INTERACTIONS BETWEEN EUROPEAN COURT OF HUMAN RIGHTS AND PRIVATE INTERNATIONAL LAW OF EUROPEAN UNION

INTERACCIONES ENTRE EL TRIBUNAL EUROPEO DE DERECHOS HUMANOS Y DERECHO INTERNACIONAL PRIVADO DE LA UNIÓN EUROPEA

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Abstract: The present work is concentrated on the analysis of the jurisprudence between the European Court of Human Rights and the European Court of Justice in the sector of private international law. In particular, it deals with the differences, similarities, influences, impact, etc. in the sector of family law, insolvency and succession according the Regulations and the private international law and last but not least the recognition of sentences by the European Member States.

Key words: European Court of Human Rights, International private law, European Court of Justice, European family law, insolvency, succession.

Resumen: El presente trabajo se concentra en el análisis de la jurisprudencia entre el Tribunal Europeo de Derechos Humanos y el Tribunal de Justicia Europeo en el sector del derecho internacional privado. En particular, aborda las diferencias, similitudes, influencias, impacto, etc., en el sector del derecho de familia, la insolvencia y la sucesión de acuerdo con el Reglamento y el Derecho internacional privado y, por último, el reconocimiento de condenas por parte de los Estados miembros europeos.

Palabras clave: Tribunal Europeo de Derechos Humanos, Derecho Internacional Privado, Tribunal Europeo de Justicia, Derecho de Familia Europeo, insolvencia, sucesión

I. Introduction[1]

1. Private international law acquires its autonomy with the loss of the unity of roman law and with the need to coexist a plurality of legal systems within the same political order. The search for the congruence of the various rights takes place under two great principles, namely territoriality (*aut unum esse ius, com unum sit imperium:* a State, a right) and personality (*ut totidem fere leges habeantur quam domus*: so many rights, as houses)[2]. But once affirmed the plurality of rights and the right to live according to their own right *(cum ergo ius cuilibet tribuatur, potest Langobardus iure suo uti contra Romanum*)[3] there will be a technique to define how to choose applicable law when litigants belong to different rights and habits. This is how the Magister Aldricus claim: پg(پc) eam quae potior et utilior videtur, debet enim iudicae secundum quod melius ei visum fuerit (پc)پh[4]. The applicability of the law in the present case, for one way and another, is in contact with several local legal systems[5], up to the thresholds and evolution of modern private, EU and international law[6].

2. The dream of a *Weltrecht,* formulated by Ernst Zitelmann[7], over a hundred years ago in the field of private and commercial law, of *Kollisionsrecht,* must be understood as a uniform law and experience over the years and to be compared with sectoral non secondary realizations. There is also a mirage today that it is good to look in the full conscience of the irreconcilability or the ongoing struggle for the future generations of a noble *officium* that will avoid the conflict of divergent norms through coordination: *concordantia discordantium canonum*[8].

3. On the one hand, the reference to the *ius commune*[9] recalls the principle of subsidiarity, the elaboration of common legal principles, on which the individual positive ordinances are then grafted.

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[1] The present study is updated in doctrine and jurisprudence until December 2017.

[2] S. Kegel, *Internationales Privatrecht,* C.H. Beck, 1987, pp. 104ss. M. Keller, K. Siehr, W. Niederer, *Allgemeine Lehren des internationalen Privatrechts*, ed. Schulthess Juristische Medien, 1986, pp. 8ss. C. Von Bar, P. Manknovski, *Internationales Privatrecht,* C.H. Beck, 1991, pp. 316ss. J. Kropholler, *Internationales Privatrecht,* C.H. Beck, 2004, pp. 456ss. A. Bainham, B.A. Rwezaura, *International survey of family law,* Jordan publishing, 2006. M. Bussani, F. Werro, *European private law: A handbook*, ed. Carolina Academic, 2009. J. Basedow, I. Meier, A. K. Schnyder, T. Einhorn, D. Girsberger, *Private law in the international arena. From national conflict rules towards harmonization and unification. Liber amicorum Kurt Siehr*, ed. T.M.C. Asser Press, 2000, pp. 818ss. P. Truniger, *Internationales Privatrecht*, ed. Helbing Lichtenhahn, 2011.

[3] P. Courbe, *Droit international privè,* ed. Hachette Supèrieur, 2007. R. Hüsstege, A. Ganz, *Internationales Privatrecht,* ed. C.H. Beck, 2013.

[4] E.m. Meijers, *L'histoire des principes fondamentaux du droit international privè* à *partir du moyen* âge, *spècialement dans l'Europe occidentale*, in *Recueil des Cours de la Haye*, 1934, pp. 544 ss.

[5] According to Ancel e Lequette: "(…) l'oeuvre de magistrats impregnès, au delà de leur diversitè, de ce que Ripert nommait l'esprit juridique c'est-a-dire l'esprit conservateur au sens philosophique du terme. Conscients de l'indispensable permanence de la règle e droit, ils savent qu'un revirement de jurisprudence est une chose grave. Aussi bien en l'opèrent-ils, en gènèral qu'au terme une longue pèriode e maturation ponctuèe de signes annonciateurs (...)". B.ancel, Y. Lequette, *Note* à *la sentence de la cour de Cassation du 25.11.1986,* in *Revue Critique de Droit International Privè*, 1987, pp. 386ss. The above sentence declared that: "(...) en ne echerchant pas, au bespoin d'office, le droit applicable, une cour d'appel n'a pas donnè de base lègale à sa dècision (...)". See, B. Ancel, Y. Lequette, *Grands arrêts de la jurisprudence française de droit international privè,* ed. Dalloz, 1987, pp. VI. See in the doctrine also: E. Jayme, *Richterlichte Rechtsfortbildung im Internationales Privatrecht,* in *Richterliche Rechtsfortbildung, Festscrhift der Juristische Fakultät Heidelberg*, Heidelberg, 1986, pp. 568ss. P. HÉBraud, *Le juge et la jurisprudence, Mèlanges Couzinet,* Université des sciences sociales de Toulouse, 1980, pp. 334 ss. F. Vischer, *Der Richter als Gesetzgeber im internationales Privatrecht, Schweiz,* in *Jahrbuch für Internationales Recht,* 1955, pp. 76ss. M. Spiro, *L'influence du code civil dans le monde,* ed. Pedone, 1954, pp. 306ss. J. Pirrung, *Internationales Privat-un Verfahrensrecht nach dem Inkrafttreten der Neuregelung des IPR*, ed. Bundesanzeiger, 1988. M. Spiro, *The incidence of time in the conflict of laws*, in *The International and Comparative Law Quarterly,* 1960, pp. 358ss. Rc. Thümmel, *Das internationale Privatrecht der nichthelichen Kindschaft. Eine rechtsvergleichende Untersuchung*, ed. Dunckler & Humblot, 1983, pp. 172ss.

[6] E. Jayme, *Considèrations historiques et actuelles sur la codification du droit international privè*, in *Recueil des Cours de La Haye,* 1982, pp. 10ss. L. Mcdougal, *Codification of choice of law: A critique of the recent european trend*, in *Tulane Law Review*, 1981, pp. 115ss.

[7] E. Zitelman, *Die Möglichkeit eines Weltrechts,* C.H. Beck, 1988, pp. 12ss.

[8] B. Ancel, *Elèments d'histoire du droit international privè*, ed. Pantheon Asses Paris II, 2017.

[9] E. Van Schagen, *The development of european private law in a multilevel legal order. Ius commune europeaeum,* ed. Intersentia, 2016.

On the other hand, it is the position of those who see in the uniformization of the law the result of an interpretative and scientific effort rather than a legislative act, namely, unification of doctrinal as an alternative *zur legislatorischen Rechtsvereinheitlichung*[10], leaving, in the end, a third articulation that tends to match the effort to alight with European law[11], *rectius* community in the fear of wanting to embrace too much in the planetary perspective. The study and the way of european unification of law goes through the formation of structures, organs, and of our society that evolves versus profoundly unified concepts and models[12]. Another debate is always open between the standard and its interpretation by operators with *iurisdictio.* The experience of the central function of the European Court of Justice in training in the daily growth of the sense of european law is paradigmatic and at the same time an actual choice of applicable law[13]. Beyond the unification of the principles, we remain conditioned by the presence of systems of private international law, continuing to have to determine the appropriate order for a specific case to choose the applicable law.

II. European Court of Human Rights, European Court of Justice and private international european law

4. The jurisprudence of the European Court of Human Rights (ECtHR) has shown not only the possibility of taking into account but also the verification and application of rules on private international law by opening a debate mainly in the area of the public order clause[14] and not only to include violations of the protection of exogenous values (the European Convention on Human Rights or the primary law of the European Union (EU))[15] or endogenous (of constitutional order)[16] or the acceptance of the notion of public order that does not take in consideration different or larger values than those obtained by Court order[17]. The European Court could deal with the compatibility of private international

[10] P. Hommelhoff, W. Jayme, W. Mangold (a cura di), *Europäischer Binnenmarkt, Internationales Privatrecht und Rechtsangleichung,* L. Müller Publishers, 1995.

[11] R. Schulze, M. Zuleeg, S. Kadelbach, *Europarecht,* ed. Nomos, 2015. A. Mac Eleavy Fiorini, *Qu'y a-t-il en un nom?-Un vrai code pour le droit international privé européen*, in M. Fallon, P. Lagarde, S. Poillot-Peruzzetto, *Quelle architecture pour un code européen de droit international privé?*, ed. Peter Lang, 2011, pp. 28ss.

[12] W. Odersky, *Harmonisierende Auslegung und europäische Rechtskultur*, in *Zeitschrift für Europäisches Privatrecht,* 1994, pp. 1ss. B. Markesinis, J. Fedtke, J*udicial recourse to foreign law: A new source of inspiration?*, ed. Routledge, 2012, pp. 138ss.

[13] A. Turmo, *L'autorité de la chose jugée en droit de l'Union européenne*, ed. Bruylant, 2017. J. Pirrung, *European Court of Justice*, in J. Basedow, K.j. Hort, R. Zimmerman, A. Stier, *Encyclopedia of european private law*, Oxford University Press, 2012. T. AZZI, *La Cour de justice et le droit international privé ou l'art de dire parfois tout et son contraire, in Les relations privées internationales-Mélanges en l'honneur du Professeur Bernard Audit,* ed. L.G.D.J., 2014, pp. 44ss. I. BarriÈRe Brousse, *Le Traité de Lisbonne et le droit international privé*, in *Journal du Droit*, 2010, pp. 4ss. R. Bieber, A. Epiney, M. Haag, M. Kotzur, *Europarecht*, ed. Helbing & Lichtenhahn Verlag, 2017, pp. 167ss.

[14] C.J. Zelada, A. Gurmendi Dunkel Berg, *Entre el escudo y la espada: El matrimonio igualitario visto desde el orden público internacional y el derecho internacional de los derechos humanos,* in *Themis Revista de Derecho*, 2016, pp. 260ss.

[15] H.w. Micklitz, C. Sieburgh (eds.), *Primary EU law and private law concepts,* ed. Intersentia, 2017.

[16] C. Grabenwarter, *The European Convention on Human Rights: Inherent constitutional tendencies and the role of the European Court of Human Rights*, in *ELTE Law Journal,* 2014, pp. 105ss.

[17] M. Forteau, *L'ordre public "transnational" ou réellement international: l'ordre public face à l'enchevêtrement croissant du droit international privé et du droit international public,* in *Journal du Droit International,* 2011, pp. 3 ss. S. Saastamoinen, *The european private international law and the Charter of fundamental rights in a commitment of private international law. Essays in honour of Hans Van Loon*, ed. Intersentia, 2013, pp. 505ss. J. Herring, *Family law,* ed. Pearson, 2015, pp. 546ss. J.M. Scherpe, *European family law*, vol. I., Edward Elgar Publishing, 2016. R. Geimer, *Der Ordre Public attenuè de la reconnaissance im Adoptionsrecht,* in *Praxis des Internationalen Privat-und Verfahrensrechts,* 2017, pp. 498ss. P. Vilas, *Public policy in private international law and its continuing importance*, in Permanent Bureau Of The Hague Conference On Private International Law (eds.), *A commitment to private international law*, ed. Intersentia, 2013, pp. 623ss. J. BASEDOW, *Zuständigkeitsderogation, Eingriffsnormen und ordre public,* in P. Mankowski, W. Wurmnest, *Festschrift für Urlich Magnus zum 70. Geburtstag,* Sellier European Law Publishers, 2015. C. Villarroel Barrientos, G. Villarroel Barrientos, *Derecho internacional privado*, ed. Juridica de Chile, 2016. C. Fresnedo De Aguirre, *Determinaciσn de la jurisdicciσn y acceso a la justicia, El acceso a la justicia en el derecho internacional privado. Jornadas de la ASADIP 2015*, Asunciσn, CEDEP-ASADIP-Ed. Mizrachi & Pujol S.A., 2015, pp. 147ss. C. Fresnedo De Aguirre, *El acceso a la justicia como derecho humano a ser garantido por el derecho internacional privado, El Derecho entre dos siglos. Estudios conmemorativos de los 25 αpos de*

law rules with human rights[18] but the problem is whether such rules are subject to union, despite their instrumental character to the right to apply to the concrete case[19]. The union of the European Court could have the fundamental values that can be obtained regionally and universally[20]. This verification could be considered to be an intrinsic value to the same private international law[21], finalized as it is to transpose the rules of foreign law with a view to opening to external values to the national reality[22]. It is necessary to understand and identify if general directional lines exist for the construction of a system of private international law based on fundamental rights autonomously or not[23], and how to structure the link criteria that respond to you independently of the content of the law you have identified[24]. These are the essential principles common to the various ordinances which, while being detected by the judge from the particular angle of view of the State community to which they belong, express basic standards that constitute the minimum of civilization considered essential to the common life of peoples, principles directed at the protection of that fundamental interest of ethical and social nature, greater participation of individual States in the life of the community of peoples, and the question of whether this function is

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[18] See, M. Arden, *Human rights and european law. Building new legal orders*, Oxford University Press, 2015. T. Schröder, *Folgenabschätzung als Element der Gesetzgebung der Europäischen Union-Maßstab für die Zweckmäßigkeit oder Gegenstand gerichtlicher Kontrolle?,* in *Zeitschrift für Öffentliches Recht,* 2013, pp. 225ss. B. Ulrici, *Aktuelle Entwicklungen des Europäischen Mahnverfahrens,* in *Europäische Zeitschrift für Wirtschaftsrecht*, 2016, pp. 370ss. J. Meyer-Ladewig, *Europäische Menschenrechtskonvention. A Handkommentar,* ed. C.H. Beck & Nomos, 2017. R. Ravasi, *Human rights protection by the ECtHR and the ECJ. A comparative analysis in light of the equivalence doctrine,* ed. Brill, 2017. D. Dero-Bugny, *Les rapports entre la Cour de justice de l'Union europèenne et la Cour europèenne des droit de l'homme,* ed. Bruylant, 2015. S. Touzé, *La Cour europèenne des droits de l'homme et la doctrine*, ed. Pedone, 2013. J. F. Renucci, *Droit europèeen des droits de l'homme,* ed. L.G.D.J., 2012.

