport or in the 1960s with containerisation[26], or again in the 1980s when computers entirely restructured business models relevant to the specific sector. This further evolutionary process, identified as "Logistics 4.0", is driven by a number of different innovations aimed at enabling a smart management of processes

[22] DE FILIPPI P., WRIGHT A., *Blockchain and the Law*, cit. p. 50; DE FILIPPI P., WRIGHT A., *decentralized blockchain technology and the rise of* lex cryptographia, 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580664.

[23] BAVASSANO G., FERRARI C., TEI A., *Blockchain: How shipping industry is dealing with the ultimate technological leap*, cit.

[24] PU S., SIU LEE LAM L., *Blockchain adoptions in the maritime industry: a conceptual framework*, cit.

[25] RADIVOJEVIC G., MILOSAVLJEVIC L., *The concept of logistics 4.0*, *4th Logistics International Conference*, 2019; WANG K. *Logistics 4.0 solutions*, in *Proceedings of the 6th International Workshop of Advanced Manufacturing and Automation*, 2016, available at https://www.atlantis-press.com/proceedings/iwama-16/25862222.

[26] CUDAHY B., *Box Boats: How Container Ships Changed the World*, New York, 2006; LEVINSON M., *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*, Princeton, 2006.

through, *inter alia*, automatic identification, real-time location, automatic data collection, connectivity and integration between technologies[27].

Among the pillars of Logistics 4.0 (e.g., Internet of Things, Cloud Computing, Big Data, Robotics and Automation and 3D Printing), blockchain technology is a cornerstone of the system. Indeed, in order to face the continuing growth of world seaborne trade[28] and its impact on their business processes, the players of the maritime industry have gradually started to develop and test pilot projects based on blockchain, which has been triumphantly described[29] as likely to become the "software" for the further facilitation of international trade, in the same way as shipping containerisation provided the "hardware" for its definitive enshrinement.

By way of example, recent analysis based on shipowners' websites shows that all leaders of this specific market have shown great interest in the development and use of blockchain-based tools[30]. In this context, APM-Maersk can be considered a pioneer, after launching its platform *Tradelens* in joint-venture with the hi-tech colossus IBM in 2017.

Unfortunately, "enthusiasts" of blockchain's anarchy and equality will be disappointed by such a project. Tradelens, indeed, is far from a "pure" permission-less and decentralised blockchain, but has rather been structured in a permissioned ledger aimed at providing several functional areas of the supply chain[31] with real time information concerning any moving cargo in Maersk's fleet[32], barring any direct intervention by anyone other than the owner of the platform.

This is probably why Tradelens raised concerns among competitors, who focused on the lack of neutrality of this kind of distributed network. Therefore, in 2018 the remaining top-players of the container market (among whom, CMA CGM, COSCO Shipping Lines, Evergreen Marine, Yang Ming and PSA International) established an alternative consortium

[27] WANG K. *Logistics 4.0 solutions*, cit.

[28] UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (UNECE), *White Paper on Blockchain in Trade Facilitation – Version 2*, cit., p. 58.

[29] GANNE E., *Can blockchain revolutionize international trade?*, Geneva, 2018, p. 44.

[30] See WAGNER N., WISNICKI B., *Application of blockchain technology in Maritime Logistics*, in *DIEM: Dubrovnik International Economic Meeting*, 2019, 4 (1), p. 155. According to such a research "*the first eleven shipowners are engaged in such projects*", in a context where "*Shipowners active in the blockchain projects, in terms of tonnage, represent as much as 84% of the world container fleet*".

[31] E.g. beneficial cargo owners, inland transport operators, customs/government authorities, ports and terminals, ocean carriers, financial service providers, software developers.

[32] See www.tradelens.com.

(the *Global Shipping Business Network*) with the aim of introducing innovation and digital transformation to the supply chain and of exploring ways to improve global trade through enhanced collaboration among shippers, banks, terminal operators and ocean carriers, – *inter alia* – through a common trusted network which would not be owned by one single shipowner[33]. The project is currently still on-going[34].

Such cases clearly highlight the huge interest that maritime industry is showing to blockchain technology. The reason is, probably, twofold.

First of all, blockchain is, by-design, a means to develop multi-party interchanges and connections in a transnational context. For this reason, it seems particularly suitable to overcome the challenges and, therefore, to match the needs of the sector at stake. Barring expectations of exhaustiveness, some synthetic remarks can clarify such a point:

a) maritime trade involves a range of different players. According to a United Nations Economic Commission for Europe ("UNECE") paper of October 2020, "*On average, both in the country of origin and in the country of arrival, about 40 parties/companies play defined roles in the transport and logistics flow. For one roundtrip, on average, a cargo vessel will call in at 5 load and 5 discharge ports and a total of 1,000 active users will be involved in the total transport and cargo flows*"[35];

b) in this context, goods, services and documents/information are daily exchanged. However, keeping track of all such transactions is extremely complicated and paper-intensive, especially because businesses deploy multiple ledgers within multiple networks. Nowadays, though most records are electronic, they often rely on physical data and are located on different computer systems located on different company premises and departments. As a result, records often require time consuming and, sometimes, manual interventions to ensure that they are properly reconciled (e.g., ensuring that all goods ordered were shipped, that all shipped goods were invoiced and all invoiced goods were paid, etc.)[36];

[33] See WAGNER N., WISNICKI B., *Application of blockchain technology in Maritime Logistics*, cit., pp. 159-160.

[34] See www.cargosmart.ai/en/solutions/global-shipping-business-network/.

[35] UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (UNECE), *White Paper on Blockchain in Trade Facilitation – Version 2*, cit., p. 58.

[36] UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (UNECE), *White Paper on Blockchain in Trade Facilitation – Version 2*, cit., p. 44.

c) here, blockchain implementation is expected to play a significant part in the digital transformation of crucial operations and related commitments of the parties involved[37], having the potential to increase transparency and availability of information for all participants, albeit subject to commercial data confidentiality guaranteed by cryptography[38]. By way of an example, parties to a transaction, such as the seller, buyer or bank, may simply consult their copy of a shared ledger to see what the current status is or to check information relating to the transaction itself. Despite increasing trustworthiness among parties beyond the correctness of the documents[39], such a system may well affect the way some intermediaries (e.g., ship-agents, customs-agent or brokers) work;

d) besides, such a system regularly faces regulations and compliance rules enforced by humans, which are therefore less predictable than the review of digitalized documents by mere information systems. Through an implementation of blockchains and smart contracts, transport information may be shared with an algorithmic-compliance-checking system which is continuously updated to the most recent rules and regulations. In such a scenario, information for a transaction may also be accessed by regulators and, if the compliance check is approved, the transaction may proceed more smoothly. This would determine a drastic improvement over currently-implemented regulatory systems[40].

Secondly, it has been argued that the booming of blockchain-based projects in the logistic sector is due to analogies between the features underlying such technology and the needs underpinning the implementation of both praxis and regulations inherent in the "traditional" transport and logistics operations (e.g., resistance to tampering, decentralisation, plurality of parties involved)[41].

Such a conclusion leads to further queries on whether it is possible to consider an allegedly self-standing set of unwritten rules, such as the already identified *lex cryptographica*, as a digital version of the *lex mercatoria* regulating, on a transnational level, the commercial relationships between maritime industry players. Moreover, should the reply be yes,

[37] PHILIPP R., PRAUSE G., GERLITZ L., *Blockchain and smart contract for entrepreneurial collaboration in maritime supply chains*, in *Transports and Telecommunication*, 2019, 20 (4), p. 365.

[38] CHRISTIDIS, K., DEVETSIKIOTIS M., *Blockchains and Smart Contracts for the Internet of Things*, in *IEEE Access*, 2016, 4, p. 2292.

[39] BECK R., *Beyond Bitcoin: The Rise of Blockchain World*, in *Computer*, 2018, 51 (2), p. 54.

[40] UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (UNECE), *White Paper on Blockchain in Trade Facilitation – Version 2*, cit., p. 64.

[41] MUNARI F., *Blockchain and smart contracts in shipping and transport. A legal revolution is about to arrive?*, cit.; TAKAHASHI K., *Blockchain technology and electronic bills of lading*, in *The Journal of International Maritime Law*, 2016, 22, p. 202.

one could ask oneself whether the current regulatory and customary framework is suited to grant the execution and enforcement of pure "digital" rights even in a "physical" world.

The following paragraph tries to sketch some preliminary answers to the questions set out above.

4. Lex cryptographica: *a* lex mercatoria *4.0?*

In the context of international trade, private autonomy has often been the "engine" for the development of uniform, transnational frameworks aimed at regulating contractual relationships between operators. Under private international law, such an engine has repeatedl allowed best maritime practice to gradually overcome national theories that considered internal law as a coherent, unitary, and complete framework of regulatory measures and, therefore, hierarchically placed over any other rule or principle[42].

Moving to modern times, and especially to the first half of the 20th century, the abovementioned national approach was undermined - first of all – by the adoption of uniform acts of international law (e.g., the Hague Rules of 1924[43], as amended in 1968 by the adoption of the Hague-Visby Rules[44], the Hamburg Rules of 1978[45], the Rotterdam Rules of 2009[46]), aimed at establishing a common legal framework concerning maritime affreightment and carriage of goods by sea.

Once ratified by individual States and enforced[47], international Conventions required compliance by national legislators, in view of the special nature thereof as compared to rules under domestic law. Admittedly,

[42] See STURLEY M., *The history of COGSA and the Hague Rules*, in *Journal of Maritime Law and Commerce*, 1991, 22 (1), p. 15.

[43] Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 25 August 1924, 12 *L.N.T.S.* 155.

[44] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules), 23 February 1968, 1412 *U.N.T.S.* 146.

[45] United Nations Convention on the Carriage of Goods by the Sea, 31 March 1978, 1695 *U.N.T.S.* 3.

[46] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by the Sea, 11 December 2008, General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122.

[47] This is not yet the case of the Rotterdam Rules, that are not yet in force as they are still far to meet the condition required for them to be effective (*i.e.* a ratification by twenty States). For an analysis of the Rotterdam Rules and their genesis see STURLEY M., *Can commercial law accommodate new technologies in international shipping?*, in SOYER B.,

international regimes provided for by Conventions have often required further fine-tuning by and among maritime stakeholders. These sources are, indeed, too narrow in at least two different ways: on the one hand, in their geographic scope of application and, on the other hand, in their terms. By way of an example, it has been recently observed that none of the existing regimes by its terms governs the entire contract for a typical door-to-door multimodal transaction – as the Hague and Visby Rules only apply on a tackle-to-tackle basis, while the Hamburg Rules only apply on a port-to-port basis[48].

This is the reason why, together with international Conventions, a decisive role for the creation of a uniform substantive maritime/merchant law has been played by other instruments developed through private autonomy. Indeed, reference is made to the so-called "model laws" as well as to other international commercial customs (*i.e.,* commercial usages and practices) that have been so widely accepted as to be considered as authoritative texts designed to consolidate best practice already achieved by operators involved in international shipping transactions[49].

As a consequence, such sources effectively constitute a "third legal order", which is distinct and autonomous from both domestic law and the international law of Conventions. These are the so-called "international law of traders" or "modern" *lex mercatoria*[50], characterising various sectors of activities[51] (e.g., international sales, maritime transport or banking operations) and aimed at (i) standardising the regulation of relevant relationships between parties, with a specific focus on their rights and obligations; (ii) providing equal treatment of homogeneous situations between stakeholders from different countries in the world and (iii)

TETTENBORN A. (eds), *New Technologies, Artificial Intellingence and Shipping Law in the 21st Century*, cit., p. 22.

[48] See STURLEY M., *Can commercial law accommodate new technologies in international shipping?*, cit., p. 25.

[49] SCHMITTHOFF C.M., *The New Sources of the Law of International Trade*, in CHENG C. (ed), *Clive M. Schmitthoff's Select Essays on International Trade Law*, Graham & Trotman, London 1988, p. 206.

[50] A first "medieval" *lex mercatoria* was developed in the medieval socio-economic context as a set of common rules emerging from the practice and aimed at increasing the sense of trust and security in commerce. See BERMAN H.J., KAUFMANN C., *The law of international commercial transactions (Lex Mercatoria)*, in *Harvard International Law Journal*, 1978, 19 (1), p. 221; DESJARDINS A., *Introduction historique à l'étude du doit commercial maritime*, Paris, 1890; PIERGIOVANNI V., *From Lex Mercatoria to Commercial Law*, Berlin, 2005; SCHMITTHOFF C.M., *The New Sources of the Law of International Trade*, cit.

[51] TETLEY W., *Mixed jurisdictions: common law vs. civil law (codified and uncodified)*, in *Lousiana Law Review*, 2000, 60 (3), p. 678

facilitating the predictability of applicable solutions, with a subsequent increase of *trust* between the parties involved.

These aims have been pursued through the elaboration of standard forms and clauses (e.g., the most commonly used charter-party contracts[52]), now used worldwide. The dissemination of such instruments has led to an almost complete "delocalisation" of any underlying contractual relationships[53], notwithstanding the respect of States' relevant principles of public order and of the overriding mandatory provisions of national legal order[54].

The above also reversed traditional perspectives mentioned above, as in such a context, national rules have become a means of implementing and/or elaborating a series of existing, self-sufficient and complete sources of customary law[55]. Accordingly, relevant maritime practices have gradually changed their legal effectiveness from mere commercial standards to general rules able to (i) bind all operators of the sector at stake, regardless of the national system in which they are supposed to apply, and (ii) require an autonomous interpretation to be found in the case law of the various States where such practice has been applied, thereby determining an eradication of a pure national law perspective[56].

[52] CARBONE S., CELLE P., LOPEZ DE GONZALO M., *Il diritto marittimo – Attraverso I casi e le causole contrattuali*, Torino, 2015, p. 41; WILSON J., *Carriage of goods by the Sea*, London, 2010, p. 47.

[53] With specific reference to maritime law, see the case *Luke v. Lyde* [1759], E.R., 617, with Lord Mansfield's statement "*Maritime law is not the law of a particular county, but the general law of nations*".

[54] CARBONE S., *Autonomia privata e modelli contrattuali del commercio marittimo internazionale nei recenti sviluppi del diritto internazionale privato: un ritorno all'antico*, in *Il Diritto Marittimo*, 1995, p. 318; LA MATTINA A., *L'Arbitrato marittimo e i principi del commercio internazionale*, Milan, 2012, p. 212.

[55] GOLDMAN, B., *The Applicable Law: General Principles of Law - the Lex Mercatoria*, in LEW J. (ed), *Contemporary Problems in International Arbitration*, London, 1986, p. 114.

[56] In a famous judgement, the US Supreme Court stated that "*it happens that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world … [then] the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole*" (see *The "Lottawanna"*, 88 US (1875), at 573). With reference to English case law, see *The "Tolten"* [1946] All. E.R. 79. In the light of these features, *inter alia*, international arbitrations have been identified as the "natural seat" to solve this kind of transnational and autonomous disputes, see DELEBECQUE P., *L'arbitrage maritime contemporain: le point de vue français*, in *Il Diritto Marittimo*, 2004, p. 436; HARRIS B., *Maritime Arbitrations*, in TACKABERRY J., MARRIOT A. (eds), *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, London, 2005, p. 743.

Furthermore, in some sectors of international trade (e.g., line transport), private autonomy has not been considered exclusively as a way of regulating economic operations as a whole but, rather, as an instrument allowing contracting parties to extend the scope of specific rules under international Conventions[57] or to subject one party to a more burdensome liability regime[58]. Private autonomy has therefore been assuming concrete value of normative background underlying the parties' contractual relationship.

In the light of the above considerations, a common ground between the conceptualisation of such a modern *lex mercatoria*[59] and the diffusion of blockchain technology can be found, thereby emphasizing the similarity of needs and values at their basis, *i.e.* (i) a deep dissatisfaction of individuals towards national State regulations in a complex global world and (ii) the subsequent quest for a liberal and spontaneous order for the development of their relationships.

Even though the "charm" of drawing comparisons between a former *lex mercatoria* "*ex charta*" and a new *lex mercatoria* "*ex machina*" (*lex cryptographica*) may be a compelling task, a series of *caveats* must be sketched in order to avoid incorrect and, probably, over- simplistic parallels.

It has been stated that public and private blockchains may potentially be equated to a "*proper transnational law regime*", enabling not only the creation of decentralised currencies, self-executing digital contracts and intelligent assets that can be controlled over the internet, but also the development of new governance systems featuring a more democratic decision-making process through a decentralised network of computers, which operates in a self-executive manner, on the basis of an *ex ante* regulation of users' conduct[60].

[57] By way of example, that is the case of the so-called "*Paramount clauses*" set forth in bills of lading and their application also to charter parties. See CELLE P., *La Paramount Clause nell'evoluzione della normativa internazionale in materia di polizza di carico*, in *Il Diritto Marittimo*, 1988, p. 11; ALVAREZ RUBIO J.J., *Las clàusolas Paramount: autonomía de la voluntad y selección del derecho aplicable en el transporte marítimo internacional*, Madrid, 1997.

[58] BARIATTI S., *Quale modello normativo per un regime giuridico dei trasporti realmente uniforme?*, in *Il Diritto Marittimo*, 2001, p. 491; CARBONE S., *Contratto di trasporto marittimo di cose*, in CICU A., MESSINEO F., MENGONI L., SCHLESINGER P. (eds), *Trattato di Diritto Civile e Commerciale*, Milan, 2010, p. 81; LA MATTINA A., *L'Arbitrato marittimo e i principi del commercio internazionale*, cit., p. 213.

[59] HAYEK F., *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy – Vol. 1: Rules and Order*, London, 1998, p. 36.

[60] See PONCIBÒ C., *Blockchain and comparative law*, in CAPPIELLO B, CARULLO G. (eds), *Blockchain, Law and Governance*, cit., p. 137, and, again, DE FILIPPI P., WRIGHT A., *Blockchain and the Law*, cit., 173.

Even in this context, a first important point has to be made in order to draw a line between the mentioned *lex mercatoria* and a possible implementation of the *lex cryptographica* in the transport and logistics industry.

Indeed, as illustrated before, the former has been developed by expert traders and operators, *i.e.*, by people who were aware of the praxis, duties and privileges thereof within a 'real', operational world. Alternatively, the latter is a pure technological ecosystem working through complex digital algorithms that may not be easily accessible and intelligible to stakeholders in order to create *ex ante* regulations for their commercial relationships[61]. From this perspective, a fundamental difference between the two systems immediately arises. Indeed, in a blockchain-based scenario, each actor in international commerce would need to rely not only on well-established sector-related praxis and on a well-known system of laws and customs, but rather, they would have to make a step forward and translate both will and actions into digital means.

In other terms, in such a scenario, the craving for freedom from the "rule of texts" and its costly intermediaries might deliver international commercial trade into the hands of nothing more than a … more complicated "rule of code" subject to other intermediaries, e.g., computer programmers, who would then become a-technical "legislators" of the blockchain "microworld"[62], in a system where every single mistake in the translation into code of wills expressed by the parties may generate immutable consequences in the chain[63].

The above may can be a first obstacle against a widespread and trusted dissemination of blockchains in the shipping industry, thereby fostering stakeholders' reluctance towards a potential sliding of such self-regulatory technologies into a "technocracy" that might prove difficult for them to handle. This scenario may hamper the unity of the global

[61] According to UNECE's *White Paper on Blockchain in Trade Facilitation – Version 2*, cit. "*Maritime trading partners that decide to implement Blockchain technology today will find it difficult to access the needed expertise for implementing because there is a lack of Blockchain talent and educational programs to develop such talent. There are a growing number of Blockchain start-ups, including in the maritime trade sector but they primarily sell standard products/solutions and do not develop tailor-made applications*" (see p. 60).

[62] LASSÈGUE J., *Some Historical and Philosophical Remarks on the Rule of Law in the Time of Automation*, in CAPPIELLO B, CARULLO G. (eds), *Blockchain, Law and Governance*, cit., p. 59.

[63] "*If a rule has not been correctly implemented as a smart contract, the consequences on that error could prove difficult to reverse without resorting to an after the fact judicial proceeding*", see DE FILIPPI P., WRIGHT A., *Blockchain and the Law*, cit. p. 201.

system it was originally intended to help, thereby complicating, rather than simplifying and easing, commercial relationships.

Moreover, some scholars have already doubted that computer codes can cope with complex issues that lie at the heart of commercial relationships, such as the interpretation of contracts and the assessment of unforeseen situation that may arise during their performance[64]. Indeed, "*the inherent 'rigidity' of algorithms and computer science is at odds with the much more nuanced approach lawyers and businessman tend to apply*"[65], with a subsequent paradoxical need for further (possibly, two-fold) qualified intermediation to make the "dream" of a speedier, seamless and costless logistic chain come true.

Finally, it has to be considered that, even though the *lex cryptographica* has – in theory – the requirements to be conceptualized as a "*global law without a State*"[66], it does operate in a legal *vacuum*, but rather, in a world where laws, policies and/or regulations apply and must be respected in order to execute and/or enforce the digital transactions performed in the blockchain. At the current state-of-the-art, this may generate potential paradoxical situations whereby (i) the activity performed through a blockchain could be legitimate in the territorial context of a given State, but illegal and sanctioned in another jurisdiction, or (ii) the enforcement of certain technical solutions could be impossible in the world "outside the chain", especially in case of maritime trade processes that are regulated by several different local authorities (port authorities or customs). In other terms, blockchain technology can create proper self-sufficient "microworlds", but these are too "small" to accommodate all the processes of the sector[67] without, sooner or later, having to face the real "macroworld", its rules and institutions, where events are not computably decidable or foreseeable.

As per the context of *lex mercatoria*, law and legislation may be the main tool through which blockchain may accommodate the real world. If this holds true, then an interplay between instruments of party autonomy (such as contractual agreements translated in digital language) and

[64] WERBACHT K., CORNELL N., *Contracts ex Machina*, in *Duke Law Journal*, 2017, 67, p. 312.

[65] MUNARI F., *Blockchain and smart contracts in shipping and transport. A legal revolution is about to arrive?*, cit., p. 14.

[66] PONCIBÒ C., *Blockchain and comparative law*, cit., p. 145.

[67] LASSÈGUE J., *Some Historical and Philosophical Remarks on the Rule of Law in the Time of Automation*, cit., p. 70; PISANTI N., LONGO G., *Le equazioni della natura. Sapere*, London, 2012.

law is not only advisable[68], but rather essential to make blockchain effective and, thereafter, to finally bridge the gap between the two emerging regulatory structures at stake (*i.e.* law and technology), joining forces to set up a system of functional equivalence[69] between digital and material world.

The abovementioned process of interaction or, better still, of cooperation between code and law should be carried out in a twofold manner: *firstly*, and in a *ex ante* perspective, through (even international) regulatory measures that, mediating between a soft and a hard approach, will take technology from its current state of "infancy" to a mature stage, in which blockchains may properly exploit all their potentials for managing private and commercial transactions across borders; *secondly*, and in an *ex post* perspective, a cooperation between intermediaries (e.g. programmers and lawyers) seems un avoidable, in order, on the one hand, to create "digital" praxis and contracts coherent with party practice and, on the other hand, to easily allow a reverse-engineering process from algorithms to natural language in order to protect and grant parties' rights and interests in case of issues or disputes[70].

The above may prove to be the only way to make blockchain a really trusted eco-system which will flourish as a "digital" *lex mercatoria*, thereby allowing blockchain technology to finally take off. In other words, *lex cryptographica* cannot be defined as a completely new *lex mercatoria* but, more exactly, as a "4.0 version" of the current *lex mercatoria*, supporting a more efficient handling of commercial relationships and, in so doing, requiring an intensive renewal of current laws and praxis.

In order to achieve this aim, I believe that a first crucial goal would be to grant functional equivalence to documents currently used in the shipping industry and digital transactions concluded in the blockchain, with the aim of providing the latter with the same effectiveness as the former. In order to do so, specific regulatory measures are required in both (i) domestic legislation and (ii) international conventions/customary laws, wherefor relevant rules and institutes may be made to imbue blockchain technology with sufficient legal certainty to spark the revolution it is aimed at and, thereafter facilitate a productive disruption of the current shipping practice.

[68] PONCIBÒ C., *Blockchain and comparative law*, cit., p. 152; TWINING W., *Globalisation and legal theory*, London, 2000.

[69] ESTRELLA FARIA J.A., *Uniform law and functional equivalence: diverting paths or stops along the same road? Thoughts on a new international regime for transport documents*, in *Elon Law Review*, 2011, 2, p. 1.

[70] MUNARI F., *Blockchain and smart contracts in shipping and transport. A legal revolution is about to arrive?* cit., p. 15.

It is an ambitious goal, which might be considered still far away to be achieved, as the current state-of-the-art of blockchain's implementation process clearly shows with respect to one of the most diffused products of the *lex mercatoria.* Reference is made to bills of lading, on which a more in-depth analysis is worth to be carried out.

5. *Are bills of lading ready to become* "blocks of lading"[71]*?*

An analysis of the role and the evolution of bills of lading over the years is, on the one hand, a practical example of the solutions that blockchain technology is theoretically able to provide the shipping industry with and, on the other hand, a instrument witnessing all the difficulties for such a "game changer" to take off in the sector at stake.

The first reason why approaching bills of lading can be useful in the context of the present analysis derives from the fact that the needs underpinning their historical and gradual implementation have much in common with the issues that blockchain technology seeks to tackle. Indeed, and as anticipated above, both instruments are aimed at assessing the truthfulness, trust, reliability, accountability and security of the information and data presented, granting trust among operators who may not know one aother.

These are crucial *a fortiori* features in the context of contracts relating to goods that must be carried from one country to another across a sea of maritime perils separating importer and shipper[72]. As highlighted above, there is a similar *rationale* behind blockchain technology and the middle-aged ancestor of the bill of lading - an initial form of ledger implemented by the shipping industry and known as *cartolario*[73]. At the time, shippers, carriers and other maritime operators needed a true record of the goods received on board of a merchant vessel. The task had to be performed by by something or – better – someone, that all parties involved in the shipment deemed trustworthy. Hence, a clerkship was instated, wherefore under oath of fidelity and by way of entering records

[71]This definition has been used in HERD J., *'Blocks of lading' Distributed Ledger Technology and the Disruption of Sea Carriage Regulation*, in *QUT Law Review*, 2019, 18 (2), p. 306.

[72] HERD J., *'Blocks of lading' Distributed Ledger Technology and the Disruption of Sea Carriage Regulation*, cit., p. 307.

[73] MUNARI F., *Blockchain and smart contracts in shipping and transport. A legal revolution is about to arrive?* cit., p. 5.

of the goods on a ledger, hard copies of the register itself could be handed over to persons entitled to demand the goods[74].

In order to grant such a need, such "archaic" bills of lading gradually been developed into "*documents issued by a carrier or its representative including the master, evidencing that certain goods have been received and loaded onto a nominated vessel in a given port, to be transported to another port and delivered against surrender of the document*"[75], quickly becoming "*one of the oldest and most international forms of contract under both the common law and the civil law*"[76].

Throughout history, bills of lading have kept their three fundamental functions, *i.e.* (i) evidence of the underlying contract of carriage, (ii) receipt that the carrier has taken possession of the goods and (iii) document of title.

The latter function is, indeed, the most delicate when attempting to apply new technologies to the maritime shipping context[77], principally due to the fact that a bill of lading must be "transferable" between the parties involved in the shipment[78].

Before looking more closely into the main issues arising out of a possible wide-spread use of electronic bills of lading, a preliminary question is made, this being: why is such a modernisation so strongly looked at by the stakeholders?

The answer is not astonishing: as anticipated, it is a matter of cutting costs. For centuries, paper-based contracts have governed the relationship between shippers (or those who succeed to their rights) and carriers (or those who perform a carriers' work, as agents or sub-contractors). Although still relatively expensive, it has been estimated that paperwork makes up between 5 to 10% of the overall shipment costs[79].

[74] MUNARI F., *Bill of lading*, in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL ASENSIO P. (eds), *European Encyclopedia of Private International Law*, Celtenham (UK) – Northampton (MA – USA), 2017, 1, p. 193; DESJARDINS A., *Traité de Droit Commercial Maritime*, Paris, 1890; MCLAUGHLIN C.B., *The Evolution of Ocean Bill of Lading*, in *The Yale Law Journal*, 1926, p. 548; WILSON J., *Carriage of goods by the Sea*, cit.

[75] See MUNARI F., *Bill of lading*, cit., p. 195.

[76] See TETLEY W., *Maritime Cargo Claims*, in *International Shipping Publications*, 1988, p. 215.

[77] LIVERMORE J., EUARJAI K., *Electronic Bills of Lading and Functional Equivalence*, in *Jorunal of Information Law and Technology*, 1998, 2, p. 1.

[78] WILSON J., *Carriage of goods by the Sea*, cit., p. 131, citing *Kum v. Wah Tat Bank* [1971] AC 439, 446.

[79] PANOS A., KAPNISSIS G., LELIGOU H. C., *Blockchain and DLTs in the Maritime Industry: Potential and Barriers*, in *European Journal of Electrical Engineering and Computer Science*, 2020, 4 (5), p. 1; STURLEY M., *Can commercial law accommodate new technologies in international shipping?*, cit., p. 23.

Moreover, paper documents may well determine further uncertainties and economic loss. By way of making an example, sometimes it can be difficult for an importer to obtain from the shipper a physical copy of the bill of lading in time to submit it – as a document of title – to the carrier and, then, to receive the goods. In such cases, the carrier may have to place the goods in storage, with subsequent demurrage costs and other potential economic losses for the importer due to fluctuations in market value of the goods.

All the above has generated concerns among the stakeholders in the sector, who therefore sought to dematerialise paper bills of lading through digital means[80]. Nevertheless, any attempts at digitally replicating bills of lading have, as yet, been unsuccessful[81], mainly due to the outdatedness of the legal framework governing such instruments and other negotiable documents of title[82]. Indeed, as illustrated above, international shipments are subject to a mosaic of legal regimes, established under international conventions, domestic statutes, doctrines and customary trade practice. At least in respect of electronic records to replace documents such as the bill of lading, commercial law is not facilitating commerce as it should, being in substance inadequate to deal with new technologies.

In a nutshell, it is possible to highlight that:

a) none of the existing international Conventions adequately addresses electronic replacements of traditional paperwork and neither the Hague Rules, nor the Hague-Visby Rules or and the Hamburg Rules address the issue of dealing with electronic commerce;

b) in some countries, domestic statutes provide formal recognition for electronic records replacing paper-based documents. However, such recognition does not suffice as a legal basis for an *international* trade[83];

c) furthermore, and under a practical perspective, many of the attempts so far developed to dematerialise bills of lading have relied on a central verified registry, which (i) failed to match up with the multiplicity

[80] By way of example, that has been the case of (i) the so-called SEADOCS semi-automated system; (ii) CMI Rules for Electronic Bills of Lading of 1990; (iii) the Bolero System of 1994. On this topic see BURY D., *Electronic Bills of Lading: A Never-Ending Story?*, in *Tulane Maritime Law Journal*, 2016, 41, p. 197; DUBOVEC M., *The problems and possibilities for using electronic bills of lading as collateral*, in *Arizona Journal of International and Competition Law*, 2005, p. 437.

[81] BURY D., *Electronic Bills of Lading: A Never-Ending Story?*, cit..

[82] HERD J., *'Blocks of lading' Distributed Ledger Technology and the Disruption of Sea Carriage Regulation*, cit., p. 308; LIVERMORE J., EUARJAI K., *Electronic Bills of Lading and Functional Equivalence*, cit., p. 3.

[83] STURLEY M., *Can commercial law accommodate new technologies in international shipping?*, cit., p. 26.

of involved parties and to grant the "uniqueness" of a transferable document of title as is a bill of lading, whereas the electronic bills of lading merely duplicated and re-printed the original, without ultimately granting that there would only be one copy of the bill in circulation[84]; (ii) raised further issues of fraud, corruption, destruction and hacking into the central registry; (iii) met the reluctancy of operators to submit to a central, and mostly unknown, authority.

Such legal uncertainty has substantially entailed the fact that stakeholders failed to fully support the implementation of electronic bills of lading in maritime trade, in view of their concern relating to the exchange of documents that would not be enforceable under most of the involved jurisdictions. Indeed, without consistent rules that uniformly apply to every stage in the performance of a contract, commercial parties would lack both the certainty and predictability of an efficient development of new technologies.

That being said about previous attempts at developing and using electronic bills of lading, I wish to underline that, in the light of its own features, blockchain technology seems to have the requirements needed to overcome at least the practical issues generated by electronic bills of lading thereby fulfilling all the traditional functions of the bill of lading without hampering its "uniqueness".

However, as in the case of its predecessors, a blockchain-based bill of lading cannot be used as document of title without the support of legal structures allowing such a function to be pursued. Thus, the technical development of such a solution within the context of shipping must go hand in hand with a legal framework specifically designed to embrace its implementation within operators' relevant practice.

But how so?

As anticipated above, the development of an international regulatory approach appears to be conducive to the granting of legal and functional equivalence between DLT-based bills of lading and negotiable, physical sea carriage documents, in order to ensure both shippers and carriers that the former will be recognized in the exact same way as the latter.

This is, indeed, the approach so far adopted at a twofold level, corresponding to both the legal formants of the abovementioned *lex mercatoria*, *i.e.* (i) international Conventions and (ii) acts of customary (soft) law.

When dealing with the first of these categories, one should take into account that the Rotterdam Rules seek to facilitate electronic commerce

[84] WHALEY D.J., MCJOHN S. M., *Problems and Materials on the Sale and Lease of Goods*, Alphen aan den Rijn, 2019, p. 501.

within the shipping industry[85]. Indeed, Chapter 3 of the Rotterdam Rules ("*electronic transport records*") (i) explicitly authorizes anything that can be done with a paper transport document to be done with an electronic transport record, proving involved parties agree (Article 8(a)); (ii) specifies that various actions performed with an electronic transport record have the same effect as the corresponding actions with a paper transport document (Article 8(b); (iii) provides for procedures governing the use of electronic transport records (Article 9); (iv) enables paper transport documents and electronic transport records to replace one another (Article 10).

That being said, the lack of interest that has so far characterised some States' approach to the Rotterdam Rules constitutes the first real brake preventing the industry from "*move[ing] past the slavish adherence to paper documents that has created so many problems*"[86].

Nevertheless, if the impact of this Convention has not caught the interest of governments[87] (with the effect that the Rotterdam Rules has not, as yet, come into force[88]), a similar approach has recently been followed by UNCITRAL with regards to soft law. More specifically, in 2017, UNCITRAL drafted a "*Model Law on Electronic Transferable Records*" ("MLETR")[89] which endeavours to guide legislative development so as to averse blockchain and DLT regulatory disruption.

As a starting point, MLETR recognises that (i) '*uncertainties regarding the legal value of electronic transferable records constitute an obstacle to international trade*' and, therefore, (ii) an international '*harmonization and unification of the law*' is required. In this vein, UNCITRAL's regulatory approach pursues two guiding principles, *i.e.,* technological

[85] STURLEY M., *Can commercial law accommodate new technologies in international shipping?*, cit., p. 29, where Rotterdam Rules are defined as "*much more than just a liability convention*".

[86] STURLEY M., *Can commercial law accommodate new technologies in international shipping?*, cit., p. 35.

[87] Again, STURLEY M., *Can commercial law accommodate new technologies in international shipping?*, cit., p. 35.

[88] In order to come into force, Rotterdam Rules must be ratified by 20 countries but, nowadays, only four countries did it.

[89] Available on-line at https://uncitral.un.org/en/texts/ecommerce/modellaw/electro-nic_transferable_records.

neutrality[90] and, again, functional equivalence[91], aiming at establishing equal treatment of transferable electronic records and paper documents.

This kind of approach appears to be balanced enough to embrace the needs of a phenomenon (*i.e.*, technical innovation) that is developing at a faster pace than that required by domestic and international policymakers to understand and regulate it.

In the light of the above, I tend to agree with those scholars who maintain that "*if such regulation becomes widely adopted, B/Ls will eventually be rendered, first, a part of history and, secondly, a legal test by which to judge other technologies in the shipping industry*"[92]. This is, indeed, probably how a proper "law of blockchain" should be developed, either in the maritime shipping context or across sectors wherein blockchain is currently expected to become a game-changer.

6. *Conclusions*

I have opened the present paper with the provocative and tricky question regarding whether the development of blockchain technology in everyday life may still be referred to as the "game-changer" it was originally (and enthusiastically) called or, rather, whether it is more similar to William Shakespeare's "*much ado about nothing*".

I believe that all the above-illustrated considerations about the current state-of-the art of blockchain implementation in the logistics and transportation sectors, together with the subsequent analysis of some of the most perceivable legal issues thereto related, can lead to some preliminary answers.

First of all, blockchain is – by design – an innovative tool, which holds the potential to overcome some of the operational issues characterising the sector at stake. Nevertheless, it cannot possibly be taken as a *panacea* for all challenges addressed by the stakeholders in their activity.

Bearing this in mind, and also considering costs – in terms of both energy and money –relating to a widespread use of blockchain technology, its development must act as a wake-up call to a traditional and con-

[90] "*Law should not require a specific technology system to be used. The benefit of regulating new technology this way is that the rules will remain relevant despite further technological innovation*", see HERD J., *'Blocks of lading' Distributed Ledger Technology and the Disruption of Sea Carriage Regulation*, cit., p. 315.

[91] See article 7 of the MLETR, according to which it "*shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form*"

[92] See again HERD J., *'Blocks of lading' Distributed Ledger Technology and the Disruption of Sea Carriage Regulation*, cit., p. 315.

servative community in search of a functional tool able to satisfy operational needs, and certainly not as obsessive quest for the adoption a completely decentralised and distributed ecosystem in which pour out all the business processes of the industry. Otherwise, stakeholders shall carefully identify the specific activities in which they want to implement such an innovation and, then, pursue only those that cannot be better performed through using other kinds of technology[93].

Secondly, for blockchain technology to effectively meet needs of the shipping industry, a purely theoretical vision of this technology as a "stand-alone ecosystem", which is completely self-sufficient and able to regulate itself through a series of codes and system settings (the so-called *lex cryptographica*, as defined above) should be relinquished. Indeed, the coexistence and interplay of law and technology should encouraged and developed, as this may prove to be the only way for blockchain to reach its much-awaited "maturity" phase and, therefore, solve some operational issues in several sectors of the industry.

In this context, international Conventions and customary law shall be the cornerstones not of a completely "new" *lex mercatoria* but, rather, of a "4.0 version" of the current *lex mercatoria*, which may well greatly facilitate market needs.

In order to achieve such an ambitious goal, stakeholders and competent policymakers alike should adequately catch-up with this new trend and strive to strike a balance between a cyber-paternalistic and a cyber-libertarian regulation[94] while still bearing in mind that "*Technology is now deeply intertwined with policy. We are building complex socio-technical systems at all levels of our society … Surviving the future depends in bridging technologists and policymakers together*"[95].

That being stated, I could conclude that blockchain may well come up as "*much ado about nothing*". Indeed, one could argue that although Bitcoin first appeared in 2008 but, twelve years later, it is still not possible to note an effective and concrete booming of blockchain-based applications in our daily life.

Nevertheless, if programmers, policymakers and operators, as well as already established middlemen such as lawyers, cooperate and share

[93] "*Through 2018, 85 per cent of Blockchain-named projects would deliver business value without using a Blockchain*", see UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (UNECE), *White Paper on Blockchain in Trade Facilitation – Version 2*, cit., p. 66.

[94] PONCIBÒ C., *Blockchain and comparative law*, in CAPPIELLO B, CARULLO G. (eds), *Blockchain, Law and Governance*, cit., p. 137.

[95] SCHNEIER B., *We must bridge the gap between technology and policy making. Our future depends on it*, in *World Economic Forum*, 2019.

skills in order to guarantee an effective interplay between law and technology, blockchain would definitely become a "game-changer" thereby properly revolutionising the world we inhabit.

As challenging as it can be, reasons seem to exist to make working on it worthwhile.

CHRISTINE TOMAN*

DIGITAL PLATFORMS IN PRIVATE INTERNATIONAL LAW: PROTECTION OF WEAKER PARTIES, DUTIES OF THE PLATFORM *VIS-À-VIS* ITS USERS, AND DEFAULT OF TRANSACTIONS

1. *Preface*

Digital platforms everywhere. Airbnb[1], Amazon[2], Uber[3] and Zalando[4] – to name but a few – have become integral parts of our lives

*I would like to thank the PEPP organisers and participants for two great weeks in Münster and Kraków. I would also like to express my gratitude to the *Deutsche Bundesstiftung Umwelt* and the *Studienstiftung des deutschen Volkes* for their support of my PhD research. This article is based on course work submitted to the *Universität Hamburg*. I would like to thank the convener *Prof. Dr. Peter Mankowski* and the participants of the seminar as well as the participants of the Private International Law Discussion Group at the *Max Planck Institute for Comparative and Private International Law* for comments on earlier versions of this article.

[1] Airbnb is a digital platform for accommodation and experiences. The platform is available in numerous country and language versions on www.airbnb.com.

[2] Amazon is a digital platform for goods, either sold by Amazon itself or others using the Amazon marketplace. The company has expanded to numerous other areas of business, e.g. cloud computing (Amazon Web Services) or online streaming (Amazon Prime Music, Amazon Prime Video). The platform is available in numerous country and language versions on www.amazon.com.

[3] Uber is a digital platform for mobility services. It is best known for car rides in cities but has expanded its business to multiple areas like Uber Eat and Uber Freight. The platform is available in numerous country and language versions on www.uber.com.

[4] Zalando is an online platform for clothing, either sold by Zalando itself or Zalando Partners. The platform is available in numerous country and language versions on www.zalando.com.

and important economic factors[5]. Why are digital platforms so successful? Because they use new technology to create a marketplace where customers and offerors can connect and conclude transactions with ease. However, this ease of use is accompanied with a degree of unease regarding the legal question on digital platforms: Are weaker parties – namely employees and consumers – sufficiently protected if they use digital platforms? What are the duties of a platform *vis-à-vis* its users? And who to turn to in case of default of the goods or services?

These questions are more or less controversial in different national laws[6]. However, yet another success factor for digital platforms is that they operate across national boundaries: The four platforms named above each have a subsidiary for their activities in the EU with seats in Amsterdam[7], Berlin[8], Dublin[9], and Luxembourg[10] respectively. As a result, platform providers are regularly registered in one country of the EU only, but their users can be from all member states (and beyond). Even if users conclude transactions between themselves, these can also be transboundary – for instance if a tourist from Genoa books accommodation in Cracow using Airbnb.

Therefore, private international law and in particular the Rome I Regulation on the law applicable to contractual obligations[11] play an important role in answering the questions raised above. In proposing answers, this article proceeds in five parts: Following an introductory part on digital platforms and the Rome I Regulation, the three questions mentioned above and the law applicable to them will be considered in turn. The last part concludes.

[5] See an overview of the European Commission's policy, including reports and studies, EUROPEAN COMMISSION, *Online Platforms*, 2020, perma.cc/6K4C-PCHF.

[6] MCCOLGAN P., *Diskussionsbericht zum Referat von Andreas* Engert, in *Archiv für die civilistische Praxis*, 2018, p. 377, 383.

[7] Uber B.V. is registered in Amsterdam, The Netherlands, see e.g. imprint for Germany on perma.cc/KX5W-LNGJ.

[8] Zalando SE is registered in Berlin, Germany, see e.g. imprint for Germany on perma.cc/TDA8-XP5M.

[9] Airbnb Ireland UC, private unlimited company, is registered in Dublin, Ireland. Note that the contracting partners for payment services for users with their place of residence or establishment in the European Economic Areas is Airbnb Payments Luxembourg S.A. with registered seat in Luxembourg, see e.g. imprint for Germany on perma.cc/AY4J-54FW.

[10] Amazon Services Europe S.à.r.l. and Amazon Payments Europe S.C.A. are registered in Luxembourg. Note that further subsidiaries in other EU countries exist, see e.g. imprint for Germany on perma.cc/AY4J-54FW.

[11] 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) OJ L 177, 4.7.2008, p. 6.

2. *Digital Platforms and the Rome I Regulation*

First, the term "digital platforms" and the contractual relations between the parties involved need to be clarified.

2.1. *Digital Platforms, Users, and Contracts*

There is a tendency to define digital platforms broadly and include a myriad of different internet services: As seen above, the term is used for virtual marketplaces for goods like Amazon and Zalando, mobility services like Uber, and accommodation like Airbnb. But there is more: App stores, cloud computing, social media or search engines are all referred to as digital platforms.

This article will use a definition that is less broad. Following the existing legal literature[12] and European draft directives and regulations on the subject[13], "digital platforms" are understood here as internet services where the provider is linked to the users by a use contract whereas the users can conclude transaction with another user or the platform using the platform's interface. "Digital platforms" are thus virtual marketplaces where transactions are concluded rather than places where information is exchanged (unless, of course, this information is sold as part of a transaction). Therefore, Airbnb, Amazon, Uber and Zalando are considered to be digital platforms in this contribution; data-driven businesses like cloud computing, social media and search engines are not. App stores could be such virtual marketplaces.

[12] MAULTZSCH F., *Verantwortlichkeit der Plattformbetreiber,* in BLAUROCK U., ERLER K., SCHMIDT-KESSEL M., *Plattformen. Geschäftsmodell und Verträge,* Baden-Baden, 2018, p. 223, 223-224; MOŽINA D., *Retail business, platform services and information duties,* in *Journal of European Consumer and Market Law,* 2016, p. 25, 25-26; SÖBBING T., *Platform as a Service,* in *Der IT-Rechts-Berater,* 2016, p. 140, 140 et seq. A similar definition is used by DREYER and HASKAMP without making this explicit (DREYER H., HASKAMP T., *Die Vermittlungstätigkeit von Plattformen,* in *Zeitschrift für Vertriebsrecht,* 2017, p. 359) and ENGERT, (ENGERT A., *Digitale Plattformen,* in *Archiv für die civilistische Praxis,* 2018, p. 304, 305–309) who focuses his analysis on „market facilitating" digital platforms. A slightly different definition is referred to by HAUCK and *BLAUT* (HAUCK R., BLAUT H., *Die (quasi-)vertragliche Haftung von Plattformbetreibern,* in *Neue Juristische Wochenschrift,* 2018, p. 1425, 1426) who include platforms if there is no platform use contract between users and platforms.

[13] BUSCH C., DANNEMANN G., SCHULTE-NÖLKE H., *Ein neues Vertrags- und Verbraucherrecht für Online-Plattformen im Digitalen Binnenmarkt? Diskussionsentwurf für eine mögliche EU-Richtlinie,* in *Multimedia und Recht,* 2016, p. 787; EUROPEAN COMMISSION, Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final.

These platforms are of particular interest because there is a triangle of contractual relations between the user-offeror offering their goods and services using the platform, the user-consumer accepting this offer and the platform, and the problems mentioned above – Are weaker parties sufficiently protected? What are the duties of the platform *vis-à-vis* its users? And who is responsible in case of default of the transaction? – become particularly relevant in this triangle.

In the following, I refer to the contract between the platform and any user concerning the use of the platform as "platform use contract", as opposed to the "transaction" that is concluded using the platform. According to their role in the transaction, users are either "user-customers" or "user-offerors".

2.2. Scope of the Rome I Regulation

The relevant legal relationships – platform use contracts and transactions – are within the material scope of the Rome I Regulation, i.e., they are contractual obligations in civil and commercial matters within the meaning of Article 1 (1) of the Rome I Regulation[14]. It is evident that the transaction – e.g., the sale of a good or the provision of a service – is a contract. The situation is less clear for platform use contracts because registration is not always required, and the use of the platform is usually free of charge at least for the user-customers.

The term "contractual relations" is defined autonomously and independent of national legal orders[15]. According to settled case-law of the Court of Justice of the European Union (ECJ), a contractual obligation is – contrary to a non-contractual obligation governed by the Rome II

[14] For the cases discussed here, none of the exclusions from scope – Article 1 (1) 2 and (2) Rome I Regulation – are relevant. The only exception could be a platform for insurance contracts (Article 1 (2) (j) Rome I Regulation. The Rome I Regulation is also only applicable to situations involving a conflict of laws, Article 1 (1) 1 Rome I Regulation, in EU member states with the exception of Denmark, Article 1 (4) and recital 46 Rome I Regulation. Pursuant to Article 28 Rome I Regulation, the Regulation is only applicable to contracts concluded after 17 December 2009.

[15] KIENINGER E.M., *Art. 1 Rom I-VO,* in FERRARI F., KIENINGER E.M., MANKOWSKI P., OTTE K., SÄNGER I., SCHULZE G., STAUDINGER A., *Internationales Vertragsrecht. Rom I-VO, CISG, CMR, FactU Kommentar,* Munich, 2018, para. 5; MAGNUS U., *Art. 1 Rom I-VO,* in VON STAUDINGER J., *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Berlin, 2016, para. 27; MARTINY D., *Art. 1 Rom I-VO,* in SÄCKER F.J., RIXECKER R., OETKER H., LIMPERG B., *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* Volume 12, Munich, 2018, para. 7.

Regulation[16] – any legal relationship formed by a *voluntary* obligation of one party *vis-à-vis* another. Reciprocity of obligations is not required[17].

While it is possible for user-customers to browse offers on most platforms without registration, a registration is usually required to conclude a transaction. While the option "buy without registration" or "order as a guest" exists in some online shops, it is not available on Airbnb, Amazon, Uber or Zalando[18]. On these platforms, registration is mandatory to order or book and includes acceptance of the general terms of the respective platform. Even if concluding a transaction without registration were possible, users are still required to agree to the platform's terms before concluding a transaction. Increasingly often, platforms also offer registration and login using accounts on other websites, in particular Facebook or Google. In this case, the other website only provides certain data – usually the name, an e-mail address of the user – and "mediates" the login. This model is for ease of use only; there is still a registration and confirmation of the terms of the "new" platform.

The use of the platform for user-offerors to offer goods or services, accommodation or travel is usually subject to registration and the payment of a fee based on the time of use, e.g., monthly fees, the number of transactions, the amount of earnings, or a combination thereof. Fees are most often charged to the user-offeror, but sometimes also to the user-customer; the result, however, remains the same[19].

[16] 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), OJ L 199, 31.7.2007, p. 40.

[17] MARTINY D., *Art. 1 Rom I-VO,* cit., para. 7; KIENINGER E.M., *Art. 1 Rom I-VO,* cit., n. 5; MAGNUS U., *Art. 1 Rom I-VO,* cit., para. 29. On the criticism of the ECJ's definition and an alternative proposal, cf. MAGNUS U., *Art. 1 Rom I-VO,* cit., para. 30 et seq. In the case discussed here, the alternative requirements are also met.

[18] Some have argued that transactions without registration must be possible to comply with the EU's General Data Protection Regulation, cf. RÄTZE M., *Neues Datenschutzrecht: Online-Händler müssen Gästenbestellungen ermöglichen!*, in *shopbetreiberblog.de*, 2018, perma.cc/C3MQ-YVUC; SCHELLE F., *Gastbestellung: Pflicht oder nicht?*, in *Trusted Shops*, 2019, perma.cc/B8V4-MHVN.

[19] AirBnB: Service fee of at least 3% for hosts and of 14,2% or less for guests; hotels and some other hosts pay 14-16% and their guests do not pay any fee; see for Germany perma.cc/H6GT-97ZQ; Amazon Marketplace Germany: Either 0,99 EUR per transaction plus percentage of earnings, or monthly fee of 39 EUR and percentage of earnings; percentages depend on the kind of product and its sales price and range between 7 and 45 %; see for Germany perma.cc/4HVL-FWZG. Uber: Booking fee for customers and 25% commission fee for offerors according to media reports, FUCHS J.G., *Kassensturz: Was Uber wirklich verdient – und wo der riesige Verlust herkommt,* in *t3n*, perma.cc/SP8K-C56Z.

All in all, all potential relations between users and platform – the platform use contracts of user-customers and user-providers, and the transaction itself – are contractual obligations within the scope of the Rome I Regulation.

2.3. *Contractual Choice of Law*

In practice, most platform use contracts[20] and some transactions[21] include a choice of law clause in favour of the law of the country where the platform (or its relevant subsidiary) is headquartered[22], e.g., Ireland for the Airbnb[23], Luxembourg for the Amazon or the Netherlands for Uber[24]. But this is not always the case: No choice of law is contained in the terms of Zalando SE[25].

A contractual choice of law is allowed in accordance with the conditions listed in Article 3 Rome I Regulation. A choice of law clause is often included in the General Terms[26] pursuant to Article 3 (1) 2 Rome I Reg-

[20] For example, point 14 of the Terms of Use of Amazon.de and Point 10 of the Terms of Sale of Amazon.de. Relating to platform use contracts for user-offerors, see KRÜGER S., PAVEL F., KOENEN J., *Study on Contractual Relationships between Online Platforms and their Professional Users,* Study for the European Commission, FWC JUST/2015/PR/01/0003/Lot1-02 final, 2018, perma.cc/SL78-J64R, especially the overview in Annex III.

[21] At least according to German authors, platform transactions are usually not covered by the contractual choice of law contained in the platform use contracts, because they are independent contracts, cf. ENGERT A., *Digitale Plattformen,* cit., p. 346–347. See also BGHZ 189, 346 = BGH, in *Neue Juristische Wochenschrift,* 2011, p. 2421, para. 21 and BGH, 15.02.2017 - VIII ZR 59/16 = BGH, in *Neue Juristische Wochenschrift,* 2017, p. 1660, para. 13, 22.

[22] This could either be the law of the country where the platform has its registered seat or habitual residence, i.e. its central place of administration, cf. Article 19 (1) Rome I Regulation.

[23] Point 21.3 of the Terms of Service (for all customers from outside the US and China), on the German Airbnb webseite, perma.cc/H24J-5FDX.

[24] Point 7 of the Terms of service if the Italian, Polish or Spanish website is accessed; if the website is accessed from Germany, German law is chosen; see for Germany perma.cc/ZT9F-5T5S.

[25] See the General Terms of Zalando for Germany, perma.cc/96UC-U9M8.

[26] FERRARI F., *Art. 3 Rom I-VO,* in FERRARI F., KIENINGER E.M., MANKOWSKI P., OTTE K., SAENGER I., SCHULZE G., STAUDINGER A., *Internationales Vertragsrecht. Rom I-VO, CISG, CMR, FactU Kommentar,* Munich, 2012, para. 24; MAGNUS U., *Art. 3 Rom I-VO,* cit., para. 176 et seq.; STÜRNER M., *Art. 3 Rom I-VO,* in GRUNEWALD B., MAIER-REIMER G., WESTERMANN H.P., *Erman BGB,* Cologne, 2020, para. 16; implicitly also: CALLIESS G.-P., *Article 3 Rome I Regulation,* in CALLIESS G.-P, *Rome Regulations,* Alphen aan den Rijn, 2011, para. 28.

ulation. The applicable law is usually selected for the entire contract (Article 3 (1) 3 Rome I Regulation)[27]. Note that it is not possible to derogate by choice of a different law from provisions of law of a country where all relevant elements of the case are located and that cannot be derogated from by agreement, Article 3 (3) Rome I Regulation. The freedom of choice is limited in a similar way regarding EU law, Article 3 (4) Rome I Regulation.

In consumer and employment contracts[28], a contractual choice of law is permissible in principle pursuant to Article 6 (2) 1 and Article 8 (1) 1 Rome I Regulation, respectively. In both cases, the choice may not have the result of depriving the weaker party of the mandatory protection of the otherwise applicable law, Article 6 (2) and Article 8 (1) 2 Rome I Regulation[29]. This protection of consumers is for instance mentioned in

[27] Choice of law clauses need to be interpreted to determine if they encompass the entire contract or only part, CALLIESS G.-P., *Article 3 Rome I Regulation*, cit., para. 48; FERRARI F., *Art. 3 Rom I-VO*, cit., para. 36 et seq.; MARTINY D., *Art. 3 Rom I-VO*, in SÄCKER F.J., RIXECKER R., OETKER H., LIMPERG B., *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Volume 12, *Internationales Privatrecht I, Europäisches Kollisionsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-26)*, Munich, 2018, para. 68-70; STÜRNER M., *Art. 3 Rom I-VO*, cit., para. 19.

[28] See below *sub* II. Protection of Weaker Parties.

[29] Relating to consumer contracts: CALLIESS G.-P., *Article 6 Rome I Regulation*, in CALLIESS G.-P, *Rome Regulations*, Alphen aan den Rijn, 2011, para. 68-74; MAGNUS U., *Art. 6 Rom I-VO*, in VON STAUDINGER J., *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Berlin, 2016, para. 127 et seq.; MARTINY D., *Art. 6 Rom I-VO*, in SÄCKER F.J., RIXECKER R., OETKER H., LIMPERG B., *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Volume 12, Munich, 2018, para. 51, 54 et seq.; RAGNO F., *The Law Applicable to Consumer Contracts under the Rome I Regulation*, in FERRARI F., LEIBLE S., *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe*, Munich, 2009, p. 149 et seq.; STAUDINGER A., *Art. 6 Rom I-VO*, in FERRARI F., KIENINGER E.M., MANKOWSKI P., OTTE K., SAENGER I., SCHULZE G., STAUDINGER A., *Internationales Vertragsrecht. Rom I-VO, CISG, CMR, FactU Kommentar*, Munich, 2012, para. 71 et seq.; STÜRNER M., *Art. 6 Rom I-VO*, in GRUNEWALD B., MAIER-REIMER G., WESTERMANN H.P., *Erman BGB*, Cologne, 2020, para. 14 et seq. Individual employment contracts: FRANZEN M., *Article 8 Rome I Regulation*, in CALLIESS G.-P, *Rome Regulations*, Alphen aan den Rijn, 2011, para. 11 et seq.; MAGNUS U., *Art. 8 Rom I-VO*, in VON STAUDINGER J., *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*, Berlin, 2016, para. 51 et seq., 56 et seq.; MARTINY D., *Art. 8 Rom I-VO*, in SÄCKER F.J., RIXECKER R., OETKER H., LIMPERG B., *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Volume 12, Munich, 2018, para. 27 et seq.; MANKOWSKI P., *Employment Contracts under Article 8 of the Rome I Regulation*, in FERRARI F., LEIBLE S., *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Munich,2009, p. 211–215; STAUDINGER A., *Art. 8 Rom I-VO*, in FERRARI F., KIENINGER E.M., MANKOWSKI P., OTTE K., SÄNGER I., SCHULZE G., STAUDINGER A., *Internationales Vertragsrecht. Rom I-VO, CISG, CMR, FactU Kommentar*, Munich, 2018,

the Uber terms for France: "*Les stipulations de cet article ne dérogent pas aux dispositions légales impératives françaises applicables aux Consommateurs.* […] *Dans les autres cas, les présentes Conditions sont régies exclusivement et interprétées conformément au droit néerlandais, à l'exclusion de ses règles sur les conflits des lois*"[30].

While stipulations on choice of law are common in practice, there is still reason to discuss the applicable law in the absence of choice: Firstly, because not *all* platform use contracts and certainly not all transactions contain such clauses. Secondly, because even if there is such a clause, it could be invalid. And thirdly because some stipulations of otherwise applicable law remain mandatory. Therefore, the remainder of the article will discuss the applicable law in the absence of choice pursuant to Articles 4 et seq. Rome I Regulation with a focus on three main problems: The protection of weaker parties, the rights and duties of platforms *vis-à-vis* their users and default of the transaction.

3. *Protection of Weaker Parties*

There are two main aspects regarding the protection of weaker parties in platform use contracts: False self-employment and consumer protection.

3.1. *False Self-Employment*

False self-employment is a problem in relation to platforms for services, for instance Uber. As a mobility platform, Uber brings together drivers and passengers for rides in a city. Uber considers its drivers to be self-employed; but it has been argued that they are, in fact, employees of Uber, and therefore enjoy special protection in substantive law[31]. Such

para. 12 et seq. STÜRNER M., *Art. 8 Rom I-VO,* in GRUNEWALD B., MAIER-REIMER G., WESTERMANN H.P., Erman BGB, Cologne, 2020, para. 8; crowd working: DÄUBLER W., KLEBE T., *Crowdwork: Die neue Form der Arbeit – Arbeitgeber auf der Flucht?,* in *Neue Zeitschrift für Arbeitsrecht,* 2015, p. 1032, 1038 et seq.

[30] Point 6.2 (1) of the General Terms for Uber in France, perma.cc/J9SG-QSBJ.

[31] For the German perspective (with reference to conflicts of law), LINGEMANN S., OTTE J., *Arbeitsrechtliche Fragen der „economy on demand",* in *Neue Zeitschrift für Arbeitsrecht,* 2015, p. 1042; for the Austrian perspective, see BALLA M., *Transportdienstleistungen: Uber,* in LUTZ D., RISAK M.E., *Arbeit in der Gig-Economy: Rechtsfragen neuer Arbeitsformen in Crowd und Cloud,* Vienna, 2017; on the Danish perspective, SØRENSEN M.J., *Private Law Perspectives on Platform Services,* in *Journal of European Consumer and Market Law,* 2016, p. 15.

special protections are also available under private international law, namely under Article 8 of the Rome I Regulation[32].

The term "individual employment contract" is not explicitly defined in the Rome I Regulation and is to be interpreted autonomously[33]. The heading or the designation of the contract, the services in question and the renumeration cannot determine the nature of the contract. According to the settled case law of the ECJ, it is rather the function of the user-offeror in the individual case that is decisive, as well as the question if they are dependent on the platform, subject to the platform's directives, and part of the platform's organisation[34].

This is clearly not the case for companies who are user-offerors on platforms, and for individuals who sell products in their own web shops as well as "Zalando Partner", or let their apartment to others via Airbnb if they are not in town. While many depend on the high profile of a platform for their business, and platforms have a large influence on transactions, these users-offerors are not part of the organisation of the platform.

However, platforms for services – be it cleaning a flat, designing a logo or driving a car – could have such a relationship with their user-providers. In the case of Uber, to become a user-provider – a "Uber driver" – one has to register on the Uber platform, upload a scan of the relevant driver's licence and have an appropriate vehicle. For instance, in Germany, drivers have to have a private hire driving licence and a vehicle that fulfils legal requirements, has at least two doors on the right side of the vehicle, is in good condition and without accidental damage, and has a permit for commercial passenger transportation as well as relevant insurance coverage[35].

Once a Uber driver logs on, the Uber platform will offer rides to the driver using the Uber app. The driver receives information about the pick-up and drop-off points that the user-customer booked; Uber will

[32] On the general applicability of Article 8 Rome I Regulation to "IT employment contracts", see MANKOWSKI P., *Employment Contracts under Article 8 of the Rome I Regulation,* cit., p. 197 et seq.

[33] MAGNUS U., *Art. 8 Rom I-VO,* cit., para. 35; STAUDINGER A., *Art. 8 Rom I-VO,* cit., para. 10.

[34] The ECJ's jurisprudence on the definition of employee in the context of Article 45 TFEU can be applied: Judgment of the Court of 3 July 1986, Deborah Lawrie-Blum v Land Baden-Württemberg, Case 66/85, para. 16 et seq.; Judgment of the Court of 12 May 1998, María Martínez Sala v Freistaat Bayern, Case C-85/96; Judgment of the Court (Fifth Chamber) of 17 July 2008; Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV; Case C-94/07. See also FRANZEN M., *Article 8 Rom I Regulation,* cit., para. 5 et seq.; MAGNUS U., *Art. 8 Rom I-VO,* cit., para. 36 et seq., 44; MARTINY D., *Art. 8 Rom I-VO,* para. 19 et seq.; STAUDINGER A., *Art. 8 Rom I-VO,* cit. Para 11, 18 et seq., 22 et seq.

[35] See vehicle requirements on the Uber website, see perma.cc/9NKD-XSWC.

also indicate the route to take as well as the price for the ride once the driver has accepted the assignment. Both invoicing and payment are handled by Uber. Uber also sets certain quality standards for drivers, based mainly on customer ratings, and acceptance as well as cancellation rates for assignments[36].

This means that Uber effectively determines all elements of the transaction – it decides which driver is offered which assignment, it determines the exact terms of the ride from the type of vehicle to the route to take, it determines the price and the payment modalities. Because Uber drivers depend on good rating and acceptance rates, they are under pressure to take as many assignments as possible and reject as few as necessary. At the same time, the driver's identity does not play any role for the transaction: Customers cannot choose their drivers, and they will only get to know their full name on the invoice once the ride is completed.

All in all, Uber's platform offers the entire organisational structure for drivers and drivers are highly integrated in this organisation. Depending on individual circumstances, the platform use contract between the platform and the provider could therefore be characterised as an individual employment contract within the meaning of Article 8 Rome I Regulation[37]. Furthermore, Uber offers special benefits to drivers in some countries, e.g., co-operations with health insurance companies in the US[38]; such social benefits are usually connected to employment and can be an additional indicator of an employment contract.

The applicable law for individual employment contracts in the absence of choice is the law of the country in which the employee habitually carries out their work in performance of the contract, Article 8 (2) 1 Rome I Regulation[39]. If the place of work cannot be determined the law

[36] BALLA M., *Transportdienstleistungen: Uber,* cit., part 2 et seq.; DOMURATH I., *Platforms as contract partners: Uber and beyond,* in *Maastricht Journal of European and Comparative Law,* 2018, p. 565, 566; SØRENSEN M.J., *Private Law Perspectives on Platform Services,* cit., p. 15 et seq.

[37] BALLA M., *Transportdienstleistungen: Uber,* cit., part 9.3.2. For a differing opinion on German law (arguing *inter alia* that the driver can decline offers, uses their own vehicle and pays a fee for using the app), see LINGEMANN S., OTTE J., *Arbeitsrechtliche Fragen der „economy on demand"*, cit., p. 1042 et seq. Undecided (referring inter alia to the flexible work times), SØRENSEN M.J., *Private Law Perspectives on Platform Services,* cit., p. 16 et seq.

[38] BALLA M., *Transportdienstleistungen: Uber,* cit., parts 2 et seq.; SØRENSEN M.J., *Private Law Perspectives on Platform Services,* cit., p. 15 et seq.

[39] FRANZEN M., *Article 8 Rom I Regulation,* cit., para. 25 et seq.; MAGNUS U., *Art. 8 Rom I-VO,* para. 93; MARTINY D., *Art. 8 Rom I-VO,* cit., para. 47 et seq., 62; STAUDINGER A., *Art. 8 Rom I-VO,* cit., para. 18 et seq. A temporary crossing of a border, e.g. if a Uber driver drove a customer to a different country, does not change this, Article 8 (2) 2 Rome

of the place of business through which the employee was engaged is situated is applicable, Article 8 (3) Rome I Regulation[40].

For platforms offering services at a certain place – for instance for Uber offering rides in specific cities – the place of work is easy to determine. It is more difficult for platforms offering services that have no connection to a specific place – e.g., drafting a new corporate design, which can be done from anywhere. Even virtual services are usually carried out continuously from the place where the user-offeror's computer is located, i.e., their place of habitual residence. However, "virtual migratory labour" has become a reality: Laptops and tablets (or even smartphones) allow user-offerors to work from virtually anywhere, and change locations frequently[41]. In such a case, the applicable law would have to be determined according to Article 8 (3) Rome I Regulation, i.e., be the law of the country where the relevant platform subsidiary has its place of business. The applicable law would be focused on very few countries, meaning that employment contracts would be considered without reference to their social context; however, "virtual migratory labour" is probably without such social context anyway.

Article 8 (4) Rome I Regulation contains an escape clause to be applied on a case-by-case basis and that allows for the application of another law if according to the circumstances of the case as a whole, this law is more closely connected to the case. Circumstances to be considered are, *inter alia*, the place of work, the nationality of the parties, the place of business of the platform, the relevant social security system, or indicators like the language of the contract, the place of the conclusion of the contract – platform use contracts usually concluded on "the internet" and therefore indecisive – and the currency in which the renumeration is paid[42].

Some platforms use contracts between platforms and user-providers can be characterised as individual employment contracts. If this is the case, the law of the place of work is applicable. If this place cannot be determined, the law of the country where the platform has its place of business is applicable. An escape clause for atypical cases allows the application of the law of a country with a manifestly closer connection.

I Regulation. The situation is comparable to that of air crews, MAGNUS U., *Art. 8 Rom I-VO,* cit., para. 161, STAUDINGER A., *Art. 8 Rom I-VO,* cit., para. 20.

[40] FRANZEN M., *Article 8 Rom I-VO,* cit., para. 33 et seq.; MAGNUS U., *Art. 8 Rom I-VO,* cit., para. 114 et seq.; MARTINY D., *Art. 8 Rom I-VO,* cit., para. 69 et seq.; STAUDINGER A., *Art. 8 Rom I-VO,* cit., para. 25 et seq.

[41] SPRINGER S., *Virtuelle Wanderarbeit,* Darmstadt, 2002.

[42] FRANZEN M., *Article 8 Rom I Regulation,* cit., para. 38; MAGNUS U., *Art. 8 Rom I-VO,* cit., para. 132 et seq.; STAUDINGER A., *Art. 8 Rom I-VO,* cit., para. 27.

3.2. *Consumer Protection*

The use of digital platforms could be a method not only to evade employee, but also consumer protection: If the platform use contract is not an individual employment contract[43], it could be characterised as a consumer contract within the meaning of Article 6 Rome I Regulation.

For this to be the case, the user would have to be a consumer and the platform a professional. A consumer is a natural person concluding the contract for a purpose which can be regarded as being outside his trade or profession, Article 6 (1) Rome I Regulation. This will be the case for many user-customers but is doubtful for user-offerors: For many operators of small online shops selling their goods for instance on the Amazon Marketplace, this is their professional activity. While Amazon's "Seller Central" seems to be targeted to professionals, there is also a "basic account" for sellers that might also be used by consumers selling, for instance, books that they do not need anymore. On Airbnb, it is possible for consumers to advertise their apartment occasionally and in a way that does not constitute their professional activity. Therefore, some users of platforms - both customers and offerors – are consumers.

A professional is a person acting in the exercise of his trade or profession. Platforms are undoubtedly professionals[44].

Furthermore, for Article 6 Rome I Regulation to apply, the professional must pursue their commercial or professional activities in the country where the consumer has their habitual residence (Article 6 (1) (a) Rome I Regulation) or to direct these activities towards this country (Article 6 (1) (b) Rome I Regulation).

"Pursu[ing] his commercial or professional activities" in a certain country pursuant to Article 6 (1) (a) Rome I Regulation means that the professional is physically present in this country and participates in the local economic activities[45]. Neither the centre of administration nor a branch have to be located in this country. As explained above, this would only rarely be the case for platforms because their infrastructure including the data processing centres are usually located in very few countries, but the platforms can usually be accessed from many more.

[43] Article 8 Rome I Regulation takes priority, RÜHL G., *Art. 6 Rom I-VO,* in BUDZIKIEWICZ C., WELLER M.-P., WURMNEST W., *Rom I-VO,* in GSELL B., KRÜGER W., LORENZ S., REYMANN C., *beck.online.GROSSKOMMENTAR Zivilrecht,* Munich, 2019, para. 74.

[44] On the personal scope, see MAGNUS U., *Art. 6 Rom I-VO,* cit., para. 51 et seq.; MARTINY D., *Art. 6 Rom I-VO,* cit., para. 12 et seq.

[45] CALLIESS G.-P., *Article 6 Rom I Regulation,* cit., para. 45 et seq., MAGNUS U., *Art. 6 Rom I-VO,* cit., para 106 et seq.; MARTINY D., *Art. 6 Rom I-VO,* cit., para. 37; STAUDINGER A., *Art. 6 Rom I-VO,* cit., para 46.

Platforms will more often fulfil the second alternative, i.e., "direct[ing] such activities to that country or several countries including that country" within the meaning of Article 6 (1) (b) Rome I Regulation[46]. This requires for the professional to specifically and deliberately participate in the economic activities of a country[47]. For internet services, this is usually articulated by the choice of suitable top-level domain, e.g. "be" for Belgium, "de" for Germany, "es" for Spain, "it" for Italy, "pl" for Poland and "uk" for the United Kingdom[48]. Platforms usually offer payment and shipping options adjusted to the targeted country. They also use other media like billboards, advertisements in magazines or commercials on TV to attract more users in each country.

The application of Article 6 (1) and (2) Rome I Regulation is also not excluded because the contract concerns the supply of services to be performed exclusively in a different country than the one where the consumer has their habitual residence, Article 6 (4) (a) Rome I Regulation[49]. This exception has to be interpreted narrowly and therefore requires the place where the professional performs their activities as well as the place where the consumer receives the performance to be located in different

[46] On this parallel discussion on Article 17 (1) c Brussels Ia Regulation: MANKOWSKI P., *Zum Begriff des „Ausrichtens" auf den Wohnsitzstaat des Verbrauchers unter Art. 15 Abs. 1 lit. c EuGVVO – zugleich Anmerkung zu BGH, Urt. v. 30.3.2006 – VII ZR 249/04,* in *Verbraucher und Recht,* 2006, p. 289; MANKOWSKI P., *Internationale Zuständigkeit der Gerichte eines Mitgliedstaats bei Bereitstellung von Service und Formularen auf Website eines Unternehmens in Landessprache des Mitgliedstaats LG München I, Urt. v. 18.07.2007 – 9 O 16842/06 (rechtskräftig),* in *Entscheidungen zum Wirtschaftsrecht,* 2008, p. 245; MANKOWSKI P., *Autoritatives zum „Ausrichten" unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO,* in *Praxis des Internationalen Privat- und Verfahrensrechts,* 2012, p. 144; MANKOWSKI P., *Neues zum „Ausrichten" unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO,* in *Praxis des Internationalen Privat- und Verfahrensrechts,* 2009, p. 238; KEILER, S., BINDER K., *Der EuGH lässt ausrichten: kein Zusammenhang von Ursache und Wirkung beim Verbrauchergerichtsstand – zugleich eine Besprechung der Rs C-218/12 (Emrek),* in *Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht,* 2013, p. 230.

[47] On electronic communication, see Judgment of the Court (Grand Chamber) of 7 December 2010, Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09), joined cases C-585/08 and C-144/09, para. 80. See also CALLIESS G.-P-, *Article 6 Rom I Regulation,* cit., para, 47 et seq.; MAGNUS U., *Art. 6 Rom I-VO,* cit., para. 113 et seq.; MARTINY D., *Art. 6 Rom I-VO,* cit., para. 38 et seq.; STAUDINGER A., *Art. 6 Rom I-VO,* cit., para. 47 et seq.

[48] Judgment of the Court (Grand Chamber) of 7 December 2010, Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09), joined cases C-585/08 and C-144/09, para. 83.

[49] Article 6 (1) and (2) Rome I Regulation does not apply to a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence, Article 6 (4)(a) Rome I Regulation.

countries[50]. If the consumer uses the platform on their laptop, tablet or smartphone at home, these strict requirements are not fulfilled.

In many cases, the platform use contract can be qualified as a consumer contract. In the absence of choice, the law of the country where the consumer has their habitual residence is applicable pursuant to Article 6 (1) Rome I Regulation; there is no escape clause.

4. *Rights and Duties Platforms*

Another practical problem of platforms is to determine the rights and duties of the platform *vis-à-vis* its users[51]. Amazon is a well-known online retailer in the EU and worldwide, and at the same time operates the largest online marketplace for the sale of goods. Small businesses who depend on the Amazon Marketplace to sell their goods and generate most

[50] CALLIESS G.-P., *Article 6 Rome I Regulation,* cit., para. 57; GANSSAUGE N., *Internationale Zuständigkeit und anwendbares Recht bei Verbraucherverträgen im Internet. Eine rechtsvergleichende Betrachtung des deutschen und des US-amerikanischen Rechts,* Tübingen, 2004, p. 188 et seq.; HEINDERL F., *Internationale Zuständigkeit und anwendbares Recht bei Vertrieb von Finanzdienstleistungen im Fernabsatz,* in HEINDLER F., VERSCHRAEGEN B., *Internationale Bankgeschäfte mit Verbrauchern,* Vienna, 2017, p. 155, 179 et seq.; LEIBLE S., *Art. 6 Rom I-VO,* in HÜßTEGE R., MANSEL H.-P., *Bürgerliches Gesetzbuch: Rom-Verordnungen. EuGüVO. EuPartVO. HUP. EuErbVO,* Volume 6 of DAUNER-LIEB B., HEIDEL T., RING G., *NomosKommentar. In Verbindung mit dem Deutschen Anwaltsverein,* Baden-Baden 2019, para. 73; MANKOWSKI P., *Consumer Contracts under Article 6 of the Rome I Regulation,* in CASHIN RITAINE E., BONOMI A., *Le nouveau règlement européen "Rome I" relatif à la loi applicable aux obligations contractuelles. Actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne,* Zurich, 2008, p. 121, 156 et seq.; MARTINY D., *Art. 6 Rom I-VO,* cit., para. 25 ; RÜHL G., *Art. 6 Rom I-VO,* cit., para. 115. See also concerning Article 29 (4) Nr. 2 EGBGB: PFEIFFER T., *Anwendbares Recht,* in GOUNALAKIS G., *Rechtshandbuch Electronic Business. Rechtsgrundlagen. Branchenspezifische Geschäftsfelder. Auslandsmärkte,* Munich, 2003, para. 81; MANKOWSKI P., *Das Internet im Internationalen Vertrags- und Deliktsrecht,* in *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 1999, p. 203, 254 et seq.

[51] On German law, ENGERT A., *Digitale Plattformen,* cit., p. 335 et seq.; MCCOLGAN, *Diskussionsbericht zum Referat von Andreas Engert,* cit., p. 378 et seq., 381 et seq.; in particular on the liability of platforms: HAUCK R., BLAUT H., *Die (quasi-)vertragliche Haftung von Plattformbetreibern,* cit., p. 1245; MAULTZSCH F., *Verantwortlichkeit der Plattformbetreiber,* cit., p. 223; OMLOR S., *Haftung von Airbnb für unwirksame Stornierungsbedingungen,* in *juris – Die Monatszeitschrift,* 2017, p. 134; on the information duties of platforms according to the Consumer Right Directive see SÖBBING T., *Platform as a Service,* cit., p. 140; on discrimination by platforms as potential breaches of European law see NAVARRO S.N., *Discrimination and Online Platforms in the Collaborative Economy,* in *Journal of European Consumer and Market Law,* 2019, p. 34.

of their profits by using the Amazon Marketplace are dependent on Amazon's goodwill. Deactivating a seller's account for instance because of an alleged IP rights infringement can result in bankruptcy of the user-offeror – guilty or not of the infringement[52].

The German Competition Authority (*Bundeskartellamt*) began proceedings against Amazon in late 2018 to determine if Amazon is abusing its market power, following numerous complaints by small sellers. The investigation focuses on business terms and practices of Amazon, including "liability provisions to the disadvantage of sellers, in combination with choice of law and jurisdiction clauses, rules on product reviews, the non-transparent termination and blocking of sellers' accounts, withholding or delaying payment, clauses assigning rights to use the information material which a seller has to provide with regard to the products offered and terms of business on pan-European despatch".[53] The proceedings were discontinued following changes in Amazon's business terms[54]. Similar proceedings took place in Austria[55], Italy[56] and Luxembourg[57]. In mid-2019, the European Commission opened a formal antitrust investigation into Amazon's use of data from sellers on Amazon Marketplace[58]. This goes to show that the duties of the platform *vis-à-vis* its user-offerors are highly relevant and contentious.

A similar assertation can be made with regard to the rights and duties of the platform *vis-à-vis* its user-customers: Those shopping on Amazon Marketplace are faced with fraudulent fake shops[59] and counterfeit goods[60]: Fake shops are user-offerors using the platform to offer goods

[52] GASSMANN M., "*Kartellamt kommt mit Amazon-Verfahren Jahre zu spät*", in *Welt*, 2018, https://perma.cc/36HT-9XGY.

[53] BUNDESKARTELLAMT, *Bundeskartellamt initates abuse proceedings against Amazon*, 2018, perma.cc/B8BK-A8DM.

[54] BUNDESKARTELLAMT, *Bundeskartellamt obtains improvements in the terms of business for sellers on Amazon's online marketplaces*, 2019, perma.cc/FRN4-VJGA.

[55] BUNDESWETTBEWERBSBEHÖRDE, *BWB informiert: Amazon verändert Geschäftsbedingungen*, 2019, perma.cc/H7DV-7TX4.

[56] AUTORITÀ GARANTE DELLA CONCORRENZA E DEL MERCATO, *A528 – Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services*, 2019, perma.cc/T7TY-S6DW.

[57] CONSEIL DE LA CONCURRENCE, *2019-MC-01-Amazon Services Europe S.à.r.l.*, 2019, perma.cc/G2Y4-TXRN.

[58] EUROPEAN COMMISSION, *Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon*, 2019, perma.cc/L7ME-9U9T.

[59] ZEIT ONLINE, "*Angelockt und abgezockt*", in *ZEIT ONLINE*, 2016, zeit.de/wirtschaft/2016-11/amazon-marketplace-betrueger-stiftung-warentest-fake-shops.

[60] WEIDEMANN T., *Amazon gesteht Probleme mit Produktfälschungen ein*, in *t3n*, 2019, perma.cc/DT8C-L3N2.

that do not, in fact, exist. Some ask customers to conclude the transaction via e-mail and advance payment outside Amazon's platform – in this case, customers will most likely neither get the goods nor their money back. There are claims that Amazon should do more to identify and deactivate fake shops to protect users. The same is true for counterfeit (and sometimes stolen) goods that some user-offerors sell on Amazon. This is not only a problem for customers who have bought a product of lesser quality; but also, for shops offering the original product whose reputation and business can suffer from low ratings on Amazon's website.

To determine which rights and duties of platforms, the characterisation of the platform-use contract and the applicable law are of critical importance.

4.1. *Franchise Contract*

If the platform user contract between the platform and the user-provider is neither an individual employment contract nor a consumer contract – as discussed above - it could be characterised as a franchise contract within the meaning of Article 4 (1) (3) Rome I Regulation. A franchise contract is distinguished in the autonomous interpretation of European law[61] by the legal and economic independence of the franchisee

[61] Judgment of the Court of 28 January 1986; Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis; case 161/84, para. 15. On Article 1 (3)(b) of Commission Regulation (EEC) No 4087/88 of 30 November 1988 on the application of Article 85 (3) of the Treaty to categories of franchise agreements, *OJ L 359, 28.12.1988, p. 46 (no longer in force),* MORSE R., *Franchise Contracts and the Conflict of Laws,* in LINDSKOUG P., MAUNSBACH U., MILLQVIST G., SAMUELSSON P., VOGEL H.-H., *Essays in honour of Michael Bogdan,* Lund, 2013, p. 363, 368 et seq. In-depth analysis with reference to Belgian, French, Italian, Lithuanian, Swedish and Spanish law, WINKLER VON MOHRENFELS P., *Franchise- und Vertriebsverträge im internationalen Privatrecht,* in *Zeitschrift für Vertriebsrecht,* 2014, p. 281 et seq. See also DUTTA A., *Franchiseverträge,* in REITHMANN C., MARTINY D., *Internationales Vertragsrecht,* Cologne, 2015, para. 6.1316 et seq.; FERRARI F., *Art. 4 Rom I-VO,* in in FERRARI F., KIENINGER E.M., MANKOWSKI P., OTTE K., SÄNGER I., SCHULZE G., STAUDINGER A., *Internationales Vertragsrecht. Rom I-VO, CISG, CMR, FactU Kommentar,* Munich, 2018, para. 44; KRÜMMEL T., *Franchising im internationalen Privat- und Prozessrecht,* in GIESLER J.P., NAUSCHÜTT J., *Franchiserecht,* Cologne, 2016, para. 52; MAGNUS U., *Art. 4 Rom I-VO,* in VON STAUDINGER J., *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen,* Berlin, 2016, para. 62; MARTINY D., *Art. 4 Rom I-VO,* in SÄCKER F.J., RIXECKER R., OETKER H., LIMPERG B., *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* Volume 12, Munich, 2018, para. 139; STÜRNER M., *Art. 4 Rom I-VO,* in GRUNEWALD B., MAIER-REIMER G., WESTERMANN H.P., *Erman BGB,* Cologne, 2020, para. 26; TEICHMANN J., *Art. 4 Rom I-VO,* in FLOHR E., WAUSCHKUHN U., *Vertriebsrecht,* Munich, 2018, para. 29.

whom the franchisor grants the right to participate in a standardised distribution concept including the name, trademarks, and know-how, within an organisational structure developed by the franchisor for the sale of goods or services. In a nutshell, the franchise contract is a "business cloning contract"[62].

However, the relation between platform and user-provider differs from the relation between franchisor and franchisee: The franchisee sells goods and services using promotion and other materials to participate in the distribution concept of the franchisor, and the franchisee has to permanently purchase such materials from the franchisor. In return, the franchisee can use the name and trademark of the franchisor. A platform, however, brings users together on a virtual marketplace. The user-provider is not obliged to permanently use the platform for their business activities but is also not allowed to use the name or the trademark of the platform for their purposes. The franchisee works closely with the franchisor, but a platform is – ostensibly – a neutral marketplace. This neutrality is what the users, be it providers or customers, expect. The platform use contract between the platform and the user-provider is therefore not a franchise contract[63].

4.2. *Distribution Contract*

The platform use contract between the user-provider and the platform could also be qualified as a distribution contract within the meaning of Article 4 (1) (f) Rome I Regulation. The franchise contract is a special sub-type of the distribution contract[64].

A distribution contract is a framework agreement between parties that determines obligations to supply and receive within the scope of a distribution concept[65]. As explained above, such obligations do not exist in platform use contract. In addition, it should be noted that also the

[62] GARCÍA GUTIÉRREZ L., *Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts,* in *Yearbook of Private International Law,* 2008, p. 233 et seq.

[63] For a different view on Danish law, SØRENSEN M.J., *Private Law Perspectives on Platform Services,* cit., p. 18. It is noteworthy that according to this, it is an essential requirement for a franchising contract under Danish law that the customer concludes a contract with the franchisor.

[64] FERRARI F., *Art. 4 Rom I-VO,* cit., para. 48. The distinction between franchising and distribution contract is difficult but not decisive in the present case, MAGNUS U., *Art. 4 Rom I-VO,* cit., para. 72.

[65] FERRARI F., *Art. 4 Rom I-VO,* cit., para. 48; HÄUSLSCHMID V., *Handelsvertreter- und Vertriebsverträge,* in REITHMANN C., MARTINY D., *Internationales Vertragsrecht,* Cologne, 2015, para. 6.1415 et seq.; MAGNUS U., *Art. 4 Rom I-VO,* cit., para. 71; STÜRNER M., *Art. 4 Rom I-VO,* cit., para. 27.

agency agreement – as which platform use contracts are sometimes qualified[66] - are not distribution contracts pursuant to Article 4 (1) (f) Rome I Regulation because the agent does not *trade* themselves but acts as a *broker*[67]. The same must apply to platform use contracts. The platform use contract can therefore not be qualified as a distribution contract.

4.3. *Contract for the Provision of Service*

If the platform use contract cannot be qualified as an individual employment, a consumer, franchise or a distribution contract, a characterisation as a contract for the provision of service pursuant to Article 4 (1) (b) Rome I Regulation, possibly in conjunction with Article 6 (3) Rome I Regulation, is possible.

Taking into account the meaning of the term "provision of service" in the Brussels Ia Regulation[68], Article 57 (1) TFEU and Article 4 (1) of the Services in the Internal Market Directive, it can be understood as meaning independent activities including commercial, industrial and professional services. It is to be interpreted broadly[69] and includes contracts of brokerage which platform use contracts are sometimes qualified[70].

[66] DREYER H., HASKAMP T., *Die Vermittlungstätigkeit von Plattformen,* cit., p. 359 et seq.; ENGERT A., *Digitale Plattformen,* cit., p. 321 et seq.

[67] FERRARI F., *Art. 4 Rom I-VO,* cit., para. 49; HÄUSLSCHMID V., *Handelsvertreter- und Vertriebsverträge*, cit., para. 6.1415 et seq.; MAGNUS U., *Art. 4 Rom I-VO,* cit., para. 71; MARTINY D., *Art. 4 Rom I-VO,* cit., para. 140. For a different view, see STÜRNER M., *Art. 4 Rom I-VO,* cit., para. 27, 28a. See also THUME K.-H., *Grenzüberschreitende Vertriebsverträge,* in *Internationales Handelsrecht,* 2009, p. 141.

[68] 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, OJ L 351, 20.12.2012, p. 1; Recital 17 Rome I Regulation.

[69] FERRARI F., *Art. 4 Rom I-VO,* cit., para. 27; MARTINY D., *Art. 4 Rom I-VO,* cit., para. 35 et seq.; STÜRNER M., *Art. 4 Rom I-VO,* cit., para. 13; MAGNUS U., *Art. 4 Rom I-VO,* cit., para. 40.

[70] On the mediation activity of platforms, see DREYER H., HASKAMP T., *Die Vermittlungstätigkeit von Plattformen,* cit., p. 359. If platform use contracts are indeed brokerage agreements – as ENGERT argues for German substantive law – is without significance for the autonomous interpretation of Article 4 (1) Rome I Regulation, see DREYER H., HASKAMP T., *Die Vermittlungstätigkeit von Plattformen,* cit., p. 359; ENGERT A., *Digitale Plattformen,* cit., p. 323 et seq. The prevailing view is that Article 4 (1) (b) Rome I Regulation encompasses brokerage agreements; therefore, ENGERT'S opinion does not contradict this article's result, MARTINY D., *Art. 4 Rom I-VO,* cit., para. 46; MARTINY D., *Verträge über Dienstleistungen,* in REITHMANN C., MARTINY D., *Internationales Vertragsrecht,* Cologne, 2015, para. 6.662.; STÜRNER M., *Art. 4 Rom I-VO,* cit., para. 17.

It is the task of the platform to provide a virtual marketplace where users can conclude contracts. Thus, a platform use contract that is not an individual employment or consumer contract, can be characterised as a contract for the provision of service pursuant to Article 4 (1) (b) Rome I Regulation. In the absence of choice, the law of the state where the platform has their habitual residence – that is their centre of administration Article 19 (1) Rome I Regulation – is applicable[71].

Lastly, the escape clause in Article 4 (3) Rome I Regulation must be considered. It allows application of a different law if it is clear from the entirety of the circumstances that the contract is manifestly[72] more closely connected to this country. Regarding the scope of Article 4 (1) and (2) Rome I Regulation, the escape clause may neither be interpreted too broadly nor, with a view to unsupportable results, too narrowly[73].

The first potential link to be considered is the characteristic performance[74]. The services offered by the platform could be considered as characteristic for the contract – similar to the situation of franchise contracts prior to the entry into force of the Rome I Regulation[75] - whereas the users are exchangeable, "small cogs" in the "big wheel" of the platform's activities. However, the result would not be different from the law applicable to contracts for the provision of service.

Depending on the specifics of the platform use contract with the user-offeror, this contract could be characterised as an individual employment contract. Platform user contracts could also be consumer contracts. If neither of these specific characterisations is applicable, the platform use contract should be characterised as a contract for the provision of service.

[71] Article 4 (2) and (4) Rome I Regulation are therefore not applicable.

[72] On the significance of the word "manifest" that was introduced by the Rome I Regulation, FERRARI F., *Art. 4 Rom I-VO,* cit., para. 71.

[73] MARTINY D., *Art. 4 Rom I-VO,* cit., para. 287 et seq.

[74] MARTINY D., *Art. 4 Rom I-VO,* cit., para. 289.

[75] For comprehensive overview of opinions prior to the entry into force of the Rome I Regulation, see DUTTA A., *Franchiseverträge,* cit., para. 6.1310 et seq., GARCÍA GUTIÉRREZ L., *Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts,* cit., p. 235 et seq.; HIESTAND M., *Die international-privatrechtliche Beurteilung von Franchise-Verträgen ohne Rechtswahlklausel,* in *Recht der internationalen Wirtschaft,* 1993, p. 173; KRÜMMEL T., *Franchising im internationalen Privat- und Prozessrecht,* cit., para. 53 et seq.; MORSE R., *Franchise Contracts and the Conflict of Laws,* cit., p. 365 et seq.; TEICHMANN J., *Art. 4 Rom I-VO,* cit., para. 36; WINKLER VON MOHRENFELS P., *Franchise- und Vertriebsverträge im internationalen Privatrecht,* cit., p., 283. On the protection of weaker parties and the relevant market, GARCÍA GUTIÉRREZ L., *Franchise Contracts and the Rome I Regulation on the Law Applicable to International Contracts,* cit., p. 238 et seq., MORSE R., *Franchise Contracts and the Conflict of Laws,* cit., p. 368; DUTTA A., *Franchiseverträge,* cit., para. 6.1309.

5. *Parties of the Transaction and Default*

The third problem considered here is that of default – problems with payment and delivery, injuries caused by a product and the like. The main problem here is to determine the parties of the transaction[76]. This is because some platforms – like Amazon – offer goods and services themselves, and these offers are difficult to distinguish from the offers of users-offerors[77] because they are presented in very similar design: For instance, on the Amazon and Zalando websites, there is a small print indication on a product page who the seller is. The transaction is often processed by the platform for the user-offeror, including payment, shipping and returns; if not, there are usually strict requirements set by the platform that a user-offeror has to fulfil.

Some platforms also "guarantee" the fulfilment of the contract or become an additional party to the transaction to boost confidence in the use of the platform[78]. This model is used by Zalando for orders from their "Zalando Partners", and their standard terms state: *"When you order Zalando merchandise, your contract is with Zalando SE, Valeska-Gert-Straße 5, 10243 Berlin, and when you order Zalando partner merchandise, you also enter into a contract with the respective Zalando partner*[79]*"*.

Similar problems exist for Airbnb and Uber - in a particularly tragic case, a guest in an Airbnb accommodation in Austin, Texas, was killed while resting in a hammock when the branch that held the hammock

[76] BALLA M., *Transportdienstleistungen: Uber,* cit.; DATTA A., KLEIN U.A., *Kostenlose Apps – eine vertragsrechtliche Analyse,* in *Computer und Recht,* 2017, p. 174; DOMURATH I., *Platforms as contract partners: Uber and beyond,* in *Maastricht Journal of European and Comparative Law,* 2018, p. 565; KLEIN U.A., DATTA A., *Vertragsstrukturen beim Erwerb kostenloser Apps,* in *Computer und Recht,* 2016, p. 587; KREMER S., *Vertragsgestaltung bei Entwicklung und Vertrieb von Apps für mobile Endgeräte,* in *Computer und Recht,* 2011, p. 769; LACHENMANN M., *Mobile Apps,* in *Der IT-Rechts-Berater,* 2015, p. 99; LACHENMANN M., *Entwicklungsverträge für mobile Apps. Formulierungsvorschläge zur Vertragsgestaltung,* in *Der IT-Rechts-Berater,* 2013, 190; SÖBBING T., *Platform as a Service,* in *Der IT-Rechts-Berater,* cit., p. 140; TWIGG-FLESNER C., *Legal and Policy Responses to Online Platforms – A UK Perspective,* in BLAUROCK U., ERLER K., SCHMIDT-KESSEL M., *Plattformen,* Baden-Baden, 2018, p. 139.

[77] See also the detailed discussion on the contractual duties of a platform in the transaction contract in German substantive law, ENGERT A., *Digitale Plattformen,* cit., p. 312 et seq.; MCCOLGAN, *Diskussionsbericht zum Referat von Andreas Engert,* cit., p. 377.

[78] ENGERT A., *Digitale Plattformen,* cit., p. 313.

[79] See for instance Point 1.1. of the Standard Terms and Conditions for the UK, perma.cc/SDC2-ZRBZ.

broke[80]. Less tragic, but with exasperating regularity, items are stolen by Airbnb guests[81].

The pattern is similar: If a platform effectively handles the entire transaction, the seller becomes a small cog in a machine and the platform outsources its risks to a smaller partner. The question on the contractual relations becomes highly relevant in case of default.

5.1. *Interpretation of the Contract*

With transactions on digital platforms, it is clear that an agreement has been reached a contract has been concluded; it is however, unclear who the parties are. This is a question of the interpretation of the contract rather than its conclusion and its effectiveness[82]. Pursuant to Article 12 (1) (a) Rome I Regulation, the *lex causae* is applicable, i.e., the law that is applicable to the contract.

Because of the different connecting factors that could be relevant[83], two different laws can potentially be applicable. A transaction with the platform could for instance be a consumer contract; pursuant to Article

[80] KALOUTA G., *Sharing Economy, Digital Platforms und die Rechtsordnungen,* in TAEGER J., *Smart World – Smart Law? Weltweite Netzwerke mit regionaler Regulierung,* Edewecht, 2016, p. 869 et seq.

[81] KALOUTA G., *Sharing Economy, Digital Platforms und die Rechtsordnungen,* cit., p. 869 et seq.

[82] FERRARI F., *Art. 12 Rom I-VO,* in FERRARI F., KIENINGER E.M., MANKOWSKI P., OTTE K., SAENGER I., SCHULZE G., STAUDINGER A., *Internationales Vertragsrecht. Rom I-VO, CISG, CMR, FactU Kommentar,* Munich, 2012, para. 8a; LEIBLE S., *Art. 12 Rom I-VO,* in HÜßTEGE R., MANSEL H.-P., *Bürgerliches Gesetzbuch: Rom-Verordnungen. EuGüVO. EuPartVO. HUP. EuErbVO,* Volume 6 of DAUNER-LIEB B., HEIDEL T., RING G., *NomosKommentar. In Verbindung mit dem Deutschen Anwaltsverein,* Baden-Baden 2019, para. 7; on the term "interpretation", see also MAGNUS U., *Art. 12 Rom I-VO,* in VON STAUDINGER J., *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen,* Berlin, 2016, para. 24; SCHULZE G., *Article 12 Rome I Regulation,* in CALLIES G.-P., *Rome Regulations,* Alphen aan den Rijn, 2011, para. 16; SPELLENBERG U., *Art. 12 Rom I-VO,* in SÄCKER F.J., RIXECKER R., OETKER H., LIMPERG B., *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* Volume 12, Munich, 2018, para. 7; WELLER M.-P., *Art. 12 Rom I-VO,* in in BUDZIKIEWICZ C., WELLER M.-P., WURMNEST W., *Rom I-VO,* in GSELL B., KRÜGER W., LORENZ S., REYMANN C., *beck.online.GROSSKOMMENTAR Zivilrecht,* Munich, 2019, para. 12. Concerning interpretation of international contracts in general, see FERRERI S., *Le juge national et l'interprétation des contrats internationaux,* in *Revue internationale de droit comparé,* 2001, p. 29.

[83] The platform use contract could also be a consumer contract; pursuant to Article 6 (1) Rome I Regulation, the law of the habitual residence of the consumer would be applicable. The transaction contract could be a contract for the sale of goods; pursuant to Article 4 (1) (a) Rome I Regulation, the law of the habitual residence of the seller would be applicable.

6 (1) Rome I Regulation, the law of the habitual residence of the consumer would be applicable. The transaction with a user-offeror could also be a contract for the sale of goods; pursuant to Article 4 (1) (a) Rome I Regulation, the law of the habitual residence of the seller would be applicable.

Effectively, this reasoning is circular: The hypothetical *lex causae* depends on the result of the interpretation, and *vice versa.* As a result, the Rome I Regulation does not explicitly answer the question which law is applicable. The situation is further complicated by the fact that in this "contractual triangle" of platform, user-customer, and user-offeror more than one platform transaction contract could be valid[84].

A similar circular reasoning exists for the interpretation of choice of law agreements. In such a case, the result of the interpretation will determine which law is applicable[85]. The German *Reichsgericht* solved such cases by interpreting the agreement pursuant to the *lex fori*[86], and the German *Bundesgerichtshof* later left this question open[87] or passed over it[88]. In the existing literature, the application of the *lex fori* is often the preferred solution[89]. The interpretation is sometimes understood as "autonomous-comparative[90]" or as taking the "principles and evaluations

[84] Zalando's terms stipulate that the platform is party to the transaction between user-customer and user-offeror, see for instance Point 1.1. of the Standard Terms and Conditions for the UK, perma.cc/SDC2-ZRBZ. See also ENGERT A., *Digitale Plattformen,* cit., p. 313.

[85] MAGNUS U., *Art. 12 Rom I-VO,* cit., para. 28; SPELLENBERG U., *Art. 12 Rom I-VO,* para. 8 et seq.

[86] Decision of the REICHSGERICHT, in *Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts,* 1929, no. 35. See also LANDO O., *The Interpretation of Contracts in the Conflict of Laws,* in *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 1974, p. 388, 391 et seq.

[87] Not decided by the BUNDESGERICHTSHOF, 19.01.2002 - VIII ZR 275. Agreement: HOHLOCH G., *BGH, 19. 1. 2000 - VIII ZR 275/98 - Rechtswahlvereinbarung und Voraussetzungen,* in *Juristische Schulung,* 2000, p. 1228; HOHLOCH G., KJELLAND C., *Abändernde stillschweigende Rechtswahl und Rechtswahlbewußtsein,* in *Praxis des Internationalen Privat- und Verfahrensrechts,* 2002, p. 30. Criticism: MANKOWSKI P., *Anmerkung zu BGH, Urt. v. 19.1.2000 - VII ZR 275/98, WM 2000, 1643 (OLG Frankfurt/M.),* in *Entscheidungen zum Wirtschaftsrecht,* 2000, p. 967.

[88] Decision of the OBERLANDESGERICHT HAMBURG, *in Die deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts,* 1998, no. 34.

[89] VON BAR C., MANKOSWKI P., *Internationales Privatrecht. Band 1: Allgemeine Lehren,* Munich, 2003, § 7 para. 82; FERRARI F., *Art. 12 Rom I-VO,* cit., para. 7.

[90] LEIBLE S., *Art. 12 Rom I-VO,* cit., para. 12.

specific for private international law" into account[91]. There is only a difference by degree between these proposals and the proposition to interpret the choice of law agreement autonomously and refer to the *lex fori* to fill gaps[92].

The problem described here - the determination of the parties of the contract - could be solved in a similar way. The solution based on the *lex fori* seems to be the most practicable; especially if there are only slight differences between the principles of interpretation in different legal orders[93]. However, the application of the *lex fori*[94] could be contrary to the purpose of the Rome I Regulation[95]: The harmony between decision interpreting the Rome I Regulation in EU are of particular importance[96]. According to Recital 6 of the Rome I Regulation, its aim is to provide legal certainty by ensuring the application of the same law independent of the forum[97]. This aim can only be achieved by taking comparative law into account for the interpretation[98].

[91] VON HOFFMANN B., THORN K., *Internationales Privatrecht,* Munich, 2007, § 10 para. 31.

[92] MAGNUS U., *Art. 12 Rom I-VO,* cit., para. 28.

[93] MAGNUS U., *Art. 12 Rom I-VO,* cit., para. 29; SPELLENBERG U., *Art. 12 Rom I-VO,* cit., para. 14. Some argue that the differences are in practice very small: LANDO O., *The Interpretation of Contracts in the Conflict of Laws,* cit., p. 390 et seq.; ZWEIGERT K., KÖTZ H., *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts,* Tübingen, 1996, p. 395 et seq. LANDO also proposes to only consider the otherwise applicable law if a party argues that this other law would come to a different conclusion.

[94] Critical VON BAR C., *Internationales Privatrecht. Band 2: Besonderer Teil,* Munich, 1991, para. 549, footnote 596.

[95] On the interpretation of the Rome I Regulation, in particular on teleological interpretation: MAGNUS U., *Einleitung,* in VON STAUDINGER J., *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen,* Berlin, 2016, para. 59 et seq.

[96] VON HEIN J., *Einleitung zum Internationalen Privatrecht,* in SÄCKER F.J., RIXECKER R., OETKER H., LIMPERG B., *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* Volume 12, Munich, 2018, para. 177; MARTINY D., *Vorbemerkung zu Art. 1 Rom I-VO: Grundlagen, Rom I-VO, EG-Vertragsrechts-Übereinkommen, Internationale Zuständigkeit, Schiedsgerichtsbarkeit,* in in SÄCKER F.J., RIXECKER R., OETKER H., LIMPERG B., *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* Volume 12, Munich, 2018, para. 12 et seq.

[97] See similar arguments made in relation to Article 27 (1) 2 EGBGB, LORENZ E., *Die Auslegung schlüssiger und ausdrücklicher Rechtswahlerklärungen im internationalen Schuldvertragsrecht,* in *Recht der internationalen Wirtschaft,* 1992, p. 697.

[98] DÖRFELT F.A.R., Gesetzgebungsziele im Internationalen Privatrecht. Eine theoretische und praktische Betrachtung, Hamburg, 2017, p. 8; JUNKER A., *Internationales Privatrecht,* Munich, 2017, § 2 para. 17.

Indeed, the legal uncertainty about the applicable law must be relativised: In the EU, there are also harmonised rules on international competence. On the whole, the most convincing arguments can be made for an autonomous European interpretation.

5.2. *Characterisation*

Apart from the question of interpretation, the applicable law depends on the characterisation of the contract in question. It could for instance be an individual employment contract (Article 8 Rome I Regulation), a consumer contract (Article 6 Rome I Regulation), a contract for the sale of goods (Article 4 (1) (a) Rome I Regulation), a contract for the provision of services (Article 4 (1) (b) Rome I Regulation), or a contract of carriage (Article 4 (1) (h) Rome I Regulation). Which type of contract is relevant and which law is applicable has to be determined on a case-by-case basis.

If necessary, the parties of the contract have to be determined according an autonomous European interpretation. Furthermore, the platform transaction contract has to be characterised and the applicable determined in the concrete case.

6. *Outlook*

As seen above, the existing law does not offer specific solutions for digital platform contract. In the future, a harmonisation of the substantive law could take place within the framework of the Digital Single Market strategy of the EU[99]. In April 2018, the European Commission published a draft directive to promote fairness and transparency of online intermediaries. The personal scope of the draft regulation is limited to professionals using digital platforms[100]. A study group presented a discussion draft of a regulation on online intermediaries with a wider personal scope[101]. But as of now, no directive or regulation has entered into force, and the current drafts would not answer all queries raised above.

[99] EUROPEAN COMMISSION, *Online Platforms*, 2020, perma.cc/6K4C-PCHF.

[100] EUROPEAN COMMISSION, Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final.

[101] BUSCH C., DANNEMANN G., SCHULTE-NÖLKE H., *Ein neues Vertrags- und Verbraucherrecht für Online-Plattformen im Digitalen Binnenmarkt? Diskussionsentwurf für eine mögliche EU-Richtlinie*, cit., p. 787. See also BUSCH C., *European Model Rules for Online Intermediary Platforms*, in BLAUROCK U., ERLER K., SCHMIDT-KESSEL M., *Plattformen*, Baden-Baden, 2018; BUSCH C., *The Rise of the Platform Economy: A New Challenge for EU Consumer Law?*, in *Journal of European Consumer and Market Law*,

The future development of private international law for platform contracts is less certain: A clarification of the situation could be useful but it remains questionable if a specific connecting factor for a platform contract would be helpful considering that most platform contracts are either individual employment contracts pursuant to Article 8 Rome I Regulation, consumer contracts pursuant to Article 6 Rome I Regulation or covered by a choice of law agreement pursuant to Article 3 Rome I Regulation. It does not seem appropriate to apply the law of the of the platform to the remainder of the cases with a view to subject all contracts of platform to the same law and avoid contradictions as digital platforms do not require additional protection. This could be assessed differently for the platform users who are consumers and conclude contracts with other consumers using the platform and in accordance with provisions made by the platform – a professional. On the other hand, the user-offeror does not seem to be worthy of specific protection. All in all, the existing private international law as contained in the Rome I Regulation seems to be able to provide rules that are as effective for virtual marketplaces as for real ones.

2016, p. 3; WIEWIÓROWSKA-DOMAGALSKA A., *Online Platforms: How to Adapt Regulatory Framework to the Digital Age?, Briefing for the European Parliament,* PE 607.323, perma.cc/YP49-D947.

STEFANO DOMINELLI

CROSS-BORDER SERVICE OF DOCUMENTS ON LEGAL COMPANIES: THREE LEGAL ISSUES

CONTENTS: 1. Introduction and scope of the research questions – 2. Service on legal representatives: interplays between material law and the Service of documents regulations – 3. Right of companies to refuse service based on linguistic grounds – 4. The (in)derogable nature of art. 8 Service of documents regulation – 5. Concluding remarks.

1. *Introduction and scope of the research questions*

Regulation n. 1393/2007[1], as recently recast by Regulation (EU) 2020/1784[2], hereinafter referred to as the Service of documents regulation(s)[3], clearly points out the relationship between the subject matter

[1] 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, in OJ L 324, 10.12.2007, p. 79.

[2] Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), in OJ L 405, 2.12.2020, p. 40.

[3] In the scholarship, on cross-border service of documents, see *ex multis* ADOBATI, *L'atto giudiziario o extragiudiziario notificato ai sensi del regolamento CE n.1348/2000 rimane valido anche se viene rifiutato per mancanza della traduzione nella lingua del paese di destinazione*, in *Diritto comunitario e degli scambi internazionali*, 2006, p. 64; BAREL, *Le notificazioni nello spazio giuridico europeo*, Padova, 2008; ID, *Regolamento (CE) n. 1393/2007 del Parlamento europeo e del Consiglio, del 13 novembre 2007, relativo alla notificazione e alla comunicazione negli Stati membri degli atti giudiziari ed extragiudiziali in materia civile o commerciale e che abroga il Regolamento (CE) n. 1348/2000 del Consiglio, GUUE, L 324/07*, in POCAR, BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, p. 602; BIAVATI, *Notificazioni e comunicazioni in Europa*, in *Rivista trimestrale di diritto e procedura civile*, 2002, p. 501; CAMPEIS, DE PAULI, *Le regole europee ed internazionali del processo civile italiano*, Padova, 2009; CARELLA, *La disciplina delle notificazioni e comunicazioni intracomunitarie: dalla cooperazione intergovernativa all'integrazione europea?*, in PICONE (a cura di), *Diritto internazionale privato e diritto comunitario*, Padova, 2004, p. 125; COSTANTINO, SARAVALLE, *Il regime della notificazione all'estero secondo la convenzione dell'Aja del I novembre 1965*, in *Rivista di diritto internazionale privato e processuale*, 1984, p. 451; DANIELE, MARINO, *Momento perfezionativo e regime linguistico delle notificazioni: dalla*

and the internal market. An area of freedom, security and justice in which the free movement of persons is assured requires measures relating to judicial cooperation in civil matters. This includes rules for the transmission of judicial and extrajudicial documents in civil or commercial matters between Member States[4]. Such documents might be writ of summons – or comparable acts, as well as judgments or extra-judicial documents whose service is a precondition for the enforcement of rights under the *lex fori*[5]. Evidently, a swift and smooth mechanism of inter-State cooperation for transnational cooperation in the subject matter becomes

sentenza Lelfler alla proposta di modifica del regolamento n. 1348/2000, in *Rivista di diritto internazionale privato e processuale*, 2007, p. 969; FRANZINA, *La notificazione degli atti giudiziari e stragiudiziali in ambito comunitario*, in BONOMI (a cura di), *Diritto internazionale privato e cooperazione giudiziaria in materia civile e commerciale*, Torino, 2009, p. 217; FRIGO, *Problemi applicativi della normativa comunitaria in materia di notificazioni di atti giudiziari*, in *Rivista di diritto internazionale privato e processuale*, 2006, p. 5; ID, *Notificazione all'estero*, in BARATTA (a cura di), *Dizionari del diritto privato. Diritto internazionale privato*, Milano, 2011, p. 247; FUMAGALLI, *Le nuove regole federali statunitensi in tema di notificazioni e di assunzione di prove all'estero*, in *Rivista di diritto internazionale privato e processuale*, 1994, p. 795; GALIČ, *Service Abroad In Civil and Commercial Matters – From The Hague Conventions To The EU 1393/2007 Regulation*, in *Collection of Papers, Faculty of Law, Nis 65*, 2013, p. 59; HEIDERHOFF, *EG-ZustVO 2007*, in RAUSCHER (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band II*, Köln, 2015, p. 762; LABRIOLA, *Notificazione all'estero e diritto di difesa*, in *Rivista di diritto internazionale privato e processuale*, 1978, p. 705; LEANDRO, *Il buon funzionamento del mercato interno va tutelato anche al di fuori del giudizio*, in *Guida al diritto*, 2009, 31, p. 108; POCAR, *Note sull'esecuzione italiana della convenzione dell'Aja del 1965 sulle notificazioni all'estero*, in *Rivista di diritto internazionale privato e processuale*, 1982, p. 574; SALVADORI, *Notificazioni e comunicazioni internazionali*, in PREITE, GAZZANTI PUGLIESE DI COTRONE (a cura di), *Atti notarili – Diritto comunitario ed internazionale*, Vol 4, Tomo I, Milano, 2011, p. 559; TOMMASEO, *Sulle notificazioni internazionali nello spazio giuridico europeo*, in COLESANTI, CONSOLO, GAJA, TOMMASEO (promosso da), *Il diritto processuale civile nell'avvicinamento giuridico internazionale. Omaggio ad Aldo Attardi*, Padova, 2009, p. 1145; VISMARA, *Cooperazione giudiziaria in materia civile: assunzione di mezzi di prova e notificazioni*, in CONETTI, TONOLO, VISMARA, *Manuale di diritto internazionale privato*, Torino, 2015, p. 102; GASCÓN INCHAUSTI, *Service of Proceedings on the Defendant as a Safeguard of Fairness in Civil Proceedings: In Search of Minimum Standards from EU Legislation and European Case-Law*, in *Journal of Private International Law*, 2017, p. 475, and DOMINELLI, *Sulla tecnica della "Focalizzazione" nel contesto della notifica transfrontaliera a persone giuridiche*, in *Rivista di diritto internazionale privato e processuale*, 2019, p. 127.

[4] Regulation (EC) No 1393/2007, cit., recitals, 1 ff; Regulation (EU) No 2020/1784, recitals 2 ff.

[5] To that effect, see Judgment of the Court (Third Chamber) of 25 June 2009, Roda Golf & Beach Resort SL, Case C-14/08, where, referring to the Regulation n. 1348/2000 repealed by the 2007 Service of documents regulation, argued as per the service of notar-

fundamental for the correct instruction of proceedings and the recognition and enforcement of decisions in the European judicial space[6]. This becomes even more apparent if the issue of service of documents abroad is approached from the traditional lenses of public international law: the act of serving a person with a document is conceived as a sovereign act[7]

ial acts that "*the regulation cannot be limited to legal proceedings alone. That cooperation may manifest itself both in the context of and in the absence of legal proceedings if that cooperation has cross-border implications and is necessary for the proper functioning of the internal market. Contrary to the submissions of the Spanish, Polish and Slovak Governments, the fact that recital 6 of Regulation No 1348/2000 mentions only the efficiency and rapidity of legal proceedings is not sufficient to remove from the scope of that regulation all documents which are unconnected to legal proceedings. That recital refers only to one of the corollaries of the main purpose of the regulation. The mention, in that recital, of extrajudicial documents in the context of legal proceedings must therefore be understood as meaning that the service of such a document may be required in the course of legal proceedings*" (para. 56 f.). Commenting the decision, see SUJECKI, *Zustellung einer notariellen Urkunde außerhalb eines gerichtlichen Verfahrens*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2009, p. 585; LEANDRO, *Il buon funzionamento del mercato interno va tutelato anche al di fuori del giudizio*, cit., p. 108.

[6] It may only suffice to say that defects in the service of writs of summons or of the judgments might constitute a ground to refuse recognition or enforcement for example under the Brussels Ia regulation (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, in OJ L 351, 20.12.2012, p. 1). Under art. 45(1)(b) of the Brussels Ia regulation, recognition and enforcement of foreign European decisions in civil and commercial decisions can be refused "*where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so*". In any other circumstance, where defect of service affects other relevant documents, the procedural public policy exception under art. 45(a) might be invoked to refuse recognition or enforcement of the decision.

[7] Cf MORELLI, *Diritto processuale civile internazionale*, Padova, 1954, p. 241; BAREL, *Le notificazioni nello spazio giuridico europeo*, cit., p. 34 ff; FRANZINA, *La notificazione degli atti giudiziari e stragiudiziali in ambito comunitario*, cit., p. 217; TOMMASEO, *Sulle notificazioni internazionali nello spazio giuridico europeo*, cit., p. 1151, and SALVADORI, *Notificazioni e comunicazioni internazionali*, cit., p. 559. In general, cf GIULIANO, *La giurisdizione civile italiana e lo straniero*, Milano, 1970, p. 6 ff. This, together with the principles of inviolability of the foreign diplomat and of the foreign diplomatic premises, also determines the impossibility to have direct service, i.e. service without the intermediation of diplomatic channels, against the foreign diplomat accredited in the State proceeding with the service, or directly within the premises of the foreign diplomatic mission (1961 Vienna Convention on Diplomatic Relations, done at Vienna on 18 April 1961, entered into force on 24 April 1964, in *UNTS*, vol. 500, p. 95, art. 22 – according to which "*The premises of the mission shall be inviolable*" – and art. 29 – according to which "*The*

– thus strictly territorial in nature. In the absence of a framework of (diplomatic or administrative) cooperation between States, a party wishing to serve a document abroad might not have such a possibility – being left with domestic rules eventually allowing for "compensatory" mechanisms to preserve its right to judicial action.

To pursue its goal, the European Union has adopted a number of regulations to establish rules on cross-border service of documents: the 2007 Service of documents regulation is the second of its kind and has recently ended its recast procedure. Whereas the European Commission initially proposed to follow the amendment procedure[8], the trialogue between the political institutions at the EU level has in the end privileged the recast procedure[9], which bears consequences in terms of voting. The Council and the Parliament only vote the new rules, and the rules which are not subject to a proposal from the Commission are not discussed by Council and Parliament[10]. In the specific case of the service of documents, this by far does not mean that the decision-making process went smoothly solely based on the procedure. During the first reading, the European Parliament alone proposed 64 amendments to the Commission's proposal[11]. However, following the first reading within the European

person of a diplomatic agent shall be inviolable"; for a comment on the provisions see DENZA, *Diplomatic Law: commentary on the Vienna Convention on Diplomatic Relations*, Oxford, 2016, p. 123 ff, where references in State practice and case law). Very clearly, in the case-law, on the nature of *acta iure imperii* of service of documents, which thus requires a framework of diplomatic or administrative cooperation between States, see also Opinion of Advocate General Stix-Hackl delivered on 28 June 2005, Case C-443/03, Götz Leffler v Berlin Chemie AG, in *Reports*, para. 26 ff ("*The State sovereignty esteemed under international law meant that, until such time as special instruments had been elaborated, service in international legal relations was possible only, if at all, through diplomatic channels. This system was supplemented by international Conventions, which is hardly surprising given the proximity of the topic to State sovereignty*").