[19] P. Mayer, *La Convention européenne des droits de l'homme et l'application des normes étrangères,* in *Revue Critique de Droit International Privè*, 1991, pp. 651ss. H. Fuchiron, *Droits fondamentaux et règles de droit international privé: Conflits de droits, conflits de logiques?*, in F. Sudre (a cura di), *Le droit au respect de la vie familiale au sens de la Convention européenne des droit de l'homme*, ed. Anthemis, 2002, pp. 358ss. O. O. Cherednychenko, *The harmonisation of contract law in Europe by means of the horizontal effect of fundamental rights?,* in *Erasmus Law Review,* 2007, pp. 40ss. D. Leczykiewicz, *Horizontal application of the Charter of Fundamental Rights,* in *European Law Review,* 2013, pp. 479ss. A. Colombi Ciacchi, *European fundamental rights, private law and judicial governance*, in H.w. Micklitz (eds.), *Constitutionalisation of european private law,* Oxford University Press, 2014, pp. 110ss. C. Herresthal, *Grundrechtecharta und Privatrecht*, in *Zeitschrift für Europäisches Privatrecht,* 2014, pp. 238ss. J.p. JacquÈ, *The Charter of Fundamental Rights and the Court of Justice of the European Union: A first assessment of the interpretation of the Charter's horizontal provisions*, in L.s. Rossi, F. Casolari (a cura di), *The EU after Lisbon, ed. Springer, 2014, pp. 138ss.* P. Kinsch, *Droit de l'homme, droits fondamentaux et droit international privé,* in *Recueil des Cours,* 2005, pp. 9ss.

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[21] N. JansÉN, *European private law,* in J. Basedow, K.j. Hort, R. Zimmerman, A. Stier, *Encyclopedia of european private law,* Oxford University Press, 2012.

[22] D. Earl Childress III, *Rethinking legal globalization: The case of transnational personal jurisdiction*, in *William & Mary Law Review*, 2013, pp. 1493ss.

[23] In particular see: F.j. Zamora Cabot, *Derecho internacional privado y derechos humanos en el αmbito europeo, Papeles el tiempo de los derechos,* Huri-Age, Consolider-Ingenio. 2010. A. Doamaral JÏNiot, L. Klein Viera, *El Derecho Internacional Privado y sus Desafvos en la Actualidad,* Grupo Editorial Ibañez, 2016, pp. 537ss. R. Arnold, *The universalism of human rights,* ed. Springer, 2013.

[24] C. GonzÁLez Beilfuss, *The unification of private international law in Europe: A success story?,* in K. Bolle-Woelki, J. Miles, J.m. Scherpe (eds.), *The future of family property in Europe,* ed. Intersentia, 2011, pp. 330ss.

distinct or not from the traditionally negative one that this limit does when it is intended to preserve the inner harmony of the hole sorting[25].

5. The process of coding the uniform rules initiated by the European Court of Human Rights and private International Law through the Hague Conference at a universal and regional level[26] by the European Union demonstrates the progressive abolition of the legal frontiers in sight of interests of voluntary unification[27] among States, to overcome national selfishness by giving greater protection to human rights[28].

6. The European Court's audit extended the way in which EU rules on private international law were applied[29]. The obligation of verification has focused on the guarantees of fundamental rights[30] and the objectives of the european area of justice[31]. There has so far been no explicit statement by the ECtHR on the way in which the rules of private international law adopted by the European Union[32].

7. Obviously, the adoption of the Charter of Fundamental Rights has helped establish the rules in the area of justice in a more break thinking perspective and protection which emphasizes the priority to be given to human rights [33]. This could reduce the risk of a possible contraction between the EU and ECtHR

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[28] J. D'oliveira, *The EU and a metamorphosis of private international law*, in J. Fawcett, *Reform and development of private international law. Essays in honour of Sir Peter North*, Oxford University Press, 2002, pp. 112ss. C. Mcglynn, *Challenging the european harmonisation of family law: Perspectives on the family,* in K. Boele-Woelki, *Perspectives for the unification and harmonization of family law in Europe*, ed. Intersentia, 2003, pp. 220ss. G.p. Romano, *Le droit international privé à l'épreuve de la théorie kantienne de la justice*, in *Revue Trimestrielle de Droit International*, 2012, pp. 59ss. A. Laquer Estin, I*nternational family law*, Edward Elgar Publishing, 2016. C. Gautier, D. Platon, D. Szymczak, *Droit européens des droit de l'homme,* ed. Sirey, 2016. C. Blanc-Fily, *Valeurs dans la jurisprudence de la Cour européenne des droits de l'homme,* ed. Bruylant, 2016. S. Smet, E. Brems, *When human rights clash at the European Court of Human Rights. Conflict or harmony?,* Oxford University Presss, 2017.

[29] See, T. WILHELMSSON, *The contract law acquis: Towards more coherence through generalisation?*, in A.A.V.V., *Sammelband, Europäischer Juristentag,* Manz Verlag, 2008, pp. 112ss. E.b. Crawford, J.m. Carruthers, *Connection and coherence between and among european instruments in the private international law of obligations*, in *The International and Comparative Law Quarterly,* 2014, pp. 4ss. J. Von Hein, G. Rühl (eds), *Kohärenz im europäischen Internationalen Privat-und Verfahrensrecht*, ed. Mohr Siebeck, 2015, pp. 40ss. D. Wiedemann, *Convergence and divergence in the EU's judicial cooperation in civil matters: Pleading for a consolidation through a uniform european conflict's codification*, in *Max Planck Private Law Research Paper No 15/14,* 2015. J. Basedow, *Kodifizierung des europäischen Internationalen Privatrechts*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2011, pp. 673ss. S. Sana-Chaille De NÉRÉ, *Droit international privè, Etas membres de l'Union européenne et Etats tiers,* ed. LexisNexis, 2009. P. Lagarde, D. Carreau, H. Synvet, *Droit international privè et droit de l'UE,* ed. Dalloz, 2017. M. Benlolo-Carabot, U. Candas, E. Cujo, *Union européenne et droit international. En l'honneur de Patrick Daillier*, ed. Pedone, 2013.

[30] S. Pais Oliveira, *The protection of fundamental rights in Europe*, in I. Iliopoulos-Strangas, V. Pereira Da Silva, M. Potacs (eds.), *The accession of the European Union to the ECtHR*, ed. Nomos, 2013, pp. 97ss.

[31] See in argument: M. Fletcher, E. Herlin-Kernell, C. Matera, *The European Union as an area of freedom, security and justice,* ed. Routledge, 2016. S. Wolff, *The rule of law in the area of freedom, security and justice: Monitoring at home what the European Union preaches abroad*, in *Hague Journal on the Rule of Law,* 2013, pp. 120ss. M. Luchtman, *Choice of forum in an area of freedom, security and justice*, in *Utrecht Law Review,* 2011, pp. 76ss. M. Douchy-Oudot, *Espace judiciaire civil européen,* in *Revue Trimestrielle de Droit Européen*, 2010, pp. 422ss. S. Poillot-Peruzzetto, *Le défi de la construction de l'espace de liberté, de sécurité et de justice,* in *Revue de Jurisprudence Commerciale,* 2010, pp. 4ss.

[32] J.s. Bergé, M. Gardenes Santiago, S. Francq, *Boundaries of european private international law*, ed. Bruylant, 2015.

[33] P. Beaumont, L. Walker, J. Holliday, *Conflicts of EU Courts on child abduction: The reality of article 11 (6)-(8) Brussels IIa proceedings across the EU,* in *Journal of Private International Law*, 2016, pp. 212ss. L.j. Silberman, The *Hague Convention on Child Abduction and unilateral relocations by custodial parents: A perspective from the United States and Europe: Abbott, Neulinger, Zarraga*, in *Oklahoma Law Review*, 2017, pp. 735ss. According to the author: "(...) the European Court of Human Rights has become an intrusive and undermining force in the efforts to remedy international parental child abduction. As noted earlier, in both Neulinger and Rabin, the Court of Human Rights misconstrued the Convention in various ways and created a sub-

guidelines on the compatibility of EU rules on private international law[34]. In essence, this is a derogation from the rules to which private international law refers and allows the interpretation to avoid more complex remedies, such as the involvement of other national Courts at the constitutional or legitimate level[35].

8. In the case of *Negrepontis Giannisis v. Greece* on 3 may 2011, the European Court assessed negatively the failure to recognize a status acquired abroad, based on the limit of public order[36], considering it to be susceptible to have a negative impact with respect to another principle, that of the protection of family life as art. 8 ECHR, considered by the ruling Court "(...) with respect to religious values which, according to the Greek judge, should have prevented the recognition of the adopted relationship established in the US by an orthodox monk (...)"[37]. We could say that the ECHR had a very broad material scope, meaning that it covered many aspects of life. Subsequently, the Convention developed mostly through case-law, in particular through the European Court of Human Rights doctrine of the Convention as a "living instrument" which must be interpreted in the light of present-day conditions. This means that much could be achieved through interpretation, making formal amendments to the ECHR or the adoption of new conventions unnecessary in many areas[38].

9. The same Court of Justice in *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden Württemberg* joined Cases C-482/01 and C-493/91 of 29 April 2004 is referred to "(...) the protection of the family life of EU citizens in order to remove obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty. In particular, it is common ground that the exclusion of a person from a country where his or her relatives live can be an interference in the right to respect the family life as foreseen by art. 8, n.1 of the Convention, which is part of the fundamental rights which, according to

stantive "best interests of the child" overlay without regard to the important private international law principle in the Convention that the appropriate Court to make that "best interests" assessment is that of the State of the original habitual residence. That is not to ignore the extreme case where return should not be ordered, but the basic architecture of the Convention is sound and should not be altered (...)". H. Djarass, *Charta der Grundrechte der Europäischen Union*, C. H. Beck, 2016. L. Coutron, C. Picheral, *Charte des droits fondamentaux de l'Union europèenne et Convention europenne des droits de l'homme*, ed. Bruylant, 2012. J. Meyer, *Charta der Grundrechte der Europäischen Union,* ed. Helbing & Lichtenhahn Verlag, 2014, pp. 189ss.

[34] D. Coester-Waltjen, *The impact of the European Convention on Human Rights and the European Court of Human Rights on european family law*, in J.m. Scherpe, *European family law,* vol. I, Edward Elgar Publishing, 2016, pp. 49ss.

[35] P. Kinsch, *Droits de l'homme, droits fondamentaux et droit international privé*, in *Recueil des Cours,* 2005, pp. 206ss. L. Fumagalli, *EC private international law and the public policy exception. Modern features of a traditional concept,* in *Yearbook of Private International Law,* 2004, pp. 172ss.

[36] See the case from the Court of Justice: *Nickel & Goeldner Spedition GmbH v. Kintra AB* C-157/13 of 4 September 2014.

[37] The European Court of Human Rights for first time was decided for the law of family based on art. 8 of the ECHR in the case: *Marckx v. Belgium* of 13 June 1979, par. 1 and *Vereinigung Bildener Künstler v. Austria* of 25 January 2007, par. 31; *X. v. Austria* of 19 February 2013, the ECtHR: "(...) observing that, in contrast to the comparison with a married couple, it has not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple. Indeed, the Government did not dispute that the situations were comparable, conceding that, in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples (...) the applicants, who wished to create a legal relationship between the first and second applicants, were in a relevantly similar situation to a different-sex couple in which one partner wished to adopt the other partner's child (...)". *Fabris v. France* of 7 February 2013. See in argument: W. PINTENS, J.M. SCHERPE, *The Marckx case: A while code of family law*, in S. Gilmore, J. Herring, R. Probert, *Landmark cases in family law,* Hart Publishing, 2011, pp. 158ss. C.j. Forder. *Legal protection under art. 8: Marckx and beyond*, in *Netherlands International Law Review*, 1990, pp. 166ss. In the same spirit see the next cases: *Keegan v. Iceland* of 16 May 1994; *Airey v. Ireland* of 9 October 1979; *Rozanski v. Poland* of 18 May 2006; *Zaunegger v. Germany* of 3 December 2009; *Schalk and Kopf v. Austria* of 21 December 2010. See in particular: E. Bribosia, I, Rrorive, L. Van Den Eynde, *Same-sex marriage: Building an argument before the European Court of Human Rights in light of the US experience*, in *Berkeley Journal of International Law,* 2014, pp. 5ss. L. Sarah, L. Cooper, *A review of the concurrent debates about the legal recognition of same-sex relationships in the Council of Europe and the United States,* in *Phoenix Law Review,* 2011, pp. 42ss. G. Willems, *La vie familiale des homosexuels au prisme des articles 8, 12 et 14 de la Convention Européenne des Droits de l'Homme: Mariage et conjugalité, parenté et parentalité,* in *Revue Trimestrielle des Droits de l'Homme,* 2013, pp. 68ss. *Pakhomova v. Russia* of 24 October 2013; *Burden v. United Kingdom* of 29 April 2008; *D.H. and others v. The Czech Republic* of 13 November 2007. See in argument: J.S. BERGE, *La double internationalité interne et externe du droit communautaire et le droit international privé*, in *Droit International Privé*, 2008, pp. 43ss. P. Franzina, *Some remarks on the relevance of Article 8 of the ECHR to the recognition of family status judicially created abroad,* in *Diritti Umani e Diritto Internazionale,* 2011, pp. 612ss.

[38] J. Casadevall, *El Convenio Europeo de Derechos Humanos, el Tribunal de Estrasburgo,* eds.Tirant lo Blanch, 2012.

settled case law of the Court, are protected in the community legal order (...)"[39]. Thus, the impossibility of "unification" of a solid and permanent family status creates an obstacle to freedom of movement, even if the european citizen must feel unprotected and weakened by rights and prerogatives recognized by him in matters of family law by domestic law[40] and from the State of origin in the event that such status is relevant as an attribute of subjective rights of european origin[41]. In the case of *Johansen v. Norway* of 7 August 1996, the European Court based on art. 8 of the Convention has declared the issuance of the ablative measure of parental authority[42] but in the abolition of mother's rights of access, the restrictions on family life should not be such as to break the relationship, as they are foreseen as temporary, and must be suspended when the situation that has determined them ceases[43]. In the judgment of *B. v. United*

[39] See from the ECtHR: *Von Hannover v. Germany* of 7 February 2012. C. Hugon, *Le titre exécutoire européen* à *la lumière de la Convention européenne des droits de l'Homme*, in M. Touchy-Pudot, E. Guinchard, *La justice civile européenne en marche*, ed. Dalloz, 2012, pp. 132ss.

[40] J.f. Sagaut, M. Cagniart, *La légitimité du droit communautaire en droit international privé de la famille*, in *Droit et Patrimoine,* 2005, pp. 24ss.

[41] H.u. Jessurun D'oliveira, *The EU and a metamorphosis of private international law*, in J. Fawcett, R*eform and development of private International law. Essays in honour of Sir Peter North*, Oxford University Press, 2002, pp. 112ss. D. MARTINY, *European family law,* in J. Basedow, K.j. Hort, R. Zimmerman, A. Stier, *Encyclopedia of european private law*, op. cit., M. GonzÁLez Pascual, A. Torres PÉRez, *The right to family law in the EU,* ed. Routledge, 2016, pp. 129ss.