[8] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), COM/2018/379 final.

[9] Council of the European Union, Interinstitutional File: 2018/0204(COD), Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council of the service in the Member States of judicial and extrajudicial documents (service of documents) (recast) – Draft Statement of the Council's reasons, 22 October 2020, point 12.

[10] See Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts, OJ C 77, 28.3.2002, p. 1.

[11] Council of the European Union, Interinstitutional File: 2018/0204(COD), Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of

Parliament in February 2019, the European Council adopted the text at the first reading without amendments on November 4th, 2020[12].

The main pillars for change the Commission introduced following the political trialogues to enhance the systems are essentially three: i) digitalization; ii) better direct communication without recourse to cross-border administrative cooperation, and iii) implementation of the regime of refusing a document based on linguistic reasons[13].

Focusing here on the first and the last points, digitalization should affect the system of administrative cooperation established between Member States. Where a cross-border service is necessary, national authorities ask the domestic foreign counterparts to proceed with service and, to that end, they send the documents. Under the new rules, sending of documents should take place through online tools. To some extent, also digital communication during proceedings should be possible[14].

the European Parliament and of the Council of the service in the Member States of judicial and extrajudicial documents (service of documents) (recast) – Draft Statement of the Council's reasons, 22 October 2020, point 4.

[12] Council of the European Union, Interinstitutional File: 2018/0204(COD), Statement of the Council's Reasons, Position of the Council at first reading in view of the adoption of Regulation of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast) – Statement of the Council's reasons – Adopted by the Council on 4 November 2020, Brussels, 5 November 2020, 9890/2/20, REV 2 ADD 1. See also Council of the European Union, Interinstitutional File: 2018/0204(COD), Information Note, Adoption of legislative acts following the European Parliament's second reading proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) - Outcome of the European Parliament's second reading, Brussels, 25 November 2020, 13259/20.

[13] See Council of the European Union, Interinstitutional File: 2018/0204(COD), Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council of the service in the Member States of judicial and extrajudicial documents (service of documents) (recast) – Draft Statement of the Council's reasons, 22 October 2020, point 18. Most recently, for a comment on the political agreements to the recast of the Service of documents regulation, see ANTHIMOS, *Towards a New Service Regulation – Some Reflections*, in *EAPIL Blog*, 19 February 2020.

[14] However, it is for the Commission to adopt the implementing acts to establish the technical system 15 months after the entry into force of the recast. Member States will then have 3 years to implement the system following the adoption of the implementing acts. Member States already sufficiently advanced can start implementation earlier. The decentralised IT system will be adopted by implementing acts of the Commissions (in these terms, Council of the European Union, Interinstitutional Files: 2018/0203(COD),

As per the last "pillar", implementation of the regime to refuse an act takes into consideration that under current art. 8 of the Service of documents regulation the recipient of the document has the right to refuse service if documents are not translated either in the official language of the *loci actus* or in language the addressee can understand. However, the regulation does not clearly state how this right to refuse service be exercised, nor that the recipient declares a language he understands for the purposes of legal translations.

In the context of this recast where much attention has been devoted to a number of issues, some appear to have been sufficiently addressed (yet, whether satisfactorily solved is another question), whilst others still appear to remain in the background as, for today, the main game in the amendment of the rules seems to be played on the role of IT and the connected infrastructure necessary to ensure proper functioning of online transmission of data. In the following pages the intention is to focus on three of the problems that have emerged prior and during the recast of the Service of documents regulation to determine if, and to what extent the current texts might contribute in solving applicative problems. The first being that of service abroad to legal representatives of companies; the second is related to the complexities of evaluating the "linguistic competences" of a corporation triggering the right to refuse service under art. 8 of the regulation, and – lastly – to what extent party autonomy, especially where durable commercial relationships are in place between commercial parties (generally – albeit not necessarily – one of them being a legal entity), can derogate to the ordinary operability of art. 8 of the regulation.

2018/0204-(COD), Cover Note, Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position adopted by the Council at first reading on the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) and of a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, Brussels, 13 November 2020, 12935/20, point 3, p. 3). On this, on 14 June 2021, the Research Service of the European Parliament released an online briefing paper concerning the proposal for a regulation on a computerised system for communication in cross-border civil and criminal proceedings.

2. *Service on legal representatives: interplays between material law and the Service of documents regulations*

The 2007 Service of documents regulation has no provision on its applicability to service on legal representatives: it (only) has a recital, according to which [it] "*should not apply to service of a document on the party's authorised representative in the Member State where the proceedings are taking place regardless of the place of residence of that party*"[15]. Other than a general remark on the normative value of recitals, this must be read in light of that case law of the Court of Justice of the European Union according to which the Service of documents regulation "*must be interpreted as precluding legislation of a Member State … which provides that judicial documents addressed to a party whose place of residence or habitual abode is in another Member State are placed in the case file, and deemed to have been effectively served, if that party has failed to appoint a representative who is authorised to accept service and is resident in the first Member State, in which the judicial proceedings are taking place*"[16]. Any means of fictitious service would be against the right of defense[17] – hence the necessity to avoid any possibility that the balancing of the interests of service lead to a breach of the right to defense. To that end, the Service of documents regulation makes a choice, in that it declares its non-applicability when service is to be made on an authorized representative abroad.

This, of course, raises the different question of "when" a person has sufficient power of representation to lawfully receive service in name of another person. The issue has emerged in particular in the field of insurance contracts – in a number of decisions[18] the Court of Justice of the European Union has interpreted the Solvency II Directive, according to

[15] 2007 Service of documents regulation, recital 8.

[16] Judgment of the Court (First Chamber), 19 December 2012, Krystyna Alder and Ewald Alder v Sabina Orlowska and Czeslaw Orlowski, Case C-325/11, on which see DÜSTERHAUS, *Unionsrechtswidrige Fiktion der Zustellung an ausländische Partei durch Niederlegung in der Gerichtsakte*, in *Neue juristische Wochenschrift*, 2013, p. 445; OKONSKA, *Keine fiktive Zustellung mangels eines inländischen Zustellungsbevollmächtigen im Anwendungsbereich der EuZustVO*, in *Recht der internationalen Wirtschaft*, 2013, p. 280, and HEINZE, *Keine Zustellung durch Aufgabe zur Post im Anwendungsbereich der Europäischen Zustellungsverordnung*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2013, p. 132.

[17] Judgment of the Court (First Chamber), 19 December 2012, Krystyna Alder and Ewald Alder v Sabina Orlowska and Czeslaw Orlowski, Case C-325/11, para. 35 ff.

[18] Judgment of the Court (Second Chamber), 10 October 2013, Spedition Welter GmbH v Avanssur SA, Case C-306/12 (on Directive 2009/103/EC), and Judgment of the Court (Eighth Chamber) of 27 February 2020, Corporis Sp. z o.o. v Gefion Insurance A/S, Case C-25/19.

which insurance undertakings may provide services in other Member States without having there an agency or an establishment. This being said, for compulsory motor insurance coverages they must appoint a representative with "*sufficient powers to represent the undertaking … including the payment of such claims, and to represent it or, where necessary, to have it represented before the courts and authorities of that Member State in relation to those claims*"[19]. The Court has excluded the applicability of the Service of documents regulation[20], yet, in the Court's eye, the Solvency II Directive has created a harmonized regime for the pursuit of insurance activities between Member States. The necessity for an insurance undertaking to appoint a representative in a State where it decides to offer services without opening an agency or an establishment is pre-ordered at the protection of persons; even though the Solvency II Directive is silent on the matter, according to the Court, not recognizing the right to weaker parties of serving documents in their own language to the representative with whom they already have taken preliminary steps would, in essence, deprive the provisions of their *effet utile*. The Court speaks of the "*possibility for that representative to accept service*"[21], and stressed the negative consequences of excluding "*the powers* [of the] *representative to accept service of documents*"[22]. Evidently, from the perspective of the foreign insurance company and its representative, this is more a matter of legal obligation to accept service.

The approach and the perspective followed by the Court becomes apparent in the conclusion. The Court has not clearly stated that the representative has an obligation to accept service – it rather concluded that the rules on appointment in the Solvency II Directive include the power to receive service of documents. An argumentative style of the Court that appears to little prejudice to the conclusion: insurance companies now know that when they appoint a representative in another Member State under art. 152 Solvency II Directive, persons will have the possibility to serve documents to that representative, and avoid a cross-border service of documents[23]. As noted in the scholarship, "*the Court accentuates the*

[19] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), in OJ L 335, 17.12.2009, p. 1, art. 152.

[20] Cf Judgment of the Court (Eighth Chamber) of 27 February 2020, Corporis Sp. z o.o. v Gefion Insurance A/S, Case C-25/19, para. 28.

[21] Cf Judgment of the Court (Eighth Chamber) of 27 February 2020, Corporis Sp. z o.o. v Gefion Insurance A/S, Case C-25/19, para. 37.

[22] Cf Judgment of the Court (Eighth Chamber) of 27 February 2020, Corporis Sp. z o.o. v Gefion Insurance A/S, Case C-25/19, para. 42.

[23] DOMINELLI, *Service of Documents on Insurance Companies: The ECJ in the Corporis/Gefion Insurance Case*, in *Conflictoflaws.net*, 16 March 2020.

difficulties faced by the victims of road traffic accidents. For those (insured) persons, the Brussels I Regulation has granted a forum actoris. Now the Court provides them with yet another benefit, i.e. the possibility to serve proceedings within the forum, and without attaching a costly translation. De lege ferenda, the same level of protection could be granted to other recognized categories of weak(er) parties, such as consumers and employees, in their capacity as claimants against sellers, service providers, or employers. Beyond insurance companies, one could think of foreign pharmaceutical companies, air carriers, car industries, social network giants, and the like. The fact that the above enterprises did not grant explicit powers to their representatives to receive judicial documents on their behalf shouldn't be an impediment anymore. This is at least the implication of the CJEU in the Corporis case"[24].

Acknowleding the issue of service of documents on representatives, the 2020 Service of documents regulation recast confirmes with a recital and with a new passage in the articles, that the instrument at hand "*does not apply to the service of a document in the forum Member State on a representative authorised by the person to be served, regardless of the place of residence of that person*"[25]. In comparison to the previsio text, it appaers more guidance is given to practictioners, as it is elaborated in the recital that "*This Regulation should not apply to the service of documents on a party's authorised representative in the forum Member State, but should apply to the service of any document on a party in another Member State if such service is required under the law of the forum Member State, irrespective of whether the document has been served on the party's representative*"[26].

If the new regulation is not to be applied applied to service upon representatives (vut has to be applied to serivice of the *represented*), it remains however that if the serivice upon the authorised representative is cross-border in nature, this will not follow the rules established by the regulation. Rather, it will be performed according to domestic laws (most

[24] ANTHIMOS, *Some Thoughts on 'Authorized Representatives' under the EU Service Regulation*, in *EAPIL Blog*, 21 April 2020, who also recalls domestic case law on the matter.

[25] Regulation (EU) 2020/1784, recital 6; art. 1(2).

[26] Cf also Council of the European Union, Interinstitutional File: 2018/0204(COD), Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council of the service in the Member States of judicial and extrajudicial documents (service of documents) (recast), 22 October 2020, recital 6.

probably, looking for international conventions) governing cross-border (cooperation[27] on) service of documents.

3. *Right of companies to refuse service based on linguistic grounds*

The 2007 Service of documents regulation, as mentioned, provides for a system which seeks to balance at least two different interests at stake. The persons asking domestic authorities to start the administrative cooperation abroad to pursue a foreign notification do not have an obligation to translate documents. However, the receiving national authority must inform[28] the subject that the addressee may refuse service on linguistic grounds if the document and the main attachments are not translated either in the official language of the State where service will be performed, or in a language the recipient can understand[29]. The recipient of the documents is, on his own side, informed of the possibility to refuse service; a right which can be exercised within one week under the 2007 regulation[30], and within two weeks under the recast regulation[31].

The person wishing to serve a document has different options. By operation of law, the addressee cannot refuse service based on linguistic grounds if the acts are translated in the official language of the State where service is performed[32]. Regardless of whether the addressee understands the language of that State, a notification by national authorities of

[27] Per se, the Service of documents regulation does not create harmonised or unified service procedures between Members States, but only cooperation procedures; see FRIGO, *Notificazione all'estero*, cit., p. 247.

[28] 2007 Service of documents regulation, art. 5. Cf 2020 Service of documents regulation recast, art. 9.

[29] 2007 Service of documents regulation, art. 8. Cf 2020 Service of documents regulation recast, art. 12.

[30] 2007 Service of documents regulation, art. 8.

[31] 2020 Service of documents regulation recast, art. 12(3)

[32] Cfr. Oberste Gerichtshof, 1 March 2012, 1Ob218/11g ("*Diese Regelung lässt nach ihrem eindeutigen Wortlaut keinen Zweifel daran, dass Schriftstücke in ihrer originalen oder übersetzten Fassung in der Amtssprache des Empfangsmitgliedstaats immer (das heißt ohne jede weitere Bedingung) zugestellt werden dürfen (Bajons aaO Art 8 EuZVO Rz 3). Die der Vorstandsvorsitzenden der Zweitbeklagten zugestellten gerichtlichen Schriftstücke waren in die niederländische Sprache, also die Sprache des Empfangsmitgliedstaats übersetzt worden. Die Verweigerung der Annahme war somit nicht gerechtfertigt*"). See also Judgment of the Court (Third Chamber) of 8 May 2008, Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin, Case C-14/07, para. 58 ("*... if the Community legislature chose, by Article 8 of Regulation No 1348/2000, to permit the addressee of a document to refuse it if it is not translated into an official language of the Member State addressed or a language of the Member State of*

documents translated into the language of that State cannot be challenged and will be the "safest" option (even though not necessarily the cheapest) for the person seeking service.

The person seeking service abroad may "take a chance" and send the documents without translation into the official language of the *loci actus*[33]. The recipient may thus contest the fact that he is not able to understand the content of the documents due to linguistic reasons. It is however for the court of the merits to determine whether this was an abuse or not, not for the foreign national authority carrying out the requested service[34]. Leaving aside the problems that have already emerged in the

transmission which he understands, that is principally to establish in a consistent manner who is responsible for the translation of such a document and liable for the cost thereof at the stage when it is served"), on which see SUJECKI, *Zum Annahmeverweigerungsrecht gem. Art. 8 EuZVO bei vertraglicher Bestimmung der Vertragssprache*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2008, p. 37; HESS, *Übersetzungserfordernisse im europäischen Zivilverfahrensrecht*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2008, p. 400, and RASIA, *Sui limiti di legittimità del rifiuto della notifica infracomunitaria da parte del destinatario di atto non tradotto: il caso Weiss und Partner*, in *Int'l Lis*, 2008, p. 127.

[33] STADLER, *Neues europäisches Zustellungsrecht*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2001, p. 518.

[34] Cf Order of the Court (Tenth Chamber) of 28 April 2016, Alta Realitat SL v Erlock Film ApS and Ulrich Thomsen, Case C-384/14, para. 56. The 2007 Service of documents regulation is silent on the matter. The Commission's proposal expressly provided a new passage in the 2007 art. 8, according to which "*If the addressee has refused to accept the document in accordance with paragraphs 1 and 2, the court or authority seised with the legal proceedings, in the course of which service was carried out, shall verify whether the refusal was well founded*" (Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), Brussels, 31.5.2018, COM(2018) 379 final, 2018/0204 (COD), art. 8, para. 4). The text adopted by the Council in October 2020 has removed the specification for the corresponding art. 12, and has devoted a recital to the matter, according to which "*If the addressee has refused to accept the document and the court or authority seised of the legal proceedings decides upon verification that the refusal was not justified, that court or authority should consider an appropriate way of informing the addressee of that decision in accordance with national law. For the purposes of verifying whether the refusal was justified the court or authority should take into account all the relevant information on the file in order to determine the language skills of the addressee. Where relevant, when assessing the language skills of the addressee, the court or authority could take into account factual elements, for example documents written by the addressee in the language concerned, whether the addressee's profession involves particular language skills, whether the addressee is a citizen of the forum Member State or whether the addressee previously resided in that Member State for an extended period of time*" (Council of the European Union, Interinstitutional File:

case law as per the threshold above which the invocation of art. 8 of the 2007 Service of documents regulation may be deemed pretentious, at the very best, the court called to determine whether the recipient has sufficient "passive" knowledge to understand the (legal) claim surely has less difficulty where this evaluation has to be made over the competences of an individual person. If the recipient of a writ of summons is a specific natural person, his or her own linguistic competences will be used as a benchmark to understand if, in a given case, the refusal to service under art. 8 of the 2007 regulation, thus the request for translations, was legitimate or rather a procedural tactic. Yet, when the addressee of the documents is a corporate entity, the question becomes which one is the person within the company whose competences should become the benchmark to evaluate a legitimate invocation of the "linguistic exception".

Absent indications or guidelines from the Court of Justice of the European Union[35], domestic courts have developed approaches to deal with the matter. German and Austrian courts[36] have refrained from adopting rigid schemes privileging the linguistic competences only of top-ranking company members, such as CEOs, legal representatives or owners[37]. As such a criterion would significantly reduce the possibility to serve documents in the language used by the company for business purposes, the solution of domestic courts seems to strike a fair balance between competing interests as it also avoids taking into consideration any linguistic competence held for "private purposes" by employees. The simple fact that an employee within the company does understand a language should not be sufficient to oust art. 8 of the 2007 Service of documents regulation. Rather. In this sense, it has been deemed necessary by some courts that the company, in its entirety, has sufficient means to understand the

2018/0204(COD), Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council of the service in the Member States of judicial and extrajudicial documents (service of documents) (recast), 22 October 2020, recital 26). In the final text, see 2020 Service of documents regulation recast, recital 26.

[35] In these terms, LG Frankfurt/Main, 3 April 2014, 2-03 O 95/13, in *dejure.org*.

[36] Oberste Gerichtshof, 1 marzo 2012, 1Ob218/11g cit.; LG Frankfurt/Main, 3 April 2014, 2-03 O 95/13 cit.; LG München, 30 November 2011, 7 O 861/09, in *unalex* DE-3198, and AG Erding, 5 December 2013, 4 C 1702/13, in *unalex* DE-3191.

[37] In favour of a substantive approach, looking at the competences possessed by the company rather than by the top-ranking working positions, LG München, 30 November 2011, 7 O 861/09, cit., and AG Erding, 5 December 2013, 4 C 1702/13, cit.

content of the document served. This becomes apparent where the company has in place permanent tools to communicate and manage a portfolio of clients from a specific State[38].

This last approach seems obviously less likely to raise doubts in the case of big corporations; yet, applicative uncertainties might still raise in borderline cases, leaving to courts the tasks to solve the issue on a case-by-case basis.

The 2020 recast of the Service of documents regulation appears to remain silent on the invocation of current art. 12 by legal entities specifically. Not even the new recital 26 on the "evaluation of linguistic skills", seems to be of particualr use in the context of companied. According to the recital, "*If the addressee has refused to accept the document and the court or authority seised of the legal proceedings decides upon verification that the refusal was not justified, that court or authority should consider an appropriate way of informing the addressee of that decision in accordance with national law. For the purposes of verifying whether the refusal was justified the court or authority should take into account all the relevant information on the file in order to determine the language skills of the addressee. Where relevant, when assessing the language skills of the addressee, the court or authority could take into account factual elements, for example documents written by the addressee in the language concerned, whether the addressee's profession involves particular language skills, whether the addressee is a citizen of the forum Member State or whether the addressee previously resided in that Member State for an extended period of time*".

As the approach followed this far by some domestic courts appears reasonable and consistent with the general scheme of EU law, and considering the persisten legislative silence, it seems it should be supported by the Court of Justice of the European Union. The normative text could be implemented with a recital offering (uniform) guidance to courts, incorporating the criteria of the case law[39].

4. *The (in)derogable nature of art. 8 Service of documents regulation*

Evidently connected to the question of the assessment of linguistic skills, also as emerges from recital 26 recast, the last question revolves

[38] Cf AG Berlin-Mitte, 8 March 2017, 15 C 364/16, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2018, p. 408, on which PICKENPACK, ZIMMERMANN, *Übersetzungserfordernis bei Zustellungen gerichtlicher Schriftstücke an juristische Personen*, in *idem*, p. 364.

[39] See already DOMINELLI, *Sulla tecnica della "Focalizzazione" nel contesto della notifica transfrontaliera a persone giuridiche*, cit., p. 140 ff.

around whether the parties can derogate to the normal operability of art. 8 2007 Service of documents regulation (now, art. 12 recast). Whereas party autonomy has acquired relevance in contractual matters, and in torts, the Service of documents regulation is also applicable in other fields where party autonomy is traditionally more limited, if not excluded – such as family matters or cross-border insolvency. In this sense, a parallelism with the relevance party autonomy has acquired in other fields seems only of little use for a generalized interpretation of the Service of documents regulation(s).

In general terms, two different scenarios should be taken into consideration and separately addressed.

The first relates to the translation of documents into the *lex loci actus*. As mentioned, the "sovereignty" of the State where service takes place prevails over effective knowledge. If documents are translated in such a language, the addressee cannot refuse service. Given the legal framework, there appears to be no room for party autonomy to oust the operability of art. 8 Service of documents regulation. In this sense, parties do not appear to be authorized to inhibit art. 8 where it allows for translation and service in the language of the place where service is to be performed. In other words: party autonomy cannot exclude the validity of the service operated in such a language.

The second scenario relates to the possibility for the parties to pre-emptively identify a language that the addressee will accept as valid (exclusively or alternatively) for the purposes of service. Will this "choice of language" bind the parties, should any party seek to challenge the previous agreement before the competent court? Limiting the question to the field of contracts, where party autonomy is generally more extended in comparison to other fields, some have argued that party autonomy could legitimise a waiver of rights under art 8 of Service of documents regulation, in the sense that parties could pre-emptively choose the language for the purposes of service[40]. Nonetheless, it appears that such an approach towards party autonomy in service matters under the current –

[40] Views in the scholarship are quite diverse. See HEIDERHOFF, *Art 8 EG-ZustVO 2007*, cit., p. 818 f. Cf SCHLOSSER, *Art. 8 EuZVO*, in SCHLOSSER, HESS, *EU-Zivilprozessrecht: EuZPR: EuGVVO, EuVTVO, EuMahnVO, EuBagVO, HZÜ, EuZVO, HBÜ, EuBVO, EuKtPVO*, München, 2015, p. 533 ff, giving significant relevance to such agreements as elements upon which linguistic knowledge should be addressed, yet excluding any proper automatism and biding nature. In general, contrary to a particular role to party autonomy, as this would lack clear normative basis, GALIČ, *Service Abroad In Civil and Commercial Matters – From The Hague Conventions To The EU 1393/2007 Regulation*, in *Collection of Papers, Faculty of Law, Nis 65*, 2013, p. 59, at p. 66. Arguing that contractual clauses on language communication that extend to the exchange of different views determines the lack for a need of a linguistic protection at the moment of

and future – legal regime should be rejected[41]. The right to choose language of service is not explicitly granted in EU law; a *renvoi* to the *lex fori processus* is also not foreseen (which thus calls out of the question possible solutions eventually prescribed by domestic law). On the contrary, the Service of documents regulation advises for caution: art. 8 is functional for the protection of the fundamental right of defense, and the Court of Justice has concluded that clauses on linguistic requirements for communication during contracts (rather than on service) between the parties do not provide for an automatism. Courts must always verify the level of knowledge of the language by taking into consideration all the elements[42]. Casting an eye to a (possible) future, this conclusion seems indirectly reinforced by recital 26 recast, as this stresses the necessity for the court – if the addressee has refused to accept the document – to take into account "*all the relevant information on the file in order to determine the language skills of the addressee*". Hence, from a practical perspective, it remains open for the parties to choose a specific language for the purposes of service, and not contest this choice – which is however a

service of documents, Opinion of Advocate General Trstenjak delivered on 29 November 2007, Case C-14/07, Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin, Joined party: Nicholas Grimshaw & Partners Ltd, cit., para. 88 f ("*In such a case the need for a document to be translated from the language of the Member State of transmission into the language of the Member State addressed can no longer be justified by the protection of the addressee's interests. Anyone who voluntarily agrees with the other party in a contract concluded between traders on a certain language regime for correspondence cannot later claim that his legitimate interests would not be protected if that language regime were followed. Such a claim would come under the heading 'venire contra factum proprium'. (53) In such a case the demand for a translation of annexes in the language of the Member State of transmission departs from the protective purpose of the right to refuse acceptance established in Article 8(1) of Regulation No 1348/2000; by accepting such a contractual regime, the interest in a translation in the language of the Member State addressed is negated, as a result of which the right to refuse acceptance under Article 8(1) of Regulation No 1348/2000 loses its justification. Otherwise the document would have to be translated into the language of the Member State addressed (54) even where there was, first, a contract concluded between the parties in the course of their business in which the language of the Member State of transmission was laid down for correspondence with the authorities and public institutions of that Member State of transmission, second, a jurisdiction clause in favour of the courts of the Member State of transmission and, third, a choice of law clause in favour of the law of the Member State of transmission. Such a result would run counter to the purpose of Regulation No 1348/2000, however*").

[41] Cf DOMINELLI, *Current and Future Perspectives on Cross-border Service of Documents*, Rome, 2018, p. 165 ff.

[42] Judgment of the Court (Third Chamber) of 8 May 2008, Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Han-delskammer Berlin, Case C-14/07, cit., para. 85 ff.

way to exclude judicial control rather than a legitimate exercise of party autonomy[43].

5. *Concluding remarks*

The path to the adoption of a recast Service of documents regulation has been anything but easy; some key features have played a major role in the process and digitalization has raised debates and concerns. Whilst

[43] To some extent, this argument seems to find comfort in a recent case-law, which was however delivered specifically on art. 8 2007 Service of documents regulation. In BGH, Urteil vom 25.02.2021 – IX ZR 156/19, in *Dejure*, the German Supreme court, amongst the many points, also argued the local authorities requested of service shall accept the documents and forward the request the those of the place where service is to be performed, even if the first local authorities have knowledge of that fact that the person requesting service abroad is serving documents in a language not known by the recipient. This is because the addressee may fail to refuse service, or may do so beyond the procedural timelimits set by the regulation (see paras. 35 ff, where it can be read that "*Zum anderen berücksichtigt die Annahme einer Obliegenheit, zunächst einen Zustellungsversuch ohne Übersetzung zu unternehmen, auch nicht die berechtigten Interessen des Antragstellers. Er wäre gehalten, das Risiko einer berechtigten Annahmeverweigerung des Empfängers nach Art. 8 Abs. 1 EuZVO auch dann einzugehen, wenn er sicher weiß, dass der Empfänger sprachunkundig ist. Macht der Empfänger tatsächlich von seinem Annahmeverweigerungsrecht Gebrauch, ist dies für den Antragsteller in mehrfacher Hinsicht mit Nachteilen behaftet, die sich ihrerseits aus Art. 8 Abs. 1, Abs. 3 EuZVO ergeben. Es muss eine neue Zustellung vorgenommen werden, die für die vom Antragsteller zu wahrenden Fristen grundsätzlich ex nunc wirkt … Den Antragsteller trifft im Hinblick auf Art. 8 Abs. 3 Satz 3 EuZVO nunmehr ein zusätzliches Verjährungsrisiko, weil er mit der erneuten Zustellung nicht beliebig zuwarten kann und ungeklärt ist, welcher Zeitraum ihm hierfür zur Verfügung steht … Darüber hinaus tritt als Folge der Annahmeverweigerung eine Verfahrensverzögerung ein. Diese resultiert nicht nur aus der Notwendigkeit, dass nun doch eine Übersetzung angefertigt werden und die Zustellung wiederholt werden muss. Vielmehr tritt der Zeitverlust auch dadurch ein, dass Art. 8 Abs. 3 Satz 3 EuZVO die Rückwirkung auf das "Verhältnis zum Antragsteller" beschränkt. Denn die Zustellung des verfahrenseinleitenden Schriftstücks darf nicht zum Lauf von Verteidigungsfristen zu Lasten des Empfängers führen, solange dieser den Inhalt des Schriftstücks nicht verstehen kann … Daher beginnt der Lauf der Klageerwiderungsfrist gemäß Art. 8 Abs. 3 Satz 2 EuZVO erst mit Zustellung der Übersetzung … Eine Einengung des in Art. 5 Abs. 1 EuZVO vorausgesetzten Wahlrechts würde letztlich auch bedeuten, den Zustellungsbetreiber daran zu hindern, den sichersten Weg zu beschreiten. Selbst wenn er positive Kenntnis von den Sprachfertigkeiten des Empfängers hat und eine Übersetzung danach entbehrlich wäre, besteht die Gefahr, dass der Empfänger die Annahme (unberechtigt) verweigert. Ein Streit über die Berechtigung der Annahmeverweigerung … kann den Verfahrensgang erheblich verzögern. Vor diesem Hintergrund erscheint es nicht zumutbar, dem Antragsteller im Rahmen des § 167 ZPO eine Vorgehensweise abzuverlangen, die für ihn mit prozessualen Nachteilen verbunden sein kann*").

the interest for a "modernization" of the regime for administrative cooperation and for direct service in the internet era appear self-evident, the construction of the necessary interconnected IT-infrastructure, its funding, as well as the training of officials and personnel has contributed in slowing down the political debate.

Yet, to some extent the recast process seems to have missed some opportunities to settle practical problems courts have already dealt with. Whereas an "evolution" of a legal framework (if well-reasoned and pondered, of course) is always welcome as it allows provisions to "keep up" with an ever-changing society, such an interest for the future should not come at the expense of the past. The legislator should not "forget" to look at "past problems" and should offer guidance, at least with new recitals, on practical applicative issues that have been solved by the courts of (some) Member States. Evidently, the risk is that solutions to such problems that have been developed within some Member States are not adopted or followed in others, with possible negative outcomes in terms of certainty and uniform application of EU law.

ISABEL GÓMEZ FUSTER

SURROGACY IN SPAIN AND INTERNATIONAL TRENDS

CONTENTS: 1. Introduction. An overview of parentage and surrogacy in Spain. – 2. ISA: a matter of domestic law or private international law? – 3. Legal framework in Spain. – 3.1. Spanish legal background. – 3.2. Administrative doctrine. – 3.2.1. The Spanish General Directorate for Registries and Notaries (DGRN). – 3.3. Judicial journey. – 3.3.1. Civil courts. – 3.3.2. Surrogacy before social courts: Labour and social security law. – 4. Current comparative overview. – 5. Approaches to surrogacy from international institutions: Council of Europe, European Union and The Hague Conference on Private International Law. – 5.1. Council of Europe and European Union. – 5.2. The Hague Conference on Private International Law. Draft Protocol. – 6. Conclusions.

1. *Introduction. An overview of parentage and surrogacy in Spain*

The concept of family has evolved in very different ways over the last decades, with a wide range of family models and different ways of understanding life, including family planning and assisted reproductive technologies that have developed at a greater speed, solving a multitude of sterility problems for couples, and helping homosexual and single-parent families to have their own children.

Among all these techniques of assisted human reproduction, surrogacy arrangements, the newest and most controversial, stand out from the rest. As option only open to certain countries, some citizens tend to move from one state to others, looking for more permissive laws. Also known as International "Fertility Tourism", "Fertility Tourism"[1] or "Cross-border reproductive care", this practice has brought about a number of problems in the recognition of parentage. Given the possibility of carrying out this kind of practice in countries where its regulation allow for it, we find ourselves in the need to adopt domestic or international regulations that provide certainty, security and continuity of legal parentage in international situations for all parties involved.

Together with Belgium, the Czech Republic, Denmark, Switzerland and Slovenia, Spain is a destination country for access to assisted human

[1] Regarding the concept of "International Surrogacy Agreement" and others, please refer to the definitions given in the "*Preliminary report on the issues arising from international surrogacy arrangement*" drawn up by the Permanent Bureau of The Hague Conference on Private International Law in March 2012, https://assets.hcch.net-/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf.

reproductive techniques, because 1) our legislation is very permissive, admitting almost all possible techniques, except surrogacy arrangements and selection of the sex of the baby, and 2) lower prices, compared to other countries, make for fewer waiting lists and the high quality of medical centres.

However, from our perspective, the key issue is not the prohibition or legalization of this kind of practice, but rather the need to find a solution for those children who are born through surrogacy in a country where it was possible and need their parentage to be recognized in a country where it is not permitted. Furthermore, it is not merely a matter of recognition, but involves the protection of children and pregnant women, the prevention of child trafficking and sale, and the detection of abuse.

In this article we shall analyse the situation of surrogacy and parentage in Spain. Indeed, we shall 1) try to understand the legal framework of surrogacy in Spain from both the administrative and judicial sides and 2) observe the chaotic situation existing at the moment and how courts and academics are dealing with these cases without uniformity.

In Spain, surrogacy arrangements are forbidden under Article 10 of the *Ley sobre técnicas de reproducción humana asistida* (Law on Assisted Human Reproduction Techniques, hereinafter LTRHA)[2]. However, this does not prevent interested parties from travelling to other countries where it is permitted and then seeking for recognition of the judgement or public document where this parentage is sought to be acknowledged.

The following problem rises before Consular authorities because the lack of a clear legal regime dealing with cases with foreign elements may entail a different treatment depending on the view of the competent authority.

From the perspective of Spanish law, as indicated above, this kind of contract is prohibited and considered null and void. But in actual fact, the application of Spanish Law to such contracts concluded abroad is questionable, as is the need to establish the applicable law. However, and despite this prohibition, Article 10.3 LTRHA allows claims of paternal filiation with respect to the biological father. This means that although entering into this type of contract is prohibited in our country, if the contract takes place abroad, in spite of the prohibition and its non-acceptance, the contract concluded is indirectly being validated and therefore allows claims of parentage by the male who contributed the genetic material.

[2] BOE n.126 of 26 May 2006.

Different opinions can be found among academics in this field. In the first place, some authors[3] support the nullity of International Surrogacy Arrangements (hereinafter ISA) under Article 10.1 LTRHA, and therefore, maintain that parentage is established in favour of the surrogate mother as a consequence of giving birth, as stated under Article 10.2 LTRHA.

By contrast, other authors[4] believe that this prohibition has become obsolete and is out of place in current times, and that we cannot ignore such an overwhelming reality, so that Spanish law should, in certain cases regulate surrogacy.

Within the social order, numerous judicial resolutions recognize the right to maternity benefits for parents whose children have been born as a result of ISA. Courts and administrative bodies in Spain resolve the same issues in different ways. Even the Spanish Bioethics Committee considers the approval of a basic universal regulation to be desirable, either accepting access to assisted reproduction techniques and surrogacy at a universal level or limiting the use of such practices to exceptional situations[5].

However, Spain is not the only country in which regulating ISA is proving difficult. At a European and international level, the situation is not very different. EU members do not follow a homogeneous criterion and surrogacy is still a very controversial matter to legislate. The regulation is varied and differs from state to state. Therefore, people who wish

[3] In the opinion of this part of the doctrine, as stated by Professor Calvo Caravaca "the prohibition must remain in order to avoid the trade on the human body and on persons, but also the exploitation of the pregnant woman". Also Aguilar Griede H. "Derechos Humanos fundamentales y gestación por subrogación en el marco de los nuevos modelos familiares" in Cuadernos de Derecho Transnacional, 2029, p. 40.

[4] AZCÁRRAGA MONZONÍS, C. "*La gestación por sustitución en el derecho internacional privado español. Un ejemplo más de la controvertida aplicación de conceptos jurídicos indeterminados*", in *AEDIPr*, 2017, p.674; FLORES RODRÍGUEZ, J. "*Convenio gestacional internacional y filiación transfronteriza: el modelo de los países del Este de Europa"* in *A fondo. Actualidad Civil* nº1, 2019; HERNÁNDEZ RODRÍGUEZ, A. "*Determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución: ¿Hacia una nueva regulación legal en España?"* in *Cuadernos de Derecho Transnacional,* 2014, p. 151.

[5] Report of the Spanish Bioethics Committee on the ethical and legal aspects of surrogacy. Accessed on 3 December 2019 and available at: http://assets.comitedebioetica.es/files/documentacion/es/informe_comite_bioetica_aspectos_eticos_juridicos_maternidad_subrogada.002.pdf.

to become parents through ISA travel to more permissive states when it is prohibited in their country, thus "internationalising" such practices[6].

Some countries, such as neighboring Portugal, have already adopted their own laws[7] regulating terms and conditions of surrogacy arrangements thereby ensuring the best possible guarantees for all parties involved. Indeed, the lack of regulation does not ensure the disappearance of the practice, but rather that it will likely take place in other countries perhaps with fewer guarantees and less safety.

Hence, the need to approach the study from the perspective of Private International Law (hereinafter PIL) and through rules established under PIL applicable in Spain. We must take into account that, cases tackled by authorities in our country already contain elements of an international nature, insofar as the recognition of the parentage of a child born abroad through a surrogacy arrangement is requested.

This continues to be a major point of debate and controversy, as, despite its detractors and defenders, once this issue has been resolved, and despite approaching the situation from the perspective of Spanish Private International Law, when recognition is sought, public policy grounds and the principle of the best interest of the child are invoked to deny it. This means that the effects of the contract carried out abroad legally, according to the laws of the relevant country, are deemed as a problem in non-permissive countries. In this contribution, we shall explore how Spain is dealing with this matter and, in order to do so, shall start by providing definitions of key concepts.

2. *ISA: A matter of domestic law or private international law?*

There is no doubt that most surrogacy cases in our country are of an international nature. This means that authorities must deal with cross-border relationships and shall therefore apply Private International Law rules (PIL hereinafter), especially those about recognition and enforcement of foreign decisions. In the absence of international or supranational regulations governing these practices, national authorities shall apply domestic PIL rules.

[6] CALVO CARAVACA, A. *"Gestación por sustitución y derecho internacional privado. Más allá del Tribunal Supremo y del Tribunal Europeo de Derecho Humanos"*, in *Cuadernos de Derecho Transnacional*, 2015, p. 49.

[7] Lei n.º 25/2016, de 22 de Agosto. Regula o acesso à gestação de substituição, procedendo à terceira alteração à Lei n.º 32/2006, de 26 de julho. www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2590&.

In Spain, there is no doubt about the possibility of fixing the parentage of the children born through ISA with respect to their intended parents by other means, despite the nullity of surrogacy arrangements under Article 10 LTRHA. This possibility is provided for both under the current LTRHA 14/2006 and the previous one, Law 35/1988 of 22 November, *Ley sobre técnicas de Reproducción Asistida* (on Medically Assisted Human Reproduction). Therefore, if it were considered a matter of domestic law, we would have the answer in the Law, in a way of recognizing the parentage in these cases.

As there are no international or supranational regulations governing these practices, the only option is PIL. The vast majority of children born through these techniques are transferred to a state other than the one in which they were born, where this type of practice is normally not allowed. This means that the parents must go through the Civil Registry in order to register the filiation of their child born through an ISA in a different country where the practice is legal and recognition may be refused[8]. In Spain, doctrine is not uniform and there are several doctrinal theses that have emerged around the control of legality under the rules of PIL[9]: those in favour of directly applying the Spanish material law[10], those in favour of verifying the legality of the act contained in the document by applying the same law applied by the foreign authority[11], and those who think that the legality of the act contained in the document can only be granted efficacy by applying the conflict rules of the *forum.*

In my opinion, we are facing situations of PIL, as these are cases with clear foreign elements from the perspective of Spanish authority, for instance, the fact that the arrangement and the birth of the baby, take place abroad, and that the surrogate woman resides abroad and hold foreign nationality. Therefore, and in application of the rules of Spanish PIL, the technique of recognition and enforcement of judicial decisions and foreign authentic instruments shall be applied.

However, the way our courts and academics are dealing with these cases is not uniform. Two different approaches can be distinguished: on the one hand, the substantive treatment of international cases, which does not take into consideration the foreign element; and consequently

[8] As happened in many cases such as *Campanelli and Paradiso v.Italy.* Judgment of the Court (Grand Chamber) of 24 January 2017, Paradiso and Campanelli v. Italy, Case 25358/12, para. 70.

[9] HERNÁNDEZ RODRÍGUEZ, A. *"Determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución: ¿Hacia una nueva regulación legal en España?"* in *Cuadernos de Derecho Transnacional,* 2014, p. 156.

[10] Based on Article 23 of the Spanish Civil Registry Law.

[11] Nevertheless, the principle of Private International Law exclusivity prevents from the application of another state´s conflict rules.

entails the application of the Spanish rules on recognition and enforcement of foreign decisions.

On the basis of the former position, the reasoning starts from the point of view of domestic substantive law, thus applying the Spanish legal system directly wherefore the nullity of the ISA is declared. In this same line, an important sector of the doctrine considers that the determination of the parentage of children born abroad through ISA should be resolved through the direct application of Article 10 LTRHA. This in view of the fact that this rule is deemed a "mandatory provision", or "*loi de police*", as it protects Spanish public and social interests[12], and should therefore be applied on a mandatory basis to all cases brought before Spanish courts and authorities, whether domestic or international.

By contrast, the second approach deals with these cases from the point of view of PIL, taking into consideration the existence of a foreign element as well as the fact that a decision has been rendered by a competent foreign authority. Consequently, the assessment of the possible effects to be granted to such decision in Spain shall be governed by the rules on recognition and enforcement of foreign decisions on the basis of the best interest of the child and public policy exception.

This panorama, as well as the number of resolutions, instructions and recommendations given in recent years, reveals the extent of regulatory and judicial chaos currently existing in our country in this field and its most serious and my no means ignorable, consequence, i.e. the existence of a child who cannot be made responsible for having come into this world through a surrogacy arrangement, but who deserves legal protection, regardless of the decisions undertaken by the adults involved. In this regard, it is important to recall that some children have been deprived from protection and rights for years due to the lack of recognition of their parentage and, therefore, their Spanish nationality.

3. *Legal framework in Spain*

In this section we shall provide the theoretical and practical grounds underpinning the Spanish legal framework in this area. On the one hand, Law 14/2006 (LTRHA) contains the only provision referring to surrogacy arrangements in the Spanish legal system. Regarding the practical side, on the other hand, we shall approach the administrative doctrine given by the *Dirección General de Registros y del Notariado* (General

[12] HERNÁNDEZ RODRÍGUEZ, A. "*Determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución: ¿Hacia una nueva regulación legal en España?* in *Cuadernos de Derecho Transnacional*", 2014, p. 159.

Directorate for Registries and Notaries, hereinafter DGRN)[13], and the judicial doctrine, including two of the most important and controversial judgments regarding ISA rendered in Spain. After that, we shall analyse the case law provided by the Social Court and assess how labour and security law impacts ISA cases.

3.1. *Spanish legal background*

The first Spanish law to cover this practice was Law 35/1988, of 22 November, on Medically Assisted Human Reproduction. Article 10 established that the contract through which the surrogacy was agreed was null and void.

This law represented a great scientific and clinical advancement in mitigating the effects of sterility and research. Partially amended by Law 45/2003, it was repealed by currently enforced LTRHA 14/2006[14]. However, none of such laws have modified existing regulations on this issue, so that surrogacy contract have been deemed null and void throughout.

LTRHA 14/2006, establishes under Article 10.1 that "*The contract by which surrogacy is agreed, with or without a price, with a woman who renounces maternal filiation in favour of the contracting party or a third party shall be null and void*". The second paragraph provides that "*parentage of the children born by surrogacy will be determined by the birth*". And the third states that "*The possible paternity action with respect to the biological father is not precluded in accordance with the general rules*".

In accordance with this latter provision, an action to claim paternal parentage by the biological father is permitted. This action is the general one about legal determination of parentage[15] and Spanish courts shall have jurisdiction according to Article 22 of the Organic Law 6/1985 of the Judiciary (*Ley Orgánica del Poder Judicial*, hereinafter LOPJ)[16].

The principle of the Roman law *mater semper certa est* is enshrined in the Spanish regulation under Article 10.2 LTRHA, which states that the parentage of children born by surrogacy will be determined by the birth. However, despite this categorical prohibition in our civil system, the possibility of carrying out this type of contracts in other countries where it is permitted and legal, has led many individuals and couples to travel abroad to this end. The problem arises when recognition of the

[13] Currently called *Dirección General de Seguridad Jurídica y Fe Pública* (General Directorate of Legal Security and Public Faith).

[14] BOE n.126, 27 May 2006.

[15] Articles 764 and followings in Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil. BOE n.7, 8 January 2000.

[16] Article 22 LOPJ. BOE n.157, 2 July 1985.

parentage of the child who was born abroad is sought and the answer of our administrative and judicial bodies appears to be uncertain and possibly different depending on the interpretation of the competent authority. Different answers to the same problem have been given and the lack of a unique criterion has resulted in legal uncertainty.

3.2. *Administrative doctrine*

Things changed in Spain in November 2008 when the authority in charge of the Civil registry of the Spanish Consulate in Los Angeles refused to register the birth of a pair of twins born in San Diego in October 2008 on the basis of a surrogacy contract concluded in California by two male Spanish citizens married in Spain in 2005. The Consul considered that such recognition could violate Article 10 LTRHA and, consequently, Spanish public policy. This decision deprived the children of the ties with the intended parents (including Spanish nationality). In the meantime, they were granted US nationality and subsequent protection under US Law.

3.2.1. *The Spanish General Directorate for Registries and Notaries*[17] *(DGRN)*

After this event in November 2008 when the authority in charge of the Civil registry of the Spanish Consulate in Los Angeles refused to register the birth of the twins born in San Diego through an ISA, DGRN adopted a number of resolutions and instructions intended to protect the best interests of children in these cases.

3.2.1.a) *Resolution of 18 February 2009 rendered by DGRN*

The first one of these resolutions was issued on 18th February 2009 by DGRN, and it was ordered the registration of the minors in the Civil Registry. The Resolution stated that a registration certificate was sufficient to establish birth and parentage because it is a decision rendered by a foreign authority, without the need of a judgment on parentage. It considered that this was a case of extraterritorial validity of foreign decisions in Spain and ordered the registration under the rules of PIL.

In this resolution, DGRN uses, the mechanism of recognition of foreign registration certificates, under which it checked that the requirements for recognition were met: the authority was internationally competent; the rights of access to justice had been respected in the state of

[17] The General Directorate of Registries and Notaries is an administrative body of the Ministry of Justice.

origin; and the effects following the recognition of the decisions were not contrary to Spanish international public policy. A further refusal to record parentage with the Spanish Civil Registry could have deprived the children of parentage by their genetic father, with this family tie changing every time they crossed state borders.

In addition, the minors would have been deprived of any fundamental right under Article 7 of the Convention on the Rights of the Child of 1989: "*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents*"[18].

3.2.1.b) *Instruction of DGRN of 5 October 2010 on the registration regime of parentage of children born through surrogacy*

The Resolution of 18 February 2009 was challenged in court. On 5 October 2010, an Instruction[19] rendered by DGRN allowed this relationship of parentage declared by a foreign court to be recorded in the Spanish Civil Registry, "*thus allowing the cross-border continuity of a relationship of parentage that implies parental responsibilities. And this even if this relationship of parentage is the result of a surrogate pregnancy*". With this Instruction, the provisions of Law 14/2006 for cases in which surrogate pregnancy occurs outside of Spain are rendered ineffective, revealing an open-minded and more permissive position according to reality.

Through this Instruction, DGRN considers it necessary to set down criteria for the determination of conditions of access to the Spanish Civil Registry for those born abroad through surrogate motherhood in order to provide full legal protection in the best interests of the child.

To this end, the same instruction establishes that the judicial decision issued by the foreign competent court must be presented together with the application for registration, determining the parentage of the child, after *exequatur*, if it was the subject of a contentious procedure, or incidental control[20] in the case of a voluntary jurisdiction procedure.

[18] Legal group 5.

[19] BOE n. 243 of 7 October 2010.

[20] "*The incidental control must assess: a) the regularity and formal authenticity of the foreign judicial decision and of any other documents presented; b) that the Court of origin has based its international judicial competence on criteria equivalent to those contemplated in Spanish legislation; c) that the procedural rights of the parties have been guaranteed; d) that the best interests of the child and the rights of the mother have not been infringed; e) that the judicial decision is final and that the consents given are irrevocable, or if they are subject to a revocation period according to the applicable foreign*

A foreign certificate or a simple declaration accompanied by a medical certificate relating to the birth of the child which does not contain the identity of the pregnant mother cannot be accepted as a certificate suitable for the registration of the birth and parentage of the child.

In some way, requiring a judicial resolution issued by the competent court, aims to control the fulfilment of the requirements of perfection and content of the contract under the legal framework of the country where it has been concluded, as well as the protection of the interests of the child and the pregnant mother[21].

Therefore, the Instruction opened up the possibility of registering in the Spanish Civil Registry a relationship of parentage declared by a foreign court, thus making it possible for the cross-border continuity of a relationship of parentage involving parental responsibilities. This requirement is grounded precisely in Article 10.3 LTHRA, which refers to the general rules on the determination of parentage, requires the exercising of procedural actions and the consequent judicial resolution to determine the paternal parentage of children born through a surrogacy arrangement, and aims to facilitate cross-border continuity of a relationship of parentage declared by a foreign court, providing the resolution is recognized in Spain.

Same also aims to "*monitor compliance with the requirements of the law of the country in which the contract is concluded as to its perfection and content, as well as the protection of the interests of the child and the pregnant mother. It allows to ascertaining the full legal capacity and the capacity to act of the pregnant woman, the legal effectiveness of the consent given and the verification that there is no simulation in the surrogacy arrangement that covers international child trafficking. ...a foreign registration certificate or a simple declaration accompanied by a medical certificate of birth which does not show the identity of the pregnant mother shall not be admitted as a certificate of eligibility for birth and parentage registration*"[22].

legislation, that this period has elapsed without the person having recognized power of revocation having exercised it". Instruction of 5 October 2010 rendered by the DGRN on the registration regime of parentage of children born through surrogacy. BOE n. 243 of 7 October 2010.

[21] "Allows the full legal capacity of the pregnant woman to act, the legal effectiveness of the consent given because she has not made a mistake regarding the consequences and scope of the consent, nor has she been subjected to deceit, violence or coercion or the possible provision and/or subsequent provision regarding the power to revoke the consent or any other requirement provided for in the legal regulations of the country of origin. It also allows verification that there is no simulation in the ISA that covers international trafficking in minors". BOE n. 243 of 7 October 2010.

[22] Instruction of 5 October 2010 rendered by the DGRN on the registration regime of parentage of children born through surrogacy. BOE n. 243 of 7 October 2010.

This Instruction has been the object of numerous criticisms, as *Reglamento del Registro Civil* (Regulation on the Civil Registry; RRC hereinafter)[23] admits the presentation of a foreign authentic act as a valid title for the registration of parentage in Spain under Articles 81 and 85 RRC. Therefore, firstly, to require a foreign judicial resolution on parentage in these cases is said to be contrary to Law and secondly, the main function of the Civil Registry is to provide legal certainty and legal security regarding the civil status of persons without having to go to court each time a fact relating to the civil status of persons has to be proven. (Articles 9 and 92 *Ley del Registro Civil*[24]; LRC hereinafter).

3.2.1.c) *Instruction of DGRN of 14 February 2019*

On 14th February 2019, DGRN once again published an Instruction which established that the registration of the birth of a child born through ISA could be carried out by presenting the judicial decision issued by the competent court determining the parentage of the child, together with the application for registration. Under no circumstances will a mere foreign registration certificate or a simple declaration, accompanied by medical certification regarding the birth of the child in which the identity of the pregnant mother is not stated, be deemed a suitable title for the registration of the birth and parentage of the child[25].

A foreign registration certification or simple declaration without the identity of the mother is not valid, but a certification with the identity of the mother and paternal affiliation is admitted. This Instruction was never published in the Spanish Official Journal (BOE) as the Government announced its cancellation on 16 February 2019. In its *communiqué*, the Government recalled that surrogacy is illegal in Spain and committed itself to pursue the agencies and bodies that profit from offering such services, without prejudice to "*continuing to serve the best interests of the child*".

The cancelled Instruction allowed the registration of children born through an ISA with the presentation of a DNA test certifying the paternity or maternity of one of the parents. This way the requirements of DGRN Instruction of 5 October 2010 were maintained and anticipated

[23] Decreto de 14 de noviembre de 1958, por el que se aprueba el Reglamento para la aplicación de la Ley del Registro Civil. BOE n. 296 of 11 December 1958.

[24] *Ley de 8 de junio de 1957, del Registro Civil.* BOE n. 151 of 10 June 1957.

[25] GARAU, F. "*El gobierno deja sin efecto la Instrucción DGRN de hace dos días sobre registro de la filiación de los nacidos mediante gestación por sustitución*", Professor´s Grau blog, http://conflictuslegum.blogspot.com/2019/02/el-gobierno-deja-sin-efecto-la.-html.

what was later ruled by the European Court of Human Rights (hereinafter EcHR) in its legal opinion of 2019 wherefore biological paternity was recognised and her partner was urged go through regular adoption procedures[26].

3.2.1.d) *Instruction of DGRN of 18 February 2019*[27]

On 18th February 2019, DGRN published a further new Instruction, which revoked the previous one of 14 February 2019, and therefore the possibility of admitting foreign instruments bearing the identity of the mother and wherein the intended and biological father coincided. Under the new Instruction, the inscription onto the Consular Civil Registry is only permitted with a final judgement with *exequatur* or object of due incidental control when appropriate, as per the Instruction of 5 October 2010.

In the absence of a court ruling, the parents of the child must obtain, if appropriate, the child's passport and permission to travel to Spain from the local authorities and, once there, "*in order to ensure that all the guarantees are met with the necessary rigour of proof, the corresponding file must be opened for the registration of the child's affiliation, with the intervention of the Public Prosecutor's Office, or legal action must be taken to claim the child's parentage*".

The Instruction insists on the need for coordinated international action, and assumes that surrogate pregnancy involves a serious violation of the rights of minors and pregnant mothers, as well as clear profit-making motive by intermediary agencies[28].

3.3. *Judicial journey*

3.3.1. *Civil Courts*

The Resolution rendered by DGRN in 2009 was challenged by the Public Prosecutor and later annulled by the Judgement of the Court of First Instance of Valencia of 15 September 2010. This later decision was confirmed by the Provincial Court of Valencia on 23 November 2011 so that the refusal of the recognition was confirmed on the basis of Article 10 LTRHA.

[26] DUTREY, Y. "*El TEDH pronuncia su primera "opinion legal" sobre la maternidad subrogada*" in http://confilegal.com, 14 April 2019.

[27] BOE n. 45, 21 February 2019, p. 16730.

[28] DUTREY, Y. "*El TEDH pronuncia su primera "opinion legal" sobre la maternidad subrogada"* in *http://confilegal.com*, 14 April 2019.

The Provincial Court considered that principles such as the unavailability of the person or the dignity of the person (Article 10.1 *Constitución Española*, (hereinafter CE), moral integrity (Article 15 CE), the integral protection by the public authorities of children and mothers regardless of their marital status (Article 39.2 CE) had been violated. Furthermore, Article 10 LTRHA is deemed to be a "*loi de police*" (Legal ground 2).

The Provincial Court of Valencia considered that the best interest of the child was not infringed because the legal system itself offered other channels through which a child's parentage may be determined (Article 3 UNCRC). Under its view, Article 10 LTRHA protects this interest as it seeks to prevent human life from being the object of commerce. Furthermore, it does not violate the right to private and family life recognized under Article 8 of the European Convention on Human Rights (ECHR hereinafter) because the denial of birth registration does not prevent the development of a *de facto* family life, and moreover children can exercise their right to a unique identity, thereby achieving the same result as the recognition of the Californian certificate (Legal ground 2)[29].

However, despite the above conclusions, the parentage of the children remained unregistered for years, and this fact raises serious concerns as to whether the best interests of the children were taken into account above all other issues[30].

It seems that DGRN's response contained in the resolution of 2009 meant that it was somehow "*legalizing surrogacy*", providing the arrangement had not been concluded in Spain and a judicial decision had been rendered by the foreign competent court. Indeed, we appreciate the modern, open and innovative character of DGRN's approach, which somehow embraces interpretations in favour of the recognition of the parentage of children born through an ISA. This trend was confirmed a year later in the Instruction of 5 October 2010.

[29] HERNÁNDEZ RODRÍGUEZ, A. "*Determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución: ¿Hacia una nueva regulación legal en España?*" in *Cuadernos de Derecho Transnacional* (Octubre 2014), Vol. 6, Nº2, p. 161.

[30] Regarding this case and the lack of protection of children see the interesting study authored by SALES PALLARES, L. in "*La pérdida del interés (superior del menor) cuando se nace por gestación subrogada*" in *Cuadernos de Derecho Transnacional,* 2019, p. 326-347.

3.3.1.a) *Judgement of the Supreme Court n. 835/2013 of 6 February 2014. First Civil Chamber*

In February 2014, the Supreme Court, confirmed the prohibition of the registration of the children, and re-confirmed the position on 2 February 2015 following a challenge claiming the nullity of the actions, which was also refused. The intended parents were left with the options of claiming biological paternity (Article 10.3 LTRHA) or adoption.

In this case, the Supreme Court admits that the recognition of foreign decisions is the appropriate applicable legal technique, since there is a decision rendered by the administrative authority of the California Civil Registry when registering the birth of the children and determining parentage according to California Law. "What needs to be resolved is whether this authority's decision can be recognized and display its effects, in particular the determination of parentage in favour of the appellants in the Spanish legal system" (Legal ground 3.2).

To this end, the instrument must be authentic and regular and offer similar guarantees (Articles 85 and 81 RRC) to those required for registration under Spanish Law (Article 23 LRC). Moreover, there should be no doubt as to the reality of the registered event and its legality under Spanish Law.

The Supreme Court includes a number of rights within the concept of international public policy, such as the right to the physical and moral integrity of people, respect for their dignity, the protection of children or rules regulating fundamental aspects of the family, that is the right to parent-child relationships, to the free development of personality - understood as the autonomy of the person to choose freely and responsibly the option that is most in keeping with his or her preferences (Article 101.1 CE), to get married (Article 32 CE), to family privacy (Article 18.1 CE), to protection of the family, to comprehensive protection of children - who are equal before the law regardless of their filiation -, and of mothers, regardless of their marital status (Article 39 CE). Together with all these rights, it also includes within the scope of international public policy, Article 10 LTRHA, devoted to surrogacy, which declares such arrangements null and void. All these rights act as a limit to the recognition of decisions issued by foreign authorities.

The Supreme Court considered that "*the decision of the registry authority of California is contrary to the Spanish international public policy because it is incompatible with rules that regulate essential aspects of family relationships such as parentage, inspired by constitutional values of dignity of the person, respect for their moral integrity and protection of children*" (Legal ground 3.10).

With regard to the best interests of the child, the Court takes into account other legal assets, such as protecting the dignity and integrity of

pregnant women, preventing the commercialisation of pregnancy and parentage and avoiding the exploitation of women, and concludes that the latter objective should prevail (Legal ground 8).

On the other hand, the Supreme Court considers that the children's right to a single identity is not violated, as they had no effective link with the United States (Legal ground 4.9) and neither is "*the right to private and family life recognised in Article 8 ECHR*" violated.

According to the Spanish Supreme Court, though the refusal to register birth and parentage, may cause inconvenience to minors, this does not signify that same are unprotected. On the contrary, protection must be granted by applying Spanish Law. Specifically, Article 10.3 LTRHA allows claims of paternity by the biological father, so that, if any of the appellants has provided his genetic material, paternal filiation may be determined with respect to that person. Likewise, other options, such as foster care or adoption, would still allow for the real integration of the minors into the family nucleus (Legal ground 4.11).

This was an extremely controversial court decision, because four judges (out of nine) held different opinions. Indeed, they considered that if "certification is placed in this regulatory context, which presupposes the existence of a foreign decision, which is not recorded, as it presupposes the existence of a pregnancy contract, which is also not recorded in the certification, Article 81 RRC would have been correctly applied as the document was one that allowed registration in the Civil Register without the need to control its legality according to Spanish Law". For them, Article 10 LTRHA is not applicable, as parentage was already determined by a foreign authority.

With regard to the violation of public policy, these judges consider that the admission or refusal of this practice in Spain, where it is illegal, should be assessed differently depending on where it takes place. In cases taking place abroad, Spanish authorities are not asked about the legality of the contract, but rather about the recognition of a valid and legal foreign decision under relevant foreign law.

Recognition may be refused, if it is contrary to public policy in the best interests of the child. Once again, there is no consensus as to the meaning of 'best interests of the child' in these cases.

With regard to the commodification of pregnant women and children and the exploitation of women in a state of need, the judges consider that it cannot be generalised, as it also implies a manifestation of the right to procreate and the pregnant mother's capacity to consent - consent which is given freely and with knowledge of the consequences, as a voluntary and free agreement.

A further argument that was put forward by the same judges is that Comparative Law is trending towards a regularisation and relaxation of

these situations. Indeed, our country has done so with DGRN Instruction of 5 October 2010, which allows the registration of children born through surrogacy in countries whose regulations permit it, provided that one of the parents is Spanish and a judicial decision has been rendered in such country. It is precisely the attenuated public policy that has allowed certain effects to be recognised in our legislation for this type of contracts[31].

3.3.1.b) *Order of the Supreme Court n. 245/ 2015 of 2 February 2015. Civil Chamber*

After several judgments by the EcHR[32], following the Supreme Court's decision of 6 February 2014, in which the Supreme Court refused the recognition of the parentage of the children born in California, the Spanish Supreme Court ratified its position by denying the recognition in Spain of the registration of the twins born in California by Order n. 245/2015 of 2 February 2015. It ruled that the EcHR´ jurisprudence referred to situations with different results. These were cases with very concrete and specific circumstances and it considered that the situation of the child's distress differend in the two cases[33].

In these cases, the French *Cour de Cassation* did not allow the establishment of a parentage relationship between the child and the parents, not even with the biological father, due to the fraudulent nature of the ISA. By contrast, Spanish legislation did allow adoption to take place and

[31] Some effects are recognized in our legal system for this type of contract with regard to paternity or maternity benefits to the intended parents within the scope of the social courts of our country: Judgment of the Social Court n.2 of Oviedo of 9 April 2012; Judgment of the High Court of Madrid 18 October 2012 and 13 March 2013; Judgment of the High Court of Catalonia of 23 November 2012.

[32] *Mennesson v. France* (application no. 65192/11) and *Labassee v. France* (no. 65941/11). The cases concerned the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment and the couples who had had the treatment. Press Release issued by the Registrar of the Court. ECHR 185 (2014). 26 June 2014.

[33] In the cases of Mennesson v.France (application n. 65192/11) and Labasse v. France (n. 65941/11), the French Court refused to gran legal recognition in France to parent-child relationships legally established in the Unites States and, despite being aware that the children had been identified in the Unites States as the children of Mr and Mrs Mennesson and Mr and Mrs Labassee, had nevertheless denied them that status under French law, and denied the possibility of establishing the paternity of the biological father due to the fraudulent nature of the surrogacy arrangement. By contrary, in the Spanish case, the Spanish legal system provides that in respect of the biological father it is possible to determine paternal parentage and, in any case, if the intended parents and the children form a *de facto* family.

considered that the best interests of the child should be taken into account and that the appropriate measures should be adopted in order to establish the correct parentage of the child.

3.3.2. *Surrogacy before social courts: Labour and social security law*

While DGRN and civil courts deal with the recognition or non-recognition of parentage of the children born from a surrogacy arrangement, the social chambers of the various High Courts of Justice in Spain have repeatedly expressed their opinion on the issue through real situations where the child, whether born through surrogacy or not, needed to be protected and not discriminated against.

In the social order, courts have recognized some legal effects to these contracts by applying a sort of "mitigated public order", and have, in several cases, granted maternity benefits, based on the necessary care of the minors.

Parents considered as such by a foreign decision shall enjoy the right to maternity allowance and any subsequent benefits thereto attached (Article 133 *bis Ley General de la Seguridad Social*[34], hereinafter LGSS).

In addition, institutions declared by foreign judicial or administrative decisions are equated to adoption and pre-adoption care[35]. This allusion allows the inclusion of these new surrogacy cases, and to this end, deploy attenuated international public policy[36].

If maternity protection is not granted to a child born following a surrogacy contract, there would be discrimination on the grounds of parentage, this being contrary to Articles 14 and 39 CE. Indeed, the latter states that public authorities shall ensure the full protection of children, who are equal before the law, regardless of their parentage[37].

[34] BOE n. 261 of 31 October 2015.

[35] Article 2.2 Real Decreto 295/2009, de 6 de marzo, por el que se regulan las prestaciones económicas del sistema de la Seguridad Social por maternidad, paternidad, riesgo durante el embarazo y riesgo durante la lactancia natural. BOE n. 69, 21 March 2009.

[36] Article 2.1 Real Decreto 295/2009, de 6 de marzo, por el que se regulan las prestaciones económicas del sistema de la Seguridad Social por maternidad, paternidad, riesgo durante el embarazo y riesgo durante la lactancia natural. BOE n. 69, 21 March 2009.

[37] Article 14 CE "The Spanish are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance".

Article 39 CE "1.The public authorities shall ensure the social, economic and legal protection of the family. 2. The public authorities shall ensure full protection of children, who are equal before the law, regardless of their parentage and the marital status of the mothers. The law shall provide for the investigation of paternity". BOE n.311, 29 December 1978.

The Supreme Court considers that no evidence of fraudulent or criminal conduct exists, beyond the very illegality of maternity on demand, and that the care of children should be the predominant point of view when it comes to Social Security benefits. The nullity of the contract cannot harm the child, because the best interest of the child must guide any decision thereon. The Court does not recognize surrogacy as such, but maternity allowance by surrogacy to intentional parents as a collateral or accessory effect of it, the granting of maternity allowance by surrogacy to intentional parents (mitigated effect of international public policy)[38].

In my opinion, it is precisely the recognition of this "accessory effect" on the grounds of the principle of the best interests of the child, that should lead to the same recognition of the parentage of the child born as a result of a surrogacy arrangement, precisely for being valid in the country where the contract was concluded and where this practice was allowed. Otherwise, precisely by not recognising in Spain the parentage of a child who has already been recognised in the country of birth, this principle of the best interests of the child is violated, leaving the child without a recognized parentage (or legally linked to a person who does not want to take care of him/her) and in a situation of unnecessary and unjustified abandonment.

4. *Current comparative overview*

Although Spain has yet a long way to go, the situation is not always better on an international level. Countries such as France, Sweden, Austria and Turkey[39] do not allow for the use of Assisted Human Reproductive Techniques by single women or lesbian couples, while others such as Belgium, Finland, the United Kingdom or Spain do.

In others[40], such as India, Thailand or Cambodia, surrogacy is permitted on a national level while international surrogacy is prohibited in an attempt at preventing the exploitation of vulnerable women. Russia, Ukraine and Georgia have regulated surrogacy and allow it in any form[41].

[38] HERNÁNDEZ RODRÍGUEZ, A. "*Determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución: ¿Hacia una nueva regulación legal en España?* in *Cuadernos de Derecho Transnacional"*, 2014, p. 165.

[39] SANHERMELANDO, J. "*Así regulan la gestación subrogada los países de la UE*" in *www.elespanol.com/mundo/europa/20180830/regulan.*

[40] AFP. "*La maternidad subrogada, una fuente de ingresos para las camboyanas pobres*" in *elnuevodiario.com*, 18 June 2017.

[41] FLORES RODRÍGUEZ, J. *"Convenio gestacional internacional y filiación transfronteriza: el modelo de los países del Este de Europa"*, in *A fondo, Actualidad Civil*, 2019, p. 6.

Portugal, Greece and the United Kingdom allow it only in the altruistic mode.

Other countries where surrogacy is completely prohibited include Austria, France, Germany, Italy and Spain. Again, though there is no legislation on the subject, the practice of surrogate pregnancy is tolerated in Belgium, the Netherlands, Ireland and Denmark.

The sheer variety of options leads intentional parents to conclude contracts in countries where the practice is allowed, with problems arising when the intending parents seek recognition of a situation created abroad before authorities of their country of origin.

Most Eastern European countries systematically reject the attribution of their own nationality to these children by application of their citizenship laws when the states of the parents of intention attribute their own nationality to them. In these cases, the child is trapped in a foreign state, does not hold the nationality of the country and is deprived of personal law and relevant associated civil, social and political rights, including diplomatic and consular action.

5. *Approaches to surrogacy from international institutions: Council of Europe, European Union and The Hague Conference on Private International Law*

We have seen that in Spain it is difficult to make progress in regulating ISA and that judicial bodies do not agree on decisions and opinions, leading to differing results issued forth by competent courts or administrative bodies.

On a European level, the situation is not much better. Indeed, EU member states have adopted heterogeneous solutions and surrogacy is still a very controversial matter to legislate. In this framework, European courts have been forced to deal with such cases, implying that the matter is in hands of judicial rather than legislative bodies. Hopefully, some sort of solution will come from international institutions in the short or medium term.

5.1. *Council of Europe and European Union*

As we have seen, despite the importance of this matter, there is, as yet, no international regulation governing surrogacy. In October 2016, the Parliamentary Assembly of the Council of Europe rejected a proposal for a Recommendation proposing the adoption of guidelines to guarantee the rights of children with regard to surrogacy arrangements.

Such highly controversial initiatives invariably generate disparity of opinions. In this case, the final rejection of the proposal highlights the

clash between two positions that are difficult to reconcile: on the one hand, those who believe that the protection of the rights of children and pregnant women is incompatible with surrogate pregnancy; on the other hand, those who believe that the rights of some and the wishes of others can be reconciled. The interpretation of Article 8 ECHR is one of the strongest arguments brought by courts precisely to ground the recognition of decisions made by foreign court.

Within the European Union, the only institution that has clearly taken a position with regards to surrogacy is the European Parliament. It happened in 2015, within the framework of the annual Report on Human Rights and Democracy in the World[42]. Indeed, the report issued forth by the European Union "condemns the practice of surrogacy, which is contrary to the human dignity of women, since their body and its reproductive functions are used as a raw material". It also considers that this practice, which involves the exploitation of reproductive functions and the use of the body for financial or other purposes, must be banned, particularly in the case of vulnerable women in developing countries, and calls for it to be examined as a matter of urgency in the framework of human rights instruments.

5.1.a) *Advisory opinion of the European Court of Human Rights*

On 10 April 2019, the EcHR issued its first "Advisory Opinion" on this subject, at the request of the French *Cour de Cassation*[43] in order to clarify the content, interpretation and application of Article 8 ECHR with regard to the recognition in national law of the parentage and registration of minors born through surrogacy. More specifically, the court was compelled to clarify whether the State can refuse to register the intended mother as a mother by admitting the intended father instead, providing he is also the biological father. In other words, the question was whether or not it was possible to differentiate cases on the basis of whether or not the genetic material of the intended parents had been used[44].

[42] "*EU annual report on Human Rights and Democracy in the World*", Council of the European Union, eeas.europa.eu/sites/eeas/files/eu_annual_report.

[43] "*Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*", Request n. P16-2018-001, European Court of Human Rights, Grand Chamber.

[44] LAZCOZ MORATINOS, G., GUTIÉRREZ-SOLANA JOURNOUD, A. "*La invisible situación jurídica de las mujeres para el TEDH ante la maternidad subrogada en la primera opinión consultiva del protocolo nº16*" in *Cuadernos de Derecho Transnacional,* 2019, p. 673.

Regarding the right of the child to respect for privacy stated under Article 8 ECHR, the Court notes that national legislation must provide for the possibility of recognizing a legal relationship between parents and children with the intended mother designated in the birth certificate legally established abroad as the "legal mother". In Spain, this can be achieved through adoption. This is the option normally offered by Spanish Courts to the intended mother, when the egg belongs to a third person. In France and Italy, this possibility was not taken in account. For the drafting of the Opinion, the Court carried out a study of forty-three member states of the Convention, not including France[45].

The study shows that surrogacy is allowed in nine of these forty-three states, that it is tolerated in ten others and it is explicitly or implicitly prohibited in the other twenty-four countries. In addition, in thirty-one of the states involved, including those where the practice is prohibited, it is possible for the intended father, who is also the biological father, to establish paternity with respect to the child born through surrogacy.

In nineteen countries it is possible for the intended mother to establish the motherhood of the child, even if there is no genetic link between them[46]. The procedure for doing so varies from State to State. The means available include registration with a foreign birth certificate, adoption or legal proceedings other than adoption.

The "Advisory Opinion" concludes that in the case of a child born through an ISA, who was conceived with the gametes of his intended father and a third party donor, and where the legal relationship between parent and child has been recognised in domestic law, the right to privacy of the child in accordance with Article 8 ECHR requires that domestic law provide for the possibility of recognition of the legal relationship between the intended mother designated as the legal mother in the foreign birth certificate and the child, not being the registration of the foreign certificate in the Civil Registry the sole way to do so. It is also possible through other means, such as adoption.

According to the above, we can conclude that the trend from European judicial institutions is moving towards the recognition of parentage even if it is requested with a birth certificate and not a judicial decision.

[45] Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, the Republic of North Macedonia, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine and the United Kingdom.

[46] Albania, Andorra, Armenia, Azerbaijan, Belgium, the Czech Republic, Finland, Georgia, Germany, Greece, Luxembourg, the Netherlands, Norway, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Ukraine and the United Kingdom.

In an attempt to protect the rights of the child already born through an ISA, and in particular their right to respect for private life, European judicial bodies are calling for recognition. We should also add that, the non-recognition of the certificate issued in one Member State of the Union by the Registry of another Member State of the EU violates the freedom of movement of European citizens.

5.1.b) *Case Law of the European Court of Human Rights*

In 2014 and 2015, the EcHR delivered two of the most important judgements on surrogacy. Both were against France and in both the State was obliged to recognize the legal effects of the parentage of children contained in a registration certificate issued by the authorities of another State[47].

The EcHR considers that, by not recognizing these birth certificates, Article 8 ECHR, which regulates the right of children to respect for their private life, is being violated: "a registration certificate issued by the authorities of a State establishing the filiation of minors must always produce legal effects in a State party to the Rome Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 which guarantees the right to privacy of minors and does not violate the international public order of the State of destination"[48].

In *Menesson v. France*, the EcHR held that the children's right to respect for their private life under Article 8 ECHR had been violated because the foreign birth certificate showed that the intended father was the biological father and France denied the bond of parentage to be established on the grounds that the child was born through surrogacy. This respect for privacy would include the non-determination of their filial identity, the deprivation of French nationality and any rights therefrom.

In this case, as well as in *Labasse v. France*, French authorities refused to register the girls' birth certificates with the French Civil Registry because they considered such a measure to be contrary to French public policy, which establishes the unavailability of the human body and the state of persons (Articles 16.7 and 16.9 French Civil Code, hereinafter FCC). The French Court was clearly seeking to discourage any intention to travel abroad to enter into contracts that would not be recognized in France.

[47] Judgment of the Court (Gran d Chamber) of 24 January 2017, *Paradiso and Campanelli v. Italy*, Case 25358/12.

[48] Judgment of the Court (Grand Chamber) of 26 June 2014, *Labasse v.France*, Case 65941/11: Judgment of the Court (Gran d Chamber) of 24 January 2017, *Paradiso and Campanelli v. Italy*, Case 25358/12; Judgment of the Court (Grand Chamber) of 26 June 2014, *Mennesson v. France*, Case 65192/11).

In the two cases heard before the EcHR, there was a genetic link to one of the intended parents. Later on, in January 2015, the same Court also ruled on *Campanelli and Paradiso v. Italy*, in which the child, born by surrogacy in Moscow, had no genetic link to the intended parents, although they believed it to be so.

As the genetic link did not exist due to a mistake made by the clinic, the child was taken away from its intended parents and given up for adoption and parentage registered in favour of the adoptive parents[49]. In this judgment of 27 January 2015 delivered by the Second Section of the EcHR, the Court refers again to a possible infringement of the right to respect of private and family life under Article 8 ECHR[50].

The Court ruled that the Italian authorities had given more weight to the Italian international public policy than to the best interests of the child. The child had been left without an identity for some years, contrary to Article 7(1) of the Convention on the Rights of the Child. Furthermore, the intentional parents were even denied the possibility of adoption.

In said judgment, the EcHR considered that the intended parents and the child had indeed formed a "*de facto*" family and an emotional bond[51], and that the removal of the child from his or her family environment was an extreme and disproportionate measure which should only be used as a last resort in cases of immediate threat.

In 2017, two years after the decision, the Grand Chamber of the EcHR ruled again on the same case. In this judgement, the EcHR considered that the family link established between the child born through surrogacy and the intentional parents is key to determining whether the child can be considered theirs and therefore grant subsequent recognition in the State of destination.

It concluded that, in this case in hand, there was no family link between the parents and the child, and therefore, no violation of Article 8 ECHR by the Italian State[52]. In brief, the same court issue two different decisions on the same case within the space of two years.

[49] VILAR GONZÁLEZ, S. "*Las sentencias de 27 de enero de 2015 y de 24 de enero de 2017 del Tribunal Europeo de Derechos Humanos en el caso "Paradiso y Campanelli contra Italia" y la vulneración del derecho a la vida privada y familiar en materia de gestación subrogada*" in *V/lex*, 2017, p. 235.

[50] ALVAREZ GONZÁLEZ, S. "*Gestación por sustitución. Nacido sin relación biológica con los padres de intención. Retirada del menor de su entorno familiar*" in *AEDIPr*, 2016, p. 1044.

[51] Case 25358/12, para. 34.

[52] PUPPINK, G. "*Surrogacy: general interest can prevail upon the desire to become parents-about the Paradiso and Campanelli v. Italy Grand Chamber judgment of 24 January 2017*" in *Revue Lamy de Droit Civil*, 2017, p. 1.

This time, the EcHR reflects on the determination and assessment of the *de facto* family link in international surrogacy, in the light of Article 8 ECHR. The EcHR ruled in 2015 that the Italian Government had not taken into account the rights and best interests of the child and had therefore violated Article 8 ECHR. The judges of Section 2 considered that the eight months that the parents had spent with the child were sufficient to understand that a *de facto* family had been formed, and that at no time had there been any serious risk to the child who had not been endangered by the intended parents. However, at the time of the second judgment, two years had elapsed since the child had been given up for adoption, so the EcHR did not oblige the Italian Government to return the child to the parents. The judgement does, however, set a precedent for future cases by establishing when one is able to understand that a *de facto* family has been constituted.

Conversely, in 2017, the Grand Chamber reached the opposite conclusion. It considered that there was no violation of Article 8 ECHR, as family links had not been previously formed. Furthermore, it understood that the fact that the intentional parents had been in Russia from the outset was not a compelling reason when it came to understanding whether or not family ties had been formed.

As we can see, Tribunals may reach different conclusions, even on an international level, even in the same case, which proves how difficult it is to reach a consensus on the subject matter in hand. There is no legal certainty of any kind, and the fate of children is in the hands of courts that constantly render inconsistent decisions.

A preliminary conclusion can be drawn as a consequence of the above. Despite being prohibited in many countries, when it comes to recognition, judges question non-recognition precisely because it means violating some of the children's fundamental rights.

5.2. The Hague Conference on Private International Law. Draft Protocol

In relation to the ISA, the Hague Conference on Private International Law (hereinafter HCCH) has been warning about the serious threats to human rights, especially those regarding children, for years.

In a 2015 report, it listed five of such threats: 1) abandonment of children by the intended parents, either for health or gender preference reasons; 2) unsuitability to become parents and the risk of child trafficking; 3) the child's right to know its genetic and biological origins; 4) problems related to the freedom of consent of pregnant women; and 5) bad practice by surrogation intermediaries.

The report also focused on the contracts that pregnant women sign with the assigned intended parents and highlighted a number of extremely worrying clauses therein. A case in point was the Ukraine, where a lengthy investigation had revealed contractual clauses whereby pregnant women were forced to live alone in a room designated by the agency from the seventh month of pregnancy thereby separating them from any existing children. In addition to that, surrogates were not allowed to see their other children again until they had given up the child in question; were forced to forego sexual intercourse for the duration of the pregnancy, and in some cases parents of intention could decide whether or not an abortion should be carried out. Again, pregnant women would also be obliged to pay a fine of 200% of the amount received for the pregnancy, if they failed to comply with any of the clauses.

Precisely because of this, and aware that the difficulties inherent in recognizing the legal parentage of the children born as a result of an ISA could affect a child's nationality, its immigration status, attribution of parental responsibility or the identity of the individuals under a duty to financially support the child, among other, in 2015, the Council on General Affairs and Policy (hereinafter CGAP) of the HCCH established that an Experts´ Group should explore this field and compile a viable regulation.

The Experts´ Group on Parentage/Surrogacy is therefore currently working on a regulation regarding the legal parentage of children and the ISA, with the aim of making progress on a possible and ambitious general Private International Law (PIL) instrument on the recognition of foreign judicial decisions on legal parentage and a separate protocol on the recognition of foreign judicial decisions on legal parentage arising from international surrogacy arrangements.

It is indisputable that the establishment and continuity of cross-border filiation, at present, are issues of international relevance, and with this premise this group of experts held its first of many meeting in early 2016. In 2019, a decision was reached for the drawing up of a separate protocol on the recognition of foreign judicial decisions on legal parentage arising from an international surrogacy arrangement[53].

The implementation of this instrument shall encourage international agreements that prevent "limping legal parentage", thus achieving greater security, certainty and continuity of legal parentage in international situations for all persons concerned, taking into account their rights, the UN Convention on the Rights of the Child and the best interests of the children.

[53] See Key documents on https:// www.hcch.net/en/projects/legislative-projects/-parentage-surrogacy/.

During the last meeting, held from 12 to 16 October 2020, the Group discussed possible uniform applicable law rules and feasible rules on the acceptance of legal parentage when recorded on public documents. The need for further discussion on these topics was duly noted. As for Protocol, the Group's discussion focused on scope, sustainable safeguarding and the framing devices, as well as on approaches on how and when compliance with such safeguards could be verified[54]. A memory report will be available in the next months.

Previously, the meeting held in March 2019 agreed to develop a feasible PIL instrument on the recognition of foreign legal decisions on parentage and a separate protocol on the recognition of foreign legal decisions on parentage arising from an ISA.

In October 2019, the Group made significant progress in developing the draft of a possible HCCH Convention dealing with the recognition of foreign judicial decisions on legal parentage.

During the meetings, the Group clarified that it did not intend to either support or criticise surrogacy, but rather to provide a tool that would help ensure the predictability, continuity and certainty of legal parentage resulting from ISAs. Furthermore, the aim of any efforts thereon was to protect the best interests of the child and the fundamental rights of all individuals involved.

Despite the difficulty in moving towards a common regulation on ISA, the group has made progress on some aspects of the future Protocol.

Clearly, ISAs should be in writing in order to better promote the transparency and protection of any parties thereto and complied prior to conception. Furthermore, the Group felt that a more appropriate and neutral way of referring to the surrogate mother should be 'surrogate woman'.

Most experts agreed that judgments rendered post-birth in the State of origin of the ISA, should be recognized by operation of law in all other Contracting States, provided that certain conditions under the Protocol are met. Minimum standards are needed to protect the rights and welfare to the parties involved and for the best interest of the child.

The possibility of establishing a certification process vouching for all conditions required by the Protocol has also been discussed. Certification may also made to confirm that ISAs were allowed under the law of the State of origin at the time the ISA was entered into and executed and state that free and informed consent has been granted by the surrogate woman.

The need to preserve information on the child's birth has also been discussed as have minimum standards concerning the eligibility and suit-

[54] www.hcch.net/en/news-archive/details/?varevent=755.

ability of both surrogate women and intending parents. However, drawing up a list of conditions to facilitate recognition of parentage is proving more difficult than drawing up a list of conditions for non-recognition. Failure to meet a condition could mean non-recognition of parentage, leaving the child with legal limping parentage.

The Group is still exploring options for ISA cases where legal parentage is established by means other than a judgment.

6. *Conclusions*

The analysis of the current situation of ISA in the international arena has evidenced notorious differences between countries and a very controversial ongoing discussion about its mere existence and the most feasible legal framework. Spain is a revealing example, where court rulings and decisions on the topic differ greatly. Rather than facilitating the task of the Civil Registries - the first to be confronted with this reality - court rulings cause more chaos. Only the DGRN has facilitate the recognition of this type of contracts with a single purpose: to protect the child who may otherwise be deprived of the determination of parentage with respect to the intended parents.

Furthermore, the non-recognition of a registration certificate issued in one EU Member State by the Registry of another EU Member State on the grounds of incompatibility with its domestic law could constitute an infringement of the right to free movement of EU citizens and their families in accordance with Article 21 of the Treaty on the Functioning of the European Union (TFEU).

Otherwise, the filiation of the child born through an ISA would change when crossing the border, thereby leading to confusion as to the subject's identity or filiation, not to mention serious professional and private problems.

In such cases, in accordance with the existing case law of the European Court of Justice on first names and surnames, which could be extended to this field, Member States should respect parentage determined in accordance with the law of another Member State unless this is contrary to their international public policy[55].

Arguments have been brought both for and against ISA – all of which can be somehow understood. In my personal opinion, there is no doubt about the necessity of regulating ISA in order to provide a legal framework for this social reality, the treatment of which is insufficient, leading

[55] HERNÁNDEZ RODRÍGUEZ, A. "*Determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución:¿Hacia una regulación legal en España?*" in *Cuadernos de Derecho Transnacional,* 2014, p. 162.

to situations of breach of protection and legal uncertainty, as with some of the judgments previously mentioned. Beyond the debate on whether having a child is a right or a freedom of choice, or even if that freedom violates the fundamental rights of others, the reality that strikes us is the existence of children whose parentage and rights demand recognition.

Discussion is open with contrasting positions, but the question is: regardless of the acceptance of these contracts, what happens to children born through ISA? Indeed, banning this kind of international surrogacy arrangements by no mean implies that situations envisaging abuse and bad practice will necessarily stop, precisely because of their lack of regulation.

Aside from the debate on whether or not to legalize this type of practice, we need to address the issue of the birth of children whose parentage needs to be recognized.

The same arguments used against international adoption in the past are now being used against surrogacy, i.e., the possible abuse of the pregnant mother and the commercialization or trafficking of children or of vulnerable women. Ultimately, the regulation has proven to be the best possible solution.

Also, other economic and safety concerns have been raised, such as the fact that this option can only be afforded by some people, that neither quality nor safety standards can be controlled; that ensuring the health of the mother and the future child is extremely difficult and that this option does indeed increase the risk of exploitation of women with scarce economic resources. As human reproduction has become an object of trade, in world where people cannot be traded - neither the mother nor the child, the result may be fraud against adoption rules or the performance of such unwanted practice as buying and selling of children and suppression of identity. Once more, the answer seems to be that regulation is needed.

In conclusion, we cannot deny what is a reality. A regulation could help to reduce or eliminate reproductive tourism, and would prevent problems and abuse, while also safeguarding the rights of the parties. At the very least, regulations would solve many of the problems created when surrogacy contracts are concluded abroad and recognition of parentage in our country is sought.

If the Spanish legislation is prepared to recogniseing voluntary acknowledgment of paternity[56] we wonder whether other types of parentage may be accepted on the basis of the parties´ intention provided that all the legal requirements of the law governing the particular ISA are fulfilled.

[56] Judgment of the Supreme Court, 15 July 2016, Case 1585/2013.

In Spain, attempts have already been made to pass a law regulating surrogacy[57]. On 8 September 2017 the Citizens' Parliamentary Group presented a draft law regulating the right to surrogacy. It proposed the altruistic modality and other requirements to be met in order to break the parentage link between the surrogate mother and the child. It also suggested the creation of the National Registry of Surrogacy, attached to the National Registry of Donors, which included the registration of women who freely wish to participate in surrogacy arrangements.

The draft law was rejected by the Spanish Parliament but debate continues. In fact, this complex debate is about to be resubmitted to the Parliament following a last minute proposal by the current left-wing Government, which considers this practice a kind of "reproductive exploitation", thus supporting its absolute prohibition[58]. Meanwhile, ISA continues to occur in many parts of the world.

[57] Boletín Oficial de las Cortes Generales, n.145-1, 8 September 2017.

[58] See the just published piece of news at (accessed on 23 October 2020) https://www.infolibre.es/noticias/politica/2020/10/22/la_ley_libertad_sexual_incluira_los-_ninos_como_victimas-_reforma_del_aborto_penalizara_los_vientres_alquiler_112395_-1012.html.

ELISA COLLETTI

PUNITIVE COMPENSATION FOR NON-PECUNIARY DAMAGES

CONTENTS: 1. Introduction. – 2. Punitive damages in Common law systems. – 3. Punitive damages in Europe: the Italian example. – 4. Considerations.

1. *Introduction*

The legal category of non-pecuniary damage, currently still under development– is a composite category, characterized by complexity profiles. Far from wanting to reconstruct its entire evolution, we shall herein only discuss those elements which are preliminary to the subsequent analysis of that compensation of non-pecuniary damage that takes the form of punitive damages.

Thus, the functions of damage compensation can be multiple: among these, the reparative function and the sanction/deterrent function. These, however, do not compete with each other in the same way, as it can clearly be said that nowadays the restorative element prevails over the others. And indeed, in civil liability it is not the action that is punished, but rather the consequence thereof, which leads one to assume that it is the damage, and not the fact, that needs to be unfair[1]. And again, we have a confirmation of the predominance of the reparatory function, if we look at the matter from a historical point of view, that is to say placing the article 2043 of the Italian civil code (hereinafter c.c.) in time and space.

[1] Advocates of this theory are PACCHIONI G., *Il danno ingiusto secondo il vecchio e il nuovo codice*, in *Scritti in onore di Ferrini* C., Milan, 1947, p. 164 ff.; FEDELE A., *Il problema della responsabilità del terzo per pregiudizio del credito*, Milan, 1954, p. 117; BARASSI L., *Teoria delle obbligazioni*, Milan, 1964, p. 432; DE CUPIS A., *Il danno*, Milan, 1966, p. 12. PUGLIATTI S., entry "*Alterum non laedere*" in *Enc. dir.,* Milan 1958, p. 98 ff.; SCHLESINGER P., *L'ingiustizia del danno nell'illecito civile*, in *Jus*, 1960, p. 336 ff. For a review of the various theoretical approaches to the formula of the "unjust harm" see SCALISI V., *Ingiustizia del danno e analitica della responsabilità civile*, in *Riv. dir. civ.,* 2004, p. 29 ff. For a general view of the concept of unjust damage RODOTÀ S., *Il problema della responsabilità civile*, Milan, 1964, p. 116 ff., as well as the review to Rodotà of GALGANO F., in *Riv. dir. civ.,* 1965, I, p. 535 ff.

As a matter of fact, even in Roman law[2] the "aquilian" responsibility originally had a reparative function[3], as it was born to protect the owner who had been injured in his right of ownership. Subsequently, and only in a second phase, the subjective element came into play, thereby accentuating the punitive function. Through time, this function has accompanied civil liability until the first Industrial Revolution, when the need for a return to the origins was felt, this being an on-going trend. The need to review the mechanism of civil liability in relation to the new industrial reality was therefore taken into consideration, as said new reality introduces increasing risks, which are however essential where production is concerned. Therefore, civil liability should only have a restorative character, in order to socialise damage: through the instrument of compensation for damages, the system tends to distribute the prejudices across subsidiaries[4].

Although tort was first conceived in the Roman legal system, having the function of completion of the criminal protection, and remained confined to some typical hypothesis (eg. theft and robbery) -acting, *de facto*, as integration to the protection provided by another branch of the system, the criminal protection one- over time the subordination of civil law has progressively ended. As a matter of fact, later on, the compensation system withstood enfranchisement, and in the modern era started to have its autonomy, with the development of two models: i) the French one, which was established under the *Code Napoleon*, and based on the idea of compensation by general clause[5]. The idea of atypicality of the "aquilian" liability, which will be further implemented in the Italian system, has at this stage been established; and ii) the German one, established under the *Bürgerliches Gesetzbuch*, which, on the contrary, is characterized by a system of typicality of the tort, which specifically indicates the juridical goods whose lesion implies civil responsibility[6].

Currently, all civil law systems include a multiplicity of indexes showing the prevalence of the restorative function. These are: i) the atypical

[2] MARTINI R., *Sul risarcimento del «danno morale» in diritto romano*, in *Studi in onore di Sergio Antonelli,* Naples 2002, p. 525 ff. .

[3] This happened, in particular, with the arrival of the well-known *Lex Aquilia de damno.*

[4] DI MARTIS M. S., *Lavoro e salute in Europa prima della Rivoluzione Industriale*, in *Rivista degli Infortuni e delle malattie professionali*, 2010, p. 161 ff.

[5] PIROTTA. G., *Il risarcimento del danno alla persona in Francia*, in *Milanosservatorio.it*, 2016.

[6] FÖRGER R., *Il risarcimento del danno alla persona in Germania,* p. 4 ff., Italian version edited by TOFFOLETTO S., *addendum* edited by VON HASE K., with the coordination of Gruppo Europa Osservatorio Milano, in *Milanosservatorio.it*, 2016.

nature of illegal acts, which, by definition, contrasts the punitive function; ii) the *favor victimae*: civil law is focused on *favouring* the injured party, as a guarantee that the damage can be effectively compensated; iii) the different attitudes of causality compared to criminal law; iv) the so-called "irrelevance of the contributory causes"; v) the presence, nowadays almost undisputed in our system, of competition or accumulation of contractual and "aquilian" responsibility; vi) the rules for the quantification of injury, which disregard any other elements than the amount of the injury itself. This can be understood by looking at the exceptional hypotheses in which the amount of the indemnifiable damage takes into account additional factors such as the seriousness of the fault and the damage that the injured party has derived from the offence[7]; vii) the remedy of *disgorgment*[8]: an equity remedy, provided by common law, according to which, if one obtain significant wealth as a result of a wrongful act, the obligation of restitution only arises if the other party is compensated by a refundable damage. If, on the other hand, there is no damaged party, there can be no compensation[9]; viii) the need, in legal systems such as the Italian one, for double damage, the event-damage and consequential-damage: the first consisting in the violation of a subjective legal position protected by law; the second, in the influence that such injury has on the economic sphere of the damaged party. Indeed, an event-damage alone does not suffice to operate the compensation mechanism, as the damage caused by the event must also have a direct impact on the person and property of the injured person.

Thus, all these factors show that, even in the multifunctionality of civil liability, the reparatory function still holds prominence.

[7] In Italy, for example, art. 125 of industrial property code: the injury must be commensurate not only to the damage caused to those who have suffered the usurpation, but also to the advantage that the who has produced the usurpation has had. The profits of the damaging party are taken into account. A similar rule is in art. 7 paragraph 3 of the current Gelli- Bianco law, in the part in which it states that the medical compensation must be commensurate also taking into account the seriousness of the fault of the health care provider. The fact that these regulations are exceptional demonstrates that the preminent function is still only restorative.

[8] BUTLER P.L., *Saving disgorgment from itself: sec enforcement after Kokesh v. Sec*, in *Duke Law Journal*, vol. 68:333, 2018, p. 338 ff. .

[9] In the Anglo-Saxon system, on the other hand, it is also possible to return the damaged item regardless of the existence of a damaged, rebalancing function. The fact that in our system there is no similar institution shows that the pre-eminent function is restorative.

2. *Punitive damages in Common law systems*

The punitive damage and any resulting compensation are among the most controversial and representative institutions of the common law systems, especially the American one, where same have had the widest practical application[10]. Moreover, it is the institute that most clearly distinguishes civil law from common law[11].

Starting from the definition, so-called punitive (or exemplary) damages provide, in case of liability of the injured party for malice or gross negligence, the recognition to the injured party of a further independent punitive compensation, in addition to the compensatory damages. These are, as stated by authoritative doctrine, mechanisms whose object is not to compensate for the damage suffered by the injured person, but rather to penalize the conduct of the person who caused the damage[12]. In addition, said phenomenon lies on the border between civil and criminal law[13], as it entails both guaranteeing that the injured party receive a sum of money in excess of the amount paid as a compensation: this constitutes a punitive action for the conduct of the injured party, characterized by particularly reprehensible traits[14]. This implies the need to analyse the event through a perspective key, which is necessarily multifunctional and pluralist. Evaluating of the compensation function of each legal system in which the institution of punitive damages claims to operate and, in doing so, to adopt perspective visions that regulate various areas of knowledge, shunning a purely normative classification, may prove useful to arrive to solutions that also take in consideration sociological, political and philosophical profiles.

The origins of the institution are to be found in the system of the English non-patrimonial damage of the eighteenth century. In fact, during the process of constructing the system of non-patrimonial damage,

[10] DOBBS D., *Law of remedies*, vol. I, St. Paul, 1993; POLINSKY AM., SHAVELL S., *Punitive damages: an economic analysis*, in *Harv. L. Rev.*, 1998, p. 928 ff.

[11] KOZIOL H., *Punitive damages: admission into the seventh legal heaven or eternal damnation? Comparative report and conclusion,* in *Punitive Damages: Common law and Civil law Prespectives. Tot and Insurance Law, vol. 25, Springer, Vienna,* 2009, p. 281 ff. .

[12] PONZANELLI G., *I* punitive damages *nell'esperienza nordamericana*, in *Riv. dir. civ.*, 1983, p. 435 ff.; BENATTI F., *Correggere e punire. Dalla law of torts all'inadempimento del contratto*, Milan, 2008.

[13] *Ex multis* OWEN DG., *The moral foundations of punitive damages*, in *Alabama Law Review*, 1989, p. 705; ELLIS D., *Fairness and efficiency in the law of punitive damages*, in *S. Cal. L. Rev.*, 1982-1983, p. 708 ff.; CHAPMAN B., TREBILCOCK M., *Punitive damages: divergence in search of a rationale*, in *Alabama Law Review*, 1989, p. 742.

[14] OWEN DG., A *Punitive Damages Overview: Functions, Problems and Reform*, in *39 Vill. L. Rev.*, p. 364;

which occurred at different times in all western legal systems, common law systems became aware of the need to fill the gaps of a still imperfect system, and deemed punitive damages as the most appropriate way to bring equity within the compensation of the damage. Therefore, the institution originally held a purely compensatory function, and only at a later stage, when the process of evolution of the non-patrimonial damage was completed and perfected, acquired the characteristics it still holds today, i.e. those of a punitive compensation[15].

In England, punitive damages first appeared in 1763 in two well-known cases: Wilkes v. Wood and Huckle v. Money[16]. In the following centuries, the deterrent and punitive function of compensation steadily settled within the English compensatory system, until 1964, when Rookes v. Barnard[17] redesigned the institute. While, in fact, previous jurisprudential pronouncements emphasized the deterrent and punitive nature of the damage, this ruling first distinguished between exemplary damages and aggravated damages[18]. In actual fact, said ruling only recognised the punitive nature of the formed, while the second, whose nature was merely compensatory, would then constitute a subcategory of moral damage, which is particularly burdensome in some cases, and deserves to be restored with a further sum of money in addition to the one that tends to be liquidated for similar cases. Furthermore, this pronunciation has the merit to have constituted (and to still constitute) a leading case in the matter of punitive damages, by way of having reduced the categorization thereof three major areas of damage: a) cases of conduct committed by a public official and characterized by profiles of arbitrariness, oppression and unconstitutionality; b) cases in which the offender acts for the purpose of making a profit which he considers will exceed any compensation

[15] AUSNESS RC., *Retribution and deterrence: The Role of Punitive Damages*, in *Products Liability Litigation*, 1985-1986, p. 39 ff.; ELLIS D., *Fairness and Efficiency in the Law of Punitive Damages*, in *56 S. Cal. L. Rev.*, 1982–1983, p. 12 ff.; SCHWARTZ VE., *Deterrence and Punishment in the Common Law of Punitive Damages: a comment*, in *56 S. Cal. L. Rev.*, 1982–1983, p. 139; RUSTAD M., KOENING T., *The historical continuity of punitive damages awards: reforming the tort reformers*, in *42 Am. U. L. Rev.*, 1993, p. 1284 ff.; OWEN DG., *A Punitive Damages Overview: Functions, Problems and Reform*, cit. p. 3; FIELD GW., *A Treatise on the Law of Damages*, Des Moines, 1881, p. 70 ff.;

[16] On that occasion, it was recognized for the first time by a jury a compensation of the injured as punishment for the damaging, with the purpose of deterring and emphasizing particularly reprehensible conduct.

[17] For a comment on the sentence HOFFMAN LH., *Rookes v. Barnard*, in *Law Quarterly Review*, 1965, p. 166 ff.; FORD L., *Damages, Punitive or Exemplary Damages - A Canadian View of Rookes v. Barnard*, in *Alberta Law Review*, 1965, p. 159 ff.;

[18] KOZIOL H., *Punitive Damages: Common Law and Civil Law Perspectives*, Vienna, 2009, p. 266 ff.

that is to be given to the injured party; c) all other cases where the punitive remedy is expressly foreseen by the law.

The aim of this jurisprudential operation was to reduce the reach of the phenomenon to those cases in which a punitive *quantum* was required given the dangerous tendency of the Courts to use punitive damages to increase compensation amounts, thus debasing the punitive function of the institute and relegating it to a mere compensatory means of the prejudice suffered. Despite numerous critiques[19] expressed against the ruling in question, the current state of English law on the matter remains unchanged[20].

As for the U.S. system, one should state in the first instance that, since the 1980s, U.S. debate on the subject reached peaks never before touched on in other areas of common law, registering a huge scientific production on the subject, and giving rise to a heated political and media debate[21]. The latter mainly focused on the problem of punitive compensation figures, which were abnormal especially in relation to the type of damage they were associated with[22]. For these reasons, since 1989, the Federal Supreme Court has pursued jurisprudential strategies aimed at revising state discipline on the point, thereby gradually setting limits to the *quantum* of compensation for damages. Empirical studies[23] on the point show a counter-trend, demonstrating that the media mostly dramatise the phenomenon; while in practice it does not appear out of control as one would like to believe. Besides a handful of sensational cases, namely those in which astronomical amounts have been liquidated for almost insubstantial damages, the situation appears to have settled on a moderate line of use of the institute of punitive damages, which does not raise huge concerns.

[19] For a harsh critique on the sentence MCGREGOR H., *In Defence of Lord Devlin*, in *Modern Law Review*, 1971, p. 520 ff.

[20] It should be mentioned, for the sake of completeness, of the proposed reform of the institution of punitive damages carried out by the Law Commission in 1997, report published by Law Commission in 1997 on *Aggravated, Exemplary and Restitutionary Damages*, (Law Com Rep No. 247).

[21] A real anti-punitive damages campaign was made, which the institution as one of the major causes of crisis in the liability system. SCHWARTZ VE., BEHRENS MA., MASTROSIMONE JP., *Reining in Punitive Damages "Run Wild" Proposals for Reform by Courts and Legislatures*, in *65 Brook. L. Rev.*, 1999, p.1003 ff.;

[22] For example, we are talking about damage from coffee served at too high a temperature in the famous case Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994), seen GERLIN A., *A Matter of Degree: How a Jury Decided That One Coffee Spill Is Worth $ 2.9 Million, Wall St. J. Europe*, 1994.

[23] Empiric experiments cited by SEBOK AJ., *Punitive damages from myth to theory*, in *Iowa Law Review*, 2007, p. 962 ff.

With reference to the nature and legal wording of the institution, paragraph 908 of the Restatement of Torts should be mentioned, which distinguishes compensatory damages from nominal damages[24]. The former are punitive damages par excellence while the latter are the so-called supra compensatory damages, i.e., the equivalent of aggravated damages in the British system. With reference to the functional structure of punitive damages, the second part of the above paragraph refers to the subjective element of illegal conduct, which is pivotal to the entire system. Indeed, the term "outrageous"[25] indicates a behaviour that appears to be precisely scandalous and harmful to the rights of others well beyond the standards of damage. Moreover, the definition is responsible for identifying the factors that should guide the judge or jury in quantifying the damage, these being the seriousness of the unlawful conduct, the nature and extent of the actual or potential damage resulting from it and the economic and financial situation of the injured party. Ultimately, the *extrema ratio* character of the remedy in question, which enters into actions in cases of absolute gravity, is undisputed. The merit of having introduced this peculiar character of punitive damages falls to the Courts, arguing that the punitive damage "*is not favoured by law*"[26].

3. *Punitive damages in Europe: the Italian example*

Among systems of civil law, we have chosen to explore the Italian example, as, from a systematic point of view, it represents, a possible reading of the European civil remedial system and the changes that occurred in its body in the last decades.

[24] "*Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future. Punitive damages may be awarded for conduct that is for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others, in assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or untended to cause and the wealth of the defendant*".

[25] The conduct is defined by the norm.

[26] McKinnon v. Kwong Wah Restaurant, 83 F.3d 498, 34 Fed. R. Serv. 3d 445 (1st Cir. 1996); Brandon v. Anesthesia & Pain Management Associates, Ltd., 277 F.3d 936 (7th Cir. 2002); Hemenway v. Peabody Coal Co., 159 F.3d 255 (7th Cir. 1998); Inc. v. Rosebrock, 970 P.2d 906 (Alaska 1999); Griff, Inc. v. Curry Bean Co., Inc., 138 Idaho 315, 63 P.3d 441 (2003); Mississippi Power & Light Co. v. Cook, 832 So. 2d 474 (Miss. 2002); Picard v. Barry Pontiac-Buick, Inc., 654 A.2d 690 (R.I. 1995); Alexander v. Meduna, 2002 WY 83, 47 P.3d 206 (Wyo. 2002).

As a matter of fact, the institute has the merit of having brought to light the discourse on the function of civil liability, which today is the subject of necessary rethinking, all the more so in view of the controversial expansion of non-pecuniary damage to areas and logics that are traditionally extraneous to it[27], such as that of personal property. Furthermore, punitive damages fully represent the phenomenon of the change of private law through jurisprudence[28], in a perspective of dialogue between courts and legislators that, far from being harmful, allows for the rethinking of private institutions by analysing them from a different perspective.

Despite the fact that in 2007[29] the Italian Court of Cassation (hereinafter Corte di Cassazione) declared that the idea of punishment and sanc-

[27] RESTA G., *Dignità, Persone, Mercati*, 2014.

[28] GRONDONA M., *L'auspicabile "via libera" ai danni punitivi, il dubbio limite dell'ordine pubblico e la politica del diritto di matrice giurisprudenziale (a proposito del dialogo tra ordinamenti e giurisdizioni)*, in *Dir. civ. cont.*, 2016, p.1ff. .

[29] Cass. Civ., 19th January 2007, n. 1183, in *Foro it.*, 2007, p. 1460 ff. with note of PONZANELLI G., *Danni punitivi, no grazie*, in *Corriere Giur.*, 2007, with note of FAVA F., Punitive damages *e ordine pubblico: la Cassazione blocca lo sbarco*, in *Europa dir. Priv.*, 2007.

On that occasion, the judges of legitimacy expressed their saying on the extraneousness of the punishment to our system of civil liability, contrary and conflicting with the objectives of compensation for damages in Italy. The decision of the judgement was not passed, and this was due to the contrary to public order. See. App. Trento, Sez. dist. Bolzano, 16/8/2008, in *Danno resp.*, 2009, p. 92 ff. with note of PONZANELLI G., *Non riconoscimento dei danni punitivi nell'ordinamento italiano: una nuova vicenda*; Cass. Civ., 8th February 2012, n. 1781, in *Corriere giur.*, 2012, with note of PARDOLESI R., *La Cassazione, i danni punitivi e la natura polifunzionale della responsabilità civile: il triangolo no*. In fact, in 2007 for the first time, the Supreme Corte di Cassazione found itself invested with the problem of the recognition in Italy of the effectiveness of a foreign judgment, in particular the North American one. In which, in recognizing the responsibility of a motorcycle helmets manufacturer for defective production of the same that had caused a fatal accident, the indemnifiable damage to a particularly high degree was identified, in view of the fact that in the North American legal system the compensation of damages also has a punitive function, hence the measure of the compensable damage is not commensurate with the criteria of the Italian legal system, which attributes to the compensation of damages a compensatory function, as it is well known. Having issued this sentence, the victorious party (Italian company), asks for recognition of the effectiveness of the North American sentence in Italy.

The Court of Appeal of Venice refuses the recognition, considering the sentence abnormal (it was, in fact, several million dollars as compensation for punitive damages), because it was believed to be contrary to Italian public order. The judgment is appealed to the Corte di Cassazione. The result is a leading case that has then determined an impressive jurisprudential development on the point. The ruling of the Corte di Cassazione

tion had nothing to do with compensation, thereby opposing the introduction of the category of punitive damages into our national legal system, the United Sections of the Corte di Cassazione, in 2017, deemed such an analysis obsolete and opted for their first recognition.

Before this revolutionary ruling, the Corte di Cassazione had always maintained that *"nel vigente ordinamento, l'idea della punizione e della sanzione è estranea al risarcimento del danno, come è indifferente la condotta del danneggiato". "Alla responsabilità civile"*, states the Court, *"è assegnato il compito precipuo di restaurare la sfera patrimoniale del soggetto che ha subito la lesione mediante il pagamento di una somma di denaro che tenda ad eliminare le conseguenze del danno arrecato"*[30].

The principle of law that may be gleaned from the 2017 ruling by United Sections is as follows: *"nel vigente ordinamento, alla responsabilità civile non è assegnato solo il compito di restaurare la sfera patrimoniale del soggetto che ha subito la lesione, poiché sono interne al sistema la funzione di deterrenza e quella sanzionatoria del responsabile civile. Non è quindi ontologicamente incompatibile con l'ordinamento italiano l'istituto di origine statunitense dei risarcimenti punitivi. Il riconoscimento di una sentenza straniera che contenga una pronuncia di tal genere deve però corrispondere alla condizione che essa sia stata resa nell'ordinamento straniero su basi normative che garantiscano la tipicità delle ipotesi di condanna, la prevedibilità della stessa ed i limiti quantitativi, dovendosi avere riguardo, in sede di delibazione, unicamente agli effetti dell'atto straniero e alla loro compatibilità con l'ordine pubblico"*[31].

The following is a brief analysis of the issue at hand.

The plaintiff, a motorcyclist who had suffered personal injury as a result of an accident in a motocross race- accident caused by a defect in the helmet produced by AXO Sport s.p.a. and resold by NOSA Inc. -, filed a claim for damages with punitive/sanctifier profiles. During the

is clear: that judgment is not subject to recognition in Italy. The motivation that the Court uses in order to deny the recognition in Italy is interesting, making use of this words: "*del pari errata è da ritenere qualsiasi identificazione o anche solo parziale equiparazione del risarcimento del danno morale con l'istituto dei danni punitivi*".

[30] Cass. Civ. 19th January 2007 n. 1183, para. 3. This principle of law commensurate compensation for damages with what is necessary to restore the property of the injured party, putting it, in fact, in a curve of indifference, as if the tort had not actually occurred: this applies to any type of damage, including non-pecuniary damage, for the compensation of which not only are elements such as the state of need of the injured party and the patrimonial capacity of the obligor irrelevant, but also proof of the existence of the suffering caused by the tort, through the attachment of concrete factual circumstances from which to presume it, it being excluded that such proof can be considered *in re ipsa*.

[31] The judgment is that of the Corte di Cassazione in United Sections of 5 July 2017 no. 16601, Pres. Rordorf, East. D'ascola, para. 25.

trial, the injured party made a settlement proposal by resizing his initial request, a proposal which was immediately accepted by NOSA Inc. The U.S. court then excluded the liability of NOSA Inc., the reseller company, and held AXO Sport s.p.a., company that actually produced the defective goods, solely liable. Therefore, NOSA requested that the three decisions, by which the North American judge had accepted the request for reinstatement of assets made by the reseller company - in relation to the compensation paid to the motorcyclist - be declared enforceable under Italian law. The Court of Appeal of Venice[32] acknowledged the enforceability of the three judgments in favour of NOSA under art. 64 of Law no. 218 of 31 May 1995, as the guarantor company (AXO) had accepted foreign jurisdiction. In fact, as AXO had never appeared in court in the interest of NOSA, in view of the fact that they had never contested their responsibility or raised any objection to the above-mentioned transactional proposal, same was actually affected by the transaction between NOSA and the injured party.

The circumstance that, in the original application, the motorcyclist had requested -as a consequence of serious personal/physical injury - a sentence "grossly sanctioning and abnormal", was definitively absorbed by the transaction implemented by the American judge, between NOSA and the injured party, in which the *quantum* of the claim was reduced well below the limits of the only patrimonial component of the compensation requested, with the ultimate benefit of both companies involved in the trial. Therefore, the three rulings were not compensated for punitive damages, since the U.S. judge merely acknowledged that AXO was only required to pay NOSA the amount of the transaction, without specifying what damage kind. The Court of Appeal of Venice therefore fully accepted NOSA's request, compensating the costs of the dispute, without taking into account punitive damages.

Notwithstanding, AXO appealed against the judgment to the Corte di Cassazione. The reasons of censure concerned precisely the alleged violation on the internal side of the procedural public order, in view of the finding that the sentences contained a "compensatory" conviction of a punitive nature - one that could not have in any way been contained, given the consensual (and never punitive) nature of the proposed settlement[33]. At this point, the First Chamber of the Italian Corte di Cassazione deemed it appropriate to refer to the United Sections for a ruling on the compatibility with public order of the so-called punitive damages[34].

[32] The judgment is that of the Court of Appeal of Venice of January 3, 2014, n. 16601.

[33] CICERO C., *La transazione*, in *Tratt. dir. civ.*, Turin, 2014.

[34] It is a case in which punitive damages would not seem to be contemplated (of the same opinion is PONZANELLI G., *Polifunzionalità tra diritto internazionale privato e diritto privato*, in *Danno e responsabilità*, 2017, 435). And in fact, in the underlying case,

Therefore, the pretext for the new pronouncement was offered precisely by order of remission No. 9978/2016[35], wherefore the United Sections have the burden of expressing their opinion on the compatibility between *punitive damages* and the unprecise concept of public order in our system. The ordinance also responded to the need to clearly address the many recalcitrant requests concerning the enforcement of foreign rulings envisaging punitive damages. In essence, remission order itself contained the answer, as well as the argumentative path to follow for the admissibility of the execution of foreign rulings on punitive damages[36]. It included a robust and reasoned proposal to the United Sections to remedy the issue of punitive damages, which invites judges of legitimacy to look at the essential values of the international community.

In other words, if the pronouncement of 2007 – alongside subsequent judgments on the same subject- advocated a concept of public order as a set of fundamental principles of our system, the ordinance of 2016, on the other hand, expresses a reassessment of the same concept, of which an unpublished and progressive reading is provided, as the consequent reading of the functions of compensation for damages is also unpublished and progressive.

With reference to public order, even before the ordinance, the jurisprudence of legitimacy had already experienced an inevitable evolution, especially if we consider the distinctly limiting and defensive character of the fundamental principles that this general clause has historically taken on in our system. In fact, in order to protect itself and its fundamental values, the system of ordinance has always rejected the effectiveness of foreign norms, acts, measures, whenever they have come into conflict with such fundamental values and with the system itself. Nonetheless, in a multi-level normative system, in a globalized society, and in a context characterized by continuous exchanges between systems, such a rigid conception of internal public order could have constituted a limit to the development of our system in international relations. This is why, in the

the U.S. court had limited itself to ascertaining the right of recourse against the defendant responsible for the damage, the amount of which had been determined by the parties concerned.

[35] The order is that of the First Civil Section of the Corte di Cassazione of 16th May 2016 n. 9978, *ex multis* GRONDONA M., *L'auspicabile "via libera ai danni punitivi, il dubbio limite dell'ordine pubblico e la politica del diritto di matrice giurisprudenziale (a proposito del dialogo tra ordinamenti e giurisdizioni)*, in *Dir. civ. cont.*, 2016; NIVARRA L., *Brevi considerazioni a margine dell'ordinanza di rimessione alle Sezioni Unite sui «danni punitivi»*, in *Dir. civ. cont.*, 2017; MONTANARI A., *La resistibile ascesa del risarcimento punitivo nell'ordinamento italiano (a proposito dell'ordinanza n. 9978/2016 della Corte di Cassazione)*, in *Dir. civ. cont.*, 2017.

[36] GIGLIO D., *Considerazioni a margine di Cassazione Sez. Un. 5 luglio 2017 n. 16601*, in *Diritto Civile Contemporaneo*, 2018.

most recent rulings, as well as in the order of remission - which, far from being revolutionary in this sense as it seemed to most people, is coherent to the most recent rulings mentioned above - a progressive reduction of the scope of the principle of public order is being discussed. As traditionally intended, in fact, the principle in question would constitute a barrier to the circulation of legal values, while the system of Private International Law operates in the diametrically opposed manner , by tending to favour the movement and exchange not only of legal values, but also, on closer inspection, of legal models. However, the same Court affirmed - in the remission order itself - that reducing the concept of public order, *"è coerente con la storicità della nozione di ordine pubblico e trova un limite soltanto nella potenziale aggressione del prodotto giuridico straniero, sia esso una norma, un provvedimento, un atto, ai valori essenziali dell'ordinamento interno"*[37]. However, the Court also added that the acts and measures mentioned above should not be analysed exclusively in the light of our domestic law, but rather in harmony with those of the international community[38]. Hence, public order is no longer a rule of barrage and defence of the values of our system, but rather a means of expanding the fundamental rights common to the different systems and inferred from the systems of protection. We are thus witnessing the passage from a historicist conception of public order, understood as a complex of fundamental principles that characterize the ethical-social structure of the national community in a given historical period, and in the mandatory principles immanent in the most important legal institutions[39], to an opposite conception, wherefore it is precipitous by the system of protections prepared at a superordinate level with respect to that of primary legislation, thus it is necessary to refer to the Constitution and, after the Treaty of Lisbon, to the guarantees prepared to fundamental rights by the Charter of Nice, elevated to the level of the founding treaties of the European Union by Article 6 TEU[40].

It is also interesting to look into the indication that the ordinance provides the judges with legitimacy for the purposes of the evaluation and possible recognition of a foreign measure with punitive damages. It is a judgment that we could define as constitutionality anticipated, that is, a judgement similar to that of constitutionality, but preventive and virtual, having to admit the contrast with public order only if the ordinary legislator is precluded from introducing a hypothetical norm, similar to the foreign one, inasmuch as it is incompatible with primary constitutional values. In other words, in the presence of recognition of a foreign

[37] Remission order, Cass. Civ., Sez. I, 16/5/2016 n. 9978, para. 7.
[38] Remission order, Cass. Civ., Sez. I, 16/5/2016 n. 9978.
[39] Cass. Civ., n. 1680/84.
[40] Cass. Civ., n. 1302/13.

judgment, all the more so if it contains punitive damages, the judge should identify the rule of which the foreign measure constitutes enforcement, and hypothesize what would happen if the Italian legislator introduced a similar rule into our system. Would it be contrary to the fundamental values of Italian law, as consecrated in the Constitution, or would it not?