[42] J.w. Paulsen, *Family law: Parent and child*, in *SMU Law Review*, 1999, pp. 1206ss. J. Black, *Foreword to international issues,* in H. Setricht et al., *International issues in family law: The 1996 Hague Convention on the protection of children and Brussels IIa,* ed. Family Law, 2015, pp. 138ss.

[43] See in argument the next cases from the ECtHR: *Ratzenböck and Seydl v. Austria* of 26 October 2017, the ECtHR declared that: "(...) establishing whether persons are in analogous or relevantly similar situations is a necessary precondition for the application of Article 14 read in conjunction with another Convention Article (see, as an early authority, *Rasmussen v. Denmark*, 28 November 1984, parr. 29-42). This step has decisive consequences for the case, since a finding that there is no comparator precludes the Court from entering into an assessment on the merits. As it has been critically noted in the scholarly writings, the use of comparators may in effect convert a potentially challengeable ground of discrimination into one that is immune from judicial scrutiny (...)". *Achim v. Romania* of 24 October 2017; *Lebois v. Bulgaria* of 19 October 2017; *Fuchsmann v. Germany* of 19 October 2017; *Alexandru Enache v. Romania* of 3 October 2017; *Vilenchik v. Ukraine* of 3 October 2017; *Shvidkiye v. Russia* of 25 July 2017; *Belcaceni and Oussar v. Belgium* of 11 July 2017; *M.S. v. Ukraine* of 11 July 2017; *Aycaguer v. France* of 22 June 2017; *Bogomolova v. Russia* of 20 June 2017, the ECtHR affirmed that: "(...) (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 par. 2 of the Convention, the following amounts, to be converted into the currency of the respondent State (...)". *Hurica v. Croatia* of 2 May 2017; *A.-M.V. v. Finland* of 23 March 2017, the ECtHR observed that: "(...) in particular the fact that paragraph 3 of the Article is closely aligned with paragraph 2 of Article 8, and taking into account the conclusions reached under Article 8 of the Convention above, the Court does not consider that an examination of the applicant's complaint can lead to different findings when reviewed under Article 2 of Protocol No. 4. There has therefore been no violation of that Article, either (...)". *Dimova and Peeva v. Bulgaria* of 19 January 2017; *Babiarz v. Poland* of 10 January 2016; *Sagvolden v. Norway* of 21 December 2016, the ECtHR has declared that: "(...) the necessity of the interference, the Court will have regard to the principles in its case-law, enunciated in *Connors v. the United Kingdom*, (no. 66746/01, parr. 81–84, 27 May 2004, and relied on in a number of subsequent judgments (see *McCann*, parr. 46-55, Ćosić, parr. 20-23; *Orlić*, parr. 63-72; *Zehentner v. Austria*, parr. 56-65, 16 July 2009; and *Bjedov v. Croatia*, parr. 64-72, 29 May 2012), as follows: 81. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (...) a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international Court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (...) in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that in so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation (...) in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation (...) this was in the context of Article 1 of Protocol No. 1, not Article 8 which concerns rights of central importance to the 30 *Sagvolden v. Norway* judgment individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (...) the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (...)". *Ustinova v. Russia* of 8 November 2016; *Moog v. Germany* of 6

Kingdom of 8 July 1987 the violation of the right to respect family life is perceived in the total exclusion of the parent of the child's life as also in *Eriksson v. Sweden* of 22 June 1989. In *Olsson v. Sweden* on 27 November 1992 the Court has recently developed the issue of public power interference in family life sometimes including all its contents among which participation and emotional sharing of decisions concerning the expropriated offspring. From the same line of thought in *Olsson v. Sweden* of 26 September 1995 and *Phostira Eftymiou et Rebeiro Fernandes v. Portugal* of 5 February 2015 the European Court draws attention to the gravity of a measure involving the disintegration of the family for its destructive capacity, it must be the only means of achieving the child's interest[44] and be inspired by the contemplation of the interests of the individual and the family[45]. Indeed, in the judgments cited above, the European Court has tried to focus on some fundamental principles such as the right of a parent and child to be together as a fundamental element of family life[46]; the assumption of a child by the public authorities does not preclude relationships with the natural family (*Eriksson v. Sweden*) and the taking into custody of a minor is a temporary measure to be suspended when the situation which has determined it falls and every act of execution must be aimed at returning the child to the family[47] hence the Court would not be legitimate to injure the health and development of the child as it is also not possible to share the negative impact of the measure on the relations between the brothers and the resumption of the family relationship to which the ablative measures are finalized[48].

October 2016; *Vrzić v. Croatia* of 12 July 2016, the ECtHR declared that: "(...) is mindful of the fact that the present case concerns proceedings between private parties, namely the applicants and their creditors on the one hand and the applicants and the purchaser of their house on the other hand. However, even in cases involving private litigation, the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic Courts and tribunals to adjudicate effectively and fairly in the light of the applicable law (see *Anheuser-Busch Inc. v. Portugal*, par. 83; *J.A. Pye par.* 57; and *Zagrebačka banka d.d. v. Croatia*, par, 250 and 251, 12 December 2013). See also: A. Wijffelman, *Child marriage and family reunification*, in *Netherlands Quarterly of Human Rights*, 2017.

[44] L. Walker, *Maintenance and child support in private international law*, Hart Publishing, 2015. C. M. Caamiña Domínguez, *En interès superior del menor: La integraziòn en el nuevo medio*, in *Cuadernos de Derecho Transnacional*, 2016, pp. 78ss. S. Goessl, *Preliminary questions in european private international law*, in *Journal of Private International Law*, 2012, pp. 64ss. C. LÓPez, *Nuevas normas de derecho internacional privado estatal en m ateria de protecciòn de adultos y de menores,* in *Annuario Español de Derecho Internacional Privado,* 2016. L.c. Pereznieto, *El derecho internacional privado actual*, ed. Zavalia, 2015. M. ÁLvarez TornÉ, *La protecciòn internacional de adulto el enlace de los actuales instrumentos de derecho internacional privado y las perspectivas de avances en la EU,* in *Jean Monnet Chair, Universitat de Barcellona,* working paper n. 2016/3. J. LONG, *Rethinking vulnerable adults protection in the light of the 2000 Hague Convention*, in *International Journal of Law, Policy and the Family,* 2013, pp. 52ss. H. Stalford, *Children and the European Union: Rights, welfare and accountability*, Hart Publishing, 2012. J. Pirrung, *Hague conference on PIL*, in J. Basedow, K.J. Hort, R. Zimmerman, A. Stier, *Encyclopedia of european private law,* op. cit., C. Fenton-Glynn, *Children's rights in intercountry adoption*, ed. Intersentia, 2014. L.e. Teitz, *Children crossing borders: Internationalizing the restatement of the conflict of laws*, in *Duke Journal of Comparative & International Law,* 2017, pp. 524ss. R.j. Wechsler, *Giving every child a chance: The need for reform and infrastructure in intercountry adoption policy,* in *Pace International Law Review*, 2010, pp. 20ss. E. Briscoe, *The Hague Convention on Protection of Children and co-operation in respect of intercountry adoption: Are its benefits overshadowed by its shortcomings?,* in *Journal of American Academy of Matrimonial Law*, 2009, pp. 440ss. A. Laquer, Estin, *Families across borders: The Hague Children's Conventions and the case for international family law in the United States*, in *Florida Law Review*, 2010, pp. 48. in particular the author notes that: "(...) detailing the U.S. Department of State's position as the U.S. Central Authority as well as the specific office within the Department that performs Convention-specific duties (...)". R. Worthington, *The road to parentless children is paved with good intentions: How the Hague Convention and recent intercountry adoption rules are affecting potential parents and the best interests of children,* in *Duke Journal of Comparative & International Law,* 2009, pp. 562ss. According to the author: "(...) even though there are no alternative procedures in place, there are solutions preferable to a complete termination of intercountry adoptions (…)".

[45] D. Porcheron, *La jurisprudence des deux Cours européènnes (CEDH et CJUE) sur le déplacement illecite d'enfant: vers une relation de complémentarité?*, in *Journal du Droit International,* 2015. A. Dutta, *Cross-border protection measures in the European Union*, in *Journal of Private International Law*, 2016, pp. 170ss. F. Forcada Miranda, *Revision with respect to the cross-border placement of children*, in *Nederlands Internationaal Privaatrecht,* 2015, pp. 38ss.

[46] J. Christoffersen, M. Rask Madsen, *The European Court of Human Rights between law and politics*, Oxford University Press, 2013.

[47] N. Taylor, M. Freeman, *International research evidence on relocation: Past, present and future,* in *Family Law Quarterly,* 2010, pp. 330. J. Holliday, *Protecting the rights of the child: Amending the child abduction provisions under the Brussels IIa Regulation*, in *International Family Law*, 2016, pp. 39ss. M. Menne, *International family law: Some current practical issues arising from cross-border children cases*, in *International Family Law*, 2016, pp. 175ss.

[48] S. Greer, *The European Convention on Human Rights. Achievements, problems and prospects,* Cambridge University Press, 2006.

10. The European Court of Human Rights has focused on the assessment and balancing of the judge's recognition in assessing the extremes of the *exequatur* request [49]. The margin of appreciation left to the judge must not lead to results such as restricting or reducing access to justice, which must be guaranteed to every individual[50], and therefore the European Court has found disproportionate the claim of the European Court of Human Rights and of international private law to subject the recognition of observance of time limits imposed by the Court to remedy transcript errors[51]. In this case, the principle of legality was of primary importance and the possibility of obtaining the recognition and enforcement of a foreign judgment is an integral part of the right to appeal to the Court under art. 6 of the ECHR [52]. In the case of *Hussein v. Belgium* of 6 May 2004, *Wagner and J.M.W.L. v. Luxembourg* of 28 June 2007 and *Trizio v. Switzerland* of 2 February 2016 the European Court had established that the claim of adoption carried out elsewhere was completed under the law determined by the conflicting rules[53] of the requested State of recognition which constituted: "(...) an unjustified interference in family life (...)"[54]. From these

[49] M. Fallon, J. Meeusen, *Private international law in the European Union and the exception of mutual recognition*, in *Yearbook of Private International Law,* 2002, pp. 38ss.

[50] See, Y. Arai-Takahashi, *The margin of appreciation doctrine and the principle of proportionality in the ECHR*, Cambridge University Press, 2002. A. LEGG, *The margin of appreciation in international human rights law. Deference and proportionality,* Oxford University Press, 2012, pp. 58ss. S. TOUZÉ, *La Cour europèenne des droits de l'homme et la doctrine,* op. cit. J. ASCHE, *Die Margin of appreciation,* ed. Springer, 2017.

[51] W. Duncan, *Transcript: Globalisation of the Hague children's Conventions with emphasis on the Child Abduction Convention*, in *Oklahoma Law Review*, 2017, pp. 609ss. E. Sthoeger, *International child abduction and children's rights: Two means to the same end,* in *Michigan Journal of International Law*, 2011, pp. 512. According to the author: "(...) she terms as an "alternative reconciliation" method of interpreting the two bodies of law. Under this scheme, a Court must interpret the exceptions to return-especially the "grave risk" exception- in such a way that it will deny return when the return cannot be reconciled with the obligation to consider the best interests of the child as a primary consideration." The argument relies on the contention that the drafters of the Hague Convention originally envisioned situations where a father abducts the child from the hands of the mother, the primary caretaker of the child." But in today's reality, where it is frequently the mother and primary caretaker who abducts the child, a return would not restore the status quo but rather create an entirely different situation for the child. This reality makes it more difficult to find that a return to the hands of the non-primary caretaker father-even if only temporary coincides with weighing the best interests of the child as a primary consideration (...) the drafters did not intend for Courts to return children where this decision would jeopardize their safety, or where the mother is fleeing domestic violence (...)". In the same opinion see also: R. Schuz, *The Hague Child Abduction Convention and children's rights*, in *Transnational Law & Contemporary Problems,* 2002, pp. 400ss.

[52] See the case: *Vrbica v. Croatia* of 1st April 2010, par. 61. S. Stein, *In search of "red lines" in the jurisprudence of the ECHR on fair trial rights***,** in *Israel Law Review*, 2017, pp. 180ss. O. Pridal, *The right to a fair trial. Article 6 of the European Convention on Human Rights,* Kluwer Law International, 2014. A. Panait, *The right to a fair trial in the dynamic interpretation of the European Court of Human Rights,* in *Challenges of the Knowledge Society***,** 2016, pp. 226ss.

[53] K. Roosevelt Iii, *Legal realism and the conflict of laws,* in *University of Pennsylvania Law Review*, 2015, pp. 8ss. C. Wasserstein Fassberg, *Realism and revolution in conflict of laws: In with a bang and out wiith a whimper,* in *University of Pennsylvania Law Review,* 2015, pp. 25ss.

[54] See also the next cases: *Poitimol v. France* of 23 November 1993; *Pelladoah v. France* of 22 September 1994, the ECtHR affirmed that: "(...) any interference must achieve a "fair balance" between the demands of the general interest of the community and the requirement of protecting the individual's fundamental rights. The search for this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, and therefore also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In each case involving an alleged violation of Article 1 of Protocol No. 1, the Court must ascertain whether by reason of the State's interference, the person concerned had to bear a disproportionate and excessive burden (see *James and Others v. the United Kingdom*, 21 February 1986, par. 50, and *Amato Gauci v. Malta*, par. 57, 15 September 2009). In determining whether this requirement has been met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (see *Chassagnou and Others v. France par.* 75, *Immobiliare Saffi v. Italy, par.* 49 and *Luordo v. Italy*, *par.* 69; *Ben el Mahi v. Denmark* of 11 December 2006. See in particular: M. Milanovic, *Extraterritorial application of human rights treaties. Law, principles and policy,* Oxford University Press, 2011, pp. 186ss. Continuing with: *Stochlak v. Russia* of 22 September 2009. See, D. Ichim, *Just satisfaction under the European Convention on Human Rights,* Cambridge University Press, 2014. In case: *Muňoz Dìaz v. Spain* of 8 December 2009, the ECtHR stated that: "(...) children born out of wedlock may not be treated differently-in patrimonial as in other family-related matters-from children born to parents who are married to each other (principle stated in *Marckx*, cited above; compare also, among other examples, *Kroon and Others v. the Netherlands*, 27 October 1994, par. 30). The corollary is that if the Spanish authorities had refused to recognise the applicant as the mother of a large family and grant her the attendant pecuniary benefits, or if they had refused to enter the children in the family record book, they would most likely have had to be found to be discriminating against the applicant and her family (...)". *Tapia Gasca y D. v. Spain* of 22 December 2009; *Mijušković v. Montenegro* of 21 September 2009, the ECtHR affirmed that: "(...) the pri-