Ultimately, the remitting Section lists a series of precepts of which no one has ever dared to suspect the unconstitutionality - or has referred the judgment to the Constitutional Court for doubt of constitutional legitimacy- which seem to refute the merely compensatory nature of compensation for damages - a function that the Corte di Cassazione had peremptorily, in 2007, considered exclusive to civil liability. In particular, in matters of defamation by means of printing, art. 12 law 47/1948[41], provides for the payment of a sum in relation to the seriousness of the offence and the diffusion of the printed matter. In addition to the compensation for the patrimonial and moral damage suffered, a victim of defamation in the press has the right to a further sum of money, which the law provides for the injured party in relation to the seriousness of the offence and the diffusion of the printed matter. The legislator's gaze no longer turns exclusively to the sphere of the damaged, but also to the conduct of the damaging party, commensurate with the gravity of the offense committed to fundamental values such as personal integrity, dignity, and a public feeling of honour.

It also cites article 96 of the Italian criminal code which, in the third paragraph, establishes that the judge commits, in addition to reimbursement of expenses, also compensation for damages for reckless litigation, i.e. a sum equitably determined on the basis of the sanctions for the abuse of the trial. The *ratio* is to punish abusive conduct of the party in court who, far from using procedural means for the appropriate purposes , takes advantage of his/her status as a party in court (whether plaintiff or defendant) to "take revenge" against the other party, or otherwise to harm his subjective legal sphere[42] free of charge.

[41] Legge 8/2/1948, n. 47, "*Disposizioni sulla stampa*", GU Serie Generale n.43 del 20-02 1948.

[42] The regulatory equivalent in the administrative process is article 26, paragraph 2, of D. lgs. 104/2010, indexed "*Spese di giudizio*", which, in the second paragraph, provides for the possibility for the judge to sentence the losing party *ex officio* to the payment of a fine, in an amount not less than double and not more than five times the unified contribution due for the appeal, when the losing party has acted or resisted recklessly in court.

The remission order also mentions art. 709-ter of the Italian civil procedure code, inserted by Law no. 54 of 2006[43] on shared custody, according to which, in disputes between parents regarding the exercise of parental responsibility or the modalities of child custody, judges have the power to condemn parents to compensation for damages, the nature of which takes on punitive features.

Moreover, it also refers to the Italian industrial property code, and in particular its article 125 therein, which recognizes that compensation due to the damaged party be set correspond by taking into account profits made by the author of the infringement: here, the damage is not commensurate to the injury suffered by the damaged party, but to the profit made by the infringing party, for example by abusively spreading the image of the injured party. Even in this case, it would seem to be compensation, which has a strong sanction, afflictive, and deterrent value.

Finally, article 187 *undecies* of legislative decree 58/1998[44] on financial intermediation, which establishes that, in criminal proceedings relating to insider dealing and market manipulation, Consob[45] may bring civil action and request, by way of compensation for damages caused by the crime to the integrity of the market, a sum determined by the judge, also on an equitable basis, taking into account the offensiveness of the fact, the qualities of the culprit, the size of the product and the profit made from the crime.

In the light of the above, the sending section is asked whether the limit of public order may be exceeded, in consideration of its reinterpretation in a euro-unitary and international key. Ultimately, the remitting section adds an important note: when the offence affects a person's property, the distinction between compensation and sanction is unclear, as the determination of a quantum is based on percentages, tabular indices and equitative judicial choices that do not exactly reflect the injury suffered by the damaged party[46].

The Court asserts that recent Corte di Cassazione no. 1126/2015[47] saw in the seriousness of the offence a requirement of undoubted importance for the quantification of non-pecuniary damages. This last an-

[43] Legge 8/2/2006, n. 54 *"Disposizioni in materia di separazione dei genitori e affidamento condiviso dei figli"*, G.U. n. 50 del 1° marzo 2006.

[44] D. lgs. 24 febbraio 1998, n. 58, "*Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52*", G.U. n. 71 del 26 marzo 1998.

[45] Commissione Nazionale per le Società e la Borsa, is the public authority responsible for regulating the Italian financial market.

[46] Remission order, Cass. Civ., Sez. I, 16 maggio 2016 n. 9978.

[47] Cass. Civ., Sez. III, n. 1126/2015, n. 4, 2015.

notation suggests that the firm conviction that the Court had always expressed in relation to the merely compensatory function of civil liability was already revoked in doubt before 2017. This is a significant step, all the more since it would, in fact, involve overcoming the approach that the so-called "San Martino" rulings[48] in November 2008 had given to the issue of non-pecuniary damage, which, in attempting to draw up a definite structure of non-pecuniary damage, had emphasized the function which was never sanctioning and never compensatory of non-pecuniary damage in each of its components: in relation to the right to health in the strict sense (so-called biological damage), and also with reference to the suffering caused by the tort (so-called moral damage suffered); and lastly, with regard to the so-called existential component of the damage.

As already anticipated, and as we will see better shortly, the jurisprudence has definitively - even if a clear line of case law has not yet been created on the point - opened the gash by proving a certain propensity towards the idea that even the compensation of personal injury, at least in the most recent settings, may take on the shape of a sanction, where the judge is asked, in the quantification of the damage, to assess the seriousness of the offense and, therefore, the behaviour of the injured party. In doing so, one of the pivotal principles advocated by the San Martino sentences, that of full compensation for personal injury, was disavowed.

In constructing its motivational procedure, the Court began by recalling judgment No. 7613/2015, which was called to examine the compatibility of the measures provided for in other jurisdictions[49] with Italian public order. The fulcrum of the reasoning of the United Sections lied precisely in public order. Another key element of the judges' motivation of legitimacy is the alleged presence, in the Italian legal system, of a significant series of hypotheses of punitive compensation devices[50], the same ones mentioned by the remission order. As a matter of fact, the very structure of moral damages could well constitute the proof of the link between compensation and sanctioning data. Be that as it may, the circumstance that, at least until a certain moment, compensation for moral damage was only recognized in cases where the wrongdoing constituted a crime, could be an indicator of an essence of that compensation of a punitive nature. From the reading of art. 2059 c.c., interpreted in conjunction with art. 185 Italian penal code, it emerges that, in cases of crime, to the fact

[48] Cass. S.U., 11-11-2008, n. 26972/3/4/5.

[49] The judgment analyses, among other regulations, the Legislative Decree no. 206 of 6 September 2005, art. 140, paragraph 7, so-called Consumer Code, where the "seriousness of the fact" and art. 187 undecies, paragraph 2, of Legislative Decree no. 24 February 1998.

[50] Art. 12 l. 47/1948; art. 96, par. 3, c.p.c.; art. 709 *ter* c.p.c.; art. 158 l. 633/1941; art.125 D.lgs. 30/2005; art. 187 *undecies* D.lgs. 58/1998 (TUF); art. 3-5 D.Lgs. 7/2016.

that one is led to justify a compensation meant to repair non-material damage, and not only to restore it[51]. Therefore, the *quantum* of compensation does not match the loss suffered, but also bears an additional value, which is in fact punitive and mostly calibrated on the reprehensibility of the conduct of the infringing party.

Performing a civil-normative analysis, it must certainly be recognized as true the assumption according to which punitive damages do not find in our system a solid normative basis on which to rest. In point of fact, the sentence in comment was, of course, severely criticized by the majority civil doctrine. The same jurisprudence, defining punitive damages as not ontologically in contrast with the Italian legal system, implicitly denies its full and total conformity with the system itself. Indeed, from a first reading of the pronunciation, the feeling is that the system has been forced. On a legal level, it is not doubted that the pivot of the compensation system is precisely the damage: even the literal data confirms it, mentioning both the art. 1218 c.c. (contractual responsibility) and the art. 2043 c.c. (extra-contractual responsibility).

[51] The Supreme Court, as already mentioned, rejects the request for execution of the sentence mentioning, as motivation, how there is not even partial identity between the Italian non-pecuniary damage and the category of punitive damages of Anglo-Saxon matrix. The Court specifies that the non-material damage corresponds to an injury suffered by the damaged party: it is still a reparative measure for an injury suffered by the injured party; the amount of the compensation is related to the same injury. And in fact the judge, in quantifying the pretium doloris (i.e. in this operation of transmutation of a personal value, such as suffering in money) has and must have regard exclusively to the injury suffered by the injured party, in accordance with the function of civil liability and compensation for damages which is not punitive but, precisely, compensatory. In the hypothesis of moral damage - adds the Court - the emphasis is placed on the sphere of the injured party, not the damaging party. Upon closer examination, the punitive damages of the North American legal system, in the quantification of the compensation *quantum*, have regard not only to the injury suffered by the party but, above all, to the subjective sphere of the injured party and his particularly reprehensible conduct. It is to that which the U.S. judge looks to entrust a punitive, deterrent, and preventive function to compensation.

This does not happen in our system, where the emphasis is always on the damaged party, never on the damaging party (considerations of G. PONZANELLI, *Novità per i danni esemplari?,* in *Contr. impr.*, 2015, p. 1195 ff.). The purpose pursued, the so-called function of compensation, is to reintegrate the injury, while in the case of punitive damages there is no correspondence between the amount of compensation and the damage actually suffered. Withal, in the present case, net of the Court's rejection, the grounds in support of the plaintiff now take on a new meaning, even though they were not the subject of the grounds of the judges of legitimacy at the time of recognition of the enforcement of the North American judgment containing punitive damages.

It is precisely the centrality of the damage, intended as loss caused by an injury of a subjective legal situation[52], to highlight the boundary between what is and what is not compensation[53]. Punitive damages, in their connotation of *quid pluris* that is added to the compensation to punish the particularly reprehensible conduct of the infringing party, are outside the civil logic and are reluctantly ascribable to pre-existing regulatory categories. Furthermore, in addition, the recognition of punitive damages gives the judge the power to quantify the damage on the basis of the aggravating circumstance of the damaging party's wilful misconduct, leading to the liquidation of a damage that has been defined as aggravated by said conduct, and thus attributing to wilful misconduct and fairness a function that is not his responsibility: transforming compensation into a way of sanctioning wilful misconduct. The result is a mix between the civil and the criminal systems, which ruinously defeats the distance between the two systems - always inherent in Italian legal culture. In fact, civil liability falls within the sphere of of Private Law, which postulates the free action of its affiliates. Hence, particular cases of civil liability are not analytically typified, thereby excluding the possibility of theorizing the definition of unlawfulness or tort in the sense of divergence of the agent's conduct from an abstract normative model[54]. Criminal law, on the other hand, is based on the principle of legality and on the principle of imperative, so that it covers analytically typical cases, which identify in the offences ways of injury.

However, if the thought of the juridical-civil doctrine presented in the above-reconstructed analysis is certainly valid on the technical, normative and, possibly, positive legal level, it is not entirely valid when we look at a broader conception of the legal phenomenon. It is in this context that the debate on the ethics of the judgement and the judicial function is inserted, in a prospective perspective that sees it not merely as a result of legal interpretation, but as a criterion for the realisation of a policy of law[55] which aims to achieve specific purposes. In the case in hand, the policy in question aims at building a system of integral protection of the person, whose sphere of freedom and rights is claimed to be defended[56]. In this perspective, which we could define as interdisciplinary,

[52] Corte Cost. n. 372/1994.

[53] GIGLIO D., *Considerazioni a margine di Cassazione Sez. Un. 5 luglio 2017 n. 16601*, in *Diritto Civile Contemporaneo*, 2018.

[54] PIRAINO F., *Ingiustizia del danno,* in *Europa E Diritto Privato*, 2005, p. 703-783.

[55] It is of this opinion that GRONDONA M., cit. p. 8, which conceives the ordinary constraints as instruments to be built and reconstructed according to the policy of law that is intended to be pursued.

[56] The same ideas are shared by RODOTA' S., *Ideologie e tecniche della riforma del diritto civile*, 1966; *Ibidem*, Le *prolusioni dei civilisti*, Naples, 2012, p. 3089 ff.

the rethinking of the concept of public order in the field of jurisprudence takes the form of a system of construction of a transnational legal space within which Member States give way to a system understood as such at a supranational level[57]. Once again, the aim is the creation of a legal and jurisprudential system based on the protection of individual rights of the person. This way, the judicial tool would be charged with a commitment that exceeds the interpretation and application of the rule to the concrete case, to include an additional protection *quid* meant to provide for the victim of the tort[58].

A further perspective is the role of punitive damages within the criminal justice system. In point of fact, the idea of civil punitive sanctions has also resonated in criminal law, where a different decriminalization process has been taken into account[59]. In cases in which the tort does not result in damage, or results in damage lower than the seriousness of the offence, or in the case in which the enrichment of the injured party in relation to the offence is higher than the indemnifiable damage, as well as in cases in which the social cost of the offence is higher than the compensation share, punitive damages could be a means to achieve a preventive-deterrent function of civil liability alternative to public punishment[60]. The idea is to re-evaluate the offender as an individual, making the hypothesis of restriction of his/her fundamental freedoms completely residual[61]. Punitive damages could thus represent an alternative measure to the public penalty, with reflections that reverberate exclusively through the offender's heritage[62]. In actual fact, compensation for damages has a greater ductility compared to criminal penalty: punitive damages would operate in the absence of sources as a legal product; they would also have fewer imperative requirements[63].

[57] GRONDONA M., cit. p. 13.

[58] The scheme recalls that of obligations without performance, in which the primary obligation - the result of the contract - is added to the so-called "accessory" obligations, designed for the protection of the individual during the time in which the same is linked to the counterparty by an obligatory relationship, if that counterparty possesses powers such as those to cause in the so-called "weak subject" the legitimate belief that his action will not result in damage to his personal and financial sphere.

[59] Analysis of LANDINI S., *La condanna ai danni punitivi tra penale e civile: la questione rimane attuale*, in *Diritto penale e processo*, 2017, p. 4 ff. .

[60] PADOVANI T., *L'utopia punitiva- Il problema delle alternative alla detenzione nella sua dimensione storica*, Milan, 1981, p. 237 ff.; F. BRICOLA, *Carattere "sussidiario" del diritto penale e oggetto di tutela*, in *Politica criminale e scienza del diritto penale*, Milan, 1997, p. 187 ff.

[61] LANDINI S., cit. p.14.

[62] LANDINI S., cit. p.14.

[63] BRICOLA F., *La riscoperta delle pene private*, in *Pol. dir.*, 1985, 71 ff., 73; BRICOLA F., voce *Teoria generale del reato*, in *Noviss. Dig. it.*, XIX, Torino, 1973, p. 48 ff.

4. *Considerations*

There is no doubt that any new factor impacts the system that incorporates it, sometimes even in a violent manner[64]. Nevertheless, this does not imply, as authoritatively argued, that jurisprudence is not an autonomous whole, nor does it have an unambiguous mode of functioning in history[65]. As a matter of fact, jurisprudence, *"prendendo parte in modo efficace alla trasformazione delle relazioni e non essendo volta a riprodurre un'identità precedente al caso (ricognizione), non ha un tenore morale o epistemico, ma etico"*[66].

It is precisely this ethical sense of the jurisprudential decision that could, in the writer's opinion, guarantee, legal citizenship to punitive damages even within civil law systems. Assumption that everything is meant to be questioned, further implemented, recapitulated while there is life[67], we understand that jurisprudence is reinvented to adapt to social practice, to the becoming of law, to the new needs thereof. In particular, the phenomenon of punitive damages, though difficult to embed into the technical identification of a normative addendum, nevertheless provides the legal system with a useful means to reach a necessary end, i.e., the protection of the person, *rectius* of the injured party from the tort that is to be restored.

Finally, an additional view of punitive damages is mentioned for the sake of completeness.

Some maintain that punitive damage is not a sanction, but a remedy itself, since it would fulfil a function of reinforced protection of the injured subjective sphere[68]. The same genesis of punitive damage in the Anglo-Saxon system would confirm this. As already specified, in fact, the institute originally held a merely compensatory function. Arguably, punitive damages can fully fit into a trend of overcoming the traditional defensive system of the civil protection apparatus of the personality, which expands and strengthens the defences of the individual, especially against the dangers created by the development of technology and market expansion[69]. The principle in question has been applied, for example, by

[64] GRONDONA M., cit. p. 13.

[65] BRINDISI G, *Il tenore etico o morale del giudizio. Note su diritto e filosofia nella riflessione di Deleuze sulla giurisprudenza*, in *Etica & Politica / Ethics & Politics*, XVIII, 2016, 3, pp. 163-182.

[66] BRINDISI G., cit. p. 14.

[67] LOMBARDI VALLAURI L., *Saggio sul diritto giurisprudenziale*, Milan, 1975, p. 370.

[68] GRONDONA M., cit. p. 14.

[69] Stated by RESTA G., *Dignità, persone, mercati*, 2014.

German case law, to contain the phenomenon of unauthorized commercial exploitation of the personality of others[70]. If taken as true, the consideration, would fully eliminate the issue concerning the recognition of punitive damages, as same would be deemed an extension of the civil remedy, with a view to greater and better protection of the injured party. The measures of the new 2018 "Tabelle di Milano"[71] go along the same line of thought, especially those measures relating to the relief of damage from defamation, which provide for an increase in the amount of damage if same has been committed with intent. As correctly argued by the Observatory, the *ratio* is not that of imposing a punitive sanction on the infringing party (this consequence, if anything, is only a reflection of the primary objective), but that of guaranteeing that the injured party obtains fair and full compensation, based on the logical assumption that those who suffer damage - that is the product of malice - certainly suffer more than those who suffer damage as a result of the fault of the infringing party, whether that be by negligence, inexperience or recklessness.

The following consideration may be conducive to greater clarity.

There is a clear differentiation in the conception of the same product in the penal and civil fields: in the first case product is an offense, whereas in the second it is identified as damage[72]. Indeed, if in the tort, we focus our attention on the damage, perceived as an obstacle to be removed in order to return to the *status quo ante* or prior to the event, regardless of whether it was committed with intent or guilt, with a criminal offense, our attention is focused on the fact, which is invested with a connotation of offensiveness and deplorability such as to lead the State to neutralize the characters through the punishment of the offender/culprit. In the latter case, damage takes the second place, to the extent that compensation is remitted to the intervention of a civil judge, while a criminal judge shall be involved in imposing a penalty on the offender.

Hence, if it is true that criminal cases are typified, while civil ones are atypical, with consequent inapplicability of penal punishment to the civil system, it is also true that there are civil cases that are, in fact, the exact reflection, in terms of compensation, of the criminal ones. This is the case

[70] Citing some of them BGH, 15/11/1994, in BGHZ, 1996; BGH, 5/12/1995, in NJW, 1996.

[71] SPERA D., *Tabelle milanesi 2018 e danno non patrimoniale*, 2018.

[72] As authoritatively argued "*the criminal offence generally tends to be considered in and of itself offensive (...)*", with the consequent "*impossibility to distinguish the damage of the protected interest from the fact in accordance with the legal model*". From this it follows that "a fact conforming to the type is therefore always, by definition, a fact detrimental to the protected interest". CRESPI-STELLA ZUCCALÀ, *Commentario Breve al Codice Penale*, Padua, 1992.

of damages caused by crime, which derive consequentially and chronologically from the fact of crime, and therefore assume recognisable connotations in each case. These are cases in which the injured party, in addition to suffering damage as we traditionally understand it (which can be classified under the known categories of biological, moral, terminal damage, *etc.*) is also burdened by a further suffering, which comes from having produced that damage with intent. A case in point for the first scenario is the situation of the family member of the victim of terminal damage caused by road accident, who is forced to come to terms with the event. A case in point for the second, is the condition of those who are obliged to make the reason of the murder of their departed, event affected by those connotations of cruelty and seriousness that arise, indeed, from a single assumption: the willingness spent in producing the damage, the scientific desire to realise certain consequences. Civil judges should take into account such further suffering, which is also generally loaded with such elements as the social resonance brought about by the wrongful act. When making relevant rulings, civil justices should therefore not consider the additional compensation *quantum* as punishment, but rather as a suitable measure to level the compensation on the extent of the damage actually suffered by the victim.

ANDREA ALBERTO BELLOLI

MARITAL COMMUNITY UNDER ITALIAN LAW AND FINANCIAL LIABILITY OF THE SPOUSES: SOME THEORETICAL (AND PRACTICAL) ISSUES

1. *Introduction*

As part of Private law, marriage undoubtedly impacts a person's financial situation more deeply than any other family relationship. This is quite clear if we consider that, throughout its duration, marriage gives rise to specific obligations and rights between spouses: such relations unfold in the context of family life) wherein emotional community often exceeds individual interest. Indeed, spouses may not relate to each other either as strangers or ordinary contracting parties[1].

Marriage also affects the spouses' financial relationships towards third parties.

With specific reference to the marital community regime in Italian law (*cf.* articles 177-197 of the Italian Civil Code – "ICC"), concerning the financial liability of spouses, a number of special rules overlap and amend the general rules set out in private property law. This raises a number of theoretical and practical issues which are worth outlining.

[1] Cf. MALAURIE P., AYNES L., *Les régimes matrimoniaux*, LGDJ, 2013, p 1.

2. *Marital community under Italian Law - an overview*

Since 1975[2], the statutory regime of spouses in Italy[3] has been the marital community regime, i.e., a community of purchases and gains, which is essentially based on the marital community regime typical of French law (cf. articles 1401 *et seq.* of the French Civil Code)[4], albeit with its own specific rules.

This is not a regime of universal community, therefore, since it does not include all the property of both spouses, but excludes the property that the spouses owned before marriage, as well as other personal property (which continues to be the exclusive property of the spouse, even if purchased after marriage). More in detail, the law establishes that certain property falls immediately into the community regime (*immediate community*), whereas other property types do so only at the time of dissolution, if still existing, for division purposes (*deferred community*).

Spousal assets that are part of the marital community property fall into three categories:

[2] The Italian reform of family law introduced marital community as a statutory regime (default regime) with Law no. 151 of 19 May 1975. Naturally, spouses may opt for a separation of property regime either at the time they celebrate their marriage or subsequently by entering into a specific agreement for the separation of property.

[3] Following the entry into force of Italian Law no. 76/2016 (which introduced civil partnerships between same-sex couples), this regime is also extended also to civil partners.

[4] As a matter of fact, marital community is not a regime that is inherent in Italian tradition. As known, it results from the French tradition (especially of *droit coutumier*). When the Code Napoléon was introduced in Italian territories in 1806, marital community barely took root, and people carried on with their usages, excluding the marital community with special clauses. During the Restoration, the old regulations came back into force, and provisions were quickly made to expressly declare the end of marital community. Thus, later on, both the *Codice Albertino* of 1837 (the civil law code in force in the Kingdom of Piedmont-Sardinia) and the Code of the Kingdom of Italy of 1865, despite being broadly based on the French *code civil*, departed from it as regards matrimonial property statutory regime; they stated that marital community was a purely optional regime based on an agreement, and justified their refusal to comply with the French *code civil* by stating that this regime was contrary to Italian usages (cf. OBERTO G., *La Comunione legale tra coniugi*, I, in *Tratt. di dir. civ. e comm.*, dir. da CICU E MESSINEO, *continuato da* SCHLESINGER, Milan, 2010 pages 120-135). Even the Italian Civil Code of 1942, until the aforementioned reform of 1975, did not envisage marital community as the statutory regime. It is worth noting that, after initial acceptance in the years immediately following the reform, today the majority of Italian families (72.9%) continue to choose separation of property (ISTAT – Italian National Institute of Statistics – data 2019), which is the most common regime in Italy.

A. Immediate community property: all purchases[5] made by the spouses – whether individually or together – during marriage and any business set up after marriage with common assets and managed by both spouses; the profits and gains of the businesses belonging to one of the spouses before marriage (or purchased after marriage with personal assets), but managed by both spouses during marriage (Art. 177 lett. a and lett. d of the ICC);

B. Deferred community property: the income from the spouses' personal property and the proceeds from each spouse's individual activities, the business of one of the spouses set up after marriage, but managed separately, and gains of a business set up before marriage and managed separately, provided they are still in existence at the time of dissolution of the community (Art. 177, lett. b, lett. c, and Art. 178 of the ICC).

C. Personal property (i.e. not included in either immediate or deferred property): property which belonged to the spouses before marriage, assets received after marriage as a gift or inheritance, assets received as compensation for damages (as well as invalidity pensions or pensions due to loss of the ability to work), property for strictly personal use[6], assets needed by a spouse for carrying out his/her profession, and assets purchased 'through subrogation', i.e. with the transfer price of personal property or its exchange (Art. 179 ICC).

According to most academics, the most relevant feature of marital community is its difference from co-ownership under general private law[7].

The latter - whose *ratio* is to protect individual property – entails shares.

Marital community[8] is considered a kind of community *without shares*, instead, and is based on the *ratio* of protecting the needs of the family.

To draw a clear boundary between ordinary co-ownership, an important ruling of the Italian Constitutional Court (Corte Cost. no. 311 of

[5] Italian case law has clarified that the notion of purchase includes not only movables and immovables, but also credits when they are made up of forms of investment other than the purchase of movables and immovables (Italian Supreme Court no. 21098/2007). Instead, credits that are 'instrumental in achieving an increase in property', such as the right to enter into a final agreement resulting from the execution of a preliminary agreement do not fall within the notion of community, and remain the exclusive property of the spouse who entered into such agreement (Italian Supreme Court no. 11504/016).

[6] (Such as clothes, watches, etc.).

[7] Art. 1100 of the ICC, Book 2 of the Italian Civil Code establishes rules on goods, property, rights of use and enjoyment (usufruct, use, habitation, perpetual lease, building rights).

[8] Art. 177 *et seq.* of the ICC: Book I of the Italian Civil Code establishes rules on Persons and Family.

17 March 1988), subsequently endorsed by a significant ruling of the United Chambers of the Italian Supreme Court of Cassation (Cass. Civ. Sezioni Unite no. 17952 of 24 August 2007), proposed the definition of marital community as "joint and several property" ("*proprietà solidale*")[9], a formula that intends to express, within its structure, the concept of coexistence of sole and full rights on the same assets, and a real 'transposition' of the rules on joint and several obligations in the field of real estate.

On the basis of this construction, unlike ordinary co-ownership (where the share is a right of the single co-owners as well as a limitation to their disposal powers), in marital community the notion of "share" is not a structural element, but its purpose is simply to perform the following mandatory functions:

1) identifying the proportional relationship which the spouses must comply with during division, upondissolution of the community (art. 194 paragraph I, ICC); and

2) specifying the limits within which marital community property may be claimed by a specific creditor of one spouse (art. 189 of the ICC) (on this matter see §3 below).

In both cases, "shares" refer to the property as a whole (and not to individual assets), and are always understood as being equal: the principle of equality of shares cannot be departed from, not even by agreement between the parties (art. 194 of the ICC), thereby showing a further significant difference from the rules of ordinary co-ownership[10].

2.1. *Management*

As regards the management of community of property, Italian law establishes different operating rules depending on whether it is an ordinary or extraordinary management transaction.

In the first case, management and representation in court are the responsibility of both spouses severally (art. 180 para. 1 ICC); whereas transactions exceeding ordinary management, as well as the execution of agreements relating to '*diritti personali di godimento*' (i.e., *inter partes* rights of enjoyment of goods, based on obligations), shall fall to the responsibility of the spouses jointly (art. 180 para. 2 of the ICC)[11].

[9] Corte Cost. no. 311/1988. Italian Academics have traced joint and several property back to the German archetype of joint ownership (*Gemeineschaft zur gesamten hand*).

[10] Pursuant to art. 1101 ICC, the shares of the joint owners of ordinary co-ownership are presumed to be equal, but they may differ.

[11] In order to distinguish between ordinary and extraordinary management transactions, the criterion normally used is to consider to what extent the transaction is essential

It is also worth mentioning that article 184 of the Italian Civil Code establishes a special rule on the legal consequences of extraordinary management transactions performed by one of the spouses without the necessary consent of the other spouse. In fact, as mentioned, for extraordinary management transactions, the law requires joint participation by both spouses.

If the extraordinary management transaction performed by one of the spouses concerns immovables, the relevant legal instrument is *effective*, but the spouse who has not given his/her consent may request voidance thereof within one year of becoming aware of it and in any event within the date of registration with the Italian Land Registers. If, on the other hand, the legal instrument concerns movables, it is effective, but the spouse who performed the relevant transaction, on motion of the other spouse, is required to return the community to the *status quo ante* or, if this is not possible, to allocate the equivalent in cash to the community[12].

Since each spouse is the owner of entire property, violation of the rule under art. 180, paragraph 2, ICC, due to failure by the other spouse to give his/her consent, makes the legal instrument voidable due to irregular formation of consent, in keeping with the general private law rule wherefore if contractual consent is irregular, the remedy of voidability is applied.

in relation to family life requirements. Therefore, ordinary management transactions include those performed for the conservation, recovery and maintenance of marital community property or to meet normal family life requirements. Instead, extraordinary management transactions are those of considerable financial significance and potentially capable of altering or affecting property integrity (for example, in case law, the preliminary contract for the sale of real estate and the contribution of an immovable to company assets are considered extraordinary management transactions).

[12] The rule described ensures a balance between the opposing needs of safeguarding the principle of joint management and protecting the legitimate expectations of third parties, and is a specific rule for this regime. Upon closer examination, it too may be regarded as a reflection of the structural difference of marital community as an example of community without shares, compared to ordinary co-ownership, which instead focuses on the concept of shares. According to general private law, in fact, if the co-owner of a property in ordinary co-ownership transfers the entire property (instead of his/her single share), the disposal is considered ineffective (at times considered subject to the condition precedent that it is attributed to him/her entirely at the time of any division). The reasons for different rules on movables and immovables also stem from the different legal status concerning categories of assets. In the case of immovables, the third-party purchaser has the opportunity to verify whether the selling party is a married person and which property regime he/she has chosen (by consulting the Registry Offices). If the selling party is a married person under the marital community regime, the third party will be aware that the other party's spouse may make the agreement void, and may therefore demand that he/she take part in the agreement or in any event give his/her consent.

From another perspective, it should be noted that the statute of limitations on an action for voidability is only one year, instead of five, as provided for under general private law rules on voidability, pursuant to art. 1442 ICC.

2.2. *Splitting between 'Formal Ownership' and 'Substantial Ownership' in marital community*

Marital community of spouses is not simply an estate (*static profile*), but first and foremost a body of legal rules binding both spouses, which govern the performance of transactions and generate certain effects (*dynamic profile*)[13]. The existence of the community regime, therefore, is an element that may change the application of the general rules of private law and generate a true *micro-system of special rules* which often raise theoretical and practical issues that need to be resolved, since they depart from the rules that would apply if the individuals were not married.

As raised in the previous paragraph, immediate community includes any purchases made, including separately, by the spouses during marriage (see art. 186, lett. a, ICC).

This rule marks another step away from ordinary co-ownership, in which a formal co-ownership always results. Indeed, with reference to immovables, the rule establishes that co-ownership by both spouses is not necessarily required to acquire assets into the community property.

In other words, when one of the spouses acquires a property *separately*, the property is formally owned by him/her. Nevertheless, (substantial) ownership *extends automatically* to the other spouse, who becomes the 'substantial' owner of the property, regardless of whose name the property has been registered in under Land Registers[14].

The effect of the marital community regime, therefore, may be a possible splitting between 'formal ownership' and 'substantial ownership', in the sense that the information contained in the Land Registers and marital community could run on different tracks: in the case of purchases made separately, the owner of a property may well be indicated as one of the spouses, while both of the spouses would be effective owners[15].

[13] This implies, among other things, that the two spouses may theoretically be under a marital community regime albeit not having any community property (Cf. CORSI F., *Il regime patrimoniale della famiglia*, I, in *Tratt. di dir. civ. e comm.*, dir. da CICU E MESSINEO, Milan, 1979, p. 66 note 42).

[14] Cf. CORSI F., *Il regime patrimoniale* cit., I, p.68.

[15] Academics have pointed out how the spouse in whose name the property is, would from a certain perspective be similar to a 'fiduciary owner' (i.e. would be in a similar position to that of a trustee), Cf. CORSI F., *Il regime patrimoniale* cit. I, p. 67. According

3. *Financial liability vis-à-vis third parties – Special rules*

Having outlined the main features of marital community and given that the spouses are free to enter into obligations, severally or jointly, vis-à-vis ordinary and extraordinary management transactions (with different consequences provided for by law, as mentioned above), let us now shift our focus on the spouses' third-party creditors and see how the marital community regime brings about changes to the general private law rules on financial liability for the fulfilment of the relevant obligations. In this case, community poses both *theoretical* and *practical* issues which have been examined in court rulings, including in relatively recent times.

First of all, according to the private law general rule on financial liability, under Art. 2740 of the ICC, debtors are normally liable for the fulfilment of the obligations with all their present and future assets, and limitations of liability are not allowed except in the cases established by law[16]. Furthermore, Art. 2741 of the ICC states that creditors have equal rights to seek satisfaction from the debtor's assets (*par condicio creditorum*), subject to the existence of pre-emption rights on them (privileges, mortgages and pledges).

Instead, under the marital community regime, pursuant to articles 186-190 of the ICC concerning the obligations undertaken by (or arising *ex lege* from) one or both of the spouses, a general liability framework is introduced, which departs from the general principles on the matter set out in the aforementioned rules, with regard to both community obligations and personal obligations.

Italian law distinguishes between two categories: 1) obligations on marital community property (specifically listed in art.186 letters a, b, c, d, ICC)[17]; and 2) personal obligations of one of the spouses (art. 189 para. 2. ICC).

to this viewpoint, however, the creditor would substantially be the co-owner of the property, not simply a creditor vis-à-vis the legal owner spouse.

[16] The rule set out in art. 2740 of the ICC corresponds to the rule under art. 2284 of the French *code civil*.

[17] Community property is liable of: a) any encumbrance thereon at the time of purchase; b) all management charges (i.e. all debts and operating costs); c) family maintenance costs (including costs for the education and upbringing of children) incurred by the spouses, including separately, in the interest of the family; d) any obligation undertaken jointly by the spouses (whatever the purpose it was undertaken for). The law, therefore, includes an objective ground for liability that takes into account the reason underlying the obligation (cases under a), b), c), and a subjective ground for liability (case under d) that does not depend on the reason underlying the obligation but is based on how the obligation arose.

1) With regard to the obligations on marital community property (Art. 186 ICC), the law[18] establishes that creditors are entitled to obtain satisfaction from the marital community property and to lay claim to the personal property of the spouses only *alternatively*[19] when the community property is insufficient and, in any case, vis-à-vis each of the spouses, "*to the extent of one half of the claim*" (Art. 190 ICC).

2) With regard to the personal obligations of an individual spouse (including those arising prior to celebration of the marriage), personal creditors of such spouse may seek satisfaction not only from the spouse's personal property, but *alternatively*[20] out of the community property, "*up to the value corresponding to his/her share*" If they are unsecured creditors, community creditors rank higher (Art. 189, para. 2 ICC).

These rules show that there is a broader general financial liability than that under Art. 2740 of the ICC, towards a spouse's personal creditors affording them a more favourable regime. In fact, alternative and partial liability (to the extent of one half of the claim) of the other spouse is added to the full and unlimited liability of the spouse who has undertaken the obligation.

On the other hand, art. 189, para. 2 of the ICC establishes a special privilege in favour of marital community creditors for community obligations, as regards spouses' unsecured creditors, also establishing that same shall be satisfied before any unsecured marital community creditors[21].

3.1. *Financial Liability and Enforcement*

A first aspect worth addressing regards the *identification of the common property* on which enforcement needs to be sought.

Based on the above observations regarding a possible split between 'formal' and 'substantial' ownership of community immovables (§2.2 above), one should conclude that creditors of obligations on the community (who should seek satisfaction, primarily, from community assets) should identify common property regardless of formal ownership[22].

[18] More precisely, art. 186 and art. 190 of the ICC.

[19] "*Responsabilità sussidiaria*".

[20] "*Responsabilità sussidiaria*".

[21] From a comparative viewpoint, it should be noted that, differently, in French law the marital community regime provides the creditors of each spouse with greater protection because they may lay claim to community property even in cases where the debt has not been incurred for family needs (cf. articles 1408, 1411, 1413 of the French *code civil*).

[22] This information may be acquired via a Land Registry search or by consulting the Registry Office.

In other words, creditors may enforce all community assets, *regardless* of whether same are formally owned by one of the spouses or both spouses jointly. Alternatively, with the same enforcement order, creditors may claim the spouse's personal assets, and *to the extent of half of the claim*[23].

In this regard, case law[24] – which is sensitive to the practical needs underlying the issue at hand – states that when the obligation referred to in the enforcement order is included in the debts of the community property (both primarily and alternatively), the fact that the enforcement order has been granted against both spouses or only one of them is irrelevant, because the enforcement shall be deemed effective also against the other spouse (subject to service to both, see §4.3 below).

Instead, as regards the identification of any movables belonging to the community, the law assumes that same belong to both spouses. In order to overcome the assumption of co-ownership of movables, the non-debtor spouse needs to prove that the disputed asset is a personal belonging (Art. 195 ICC).

Secondly, the notion of '*alternatively*'[25]when it comes to liability is worth looking into.

According to currently prevailing views, this may take the form of *beneficium ordinis* rather than *beneficium excussionis*, meaning that prior enforcement of the personal property of one of the spouses (or the common property, as the case may be) is not a condition of admissibility of the legal action of enforcement.

In other words, creditors may freely claim any of the spouses' assets, since it may not be clear to third parties which assets are common and which are personal. Therefore, once creditors have commenced enforcement on any property they have identified, it is the spouses' responsibility to specify the existence of any personal, or common assets, as the case may be, over which precedence may, and shall, be given by the creditor to obtain satisfaction.

Given the above, among the operational consequences of marital community as joint and several property (i.e. a community without shares), special attention should be paid to the *practicalities* of enforcement proceedings initiated by a personal creditor of an individual spouse on the assets forming part of the marital community, i.e. the case referred to under in art. 189, paragraph 2, ICC.

[23] It should be noted that marital community has no legal personality and is not an independent estate, but a group of assets subject to a special body of rules.

[24] *Ex multis*, Court of Milan, 14 June 1993.

[25] *"Responsabilità sussidiaria"*.

This topic has been the subject of heated debate, especially if we consider that, practically speaking, enforcement actions undertaken for obligations actually "incumbent" upon marital community[26] are quite theoretical, whereas in the majority of cases creditors who lay claim on community property are personal creditors of one of the spouses.

Since the 1975 Family Law Reform came into force, the debate has focused on the meaning attributed to the wording of Art. 189, para. 2 of the ICC, according to which a creditor of one of the spouses may seek satisfaction alternatively from the community property "*up to the value corresponding to the share of the debtor-spouse*".

Many doubts have arisen over the interpretation of this provision with regard to two key issues.

A) The first issue is of a purely substantive nature, as it involves the nature of marital community between spouses as a kind of community without shares, and precisely the identification of the "subject" of the attachment proceedings.

B) The second issue, of a procedural nature, and only partially related to identifying the subject of the attachment proceedings, regards the *modus procedendi* of the enforcement, i.e., identifying the procedural steps through which the enforcement proceedings shall be carried out.

Ambiguity and inadequacy of the law have led academics and judges to offer many different interpretations each arguable both from a theoretical and dogmatic viewpoint as well as in terms of the practical inconveniences they lead to.

Over the years, four different methods have been suggested for the attachment of immovables purchased under a community of property regime by a personal creditor of one of the spouses:

1) a first solution theoretically suggests that, the whole share of marital community property (made of various and different assets) could be claimed;

2) according to a second theoretical approach, a debtor-spouse's ideal share of each asset included in the community could be claimed;

3) according to a third approach, each individual asset, in its entirety, of the community may be claimed, but with allocation of half of the proceeds to the non-debtor spouse;

4) finally, another option suggests claiming each individual community asset, in its entirety, , but allocating all proceeds of the sale to the personal creditor of the debtor-spouse.

Firstly, it should be noted that suggestions 1) and 2) were immediately ruled out by main case law on the merits.

[26] I.e., related to the categories referred to in aforementioned Art. 186 lett. a, b, c, d of the ICC.

Indeed, the subject of the enforcement cannot be the community share as a whole, nor can the person acting *in executivis* request the separation of property between spouses, as the list set forth under Art. 191 of the ICC, specifying cases in which community dissolution occurs[27], is exhaustive.

Assuming the execution of the whole share of marital community property would indeed mean accepting (at least theoretically) that a share of the entire common property be put up for sale in order to satisfy creditors and that, following disposal, other persons take the enforced spouse's place in the co-ownership and in the exercise of management powers of marital community. This would distort the notion of marital community regime, as it would allow a stranger, other than the spouse, to enter the community.

Specifically, it was pointed out that the attachment of such a mixed and diverse property such as marital community, which comprises both tangible and intangible assets, would not be legitimate, since it would be materially impossible to meet the specific requirements that characterise enforcement proceedings.

Having ruled out the option of executing the share of the community property as a whole, an approach that admits execution on the share of half of the single assets of the community, has been quite widespread for a long time now – both among academics and in case law[28].

The Italian Supreme Court's first ruling on the matter (ruling No. 6575 of 14 March 213) was issued no earlier than about thirty years after entry into force of the Family Law Reform, which introduced marital community as the statutory financial regime. More recently, the Court ruled again on the matter (ruling No. 2047 of 24 January 2019), confirming the trend expressed six years earlier.

The trend set by the Italian Supreme Court, regardless of the undeniably subjective nature of certain interpretations (see below), is currently a milestone for all academics and especially for judges deciding cases on the merits.

The first point that has been clarified regards identifying the subject of the attachment: according to the Italian Supreme Court, the subject of the attachment of an individual asset cannot be the share of the asset, but the asset "in its entirety".

[27] Marital community dissolves: following a declaration of absence or presumed death of one of the spouses; in case of annulment, dissolution or cessation of all civil effects of the marriage; legal separation; property division by judge order; change of matrimonial property regime by agreement; or bankruptcy of one of the spouses.

[28] E.g., Court of Lecce, 3 February 2010.

The Italian Supreme Court's approach is based on the acceptance to the dogmatic construction of marital community "without shares"[29].

According to the Court, if the marital community share is not an independent legal asset that may circulate from a legal point of view, it cannot be attached either generally or in relation to an individual asset. Otherwise, an unacceptable "function of creating *iura in re*[30] having prior non-existent content or scope" would be attributed to the attachment.

Therefore, considering that the subject of the attachment cannot be the "share" of the debtor-spouse (since, in the marital community, a share as an independent legal asset that may circulate from a legal point of view does not exist), the only logical and feasible approach is to consider that the attachment brought forward by the spouse's personal creditor will affect the individual community assets in their "entirety".

As regards the further interpretation problem as to whether the limit of enforceability laid down by Art. 189 of the ICC ("*up to the value of the debtor-spouse's share*") should be referred to the "*community property as a whole*"[31], or to the "individual asset" enforced[32], the Italian Supreme Court has adopted the following conclusion.

As mentioned above, since the Italian Supreme Court was concerned about the practical consequences of this solution, it embraced the second interpretation, granting the creditor the right to seek satisfaction only from half of the *proceeds* of the attachment. According to the Court, should the other interpretation be adopted, the enforcement proceedings would inevitably be affected by the overwhelmingly practical difficulties of how to actually determine the value of the "community property as a whole". The enforcement proceedings would face the serious risk of coming to a halt, pending uncertain and random judgments to determine the exact value of the debtor-spouse's share (suffice it to think, for example, of the continuous changes that occur within community property, or of the problems related to the filing of simultaneous or subsequent motions to obtain a writ of attachment by personal creditors of the same spouse)[33].

[29] Although, at a closer look, it also appears to be guided by the intent to seek a fitting practical solution for implementing the rule in question.

[30] Civil law *erga omnes* rights that grant the holder immediate and absolute power over an asset.

[31] Based on which the creditor may obtain satisfaction from the entire sum resulting from the enforcement sale, provided it does not exceed the aforementioned limit.

[32] In this case, the creditor will only be able to obtain satisfaction from half of the sum resulting from the sale.

[33] Apart from the clearly practical implications, it should be noted that according to authoritative Academics, the solution that is most consistent with the structure of marital community as 'joint and several property', is based on calculating the value of the debtor-

After reaching this conclusion, the Italian Supreme Court finally addressed the issue of how to allocate the other half of the proceeds. The Court's opinion was that they should be allocated as exclusive ownership to the non-debtor spouse, ruling out that they should be "returned" to the marital community. The Court reached this conclusion not only on the grounds of application of the general principles on the splitting of community proceeds upon dissolution as established by law, but also because, if the other half of the proceeds were to remain in the community, they would be subject to further endless enforcements by personal creditors of the same spouse, thus nullifying the limit of enforceability under Art. 189 of the ICC.

3.2. Some critical observations

We should firstly consider that the *theoretical* difficulty of this matter regards identifying the subject of the enforcement proceedings, while the main *practical* difficulty lies in the operational methods of enforcement, which need to be applied to a very specific structure, i.e., marital community – which is somehow separate from the spouses' personal property, yet not a separated property in the proper sense.

Before clarifying its position, the Italian Supreme Court specified how each of the solutions already envisaged drawbacks and inherent doubts and were unable to provide completely flawless solutions in terms of systematic consistency.

Indeed, even the construction provided by the Italian Supreme Court fails, in many respects, to deliver satisfactory conclusions.

In the first place, it forces one to state that the sale of the attached property leads to a kind of dissolution of marital community, which Legislators have never deemed such in statute law, but which has only appeared in case law.

However, it is not simply the dissolution of marital community, referring to an individual asset and not to the complex family financial regime, that results created by case law. Even the rule drawn up by the Supreme Court on the distribution of the proceeds from the sale of the enforced property does not fall within the system of the distribution of

spouse's share not for each individual asset, but for the marital community property as a whole. This is the only way of being sure that personal creditors' enforcement proceedings, although carried out on each asset in its entirety, do not consider an overall value exceeding half of the community property as a whole, *Cf.* PALADINI M., *La comunione legale come proprietà solidale: le conseguenze sistematiche e applicative,* in *Famiglia e diritto*, no. 7/2008, p. 688.

assets and liabilities regulated by statute law in the event of dissolution of marital community[34].

It has been noted[35] that allocating half of the proceeds of the enforcement sale to the non-debtor spouse means nothing more than acknowledging the existence of a *pro quota* right on the community property, thus leading to a contradiction (at least in logical terms) with the theoretical approach underlying the execution of the entire property (i.e., the fact that joint and several property has no shares). In other words, after enforcement, the share of the single asset subject to execution (the existence of which is denied *a priori*) comes to the forefront through the shape of 'portion of the proceeds' which is assigned to the other spouse[36].

4. *Types of attachment*

After clarifying the subject of the attachment, and how the limit of enforceability under art. 189 of the ICC should be interpreted, the Italian Supreme Court then addressed the practical issue of identifying the types of proceedings through which attachment should be carried out.

4.1. *Unenforceability of undivided property*

With reference to this further aspect, the Court excluded application of the rules on the enforcement of undivided property according to article 599 *et seq.* of the Italian Code of Civil Procedure ("ICCP"), as same were considered incompatible with marital community, which, as seen in the previous paragraphs, constitutes a "community without shares", and not an ordinary co-ownership of property.

On closer examination, however, the decision to exclude the rules on the execution of undivided property was not based exclusively on the purely dogmatic consideration mentioned above, but mainly due to the

[34] Art. 194 ICC: "*The division of the marital community property is carried out by dividing the assets and liabilities in equal parts. The judge, depending on the needs of the children and their custody, may grant one of the spouses with usufruct of a part of the property to which the other spouse is entitled*".

[35] ACONE M., *Espropriabilità dei beni della comunione legale per i debiti personali di uno dei coniugi: un passo avanti ed uno indietro della Corte di cassazione*, in *Foro Italiano*, 2013, p. 3282.

[36] On the other hand, such construction cannot be justified by possible joinder of the non-debtor spouse to the enforcement proceedings because he/she may take part solely to defend himself/herself against any violation of the limits envisaged for enforcement proceedings under article 189 paragraph 2 of the ICC, and not to make him/her the recipient of part of the enforcement proceeds.

fact that the direct application of these rules did not appear to be fully consistent with continual subjection of the attached property to marital community regime.

In this respect, it is worth noting that, as mentioned above (§2.3), art. 184 of the ICC entitles each spouse to the right to effectively dispose of the community property in its entirety[37].

This specific disposal power, which also during the enforcement proceedings each spouse is entitled to under art. 184 of the ICC, could conflict with the needs of the creditor who started the enforcement proceedings, since the disposal of the attached property by the non-debtor spouse could nullify the action taken by the creditor.

Both academics and judges, therefore, have investigated possible reasons for automatically "extending" to the other spouse the lien arising from the attachment against the debtor-spouse[38].

But, if the attachment lien was automatically extended to a person who, on the one hand, is entitled to dispose of the attached property and, on the other, is not the recipient of the attachment, this would give way to an 'anomalous approach', that automatically subjects a person who does not, as yet, have any (legal) knowledge[39] of the existence of an attachment, to the attachment lien. In other words, this would breach the adversarial principle, which is key principle to civil proceedings, including enforcement.

Furthermore, even art. 600 of the ICCP – which describes three types of enforcement: 1) separation of the share in kind, 2) sale or allocation of the undivided share and 3) judicial division – does not appear to be fully applicable to the case in question.

Indeed, except for the (quite rare) first option, where the share of the property may be separated in kind, the second type of enforcement set out in the ICCP (sale or allocation of the undivided share) does not seem

[37] Indeed, pursuant to the aforementioned rule, each spouse may – even if the other spouse does not agree: a) dispose of movables by means of fully valid and effective agreements (art. 184, para. 3, ICC); b) dispose of registered immovables and movables by means of fully effective agreements, even though they are voidable upon motion of the other spouse (art. 184, para. 2, ICC).

[38] Cf. VERDE G., voce *Pignoramento in generale*, Enc. dir., XXXIII, Milano, 1983, p. 810; TISCINI R., *L'espropriazione forzata di beni facenti parte della comunione legale per debiti personali di un solo coniuge alla prova del procedimento di espropriazione dei beni indivisi*, REF, 2008, p 723. *et seq.;* LOMBARDI A., *Espropriazione forzata dei beni della comunione legale, e responsabilità sussidiaria ex art. 189 comma 2 c.c.,* in *Giurisprudenza d Merito*, 2006, p. 1649 *and subsequent* cit., 1650. In case law, see Court of Rome, 28 December 2005; Court of Rome, 25 March 2005.

[39] Being the spouse, it is at the very least likely that he/she could have *de facto* knowledge thereof.

to be feasible because – as pointed out by the Italian Supreme Court[40] – it would alter the notion of marital community, by allowing the debtor-spouse to be replaced by a third party not included in the marital community[41]; and above all because, more generally, this type of enforcement is incompatible with the fact that the subject of the attachment is not an ideal share of the property, but the property as a whole. If the sale or allocation of the undivided share were permitted, the attachment would unacceptably constitute a right to a share in the property which was previously non-existent[42].

Finally, the third type of execution under art. 600 of the ICCP (judicial division) would seem to deviate from the approach envisaged by law, since application of judicial division provided for by the Civil Code, and relating to the *whole* property, would have to be excluded (cf. art. 194 of the ICC), in order to proceed with judicial division on the individual asset and allow the creditor who started the enforcement proceedings to obtain satisfaction from half of the sum received. In fact, it would lead to an (unacceptable) dissolution of the marital community other than in cases under art. 191 of the ICC (obviously regarded as a *numerus clausus*).

Consequently, applying the rules on the enforcement of undivided assets would lead to excessive incompatibilities and inconsistencies with regards to the marital community regime and has therefore been ruled out.

4.2. *Exclusion of execution 'against the third-party owner'*

Having excluded the enforceability of undivided property for the reasons set out above, the Italian Supreme Court also excluded that the rules on the execution against the third-party owner (articles 602 *et seq.* ICCP), may be applied to enforcement proceedings started by a spouse's personal creditors on property falling within the marital community, mainly due to the "exceptional" nature of the above rules, thus rendering it impossible to apply them beyond the cases expressly provided for by law.

[40] Italian Supreme Court no. 6575 of 14 March 2013 as quoted.

[41] *Contra*, some Academics have objected that there is no reason to exclude the sale or allocation of the undivided share of property in marital community, as this would lead to a (totally legitimate) situation of ordinary co-ownership between the third party, who has become the owner of the share sold or allocated, and the spouses, who have become the owners in the marital community regime of the other share: (cf. ATTARDI A., *Profili processuali della comunione legale dei beni*, in Rivista di Diritto Civile, 1978, p. 30).

[42] SANTAGADA G., *Espropriazione forzata dei beni in comunione legale per debiti personali del singolo coniuge, in Rivista dell'esecuzione forzata* 3/2014, p. 578.

This exclusion, however, is criticised by a number of authoritative academics, who argue that procedural rules referred to under articles 602 *et seq.* of the ICCP are open to extensive (rather than analogical interpretation) interpretation that exceeds the cases expressly provided for by art. 602 of the ICCP and art. 2910, para. 2, of the ICC[43], and that is suitable to cover all the cases in which the law recognises the "*enforcement liability*" of a person who is not a debtor (as would be the case of the other spouse in the marital community)[44].

According to these academics, the provision set out under paragraph 2 of art. 189 of the ICC grants the non-debtor-spouse a *special "enforcement liability" for the other spouse's personal debts,* which justifies the application of articles 602 *et seq.* of the ICCP. The attachment, therefore, should be materially initiated simultaneously against both spouses[45].

Such academics consider this procedural method to be the best suited to overcome the issues described above, which arise out of trying to apply procedural rules on execution of undivided property.

Based on the rules on execution 'against the third-party owner', the non-debtor spouse could "immediately" and "fully" join the enforcement proceedings upon being served the enforcement order and relevant *praecipe* (art. 603 ICCP). Furthermore, the effects of the attachment would be produced directly against the non-debtor spouse as the recipient of the writ of attachment pursuant to art. 604 of the ICCP, without triggering any issues of violation of the adversarial principle described above.

A further contrasting opinion expressed by academics, however,[46] while recognising the benefits and advantages resulting from the application of execution proceedings against third parties, does not believe it may be applied even by resorting to extensive interpretation, for the following reasons.

Regardless of the "exceptional" (or otherwise) nature of these rules, academics point out that the rules may be applied solely in cases where

[43] Art. 2910 ICC. Para. 1: To receive the amount due, the creditor may have the debtor's assets executed, according to the rules established by the Code of Civil Procedure (Art. 602 et seq.). Para. 2: The property of a third party may also be executed when they are subject of a lien to secure the claim or when they concern a transaction that has been revoked because it has caused the creditor a damage.

[44] ACONE M., *Espropriabilità dei beni della comunione legale per i debiti personali di uno dei coniugi: un passo avanti ed uno indietro della Corte di cassazione*, in *Foro Italiano*, 2013, p. 3284.

[45] Constituting a case that, according to civil procedure rules, is referred to as 'passive subjective overlapping due to connection of subject matter' (cumulo soggettivo passivo per connessione di oggetto).

[46] SANTAGADA G., *Espropriazione forzata*, cit., p. 580.

"the property of a third party, neither debtor nor liable with his/her entire property" is subject to execution. And this is what would make the difference. Indeed, we have already highlighted that the structure of marital community, as joint and several property, implies, in addition to 'formal ownership', a 'substantial ownership' of both spouses, who cannot possibly be regarded as third parties vis-à-vis the attached property.

In other words, the non-debtor spouse cannot be considered a "third party liable for the debt of others", according to the procedural rules under art. 602 *et seq.* of the ICCP.

Actually, in this case personal creditors of the individual spouse are entitled to enforce (albeit alternatively) entire assets of the marital community. This is not because the assets belong to the non-debtor spouse's property - and, pursuant to art. 2910, para. 2 of the ICCP, are subject to fulfilment of the other spouse's debt, as if they were third-party assets - but because they are, after all, assets falling within the general financial liability of the debtor-spouse under art. 2910, para. 2 of the ICC, albeit within the limit of the value corresponding to his/her share.

Furthermore, application of art. 602 *et seq.* of the ICCP would imply that the assets subject to liability due to the debt of others are "pre-established", whereas in our case, the personal creditor of the individual spouse may enforce "all" of the assets falling within the marital community (assets which may increase, decrease or otherwise change over time).

4.3. *Ordinary execution against the debtor. Some remarks*

Having clarified this, the Italian Supreme Court had no other choice but to turn to the general rules of ordinary execution "against the debtor" (as provided for under articles 513 *et seq.*, 543 *et seq.* or 555 *et seq.* of the ICCP, depending on the nature of the attached property).

This conclusion is undoubtedly consistent with the fact that, as seen in the preceding paragraphs, the subject of the attachment is the property in its "entirety", as it falls within the debtor-spouse's general financial liability pursuant to art. 2910, para. 1, of the ICC.

However, application *sic et simpliciter* of the general rules on execution against the debtor, envisaging an involvement of the debtor-spouse "alone", is certainly not sufficient to meet the specific needs arising out of subjection of the attached property to the marital community regime.

Indeed, it should be noted that the other spouse – although neither a debtor nor liable for the debt of others – is still a "joint and several co-owner" of the attached property; implying that at the end of the enforcement proceedings his/her original 'substantial' co-ownership of the attached property will turn into an exclusive ownership of its financial equivalent. The situation is such that it is not possible to grant the remedy

sought by the creditor within the enforcement proceedings without affecting the other spouse's rights.

If the enforcement proceedings were to be brought against the debtor-spouse alone (as should be the case according to strict application of the general procedural rules of execution against the debtor), there would appear to be, once again, a violation of the adversarial principle as applicable to the other spouse.

For this reason, the Italian Supreme Court held that the only way to comply with this principle was to state that "*the execution of an asset which is equally co-owned by the non-debtor spouse makes him/her the passive subject of the execution proceedings, with rights and obligations identical to those of the debtor-spouse against whom the execution proceedings were bought*". From a practical viewpoint, making the non-debtor spouse the passive subject of the enforcement proceedings means allowing him/her to join the proceedings, and therefore requiring that the writ of attachment be served against him/her as well.

Practically speaking, serving the writ of attachment on both spouses would also protect the creditor who started the enforcement proceedings with regard to any disposal transactions on the attached asset by the other spouse, which would be fully *effective* by virtue of the specific entitlement to dispose of it laid down by art. 184 of the ICC, to the detriment of the third party.

In its rulings issued on the matter[47], the Italian Supreme Court has not explicitly clarified whether the writ of attachment should be addressed "individually" to the debtor-spouse and served to both spouses (as the literal expression used by the Court would suggest) or whether it should be actually addressed to both spouses as passive subjects of the enforcement proceedings.

The most persuasive opinions by academics[48] support the latter approach.

In fact, should the first solution (according to which the non-debtor spouse would simply be the recipient of the "service" of the writ of attachment against the other spouse) be chosen, the only way to adequately protect the creditor's rights would be to acknowledge immediate and automatic "extension" of the effects of the attachment vis-à-vis the non-debtor spouse. However, as already noted, such an "extension" of the effects of the attachment would be inconsistent with the adversarial principle.

It would seem preferable, therefore, to opt for the second solution, according to which the writ of attachment must be addressed "jointly" to

[47] Italian Supreme Court no. 6575/2013 and no. 2047/2019.

[48] SANTAGADA G., *Espropriazione forzata*, cit., p. 584-585.

both spouses, thereby considering the non-debtor spouse as the passive subject of the attachment.