mary object of Article 8 is to protect the individual against arbitrary action by the public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see *Keegan v. Ireland*, 26 May 1994, par. 49) (...) has repeatedly held that Article 8 includes a right for parents to have measures taken that will permit them to be reunited with their children and an obligation on the national authorities to take such action (see, among other authorities, *Ignaccolo-Zenide v. Romania*, par. 94; *Nuutinen v. Finland*, par. 127 and *Sylvester v. Austria*, par. 58, 24 April 2003) (...)". In case: *Saleck Bardu v. Spain* of 24 May 2010 the ECtHR: "(...) first observes that the applicant's children were persistently reluctant to have contact with the applicant (...) observes in this regard that the decisions taken by the domestic Courts to suspend contact between the applicant and his children were based on the children's statements and on expert reports which, having regard to the children's determined hostility to their father, and to the children's well-being, advised against any contact until psychological therapy with the children had taken place. However, this therapy could not take place, since the applicant's former wife obstinately failed to obey the domestic Courts' orders in this regard. The attitude and conduct of the applicant's former wife made it particularly difficult for the domestic Courts to act to facilitate contact (...)". In case: S*haw v. Hungary* of 26 July 2011, the ECtHR : "(...) also held that although coercive measures against the children are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of unlawful behaviour by the parent with whom the children live (see *Ignaccolo-Zenide*, cited above, par. 106) (...) reiterates that the Convention must be applied in accordance with the principles of international law, in particular with those relating to the international protection of human rights (see *Streletz, Kessler and Krenz v. Germany, par.* 90 and *Al-Adsani v. the United Kingdom par.* 55) (...) considers that the positive obligations that Article 8 of the Convention lays on the Contracting States in the matter of reuniting a parent with his or her children must be interpreted, in the present case, in the light of the Hague Convention and the EC Regulation on the Recognition of Judgments (...)". *Sholokhov v. Armenia and Republic of Moldova* of 31 July 2012. See, F. Ippolito, S. Iglesias Sánchez (a cura di), *Protecting vulnerable groups: The european human rights framework*, Hart Publishing, 2015, pp. 28ss. P. Agna (a cura di), *Human rights between law and politics: The margin of appreciation in post-national context*, Hart Publishing, 2017, pp. 25ss. In the same spirit see: *Moretti and Benedetti v. Italy* of 27 April 2010. In case: *Harroudj v. France* of 4 October 2013 the ECtHR noticed that: "(...) the judicial grant of *kafala* is fully recognised by the respondent State and that it produces effects in that country that are comparable in the present case to those of guardianship, since the child, Hind, had no known parentage when she was placed in care. In that connection, the domestic Courts emphasised the fact that the applicant and the child had the same surname, as a result of the relevant legal procedure, and that the applicant exercised parental authority, entitling her to take any decision in the child's interest. Admittedly, as *kafala* does not create any legal parent-child relationship, it has no effects for inheritance and does not suffice to enable the child to acquire the foster parent's nationality. That being said, there are means of circumventing the restrictions that stem from the inability to adopt a child. In addition to the name-change procedure, to which the child was entitled in the present case on account of her unknown parentage in Algeria, it is also possible to draw up a will with the effect of allowing the child to inherit from the applicant and to appoint a legal guardian in the event of the foster parent's death (...)". In particular see: I. Gallala-Arndt, *Die Einwirkung der Europäischen Konvention für Menschenrechte auf das Internationale Privatrecht am Beispiel der Rezeption der Kafala in Europa-Besperechung der Entscheidung des EGMR Nr. 43631/09 vom 04.10.2012, Harroudj/ Frankreich,* in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, *2015, pp. 410ss. See also: Henry Kismoun v. France* of 14 March 2013. J. Laffranque*, Can't get just satisfaction,* in A. Seibert-Fohr, M.e. Villiger (eds.), *Judgments of the European Court of Human rights. Effects and implementation,* ed. Nomos*, 2014, pp. 77ss.* In case: *Oleynikov v. Russia* of 26 June 2013, the ECtHR noticed: "(...) the right of access to Court secured by Article 6 par. 1 is not absolute, but may be subject to limitations: these are permitted by implication, since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 par. 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Waite and Kennedy v. Germany, par.* 59; *T.P. and K.M. v. the United Kingdom par.* 98, *Fogarty v. the United Kingdom par.* 33 and *Cudak v. Lithuania par.* 55, ECHR 2010) (...)". *Mennesson v. France and Labassee v. France* of 26 June 2014, the ECtHR observed that: "(...) respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship (...) an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned (...) as domestic law currently stands, the third and fourth applicants are in a position of legal uncertainty. While it is true that a legal parent-child relationship with the first and second applicants is acknowledged by the French Courts in so far as it has been established under Californian law, the refusal to grant any effect to the US judgment and to record the details of the birth certificates accordingly shows that the relationship is not recognised under the French legal system (...)". *Cavani v. Hungary* of 28 October 2014; *Chbihi Loudoudi and others v. Belgium* of 16 December 2014; *Chapin and Charpentier v. France* of 9 July 2016. See also in argument: I.j. Sales, *La vida familiar en la jurisprudencia del Tribunal Europeo de Derechos Humanos: Una intrerpretaciòn constructiva,* ed. Bosch, 2015. C. Fenton-Glynn, *The child's voice in adoption proceedings: A european perspective*, in *International Journal of Children's Rights*, 2014, pp. 142ss. L. Carpaneto, *In depth consideration of family life v. immediate return of the child in abduction proceedings with the EU*, in *Rivista di Diritto Internazionale Privato e Processuale,* 2014, pp. 932ss. E. Ravasi, *Human rights protection by the ECtHR and the ECJ: A comparative analysis in light of the equivalency doctrine,* ed. Brill, 2017, pp. 169ss. H. Baker, M. Groff, *The impact of the Hague Conventions on European family law,* in J.m. Scherpe (eds.), *European Family Law, vol. I, The impact of Institutions and Organisations on european family law,* op. cit., D. Harris, M. O'boyle, E.p. Bates, C.m. Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention of Human Rights*, Cambridge University Press, 2014. J. Gerards, E. Brems, *Procedural re-*

judgments no absolute principle of private international law or general protection of a fundamental right can be derived, nut it can be inferred that the protection of human rights may exclude the applicability of the conflict rules[55] in the case of conflict[56]. Human rights must be additional to the case of malfunctioning of private international law. *Exequatur* verification could also relate to existing deficiencies not adequately considered in *exequatur*: in this case, the European Court has the role of enhancing and verifying indirectly, and offering a remedy to prevent the judgment being effective whose recognition is likely to have adverse effects in several different regimes[57].

11. In a number of cases referring to the jurisdiction and recognition of sentences concerning the international abduction of minors the European Court has referred as well as to the principles proclaimed in Universal Conventions such as the Hague Convention of 1980 and the New York Convention of 1989[58], recalling the child's superior interest[59] as a point *de repère*[60] specifically considered in the individual case, as a parameter for balancing, which the national Court *(lex fori*) is called upon to make in the resolution of cases[61]. Despite the fact that international private law has the character of "compe-

view in european fundamental rights cases, Cambridge University Press, 2017. A. Seibert-Fohr, M. Villiger, *Judgments of the European Convention of Human Rights. Effects and implementation*, ed. Nomos, 2017. A. Henriksen, *International law,* Oxford University Press, 2017, pp. 218ss.

[55] A.J. Colangelo, *Absolute conflicts of law,* in *Indiana Law Journal,* 2016.

[56] A. Hoc, G. Willems, S. Watier, *Human rights as a basis for reevaluating and reconstructing the law*, ed. Bruylant, 2016. M. Afroukh, L. Callejon-Sereni, G. Gonzalez, O. Martelly A. Schah Maneche, H. Surrel, *Les conflits de droits dans la jurisprudence de la Cour europèenne des droit de l'homme*, ed. Anthemis, 2014.

[57] T. KerikmÄE, *Protecting human rights in the European Union,* ed. Springer, 2014.

[58] I. Reig Fabado, *El retorno inmediato del menor en la sustracción internacional de menores*, in *Revista Boliviana de Derecho,* 2015, pp. 246ss. C. Neirick, *La Convention des droits de l'enfant. Une Convention particulière*, ed. Dalloz, 2014.

[59] A. Dieci, *Balancing the principle of the best interest of the child with the right to be heard: An ongoing challenge from an international perspective*, in *Jura Gention, Journal of Philosophy of International Law and Global Policy*, 2017

[60] J. Ferrer Í. Riba, *Child protection,* in J. Basedow, K.J. Hort, R. Zimmerman, A. Stier, Encyclopedia of european private law, op. cit., R. Garimella, S. Jolly, *Private international law*, ed. Springer, 2017.

[61] See from the ECtHR the next cases in the argument of best child interest: *Bronda v. Italy* of 9 June 1996; *Scozzari and Giunta v. Italy* of 13 July 2000; *K. and T. v. Finlandia* of 13 July 2001; *P.C. and S. v. United Kingdom* of 16 July 2002; *K.A. v. Finlandia* of 14 January 2003; *Haase v. Germany* of 8 April 2004; *Kosmopoulou v. Greece* of 5 February 2004; *Pini and others v. Romania* of 22 June 2006; *Elsholz v. Germany* of 13 July 2000; *Hoffmann v. Germany* of 11 October 2001; *Hoppe v. Germany* of 5 December 2002; *Bove v. Italy* of 30 June 2005; *Neulinger and Shuruk v. Switzerland* of 6 July 2010; *Kennedy v. United Kingdom* of 18 May 2010, the ECtHR observed that: "(...) the obligation to hold a hearing is not absolute. There may be proceedings in which an oral hearing is not required and where the Courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials. The character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national Court (see *Jussila v. Finland, parr.* 41 to 42) (...)". *Shimovolos v. Russia* of 21 June 2011; *Bykov v. Russia* of 10 March 2009; *Hode and Abdi v. United Kingdom* of 6 November 2012; *Biao v. Denmark* of 25 March 2014, the ECtHR in particular: "(...) has recognised that "there are in general persuasive social reasons for giving special treatment to those who have a special link with a country" (see *Ponomaryov and Others v. Bulgaria* (dec.), no. 5335/05, 18 September 2007, concerning preferential treatment of "aliens of Bulgarian origin and Bulgarians living abroad") and, in particular, "to those whose link with a country stems from birth within it" (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, par. 88, concerning reunification of spouses). In our view, this principle applies equally to the existence of close ties with a country stemming from being a national for a certain period. The majority do not find it necessary to explain whether they are departing from the case-law authorities cited above or are finding the present application distinguishable from them, particularly from *Abdulaziz, Cabales and Balkandali,* which was explicitly analysed and relied upon by the Supreme Court in its consideration of the present case. I cannot interpret Article 14 of the Convention as aiming at achieving equality by any means, including by equating incommensurable interests. In the event of revocation of the impugned exemption clause, a feeling of satisfaction for the applicants that they would no longer be differentiated as migrants is perfectly understandable, but it is of the utmost importance that their core Article 8 right will remain intact (...)". See also: S.c. Nuñez, *The ECtHRs's judgment in Biao V. Denmark: Non-discrimination among nationals and family reunification as converging european standards ECtHR, Biao v. Denmark, Judgment of 24 May 2016*, in *Maastricht Journal of International & Comparative Law*, 2016, pp. 867ss. *Balogun v. United Kingdom of* 10 April 2012; In case: *Jeunesse v. Netherlands* of 3 October 2014 the ECtHR observed that: "(...) to have taken a somewhat similar position; both concerned the Netherlands (*Tuquabo-Tekle and Others v. the Netherlands* and *Şen c. Les Pays Bas* (...) the last mentioned decision not being available in English and not being cited by the Court in the present judgment). Both of these cases concerned the reunification of families by admitting a child to the territory of the host State (the Netherlands) where the parent or parents had legal residence. The integration of the children concerned into the family unit was regarded as necessary for their development in view of their young age (nine years in *Şen* and fifteen years in *Tuquabo-Tekle and Others*). It should be observed that neither of these two cases

tence" based on the spatial and/or personal localization of the case, which it has to regulate, many times in the european case law and the ECtHR "for functional reasons" of the conduct of legal situations once they have been constituted. In this sense, an important step has been given by the Great Chamber on the case *X. v. Latvia* of 26 November 2013, in which the Court notes the importance of harmonizing international instruments and refers to the Hague Convention of 1980[62]. In particular the Judge Pinto de Albuquerque has declared that: "(...) Justice for children, even summary and provisional justice, can only be done with a view to the entirety of the very tangible case at hand (...) of the actual circumstances of each child involved. Only an in-depth or "effective" evaluation of the child's situation in the specific context of the return application can provide such justice (...)"[63]. Before the last above case the European Court of Human Rights in the cases: *Maumousseau and Washington v. France* of 6 December 2007; *Raban v. Romania* of 26 October 2010; *Blaga v. Romania* of 1st July 2014; *Adžić v. Croatia* of 12 March 2015, which the Court has declared that: "(...) the Hague Convention is not suited to situations relating to the end of family life[64] and submits that the separation of a child under seven from his mother will always create a grave risk of harm as understood by art. 13(1)(b), 1980 Hague Convention. Equally there have long been calls for the Convention not to apply to applications made by left behind fathers whose custody right is limited to a right of veto over the removal of the child from the jurisdiction (...)"[65]; *Neulinger and Shuruk v. Switzerland* of 6 July 2010, reiterated the obligations under the ECHR and declared that:

concerned family-formation during an illegal overstay in the host State, but that, on the contrary, in both instances the request to have the children enter the State was filed before they had entered the State, in compliance with the applicable immigration law–quite unlike the situation in the present case. In both of these previous cases, where the children themselves were applicants, the Court concluded that the Netherlands had a positive obligation to allow the children to reunify with their parent(s) lawfully on Dutch territory (...)". *Kiyutin v. Russia* of 10 March 2011; *Novruk and others v. Russia* of 15 March 2016; *Pajić v. Croatia* of 23 February 2016. See for the cases above: D. Xenos, *The positive obligations of the state under the European Convention of Human Rights,* ed, Routledge, 2012, pp. 138ss. M. Feria Tinta, *The landmark rulings of the inter-American Court of Human Rights on the rights of the child. Protecting the most vulnerable at the edge,* Martinus Nijhoff Publishers, 2008, pp. 202ss. E. Brems, R. Desmet, *Integrated human rights in practice: Rewriting human rights decisions,* Edward Elgar Publishing, 2017, pp. 173ss. O. De Schutter, *International human rights law: Cases, materials, commentary,* Cambridge University Press, 2014, pp. 996ss. M.w. Janis, R.s. Kay, A.w. Bradley, *European human rights law: Text and materials,* Oxford University Press, 2008. S. PEERS, *EU justice and home affairs law: vol. II,* Oxford University Press, 2016, pp. 76ss. K. Trimmings, *Child abduction within EU*, Hart Publishing, 2013, pp. 1968ss. M. Woolf, *Coming of age? The principle of the best interests of the child,* in *European Human Rights Law Review,* 2003, pp. 208ss. M. De Boer-Buquicchio, *The protection of children's right in Europe and the UN Convention on the rights of the child,* in P. Mahoney and others (a cura di), *Protection des droits de l'homme, la perspective europèenne: Mèlanges* à *la mèmoire de Rolv Ryssdal,* ed. C. Heymanns Verlag, 2000, pp. 346ss. U. Kilkelly, *Effective protection of children's rights in family cases: An international approach*, in *Transnational Law and Contemporary Problems,* 2002. T. Schriwer, *Establishing an affirmative governmental duty to protect children's rights. The European Court of Human Rights ad a model for the United States Supreme Court,* in *University of San Francisco Law Review,* 2000. C. Mcglynn, *Families and the European Union Charter of fundamental rights: Progressive change or entrenching the status quo?*, in *European Law Review,* 2001, pp. 588ss. Kmk. De Vries, *Rewriting Abdulaziz: The ECtHR Grand Chamber's ruling in Biao v. Denmark*, in *European Journal of Migration and Law,* 2016, pp. 468ss. F. Ippolito, *Migration and asylum cases before the Court of Justice of the European Union: Putting the EU Charter of fundamental rights to test?*, in *European Journal of Migration and Law*, 2015, pp. 2ss. J. MINK, *EU Asylum law and human rights protection: Revisiting the principle of non-refoulement and the prohibition of torture and other forms of ill-treatment,* in *European Journal of Migration and Law*, 2012. S. Schmahl, *Kinderechtskovention, Nomos Kommentar*. C.H. Beck, 2017, pp. 356ss.

[62] In case: *X v. Latvia* of 26 November 2013, par. 94, the Court has declared that: "(...) The decisive issue is whether the fair balance that must exist between the competing interests at stake-those of the child, of the two parents, and of public order-has been struck, within the margin of appreciation afforded to States in such matters (...), taking into account, however, that the best interests of the child must be of primary consideration and that the objectives of prevention and immediate return correspond to a specific conception of the best interests of the child (...)". See also the opposite approach from the Inter American Commission in the Case: *X and Z v. Argentina* in the Report of 3 October 2000, no. 71/00: "(...) the Commission ruled that Argentina had violated the Hague Convention of 1980, in a case in which the Argentine authorities had ordered the immediate return of the child to Spain before the measure was issued (...) The Commission underlined that the purpose of the Hague Convention is to prevent the law from being circumvented by prejudicing the child's interests whenever one of his parents illegally moves him from the place of his habitual residence and tries to block (...)".

[63] J. Eekelaar, *The role of the best interests principle in decisions affecting children and decisions about children*, in *The International Journal of Child Rights,* 2015, pp. 5ss. H. Stalford, *Children and the European Union,* Hart Publishing, 2012.

[64] A.E. Rossi, B. Stark, *Playing solomon: Federalism, equitable discretion, and the Hague Convention on the Civil aspects of International Child Abduction*, in *Roger Williams University Law Review*, 2014, pp. 21ss.

[65] H. Muir Watt, D.P. FernÁNdez Arroyo, *Private international law and global governance,* Oxford University Press, 2014.

"(...) Article 8 of the Convention imposed on domestic authorities a particular procedural obligation. When assessing an application for a child's return, the Courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case (...) (b)oth a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention[66] and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning Convention, of the domestic Courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague which must be interpreted strictly is necessary (...)"[67]. In the 2015 version of the Commission's Practice Guide for the Application of the Brussels IIa Regulation, it is put forward that the mere existence of protective procedures in the Member State of origin is not sufficient, rather "it must be established that the authorities in the Member State of origin have taken concrete measures to protect the child in question". This is a requirement for the internal judge to instruct the case by giving adequate space to the texts, listening to the child, and all the evaluation elements that enable the child's situation to be adequately framed[68].

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[66] The same justification and spirit was obtained from the Court of Justice in the case: *D. Bradbrooke v. A. Aleksandrowicz* C-498/14 of 9 January 2015.

[67] See in argument: D. Rietiker, *Un enlèvement d'enfant devant la grande chambre de la Cour européenne des droits de l'homme: L'affaire Neulinger et Shuruk: Suisse analysée à la lumière des méthodes d'interprétation des traités internationaux*, in *Revue Rrimestrielle des Droits de l'Homme*, 2012, pp. 394ss. S. Vigers, *Mediating international child abduction cases. The Hague Convention*, Hart Publishing, 2011. K. Trimmings, *Child abduction within the European Union*, Hart Publishing, 2013, pp. 1998ss. J. Viljanen, H. E. Heiskanen, *The European Court of Human Rights A guardian of minimum standards in the context of immigration,* in *Netherlands Quarterly of Human Rights*, 2016. H. Keller, C. Heri, *Protecting the best interests of the child. International child abduction and the European Court of Human Rights,* in *Nordic Journal of International Law,* 2015, pp. 270ss. V. Stephens, *Children's welfare and human rights under the 1980 Hague abduction Convention*, ed. Routledge, 2012. D. Martiny, Internationale *Kindesentführung und europäischer Menschenrechtsshutz-Kollission unterschidlicher Ansätze*, in K. Hilbig-Lugani, D. Jakob, G. MäSch, P. Reuss, C. Schmid (eds.), *Zwischenbilanz-Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag,* Geseking Verlag, 2015, pp. 598ss. A. Schulz, *The enforcement of child return orders in Europe,* in *International Family Law,* 2012, pp. 44ss. M. Bogdan, *Some Reflections on the Treatment by the ECHR of the Hague Convention on the Civil Aspects of International Child Abduction,* in J.J. Forner I Delaygua, C. GonzÁLez, Beilfuss, R. ViÑAs FarrÉ, *Entre Bruselas y la Haya: Estudios sobre la unificaciòn internacional y regional del derecho internacional privado. Liber amicorum Alegrìa Borràs*, ed. Marcial Pons, 2013, pp. 214ss. R. Schuz, *The Hague child abduction Convention a critical analysis,* Hart Publishing, 2014, pp. 24ss. L.J. Silberman, *The Hague Convention on Child Abduction and unilateral relocations by custodial parents: A perspective from the United States and Europe-Abbott, Neulinger, Zarraga*, in *Oklahoma Law Review*, 2011. L. Walker, P. Beaumont, *Shifting the balance achieved by the abduction Convention: The contrasting approaches of the European Court of Human Rights and the European Court of Justice*, in *Journal of Private International Law,* 2011, 243ss. P. Mceleavy, *The European Court of Human Rights and the Hague child abduction Convention: Prioritising return or reflection?,* in *Netherlands International Law Review,* 2015, pp. 366ss. G. Lupşan, *Some aspects of international children abduction. Theoretical and practical approach form the perspective of the european law and judicial practice*, in *EIRP Proceedings,* 2015. T. Kruger, *International child abduction: The inadequacies of the law,* Hart Publishing, 2011, pp. 252ss. N. Lowe, V. Stephens, *Global trends in the operation of the 1980 Hague Abduction Convention*, in *Family Law Quarterly*, 2012, pp. 42ss. L. Walker, *The impact of the Hague Abduction Convention on the rights of the family in the case-law of the European Court of Human Rights and the UN Human Rights Committee: The danger of Neulinger,* in *Journal of Private International Law*, 2010, pp. 650ss. In particular the author has declared that in the case *Neulinger* that: The Court of Human Rights insisted: "(...) that it had the responsibility to ascertain whether the domestic Courts conducted an in-depth examination of the entire family situation and of a whole series of factors as to what would be best for an abducted child in the context of an application for return. But that inquiry misconceives the role of a Court hearing a petition for return, which under the Convention is to ensure the child's safety and well-being in making an order of return. The assessment of the entire family situation is for the Courts of the habitual residence to make in its merits determination of custody (...)". See also: J. Chamberland, *Whither the "best interests of the child" in the 1980 Child Abduction Convention?,* in *International Family Law*, 2012, pp. 30ss. In the same spirit see from the Court of justice the case *Barbara Mercredi v. Richard Chaffe* C-497/10 PPU of 10 December 2010. In particular the Court of Justice under the Brussels IIa Regulation has declared that: "(...) the place which reflects some degree of integration by the child in a social and family environment. In particular, duration, regularity, conditions and reasons for the stay on the territory of the Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State should all be taken into consideration obviously appropriate to the child's age (...)".

[68] J. Meyer-Ladewig, M. Nettesheim, S. Von Raumer, *EMRK Europäische Menschenrechtskonvention*, ed. Helbing & Lichtenhahn Verlag, 2017, pp. 287ss.

12. The Court's considerations as regards the infringement of art. 8 of the ECHR are essentially analogous to those already expresses in the case Š*neersone & Kampanella v. Italy* of 12 October 2011[69], in which the Court recognized the lack of due consideration by the judge of the State of origin of the elements relating to the psychological effects of the child's posting[70]. The European Court's attention to the principles set out in the Universal Human Rights Conventions is based on the customary nature of the obligation to protect family relations and the rights of the child as well as the obligation for States to ensure fair trial as one of the fundamental principles of the European Convention on Human Rights[71], which according to Williams: "(...) Procedural due process may be classed as; 1) Positivist due process which means that the right to due process is limited to that prescribed by positive law, 2) Judicial intervention due process which mandates limited control on the legislature. This interpretation requires that any coercive action must be preceded by a determination from an independent and impartial Tribunal. 3) Fair procedures due process denotes not only compliance with law and the curial process but also compliance with some normative conception of fairness 4) Common law procedures[72]: Due process this form of due process allows

[69] See in particular the previous cases from the ECtHR: *Varnava and others v. Turkey* of 18 September 2009; *Narinen v. Finland* of 19 December 1997; *Haig v. Aiken* of 10 September 1999; *Jamil v. France* of 27 May 1999 and after the sentence *Kampanella* the next cases: *Malysh and Ivanin v. Ukraine* of 9 September 2014; *Sokolov and others v. Serbia* of 14 January 2014. In argument: B. Rainey, E. Wicks, C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, Oxford University Press, 2017.

[70] See the case: *Povse v. Austria* of 18 June 2013, par. 3

[71] E. GruodytÉ, S. Kirchner, *The right to a fair trial as the legal basis for legal aid*, in T. KerikmÄE, *Protecting human rights in the EU: Controversies and challenges of the Charter of Fundamental Rights*, ed. Springer, 2014, pp. 89ss.

[72] See under the common law the next important cases of equal trial from United States, Australia and Canada: *S v. Khanyile and Another* 1988 (3) SA 795 (N) at 809 (S. Afr.); *Dietrich v. The Queen* (1992) 177 CLR 292, 299 (Mason CJ and McHugh J); *Cf R v. DA* (2008) ACTSC 26(31 March 2008) (7)-(8) (Higgins CJ); *Dietrich v. The Queen* (1992) 177 CLR 292; See, G. Williams, S. Brennan, A. Lynch, Blackshield, Williams, *Australian constitutional law and theory: Commentary and materials,* Federation Press, 5th ed, 2010, pp. 701ss. See also: *Weiss v. The Queen* (2005) 224 CLR 300: "(...) The right also manifests itself it the power of the Court to punish a contempt of Court (...)"; *X7 v. Australian Crime Commission* (2013) 298 ALR 570, 583-4 (38) (French CJ and Crennan J); *Hammond v. Commonwealth* (1982) 152 CLR 188. See, J. Spigelman, *Statutory interpretation and human rights,* in *Mcpherson Lecture Series*, University of Queensland Press, 2008, pp. 62ss. J. Spiegelman, *Principle of legality and the Clear Statement Principle,* in *Australian Law Journal,* 2005, pp. 769ss. Cfr: R v. PLV (2001) 51 NSWLR 736, 743; *Bryne v. Australian Airlines Ltd* (1995) 185 CLR 410, 459 (McHugh and Gummow JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 577; *Electrolux Home Products Pty Ltd v. Australian Workers' Union* (2004) 211 CLR 309, 328; *Momcilovic v. The Queen* (2011) 245 CLR 1, 46-7 (43) (French CJ); *Coco v. The Queen* (1994) 179 CLR 427, 437; *R v. Secretary of State for the Home Department;* Ex parte Simms (2000) 2 AC 115, 131-2 (Lord Hoffman); *Potter v. Minahan* (1908) 7 CLR 277, 304; *Sargood Bro's v Commonwealth* (1910) 11 CLR 258, 279 (O' Connor J); *Ex Parte Walsh and Johnson; In Re Yates* (1925) 37 CLR 36, 93 (Issacs J); *Lee v. New South Wales Crime Commission* (2013) 302 ALR 363, 447-52 (307-14) (Gageler and Keane JJ); *Environment Protection Authority v. Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 517. See for the above cases: D. Meagher, *The principle of legality in the age of Rights*, in *Melbourne University Law Review*, 2011, pp. 449ss. See also: *S v. Boulton* (2006) 151 FCR 364, 383 (Jacobson J); *Barton v. The Queen* (1980) 147 CLR 57, 103 (Gibbs ACJ and Mason J); *Jago v. District Court* (NSW) (1989) 168 CLR 23, 47 (Brennan J); *Moevao v. Department of Labour* (1980) 1 NZLR 464, 481 (Richardson J) cited in *Jago v. District Court* (NSW) (1989) 168 CLR 23, 29-30 (Mason CJ); *Dupas v. The Queen* (2010) 241 CLR 237, 243; *Police (SA) v. Sherlock* (2009) 103 SASR 147, 158-9 (Doyle CJ). *Dupas v. The Queen* (2010) 241 CLR 237, 251; *Moti v. The Queen* (2011) 245 CLR 456, 464; *Attorney General (NSW) v. Watson* (1987) 20 Leg Rep SL 1 (Mason CJ, Wilson and Dawson JJ); See, *Jago v. District Court* (NSW) (1989) 168 CLR 23, 76 (Gaudron J); *R v. Milne* (No 1) (2010) 260 FLR 166,186-7 (Johnson J); *R v. Glennon* (1992) 173 CLR 592, 605 (Brennan J); *Barton v. The Queen* (1980) 147 CLR 75, 11 (Wilson J) *Moevao v. Department of Labour* (1980) 1 NZLR 464, 481 (Richardson J) cited in Jago v. District Court (NSW) (1989) 168 CLR 23, 29-30 (Mason CJ); *Momcilovic v. The Queen* (2011) 245 CLR 1, 49 (French CJ); from United Kingdom: *Ghaidan v. Godin-Mendoza* (2004) 2 AC 557, 572 (Lord Nicholls), 601 (Lord Roger). See in argument: A. Gray, *Constitutionally Protecting the Presumption of Innocence,* in *University of Tasmania Law Review*, 2012, pp. 148ss. G. Williams, *The one and only substantive due process clause*, in *Yale Law Journal,* 2010, pp. 408ss. N.s. Chapman, M.w. Mcconnel, *Due process as separation of powers,* in *Yale Law Journal,* 2012, pp. 1672ss. S. Gardbaum, *How successful and distinctive is the Human Rights Act? An expatriate comparatist's assessment,* in *The Modern Law Review,* 2011, pp. 201ss. A. Cossins, *Time out for Longman: Myths, science and the common law*, in *Melbourne University Law Review,* 2010, pp. 69ss. J. Spiegelman, *The truth can cost too much: The principle of a fair trial*, in *Australian Law Journal,* 2004, pp. 36ss. D. Moeckli, S. Shah, S. Sivakumaran (eds) *International Human Rights Law,* Oxford University Press, 2010, pp. 315ss. T.r.s. Alan, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy,* in *Cambridge Law Journal,* 2008, pp. 423ss. A. Zimmermann, *The rule of law as a culture of legality: Legal and extra–legal elements for the realisation of the rule of law in society,* in *Murdoch University Electronic Journal of Law,* 2007, pp. 17ss. I. Langford, *Fair trial: The history on an idea,* in *Journal of Human Rights,* 2009, pp. 51ss. M. Bagaric, T. Alexander, M. Ebejer, *The illusion that is the right to a fair trial in Australia*, in *Australian Journal of Human Rights*, 2011, pp. 65ss. T.h. Bingham, *The rule of law,* ed. Penguin Books, 2010, pp. 90ss. A.j. Wistrich, C. Guthrie, J. Rachlinski, *Can judges ignore inadmissible information? The difficulty of deliberately disregarding,* in

individuals to claim due process based on historical common law rules[73]; Conceptions of substantive due process constitute; 1) Vested rights due process refers to the notion, based on natural law, which prescribes that where rights become vested in persons, the legislature cannot curtail such rights; 2) General law due process denotes that legislatures cannot deprive rights by specific enactment. Rather, legislation must only prescribe general rules; 3) Police powers due process which mandates that legislation which is beyond the scope of legislative power is invalid; 4) Fundamental Rights: Due process places weight on the identification of certain interests which are so fundamental that the government cannot infringe on them (...)"[74]. On the other hand, given the high number of States that have acceded to those Conventions, it is often the case that States involved in a dispute for non compliance with these principles are bound to follow their obligations. This entitles the European Court to take this into account for the purposes of the interpretation of the ECHR[75], as envisaged in art. 31, par. 3, lett. c) of the 1969 Vienna Convention on the Law of Treaties, which provides: "(...) that, for the purposes of the interpretation of a treaty, other than those resulting from other conventions concluded between States Parties may also be taken into account (...)"[76]. In this way, the case law of the European Court allows an extension of the benchmarks that national Courts must consider in order to correctly apply the public order limit; and let us not forget that the ECtHR carries out mixed functions of control and guarantee of uniformity in the method of application of Universal Conventions such as the Hague, with no judicial review mechanisms and can become a contribution to the principles set out therein.