Furthermore, accepting this construction would also allow the non-debtor spouse to "avoid attachment" by paying the process server directly, as provided for under art. 494 of the ICCP.

5. *Further critical comments and final remarks*

In the absence of specific legal rules that take into account the specificity of marital community between spouses, the option described above, with the abovementioned interpretative clarifications, represents the solution currently adopted by the Italian Supreme Court.

Despite the effort to find an approach that could be as coherent as possible with marital community and satisfactory in practical terms, the solution is nevertheless unable to overcome some highly critical theoretical and practical issues.

First of all, stating that a spouse is the passive subject of an attachment against a property belonging to him/her, outside his/her sphere of personal liability, seems to conflict with the principle under art. 2740 of the ICC.

As mentioned, while the method of execution of each asset in its entirety is mostly preferred because of a practical need for greater efficiency, it has been rightly observed[49] that only attachment of the *share* of each individual asset would take into due consideration the financial integrity of the non-debtor spouse. On the contrary, admitting that a spouses' personal creditor may start enforcement proceedings against an entire property forming part of the marital community would actually mean violating the other spouse's property and, therefore, contravening the fundamental principle of legal culture expressed by articles 2740 and 2910 of the ICC (and, in procedural terms, by art. 477 of the ICCP), according to which a person is liable for *debts with his/her own property, not with the property of others* (except in strictly envisaged cases).

This violation cannot be cancelled by acknowledging *ex post* the restitution of half of the proceeds of the execution sale to the non-debtor spouse: on the contrary, this would mean acknowledging that the enforcement proceedings have affected the economic right of the non-debtor spouse. This appears to be the main contradiction of the Italian Supreme Court's reasoning.

[49] CARDINO A., *Creditori particolari del coniuge in comunione legale e oggetto del pignoramento tra diritto vivente e diritto morente*, in *Giurisprudenza di Merito*, 2012, § 5.

The solution chosen by the Italian Supreme Court also leads to two further types of possible practical inconvenience regarding the allocation of half of the proceeds of the execution, as exclusive property, to the non-debtor spouse.

The first inconvenience could occur should "partial" dissolution caused by the attachment be later followed by a dissolution of the marital community pursuant to articles 191 *et seq.* of the ICC.

Within this context, according to the law and without making any further forced assumptions, it is likely that the spouse against whom the enforcement was initiated be required, pursuant to art. 192, para. 2 of the ICC[50], to reimburse the entire value of the property referred to in art. 189 of the ICC to the community; this would entail a financial benefit that the non-debtor spouse presumably would have not benefited from according to general legal rules.

Indeed, the spouse would have already obtained half of the value of the property at the time of the enforcement proceedings, and would now be entitled to another half of the property upon "full" dissolution of the marital community. Briefly, this would constitute *unjust enrichment* in his/her favour[51].

The second inconvenience regards the fact that, since the creditor may seek satisfaction only from half of the proceeds, he/she will probably be forced to attach the most valuable community assets or, alternatively, to initiate multiple attachment proceedings on different assets, all to the obvious disadvantage of both spouses.

Ultimately, as we have tried, albeit briefly, to explain, the structure of marital community as a community without shares and the body of special rules established by law on the spouses' financial liability create an actual micro-system that prevents direct application of substantive and procedural private law rules that would operate if the persons were not married.

The absence of specific legal rules on how to conduct execution proceedings on the assets of the marital community also raises theoretical and practical issues, which have not yet been completely resolved. Judges and Academics have tried to find a solution to such issues, but none of the solutions adopted appear totally satisfying or able to solve all the involved difficulties and contradictions.

[50] "[Each spouse] *shall also be required to reimburse the value of the property referred to in article 189 unless, in the case of an extraordinary management transaction performed by him/her, he/she proves that the transaction was convenient for the community or that it met a family need*".

[51] CRISCUOLI P., *L'oggetto dell'espropriazione immobiliare e la comunione legale dei beni*, in *Immobili & proprietà*, 10/2013, p.579.

FRANCESCA MAOLI

COVID-19 EMERGENCY, IMPOSSIBILITY OF PERFORMANCE AND OVERRIDING MANDATORY PROVISIONS: IS THE NEW ITALIAN DISCIPLINE ON TOURISM AND TRANSPORT CONTRACTS COMPATIBLE WITH THE ROME I REGULATION?

1. *Introduction*

Overriding mandatory provisions represent a classical theme of discussion for private international law. Those rules interfere with the normal operation of conflict-of-law rules, since they are applicable to a situation that would otherwise be regulated by a different *lex causae*. Downsizing the applicable law is justified by the fact that overriding mandatory provisions are the expression of priority State interests (normally, the country of the sized court).

In the context of the emergency caused by the spread of SARS-CoV-2 and COVID-19 syndrome, national governments have had to face (and still are facing) severe difficulties, underlying public and private interests featuring unusual characteristics and have required massive interventions. Many States have adopted an extensive regulatory framework aimed at containing the spread of the epidemic, which has caused relevant limitations to the movement of persons within and across national borders[1]. Such measures as lock-downs, the institution of quarantine zones or other travel restrictions may concern State nationals or residents, or may impose travel bans from countries considered "at risk" because of high epidemic rates. As a consequence, the transport sector has been

[1] Since the beginning of February 2020, and not differently from other countries, the Italian legal system has adopted a growing number of measures restricting constitutional rights and freedoms, to deal with the health emergency linked to the spread of the Covid-19 virus. On the topic CUOCOLO L. (ed.), *I diritti costituzionali di fronte all'emergenza Covid-19: la reazione italiana*, in CUOCOLO L. (ed.), *I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata*, in *Federalismi*, 2020, p. 13, available online at https://www.federalismi.it/; DI COSIMO G., *Sulle limitazioni ai diritti durante l'emergenza*, in CALZOLAIO E., MECCARELLI M., POLLASTRELLI S. (eds.), *Il diritto nella pandemia. Temi, problemi, domande*, Macerata, 2020, p. 29.

severely affected, since the restrictive measures have caused the cancellation of numerous arrangements as well as the impossibility/unwillingness for many passengers to travel[2]. Similar considerations apply to package travel or other contract-types in the tourism sector.

Having acknowledged the above, specific provisions have been adopted in Italy on the reimbursement of fees paid under transport, package travel and accommodation contracts, when the contractual performance could not be executed due to the aforementioned restrictive measures. The objective of the discipline of art. 28 par. 8 of the Decree Law No. 9/2020[3], later on included in art. 88-*bis* of the Decree law No. 18/2020 (converted into Law No 27/2020)[4], was to provide an indirect economic support to tourism operators and other professionals in the area, that would incur negative financial repercussions, if forced to reimburse large sums of money in a short period of time.

The discipline presents interesting profiles for private international law, because of the self-qualification of art. 88-*bis* as overriding mandatory provision of Italian Law, "*according to art. 17 of the Law 31st May 1995, No 218 and art. 9 of the EC Regulation No 593/2008*"[5].

2. *The new discipline for tourism and transport contracts in the context of the epidemic emergency…*

The outbreak of the COVID-19 pandemic has had a major impact on commercial transactions: many businesses were severely struck by the emergency and the various governmental pandemic-mitigation restrictions enacted in response to COVID-19 have affected the ability of

[2] As stated by the European Commission in its communication of 18 March 2020, concerning *Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19*, C(2020) 1830 final: "*Passengers and the European transport industry are hit hard by the Covid-19 outbreak. Containment measures of authorities, such as travel restrictions, lock-downs and quarantine zones, imply that transport may be one of the most severely affected sectors of this pandemic. The situation is stressful for many passengers, whose travel arrangements have been cancelled and/or who do not wish or are not allowed to travel anymore*".

[3] Decree Law of 2 March 2020, No 9, *Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19*, in the Official Journal of the Italian Republic No 53 of 2 March 2020.

[4] Decree Law of 17 March 2020, No 18, *Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19*, coverted with amendments by the Law of 24 April 2020, No 27, in the Official Journal of the Italian Republic No 110 of 29 April 2020.

[5] Art. 88-*bis*, paragraph 13 of the Decree law No 18/2020.

the parties to duly perform their contractual obligations[6]. Clearly, this circumstance is not confined to domestic settings, but extends to international business transactions[7].

In order to contain the severe economic losses that companies may face, primarily as a consequence of the liability for breach of contract, several countries have adopted specific measures that may well affect (or even derogate from) the general discipline on contracts, as same may differ from ordinary provisions on contractual contingencies[8]. In Italy, Decree Law No. 18/2020 has introduced a provision wherefore the compliance with measures adopted for the containment of the Covid-19 epidemic "*is always evaluated for the purposes of the exclusion, pursuant to Articles 1218 and 1223 of the Civil Code, of the debtor's civil liability, also in regard to the application of any forfeiture or penalties related to delayed or omitted performance*"[9]. Without prejudice to the fact that this rule does not cause a structural amendment to the general discipline on civil liability, it nevertheless represents an indicator of the potential applicability of the discipline of the impossibility of performance and concerning the quantification of damage. This is meant to help economic actors facing the economic consequences of non-compliance to contractual obligations, when the latter is a consequence of the current health crisis. The same purpose informs the French legal system, where the legislative intervention has addressed the discipline of deadlines and time limits concerning the operativity of periodic penalty payments, as well as penalty, termination and forfeiture clauses. The overall effects of measures contained in Articles 4 and 5 of the *Ordonnance* of 25 March 2020[10] is to suspend the effects of the above-mentioned clauses during

[6] BERGAMASCHI M., *L'esecuzione dei contratti ai tempi del coronavirus*, in *Il Quotidiano Giuridico*, 21 April 2020, available online at https://www.quotidianogiuridico.it-/documents/2020/04/21/l-esecuzione-dei-contratti-ai-tempi-del-coronavirus (accessed 1 October 2020).

[7] TORSELLO M., WRINKLER M., *Coronavirus-Infected International Business Transactions: A Preliminary Diagnosis*, in *Eur. Jour. Risk Regul.*, 2020, p. 1.

[8] As concerns Italy, the issue is addressed by BENATTI F., *Contratto e Codiv-19: possibili scenari*, in *Banca Borsa e Titoli di Credito*, 2020, p. 198.

[9] Art. 3, par. 6-*bis* of the Decree Law of 23 February 2020, No 6, coverted with amendments by the Law of 5 March 2020, No 13, in the Official Journal of the Italian Republic No 110 of 29 April 2020.

[10] *Ordonnance n° 2020-306 du 25 mars 2020 relative à la prorogation des délais échus pendant la période d'urgence sanitaire et à l'adaptation des procédures pendant cette même période*, available at https://www.legifrance.gouv.fr/ (accessed 30 september 2020).

the period of the emergency, in order to grant debtors additional time to remedy contractual breaches[11].

Given that European countries handle this particular sector of law differently – in particular as concerns the institutes and remedies that are applicable in case of unforeseen changes of circumstances in contractual performance[12], the interplay of such rules with the law applicable to international transactions can give rise to several problems of coordination. In particular, the impact of these domestic provisions on contracts subject to foreign law is not always clear. This holds particularly true when it comes to measures that are characterized by national governments as overriding mandatory provisions, therefore having – at least from the point of view of the State adopting the rule – a potential extraterritorial application in cross-border transactions.

Art. 28 of the Italian Decree Law No. 9/2020 has introduced specific rules that derogate from the general discipline of contracts contained in the Italian Civil Code, and applicable to transport, package travel and accommodation contracts. The discipline was subsequently included into art. 88-*bis* of the Decree Law No. 18/2020, as an effect of the modifications provided for by Law No. 27/2020 converting the aforementioned

[11] For a comment on the provisions, see CAYROL N., *État d'urgence sanitaire: dispositions générales relatives aux délais. À propos de l'ordonnance n° 2020-306 du 25 mars 2020, Titre I*, in *La Semaine Juridique - Édition Générale*, 2020, p. 481.

[12] A part from specific and *ad hoc* measures adopted by States, in the context of international contracts relevance shall be given to the possible application of *force majeure* clauses, with the correlated difficulties concerning their technical complexity and the need for a transnational definition of the institute. As concern this aspect, that is outside the scope of the present contribution, see WRINKLER M., *Practical Remarks on the Assessment of Covid-19 as Force Majeure in International Contracts*, in *SIDIBlog*, 6 May 2020, available online at http://www.sidiblog.org/2020/05/06/practical-remarks-on-the-assessment-of-covid-19-as-force-majeure-in-international-contracts/ (accessed 30 September 2020). For an overview of contractual contingencies in international contracts, see FONTAINE M., DE LY F., *Drafting International Contracts: An Analysis of Contract Clauses*, Leiden, 2008, p. 409; CORDERO-MOSS G., *International Commercial Contracts: Applicable Sources and Enforceability*, Cambridge, 2014, p. 109; CIRIELLI S.E., *Clausola di* hardship *e adattamento nel contratto commerciale internazionale*, in *Contratto e Impresa Europa*, 1998, p. 758; KARAMPATZOS A., *Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to AngloAmerican, German, French and Greek Law*, in *European Review of Private Law*, 2005, p. 142; DI MATTEO L.A., *Contractual Excuse Under the CISG: Impediment, Hardship, and the Excuse Doctrines*, in *Pace International Law Review*, 2015, p. 266.

Decree. Lastly, further amendments to art. 88-*bis* have been introduced by the Decree Law No. 34/2020[13] and by the Decree Law No. 41/2021[14].

The scope of the provisions is to introduce more guarantees both for travellers/consumers and for transport and accommodation providers[15]. On the one hand, the first paragraph of art. 88-*bis* stipulates that any obligation arising from air, rail, maritime or land transport contracts, as well as accommodation or package travel contracts, concluded by specific persons affected by Covid-19 restrictive measures, is to be considered impossible under art. 1463 of the Italian civil code. This means that the contracts in question, under specific subjective and objective situations resulting from Covid-19 restrictive measures, are subject to termination by direct provision of law and that any obligations already performed (payment of the price included) must be returned. In this framework, not only shall factual circumstances that trigger the termination of the contract be "taken into account" by the interpreter, but same shall also constitute the condition for the automatic application of the remedy established under art. 1463 of the civil code.

On the other hand, under the same circumstances, art. 88-*bis* paragraph 3 provides for a more favourable rule for the benefit of the carrier or the accommodation facility, who may therefore avoid issuing a direct refund of the amount paid by issuing a *voucher* for the same amount to be used within twenty-four months of issue (the term was originally of twelve months, but it has been recently extended). Moreover, art. 88-*bis* allows the provider of the service to exercise the right of withdrawal when a contract cannot be performed due to Covid-19 restrictive measures[16]: in that case, the same conditions foreseen for the refund of the price paid.

[13] Decree Law of 19 May 2020, No 34, *Misure urgenti in materia di salute, sostegno al lavoro e all'economia, nonché di politiche sociali connesse all'emergenza epidemiologica da COVID-19*, coverted with amendments by the Law of 17 July 2020, No 77, in the Official Journal of the Italian Republic No 180 of 18 July 2020.

[14] Decree Law of 22 March 20201 No 41, *Misure urgenti in materia di sostegno alle imprese e agli operatori economici, di lavoro, salute e servizi territoriali, connesse all'emergenza da COVID-19*, coverted with amendments by the Law of 21 May 2021, No. 69, in the Official Journal of the Italian Republic No 120 of 21 May 2021.

[15] A thorough examination of the discipline is carried out by POLLASTRELLI S., *Trasporti e turismo nell'emergenza epidemiologica da coronavirus. Sfera soggettiva di protezione dei diritti dei passeggeri*, in CALZOLAIO E., MECCARELLI M., POLLASTRELLI S. (eds), *Il diritto nella pandemia*, cit., p. 105.

[16] Art. 88-*bis* paragraph 4 of the Decree Law of 17 March 2020, No 18. Other than the right of withdrawal, the provider of the service may also offer a replacement service of equivalent, higher or lower quality (with refund of the difference in price).

3. … *and the self-proclamation of its overriding mandatory nature*

Apart from purely "internal" contracts, for which the application of Italian law is not under discussion, Italian lawmakers have considered the possible difference in treatment between the aforementioned situations and international contracts. Therefore, paragraph 13 of art. 88-*bis* states that "*the provisions of this article shall constitute overriding mandatory provisions pursuant to art. 17 of the Law 31 May 1995 No 218*[17] *and to art. 9 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008*"[18].

Under general theories of private international law, overriding mandatory provisions are superimposed on the law applicable to the legal situation[19]. They do not coincide with the imperative rules of the forum State, which constitute a limitation of party autonomy also with reference to purely internal contracts, but exceptionally also apply when the legal situation is subject to foreign law and instead of the latter[20]. Therefore, overriding mandatory provisions interfere with the operativity of the classical choice-of-law rules, since they are the expression of a unilateral approach to conflict of laws: the unilateral determination of the scope of application of overriding mandatory provisions does not take into account the applicable law identified by the pertinent conflict rules. The function and underlying justification of the institute lies in the fact that

[17] The Law 31 May 1995 No 218 contains the Italian discipline of private and procedural international law. Art. 17 qualifies overriding mandatory provisions as «rules which, in view of their object and purpose, must be applied despite the reference to foreign law».

[18] See CRESPI REGHIZZI Z., *Effetti sui contratti delle misure normative di contenimentodell'epidemia Covid-19: profili di diritto internazionale privato*, in *Diritto del commercio internazionale*, 2020, p. 923; ZARRA G., *Alla riscoperta delle norme di applicazione necessaria: brevi note sull'art. 28, co. 8, del DL 9/2020 in tema di emergenza Covid-19*, in *SIDIBog*, 30 March 2020, available online at http://www.sidiblog.org/2020/03/30-/alla-riscoperta-delle-norme-di-applicazione-necessaria-brevi-note-sullart-28-co-8-del-dl-92020-in-tema-di-emergenza-covid-19/ (accessed 25 September 2020).

[19] MOSCONI F., CAMPIGLIO C., *Diritto internazionale privato e processuale. I. Parte generale e contratti*, Milano, 2020, p. 307 ff.; BOSCHIERO N., *Ordine pubblico "internazionale" e norme di applicazione necessaria*, in, PREITE F., GAZZANTI PUGLIESE DI COTRONE A. (eds), *Atti notarili. Diritto comunitario e internazionale*, I, *Diritto internazionale privato*, Milano, 2011, p. 137; BALLARINO T., *Norme di applicazione necessaria e forma degli atti*, in *Rivista di Diritto Internazionale Privato e Processuale*, 1967, p. 711.

[20] BONOMI A., *Le norme imperative nel diritto internazionale privato*, Zürich, 1998, p.78.

overriding mandatory provisions are justified by the protection of fundamental interests of the State[21].

As established by art. 88-*bis*, paragraph 13, the provision at hand contains a two-fold qualification: the aforementioned special rules are qualified as overriding mandatory provisions for the purposes of Italian law, pursuant to art. 17 of the Law No 218/1995, and with reference to art. 9 of the Rome I Regulation[22]. The first qualification (on the basis of Italian law) is dictated by the need to ensure the application of the guarantees provided, even to contracts subject of a foreign law, because of the application of the relevant rules of private international law.

Even if some doubts may rise in relation to the opportunity of an express qualification overriding mandatory provisions by lawmakers, this possibility seems accepted within the Italian discipline of private international law, and is compatible with the institute at hand[23]. To a certain extent, resorting to the category of overriding mandatory provisions by way of an express qualification is not frequent within the Italian legal system. On the other hand, there is a number of important examples in the field of family law. In the context of the significant 2012-2013 reforms on filiation[24], which essentially deleted the distinction between children born within or outside of wedlock, Italian lawmakers did not introduce a list of specific provisions that were to be qualified as mandatory in their application. However, the new art. 33, paragraph 4 of the Law No 218/1995 indicates that, generally speaking, any Italian rule establishing the absolute equivalence between the legal status of children shall be considered as overriding mandatory provisions[25]. The ultimate identification

[21] WILDERSPIN M., *Overriding Mandatory Provisions*, in BASEDOW J., RÜHL G., FERRARI F., DE MIGUEL ASENSIO P. (eds), *Encyclopedia of Private International Law*, Cheltenham-Northampton, 2017, 1330.

[22] 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), in OJ L 177, 4.7.2008, p. 6.

[23] See the analysis by MARONGIU BUONAIUTI F., *Le disposizioni adottate per fronteggiare l'emergenza coronavirus come norme di applicazione necessaria*, in CALZOLAIO E., MECCARELLI M., POLLASTRELLI S. (eds), *Il diritto nella pandemia*, cit., p. 237.

[24] The legislative reform of the Italian legislation on filiation has been implemented in two distinct moments: through the Law of 10 December 2012 No 219 introduced some immediately preceptive legal provisions and identified a series of principles and objectives on the basis of which the Governement, through the delegation attributed to the aforementioned Law, adopted the legislative Decree No 154 of 28 December 2013. On the reform BIANCA C.M., *La riforma del diritto della filiazione*, in *Nuove Leggi Civili Commentate*, 2013, p. 437; MANTOVANI M., *I fondamenti della filiazione*, in ZATTI P. (ed), *Trattato di diritto di famiglia*, Milano, 2012, p. 3.

[25] CANNONE A., *Tendenze legeforiste nelle recenti modifiche delle norme di diritto internazionale privato italiano in materia di filiazione e di rapporti tra genitori e figli:*

of such rules is entrusted to interpreting parties, who shall be guided by the general principle enshrined in the reform (*i.e.*, the equivalent status of all children) and characterizing Italian family law[26]. A further specification is contained in Article 36-*bis*, which requires the application, *inter alia*, of Italian rules on joint parental responsibility and shared child support.

In addition, it is worth mentioning art. 32-*ter* of the Law No 218/1995, which expressly establishes the overriding nature of the causes preventing the establishment of a civil union between two individuals of the same sex (*de facto*, extending conditions for concluding a marriage to civil unions)[27]. Including such a provision in the legal text containing the general discipline of private international law should remove any uncertainty on the legitimacy of an express qualification – by way of a legislative provision – of overriding mandatory provisions.

With the exception of family law, the express qualification of specific rules as overriding mandatory provisions has rarely been applied in Italy in the last years[28], as such provisions have mostly been identified through interpretation by the case law on the basis of their object and purpose (according to the definition given under art. 17 of Law No. 218/1995)[29].

alcune riflessioni, in *Rivista di Diritto Internazionale Privato e Processuale*, 2019, p. 3; DE MAESTRI M.E., *Il nuovo status di figlio nell'ordinamento italiano e il diritto internazionale privato: riforma sostanziale o codificazione di prassi già consolidata?*, in QUEIROLO I., BENEDETTI A.M., CARPANETO L. (eds), *Le nuove famiglie tra globalizzazione e identità statuali*, Roma, 2013, p. 1; GIARDINI F., *Unification of Child Status and Parental Responsibility: the Reform of Filiation Remodels the Family in the Legal Sense in the Italian Legal System*, in *Interdisciplinary Journal of Family Studies*, 2017, p. 1.

[26] BERGAMINI E., *Problemi di diritto internazionale privato collegati alla riforma dello "status" di figlio e questioni aperte*, in *Rivista di Diritto Internazionale Privato e Processuale*, 2015, p. 315; CAMPIGLIO C., *sub artt. 33*, in POCAR F., TREVES T., CARBONE S.M., GIARDINA A., LUZZATTO R., MOSCONI F., CLERICI R. (eds), *Commentario del nuovo diritto internazionale privato*, Padova, 1996, p. 178; CARELLA G., *sub art. 33*, in BARIATTI S. (ed), *Legge 31 maggio 1995, n. 218. Riforma del sistema italiano di diritto internazionale privato*, in *Nuove Leggi Civili Commentate*, 1996, p. 1184.

[27] Those impeding causes are contained in art. 1, paragraph 4 pf the Law No 76/2016, which has introduced in Italy the institute of the civil union between persons of the same sex.

[28] The only example of express qualification of a rule as an overriding mandatory provision can be found in the Decree No 199 of 19 October 2012 adopted by the Italian Minister for Agricultural, Food and Forestry Policy, in the Official Journal of the Italian Republic No 274 of 23 November 2012. Art. 1, paragraph 2 of the Decree qualified all the rules introduced by the instruments as overriding mandatory provisions «pursuant to art. 9 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations».

[29] For an overview, see MOSCONI F., CAMPIGLIO C., *Diritto internazionale privato e processuale*, cit., p. 307; BOSCHIERO N., *sub artt. 14-17*, in BARIATTI S. (ed), *Legge 31*

An example of a rule that could be qualified as an overriding mandatory provision, in the context of the legislative instruments adopted in the emergential context, is art. 91 of the Decree Law No. 18/2020, according to which the compliance with the COVID-19 containment measures must be assessed in order to exclude the debtor's liability under Article 1218 of the Civil Code, as well as the application of any forfeiture or penalty related to delayed or omitted performance[30].

Within the Italian legal system, the introduction of overriding mandatory provisions in the field of tourism and transport contracts does not seem to raise particular issues. Generally speaking, a State is free to select the provisions whose application is considered crucial for the protection of its fundamental interests, of a political, social or economic nature[31]. The natural consequence lies in the substantial differences between which interests each State considers worthy of protection. Some legal systems consider that, in order for a rule to be deemed as an overriding mandatory rule, it must primarily protect a public interest[32]. Under a different approach, one which Italian lawmakers seem to prefer, even rules that have a balancing function between private interests (for instance, rules on consumer protection) may be qualified as overriding mandatory provisions[33].

However, the discipline at hand intervenes in a normative context when EU law plays a huge relevance. Doubts have arisen whether Italian rules – and, in particular, the fact that they are considered of mandatory application irrespective of the law applicable to the contract – may constitute a limitation over the operativity of EU conflict rules or even to the EU material law instruments existing within the same matter[34].

maggio 1995, n. 218, cit., p. 1035; TREVES T., *sub art. 17*, in POCAR F., TREVES T., CARBONE S.M., GIARDINA A., LUZZATTO R., MOSCONI F., CLERICI R. (eds), *Commentario*, cit., p. 84.

[30] The provision has been recently applied by Tribunale di Roma, judgment of 19 February 2021, No. 3114.

[31] According to the definition given by one of the first academics that gave wider recognition to those rules: P. FRANCESCAKIS, *Quelques précisions sur les "lois d'application immediate" et leurs rapports avec les régles de conflits de lois*, in *Revue Critique de Droit International Privé*, 1966, p. 12.

[32] WILDERSPIN M., *Overriding Mandatory Provisions*, cit., p. 1332.

[33] See KUIPERS J., *EU Law and Private International Law. The Interrelationship in Contractual Obligations*, Leiden-Boston, 2012, p. 125, p. 161. This broader approach has been accepted also by the European Court of justice in *Arblade* (Judgment of the Court of 23 November 1999, Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL, joined cases C-369/96 and C-376/96).

[34] On this issue see the analysis by MARONGIU BUONAIUTI F., *Le disposizioni adottate per fronteggiare l'emergenza coronavirus come norme di applicazione necessaria*, cit., p. 235.

As concerns the first aspect, the Italian discipline intervenes in the field of contractual obligations, which is subject to conflict-of-law rules laid down by Regulation (EC) No 593/2008 (Rome I Regulation)[35]. As such regulation is directly applicable within the legal systems of member States, and considering the incidence of overriding mandatory provisions over conflict-of-laws rules, national rules at hand may well interfere with the correct and uniform application of EU law. A possible consequence is the violation by the State of the duty to abstain from acts that are incompatible with the objectives pursued by European lawmakers.

4. *Overriding mandatory provisions and Rome I Regulation*

As known, the Rome I Regulation contains the European conflict rules governing the law applicable to contractual obligations binding all EU Member States. It applies to contracts concluded on or after 17 December 2009 relating to civil or commercial matters. Any law specified by the regulation may be applied whether or not it is the law of a member State[36].

The Rome I Regulation accommodates the principle of overriding mandatory provisions, defining the latter as "*provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this regulation*" (art. 9, par. 1). The provision aims at ensuring a balance between the uniformity of the conflict rules stated on an EU level and the

[35] 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), in OJ L 177, 4.7.2008, p. 6.

[36] Art. 2 Rome I Regulation. As a consequence, European judges will continue to apply English law to contracts even after Brexit, when the conflict rules of Rome I Regulation localize the legal issue in the United Kingdom. Moreover, the Rome I Regulation will continue to apply in the UK as "retained EU law" after the scheduled end of the transition period: see the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations (SI 2019 No. 834). On this matter FITCHEN J., *The Private International Law Consequences of Brexit*, in *Nederlands Internationaal Privaatrecht*, 2017, p. 424; RÜHL G., *The Effect of Brexit on the Resolution of International Disputes: Choice of Law and Jurisdiction in Civil and Commercial Matters*, in ARMOUR J., EIDENMÜLLER H. (eds), *Negotiating Brexit*, Munich/Oxford/Baden, 2017, p. 62; DICKINSON A., *Back to the Future: The UK's EU Exit and the Conflict of Laws*, in *Journal of Private International Law*, 2016, p. 203.

wish of the Member States to safeguard their fundamental interests[37]. As stated by the European Court of Justice in *Nikiforidis*[38], the opening towards the recognition of national overriding mandatory provision aims at balancing the approach of the Regulation, which focuses on the protection of party interests more than on public interest. On the other hand, Article. 9 should not have the effect of invalidating the fundamental structure and principles of the Regulation. Recital 37 of the preamble explains why , the application of overriding mandatory provisions represents a derogating measure and art. 9 should be interpreted strictly[39].

Nevertheless, as a matter of principle, the operativity of overriding mandatory provisions is safe under the Rome I Regulation. What is more controversial is the identification of the rules qualified as such under the definition given by art. 9. On the one hand, it is uncontested that each State is competent for the determination of the provisions whose application is considered "*crucial* […] *for safeguarding its public interests*"[40]. On the other hand, when speaking about overriding mandatory provisions, art. 9 seems to give an autonomous definition of EU law, that may be inconsistent with the definition that is accepted under each national legal system. This means that no overriding mandatory provision of na-

[37] BONOMI A., *Article 9*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume II, Rome I Regulation*, Kòln, 2017, p. 604. On art. 9 Rome I Regulation, in general, see BONOMI A., *Prime considerazioni sul regime delle norme di applicazione necessaria nel nuovo regolamento Roma I sulla legge applicabile ai contratti*, in VENTURINI G., BARIATTI S. (eds), *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, II, Milano, 2009, p. 107; BONOMI A., *Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts*, in *Yearbook of Private International Law*, 2008, p. 285; BIAGIONI G., *Art. 9 – Norme di applicazione necessaria*, in *Le Nuove Leggi Civili Commentate*, 2009, p. 788; KRONENBERG A., *Foreign Overriding Mandatory Provisions Under the Regulation (Ec) No 593/2008 (Rome I Regulation). Judgment of the European Court Of Justice of 18 October 2016, Case C-135/15*, in *Cuadernos de Derecho Transnacional*, 2018, p. 873; S. SÀNCHEZ LORENZO, *Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I*, in *Yearbook of Private International Law*, 2010, p. 67.

[38] Judgment of the Court (Grand Chamber) of 18 October 2016, Republik Griechenland v Grigorios Nikiforidis, case C-135/15, para. 43.

[39] Judgment of the Court (Grand Chamber) of 18 October 2016, Republik Griechenland v Grigorios Nikiforidis, case C-135/15, para. 44.

[40] MARONGIU BUONAIUTI F., *Le disposizioni adottate per fronteggiare l'emergenza coronavirus come norme di applicazione necessaria*, cit., p. 239.

tional law – whether labelled or not as such by the legislator – may prevent the application of EU conflict-of-laws rules, if it does not fit in with the definition under of art. 9 Rome I Regulation[41].

The wording contained in art. 9 Rome I Regulation derives from the *Arblade* decision[42] of the European Court of Justice, given in the context of the 1980 Rome Convention. Even though it has been highlighted that the Court did not want to provide an autonomous definition of EU law[43], the conclusions contained in the decision are reported in the same terms into the provision at hand, which refers to a category of rules that is more restricted than the one of "mandatory legal provisions", which cannot be derogated from by contract[44].

By explaining the characteristics of overriding mandatory provisions, art. 9 does not intend to limit the discretion of States when determining which rules are considered as such within their national legal systems. However, the definition may impose certain limitations on the qualification of such rules for the purposes of the Rome I Regulation, in particular as concerns the type of interest that is protected by the national overriding mandatory provision. Since national rules do not usually provide an express reasoning on the respect of the criteria stated under Article 9, it is for the national court to make a detailed assessment based on the "*general structure*" of the provision and "*of all the circumstances in which that law was adopted*", in so far as it appears that "*the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned*"[45].

If the private and public nature of the protected interests is not deemed relevant for the qualification of a rule as an overriding mandatory

[41] Indeed, the definition of overriding mandatory provisions contained in art. 9 Rome I Regulation has been criticized by the legal doctrine because of its strict terms: see BIAGIONI G., *Art. 9*, cit., p. 789; BOSCHIERO N., *Norme inderogabili, "disposizioni imperative del diritto comunitario" e "leggi di polizia" nella proposta di regolamento Roma I*, in *Il nuovo diritto europeo dei contratti dalla convenzione di Roma al regolamento "Roma I"*, Milano, 2007, p. 107; BOSCHIERO N., *Verso il rinnovamento e la trasformazione della Convenzione di Roma: problemi generali*, in PICONE P. (ed), *Diritto internazionale privato e diritto comunitario*, Padova, 2003, p. 386.

[42] Judgment of the Court of 23 November 1999, Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL, joined cases C-369/96 and C-376/96, para. 30.

[43] BONOMI A., *Article 9*, cit., p. 617.

[44] This formulation is used in art. 3(3), 5(2) and 6(1) of the Rome I Regulation and makes reference to imperative provisions of contract law that cannot be derogated from by party autonomy: see BIAGIONI G., *Art. 9*, cit., p. 790.

[45] All these indications are contained in Judgment of the Court (Third Chamber), 17 October 2013, United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, case C-184/12, para. 50.

provision within the Italian legal system, more doubts may rise regarding the definition contained in art. 9 Rome I Regulation. The latter makes explicit reference to "*public interests*" of the State, "*such as its political, social or economic organization*". As a consequence, overriding mandatory provisions aimed at protecting "private" interests, or interests that do not fall within the aforementioned categories, may not be effective when the conflict rules of the Rome I Regulation are to be applied.

Indeed, the wording of art. 9 suggests a different interpretation, at least in the part where it refers to rules pertaining to the political, social or economic organization of the State. This specification should be intended as a mere exemplification, since it is preceded by the phrase "*such as*"[46]. Therefore, interests pertaining to other areas should also provide a valid basis for overriding mandatory provisions.

More controversial is the possibility of also including within the scope of application of art. 9 rules protecting genuinely private interests, whereas the European provision explicitly makes reference to "*public interests*" of the State. In addition, the reference to norms deemed to be "*crucial*" for the safeguard of such interests suggests that European lawmakers intended to restrict the use of overriding mandatory provisions, in order to prevent excessively frequent derogations from the uniform choice-of-law rules of the Rome I Regulation[47]. As already highlighted, Recital No 37 of the Regulation expresses this exact position: judges of the Member States may derogate from the conflict rules of the Regulation in exceptional circumstances and on the basis of considerations of public interest[48]. This means that overriding mandatory provisions should be directly aimed at protecting national public interests, rather than individual interests of a contractual party[49].

Hence, it has been held that provisions whose only objective is to balance the interests of contractual parties cannot qualify as overriding mandatory provisions[50] and therefore cannot derogate from the application of choice-of-law rules of the Rome I Regulation.

[46] ZARRA G., *Alla riscoperta delle norme di applicazione necessaria*, cit.

[47] BONOMI A., *Article 9*, cit., p. 618.

[48] Judgment of the Court (Grand Chamber) of 18 October 2016, Republik Griechenland v Grigorios Nikiforidis, case C-135/15, para. 44; Judgment of the Court (Third Chamber), 17 October 2013, United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, case C-184/12, para. 49.

[49] BONOMI A., *Article 9*, cit., p. 621.

[50] SCHMIDT-KESSEL M., *Article* 9, in FERRARI F. (ed), *Coincise Commentary on the Rome I Regulation*, Cambridge, 2020, p. 240.

5. *The Italian discipline through the lens of art. 9 Rome I Regulation*

From the above considerations, one understands that the Rome I Regulation does not exclude a priori the efficacy of national overriding mandatory provisions, but rather establishes the possibility that the latter may limit the operativity of EU conflict-of-laws rules. The controversy lies in the limitations concerning national provisions that may override EU discipline, as stated under art. 9 of the Regulation. This depends on the degree of autonomy that the Regulation allows national lawmakers when conferring an overriding character to domestic mandatory rules. Indeed, from both the analysis of art. 9 and the wording of Recital 37, EU lawmakers attempt to avoid excessively frequent derogations from the uniform conflict-of-laws rules.

At a first glance, the rules established under art. 88-*bis* of the Italian Decree Law No 18/2020, and qualified as overriding mandatory provision by Italian lawmakers, may seem to fall into the category of rules aimed at balancing the interests of contractual parties. As examined, the discipline aims at "adjusting" the contractual positions of parties to certain tourism contracts, by intervening on the legal consequences of the breaches of contractual obligations and especially on the discipline of impossibility of performance and damage quantification.

Following a restrictive interpretation of art. 9 Rome I Regulation, rules aimed at protecting certain categories of individuals (*e.g.* weaker parties) and at re-establishing a balance between the parties to the contract cannot be qualified as overriding mandatory provisions and cannot therefore supersede the application of EU conflict rules[51]. On the other hand, another approach considers a broader reading of art. 9, according to which, provisions protecting certain categories of individuals may also be qualified as overriding mandatory provisions, as same may be crucial to the protection of certain public interests[52]. The latter seems to be the

[51] Rules of this kind are the *Parteischutzvorschriften* of German law, whose mandatory nature is aimed at re-establishing a balance between the parties to the contract, and are mentioned by the German doctrine in order to exclude them from the scope of application of art. 9 Rome I Regulation. See the references in BONOMI A., *Le norme imperative nel diritto internazionale privato. Considerazioni sulla Convenzione europea sulla legge applicabile alle obbligazioni contrattuali del 19 giugno 1980 nonché sulle leggi italiana e svizzera di diritto internazionale privato*, Zürich, 1998, p. 172.

[52] POCAR F., *La legge applicabile ai contratti con i consumatori*, in TREVES T. (ed), *Verso una disciplina comunitaria della legge applicabile ai contratti*, Padova, 1983, p. 314; BOSCHIERO N., *Norme inderogabili, "disposizioni imperative del diritto comunitario" e "leggi di polizia" nella proposta di regolamento Roma I*, cit., p. 111; BIAGIONI G., *Art. 9*, cit., p. 522; KUIPERS J., *EU Law and Private International Law*, cit., p. 125.

position of the European Court of Justice in *Ingmar*[53]. Indeed, although the object of the decision was not national law, but certain rules under the Commercial Agents Directive, the Court noticed that the general objective of such provisions was to promote certain fundamental principles and freedoms of EU law. Therefore, the Court has concluded for their overriding mandatory nature, in spite of the fact that the application of the rules resulted in the protection of commercial agents as weaker parties[54].

However, it should be noticed that the new Italian rules on tourism contracts are neither aimed at protecting a weaker party, nor at restoring a proper contractual balance. In fact, provisions under art. 88-*bis* of the Decree Law No 18/2020 introduces a set of guarantees benefitting both travellers/consumers and transport and accommodation providers. Same does not distinguish between parties to tourism contracts affected by the new provisions, nor does it qualify certain parties as "weaker" or worthy of any specific protection. The new rules are balanced in providing certain advantages, and in general a more favourable discipline on the impossibility of performance, to both consumers and providers. Therefore, it should be concluded that those rules cannot be assimilated to those mandatory provisions aimed at protecting the private interests of a weaker party.

Another aspect that should be considered is the context in which the Italian rules were adopted, as well as the underlying scope inspiring the special discipline on tourism and transport contracts. The objective of Decree Law No 9/2020 and of the discipline later included in art. 88-*bis* of Decree Law No 18/2020 was to (indirectly) sustain tourism operators and consumers severely struck by the COVID-19 emergency. The global pandemic represents the cause and the reason why Italian lawmakers chose to compile more favourable provisions on contractual breach, with the aim of alleviating economic repercussions deriving from impossibility of performance.

From the above, it should be possible to affirm that the Italian overriding mandatory provisions may be in conformity with the legal framework of the Rome I Regulation, notwithstanding a strict interpretation of art. 9 of the Regulation, wherein reference is made to rules that are "*crucial*" for the protection of public interests of the State.

In other words, the adoption of a special discipline qualifying rules as overriding mandatory provisions has occurred amid a health emer-

[53] Judgment of the Court (Fifth Chamber) of 9 November 2000, Ingmar GB Ltd v Eaton Leonard Technologies Inc., case C-381/98, para. 23-24.

[54] Judgment of the Court (Fifth Chamber) of 9 November 2000, Ingmar GB Ltd v Eaton Leonard Technologies Inc., case C-381/98, para. 20-21.

gency, this being the main justification of an intervention by national lawmakers. The protection of a category of subjects coincides with objectives of general interests for the State and, more specifically, with the objective of safeguarding the economic stability of important economic sectors (namely, tourism and transport). All such elements should serve the thesis informing the understanding under art. 88-*bis* of Decree Law No 18/2020, wherefore public interests can be qualified as "*crucial*" for the protection of the latter according to art. 9 Rome I Regulation.

6. *Conclusions*

The interplay between national and EU law in the context of the Rome I Regulation requires further clarification. On the one hand, art. 9 of the Regulation attempts an opening towards the need for legal systems to safeguard fundamental national principles and structure. On the other hand, the admissibility of overriding mandatory provisions still seems to be subject to a strict interpretation by the legal doctrine and – to a lesser extent – by the European Court of Justice. The exceptional application of national overriding mandatory provisions is justified by the need to preserve the integrity of the uniform conflict-of-laws rules.

What is certain is that the operativity of national overriding mandatory provisions is subject to a case-by-case evaluation, within the framework provided by the definition contained under art. 9 and under case law of the European Court of Justice. Despite the fact that the provisions under art. 88-*bis* of the Decree Law No 18/2020 appear to be found on strong public interests – mostly relating to an emergency context that justifies the adoption of such measures – it will be for the case law to determine whether or not Italian rules are compatible with EU law. Indeed, Italian courts will likely respect the indications by national lawmakers, which clearly establish the overriding nature of the rules at hand for the purposes of art. 9 Rome I Regulation. On the other hand, it would be interesting to see the position of the European Court of Justice in this regard.

PIETRO SANNA

THE LATEST APPROACH OF THE ITALIAN SUPREME COURT ON JURISDICTION IN MARITIME LABOUR CLAIMS: BETWEEN THE CONNECTING FACTOR OF THE "PLACE OF RECRUITMENT" AND "FLAGS OF CONVENIENCE"

1. *Introduction*

The Grand Chamber of the Italian Supreme Court has returned[1] to the issue of the relevance, within the context of the domestic system of international private and procedural law, of certain connecting factors to determine both the Court having jurisdiction and the law governing employment relationships[2].

Namely, the Supreme Court has focused its attention on the notion of "place of recruitment" ("*stabilimento di assunzione*") in relation to the peculiar framework of maritime employment contracts[3].

[1] In matters of seafarers' employment agreements, see Cass., S.U., 8th October 1958, no. 3148, in *Riv. dir. nav.*, 1958, II, pp. 145 ff.; Cass., S.U., 24th October 1990, no. 10322, *Pacific International Lines (Private) Limited v. Billyardo L. Camaling and others*, in *Dir. mar.* (commented by M. ORIONE, *L'intervento dell'I.T.F. nelle controversie di lavoro fra armatori e marittimi stranieri*), 1991, pp. 974 ff.; Cass., S.U., 28th October 1998, no. 10730, *La Costa D'Argento Charteboat Gmbh Srl v. A. Coli*, in *Riv. dir. int. priv. proc.*, 1999, pp. 986 ff.; Cass., S.U., 17th July 2008, no. 19595, *T.I. v. B.A.*, in *Dir. mar.*, 2009, pp. 144 ff.

[2] Cass., S.U., 14th July 2017, no. 17549, *Carnival Cruise Lines v. A.C.*, in *Dir. mar.*, 2019, pp. 781 ff.

[3] As it will be assessed, the relevant problematic Italian law provisions were Article 603 of the Italian Code of Navigation (according to which – in the currently applicable version – "*the individual controversies regarding: a) the labour relations of the maritime personnel even if the lawsuit is brought by persons of the family of the seaman or by other persons entitled and although the labour contract is null and void for default of form; b) the execution of the port labour and the application of the relative tariffs; c) the rewards due to the pilots, drivers in local service, moorers, boatmen and ballasters; to towing enterprises; operators of lighters, mechanisms and means used in the operations of loading and unloading of the goods, or in the embarkment or disembarkment of persons, or in*

As known, in fact, in such specific field the above connecting factor requires a special hermeneutical effort in order to identify its proper scope of application.

2. *The Case*

The case at hand stems from a judgment issued by the Court of Genoa. Having ascertained the existence of an employment relationship between the plaintiff – a third officer on deck – and the defendant – a U.S. shipping company –, the Court of first instance declared the wrongfulness of the dismissal of the seafarer and ordered the shipowner to compensate the latter for damages[4].

any case in the use or service of vessels or lighters; to furnishers of water for use on board […] are instituted before the Tribunal of the Department in which the vessel is enlisted, or the labour contract has been concluded or carried out or has ceased, or the proposal reached the seaman, if the contract was not followed by engagement. The provisions of letters b) and c) of the present article are also applied to national war vessels, but same do not innovate the provisions in force on the controversies regarding relations of public employment". English translation by P. MANCA, *The Italian Code of Navigation: Translation and Commentary*, Milan, 1958, p. 290) and Article 3 of Law no. 218/1995 (which reads as follows: "*1. Italian Courts shall have jurisdiction if the defendant is domiciled or resides in Italy or has a representative in this country who is enabled to appear in Court pursuant to Article 77 of the Code od Civil Procedure, as well as in the other cases provided for by law. 2. Italian Courts shall further have jurisdiction according to the criteria set out in Sections 2, 3 and 4 of Title II of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters with Protocol, signed in Brussels on 27 September 1968, enforced by Law No. 804 of 21 June 1971, with amendments in force for Italy, including when the defendant is not domiciled in the territory of a contracting State, with respect to any of the matters falling within the scope of application of the Convention. With regard to other matters, jurisdiction shall be also determined according to the criteria laid down for territorial jurisdiction*". English translation by A. GIARDINA, *Italy: Law Reforming the Italian System of Private International Law*, in *International Legal Materials*, Vol. 35, No. 3, 1996, p. 765). For a general overview in matters of maritime labour, see L. MENGHINI, *I contratti di lavoro nel diritto della navigazione*, Milan, 1996; C. CARDILLO, *Il rapporto di lavoro nautico*, Padua, 1998; F. GUADAGNA, *Internazionalizzazione degli equipaggi e legge applicabile ai rapporti di lavoro*, in *Dir. mar.*, 2006, pp. 668 ff.; A. ZANOBETTI PAGNETTI, *Il rapporto internazionale di lavoro marittimo*, Bologna, 2008; O. FOTINOPOULOU BASURKO, *El contrato de trabajo de la gente de mar*, Granada, 2008; A. LEFEBVRE D'OVIDIO, G. PESCATORE, L. TULLIO, *Manuale di diritto della navigazione*, Milan, 2011, pp. 341 ff.; S. M. CARBONE, P. CELLE, M. LOPEZ DE GONZALO, *Il diritto marittimo attraverso i casi e le clausole contrattuali*, 6th Ed., Turin, 2020, pp. 81 ff.; L. CARBALLO PIÑEIRO, *International Maritime Labour Law*, Berlin-Heidelberg, 2015.

[4] Court of Genoa, 10th January 2013, no. 19.

Furthermore, the Court[5], after having preliminarily excluded the applicability of the arbitration clause agreed by the parties within the employment contract, declared the Italian jurisdiction on the basis of the residual criterion as per Article 603 of the Italian Code of Navigation, to be applied pursuant to Article 5, para. 1, no. 1 of the Brussels Convention of 1968[6].

Challenged on the ground, *inter alia*, of the lack of Italian jurisdiction, the judgment of the Court of first instance was upheld by the Court of Appeal of Genoa, which confirmed the jurisdiction of domestic Courts, in particular by relying on the connecting factor of the place of

[5] The Court, first, and the Court of Appeal, then, declared the Italian jurisdiction due to the invalidity of the arbitration clause, by noting that Article 4 of Law no. 218/1995 excludes any possibility of prorogation of the Italian jurisdiction, not only where the prorogation is not proven in writing, but also in the cases referred to in Articles 806 and 808 of the Italian Code of Civil Procedure. In particular, the second paragraph of said Article 4 – the content of which, due to the Legislative Decree no. 40/2006, is currently transfused in a simplified version into the second paragraph of Article 806 of the Code of Civil Procedure –, establishes that the disputes referred to in Article 409 of the Code of Civil Procedure, including those concerning employment contracts of private nature, can be decided by arbitrators only if this is provided for by the collective labour agreements. Condition undisputedly unfulfilled in the case at hand. Finally, the Grand Chamber of the Supreme Court by confirming the aforementioned provisions, also reaffirmed the well-established principle of law (see, for instance, Cass., 12th January 2007, no. 412, in *Guida al diritto*, 2017, 10, p. 55), according to which the validity and applicability of the arbitration clause pursuant to Articles 2 and 3 of the 1958 New York Convention, shall be subject to preliminary evaluations by the Court in charge of the dispute in order to assess – and thus potentially declare – its nullity, as duly occurred in the case in comment. For a general overview on international arbitrations, see, *ex multis*, M. LOPEZ DE GONZALO, *La disciplina delle clausole compromissorie tra formalismo e prassi del commercio internazionale*, in *Dir. mar.*, 1990, pp. 326 ff.; F. BERLINGIERI, *Trasporto marittimo e arbitrato*, in *Dir. mar.*, 2004, pp. 423 ff.; S. M. CARBONE, M. LOPEZ DE GONZALO, *L'arbitrato marittimo*, in G. ALPA, V. VIGORITI (eds.), *Arbitrato. Profili di diritto sostanziale e di diritto processuale*, Turin, 2013, pp. 1293 ff.; A. LA MATTINA, *L'arbitrato marittimo e i principi del commercio internazionale*, Milan, 2012; ID., *L'arbitrato marittimo internazionale*, in *Riv. arb.*, 2014, pp. 19 ff.; ID., *Conflitti di leggi e arbitrato marittimo*, in *Riv. arb.*, 2014, pp. 575 ff.; M. RICCOMAGNO, *L'arbitrato marittimo nel contesto dell'arbitrato commerciale internazionale*, in *Riv. arb.*, 2014, pp. 495 ff.. For a comment on Article 4 of the Italian Law no. 218/1995, see S. M. CARBONE, in *Nuove leggi civ. comm.*, 1995, pp. 918 ff.; R. LUZZATTO, in *Riv. Dir. int. priv. e proc.*, 1995, pp. 938 ff.; I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale*, Padua, 2000, pp. 198 ff.

[6] As it will be more in-depth discussed below, said provision found application due to the fact that the connecting factor of the place of performance could not apply in the present case since the work activity took place during the navigation and the employment contract has been terminated not by landing but by telegram, which has been sent to the residence of the claimant.

termination of the contractual relationship, which was undisputedly located in Italy[7].

In light of the above, the shipowner also challenged this second judgment[8] on the basis of four grounds of appeal, three of which – once again – related to lack of jurisdiction[9], by leading the Court to refer the claim to the First President of the Supreme Court for the assignment to the Grand Chamber.

3. *The Decision of the Italian Supreme Court: The Localization of the "Place of Recruitment" (and the "Place of Business") of Shipboard Staff and the (Ir)Relevance of the Flag State*

In order to definitively clarify the subject matter of the dispute, the Grand Chamber of the Italian Supreme Court, by making express reference to their own previous case-law[10], reviewed all possible adaptations to the concrete case of the abstractly applicable relevant rules, finally confirming Italian jurisdiction, as the result of a comprehensive *ad excludendum* assessment of possible alternative scenarios[11].

[7] Court of Appeal of Genoa, 9th April 2013.

[8] Cass., sez. lav., 13th February 2017, no. 3740, *Carnival Cruise Lines v. A.C., C.F.*

[9] Namely, the claimant maintained the violation/wrong application as per Article 360, no. 3, of the Code of Civil Procedure of the following provisions: *(i)* Article 3, para. 2, of Law no. 218/1995, Articles 5 and 2 of the 1968 Brussels Convention, Article 19 of the Regulation (EC) no. 44/2001, as well as Article 603 of the Italian Code of Navigation, as to the determination of the jurisdiction; *(ii)* Articles 112 and 806 of the Code of Civil Procedure, as well as Article 2 of the 1968 New York Convention, as to the effectiveness of the arbitration clause agreed by the parties; *(iii)* Articles 14 and 16 of Law no. 218/1995, as to the possible application of the foreign law governing the seafarer employment agreement, which the Court considered in contrast with the public order, assuming that in the case at hand the US and Panamanian legal system did not properly protect employees from wrongful dismissals; *(iv)* Articles 1335 and 2697 of the Italian Civil Code and Article 31 of the implementing provisions of the Civil Code, as to the presumption of knowledge by the employee of the dismissal, which has been communicated by a telegram sent to the residence of the seafarer.

[10] Cass., S.U., 17th July 2008, no. 19595, cit.. For a comment to the judgment, see S. M. CARBONE, *Dallo stato della nazionalità della nave allo stato di radicamento territoriale non occasionale della nave nella disciplina del lavoro marittimo*, in *Dir. mar.*, 2009, pp. 81 ff.; M. M. COMENALE PINTO, *In tema di bandiere e giurisdizioni di comodo*, in *Giust. civ.*, 2009, 3, I, pp. 663 ff.; M. COMUZZO, *Una nuova interpretazione del criterio dello "stabilimento di assunzione" per la determinazione della giurisdizione in materia di lavoro marittimo*, in *Dir. trasp.*, 2010, 2, pp. 397 ff.

[11] M. COMUZZO, *Una nuova interpretazione del criterio dello "stabilimento di assunzione" per la determinazione della giurisdizione in materia di lavoro marittimo*, cit., p. 405.

The Supreme Court correctly focused its analysis on Article 3 of Italian Law no. 218 of 31st May 1995, reforming the Italian private international law system[12], which provides for three subsidiary criteria to determine Italian jurisdiction.

Firstly, domestic Courts shall exercise jurisdiction where the place of residence or domicile of the defendant – or of his representative authorized to stay in Court – is located in Italy, as well as in other cases provided for by law.

Secondly, regardless of the defendant's domicile, Italian jurisdiction may be affirmed by referring to Sections 2, 3, 4 of Title II of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters[13], when one of the matters covered by

[12] On the reform of the Italian private international law system, see R. LUZZATTO, *Sulla riforma del sistema italiano di diritto processuale civile internazionale*, in G. GAJA (ed.), *La riforma del diritto internazionale privato e processuale (Raccolta in ricordo di Edoardo Vitta)*, Milan, 1994, pp. 151 ff.; M. R. SAULLE, *Lineamenti del nuovo diritto internazionale privato*, Naples, 1995; V. FRANCESCHELLI, *Il nuovo diritto internazionale privato*, Milan, 1995; G. CAMPEIS, A. DE PAULI, *Prime riflessioni sulla "Riforma del sistema italiano di diritto internazionale privato" (e processuale)*, in *Giust. civ.*, 1995, pp. 495 ff.; P. MENGOZZI, *La riforma del diritto internazionale privato italiano*, Naples, 1996; U. VILLANI, *Il declino del principio della cittadinanza nella determinazione della giurisdizione*, in *Guida al diritto*, 1996, pp. 25 ff.; N. BOSCHIERO, *Appunti sulla riforma del sistema italiano di diritto internazionale privato*, Turin, 1996; F. SEATZU, *Sulla deroga della giurisdizione italiana in materia di lavoro nel nuovo sistema di diritto processuale civile internazionale*, in *Giust. civ.*, 1997, pp. 429 ff.; P. PICONE, *La riforma italiana del diritto internazionale privato*, Padua, 1998.

[13] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), *OJ C 27*, 26th January 1998, pp. 1-33. S. M. CARBONE, C. E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, 7th ed., Turin, 2016, pp. 2 ff.; A. MALATESTA, *Le novità in materia di fori protettivi della parte debole*, in A. MALATESTA (ed.), *La riforma del Regolamento Bruxelles I. Il Regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*, Milan, 2016, pp. 1 ff.; F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione). Evoluzione e continuità del "sistema Bruxelles-I" nel quadro della cooperazione giudiziaria civile europea in materia civile*, Vicenza, 2015, pp. 1 ff.; P. DE CESARI, *Diritto internazionale privato dell'Unione europea*, Turin, 2011, pp. 66 ff.; F. P. MANSI, *Il giudice italiano e le controversie europee: i principali regolamenti comunitari di diritto processuale civile. I principali regolamenti comunitari di diritto processuale civile*, 2° ed., Milan, 2010, pp. 5 ff.; S. M. CARBONE, *Giurisdizione ed efficacia delle decisioni in materia civile e commerciale nello spazio giudiziario europeo: dalla Convenzione di Bruxelles al Regolamento (CE) n. 44/2001*, in S. M. CARBONE, M. FRIGO, L. FUMAGALLI (eds.), *Diritto processuale civile e commerciale comunitario*, Milan, 2004, pp. 3 ff.; A. BONOMI, *Il diritto internazionale privato dell'Unione europea: considerazioni generali*, in *Diritto internazionale e le controversie europee. Dalla convenzione di Bruxelles del*

the Convention is involved[14]. In the case at hand, it is clear that reference is made to Article 5, para. 1, no. 1 of the 1968 Brussels Convention, which, for the purpose of establishing Italian jurisdiction, provides for two subsidiary connecting factors. *Incidenter tantum*, it should be reminded that this provision concerned "contracts" in general and had specific rules on employment matters – contrary to the Brussels I Regulation(s), containing more "evolved" autonomous sections which are specifically devoted to the protection of weaker parties[15]. In the first place,

1968 alla convenzione di Lugano del 1988 ed al regolamento (CE) n. 44/2001, Milan, 2004, pp. 5 ff.; S. M. CARBONE, *La Convenzione di Bruxelles sulla giurisdizione e l'esecuzione delle sentenze*, in A. TIZZANO (ed.), *Il diritto privato dell'Unione europea*, t. II, Turin, 2000, pp. 1431 ff.; L. MARI, *Il diritto processuale civile della convenzione di Bruxelles. Il sistema della competenza*, Padua, 1999; F. POCAR, *La Convenzione di Bruxelles sulla giurisdizione e l''esecuzione delle sentenze*, 3rd ed., Milan, 1995; R. LUZZATTO, *Giurisdizione e competenza nel sistema della Convenzione di Bruxelles del 27 settembre 1968*, in *Dir. comm. int.*, 1991, pp. 63 ff.; ID., *Competenza giurisdizionale o diretta e competenza internazionale o indiretta nelle convenzioni dell'Aja e di Bruxelles*, in *Riv. dir. int. proc.*, 1969, pp. 66 ff.