13. In the case of *Hämäläinen v. Finland* of 16 July 2017, it is plausible that the fundamental right of the individual is not isolated and can not be opposed to another right, or vested by the same person against the State, or which is owned by another person[77]. In the *Hämäläinen* judgment, the State

University of Pennsylvania Law Review, 2005, pp. 1251ss. C.T. Kotuby, *General principles of law, international due process and the modern role of private international law*, in *Duke Journal of Comparative & International Law*, 2013, pp. 417ss. T. Sourdin, N. Burstyner, *Cost and time hurdles in civil litigation: Exploring the impact of pre-action requirement*, in *Journal of Civil Litigation and Practice*, 2013, pp. 66ss. J. Faulks, *A natural selection? The potential and possibility for the development of less adversarial trials by reference to the experience of the Family Court of Australia*, in *University of Western Australia Law Review,* 2010, pp. 185ss. Under the ultimate author: "(...) The right to a fair trial must also be balanced against the interests of society in the allocation of limited resources. This is pertinent in light of recent funding cuts to Courts in some Australian jurisdictions (…) Courts can only conduct "as fair a trial as practicable" in light of resources (...) The tension between limited resources and the fair trial is best expressed by White J. who observes (...) that due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person (...)". In the same spirit see also: F. BUCKLEY, *Pre-trial publicity, social media and the "fair trial": Protecting impartiality in the Queensland criminal justice system,* in *Queensland Lawyer,* 2013, pp. 42ss.

[73] See, D. Liakopoulos, *The common law rights in the jurisprudence of the European Court of Human Rights,* in *International and European Union Legal Matters***,** 2015, pp. 17ss.

[74] G. Williams, *The Victorian Charter of Human Rights and responsibilities: Origins and scope*, in *Melbourne Law Review,* 2006, pp. 893ss

[75] K. Rohleder, *Grundrechtsschutz im europäischen Mehrebenensystem,* ed. Nomos, 2008, pp. 342ss.

[76] See, V. Tzevelekos, *The case of article 31 (3) (c) of the VCLT in the case law of the ECtHR an effective anti-fragmentation tool or a selective loophole for the reinforcement of human rights teleology*, in *Michigan Journal of International Law*, 2010, pp. 622ss. O. Korten, P. Klein, *The Vienna Convention on the law of Treaties. A Commentary*, Oxford University Press, 2011. C. Mclachlan, T*he Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, in *The International and Comparative Law Quarterly,* 2005, pp. 280ss. M.e. Villiger, *Articles 31 and 32 of the Vienna Convention on the Law of Treaties in the case-law of the European Court of Human Rights,* in J. Bröhmer, R. Bieber, C. Langenfeld, S. Weber, J. Wolf, *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress,* ed. C. Heymanns, 2005, pp. 318ss. O. Corten, P. Klein, *The Vienna Conventions on the law of treaties. A commentary,* Oxford University Press, 2011.

[77] See in argument: D. Thym, *Forum for private and family life under article 8 ECHR in immigration cases: A human right to regularize illegal stay?*, in *The International and Comparative Law Quarterly*, 2008, pp. 89ss. N. Arolf Lorenz, X. Groussot, G. Thor Petursson, *The european human rights culture: A paradox of human rights protection in Europe,* Martinus Nijhoff Publishers, 2013, pp. 165ss. L. Magi, *Same-sex couples before the inter-american system of human rights*, in D. Gallo et al. (eds.), *Same-sex couples before national, supranational and international jurisdictions*, ed. Springer, 2014. D.a. Gonzalez Salzberg, *Confirming (the illusion of) heterosexual marriage: Hämäläinen v. Finland*, in *Journal of International and Comparative Law*, 201, pp. 5ss. P. Johnson, *The choice of wording must be eegarded as deliberate: Same-sex marriage and article 12 of the European Convention on Human Rights*, in *European Law Review*, 2015, n. 2. P. Dunne, *Marriage dissolution as a pre-requisite for legal gender recognition*, in *The Cambridge Law Journal*, 2014. M. D'amico, C. Nardocci, *LGBT rights and the way forward: The evolution of the case law of the ECtHR in relation to transgender individual's identity*, in *ERA Forum*, 2016. A. Tryfonidou, *EU free movement law and the legal recognition of same-sex relationships: The case for mutual recognition*, in *Columbia Journal of European Law,* 2015, pp. 242ss. T. E. Lagrand, *Mutual recognition of same-sex marriages*

may enjoy a certain margin of discretion, which must be exercised in accordance with the principle of reasonableness. In case: *Šneersone and Kampanella v. Italy* of 12 July 2011, it should be noticed that the conflict between two subjects in the enjoyment of family life prevails a different right and considered to be paramount, that of the minor. Similarly, in the cases of *Carlos Garcia Avello v. Belgian State* C-148/02 of 2 October 2003 and *S. Grunkin and D.R. Paul* C-353/06 of 14 October 2008 the Court of Justice is noted that a conflict between two subjects in the enjoyment of family life[78] prevails a different right and considered to be paramount, that of the minor[79], especially in order to avoid the limping relationships in the European legal space based on the fundamental freedoms of movement of the European Union[80] reinvigorating for another time the position of the Court seeking to safeguard the free movement, imposing on the subject an identity in which it was denied. In the absence of uniform rules of conflict, the Court has used the general principles of european law to achieve the coordination of national rules by avoiding any assessment of the linkage criteria in general and prejudicing the choices of the

from an EU immigration law perspective, in A. Schuster, (ed.), *Equality and justice: Sexual orientation and gender identity in the XXI Century*, ed. Forum, 2011, pp. 252ss. K. Lenaerts, *Federalism and the rule of law: Perspectives from the European Court of Justice*, in *Fordham International Law Journal*, 2011, pp. 1360ss. J. Rijpma, N. Koffeman, *Free movement rights for same-sex couples under EU law: What role to play for the CJEU?*, in D. Gallo et al. (eds.), *Same-sex Couples before national, supranational and international jurisdictions*, ed. Springer, 2014, pp. 474ss. M. Van Den Brink, *What's in a aame? Some lessons for the debate over the free movement of same-sex couples within the EU*, in *German Law Journal*, 2016, pp. 434ss. S. Marinai, *Recognition in Italy of same-sex marriages celebrated abroad: The importance of a bottom-up approach,* in *European Journal of Legal Studies*, 2016, n. 9.

[78] See ex multis, P. Johnson, *Homosexuality and the European Court of Human Rights*, ed. Routledge 2013. M. Lee, *Equality, dignity and same-sex marriage*, Martinus Nijhoff Publishers, 2010. A. Mowbray, *Cases, materials and commentary on the European Convention on Human Rights*, Oxford University Press, 2012. W. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, 2015. L. Lavrysen, *The scope of rights and the scope of obligations,* in E. Brems, J. Gerards (eds), *Shaping rights in the ECHR:The role of the European Court of Human Rights in determining the ccope of human rights,* Cambridge University Press, 2013. G. Letsas, *The ECHR as a living instrument: Its meaning and legitimacy,* in A. Føllesdal, B. Peters, G. Ulfstein (eds), *Constituting Europe,* Cambridge University Press, 2013, pp. 289ss. P. Mahoney, R. Kondak, *A starting point or destination for comparative-law analysis by the European Court of Human Rights?,* in M. Andenas, D. Fairgrieve (eds), *Courts and comparative law,* Oxford University Press, 2015. T. Zwart, *More human rights than Court: Why the legitimacy of the European Court of Human Rights is in need of repair and how it can be done*, in S. Flogaitis, T. Zwart, J. Fraser (eds), *The European Court of Human Rights and its discontents: Turning criticism into strength*, Edward Elgar Publishing, 2013. A. Verbeke, A. Scherpe, J. Declerck, C. Helms, P. Senaeve (eds.), *Confronting the frontiers of family and succession law–Liber amicorum Walter Pintens,* ed. Intersentia, 2012, pp. 1128ss. J. Scherpe, *Towards marriage for same-sex couples–The international development*, in *Lesben-und-Schwulenverband Deutschland (LSVD), Vom Verbot zur Gleichberechtigung– Die Rechtsentwicklung in Deutschland, Festschrift für Manfred Bruns*, ed. Hirschfeld-Eddy-Stiftung, 2012, pp. 92ss. K. GrÖGer, *Das Eingetragene Partnerschaft-Gesetz,* in Österreichische Juristen-Zeitung, 2010, pp. 199ss. N. Bamforth, *Families but not (yet) marriages? Same-sex partnership and the developing of European Convention "margin of appreciation",* in *Child and Family Law Quarterly,* 2011, pp. 132ss. L. Hodson, *Loveday: Ties that bind: Towards a child-centred approach to lesbian, gay, bi-sexual and transgender families under the ECHR*, in *International Journal of Children's Rights*, 2012, pp. 504, according to the author: "(...) it cannot be in the best interest of (…) children to leave their important relationships of care outside of the legal framework of rights and responsibilities that are specifically designed to protect their interests simply on the basis of their parent's sexual orientation or gender identity (...)". L. Holning, *Rewriting Schalk and Kopf: Shifting the locus of deference,* in E. BREMS (ed.), *Diversity and european human rights: Rewriting judgments of the ECHR,* Cambridge University Press, 2013, pp. 247ss. J. Sullivan, *Closed material procedures and the right to a fair trial*, in *Maryland Journal of International Law,* 2014, pp. 270ss. M. Saez, *Same-sex marriage, same-sex cohabitation, and same-sex families around the world: Why "same" is so different?*, in *American University Journal of Gender Social Policy and Law*, 2011, pp. 18ss. C.e. Smith, *Equal protection for children of same-sex parents,* in *Washington University Law Review*, 2013, pp. 1590ss. R. Butterfield Isaacson, *"Teachable moments": The use of child-centered arguments in the same-sex marriage debate,* in *California Law Review*, 2010, pp. 124ss. Y.l. Hillel, *Resolving interstate conflicts over same-sex non-marriage*, in *Florida Law Review*, 2011, pp. 48ss.

[79] See the cases of the ECtHR: *Daròczy v. Hungary* of 1st July 2008; *Cusan and Fazzo v. Italy* of 7 January 2014, par. 55ss.

[80] See, F. Niedrist, *Las cláusulas de los derechos humanos en los tratados de libre comercio de la Unión Europea*, in *Anuario Mexicano de Derecho Internacional*, Editado por el Instituto de Investigaciones Jurídicas de la UNAM, 2011. In particular the author declared that: "(...) supremacía del bien común internacional sobre el bien común nacional, afectando el sentido y alcance de la soberanía estatal. Así se bosqueja una nueva estructura de poder supranacional y supraestatal, generándose un orden público internacional y supraestatal cada día más evidente. Este tiene como sujeto básico la dignidad de la persona y tiene como fin el reconocimiento, garantía y promoción efectiva de los derechos humanos, tal como los ha definido la comunidad internacional y los órganos reguladores de los sistemas de protección del Derecho Internacional de los derechos humanos (...)". I. BlÁZquez RodrÍGuez, *Libre circulaciòn de personas y derecho internacional privado: Un anàlisis a la luz de la jurisprudencia del Tribunal de justicia de la Uniòn Europea,* in *Cuadernos de Derecho Transnacional,* 2017, pp. 106-126

european legislature in advance, as is also apparent from the practice legislation *in tempis*. An incompatibility with european law of a Member State's refusal based on its rules of private international law has been established to recognize the name given to a person in another Member State and registered in the civil status registers of that State[81]. Judges are therefore based on relations between States adopting different material solutions and different linking criteria[82]. Failing to protect the former, the second was hindered, and in that case the Court tried to bring both aspects of personality and freedom of movement into line. In fact, the case law of the Court of Justice, which does not recognize a criterion of prevalence among (plural) citizenship possessed by a person, as in the case of the Court of Justice *Hadadj v. France* C-168/08 of 16 July 2009, admitted that the latter could freely choose between them. The principle of freedom can be extended even by the judgment in *Grunkin* and *Paul,* in which the person concerned had a single nationality[83] and in the case of the positive conflict of the laws of habitual residence[84] and citizenship[85], the choice is still to be met by the interested parties, in this case reaffirming the principle of autonomy[86] which best suits its interests, one of the corollary principles of private international law[87].

III. Interpretation of the rules of private international law by the European Court of Human Rights and the Court of Justice of the European Union

14. In the Brussels system concerning jurisdiction and the recognition of judgments[88], an element that could squeeze the margin of appreciation[89] could be the need for the circulation of judgments.

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[81] D. Henich, *Anerkennung statt IPR: eine Grundsatzfrage*, in *Praxis des Internationalen Privat-und Verfahrensrechts*, 2005, pp. 423ss. H. P. Mansel, *Anerkennung als Grundprinzip des Europäischen Rechtsraums. Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen Privatrechts,* in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2006, pp. 652ss. B. Hess, *La influencia del Tribunal europeo de derechos humanos en el derecho procesal civil europeo*, in *Anuario Español de Derecho Internacional Privado,* 2015, pp. 35ss. M.L. Niboyet, Y.M. Serinet, *L'action en justice: comparaison entre le contentieux international et le contentieux interne,* in E. Pataut, S. Bollée, L. Cadiet, E. Jeuland, *Les nouvelles formes de coordination des justices étatiques,* in *Institut de recherche juridique de la Sorbonne*-IRJS Éditions, 2013, pp. 88ss.

[82] L. Mcconnell, *Extracting accountability from non-State actors in international law. Assessing the scope for direct regulation,* ed. Routledge, 2016, pp. 106ss.

[83] See the cases from the ECtHR: *Slivenko v. Latvia* of 23 January 2003; *Genovese v. Malta* of 11 October 2011, parr. 29, 33.

[84] See in particular: B. Rentsch, *Der gewöhnliche Aufenthalt im System des Europäischen Kollisionsrechts,* ed. M. Siebeck, 2017.

[85] D. Baetge, *Habitual residence*, in J. Basedow, K.J. Hort, R. Zimmerman, A. Stier, *Encyclopedia of european private law,* op. cit.,

[86] C. Kohler, *L'autonomie de la volonté en droit international privè: un principe international entre libèralisme et ètatisme,* Martinus Nijhoff Publishers, 2013. A. Diduck, *Autonomy and vulnerability in family law: The missing link*, in J. Wallbank, J. Herring, *Vulnerabilities, case and family law,* ed. Routledge, 2014, pp. 96ss. J. Garruthers, *Party autonomy in the legal Regulation of adult relationships: What place for party choice in private international law?*, in *The International and Comparative Law Quarterly*, 2012, pp. 882ss. S. Fulli-Lemaire, *L'autonomie de la volonté en droit international privè europèen de la famille,* in M. A. Parra Lucán, *Derecho y autonomia privada. Una visiòn comparada e interdiscplinar,* ed. Comares, 2017. C. Kohler, *L'autonomie de la volonté en droit international privè un principe universel entre liberalisme et ètatisme*, ed. Brill, 2017. A. Bucher, F. Guillaume, *Droit international privè,* Helbing & Lichtenhahn Verlag, 2017, pp. 156ss. L. Pereznieto Castro, *La autonomìa de la voluntad en el derecho internacional privado,* in *Revista mexicana de derecho internacional privado y comparado,* 2016.

[87] L. Carballo Piñeiro, X.e. Kramer, *The role of private international law in contemporary society: Global governance as a challenge*, in *Erasmus law review,* 2014. D. Martiny, *The impact of the European Union private international law instruments on european family law*, in J.m. Scherpe, *European family law,* op. cit., pp. 262ss.

[88] See, D. Liakopoulos, *Recognition and enforcement of foreign sentences in European Union context: The italian and german private international law cases,* in *International and European Union Legal Matters, working paper series,* 2010.

[89] See in argument: A. Legg, *The margin of appreciation in international human rights law: Deference and proportionality,* Oxford University Press, 2012, pp. 61ss. S. Peers, *Taking rights away? Limitations and derogations*, in S. Peers, A. Ward (eds.), *The EU Charter of Fundamental Rights: Politics, law and policy, Essays in European Law*, Hart Publishing, 2004, pp. 141, 169; The author declared that: "(...) the margin of appreciation is a concept designed by an international Court with plenary jurisdiction over human rights issues to take account of highly diverse situations, and has no role within a legal order with the different objectives characterized by limited competences and the goal of approximating the legislation and policy of its Member States in those areas (...)". See in argument: F. J. Mena Parras, *Democracy, diversity and the margin of appreciation: a theoretical analysis from the perspective of the international and constitutional functions of the European Court of Human Rights*, in *Re-*

This is a priority to which the work of the EU institutions is responsible, including the Court of Justice in defending the area of freedom, security and justice[90] and to pursue the objective of integration between the Member States laws[91]. This means that the Court of Justice follows a restrictive interpretation of the balance between human rights guarantees and the rules of the EU private international law system[92], taking into account the fundamental principle of mutual trust between the Member States and the equivalence of the effects of the application of the rules of either of the other Member States or of the exercise of jurisdiction by the judges of one or other country[93]. This spirit justifies the gradual decline in the execution of the verification powers, which in principle remain a prerogative of the judge of origin[94], while accepting the exception of the public order limit is a safeguard clause in the Regulations on private

vista Electrónica de Estudios Internacionales, 2015. J. Gerards, *Pluralism, deference and the margin of appreciation doctrine*, in *European Law Journal,* 2011, pp. 82ss. D. Spielmann, *Allowing the right margin: The European Court of Human Rights and the national margin of appreciation doctrine: Waiver or subsidiarity of european review?,* in *Cambridge Yearbook of European Legal Studies*, 2012, pp. 382ss. K. Dzehtsiarou, *Does consensus matter? Legitimacy of european consensus in the case law of the European Court of Human Rights*, in *Public Law*, 2011, pp. 534ss. M. Forowicz, *The ricochets of convergence in EU Law and the ECHR: Much ado about the margins of appreciation?,* in S. Besson, N. Levrat, E. Clerc (eds), *Interprétation en droit européen/Interpretation in European Law*, ed. Schulthess, 2011, pp. 102ss. S. Weatherill, *Can there be common interpretation of european private law?,* in *Georgia Journal of International & Comparative Law,* 2014. N.L. Arold Lorenza, X. Groussot, G. Thor Petursson, *The European Human Rights culture-A aaradox of human rights protection in Europe?,* Martinus Nijhoff Publishers, 2013, pp. 72ss. O. Pollicino, *A further argument in favour of the construction of a general theory of the domestic impact of jurisprudential supranational law. The genesis and the first steps of ECHR and EU legal orders*, in *Comparative Law Review,* 2012, pp. 4ss. M. Claes, M. De Visser, *The Court of Justice as a Federal Constitutional Court: A comparative perspective*, in E. Cloots, G. De Baere, S. Sottiaux (eds.), *Federalism in the European Union,* Hart Publishing, 2012, pp. 84ss. C. Mcgrudden, *Using comparative reasoning in human rights adjudication: The Court of Justice of the European Union and the European Court of Human Rights compared,* in *Cambridge Yearbook of European Legal Studies,* 2013, pp. 390ss. F. Fabbrini, *Fundamental rights in Europe: Challenges and transformations in comparative perspective*, Oxford University Press, 2014, pp. 30ss. A. Torres PÉRez, *Conflicts of rights in the European Union: A theory of supranational adjudication,* Oxford University Press, 2009, pp. 72ss. M. Fichera, E. Herlin-Karnell, *The margin of appreciation test and balancing in the Area of Freedom Security and Justice: A proportionate answer for a Europe of rights?*, in *European Public Law*, 2013, pp. 780ss. K. Lenaerts, *The Court's outer and inner selves: Exploring the external and internal legitimacy of the European Court of Justice,* in M. Adams, H. De Waele, J. Meeusen, G. Straetmans (eds.), *Judging Europe's judges: The legitimacy of the case law of the European Court of Justice*, Hart Publishing, 2013, pp. 15ss. C. Nivard, *Marge nationale d'appréciation et pluralisme dans la jurisprudence de la Cour de justice de Luxembourg,* in M. Levinet, *Pluralisme et juges européens des droits de l'homme,* ed. Bruylant, 2010, pp. 170ss. E. Brems, *Towards an integrated view on multilayered human rights,* in *Journal Européen Des Droits de L'Homme/ European Journal of Human Rights,* 2014. D. Liakopoulos, *The margin of appreciation in the jurisprudence of the European Court of Human Rights,* in *International and European Union Legal Matters***,** 2014. J. KratochvÍL, *The inflation of the margin of appreciation by the European Court of Human Rights***,** in *Netherlands Quarterly of Human Rights,* 2011, pp. 325ss. J. Gerards, *Diverging fundamental rights standards and the role of the European Court of Human Rights,* in M. Claes, M. De Visser, (eds.), *Constructing european constitutional law,* Hart publishing, 2015. J.h. Mena Gerards, *Pluralism, deference and the margin of appreciation doctrine***,** in *European Law Journal***,** 2011, pp. 82ss. K. Dzehtsiarou, *Does consensus matter? Legitimacy of european consensus in the case law of the European Court of Human Rights,* in *Public Law,* 2011, pp. 534ss. M.forowicz, *The ricochets of convergence in EU Law and the ECHR: Much ado about the margins of appreciation?,* in S. Besson, N. Levrat, E. Clerc (eds), *Interprétation en droit européen/Interpretation in European Law,* ed. Schulthess, 2011, pp. 102ss. C. Mccrudden, *Using comparative reasoning in human rights adjudication: The Court of Justice of the European Union and the European Court of Human Rights compared***,** in *Cambridge Yearbook of European Legal Studies,* 2013, pp. 390ss.

[90] J. De Zwaan, *The new governance of justice and home affairs: Towards further supranationalism*, in S. Wolff, F.a.n.j. Goudappel, J. W. De Zwaan, (eds) *Freedom, security and justice after Lisbon and Stockholm,* T.M.C. Asser Press, 2011, pp. 25ss. G. De Burca, *After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?*, in *Maastricht Journal of European and Comparative Law*, 2013, pp. 169ss. D.a. Arcarazo, C.c. Murphy (ed.), *EU security and justice law after Lisbon and Stockholm,* Hart Publishing, 2014, pp. 66ss. V. Trstenjak, E. Beysen, *The growing overlap of fundamental freedoms and fundamental rights in the case-law of the CJEU,* in *European Law Review,* 2013, pp. 293ss where the authors consider the "(...) overlap of fundamental freedoms and fundamental rights (…) in the application and observance" of fundamental rights (...)". K. Lenaerts, *The principle of mutual recognition in the Area of Freedom, Security and Justice,* in *Il Diritto dell'Unione Europea,* 2015, pp. 528ss.

[91] M. Bogdan, U. Maunsbach, *European Union private international paw: An ECJ casebook*, Edward Elgar Publishing, 2012. G. Vancalster, *European private international law,* Hart Publishing, 2016.

[92] R.M. Moura Ramos, *Estudos de direito internacional privado da União Europeia*, ed. Impressa da Universidade de Coimbra, 2016, pp. 240ss.

[93] See in argument: R. Garnett, *Substance and procedure in private international law*, Oxford University Press, 2012. J. Devenney, *The transformation of european private law. Harmonisation, consolidation, codification or chaos?,* Cambridge University Press, 2013.

[94] See the case from the Court of Justice: *J.McB*, C-400/10 PPU of 5 October 2010, par. 59.

international law and is justified only in extreme cases. Its relevance is subject to certain conditions as if the decision was rendered in default; that the document instituting the proceedings has not been notified in good time[95], the rights of the defense must be guaranteed if the defendant has had a procedural conduct consisting in bringing the case to judgment and arguing for its own merits. Decisive is the fact that decisions produce mutually exclusive legal effects. Positions verified by *Trade Agency Ltd v. Seramico Investments Ltd* of 6 September 2012 where the Court of Justice has taken a position in relation to the limit of public order and the recognition of a judgment issued in another Member State, given the failure to state reasons of the judge of origin[96]; thus allowing it to decide: it is for the referring Court to test and evaluate with "global means"[97] the procedure and the relevant elements, and above all, if the decision to recognize involves "a manifest and defective injury to the defendant's right to a fair trial"[98], because of the inability to appeal against this decision in a useful and effective way[99]. By the judgment in *Gothaer Allgemeine Versicherung AG and others v. Samskip GmbH* C-456/11 of 15 November 2012 the Court of Justice has resolved the question of its jurisdiction in relations with other Member States. The Court has based itself on the Brussels system to recognize the external relevance of the judicial decision on jurisdiction and, in addition to the operative part of the judgment, the "reasoning of it, which constitutes the necessary foundation of the measure and, in fact, is indissociable from the latter (...)"[100].

15. Both the European Court of Justice and the Court of justice have followed different ways in their assessment but with similar results as to the compatibility of the judge in applying a rule in international private law and human rights[101]. The Charter of Fundamental Rights, in which the principles set out in the ECHR have been reproduced and formulated in more detail by incorporating fundamental rights as an integral part of the EU system, is capable of deeply affecting the interpretation and application of rules relating to space security, justice and freedom[102]. The Court must interpret the rules on

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[95] G. Mecarelli, *La signification et la notification transfrontières des actes judiciaires et extrajudiciaires en Europe, dix ans après,* in M. Douchy-Oudot, E. Guinchard, *La justice civile européenne en marche,* ed. Dalloz, 2012, pp. 96ss.

[96] In particular the Court has declared that: "(...) the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle (…) to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (...)".

[97] See, D. Solomon, *Die Renaissance des Renvoi im Europäischen Privatrecht, in Liber Amicorum Klaus Schurig*, ed. Gruyter, 2012, pp. 257ss.

[98] See, S. Joseph, M. Castan, *The International Covenant on Civil and Political Rights. Cases, materials, and commentary,* Oxford University Press, 2013. K. Gledhill, *Human rights acts: The mechanisms compared*, Hart Publishing, 2015. J. Rehman, *International human rights law,* ed. Pearson, 2010, pp. 186ss. C. Hillebrecht, *The power of human rights Tribunals: Compliance and domestic policy change,* in *European Journal of International Law*, 2014, pp. 1ss. C. Grabenwarter, K. Pabel, *Europäische Menschenrechtskonvention,* C. H. Beck, 2016. D. Harris, M. O'boyle, E. Bates, C. Buckley, *Warbrich law of the European Convention of Human Rights,* Oxford University Press, 2014. C. Rainey, E. Wicks, B. Ovey, *The European Convention on Human Rights,* Oxford University Press, 2014. P. Leanza, O. Pridal, *The right to a fair trial. Article 6 of the European Convention on Human Rights,* Kluwer Law International, 2014. M. Dahlberg, *It is not its task to act as a Court of fourth instance: The case of ECtHR,* in *European Journal of Legal Studies*, 2014, pp. 86ss. C. Mititelu, *The European Convention on human rights,* Danubius University Press, (EIRP Proceedings), 2015. P. Giliaux, *Droits europèens* à *un procès èquitable,* ed. Bruylant, 2012. B. Lavergne, M. Mezaguer, *Regards sur le droit au procès èquitable, in Institut Fèdèratif des Normes Juridiques*, Universitè Toulouse I, 2012.

[99] According to the Court of Justice the judge of *exequatur* under art. 34, par. 1 of Regulation n. 44/2001, is competent to verify the consistency between the information contained in the attestation of the Court of origin and the evidence: "(...) Whereas Art. 6, par. 1 ECtHR-corresponding to art. 47 of the Charter-has been interpreted by the ECtHR as requiring national Courts to state the reasons for the case, it should be possible for the referring Court to comply with Article. 34, par. 1 of the Rules of Procedure refuse to recognize a foreign decision disregarding that obligation (...)". There is an important case-law on compliance with the principles of the fair trial: as regards the configurability of the public order limit in the event of non-compliance with the contradiction see, inter alia, the *Gambazzi* case (judgment of 2 April 2009, C-394/07); with regard to the need to ensure effective judicial protection see also the *Alassini* case (judgment of 18 March 2010, cases C-317-320/08).

[100] T. Hartley, *Civil jurisdiction and judgments in Europe. The Brusells I Regulation, the Lugano Convention and the Hague choice of Court Convention,* Oxford University Press, 2017.

[101] C. Busch, H. Schulte-NÖLke, *EU Compendium. Fundamental rights and private law,* Sellier European Law Publishers, 2010, pp. 17ss.

[102] See in particular: J.c. Piris, *The Lisbon Treaty. A legal and political analysis*, Cambridge University Press, 2010, pp. 190ss. K. Lenaerts, *The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice*, in *The*

the judicial area not only in the light of the principle of the free movement of judgments, but also of the principles enshrined in the Charter, including the respect of defense guarantees during the proceedings in the country of origin (art. 48 (2))[103].