[14] The first sentence of paragraph 2 of Article 3 of Law no. 218/1995, without affecting the material scope of the Community legislation, extends also to defendants not domiciled in a Member State the subjective scope of application of the provisions under Sections 2, 3 and 4 of Title II of the 1968 Brussels Convention, to which correspond Sections 2, 3, 4 and 5 of Chapter II of the Brussels I and Ia Regulations, relating to special jurisdiction, as well as those relating respectively to jurisdiction in matters of insurance, consumer contracts and individual contracts of employment. It is to be noted that in 1995, when Italian Law no. 218 entered into force, Article 5, no. 1 of the 1968 Brussels Convention already included a special provision on jurisdiction in labour matters. However, said provision has been better clarified at a later stage in Section 5 of the Chapter II of the Brussels I and Ia Regulations, respectively at Articles 18-21 and 20-23. F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale – Volume I: Parte generale e obbligazioni*, 9th ed., Milan, 2020, pp. 156 ff.

[15] On the protection of weaker parties in the framework of Brussels I Regulation(s), see, *ex multis* S. MARINO, *Metodi di diritto internazionale privato e tutela del contraente debole nel diritto comunitario*, Milan, 2010; G. VITELLINO, *Le novità in materia di fori protettivi della parte debole*, in MALATESTA A. (ed.), *La riforma del Regolamento Bruxelles I. Il Regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*, Milan, 2016, p. 47; A. GALIČ, *Extension of the Weaker Party Protection in the Brussels I Recast to Third-State Defendants: Removing National Law or Providing for Minimum Standards?*, in *The European Legal Forum*, 2016, p. 1; G. RÜHL, *The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy*, in *Journal of Private International Law*, 2014, p. 335; A. M. BENEDETTI, I. QUEIROLO, L. CARPANETO (eds.), *La tutela dei "soggetti deboli" tra diritto internazionale, dell'Unione europea e diritto interno*, Rome, 2012; T. HARTLEY, *Civil Jurisdiction and Judgments in Europe. The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention*,

Article 5 relies on the place of performance of the obligation in question, while, in the second place, if the employee does not habitually carry out his activity in a single State, then reference is made to the "place of recruitment"[16] of the latter[17].

Finally, Article 3 of Italian Law no. 218/1995 residually provides that should the titles of jurisdiction pursuant to the aforementioned sections of the 1968 Brussels Convention be unapplicable, Italian jurisdiction shall also be grounded on the criteria established for the territorial jurisdiction with regards to the matters which do not fall within the scope of the above Convention[18]. In this sense, Article 603 of the Italian Code of

New York, 2017, p. 172; V. LAZI , *Procedural Position of a 'Weaker Party' in the Regulation Brussels Ibis*, in V. LAZI , S. STUIJ (eds.), *Brussels Ibis Regulation. Changes and Challenges of the Renewed Procedural Scheme*, The Hague, 2017, p. 51; ID., *Procedural Justice for 'Weaker Parties' in Cross-Border Litigation under the EU Regulatory Scheme*, in *Utrecht Law Review*, 2014, p. 100; F. PESCE, *La tutela dei cd. contraenti deboli nel nuovo regolamento UE n. 1215/2012 (Bruxelles I bis)*, in *Diritto del commercio internazionale*, 2014, p. 579; ID., *Protection of the so-called Weak Parties in the new Brussels I Recast*, in I. QUEIROLO, B. HEIDERHOFF (eds.), *Party Autonomy in European Private (and) International Law*, tomo I, Rome, 2015, p. 125; S. DOMINELLI, *Party Autonomy and Insurance Contracts in Private International Law. A European Gordian Knot*, Rome, 2016; E. VASSILAKAKIS, *International Jurisdiction in Insurance Matters under Regulation Brussels I*, in *Revue Hellénique de Droit International*, 2013, p. 273; C.M. CAAMIÑA DOMÍNGUEZ, *Los litigios en materia de seguros en la Unión europea – Cuestiones de Derecho Internacional Privado*, Granada, 2014.

[16] Reference is made to the Italian version of the 1968 Brussels Convention, which refers to "the place of recruitment" ("*stabilimento di assunzione*") of the employee as connecting factor.

[17] Article 5, para. 1, no. 1, of the 1968 Brussels Convention: "*A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the Courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the Courts for the place where the business which engaged the employee was or is now situated*". On the provision at stake and related issues, see S. M. CARBONE, *Lo spazio giudiziario europeo. La Convenzione giudiziaria di Bruxelles (con la proposta di regolamento comunitario) e la Convenzione di Lugano*, Turin, 2000, pp. 63 ff.; M. LOPEZ DE GONZALO, *L'esercizio della giurisdizione in materia di trasporto marittimo ed intermodale*, in *Dir. mar.*, 2001, pp. 514 ff.; A. ZANOBETTI PAGNETTI, *Il rapporto internazionale di lavoro marittimo*, cit., pp. 99 ff.

[18] Pursuant to a constitutionally oriented interpretation of the second sentence of the second paragraph of Article 3 of Law no. 218/1995 –imposed by the amended version of Article 117, para. 1, of the Italian Constitution, which among the parameters of constitutional legitimacy includes the compliance with the commitments arising from both European Community legal system and international obligations ("*dei vincoli derivanti dall'ordinamento comunitario e dagli obblighi internazionali*") – the relevant case-law states that

Navigation shall apply in the case at hand, since, pursuant to the principle of specialty, it shall prevail over the general provision under Article 413 of the Italian Code of Civil Procedure[19]. Therefore, Italian Courts have jurisdiction when the ship is registered in the Italian Naval Register as well as when the employment contract has been concluded, executed or terminated in Italy[20].

Assuming that the applicability of first of the above grounds of jurisdiction as per Article 3 of Italian Law no. 218/1995 has been ruled out, since the defendant ship-owner does not have any establishments in Italy, the Supreme Court thus based the recognition of the Italian jurisdiction on the residual criterion provided for by Article 603 of the Italian Code

the grounds of jurisdiction are to be construed in accordance with the principle set forth by Article 6 of the European Convention of Rome of 4th November 1950 for the protection of human rights and fundamental freedoms, according to which "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". Therefore, judicial protection cannot be denied whenever the criteria of the defendant's domicile or residence as well those provided for by Sections 2, 3 and 4 of Title II of the Brussels Convention do not apply, or if no foreign Courts have jurisdiction. S. ZUNARELLI, M. M. COMENALE PINTO, *Manuale di diritto della navigazione e dei trasporti*, I, 3rd ed., Milan, 2016, p. 159.

[19] Italian Law no. 533 of 11th August 1973, reforming the rules of individual labour disputes and compulsory social security and welfare, provided for new criteria for the determination of the jurisdiction and the related procedures to follow. However, the above law did not abrogate Article 603 of the Italian Code of Navigation, due to the peculiarity of maritime employment relationships and the fact that they cannot be subject to the criteria provided for by new Article 413 of the Code of Civil Procedure, especially in light of the impossibility to compare the vessel to a company or a subsidiary. This implies the coexistence within the Italian legal system of two different provisions on territorial jurisdiction as to maritime labour disputes: a general one pursuant to Article 413 of the Code of Civil Procedure and a special one set forth by the Article 603 of the Code of Navigation, specifically referred to seafarers' employment contracts. See, in this terms, Cass., S.U., 17th July 2008, no. 19595, cit.. Italian Courts solved the above dichotomy, which only relates to territorial jurisdiction, in the sense that the special provision prevails over the general one. See Cass., 21st May 1986, no. 3388, *C. Manfredi e A. Mastroianni v. Achille Lauro Armatore*, in *Vita not.*, 1986, p. 1272. See also the more recent Cass., 3rd March 2020, *C.F., S.R. v. Calisa S.p.A.*, which confirms that – as to claims regarding maritime labour relationships – the standard criteria for the identification of the territorially competent Court under Article 413 of the Code of Civil Procedure, do not apply, since reference is to be made to the special criteria under Article 603 of the Navigation Code, which provide for two territorially competent Courts: *(i)* the Court of the place in which the maritime labour relationship was established, performed or ceased, or *(ii)* the Court competent for the district in which the vessel was registered.

[20] In this terms, Article 603 of the Italian Code of Navigation. In the case at hand, the Court relied on the place of termination of the employment contractual relationship, which undisputedly occurred in Italy.

of Navigation. This, also taking into account the inapplicability to the case at hand of the connecting factors set out under Article 5, para. 1, no. 1 of the 1968 Brussels Convention due to the following reasons.

On the one hand, by merely referring to previous case-law[21], the Court confirms the inapplicability to maritime labour claims of the grounds of jurisdiction pursuant to the second sentence of Article 5, paragraph 1, no. 1 of the Brussels Convention, according to which, in matters of individual contracts of employment, the defendant may be sued in the Courts of the place "*where the employee habitually carries out his work*". Although judges do not offer an express and comprehensive explanation on this point, the reason of the above incompatibility of titles of jurisdiction at stake, with respect to maritime labour issues, seems to be attributable to the peculiar nature of the latter, indeed characterized by an activity ontologically intended to be performed within – and between – different States and, therefore, potentially subject to several jurisdictions[22]. In this sense, according to the Supreme Court, the place of performance of the work activity is not suitable to determine the national legal system which has the most genuine link with the claim and which, therefore, would justify exercising domestic jurisdiction.

[21] See Cass., S.U., 17th July 2008, no. 19595, cit.. Even if by making reference to its own case-law, the Supreme Court, due to the peculiar factual circumstances of the case at stake, comes to different conclusions. In fact, in 2008, even if confirming that it was not possible to identify the place of performance of the work activity – since it was a cruise ship –, the Court relied on the residual connecting factor of the place where the establishment where the employee had been engaged was located. This was possible because the vessel had been permanently in a specific port for an appreciable period of time. In the case in comment, as will be more in-depth discussed below, the Court instead denies the possibility to identify a "place of recruitment" since the vessel on which the employee carried out his work activity did not stay in a specific port for a prolonged period of time. This is why the Court applies the subsidiary criterion as per Article 603 of the Italian Code of Navigation.

[22] The main reason of said incompatibility is to be found in the lack of habitual nature of maritime labour, which implies a mutable work activity to be carried out in different places. In this sense, S. M. CARBONE, *Dallo stato della nazionalità della nave allo stato di radicamento territoriale non occasionale della nave nella disciplina del lavoro marittimo*, cit., pp. 81 ff.; M. COMUZZO, *Una nuova interpretazione del criterio dello "stabilimento di assunzione" per la determinazione della giurisdizione in materia di lavoro marittimo*, cit., p. 406. The same observations shall apply also to work activities carried out in the specific framework of international air transport, which, as to this aspect, have the same characteristics of the maritime labour. As to the EU case-law on jurisdiction in matters of employment contracts within the international air transport sector, see C. E. TUO, *La nozione di "luogo di abituale svolgimento dell'attività lavorativa" ancora al vaglio della Corte di giustizia UE: il caso degli assistenti di volo*, in *Dir. mar.*, 2018, pp. 403 ff.

On the other hand, the Grand Chamber, this time dwelling on the reasons behind the statement, also denies the applicability of the second connecting factor as per Article 5, para. 1, no. 1 of the 1968 Brussels Convention in the context of maritime labour claims, i.e. the "place of recruitment" of the seafarer. Accordingly, the last sentence of said provision – in the Italian version of the Convention – provides that if the employee does not habitually carry out his work in a specific country, the employer may also be sued before the Courts for the place of "recruitment". In particular, the Supreme Court clarifies that, in order to localize such "place of recruitment", the recruiting establishment shall be strictly connected to a specific geographical place, assuming that the mere nationality of the ship does not suffice to not establish jurisdiction[23].

This last statement seems to be in line with certain scholars[24] who recognize a generalised trend towards marginalising the flag as a title of jurisdiction or connecting factor[25] within national and international maritime practice. Since the undervaluation of a ship's nationality should also

[23] Textually, the decision at stake reads as follows: "*In sostanza nel primo motivo si allega che, essendo pacifico che l'A. si sia imbarcato nelle Isole Hawaii, era applicabile, prima di passare ai criteri sussidiari, l'art. 5.1 e cioè lo stabilimento ove il lavoratore era stato assunto; ma già questa Corte ha osservato con il precedente del 2008 che perché si possa parlare di uno "stabilimento" occorre un radicamento di una certa consistenza territoriale (segnatamente in un porto) che nel caso in esame non è emerso: "ignorandosi invece se il natante fosse rimasto per un prolungato periodo di tempo in un certo porto" […], sicché il criterio fissato all'art. 5 non può essere di utilità per stabilire la giurisdizione ed occorre rifarsi a quelli sussidiari; tanto meno può rilevare un collegamento territoriale sulla base della mera circostanza della nazionalità del natante che batteva bandiera panamense […]*". Cass., S.U., 14th July 2017, no. 17549, cit., point 9.

[24] On the gradual marginalisation as connecting factor of the law of the flag State, see S. M. CARBONE, *Legge della bandiera e ordinamento italiano*, Milan, 1970; ID., *Dallo stato della nazionalità della nave allo stato di radicamento territoriale non occasionale della nave nella disciplina del lavoro marittimo*, cit., pp. 81 ff.; ID., *La legge ed il regime previdenziale applicabile ai rapporti di lavoro marittimo nella U.E.*, in *Dir. mar*, 2015, pp. 52 ff.; I. QUEIROLO, *La "residualità" della nazionalità della nave nelle norme di conflitto in campo marittimo*, in *Riv. dir. int. priv. proc.*, 1994, pp. 539 ff.; M. T. D'ALESSIO, *Carattere residuale della legge nazionale della nave nel sistema italiano di diritto internazionale privato della navigazione*, in *Dir. mar.*, 1994, pp. 786 ff.. However, it is to be noted that a minor part of scholars has an opposing view. See A. ZANOBETTI PAGNETTI, *Il rapporto internazionale di lavoro marittimo*, cit., pp. 143 ff.

[25] This approach stems from the US legal practice aroused during the first half of XX century and which has been embraced only at a later stage also by Civil law legal system. S. M. CARBONE, *Dallo stato della nazionalità della nave allo stato di radicamento territoriale non occasionale della nave nella disciplina del lavoro marittimo*, cit., p. 84; ID., *La legge ed il regime previdenziale applicabile ai rapporti di lavoro marittimo nella U.E*, cit., p. 52. In this sense, it is of certain interest, for instance, the recent Spanish judgement *Juzgado de lo Social n. 4* of *Palma de Mallorca*, 28th June 2018, no. 00368. The case stems

cover the related discipline of the so-called internal order, which also includes maritime employment agreements, there would appear to be a well-established tendency to undermine the link with the flag State in favour of the link to the different State that, due to the peculiar facts of the case, appear to be more closely connected to the contractual relationship considered on a case-by-case basis.

The main reason of the above-described approach is represented by the progressive phenomenon of the so-called "flags of convenience", i.e. the widespread practice of replacing the socio-economic link between the ship and the flag State with the one, of purely economic convenience, conducive to benefitting from foreign investments at particularly advantageous conditions[26]. In fact, said practice involves States which prescribe

from the appeal against a settlement agreement concerning the termination of the employment relationship between a ship-owning company based in the Netherlands and a first officer embarked on a Dutch flag leisure vessel normally based in a small port of Palma de Mallorca. Called to decide on the alleged lack of jurisdiction of Spanish judges, the Court, in line with the aforementioned trend to undervalue the law of the flag State, confirmed the Spanish jurisdiction, stating that, in order to determine the jurisdiction in maritime labour claims, if the vessel on which the work is performed is habitually based in a specific port, the location of that port is more relevant than the flag of the vessel (in this case the jurisdiction has been identified pursuant to Article 21, para. 1, of the Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). The Court by expressly making reference to the case-law of the Spanish Supreme Court (*Tribunal Supremo – Sala Cuarta, de lo Social*, 8th February 2007, Recourse no. 149/2005) confirmed that "*el concepto de puerto se asienta o apoya en una situación que se deriva de la propia actividad marítima de la nave, y por ello, en principio, no está necesariamente vinculado al lugar de incripción de la misma en algún Registro oficial*".

[26] On the "flags of convenience" issue, see, *ex multis*, S. M. CARBONE, *Legge della bandiera e ordinamento italiano*, cit.; ID., *La disciplina giuridica del traffico marittimo internazionale*, Bologna, 1982; ID., *Lezioni, casi e modelli contrattuali di diritto marittimo*, Turin, 1997, pp. 3 ff.; F. LAURIA, *Bandiere ombra e situazioni giuridiche di comodo*, in *Trasp.*, 11/1977, pp. 83 ff.; S. ZUNARELLI, *Le bandiere di convenienza e l'evolversi dei principi di liberà di navigazione e di commercio marittimo*, in *Dir. mar.*, 1980, pp. 400 ff.; C. MONTEBELLO, *Bandiere di convenienza, sistemi di registrazione "alternativi" e Port State Control*, in *Trasp.*, 85/2001, pp. 149 ff.; P. CELLE, *Il "Port State Control" nel diritto internazionale*, in *Dir. mar.*, 2007, pp. 712 ff.; A. MASUTTI, *Genuine link e bandiere ombra*, in A. ANTONINI (ed.), *Trattato breve di diritto marittimo*, vol. I, Milan, 2007, pp. 417 ff.; A. ZANOBETTI PAGNETTI, *Il rapporto internazionale di lavoro marittimo*, cit., pp. 160 ff.; S. POLLASTRELLI, *Il contratto di trasporto marittimo di persone*, Milan, 2008, pp. 80 ff.; S. M. CARBONE, L. SCHIANO DI PEPE, *Conflitti di sovranità e di leggi nei traffici marittimi tra diritto internazionale e diritto dell'Unione europea*, Turin, 2010, pp. 36 ff.; F. MUNARI, L. SCHIANO DI PEPE., *Standard di tutela dei lavoratori marittimi: profili sostanziali e internazionalprivatistici nel diritto dell'Unione europea*, in *Riv. dir. int. priv. proc.*, 2012, pp. 37 ff.

"soft" requirements for registration with national naval registers, thereby granting their own nationality to ships that do not have any socio-economic link with the domestic legal system. This leads to the implementation of an "open registry" policy combined with particularly favourable tax conditions and substantially aimed at attracting foreign capital and encouraging foreign investments within their "jurisdiction" due to a greater profitability of the ship[27].

4. *Conclusive Remarks on the Scope of the Reference made by Italian Law no. 218/1995 to the Grounds of Jurisdiction Provided for by the 1968 Brussels Convention*

A final consideration should be made with regard to the scope of the *renvoi* made by Article 3, para. 2, of Italian Law no. 218/1995 to the 1968 Brussels Convention[28], which unilaterally extends the scope of application of the latter.

According to the above provision, Italian Courts have jurisdiction also due to the grounds as per Sections 2, 3 and 4 of Title II of the 1968 Convention[29], "as subsequently amended and applicable to Italy"[30], even if the defendant is not domiciled in a Contracting State.

In the case at hand, the Supreme Court, again with regard to jurisdiction, is also called on to decide on the applicability to the claim of Article

[27] In this terms, S. M. CARBONE, *Dallo stato della nazionalità della nave allo stato di radicamento territoriale non occasionale della nave nella disciplina del lavoro marittimo*, cit., p. 83; C. E. TUO, *La nozione di "luogo di abituale svolgimento dell'attività lavorativa" ancora al vaglio della Corte di giustizia UE: il caso degli assistenti di volo*, cit., p. 420.

[28] On the reference made by Law no. 218/1995 to the grounds of jurisdiction as per the 1968 Brussels Convention, see L. MARI, *Delimitazione della giurisdizione italiana mediante rinvio alla convenzione di Bruxelles del 1968 e competenza pregiudiziale della Corte di giustizia*, in *Foro.it*, 1996, IV, pp. 365 ff.; G. GAJA, *Il rinvio alla convenzione di Bruxelles in tema di giurisdizione*, in F. SALERNO (ed.), *Convenzioni internazionali e legge di riforma del diritto internazionale privato*, Padua, 1997, pp. 27 ff.; V. STARACE, *Il richiamo dei criteri di giurisdizione stabiliti dalla Convenzione giudiziaria di Bruxelles nella legge di riforma del diritto internazionale privato*, in *Riv. dir. internaz.*, Issue 1, 1999, pp. 5 ff.; P. PICONE, *La riforma italiana del diritto internazionale privato*, cit., pp. 214 ff.; S. M. CARBONE, C. E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, cit., pp. 7 ff.; F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale – Volume I: Parte generale e obbligazioni*, cit., pp. 156 ff.

[29] As already assessed, these are the sections devoted to special jurisdiction and protection of weaker parties in insurance, consumer and employment contracts, to which correspond Sections 2, 3, 4 and 5 of Chapter II of the Brussels I and Ia Regulations.

[30] Literally in Italian: "*e successive modificazioni in vigore per l'Italia*".

19, para. 2, letter *b)*, of the Regulation (EC) no. 44/2001 (so-called Brussels I)[31], which, as secondary EU legislation, shall prevail over the Convention in the context of relationships between Member States[32].

Said provision – in the Italian version of the Regulation –, by emphasizing the connecting factor of the "place of business" (intended as the place where the work activity is carried out), rather than using the term of the "place of recruitment" used under Article 5 of the 1968 Brussels Convention, provides that, if the employee does not, or did not, habitually carry out his work in a specific country, an employer domiciled in a Member State may be sued in another Member State before the Courts where the "place of business" of the employee is, or was, situated[33].

[31] Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 12*, 16th January 2001, pp. 1-23 (so-called Brussels I Regulation). Replaced by its recast, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12th December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 351*, 20th December 2012, p. 1-32 (so-called Brussels Ia Regulation). For a broader study on the Bruxelles Ia Regulation, see, *ex plurimis*, P. MANKOWSKI (ed.), *Research Handbook on the Brussels Ibis Regulation*, Cheltenham, 2020; F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale, Volume I, Parte generale e obbligazioni*, cit., pp. 74 ff.; T. HARTLEY, *Civil Jurisdiction and Judgments in Europe. The Brussels I Regulation, the Lugano Convention, and the Hague Choice of Court Convention*, New York, 2017; U. MAGNUS, P. MANKOWSKI (eds.), *Brussels Ibis Regulation*, Koln, 2016, pp. 504 ff.; S. M. CARBONE, C. E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, cit.; F. FERRARI, F. RAGNO (eds.), *Cross-border Litigation in Europe: the Brussels I Recast Regulation as a Panacea?*, Milan, 2016; A. MALATESTA (ed.), *La riforma del Regolamento Bruxelles I. Il Regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*, cit.; F. SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione). Evoluzione e continuità del "sistema Bruxelles-I" nel quadro della cooperazione giudiziaria civile europea in materia civile*, cit.; A. BRIGGS, *Civil Jurisdiction and Judgments*, 6th ed., London, 2015, pp. 23 ff.; A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, 2015.

[32] Pursuant to Article 68 of Brussels I, the Regulation itself, as between the Member States, shall supersede Brussels Convention and any reference to the Convention shall be understood as a reference to the Regulation. For a comment, P. MANKOWSKI, *Article 68*, in U. MAGNUS, P. MANKOWSKI (ed.), *Brussels I Regulation*, 2° ed., Munich, 2012, pp. 850 ff.; A. BORRÁS, M. E. DE MAESTRI, *Articolo 68*, in T. SIMONS, R. HAUSMANN, I. QUEIROLO (eds.), *Regolamento «Bruxelles I». Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, Munich, 2012, p. 928.

[33] It is to be stressed that the considered issue arises in connection with the Italian version of the relevant provisions of Regulation No. 44/2001 and the 1968 Brussels Convention. In fact, in the English version the relevant parts – for our purposes – of Article 5 of Brussels Convention and Article 19 of Brussels I Regulation have the same wording (reference is made to "*the Courts for the place where the business which engaged the*

Assuming that in the present case the EU law shall not be applied – thus the *renvoi* to the domestic provision *is still to be understood to be in favour* of the Convention and not in favour of the Brussels Regulations – the Supreme Court states that, pursuant to Italian Law No 218/1995, which expressly refers only to the 1968 Brussels Convention, any amendment to the latter shall not automatically operate. In other words, according to the Italian Supreme Court, the Brussels I Regulation does not represent a "subsequent amendment" of the previous Convention and, therefore, the reference made by Article 3 of Italian Law No 218/1995 shall not be conceived as being in favour of the secondary EU legislation.

Although not crucial for the determination of jurisdiction in the case at hand[34], the above conclusion raises several doubts.

If, on the one hand, the judgment in comment is in line with a number of decisions issued by the Italian Supreme Court on the matter[35], on the

employee is or was situated"). In Italian, instead, said Article 5 makes reference to the Courts for the place where the "place of establishment" where the employee has been engaged is located ("*giudice del luogo in cui è situato o era situato lo stabilimento presso il quale è stato assunto*"), while Article 19 of Brussels I refers to the Courts for the place where the "place of business" where the employee has been engaged is located ("*giudice del luogo in cui è o era situata la sede d'attività presso la quale è stato assunto*").

[34] Accordingly, the Supreme Court notes that, even if Article 19 of Brussels I Regulation would apply, in the case at hand it would not be possible to identify the "place of business" where the employee has been engaged, provided that the vessel –which has been recognized also by the claimant as the place of performance of the work activity – did not have a stable territorial link with a specific port and therefore could not be identified as place of business (literally, "*la stessa parte ricorrente sostiene che per «sede di attività» si debba intendere la stessa nave ove l'A. fu imbarcato, il che non può essere […] laddove manchino elementi di stabile radicamento territoriale della nave in un certo porto*". Cass., S.U., 14th July 2017, no. 17549, cit., point 9, last sentence).

[35] See, in this sense, Cass., S.U., 21st October 2009, no. 22239, *Giacometti Group S.r.l. v. S.c.s. David&Cie*, in *Riv. dir. int. priv. proc.*, 2010, pp. 481 ff., where the Italian Supreme Court states that the referral made by Article 3, para. 2, of Law no. 218/1995 exclusively relates to the 1968 Brussels Convention and not to the Brussels I Regulation. Accordingly, said Regulation did not abrogate the Convention, provided that the latter is still to be applied as to the relationships between Member States and both non-Member States or Member States that did not adopted the Regulation – such as Denmark – (literally, "*il rinvio operato dall'art. 3 comma 2 della legge n. 218/1995 attiene esclusivamente alla Convenzione di Bruxelles, e non si estende al regolamento (CE) n. 44/2001. Né può ritenersi che la Convenzione sia stata definitivamente sostituita (e quindi implicitamente abrogata) dal sopravvenuto regolamento, […] la convenzione continua infatti ad operare relativamente ai rapporti con soggetti non domiciliati in uno degli Stati dell'Unione ovvero che non hanno adottato il predetto regolamento, pur facendo parte dell'Unione (ad esempio la Danimarca)*"). As known, the latter reference to Denmark is actually obsolete, since, even if with certain derogations, also Denmark became subject to the Brussels I

other hand, it cannot be ignored the case-law – even more recent – according to which the referral made *ex* Article 3 of Law no. 218/1995 is actually to be conceived in favor of the Brussels Ia Regulation[36].

Accordingly, authoritative scholars have long since maintained that the reference made by Italian Law no. 218/1995 should be extended to the criteria provided for by the Brussels I Regulation (and, consequently, by the Brussels Ia Regulation). This because only such an interpretation of the referral would make it possible to pursue the objectives which inspired and guided the authors of the reform, to be identified in the willingness to create a stable link between the results achieved by the cooperation between the EU Member States on the subject matter and the domestic rules on jurisdiction matters[37].

While hoping for a *revirement* by the Supreme Court, an intervention by the Italian legislator aimed at definitively clarifying the issue would be certainly highly appreciated[38].

Regulation due to the 2005 Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 299*, 16th November 2005, pp. 62-70. In line with the abovementioned judgement, see also Cass., S.U., 17th July 2008, no. 19595, cit.; Cass., S.U., 1st October 2009, Order no. 21053, in *Giust. civ.*, 2010, 11, I, pp. 2543 ff.; Cass., S.U., 4th November 2011, no. 22883, *Società Generale del Latte e Derivati – General Dairies and Products Company v. IN.AL.PI. S.p.A.*, in *Dir. mar.* (commented by C. E. TUO, *Giurisdizione in materia di contratti di compravendita di merci e Incoterms: la Corte di Cassazione ritorna al passato?*), 2013, pp. 420 ff.; Cass., S.U., 12th April 2012, no. 5765, *Fata Engineerins S.p.A. v. Bank Mellat*, in *Giust. civ. Mass.*, 2012, 4, pp. 481 ff.

[36] The Grand Chamber of the Supreme Court, even without offering an express and comprehensive explanation, came to opposite conclusions in Cass., S.U., 20th February 2013, no. 4211, in *Riv. dir. int. priv. proc.*, 2013, pp. 482 ff., as well as, more recently, in Cass., S.U., 13th December 2018, Order no. 32362. In the above judgements, the Court on the basis of the reference made by Article 3, para. 2, of Law no. 218/1995, respectively applied Regulations Brussels I and Brussels Ia.

[37] P. FRANZINA, *La giurisdizione in materia contrattuale. L'art. 5 n. 1 del regolamento n. 44/2002/CE nella prospettiva della armonia delle decisioni*, Padua, 2006, p. 18; P. DE CESARI, *Diritto internazionale privato dell'Unione europea*, cit., p. 70; S. M. CARBONE, C. E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, cit., p. 7; F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale – Volume I: Parte generale e obbligazioni*, cit., p. 52.

[38] In this sense, see P. DE CESARI, *Diritto internazionale privato dell'Unione europea*, cit., p. 70; S. M. CARBONE, C. E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, cit., p. 8.

JAKUB JANSA

DIFFERENT APPROACHES TO THE REMEDY OF SPECIFIC PERFORMANCE

CONTENTS: 1. Specific performance – overview. – 2. The scope of specific performance in civil and common law. – 3. Specific performance as a substantive right and as a remedy. – 4. Inadequacy of common law remedies. – 4.1. Uniqueness of the subject matter of the contract. – 4.2. Other reasons why damages might be inadequate. – 5. Specific performance in civil law jurisdictions. – 6. Specific performance in international contract law. – 7. Conclusion

1. *Specific performance – overview*

Apart from compensatory damages specific performance, also referred to as specific relief[1], is the most commonly sought remedy for breach of contract. It has been asserted[2], and I think correctly so, that the reason why specific performance is so popular among plaintiffs is that "*it accords best with the classical underlying theory of contracts itself*". The whole edifice of contract law is built on mutual trust. Whenever someone enters into a contract, they trust that the other party will keep its end of the bargain. Otherwise the principle of *pacta sunt servanda,* which means "promises must be kept", would be seriously undermined and consequently contracting would become pointless. That being said, it must be noted that despite its numerous advantages specific performance is not the primary contractual remedy in all legal systems. The role the remedy of specific performance plays in common law jurisdictions is much less significant than the one it plays in civil law.

2. *The scope of specific performance in civil and common law*

Before any further remarks on the remedy of specific performance are made, it must be made clear that the term "specific performance" does not have the exact same meaning across legal systems. Even though

[1] Both terms shall be used interchangeably. It must be pointed out, however, that the term "specific relief" is usually broadly construed to include both specific performance and injunction.

[2] R. JUKIER, *Taking Specific Performance Seriously: Trumping Damages as the Presumptive Remedy for Breach of Contract,* in *Remedies/Les Recours Et Les Mesures de Redressement* 85, 2010, p. 90.

at first blush the differences may seem barely discernible, one should remember that in "*comparative law ascribing different meanings to the same or similar-sounding words and expressions used in different legal systems may be a source of great confusion*"[3]. Being fully aware of the terminological differences between common and civil law with regard to specific performance will help the reader to better understand the nature of this remedy. Common law lawyers use the term "specific performance" in the narrow sense. A decree of specific performance issued by a common law court orders the defendant to perform his contractual obligations[4]. Consequently, the defendant has to perform the contract himself. Therefore, technically speaking, performance neither by a third party, nor by the aggrieved plaintiff himself at the expense of the defendant qualifies as specific performance. It follows that in common law jurisdictions the remedy of specific performance is focused more on what the defendant furnishes and less on what the plaintiff receives[5]. By way of contrast, under the civil law tradition the term "specific performance" is broadly construed to include performance by a third party and the plaintiff himself at the expense of the defendant. It has been stated[6] that "*the concept of specific performance is much broader in the civil law than in the common law and can encompass any mechanism that lets the aggrieved party receive what he or she is entitled to under the contract*". At the end of the day all that matters is that the promised performance is rendered and the injured plaintiff's interest is satisfied. As already mentioned, the bargained for performance can be rendered not only by the defendant, but also by other people, including the plaintiff himself. Should this be the case, it is incumbent upon the defendant to reimburse the plaintiff for all reasonably incurred expenses.

Another difference, often overlooked by scholarly writers and even courts[7], is that common law distinguishes between claims for specific performance and claims for an agreed sum. On the one hand, the award of an agreed sum compels the breaching party to perform his contractual obligations thereby rendering it similar to specific performance. On the other hand, it does not attract the same bars, or any other bars for that

[3] L. Romero, *Specific Performance of Contracts in Comparative Law: Some Preliminary Observations,* in *27 Cahiers de Droit,* 1986, p. 787.

[4] P.H. PETIT, *Equity and the Law of Trusts,* 12th edn, Oxford, 2012, p. 649.

[5] L. ROMERO, *Specific Performance of Contracts in Comparative Law: Some Preliminary Observations,* cit., p. 787.

[6] J. FITZGERALD, *CISG, Specific Performance, and the Civil Law of Louisiana and Quebec,* in *Journal of Law and Commerce 16,* 1997, p. 298.

[7] *Ministry of Sound Ltd v. World Online Ltd,* EWHC 2178 (Ch) 2 All ER (Comm) 823, 2003.

matter[8]. There are a number of limitations on the availability of specific performance. Factors like impossibility of performance, its personal character or hardship may preclude a plaintiff seeking specific performance from obtaining it. Action for an agreed sum, also referred to as an action for the price (especially in contracts for the sale of goods)[9], is not subject to such limitations. The rationale underlying the distinction between specific performance and action for an agreed sum is simple. Contrary to performing a positive contractual obligation, such as rendering services or selling goods, paying a sum of money is never objectively impossible or extremely onerous for the defendant, nor does it require performance of an exclusively personal character. An action for the sum due under the contract must also be distinguished from the remedy of damages which is likewise subject to limitations. Chief among them is the duty to mitigate damages, *i.e.* minimize the loss suffered as a result of breach of contract. Neither the mitigation rule, nor any other rules limiting a plaintiff's right to claim damages, apply to action for an agreed sum. Therefore, it stands to reason that rather than seeking damages, a prudent plaintiff should claim the sum due under the contract.

The position of specific enforcement of monetary obligations is radically different, at least theoretically, in civil law jurisdictions. Action for an agreed sum does not amount to a separate remedy. It falls under the category of specific performance and is hedged around the same restrictions. However, as already mentioned, under civil law restrictions on the granting of specific performance are few and far between. In fact, apart from physical impossibility of performance, an exclusively personal character of performance constitutes the only bar to the remedy of specific performance. It bears reiterating that performing monetary obligations is always physically possible and does not require performance of an exclusively personal character. Taking that into consideration, the inescapable conclusion is that even though civil law does not grant action for an agreed sum the status of a separate remedy, both systems are conducive to claiming the sum due under the contract.

As far as international contract law is concerned, the drafters of the major legislative acts took a cue from common law systems and separated specific enforcement of monetary obligations from specific enforcement of non-monetary obligations. Only the latter is subject to restrictions, chief among which are the already-mentioned impossibility of performance and its personal character.

[8] J. BEATSON, A. BURROWS, J. CARTWRIGHT, *Anson's Law of Contract*, 29th edn, New York, 2010, p. 573.

[9] L. KOFFMAN, E. MACDONALD, *The Law of Contract*, 6th edn, Oxford, 2007, p. 598.

3. *Specific performance as a substantive right and as a remedy*

Specific performance is the presumptive remedy in civil law jurisdictions. Subject to several exceptions, an aggrieved party is therefore entitled to claim specific relief even if compensatory damages would be an equally adequate and effective remedy. It has been claimed[10] that "*in the civil law tradition the victim of non-performance may seek specific performance. It is legally binding while the compensation for the damages incurred can only be regarded as a last resort*". Therefore, from a theoretical standpoint, specific performance is superior to damages. This is in stark contrast with the common law tradition where specific performance is a secondary remedy and as such is subordinate to damages. It lies only where monetary compensation is inadequate[11]. It is a discretionary remedy which means it will not be granted unless the court finds it more adequate than damages[12]. In other words, specific performance is an equitable remedy granted only in cases where the promise's interest cannot be satisfied in any other way, especially by means of compensatory damages. However, such cases are extremely rare. It is submitted[13] that "*in the common law specific performance of the terms of a contract is an extraordinary remedy granted in very limited circumstances*". The difference between common and civil law with regard to specific performance stems primarily from the fact that the former sees it as a remedy, whereas in the latter it is available as of right. Consequently, under common law one party may claim specific relief only if the other party breaches the contract, *i.e.* commits a legal wrong. That is because, as a legal remedy (rather than a right), specific performance is always a consequence of a legal wrong[14]. As previously alluded to, Continental lawyers see specific performance as a substantive right both parties acquire already at the time of contracting. It has been argued[15] that under the civil law tradition "*the creditor's claim to specific performance of the contract is regarded*

[10] O. MORETEAU, *Remedies for Breach of Contract: A Theoretical and Practical Approach to Specific Performance in International Commercial Law,* in *International Business Law Journal 639,* 2017, p. 641.

[11] E. MCKENDRICK, I. MAXWELL, *Specific Performance in International Arbitration,* in *The Chinese Journal of Comparative Law Vol.1 No.2,* 2013, p. 196.

[12] G.H. TREITEL, *Remedies for Breach of Contract, New York, 1988, p. 63.*

[13] P. PILIOUNIS, *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under the CISG: Are These Worthwhile Changes or Additions to English Sales Law?,* in *12 Pace International Law Review 1,* 2000, p. 10.

[14] T. AL-TAWIL, *Does Restitution for Wrongdoing Give Effect to Primary or Secondary Rights,* in *Canadian Journal of Law and Jurisprudence Vol. XXIV, No.2, 2011, p. 244.*

[15] B. MARKESISNIS, H. UNBERATH, A. JOHNSTON, *The German Law of Contract: A Comparative Treatise,* 2nd edn, Oxford, 2006, p. 399.

as an inherent and standard right flowing from the contract itself". In a similar vein, it has been claimed[16] that contrary to common law, under civil law "*specific performance does not presuppose a breach of contract, but is the consequence of the contract's existence*". This difference is particularly significant as it helps answer the question why the position of specific performance is so much stronger in civil law than common law.

4. *Inadequacy of common law remedies*

As previously alluded to, under common law specific performance is an equitable remedy which means that the final decision as to whether it should be granted or not is left to the discretion of the court. Equitable remedies are not granted in cases where legal remedies, such as *e.g.* compensatory damages, are adequate. It is trite law that the remedy of damages is inadequate only when it is incapable of enabling an aggrieved party to make a cover transaction[17]. Therefore, it can be said that even though adequacy of damages is not the only factor that may defeat a claim for specific performance, it is the first and probably the most difficult obstacle a plaintiff must overcome on his way to obtaining the remedy. If the court determines that damages are sufficient to make good the loss incurred by the plaintiff, his claim for specific performance will be dismissed. It can be easily inferred from the passage above that contrary to legal remedies equitable remedies are not granted as of right[18]. In order for a plaintiff to convince the court to issue a decree of specific performance he must prove that an award of damages would be inadequate as it would fail to put him in the same position as he would have been in had the other party not breached the contract. Arguably the best way to do so is to show that the subject matter of the breached contract is unique.

[16] F. FAUST and V. WIESE in J. SMITS, D. HAAS, G. HESEN, *Specific Performance in Contract Law: National and other Perspectives,* Antwerp-Oxford-Portland, 2008, p. 50-51.

[17] M. YAN, *Remedies under the Convention on Contracts for the International Sale of Goods and the United Kingdom's Sale of Goods Act: A Comparative Examination,* in *City University of Hong Kong Law Review 3*, 2011, p. 123.

[18] M. CHEN-WISHART, *Contract Law,* New York, 2005, p. 589.

4.1. *Uniqueness of the subject matter of the contract*

Specific performance is readily available in cases where the subject matter of the contract, be it goods or services, is unique and as such cannot be obtained from a different source[19]. The question springs readily to mind: what exactly does it mean that the subject matter of the contract is unique? What qualities must it possess in order to be deemed unique? Obviously each case is different and must be decided upon its own facts, but there is a substantial body of both literature[20] and case law suggesting that the remedy of specific performance is routinely granted in cases of contracts for the sale of real estate. The rationale underlying the rule that such contracts should be specifically enforced is that "*each parcel of real estate has its own characteristics and no two parcels of land are precisely the same*"[21].

It bears noting that the above has not been adopted in every common law jurisdiction. Perhaps the most notable example of a common law country in which courts remain reluctant to routinely grant specific performance in cases where the subject matter of the contract is a piece of real estate is Canada. Ever since the *Semelhago v. Paramadevan*[22] case decided almost twenty five years ago, Canadian courts have been skeptical about the automatic availability of specific relief in contracts for the sale of real estate. In *Semelhago v. Paramadevan* the court held that "*it cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all case*". Consequently, it is incumbent upon a plaintiff interested in obtaining a decree of specific performance to prove that the property he was promised under the contract is unique to the extent that its substitute would not be readily available[23]. Doing so is not particularly difficult in cases where a piece of real estate is purchased for non-commercial purposes. In such cases the buyer can easily prove that he purchased a particular piece of property, *e.g.* a house, on account of its convenient location or other subjective criteria. If, however, the same house were bought for commercial

[19] R. AUSTEN-BAKER, *Difficulties With Damages As a Ground For Specific Performance,* in *King's College Law Journal 10*, 1999, p. 1.

[20] S. SHAVELL, *Specific Performance Versus Damages for Breach of Contract, The Law and Economics Workshop*, 2005, p. 22; J. KIRWAN, *Appraising a Presumption: A Modern Look at the Doctrine of Specific Performance in Real Estate Contracts,* in *William & Mary Law Review 697*, 2005, p. 697.

[21] J. MCCAMUS, *The Law of Contracts,* Toronto, 2005, p. 913.

[22] 2 S.C.R.415, 136 D.L.R. (4TH.) 1, 91 O.A.C., 1996.

[23] C. WELLS, *The Limited Availability of Specific Performance of Agreements for the Sale of Land since Semelhago v. Paramadevan,* in *39 Advocates' Quarterly 171*, 2011, p. 177.

purposes, such as *e.g.* to resell it at a profit, convincing the court that specific performance is a more adequate remedy than damages would be a truly arduous task. The line of reasoning applied by the court in *Semelhago v. Paramadevan* was subsequently adopted by other Canadian courts, including the Supreme Court. For instance, in *Southcott v. Toronto Catholic School Board* the court stated that "*a plaintiff deprived of an investment property does not have a fair, real, and substantial justification or a substantial and legitimate interest in specific performance unless he can show that money is not a complete remedy because the land has a peculiar and specific value to him*".

Although tenable, the arguments laid out by the Supreme Court of Canada and a number of other Canadian courts did not strike a chord with courts in other major common law jurisdictions[24]. Both English and American judges remain unequivocal when it comes to the uniqueness of real estate. English law takes the view that whether a particular piece of real estate is ordinary or unique is irrelevant. In such cases the only remedy fully capable of putting the purchaser in the same position as he would have been in had the vendor not breached the contract is the remedy of specific performance. The same holds true for the United States where the conviction that every piece of real estate is unique remains strong[25]. There have been several attempts to incorporate the Canadian approach into the law of New Zealand, but they eventually failed[26]. This outright rejection of the view that in some cases involving the sale of real estate compensatory damages could be as good a remedy as specific performance is somewhat surprising. It is clearly at odds with the long-standing rule that specific performance should be ordered only in cases where the subject matter of the contract is irreplaceable and as such cannot be obtained from another source. Notwithstanding the above, and despite the suggestions that the Canadian approach to the uniqueness of real estate should serve as a model for reform in other common law countries[27], it remains a purely Canadian idiosyncrasy. That being said, one must remember that law is in flux and there is a good chance judges from other common law jurisdictions will not stand pat forever as they will eventually see the true value of the perspicuous and logical arguments put forth by Canadian courts.

[24] M. LAVOLE, *Canada's Unique Approach to Specific Performance in Contracts for the Sale of Land: Some Theoretical and Practical Insights,* in *12 Oxford University Commonwealth Law Journal 207*, 2012, p. 207.

[25] J. PERILLO, *Calamari and Perillo on Contracts,* 6th edn, St. Paul, 2009, p. 553-54.

[26] *Fu Hao Construction Ltd v. Landco Albany Ltd,* 1 NZLR 535, *2005.*

[27] See generally J. BERRYMAN, *Recent Developments in the Law of Equitable Remedies: What Can Canada Do for You,* in *33 Victoria University of Wellington Law Review 51*, 2002.

It is worthy of notice that even though a contract for the sale of real estate is a textbook example of a situation in which specific performance prevails over damages, it is not the only one. Other examples include financial derivatives, vintage cars, antique furniture, heirlooms and a variety of chattels personal. The one thing they all have in common is their subjective value[28]. The typical buyer of such items is a collector who purchases them precisely because of their uniqueness. Avid collectors may spend years on end searching for a particular model of a vintage car or a piece of fine art. If the seller breaches the contract and fails to deliver the vintage car or the piece of art he promised under the contract, it is highly unlikely that the buyer will content himself with damages. It must be remembered, however, that in such cases the burden of proof lies with the buyer. That is because specific performance is not the default remedy and before granting it to the plaintiff the court has to make sure that all the necessary prerequisites, such as *e.g.* the uniqueness of the subject matter of the contract, have been met. Should the buyer fail to prove that the item he was promised under the contract is unique, the court might draw adverse inferences and award damages in lieu of specific performance.

4.2. *Other reasons why damages might be inadequate*

Even though the uniqueness of the subject matter of the contract is the strongest and most obvious argument a plaintiff seeking specific performance could use to convince the court to grant the remedy, it is not the only one. There are a few more ways of making the court realize that compensatory damages should not always prevail over specific performance. One of them is proving that damages would be hard to quantify. It bears noting that in order to invoke this head of inadequacy the plaintiff does not have to prove that calculating the amount of damages would be altogether impossible. It is enough to prove that it would be excessively burdensome[29]. It can be done by showing that the damage incurred by the plaintiff as a result of the defendant's breach cannot be properly measured[30]. Suppose an impassioned art collector concludes a contract with an art gallery pursuant to which he will purchase one of its paintings. Shortly after signing the contract the art gallery resiles from its promise to sell the painting. Without giving it much thought the collector files a claim for specific performance. An expert witness appointed by the court determines that the current market price of the painting is 15% higher than the price the plaintiff paid upon conclusion of the contract. Theoretically, calculating the amount of damages should be easy. However,

[28] *Houseman v. Dare*, 966 A.2d 24, 27 (N.J. Super. App. Div.), 2009.
[29] G. JONES, W. GOODHART, *Specific Performance*, 2nd edn, London, 1996, p. 31.
[30] *Esso Petroleum Co Ltd v. Niad Ltd*, EWHC Ch 458, AII ER (D) 324, 2001.

given the circumstances, especially the fact that the buyer is an avid art collector, it seems clear that his purpose in purchasing the painting was not to sell it on at a profit, but rather to keep it in his collection. In other words, the buyer has suffered a loss of bargain not because he cannot resell the painting, but because he cannot enjoy having it in his collection. If faced with such a case the court may choose to apply one of the three following lines of reasoning. According to the first line of reasoning, the court may decide to award compensatory damages in the sum equal to the difference between the price offered by the seller and the current market price of the painting determined by the expert witness. The shortcomings of this solution are numerous, however. Chief among them is that it fails to take into account the obvious fact that the value the buyer attaches to the painting is much greater than its actual, *i.e.* objective, value. In this case damages are virtually impossible to calculate on account that the buyer has subjective preferences not reflected in market values[31]. One may argue that the subjective value of the painting is irrelevant and should not have any impact on the amount of damages. However, it must be remembered that the main function of compensatory damages is to put the aggrieved creditor in the same position as he would have been in had the debtor not breached the contract. It seems then that an award of damages in the amount equal to the difference between the contract price and the current market price would fail to serve that purpose.

The second line of reasoning the court may choose to follow in the case at hand is to ascertain how much the painting is really worth to the buyer. Doing so would require the court to determine the subjective value of the painting. That, however, could turn out to be impossible. Finally, the third thing the court can do is to conclude that money damages cannot be properly assessed and therefore the buyer should be granted specific performance. Given the circumstances, especially the fact that determining the real value of the painting is not feasible, it seems that this solution would serve justice better than the other two. That being said, it must be pointed out that even in cases where the exact amount of damages is hard to quantify, the remedy of specific performance is still subject to restrictions such as impossibility of performance or its exclusively personal character.

Courts may also find the remedy of damages inadequate in cases where they would be merely nominal. This head of inadequacy may be a corollary of the previous one. An aggrieved plaintiff may be awarded nominal damages when the court comes to the conclusion that the defendant did in fact breach the contract, but the plaintiff did not suffer

[31] D. BUSSEL, *Doing Equity in Bankruptcy*, in *34 Emory Bankruptcy Developments Journal 13*, 2017, p. 17.

any pecuniary loss as a result of that breach. This may be the case for example when the plaintiff's reason for entering into the contract is to get some kind of pleasure or peace of mind[32]. Awarding only nominal damages in cases like that would mean that such contracts can be breached with impunity. Suppose A and B conclude a contract under which A is obliged to organize an exotic trip for B. A breaches the contract and refunds B. Even though A's failure to organize the trip clearly amounts to a breach of contract, B cannot claim compensatory damages because he has suffered no pecuniary loss. He has been refunded by A and – technically speaking - is in the same position as he would have been in if the contract had not been breached. Consequently, awarding compensatory damages to B would amount to overcompensation. Even if the court found that damages were an appropriate remedy, they would most certainly be hard, if not impossible, to assess. That is because A's breach did not cause any discernible, quantifiable damage. B's loss consists in his disappointed expectations. In such cases some courts award the so-called "amenity damages"[33]. However, such a solution does not seem particularly sagacious. Its most obvious flaw is that, given the lack of quantifiable losses, the amount of amenity damages is always conjectural and thus precarious. Therefore, it seems that the only way the court can force A to rectify the situation and compensate B for his disappointed expectations is to order specific performance. It must be noted, however, that, as already established, the remedy of specific performance is not always available. In cases where specific relief is unavailable either because the court "will not" or "cannot" order it[34] and compensatory damages would be either unquantifiable or merely nominal, the only remedy left is the remedy of gain-based damages[35]. Gain-based damages are awarded only occasionally, as a last resort. They come into play only in cases in which neither compensatory damages, nor specific relief is adequate. Contrary to compensatory damages, gain-based damages, as the name implies, are concerned with how much the breaching party has gained from the breach. It is submitted[36] that "*gain-based damages focus on the defendant's gain rather than on the claimant's loss. Whereas compensatory damages seek to reverse the effect that the wrong has had on the claimant,*

[32] *Farley v. Skinner,* UKHL 49, 2001.

[33] *Ruxley Electronics and Construction Ltd v. Forsyth,* AC 344, 1996.

[34] R. CUNNINGTON, *The Measure and Availability of Gain-based Damages for Breach of Contract*, in D. SAIDOV, R. CUNNINGTON (eds), *Contract Damages: Domestic and International Perspectives,* Portland, 2008, p. 238.

[35] *Attorney General v. Blake,* AC 268, 2001; *Lane v. O'Brien Homes Ltd,* EWHC 303, 2004.

[36] R. CUNNINGTON, *The Measure and Availability of Gain-based Damages for Breach of Contract*, cit., p. 238.

gain-based damages seek to reverse the effect that the wrong has had on the defendant by removing the gains he has acquired by virtue of the wrong. These gains may consist of either benefits received or expenses saved". Consequently, awarding gain-based damages is possible only if the breaching party has gained something from his breach. For example, in the exotic trip hypothetical above gain-based damages could only be awarded if it was proved that the defendant sold the trip to another person, perhaps at a higher price than that offered to the plaintiff. As already mentioned, compensatory damages would be merely nominal and thus inadequate. The plaintiff's vacation is over so even if the defendant offered to organize the trip at a later date or were compelled by the court to do that, the plaintiff could not go. Therefore, the remedy of specific performance would not be appropriate either. It has been claimed[37], however, that gain-based damages are "*a monetized form of specific performance*" and may act as an alternative. Gain-based damages were also compared to specific performance in the famous and frequently cited case of *Attorney General v. Blake.* In the statement of grounds the court wrote: "*in the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his contract*". Comparing the remedy of gain-based damages to the remedy of specific performance is legitimate because when calculated correctly, the amount of gain-based damages awarded to the plaintiff should be equivalent to the value of the defendant's performance. Furthermore, both gain-based damages and specific performance deter the defendant from committing a breach. The former achieves that goal by removing any incentive to breach. The latter achieves the same result through severe sanctions for contempt of court. Taking all the above into consideration, awarding gain-based damages to the aggrieved plaintiff in the exotic trip case seems to be the only thing the court can do to compensate him for his disappointed expectations. It should be emphasized once again, however, that gain-based damages are available only in situations where neither compensatory damages, nor specific relief is appropriate. If either is available, there is no ground for the award of gain-based damages.

Yet another example of a case wherein the court may deem compensatory damages inadequate is where it is clear that the defendant is incapable of paying them. This head of inadequacy is like no other as it has nothing to do with the subject matter of the contract, but is concerned

[37] J. BEATSON, *The Use and Abuse of Unjust Enrichment,* Oxford, 1991, p. 17.

with the financial position of the party that committed the breach instead[38]. The rationale underlying the idea that damages are an inadequate remedy in cases where the defendant's financial situation is bad seems to be that awarding damages would be ineffective[39]. Indeed, despite some dissent[40]. there is consensus among scholarly writers as to the fact that the insolvency of the defendant renders the remedy of damages inadequate[41]. It seems clear that awarding money damages, all the while being fully aware of the breaching party's insolvency, is both illogical and unfair to the injured party. In order for a remedy to be adequate it has to be both practical and efficient. Uncollectible damages are neither.

It bears pointing out, however, that the above does not always apply where the defendant is incapable of paying the full amount of damages, but remains solvent and can still pay some part of it. Before issuing a decree of specific performance in such cases the court has to make sure that the defendant does not have any other creditors besides the plaintiff. If it transpires that there are creditors other than the one claiming specific performance, the court should refuse to order it and award damages instead. It is submitted[42] that "*awarding equitable relief in favor of one injured party against the insolvent debtor will obstruct achievement of the goals of aggregate wealth maximization, equitable loss-sharing and debtor rehabilitation. By granting specific performance the court removes an asset from the common pool available to satisfy creditor claims and awards it to the party entitled to specific relief, thus favoring it over others similarly situated*". The most reasonable course of action in such situations is to distribute the remaining assets of the debtor's estate among all his creditors on a pro-rata basis. Granting specific relief to one of them could leave the others with nothing at all.

[38] E. MACDONALD, *Inadequacy of Adequacy. The Granting of Specific Performance,* in *38 Northern Ireland Legal Quarterly 244*, 1987, p. 247.

[39] I. SPRY, *The Principles of Equitable Remedies,* 5th edn, London, 1997, p. 68.

[40] S. WORTHINGTON, *Proprietary Interests in Commercial Transactions,* New York, 1996, p. 203.

[41] M. LAVISKY, *Behind the Times: Florida's Failure to Recognize Insolvency as Satisfying the Inadequate Remedy at Law Requirement for Injunctive Relief,* in *10 Florida Coastal Law Review 119*, 2008, p. 125; D. LAYCOCK, *The Death of the Irreparable Injury Rule, in 103 Harvard Law Review 687*, 1989, p. 716-717.

[42] D. BUSSEL, *Doing Equity in Bankruptcy,* cit., p. 33.

5. *Specific performance in civil law jurisdictions*

As noted, when it comes to granting specific performance courts in civil law jurisdictions are much more liberal than their common law counterparts. That is, however, not to say that specific performance is ordered in every case of contractual breach except cases where the plaintiff's claim must be dismissed by the court on account of factors such as impossibility of performance or its exclusively personal character. Quite the contrary, in fact. It has been shrewdly observed[43] that despite the fact that specific performance is the primary remedy in civil law and as such is readily available, it is hardly ever sought, especially where performing the contract would require the breaching party to act. It is much more common and prudent to claim specific performance in cases where it can be effectively enforced without the need to involve the breaching party. A textbook example of such a case is where performance can be ensured by the handing over of already existing goods. In such cases cooperation on the part of the breaching party is not necessary which makes enforcing the contract that much easier and bodes well for the plaintiff. Another example of a case where seeking specific performance seems reasonable is a contract for the sale of an already existing piece of real estate. Should the seller breach the contract, the purchaser may still acquire title to that real estate, even against the seller's will. On the other hand, seeking specific performance of contracts that require the breaching party to act, for example by rendering services or manufacturing goods that do not yet exist, although possible in theory, is hardly feasible in practice. Forcing the breaching party to perform a "positive act" usually entails considerable costs and is time-consuming. Moreover, the defendant's unwillingness to cooperate in cases where his cooperation is essential hinders the whole process and militates against the plaintiff's chances of receiving what he was promised under the contract. Therefore, it stands to reason that when the defendant does not want to cooperate, the plaintiff should content himself with compensatory damages.

As the above discussion has shown, despite the obvious differences between the common and civil law with regard to the remedy of specific performance, the end result is usually the same, especially in cases where performing the contract *in specie* would require the defendant to act. The juxtaposition between common and civil law presented above clearly indicates that more often than not damages prevail over specific performance in both systems. It bears pointing out, however, that under common law jurisdictions the above-mentioned end result is often achieved against the injured party's will. As previously alluded to, the final decision

[43] H. LANDO, C. ROSE, *The Myth of Specific Performance in Civil Law Countries*, in *American Law & Economics Association Annual Meetings 15*, 2004, p. 1.

as to whether to order specific performance or damages depends entirely on the discretion of the court. In civil law jurisdictions, on the other hand, the injured party's position is much stronger. The court, devoid of the power to exercise discretion, cannot act paternalistically by compelling the plaintiff to seek damages in lieu of specific performance even in cases in which insisting that the defendant perform the contract according to its terms may do the plaintiff more harm than good.

The approach to specific relief varies from one civil law jurisdiction to another. There are, however, at least two characteristic features that all, or almost all, civil law jurisdictions have in common when it comes to the remedy of specific performance. First of all, it is readily available and consequently the decision as to whether to seek specific performance or damages usually lies entirely with a plaintiff. This feature has already been amply discussed and does not need further elaboration. Secondly, a creditor's right to claim specific performance is so obvious that it is not expressly codified in any statutes or regulations. This is the case, for example, under Polish law. An aggrieved creditor may avail himself of a number of remedies offered by the Civil Code, but technically specific performance is not one of them. As already mentioned, specific performance is available as of right and therefore does not fall under the category of remedies. Contrary to damages which can only be claimed once, the contract has already been breached, the creditor is entitled to require performance from the debtor both before and after the breach.

Another example of a civil law jurisdiction in which the right to claim specific performance is not explicitly referred to in statutory law is the Netherlands. Also in this case the primary position of specific performance and its supremacy over damages is an obvious consequence of the *pacta sunt servanda* principle strongly embedded in the Dutch law of contract[44]. On the one hand, it may seem natural to wonder why Dutch legislators did not incorporate the right to claim specific performance into the law of contract despite its importance. On the other hand, it could be argued that the right to require specific performance is not explicitly referred to in statutory law not in spite but, paradoxically, because of its importance. It is submitted[45] that "*the Dutch legislator regarded the idea that the debtor should keep his promise as such an essential feature of an obligation resulting from the contract that he did not consider it necessary to support this by means of an explicit legal basis*". In other words, just like under Polish law, the right to specific performance is a

[44] S. VAN DER MERWE, *A Comparative Evaluation of the Judicial Discretion to Refuse Specific Performance,* Stellenbosch, 2014, p. 53.

[45] D. HAAS and C. JANSEN in J. SMITS, D. HAAS, G. HESEN, *Specific Performance in Contract Law: National and other Perspectives,* cit., p. 15.

natural consequence of concluding a contract and as such does not need to be formally codified[46].

The position of the remedy of specific performance under Danish law is similar, yet slightly more peculiar. On the one hand, in case of breach of contract the aggrieved party is free to choose between damages and specific performance, On the other hand, if he chooses to seek specific performance, certain provisions of the Code of Procedure may preclude him from actually obtaining it. That is because if the breaching party does not comply with the order for specific performance made by the court, it must be converted into compensatory damages[47]. It is submitted[48] that "*under Danish law if the court grants specific performance and the defaulting party still does not perform his contractual obligations, the other party may ask the enforcing authority (in Danish the foged, similar to a bailiff in the common law) to enforce performance*". However, pursuant to the provisions of the Code of Procedure, in such a case the enforcing authority has no choice but to convert the order for specific performance to an award of damages. Nevertheless, it must be pointed out that the defendant's failure to comply with the court's order for specific performance may have grave consequences for him. That is because in such a case the plaintiff may file a criminal suit against him. If the plaintiff prevails, the defendant will be fined or even incarcerated. However, should that be the case, neither of the two parties really win. The defendant has to face the serious consequences mentioned above and the plaintiff is left with nothing. That is because the defendant cannot be sanctioned more than once for his failure to perform. In consequence, if the defendant loses in the criminal trial and is incarcerated, he no longer has to perform his contractual obligations[49]. The potential consequences of losing such

[46] D. BUSCH in D. BUSCH, E. HONDIUS, H. VAN KOOTEN, H. SCHELHAAS, W. SCHRAMA (eds), *The Principles of European Contract Law and Dutch Law,* The Hague, London, New York, 2002, p. 348.

[47] That, however, does not apply to the following situations: a) "where objects (already produced goods) simply need to be handed over to the plaintiff, including where a person is to be given access to real estate; b) where a good can be procured by from a third party; the enforcing authority can allow for a third party to perform and if the breaching party does not pay for that, the enforcing authority can seize his assets; c) where the only act to be performed is a signature on a document; the enforcing authority can sign for the defendant; d) where the act to be performed is the pledging of security; the enforcing authority can seize the assets from the breaching party and pledge them as security; e) where the breaching party has to be restrained from performing certain acts that could be harmful to the other party".

[48] H. LANDO, C. ROSE, *The Myth of Specific Performance in Civil Law Countries, cit.*, p. 5-6.

[49] H. LANDO, C. ROSE, *The Myth of Specific Performance in Civil Law Countries,* cit., p. 7.

a criminal trial may effectively discourage the defendant from not complying with the court's order for specific performance, though. If he performs his contractual obligations even after the commencement of criminal proceedings, the trial has to be stopped. It must be noted, however, that even though aggrieved plaintiffs may find the possibility to file a criminal suit against disobedient defendants appealing, such trials are extremely rare in Denmark.

Even though the Danish law on specific performance is peculiar, it is not the only legal system where an aggrieved plaintiff's right to specific performance is significantly limited or even eliminated by procedural provisions. For example, under German law there is a clear distinction between the right to claim specific performance and the right to enforce it. It has been stated[50] that "*German lawyers strictly distinguish between the existence of a claim, which is a question of substantive law, and the enforcement of a claim, which is a question of a procedural law. As German lawyers are used to thinking in terms of substantive law, they relate the Anglo-American concept of specific performance to this side of the issue, and not to the procedural side. Hence they equate specific performance with Erfullung or Erfullungsanspruch, whether or not the debtor is under an obligation to perform. If he is, it is self-evident for a German lawyer that a court will give a judgment ordering the defendant to perform. How that judgment can be enforced, and whether it can be enforced at all, is considered an altogether different question*". Consequently, the first question a German judge will ask is whether the contract requires the debtor to do (or not to do) something or not. If the answer to that question is positive, the court - subject to section 276 of the German Civil Code which contains a list of circumstances in which the debtor may refuse to perform - will order specific performance regardless of, for example, whether the performance to be delivered by the debtor is of an exclusively personal character or not. That remains completely irrelevant at this point. However, practical limitations on the availability of specific performance may emerge subsequently, especially when a creditor who has already been granted a decree of specific performance wishes to enforce it. At this stage, for example, the fact that the performance is of an exclusively personal character is likely to preclude the creditor from effectively enforcing it. For instance, if there is a valid employment contract between the parties and in breach of that contract the employee refuses to work, the employer is entitled to claim specific performance. The court will order specific performance on account of the employment contract that both parties are bound by. The above-men-

[50] F. FAUST and V. WIESE in J. SMITS, D. HAAS, G. HESEN, *Specific Performance in Contract Law: National and other Perspectives,* cit., p. 48-49.

tioned list of circumstances under which the debtor may refuse to perform does not include rendering personal services, therefore the court is precluded from dismissing a claim for specific performance on account of the personal character of the required performance. That notwithstanding, the prevailing party, *i.e.* the employer, will not be able to force the employee to work. That is because pursuant to section 888 of the German Code of Civil Procedure performance of contracts to provide services shall not be enforced.

6. *Specific performance in international contract law*

As far as specific performance in international contract law is concerned, the following international instruments should be taken into account: the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Unidroit Principles of International Commercial Contracts (UPICC), the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR). The main goal of the above is to unify international contract law. A task all the more difficult given the extremely diverging views on the remedy of specific performance under the common and civil law. It seems that the drafters of the CISG, failed to achieve the coveted uniformity which eventually led to a barrage of criticism. Under Articles 46 and 62 of the Convention an aggrieved creditor is entitled to claim specific performance. However, this substantive right is seriously undermined by Article 28 pursuant to which the final decision as to whether specific performance should be ordered in a given case lies with the domestic court which is bound by its own national law on specific performance. The way in which the issue of specific performance was handled by the drafters of the CISG leaves a lot to be desired. That is because, despite some views to the contrary[51],the inclusion of Article 28 in the Convention undermines the uniformity of international sales law and consequently encourages forum shopping[52]. As regards the other acts, it must be pointed out that the drafters did not take an aggrieved creditor's right to claim specific performance for granted. Therefore, the possibility to claim specific performance is not a substantive right of the aggrieved party, but rather an explicitly expressed remedy for breach of contract. This is the most obvious similarity concerning specific performance between international contract law and

[51] B. ZELLER, *CISG and the Unification of International Trade Law,* New York, 2007, p. 60.

[52] S. WALT, *For Specific Performance Under the United Nations Sales Convention,* in *26 Texas International Law Journal 211,* 1991, p. 223.

common law systems. There is another subtle, yet very significant characteristic that common law and international contract law have in common. At first glance it may seem that the drafters of the international instruments in question have managed to keep a healthy balance between the almost unlimited availability of specific performance in civil law and the strict rules that drastically limit its availability under common law. It is said that the balance consists in the fact that even though specific performance is the primary remedy under all of those acts, its availability is subject to a number of exceptions. However, closer inspection reveals that the scope of those exceptions is sometimes so wide that the primacy of specific performance is illusionary and in actual fact there is no discernible difference between the position the remedy occupies in some of those international legislative acts and common law. The Unidroit Principles of International Commercial Contracts are a perfect example of that. It has been argued[53] that "*theoretically the UPICC are in favor of specific performance but a thorough review of case law and arbitral jurisprudence demonstrates it is hard to enforce*". Indeed, the wording of Article 7.2.2 of the UPICC clearly suggests that in case of breach of contract specific performance is the basic remedy of the injured party. As previously alluded to, there are numerous exceptions to this rule, including situations in which performance would be impossible, unreasonably burdensome or too personal. The injured party is also precluded from claiming specific performance if he fails to make his claim within a reasonable time after he has, or ought to have, become aware of the non-performance. Each of the above-mentioned factors is sufficient to bar specific performance under civil law. If the aggrieved party's right to require performance were limited just to those factors, it would be fair to say that specific performance is the primary remedy for breach of contract under the UPICC. What really makes the position specific performance occupies in the UPICC similar to that in common law systems is subsection (c) of the already mentioned Article 7.2.2. It provides that the aggrieved party is entitled to specific performance unless he can easily obtain it from another source. Subsection (c) of Article 7.2.2 captures the essence of specific performance under common law. As already mentioned, under common law specific performance is generally subordinate to damages and lies only where damages are an inadequate remedy. The basic reason why damages might be an inadequate remedy is that the subject matter of the contract is unique and thus difficult to obtain from a source other than the breaching debtor. Therefore, just like in the case of common law, under the UPICC an aggrieved creditor cannot claim specific performance unless the subject matter of the contract is unique.

[53] O. MORETEAU, *Remedies For Breach of Contract: a Theoretical and Practical Approach to Specific Performance in International Commercial Law,* cit., p. 642.

Given the commercial nature of contracts regulated by the UPICC, their subject matter is hardly ever unique. Therefore it is safe to say that the availability of specific performance under the UPICC is very limited and treating it as the primary remedy could be misleading.

The right to claim specific performance under the PECL is dealt with in Article 9:102. Pursuant to this provision, which is virtually a verbatim copy of Article 7.2.2 UPICC, the aggrieved party's right to claim specific performance is subject to a number of exceptions, one of which is the possibility to obtain performance from another source. Given the wording of Article 9:102, especially the subsection precluding the aggrieved party from claiming specific performance in cases where a market substitute is readily available, it stands to reason that although seemingly subordinate to specific performance, damages are, in fact, the primary remedy for breach of contract. Consequently, just like in the case of the UPICC, under the PECL specific performance lies only where damages turn out to be an inadequate remedy.

The position on specific performance taken by the drafters of the DCFR is slightly different. The aggrieved creditor is entitled to claim performance unless it would be unlawful, impossible, unreasonably burdensome or too personal. In this regard the wording of Article 3.302 of the DCFR is identical to its UPICC and PECL counterparts. Contrary to the other instruments, however, the DCFR does not preclude the aggrieved party from claiming specific performance in cases in which the subject matter of the contract can be obtained from another source. That said, a reasonable creditor should not insist on specific performance if a market substitute is readily available. Article 3:302 (5) states that "*the creditor cannot recover damages for loss or a stipulated payment for non-performance to the extent that the creditor has increased the loss or the amount of the payment by insisting unreasonably on specific performance in circumstances where the creditor could have made a reasonable substitute transaction without significant effort or expense*". Article 3:302 (5) is primarily concerned with contracts whose subject matter is fungible and thus can be easily obtained from another source[54]. It applies to situations wherein the aggrieved party's claim for specific performance is dismissed and he must content himself with damages. It may also be invoked in cases where the aggrieved party's claim for specific performance is successful and the debtor finally performs, but the creditor still claims damages. Receiving performance does not deprive the creditor of the right to claim other remedies, *e.g.* in case of late performance. It is possible to combine a claim for specific performance with a claim for damages. However, under Article 3:302 (5) a creditor who insisted on performance even

[54] H. KUPELYANTS, *Specific Performance in the Draft Common Frame of Reference*, in *UCL Journal of Law and Jurisprudence*, vol.1, No.2, 2012, p. 18-19.

though he should have made a cover transaction will not be awarded damages for any loss caused by the late performance which could have been avoided had same made a timely cover transaction. Article 3:302 (5) is in line with the principle of mitigation enshrined in Article 3:705 (1)[55]. It cannot be emphasized enough, however, that the principle of mitigation applies exclusively to the remedy of damages. It is by no means applicable to claims for specific performance. Unlike a creditor seeking damages, a creditor who seeks specific performance cannot be denied that remedy on the grounds that he did not take sufficient measures to mitigate his loss. In fact, any attempt to mitigate a potential loss is inconsistent with claiming specific performance.

To recapitulate, it must be underlined that a cursory glance at the provisions on the remedy of specific performance in international contract law may suggest that it is the default remedy in case of breach of contract. On closer inspection, however, it becomes clear that the allegedly broad availability of specific performance in international contract law is a fallacy and there is no discernible difference between international contract law and common law in that regard.

7. *Conclusion*

The above discussion has shown that the position of specific performance differs from one jurisdiction to another. It is very unusual for common law courts to order specific performance, sometimes even in cases where the subject matter of the contract is generally regarded as unique. On the other hand, the remedy of specific performance is readily available in civil law jurisdictions. However, it must be once again emphasized that the broad availability of specific performance does not necessarily mean that it is sought more often than compensatory damages. A shrewd plaintiff should always be aware of the potential pitfalls of enforcing specific performance and analyze the situation carefully. If he comes to the conclusion that forcing the breaching party to perform may turn out to be futile, he should content himself with damages. As regards international contract law, at first blush it may seem that the drafters of most of them managed to strike a balance between the rigid approach taken by common law and the liberal one taken by civil law. It was proved, however, that this is not exactly the case and in actual fact a plaintiff seeking specific performance of a contract governed by international instruments such as the UPICC or PECL may encounter some problems.

[55] Art. 3:705 (1) provides that "*the debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps*".

ESTEBAN GAVIRIA TOBÓN

THE BEGINNING OF THE END OF TRADITIONAL INVESTMENT DISPUTE MECHANISMS: THE MULTILATERAL INVESTMENT COURT (MIC)

CONTENTS: 1. Introduction. – 2. Background. – 3. Mechanisms for Investment Dispute Resolution. – 3.1. Direct Agreement. – 3.2. Diplomatic Consultation. – 3.3. Diplomatic Protection. – 3.4. Government Route. – 3.5. Local Courts. – 3.6. Mediation. – 3.7. Arbitration. – 3.8. Dispute Boards. – 4. Foreign Investment Conflict - A Matter of International or Domestic Law? – 4.1. Conflict Internationalization - "Umbrella Clause". – 4.2. Conflict Nationalization. –5. Foreign Investment Conflicts - A Matter of Public or Private Law? – 5.1. Private Law. – 5.2. Public Law. – 5.3. Mixed Law. – 6. Active Legitimation of the State Receiving the Investment. – 6.1. Investors' Responsibility towards the Host States of Investment. – 7. Investment Protection Regime - European Perspective. – 7.1. Investment Arbitration - Precedent: 'Achmea vs Slovakia Case'. – 7.2. Free Trade and Investment Agreements in the EU. – 7.3. Comprehensive Economic and Trade Agreement (CETA). – 7.3.1. CETA - Investment Controversy System. –7.3.2. CETA - Consultation Mechanism. –7.3.3. CETA - Mediation Mechanism. – 7.3.4. CETA - Bilateral Court. – 8. Conclusions.

1. *Introduction*

The legal framework that governs relations between investors and investment receiving States has not been peaceful, we are entering waters with deep contradictions, meanwhile we can start by highlighting the emphatic position in the Charter of Economic Rights and Duties of States uttered by the United Nations[1] through which the activation of international bodies to resolve investment disputes between foreign investors and receiving States is restricted. Hypothesis supported by doctrine highlighting Carlos Calvo[2] when considering inadmissible to equate procedural equal treatment between a sovereign State and a particular foreign subject *"animus curiae"*, in their opinion, the appropriate means is to go to the Domestic Courts of the same State receiving the foreign investment. However, on the other hand, the entrenched position of the World Bank circumscribed in the 1965 Washington Convention, by which the International Centre for the Settlement of Investment Disputes (ICSID), is created. This forum constitutes an international scenario to resolve

[1] United Nations. *Charter of Economic Rights and Duties of States*, December 12th, 1974. Resolution 3281 (XXIX) of the UN General Assembly.

[2] CALVO, *Le Droit International*, 1885, p. 231.

conflicts through MASC between States and foreign Investors, this initiative is in turn strongly supported by the doctrine, highlighting Albert Van den Berg[3].

Another discussion that oscillates the legal treatment of International Investment Arbitration is to pigeonhole it in Public International Law[4] or in Private International Law[5]. Some academics, myself included, consider it a nascent hybrid of these two branches of Law.

Taking into account that Europe highlights a leading role in the field of Investments worldwide, and starting from the different contrasts, contradictions that have blurred the administration of Investment disputes throughout history, a new system permeates with projection to a new mechanism that possibly appeases several of the disputes found.

One of the greatest challenges in foreign investment is the legal framework that regulates the legal treatment between the investor and the State. The doctrine emphasizes on classifying investors at a clear disadvantage in this relationship, being exposed to conflict politicization, possible lack of guarantees, a relationship with manifest weakness vis-à-vis a sovereign State as a counterpart, the high costs involved in the process, among other things, taking into account that a possible litigation in the jurisdiction of the State would mean for the State to play a role of Judge and Party at the same time in the conflict. Although it is true, some distort the previous precision in accordance with the principle of Separation of Powers[6]. For many, this argument is insufficient to promulgate the due guarantees to foreign investors, as they are meticulously subjected to the State's rule, treatment and authority as a counterpart.

According to statistics from the European Commission, Eurostat and EY's Global Investment Monitor (GIM), in 2019 Europe became the first preferred destination of investors in the world, receiving about 5.7 trillion Euros, above the United States and China, second and third respectively. Europe reached about 4,450 investment projects in incursion, with United States nationals as main investors.

Investment management is constantly subject to the fate of disputes and differences between foreign investors and the receiving States, thus,

[3] VAN DEN BERG,. *Planning Efficient Arbitration Proceedings*: *The Law Apllicable in International Arbitration*, Vienna, 1994. The case of Arbitration under the ICSID Convention.

[4] CHUECA, *Arbitration between States and individuals in Public International Law*, 1989, p. 71 f.

[5] DE CARDENAS, *Arbitration and International Investment.* in AA.VV *Private Law before internationality, in integration and globalization*, Buenos Aires, 2005.

[6] MONTESQUIEU, *The Spirit of Laws*, London, 1748.

history has arranged a series of mechanisms for the administration of possible disputes, making way to strong questioning by the doctrine regarding the suitability of the best mechanisms to implement.

One of the main concerns arises in the possible state of manifest weakness and disadvantage that subsists is; the investor as an individual person in front of a sovereign State and counterpart of the legal business, which can undermine public problems, change of government, tax reforms, or truncation in the possible derivative permits for the exercise of its investment project, among others.

Among the various questions, there is the question of domestic, nonnational or international forums? Increasing globalization was opening the way to different alternatives until today in constant "boom" and evolution. However, for many, the road is still long to denote a favourable space and absolute guarantees between this sometimes tense but necessary relationship between States and foreign investors.

2. Background

Economy control and direction policies have been strongly discussed since the time of monetization, with ideologies like socialism and capitalism confronting each other. For States, the direction of the Economy corresponds to the State, or in its place, to the private sector, naturally driving the economy.

Now, in terms of foreign investment projects, two homologous States could clearly act as an investor and parties to this relationship or, failing that, a State against a private or corporate investor, the latter becoming more frequent, however, years ago it was common to find homologous States at the ends of the investment project, basing their relationship on principles such as 'comity', reciprocity and sovereign brotherhood in favour of a sustainable, collaborative and participatory development for all in the era of globalization.

One of the most ambitious projects that joined two States for its execution and investment was the Panama Canal, after that State's recent independence from Colombia, the United States decided to acquire the Rights of exploitation and development of the work through the Hay-Bunau Varilla Treaty, in the first instance with perpetuity and later with expiration, according to the Torrijos-Carter Treaty.

The aforementioned experience showed an investment by two States that eventually subtly reached scenarios with differences that were resolved with the later and definitive treaty (Torrijos-Carter), showing evidence of a context every time that the Parties involved are the States directly, since diplomatic relations and all connected interests (trade, tourism, among others) are at stake. What makes it more difficult to handle

possible differences in foreign investment is when the investor in one of the parties is not a State, but rather a private individual described by skeptics as a mere mortal in comparison to a State that gets empowered by its investment.

Globalization brought on an increasingly-growing demand for the exchange of products and services between States, which forced the refinement of stronger commercial relations. Relationships that were arranged to observe adequate legal treatment in case of possible controversies and equal treatment for their nationals in the counterpart foreign territory. Throughout their history, States have always sought to protect and promote their relations through treaties circumscribed between them. As for remote treaties, history takes us back to the Treaty of Sardis and Ephesus, the Treaty of Eden, and as a pioneering example in contemporary times, the Friendship Treaty between Germany and Pakistan, which subsequently led to the Investment Treaty. The above treaties are a clear example of Free Trade Agreements in history, of which there currently are close to 3,000 Free Trade Agreements (FTA) and Reciprocal Investment Agreements (BIT)[7]. This reality shows the need for an optimal outlook, necessary for the resolution of possible derivative controversies of the relationships they emanate.

History opened the possibility of different mechanisms that dealt with foreign investments controversies in different ways, with the dynamic question: What mechanism to adopt? This type of questioning has brought new views and projections that propose the dynamics to a new system to be established.

3. *Mechanisms for Investment Dispute Resolution*

Some of the mechanisms widely adopted by the parties in relation to foreign investment disputes are highlighted below.

3.1. *Direct Agreement*

Since time immemorial, the dispute resolution has been promoted through negotiation, seeking rapprochement and reciprocal dialog between the parties. Sovereign States' practice is no stranger to this lecture, frequently taught to children in solving problems through dialogue. Most investment-related agreements establish staggered clauses for their possible dispute resolution, with the direct approach between the parties as a preliminary step in order to reach a negotiation and possible solution.

[7] GARCIA BOLIVAR, *A Crise do Direito Internacional dos Investimentos Estrangeiros: Propostas de Reforma*, 2015, p. 137.

In case of failure to agree, the following established phases would continue.

3.2. *Diplomatic Consultation*

This increasingly disused auxiliary mechanism proposes a participation of the State from which the investors are nationals, but with a limited role, as its name indicates, only consultative. This proposes assistance, oversight or enforcement in the face of conflicts, but does it act in these types of claims. In practice, these types of consults are elevated to the investors' State Ambassadors based in the host State of the investment, so that they basically express their opinion or professional concept in order to predict a proportionality and possible weighting of interests and criteria in the differences raised.

3.3. *Diplomatic Protection*

Diplomatic protection is linked to the theory of state paternity. This, unlike the previous latter, supposes a direct claim of the State of Investors before the counterpart State, host of the investment, thus seeking to condemn international responsibility to the State by presenting a lawsuit. Basically, it anticipates that the State assert its paternal role in order to defend the rights and interests of its fellow investors against the other counterpart State and recipient of the investment, alleging a possible abusive behaviour (exercise of its dominant position) or violation of rights of its national investors, which means that the State takes the lawsuit as its own and claims before its counterpart in the name and representation of its affected compatriots.

Since 1758 the jurist E. Vattel[8] recognized this figure and the need for its adoption in legal systems, but it was only then that the International Court of Justice recognized this figure's suitability initially in the case Mavrommatis Concessions in Palestine Greece v. United Kingdom[9]. The UN International Law Commission, covered the scope of this figure in the «State Responsibility» projects, euphorically rejecting the scope and use of force or hostilities between States in its implementation, a position systematically shared by a large number of States.

[8] VATTEL, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Translation of the Edition of 1758 by Charles G. Fenwick, Washington, 1916, Book II, Chapter VI, p. 136.

[9] Mavrommatis, *Concessions in Palestine 'Greece v. United Kingdom'*, Judgment, in *Reports of the CPJI*, 1924, Series A, no. 2, p. 12.

Over time, this forum reached a dominant role in the field of investment disputes, where these matters that meant a direct confrontation between two States, one on behalf of its national and the other as a possible perpetrator of incurred damage, frequently resolved their possible differences this way.

3.4. *Government Route*

An important number of provisions related to investments in the source channel to legitimize claims establish the prior exhaustion of the governmental route. Although it is not a channel with a de facto final resolution, it is important to refer to it. Taking into account that it can occasionally resolve any claim of the investor in its favour. This mechanism enables public and non-judicial authorities of the Host State to process claims between the State and the Investor. Skeptics are critical of this mechanism since some of these entities are governmental and follow the fate and direction of the Government in office, drastically disturbing transparency, thus permeating an environment of Judge and Party on part of the Host State against possible claims from the investor.

The best parallel example that we can bring up in these cases are the Consumer Ombudsmen attached to Banks or Large Stores, although they are still dependent and attached to the actuated entity, occasionally they may formulate policies for the protection and defence of genuine interests, in such a way that the government route could be classified as a "Consumer Defender" that the investor has to accommodate their rights and interests.

3.5. *Local Courts*

A part of the doctrine remains insistent on maintaining the management of these differences within the framework of the Legal Courts of the Host State of the investment. Basically, this ideology bases its foundation on the costs involved in staggering disputes in international scenarios, the *"Ius Soli"*, on concern about not segmenting trust in the Judiciary of the same States, and on the precision of the principle of Separation of Powers. Emphasizing that the governments in office have no impact on the judicial bodies.

For this school of thought, it is considered a legal outburst to ignore the judiciary of the different legal systems. Currently there is an important compendium of international entities and doctrine that support its prevalence as a means of resolving these types of controversies, as we will see later.

3.6. *Mediation*

The following are mechanisms (traditional and new) part of the ADR, an important compendium of Investment Treaties after exhausting any of the previous ones, establishes mediation as a dispute resolution mechanism. A third party intervenes in this mechanism, facilitating a rapprochement between the parties. It is similar to what other States adopt as Conciliation, highlighting an important number in Latin America with the exception of Argentina. Europe and the States practicing Anglo-Saxon Law are in favour of Mediation. There are still some minor 'differences' between Mediation and Conciliation outlined by theory, hardly seen in practice.

This mechanism has consolidated an important scenario in investments practice, to the point where different international Disputed Resolutions Centres formally adopt this service, considering that it reduces time and costs in arriving at giving a solution. If an agreement is not reached, the conflict would be elevated to any other mechanism.

3.7. *Arbitration*

Arbitration has been considered the mechanism of excellence for an important niche of doctrine, showing absolute impartiality and detachment from the yoke of the States, by conferring power on a third party to resolve the controversy. Currently several dispute resolution centres make this mechanism available to States and Investors to resolve disputes, such as the London Court of International Arbitration (LCIA), the International Chamber of Commerce of Paris (ICC), the International Court, the Stockholm Chamber of Commerce (SCC) and the International Centre for Settlement of Investment Disputes in Washington D.C. (ICSID). In the beginning, arbitration centres such as the LCIA handled investment disputes under links with the commercial field *"Lex Mercatoria"*. Currently the vast majority of centres serve separately investments disputes than commercial disputes, and in some cases, such as ICSID (run by the World Bank), exclusively address foreign investment disputes *"Ratione Materiae"*. In arbitration practice, this centre is considered the main centre for investment disputes resolution.

3.8. *Dispute Boards*

The Panel of Experts is key, especially in the infrastructure and energy sector, which represent close to the highest demand for investment. This type of investment, which includes the execution of important construction projects, engineering works (work-labour), is no stranger to in-

cidents and differences at the time of carrying it out. These types of differences can be resolved by a panel of experts that dictates decisions of a contractual nature (by virtue and scope of the 'Dispute Board Clause'). These experts not necessarily exclusively comprise lawyers, but also include professionals of another nature, it being common to find engineers as well. Like mediation and the government route, this does not constitute a closing body, but minimizes disputes regarding investments' execution and ongoing development, making it key to consider it in this compendium. It has currently reached increasing demand as a service currently offered by the ICC, among others.

4. *Foreign Investment Conflict - A Matter of International or Domestic Law?*

The favourable scenarios for the resolution of investment disputes may in turn be susceptible to a framework of International and/or Domestic Law, as we will see below.

4.1. *Conflict Internationalization - "Umbrella Clause"*

There is a current school of thought in favour of the internationalization of foreign investments conflicts. For jurists and the doctrine, the relations must be catapulted in the framework of an international conflict scenario, in lieu of any possible issues with Investors' interests. Investment agreements allude to the Right to Fair, Minimum and Equitable Treatment, protecting non-discrimination, due to its condition as foreigner, among others. This internationalization phenomenon is materialized through the use of Diplomatic Protection as mentioned before, and in the specific case of arbitration, through what the practice grants as the "Umbrella Clause". This clause supposes an ipso-facto activation of any contractual claim between the State and the investor through the International Investment Arbitration.

This has not been peaceful in arbitration doctrine and practice; in this regard we can highlight two cases: SGS vs Pakistan[10], whereby the Court denoted a skeptical and negative stance regarding the scope and elevations of contractual obligations in response to the umbrella clause. On the other hand, a posteriori, involving the same company (SGS) and this time against the Philippines[11], the Arbitration Court denoted a radically-

[10] Societe General de Surveillance S.A. v. Pakistan, Court Decision on Objections to Jurisdiction, ICSID (World Bank) Case No. ARB/01/13 (2003).

[11] ICSID Case No. ARB/02/6 *Societe Generale de Surveillance S.A. vs. Republic of the Philippines*, January 29th, 2004.

opposite position, determining the absolute scope and elevation of International Law and therefore locking in international litigation of favourable contractual aspects and the framework of a "domestic" negotiation, provided that the 'Umbrella Clause' is established and consequently activates this elevation.

4.2. *Conflict Nationalization*

An important segment of the Doctrine, widely supported by International Law organizations, remains in a conservative position in terms of pigeonholing investment-related disputes in the domestic sphere, maintaining knowledge of it in governmental, administrative or judicial instances of the State. Host, even allowing arbitration with a domestic character and administered by the Investment-receiving State's centres, in order to resolve the differences in State scenarios and uprooted from an international context. The Charter of Economic Rights and Duties of States issued by the United Nations[12], which rules a refusal to activate international bodies, a hypothesis in turn supported by the doctrine, highlighting renowned jurist Carlos Calvo[13], shows broad support for this position. Thus, this duality of scenarios to be initiated, both domestic and international, gave rise in practice to the "Fork in the Road Clause", triggering a prior selection of the scenario to be initiated, automatically permeating the exclusion of the other (National or International).

5. *Foreign Investment Conflicts - A Matter of Public or Private Law?*

Another controversial point is the ideal classification in the Law of Investment Disputes, as we will see below.

5.1. *Private Law*

For some, this discipline of Law is consistent with the Private Law Branch, inasmuch as it concentrates at one procedural end a particular investor vis a vis, directly against the litigation, added to the above obligations of a contractual nature and legal obligations in the framework of negotiations with a company or person. This classification is supported, for example, by Feldestein de Cárdenas[14]. For this school of thought, in

[12] United Nations, *Charter of Economic Rights and Duties of States*, December 12th, 1974. Resolution 3281 (xxix) of the UN General Assembly.

[13] CALVO, *Le Droit International*, 1885, p. 231.

[14] DE CARDENAS. *Arbitration and International Investment*, in AA.VV, *Private Law before internationality, in integration and globalization*, Buenos Aires, 2005.

addition to the contractual obligations and the individual subject, the causal link with the *"Lex-Mercatoria"* trade stands out. Theorists point out that Private Law, unlike Public Law, has a wide degree of flexibility, which is why matters such as Social Law or Investment-Related Disputes are subject to private classification, while the rigidity of Public Law is reluctant to immersion of private law aspects, highlighting the investment field, a summary and related compendium of immersed commercial and economic law that highlights its private structure more.

5.2. *Public Law*

There is a minority school of thought that postulates investments litigation in Public Law. Although it is true that there is an effect combined with Private Law elements (investor, contract, etc.), these assumptions simply become of secondary importance and become links that activate the State's representation where the affected parties are nationals. Meanwhile, the international sphere focuses its attention in a prevalent manner on international instruments, investment treaties and interstate agreements, adding the assumptions of diplomatic consultation and diplomatic protection that make state participation predominant, understood subsidiarily that of investors as a second-tier stake.

5.3. *Mixed Law*

Another part of the doctrine decides to recognize the participatory scopes of both branches of Law, granting it an Autonomous and/or Mixed Branch character, a precision to which I adhere. We can also find this hybrid character in the postulate of the International Thunderbird Gaming vs. Mexico[15] case, below: "*(…) While public international law still provides the main principles [...] one needs to keep in mind that investment treaties [...] deal with a significantly different context from that conceived by traditional public international law: at its core lies the right of a private stakeholder to submit to arbitration against a (foreign) government regarding government conduct that affects the investor. This is a fundamental difference with respect to public international law, which is based on the resolution of controversies between sovereign States and where private subjects do not have active legitimacy. Therefore, analogies with interstate international law have to be treated with caution. While international investment law remains firmly embedded in public international law, the introduction of an investor's right to initiate arbitration*

[15] UNCINTRAL case: Arbitral Award in the matter of a NAFTA arbitration under the UNCITRAL Arbitration Rules between International Thunderbird Gaming Corporation (Claimant) and The United Mexican States, January 26, 2006.

transforms international investment law from a set of subsidiary rules into a fundamental legal framework that directly governs relations between investors and states. Functionally, therefore, international investment law and arbitration differ from the mechanisms of traditional public international law in governing relations between private investors and States".

Thus, some authors agree on integrating the hybrid and shared character as in a new sub-species and branch of Law, which I consider requires careful application of the Law and receptivity of the international norm, without making it explicit in either of the two previously-stated traditional of branches law.

6. *Active Legitimation of the State Receiving the Investment*

6.1. *Investors' Responsibility towards the Host States of Investment*

The doctrine is pressing in the investment controversy system, as the branch of which arises mainly for the protection of abusive acts of the States against foreign investors; acts such as expropriations. However, one of the greatest contemporary challenges in investment disputes is that some dispute resolution systems, such as Arbitration, highlighting the ICSID, have been branded by some academics as «Pro-Investor» mechanisms in favour of the exclusive interests and protection of investors. This extremist postulate highlights questions that arise in relation to the Responsibility of investors towards the States. Some consider a strong disproportion and imbalance to actively legitimize the investor exclusively, reducing the range of possibilities for the States to formulate a counterclaim if applicable, or articulate its Domestic Courts.

Scenarios that directly affect the investor's exercise are Human Rights and Climate Protection, among others. If an investment company violates International Law provisions that protect Human Rights and the environment, it is striking that the subject internationally liable for this fraud is the Host State of the Investment, in accordance with *"Ius Solis"* and *"Locus Delicti Commissi"*. In consequence, the exercise of repetition by the State over the investors is left at its discretion. The exclusive responsibility predicable in an international framework falls on the States, and its foundation is supported by the idea of International Law Public that legitimizes them exclusively as procedural subjects, and a summary basis that they are the ones who must supervise and control the diminished activities in their territories, without mediating whether they are exercised by nationals or foreigners.

One case that attracted attention was the "Urbaser and Consorcio Aguas de Bilbao vs. Argentina[16] case, where the Argentine State claimed liability in the investor for direct impact on human rights and the environment, as a consequence of the violation and non-respect of the regulations in the exercise of undue exploitation of the investment. However, the States' impossibility to claim this type of responsibility was drastically disturbed, as the aforementioned case highlighted in the award: "*(…) the situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights[,] would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties*".

The previous scenario further delves in the need to undermine a liability regime applicable to the investor, and to gradually detach the pro-investor policy included in some mechanisms, leading to an absolute impartiality, where either of the two is legitimized in active for the direct claim. For now, the best way to counteract this imbalance or liability gap undermining investors is through BITs, establishing a liability regime (national and/or international) on part of investors against the States, where their conduct entails a clear violation of international law.

This regime with little legal, doctrinal and jurisprudential development, has seen a reduced consideration in terms of derivative liability on the part of foreign corporate investors, leaving in doubt the cases in which the investor acts as an individual in its own name. Among the aforementioned efforts outlined above, added to the experience of Argentina in the latter case, these kinds of provisions as moderately seen in the Argentina-Qatar and Pacific Alliance BIT[17] were reconsidered, which seems to be the beginning of the consideration of a liability regime awaiting regulatory development.

7. *Investment Protection Regime - European Perspective*

According to statistics from the European Commission, Eurostat and EY's Global Investment Monitor (GIM), in 2019 Europe reached the first favourite destination of investors in the world, with a collection close to 5.7 billion euros, ranking above the United States and China, second and third respectively in this order. Europe reached about 4,450 investment projects with a majority incursion of national investors from the

[16] ICSID Case. *Urbaser and Consorcio de Aguas Bilbao v. Argentina*, ICSID Case No. ARB/07/26, Award, December 8, 2016.

[17] BIT Argentina - Qatar of 2016. Corporate Social Responsibility, Article 12. Investment Agreement of the Pacific Alliance of 2014, articles 10.30 - 10.31.

United States, as main foreign investors. Among the most desired, are the financial, start-ups, infrastructure and energy sectors, among others.

7.1. *Investment Arbitration - Precedent: 'Achmea vs Slovakia Case'*

During a good part of history, Investment Arbitration has been one of the preferred means for the resolution of investment controversies. However, with the arrival of Union law, European law regulations become binding, restating the fate of this series of mechanisms. This is shown by the case of Achmea vs. Republic of Slovakia.

Achmea is a financial services company from the Netherlands, highly-specialized in insurance services. In 2004, the Slovak Government established open policies to health insurance, attracting the participation of private insurance providers such as Achmea, who established a Slovak subsidiary to offer its services. Despite the above, in 2006 the Government reverted the free trade policy. Achmea filed an international Investment Arbitration claim with the Permanent Court of Arbitration in accordance with UNCITRAL'S arbitration rules.

Among the arguments for the defence of the Government of Slovakia, it was highlighted that the BIT concluded between Slovakia and the Netherlands in its Article 8 referred to an Arbitration Agreement, contrary to the provisions of EU law. What led Slovakia to challenge the jurisdiction of the Arbitration Court, forced to resolve its own competence by virtue of *"Kompetence-Kompetence"*, by means of a Partial Interlocutory Award on Competence, in October 2010 it decided to reject the objections against its own competence and thus, two years in a row, it issued a Final and Condemnatory Award against the Republic of Slovakia and in favour of Achmea in compensation. Once aware of the decision, Slovakia decided to initiate proceedings for annulment of an award in its home country, i.e., Germany, citing lack of competence by the Court as opposed to the EU law, given that the claim had been formulated in *'prima facie'* as a *'si ne qua non'* requirement of procedure to initiate grounds for voidability. However, in the first instance its procedure was rejected and on March 3rd, 2016, it was referred to the Federal Court of Justice of Germany for an appeal. The Federal Court formally requested the Court of Justice of the European Union (CJEU) in Luxembourg, as a legal advisory concept, to rule on the compatibility or incompatibility between the arbitration agreement circumscribed in the Slovakia-Netherlands BIT and EU law.

Fulfilling the procedural order of the CJEU in the first instance on September 19th, 2017, the assigned General Counsel issued a non-binding formal concept[18], for the knowledge of the parties (plaintiff) and the Grand Chamber of the CJEU, through which it established the «Preliminary Reference» that Articles 18, 267 and 344 did not contradict the Treaty on the Functioning of the European Union, as adduced by Slovakia in its lawsuit. However, it was then sent to the Grand Chamber of the CJEU, which issued an advanced and binding resolution on March 6th, 2018[19] for adhesion and reference compliance by the German Federal Court. The Grand Chamber of the CJEU decided to move away from the preliminary reference, and recognizes that article 8 of the BIT between Slovakia and the Netherlands does have a repercussion on the stability of the Right of Union to establish the obligatory nature of the State and European Law in the controversy known by the Arbitration Court. As per the Great Chamber's judgment, this possibility does go against the due operation and harmonization of Applicable Law in the European Union, because the Arbitration Court has to comply with the national provisions and exceeds European Law, of the State where the Arbitration is taking place and in accordance with the applicable law chosen by the parties.

The aforementioned practice may have repercussions in oppositions and inverse interpretations in regard to European Law, a situation that the Grand Chamber was forced to restrict, maintaining the uniformity and harmonization of European Law in every sphere and possible measure.

The previous ruling constitutes a clear referential precedent for the Investment Arbitration practice to be followed, with countless questionings about the favourable scope of the '*Intra-EU*' Investment Arbitration, the very effectiveness of the mechanism, prioritizing future vulnerability by being susceptible to possible annulment of the award, as happened in the case in question.

It is clear that the CJEU demonstrated an exclusive stance on the application of the rules in *'Intra-EU'* scenarios. However, the question arises of to what extent does the scope of EU Law in *'Extra-EU'* contexts where EU Law, despite its supra nature, becomes Foreign Law for States Foreign to the European Union. It is thus uncertain to assume *"erga-omnes"* effects in those binding decisions with a foreign State immersed in a certain legal dispute.

[18] Preliminary Reference of September 19th, 2017. General Counsel of the CJEU, Achmea v. Slovakia.

[19] Ruling of March 6th, 2018. Grand Chamber of the CJEU case Achmea v. Slovakia.

7.2. *Free Trade and Investment Agreements in the EU*

The European Council grants powers to the European Commission through a 'Negotiation Mandate' to advance possible Free Trade and Investment agreements between third party countries and the European Union. The following are examples of ongoing agreements to be highlighted: i) JEFTA (Transatlantic Trade and Investment Partnership) Japan-EU: free trade agreement that became effective on February 1st, 2019; the negotiating directives were adopted in 2017 and the agreement was ratified at the end of 2018; ii) Singapore: Free Trade Agreement signed on October 19th, 2018, and that became effective in 2019; the negotiating directives were adopted in 2007 within the framework of the Association of Southeast Asian Nations (ASEAN); iii) Vietnam: Free Trade Agreement that was signed on June 30th, 2019; the negotiating directives were adopted in 2007 in the framework of ASEAN; iv) Mexico: the modernization text of the EU-Mexico global agreement will be finalized no later than the end of 2018; the negotiating directives were adopted in 1999; v) Mercosur: on June 28th, 2019, negotiations on a trade agreement, integrated into the Association Agreement, with the South American trade bloc comprised of Argentina, Brazil, Paraguay and Uruguay ended; the negotiating directives were adopted in 1999; vi) Chile: negotiations are under way to modernize the current free trade agreement; the negotiating directives were adopted in 2017; vii) Australia and New Zealand: negotiations on free trade agreements are ongoing; the negotiating directives were adopted in 2018; viii) TTIP (Transatlantic Trade and Investment Partnership) US – EU: Agreement in negotiation since 2013, it suspended its negotiations in 2016 and they have resumed again; iv) CETA (Comprehensive Economic and Trade Agreement) Canada-EU. The agreement began negotiations in 2009 and was signed in 2016, pending ratification by the parliaments of member states.

Once the agreements are negotiated by the European Commission duly empowered by the Council of the European Union, they are submitted for approval to the European Parliament, who will be able to vote exclusively for their approval or not (YES or NO). The European Parliament's voting cannot formally modify the contents of the Agreement Project presented by the Commission for its consideration, however, in practice, the Parliament issues a recommendation report justifying the possible points that eventually motivated a possible refusal. In order to try to abolish refusals, some Parliament Committees such as International Trade, Employment and Environment usually accompany the negotiations as aids, giving suggestions and perspectives. These Committees can be controversial in their opinions, as happened in the CETA negotiation

framework, within which the Employment Committee gave an unfavourable view to the agreement while the International Trade and Environment committees gave a favourable opinion on the agreement.

The agreements negotiated by the EU are not within the framework of all the powers and competencies of the Euro-Institutions, which requires in some matters that they be ratified by the Parliaments of each State of the Union to become effective and applicable. For example, the commercial sphere itself is understood as part of the powers of the Union Policy, which is why it still becomes effective under the figure of 'provisionality' with full legal scope and effects. On the other hand, what refers to Investments and the mechanism to resolve disputes, is beyond the powers of the EU, which is why it is required to reach that specific point (Investments) to be ratified by the State. One of the oscillating concerns is that it is predicted that if a single State of the 27 of the Union does NOT ratify the agreement, it loses its community effects and consequently has to be re-negotiated by the community authorities and the immersed third-party country.

In general, for the European Union, the markets and areas of investment are very active and regulated scenarios in the TFEU, especially considering that Europe is the global player in the field of trade and investment, according to reports from the European Council and the European Commission. Added to a series of protocols depending on the subject. These statistics, added to the discussions raised so far, led the main European authorities to consider exploring a new initiative to submit these types of differences, achieving a 'harmonious' scenario to a greater extent.

However, taking into account the various oppositions previously addressed, the controversial precedent of the Achmea case has not yet been considered. The European Commission, within the framework of the Development of the TTIP, decided to carry out a public survey through which it sought to clarify the positions on the occasion of submitting investment disputes to National Courts or Exogenous Courts to National Courts, as a result of the above, 149,399 responses were received in total, of which the vast majority were collective responses, and at least 3,589 individual responses. As European participation in this regard, responses can be highlighted from the next seven state members: United Kingdom (34.8%), Austria (22.6%), Germany (21.8%), France (6.5%), Belgium (6.3%), Holland (3.3%) and Spain (1.7%). Participation from all sectors stands out among those surveyed, with leading experts in civil, commercial, academic, political, union and NGO areas.

To summarize the previous consultation, a notorious position was consolidated by sectors such as politics, NGOs and unions, with a

clear preference for National Courts, which in general shows favouritism according to this report. However, sectors such as the commercial sector (private and public with the participation of business associations, chambers of commerce, among others, and some academics), showed a clear preference for an alternative mechanism to the National Courts, highlighting the possibility of an ISDS system, or something similar.

Following the results, the European Commission decided to temporarily halt the general and explicit negotiations of the investment chapter in the TTIP at the end of 2016, a decision that subsequently fuelled political tensions since the US President Donald Trump in March of 2018 announced new tariffs, a declaration rejected by the EU expressing disagreement with the ICO's postulates. However, meanwhile, alternatives were being discussed in the Committee on International Trade (INTA) of the European Parliament. The report presented by the European Commission in May 2015 stated additional changes (or an alternative) to the traditional ISDS system. Finally, the European Parliament decided to promote an absolute substitution to the aforementioneds ISDS system, as a replacement for a new initiative that solved these types of controversies. This guideline, of course, had *erga-omnes* effects on the EU's proscribed agreements, leading to the recapitulation of the recognized investment dispute-resolution systems in all signed and emerging trade agreements, highlighting the CETA. The guideline of the European Parliament, for the attention of the European Commission, became insinuating with the exploration of a Multilateral and Permanent Court of Investments.

Canada and the EU recapitulate the summarize the ISDS system's situation and make way for a Bilateral and Permanent Investment Court, which is made up of a Designated Court and a Court of Appeals. The parties (EU and CANADA) and other allies equivalent to other States, have already expressed their intention and absolute disposition to constitute it in a Multilateral and Permanent Investment Court in the mid-term. In the best interest of time, we will address some points that attract the attention of (CETA), while it is considered to be comparatively more advanced and with important points to be addressed.

7.3. *Comprehensive Economic and Trade Agreement (CETA)*

7.3.1. *CETA - Investment Controversy System*

Regulated in Chapter 8 regarding investments. Basically, highlights three phases from its structure, namely; Consultation, Mediation and Judicial before the Court. In this regard, the following stands out from each of these.

7.3.2. *CETA - Consultation Mechanism*

When any of the parties consider an apparent violation or improper interpretation of the rules in Law, consultation must be exhausted as a procedure, which must be addressed within three years after the alleged breach. This request must be supported by investment evidence. After the consultation and in the absence of a timely response or unsatisfied notification, the investor must initiate a formal lawsuit before the Court. However, said claim must have a minimum of six months before taking action. This condition seeks the possibility of an amicable solution prior to the judicial claim. Now, if after the aforementioned term, no response is obtained or it is unsatisfactory, the legal claim proceeds at the discretion of the investors.

The consultations that have taken place are attended as per the regulations allegedly infringed or in disagreement with respect to their interpretation. Therefore, in the case of regulations for clarification of Canadian Law, the consultation is resolved by the relevant authority in Ottawa for its effects. When it addresses presumably infringed European rules, the concept falls under the responsibility of the Public Authority in Brussels and, alternatively, if it addresses provisions of Domestic Law of any of the States of the Union, the designated authority would rule.

7.3.3. *CETA - Mediation Mechanism*

This mechanism is completely voluntary and seeks an amicable solution between the parties. The mediator will be chosen by the parties by mutual agreement. In the absence of this, one will be appointed under a nominal function by the ICSID'S General Secretary. The mediation procedure must last up to 60 days.

7.3.4. *CETA - Bilateral Court*

The CETA Court comprises a kind of hybrid between the traditional Investment Arbitration System with broad similarity and the provisions of the WTO dispute resolution mechanism. Now, to activate it, the investor must present the formal claim and the State must grant its consent, taking into account the Denial of Benefits contemplated in 8.16 of CETA, for which it has 50 days. After ratification of consent, the investor has up to 10 years to file the claim.

The basic structure and composition comprise a permanent mixed committee of 15 legal operators whom, for practical purposes of this writing, we will call 'Judges-Arbitrators', reiterating this Court's hybrid composition. Of the 15 'Judges-Arbitrators', 5 are Canadian, 5 are European,

and 5 are foreign. The committee may vary the number, always respecting the proportion in numbers of 3. The CETA court contemplates an initial instance and an appeal instance. The initial instance in many respects resembles an Investment Arbitration, and the appeal instance resembles more the WTO's own dispute mechanism.

The appeal must be presented within 90 days after the first instance ruling. The number of 'judge-arbitrators' will be what the mixed committee considers pertinent. On appeal, unlike on the Conventional Investment Arbitration System, the Court of Appeal will know aspects of its own form and substance (taking into account that the Annulment Action is exclusively applicable to aspects of form) in such a way that the Court of Appeals may confirm, modify or revoke the preceding judgment through a definitive judgment which is not susceptible to any legal action in any court of a State rooted in its Domestic Law. In other words, as it happens in the Action for Annulment of Awards, known by the Courts of the State where the procedure is administered, except in the ICSID Arbitration System that is self-sufficient, the CETA system is also self-sufficient when not permeating possible actions that truncate the effects of the ruling by Domestic Courts, to safeguard its effectiveness.

The 'Judges-Arbitrators' must serve as Justice of the highest Court of their State where they are from. In the event of a challenge, it will be decided and possibly sanctioned through a nominal function by the President of the International Court of Justice of The Hague.

The rules that will apply to the procedure will be those of the ICSID complementary mechanism or the United Nations Commission for International Trade Law (UNCITRAL) Ad-hoc committee? The applicable law will be that of the States Parties and the European Community for their effects. In accordance with Articles 8.41. (B-II) 5-6 the judgments rendered have the character of 'Award', and this is hybridly equated to a final Award for the purposes of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of New York (1958), and at the same time to an Award equivalent to that issued in the ICSID Convention of Washington D.C. (1966) pursuant to Chapter IV, Section 6 of this convention.

For the purposes of CETA, as it happens in ICSID, there are controversial aspects. It denotes an enforceable nature of its judgments, considering them Law of the other immersed States equivalent to a domestic judgment which is interpreted by some as a scope of immediate execution, but at the same time, it refers to the applicability of the normative assumptions for the recognition and homologation of judgments in each State where it is intended to be valid.

One of the characteristics that transcend in the CETA is its intention to a Permanent Court. For now, the secretary at the service of CETA is the same Administrative and General Secretary of CETA'S totalitarian

framework. For the time being there was no explicit secretary at the service of the Court for reasons of costs and a minimum projection in cases for its administration, which is why the fees of the 'Judges-Arbitrators' are assessed according to the rates established in the agreement and the services provided. However, the intention of making them permanent and uninterrupted, under a salary category proportional to a category by plural administration of various arbitrations, has already been publicly affirmed, harmonizing with the principle of compensation and balance. The future projection is a roster of its 'Judges-Arbitrators' added to the creation of its explicit and permanent secretariat; in the previous context a permanent Court becomes clear.

One of the great challenges for the proper functioning of the CETA Court was what happened in the Achmea case, that is, the interpretation and application of European Law. Opening the possibility of multiple positions in the European legal norm, in order to clarify this possibility, the European Court of Justice was directly requested to issue a Legal Concept in this regard through elevated consultation. The European Court of Justice ruled by Opinion 1/17, published in Press Release No. 52/19 of April 30th, 2019. In this regard, it clarified that the interpretation and application of European Law by the CETA Court did not affect the Union Law, since it focused on the formal points of the Agreement. In the same way, it highlighted the mechanisms attributed by the Union Law so that any affected party can exercise defence against any measure that it finds inappropriate. Finally, in the event that a Member State and/or a state affected by an extreme approach, considers that its rights have been violated by the Union, it may sue before the European Court of Justice. This way, it is legitimized as a genuine and exclusive closing body in the proper application of European Law.

The interpretation of the European Court on the possibility of staggering any possible damage derived from the European regulatory application vis-à-vis CETA informally means an additional scale that ensures the application of European Law as the closing body in charge of the European Court of Justice, but at the same time it means a greater effort for all affected investors. Bringing it before this Court is counterproductive for the speed of the process and the costs that this entails in the CETA phase (which are already considered high). Therefore, this particular scenario should only occur in very exceptional situations.

On the occasion of Corporate or Investor Responsibility towards the States, CETA joins the majority of agreements that lack instructing a Social Responsibility Regime for investors. What can be subtracted from this agreement is deduced from the chapters on Trade and Sustainable Development and the Environment, which establish a weak statement of obligations to promote and protect Corporate Social Responsibility as an obligation directed to the States, and not directly to Investors. Once

again there is a feeling of emptiness, since the States lack a Legal Regime to sue investors in the Investment systems whenever they cause damage in the execution and/or exploitation of their investment project. The only viable option for the States ends up being to sue the investors through the Domestic Courts before a possible sanction to which the State has been immersed in the regulatory framework of International Law. This scenario is clearly lacking in regulation, leaving in practice the action of repetition by the states as the only option.

CETA's Permanent Court of Investments currently fulfils a bilateral function, involving only the European Union and Canada at its parties. However, there are serious intentions being considered by other States (inspired by CETA) to create a Multilateral Investments Court, despite the dissent of some others, as the US let it be known its position against the TTIP regarding the applicable modality of this Investment Court. At this point it is important to highlight that the EU, in 2017, took the debate to the United Nations Commission for International Trade Law (UNCITRAL), where strong studies have already been carried out for a regulatory framework in favour of what would be a Multilateral Investment Court (MIC).

8. *Conclusions*

Legal disputes related to foreign investments have been the subject of multiple execution scenarios, always encountering important criticisms. These criticisms are supported by a doctrine such as jurisprudence, with the Achmea case standing out in the European sphere, a critical compendium that attributes from a lack of guarantees to a possible risk of uniformity in European Law. All of the above caused a constant exploration of optimal scenarios that will balance the differences to a greater extent for the proper exercise of legal disputes arising in this field. It is clear that the Domestic Courts and the International Investment Arbitration played a leading role in these types of scenarios, with the Arbitration practice growing more and more. However, considering the consent required for arbitration in its due activation, a feeling of lack of effectiveness permeates, as it is possible to be reluctant to arbitration and ignore it.

The different mechanisms for hearing investment disputes tend to have a greater number of legal possibilities for incurring in favour of investors against the States, if not that the investors are the only ones entitled to sue and the States to respond with a Counterclaim. Despite the developments that we can see today, this point is still a challenge in current reality. There are those who qualify all these mechanisms as «Pro-Investors». Although it is true that it is a relationship with a disadvantage,

a balance should be advocated for both parties involved in the legal business, that is, the Receiving State of the Investment and the Foreign Investor.

Finally, the States, in exercise of their powers, are free to open spaces to a new scenario that would face the knowledge of this type of controversy. This brought on the Bilateral Investment Court, as a result of the initiative proposed by the CETA Global Economic and Trade Agreement, involving Canada and the European Union, where the suppression of Investment Arbitration is set as a precedent and this Court advocates as the only valid scenario. It should be noted that, for the moment, the CETA Court is acting bilaterally, serving Canada and the EU. Currently, the Commercial Law Commission attached to the UNCITRAL is carrying out a study project for the constitution of a Court with similar characteristics and a Multilateral character, that is, with shared participation through a plurality of different States.

Taking into account that the States are the ones who recognize the ideal scenarios, this new panorama brought by the Multilateral Investment Court becomes the beginning of the end of International Investment Arbitration and other traditional mechanisms. Space is opening up for a Permanent Court, so it will be a matter of time before more and more States join in this movement, which would mean the inevitable long-term extinction of traditional mechanisms. The world is on the verge of coming face to face with a Multilateral Investment Court that has come to stay, surely forever.

1. I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (a cura di), *La tutela dei "soggetti deboli" tra diritto internazionale, dell'Unione europea e diritto interno*, 2012
2. I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (a cura di), *Le nuove famiglie tra globalizzazione e identità statuali*, 2014
3. F. PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea*, 2013
4. I. QUEIROLO, B. HEIDERHOFF (edited by), *Party Autonomy in European Private (and) International Law, Tome I*, 2015
5. M.E. DE MAESTRI, S. DOMINELLI (edited by), *Party Autonomy in European Private (and) International Law, Tome II*, 2015
6. C. CELLERINO, *Soggettività internazionale e azione esterna dell'Unione europea. Fondamento, limiti e funzioni*, 2015
7. I. QUEIROLO, *EU Law and Family Relationships. Principles, Rules and Cases*, 2015
8. B. HEIDERHOFF, I. QUEIROLO (edited by), *European and International Cross-Border Private and Economic Relationships and Individual Rights*, 2016
9. F. PESCE, D. RONE (edited by), *Mediation to Foster European Wide Settlement of Disputes*, 2016
10. S. DOMINELLI, *Party Autonomy and Insurance Contracts in Private International Law: A European Gordian Knot*, 2016
11. A.M. BENEDETTI, I. QUEIROLO (a cura di), *Il consumatore di servizi finanziari nella crisi globale*, 2016
12. I. QUEIROLO (edited by), *Private International Law within the EU. Current Issues and Regulatory Perspectives*, 2016
13. F. MUNARI, C. CELLERINO (a cura di), *L'impatto della nuova direttiva 104/2014 sul Private Antitrust Enforcement*, 2016
14. P. CELLE, *La tutela dei diritti fondamentali dell'Unione europea*, 2016

15. M. GRONDONA (a cura di), *Libertà, persona, impresa, territorio. Visioni interdisciplinari a confronto*, 2016
16. B. HEIDERHOFF, I. QUEIROLO (edited by), *Current Legal Challenges in European Private and Institutional Integration*, 2017
17. S.M. CARBONE (edited by), *Brussels Ia and Conventions on Particular Matters. The Case of Transports*, 2017
18. I. QUEIROLO, S. DOMINELLI (edited by), *European and National Perspectives on the Application of the European Insolvency Regulation*, 2017
19. L. SANDRINI, *L'interpretazione del diritto internazionale privato dell'Unione Europea. Il caso della responsabilità da prodotto*, 2018
20. S. DOMINELLI, *Current and Future Perspectives on Cross-Border Service of Documents*, 2018
21. B. HEIDERHOFF, I. QUEIROLO (edited by), *Persons on the Move. New Horizons of Family, Contract and Tort Law*, 2018
22. B. HEIDERHOFF, I. QUEIROLO (edited by), *Old and New Problems in Private Law*, 2020
23. L. CARPANETO, *Autonomia privata e relazioni familiari nel diritto dell'Unione europea*, 2020
24. B. HEIDERHOFF, I. QUEIROLO (edited by), *Private (International) Law in an Evolving Transboundary Society. Selected Issues*, 2020
25. I. QUEIROLO, R. ESPINOSA CALABUIG, G.C. GIORGINI, N. DOLLANI (directed by), C.E. TUO, L. CARPANETO, S. DOMINELLI (edited by), *Brussels I bis Regulation and Special Rules. Opportunities to Enhance Judicial Cooperation*, 2021

Per i tipi di Editoriale Scientifica

26. B. HEIDERHOFF, I. QUEIROLO (edited by), *New Approaches in Private (International) Law*, 2021