16. If the Court complies with the ruling by the Court of Justice, the European Court demonstrates its willingness to reject the appeal for breach of the ECHR rules[104]. This can be explained by the importance of the Charter's principles in the pre-litigation procedure before the Court of Justice. Thus, the European Court in the case of *Povse v. Austria* of 18 June 2013 found that the action brought by the Austrian Court on the return of a minor issued by the italian judicial authorities pursuant to Regulation n. 2201/2003 "on jurisdiction, recognition and enforcement"[105] as inadmissible of decisions on matrimonial matters and parental responsibility (Brussels II-bis)"[106]. In the case of matrimonial matters and parental responsibility[107] see also the case: *M.C.B v. L.E.* C-400/10 PPU of 5 October 2010 the CJEU which confirmed that: "(...) it was able to take account of the Charter when interpreting Brussels II Regulation (...) the Charter should

International & Comparative Law Quarterly, 2010, pp. 258ss. E. Herlin-Karnell, *Constitutional principles in the EU Area of Freedom, Security an Justice*, in D. Acosta, C. Murphy (eds), *EU security and justice law,* Hart Publishing, 2014, pp. 38ss. J. Menendez, *The existential crises of the European Union*, in *German Law Journal*, 2013, pp. 455ss. J. Neyer, *The justification of Europe, a political theory of supranational integration,* Oxford University Press, 2012. M. Fichera, E. Herlin-Karnell, *The margin of appreciation test and balancing in the Area of Freedom Security and Justice: A proportionate answer for a Europe of rights?,* op. cit., pp. 762ss. L. Pailler, *Le respect de la Charte de l'Union europèenne dans l'espace judiciaire europèen en matière civile et commerciale,* ed. Pedone, 2017. J. Fawcett, S. Shah, M. Shuilleabhain, *Human rights and private international law,* Oxford University Press, 2016. L. Burgorgue-Larsen, *La Charte des droits fondamentaux saisie per les jugès en Europe,* ed. Pedone, 2017. L. Coutron, C. Picheral, *Charte des droits fondamentaux de l'Union europèenne et Convention europenne des droits de l'homme*, op. cit.

[103] See also the passage contained in *J. McB*, case above in para. 53: "(...) It turns out, then, from Art. 52, n. (3) of the Charter, where the latter contains rights equivalent to those guaranteed by the ECHR, the meaning and scope of the Charter are the same as those conferred on them by that Convention. That provision does not, however, preclude that Union law gives greater protection. Under the terms of art. 7 of the same Charter, any person has the right to respect for his private and family life, his domicile and his communications. The text of art. 8, n. 1 of the ECtHR is identical to that of Art. 7, except for the fact that it uses the word "own correspondence" instead of "own communications". That being said, it must be held that that art. 7 contains rights equivalent to those conferred by art. 8, n. 1 of the ECtHR. It is therefore necessary to attribute to art. 7 of the Charter has the same meaning and scope as are conferred on art. 8, n. 1 of the ECHR in its interpretation of the case law of the European Court of Human Rights (...)". In argument: S. Peers, T. Hervey, J. Kenner, A. Ward, *The European Union Charter of fundamental rights. A Commentary,* C.H. Beck, Hart Publishing & Nomos, 2014. H. Keller, *Article 8 in the system of the Convention*, in A. Büchler, H. Keller, *Family forms and parenthood*, ed. Intersentia, 2016, pp. 28ss. J. Meyer, *Charta der Grundrecht der Europäische Union,* ed. Nomos, 2014. L. Coutron, C. Picheral, *Charte des droits fondamentaux de l'Union europèenne et Convention europenne des droits de l'homme, op. cit.*

[104] A. Tizzano, A. Rosas, R. Silva De Lapuerta, K. Lenaerts, J. Kokott (a cura di), *La Cour de Justice de l'Union europèenne sous la prèsidence de Vassilios Skouris (2003-2015)*, ed. Bruylant, 2015.

[105] W. Van Ballegooi, *The nature of mutual recognition in european law*, ed. Intersentia, 2015.

[106] In particular see the next cases from the Court of Justice: *OL v. PQ* C-111/17 PPU of 14 July 2017; *W and V v. X* C-499/15 of 15 February 2017; *Bradbrooke v. A. Aleksandroviczovej* C-498/14 PPU of 9 January 2015. J. Basedow, I. Meier, A.k. Schnyder, T. Einhorn, T. Girsberger, *Private law in the international arena. From national conflicts rules towards harmonization and unification. Liber amicorum Kurt Siehr,* T.M.C. Asser Press, 2000, pp. 739ss. G.p. Romano, *Conflicts between parents and between legal orders in respect of parental responsibility,* in *Yearbook of Private International Law*, 2014/2015, pp. 130ss. M. SATTLER, *The problem of parental relocation: Closing the loophole in the law of international child abduction*, in *Washington & Lee Law Review,* 2010, pp. 1710ss. J. Ferrer Í. Riba, *Parental responsibility,* in J. Basedow, K.j. Hort, R. Zimmerman, A. Stier, *Encyclopedia of european private law,* op. cit.

[107] See also: Doc. 14435 of 30 October 2017 entitled: Cross-border parental responsibility conflicts Report1 Committee on Social Affairs, Health and Sustainable Development. The above relation noticed that: "(...) in relation to Resolution 2079 (2015) "Equality and shared parental responsibility: the role of fathers", the best interests of the child must come first, also in parental authority (...) the committee wishes to emphasise that a parent's right to shared parental responsibility, joint custody or shared residence for a child can never supersede the rights of the child concerned. Every child has the right not to be separated from his or her parents, and to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. A child who is capable of forming his or her own views also has the right to express those views freely in all matters affecting him or her, the views of the child being given due weight in accordance with the age and maturity of the child. It is thus not sufficient for parents themselves or the competent courts to determine how parental responsibility, custody or the child's residences are to be shared-the views of the child concerned must be taken into account and his or her best interests must be given primacy (...)".

apply if *mutatis mundandis* with the ECtHR (...)"[108]. Of the same spirit in cases: *Purrucker I* C-256/09 of 15 July 2010 and *Purrucker II* C-296/10 of 9 November 2010, where the Court of Justice has recognized the opportunity: "(...) not to subordinate the decision on the return to the substance of the case, even if the first one is preceded by the latter where the Court deems it appropriate, for example for the hearing of the child or a full acquisition of evidence (…) it should be pointed out that the assessment of the jurisdiction by the Court of the Member State of enforcement in the case of a decision containing a provisional measure is not contrary to the prohibition of reviewing the jurisdiction. Before issuing the declaration of enforceability the Court seized still needs to verify whether the judgment falls under the scope of application of the Regulation"[109]. Therefore, the Court of justice is at the non return path adopted by the Refugee judge, which according to recital n. 30: "(...) may be replaced by a subsequent decision rendered in custody, after a thorough examination of the child's best interests, by the Courts of the Member State of the child's habitual residence[110] before his or her unlawful transfer or non return (...)[111]. Obviously, in the field of parental responsibility, the driver is the child's interest, leaving a wide margin of appreciation[112] to the judge that in the field of *forums non conveniens*[113] creates a lot of problems[114].

17. They are less concerned with the changes introduced on the subject of separation and divorce[115] but are not indifferent to the evolution of the notion of the family claiming that the fundamental principles of any democratic order are safeguarded. The European Court held that the conduct of the Court was in line with what the Court of Justice had ruled in a previous preliminary ruling on the same case, in the sense that the automatic mode of play (automatically come into play/*gebieterisch aufdrängen*)[116] was instrumental in respect of better protection of the interests of the child[117], and considered that "(...) EU law is capable of ensuring equivalent protection, although not identical, to that provided by the ECHR (...)"[118]. This approach is consistent with the ECtHR self restraint principle of exercising a trade union on behavior of Member States considered legitimate in the light of EU law[119] and as was envisaged by the interpretative pronouncement

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[108] See, S. Barriati, *Cases and materials on EU private international law,* Hart Publishing, 2011, pp. 193ss. J.m. Scherbe, *European family law. The impact of Institutions and Organisations on european family law,* Edward Elgar Publishing, 2016.

[109] T. Garber, *EU-Unterhaltsverordnung*, in j. kindl, c. meller-hannich, h.j. wolf (eds) *Gesamtes Recht der Zwangvollstreckung,* ed. Nomos, 2015.

[110] J. Atkinson, *The meaning of "habitual residence" under the Hague Convention on the civil aspects of international child abduction and the Hague Convention on the protection of children,* in *Oklahoma Law Review,* 2017, pp. 648ss.

[111] T. Rauscher, *Europäisches Zivilprozess-und Kollissionsrecht EuZPR/EuIPR, Kommentar,* Band I, Brüssel Ia-Vo. Otto Schmidt Verlag KG, 2016, pp. 1157ss.

[112] D. Liakopoulos, *The margin of appreciation in the jurisprudence of the European Court of Human Rights***,** in *International and European Union Legal Matters,* 2014, pp. 22ss.

[113] See in particular: R.a. Brand, S.r. Jablonski, *Forum non conveniens: History global practice and future under the Hague Convention on choice of Court agreements,* Oxford University Press, 2007, pp. 148ss. B. Workman, *Deference to the plaintiff in forum non conveniens cases*, in *Fordham Law Review,* 2017, pp. 874ss. R.a. Brand, *Challenges to forum non conveniens*, in *New York University of Journal of International Law & Politics,* 2013, pp. 1005ss. C.a. Whytock, *Some cautionary notes on the "chevronization" of transnational litigation***,** in *Stanford Journal of Complex Litigation,* 2013, pp. 468ss. B.j. Springer, *An inconvenient truth: How forum non conveniens doctrine allows defendants to escape State Court jurisdiction,* in *University of Pennsylvania Law Review***,** 2015, pp. 618ss. O. Frishman, *Should Courts fear transnational engagement?*, in *Vanderbilt Journal of Transnational Law***,** 2016, pp. 102ss.

[114] See in argument: M. Bogdan, *Private international law as component of the law of the forum,* in *Cours de l'Acadèmie de droit international de La Haye,* 2010, pp. 12ss

[115] A. Devers, M. Farge, *Le nouveau droit international privé du divorce:* à *propos du règlement Rome III sur la loi applicable au divorce,* in *La Semaine Juridique-Edition générale,* 2012, pp. 1277ss. P. bourel, P. De Vareilles-Sommiéres, y. loussouar, *Droit international privé* (10e édition), ed. Dalloz-Precis Dalloz, 2013

[116] See, Bundestrafgericht 30 March 2009, BG.2008.22 and BGE 119 IV 250.

[117] See the case of 1st July 2010, in case *D. Povse v. M. Alpago* C-211/10 PPU if 1st July 2010 and especially the par. 64. the interpretation of reserve of judge of origin is founded in the next case, too: *Aguirre Zarraga v. Pelz* C-491/10 PPU of 22 December 2010.

[118] P. MarguÉNaud, *La Cour europèenne des droits de l'homme,* op. cit.

[119] The expression of this principle is founded in the case: *Bosphorus Hava Vollari Turizim ve Ticaret Anonim Sirketi v. Ireland* of 30 June 2005. See in argument: K. Kuhnert, *Bosphorus double standards in european human rights protection?,* in *Utrecht Law Review*, 2006, pp. 170ss. F. Schorkopf, *The European Court of Human Rights judgment in the case of Bosphorus Hava Yollari Turìzm v. Ireland,* in *German Law Journal,* 2005, pp. 1256ss. T. Lock, *Beyond Bosphorus: The European Court of Human Rights case law in the responsibility of Member States of international organizations under the European Conven-*

of the *Cilfit* judgment (Srl CILFIT and *Lanificio di Gavardo SpA v. Ministry of Health* 283/81 of 06 October 1981) where the Court has stated "(...) any provision of Community law must be relied on its own context and interpreted in the light of all the provisions of that right, its aims and its evolution stage at the time when the application of the provision in question is adopted (…) of the terms of a provision of European Union law which does not contain any express reference to the law of the Member States for the purpose of determining its meaning and its scope must normally be an autonomous and uniform interpretation throughout the European Union, taking into account the context of the provision and the purpose pursued by the legislation in question (...)" [120]. By its judgment in *Krombach v. France* C-7/98 of 28 March 2000 of the Court of justice the right of the German Court to refuse recognition of a judgment rendered in France was based on a procedural rule which penalized the defendant, preventing him from pursuing his defense if he had not submitted himself in the process. The judgment of the Court of Justice did not bind the Court to a particular solution to the case (in reality, not to recognize the foreign judgment) but to rule out the non recognition of a breach of the Brussels if, in the Court's view there was a manifest incompatibility of the proceedings before the foreign Court with the fundamental safeguards of the defense. In the same case, the ECtHR, by judgment of 13 February 2001, sentenced France for failing to allow the accused to appear in Court under the French Code of Criminal Procedure, which deprived the defendant of the defense in judgment when an alleged crime was being challenged. The Court of justice referred to the case law of the European Court of Human Rights in defining the refusal to hear the defense of an accused absent from the hearing as a "manifest violation of a fundamental right" [121].

18. Within this framework, we can understand through the above mentioned jurisprudence that not only the fundamental "classical" rights can be considered as recognized by the European Convention on Human Rights, but freedom of movement and social rights must also be taken into account. Just think about the *Laval* cases[122] and *Viking* of the Court of Justice C-438/05 of 11 December 2007[123]; *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* C-341/05 of 8 December 2007 in which there was a conflict between the right to strike and the freedom to provide services, which from the point of view of fundamental rights may correspond with economic initiative. The Court of Justice also refers to the case *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* C-112/00 of 12 June 2003 which saw the right of expression and assembly and the free movement of goods as apposed to the Court of justice in the case of *Omega Spielhallen und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* C-36/02 C-36/02 of 14 October 2004 which likewise deals with commercial freedom. In this case, the Court of Justice did not rely solely on a general discussion of the free movement of services, but more was based on the relationship between a fundamental human right emphasized in a Member State (dignity) and the free providing services so as to find the link criteria that can simultaneously protect the various conflicting rights[124].

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tion on Human Rights, in *Human Rights Law Review,* 2010, pp. 530ss. C. Costello, *The Bosphorus ruling of the European Court of Human Rights: Fundamental rights and blurred boundaries in Europe,* in *Human Rights Law Review*, 2006, pp. 88ss. S. De Vries, U. Bernitz, S. Weatherill, T*he EU Charter of fundamental rights as a binding instrument: Five years old and grooming,* Hart Publishing, 2015, pp. 32ss. J. Negrelius, E. Kristoffersson, *Human rights in contemporary European law,* Hart Publishing, 2015, pp. 17ss. C. Büyükbay, D. Ertin, *EU-Skeptizismus am Bosporus?,* in *Zeitschrift f*ür *Internationale Beziehungen*, 2017, n. 2.

[120] See, L. Azoulai, *The part of future of EU law: The classics of EU law revisited on the 50th Anniversary of the Rome treaty,* Oxford University Press, 2010. G. Beck, *The legal reasoning of the European Court of Justice of the EU*, Hart Publishing, 2012. K. Lenaerts, J. Gutiérrez-Fons, *To say what the law of the EU is: Methods of interpretation and the European Court of Justice,* in *EUI Working Papers*, 2013. J. D. Lüttringhaus, Ü*bergreifende Begrifflichkeiten im europäischen Zivilverfahrens-und Kollisionsrecht,* in *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 2013, pp. 32ss.

[121] Par. 40 of the case *Krombach v. A. Bamberski* of the Court of Justice C-7/98 of 28 March 2000. J.p. Costa, *La Cour europèenne des droits de l'homme. Des juges par la libertè,* ed. Dalloz, 2017.

[122] *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and O*Ü *Viking Line Eesti* C-438/05 of 11 December 2007. M. Mörk, *An end to the possibilities-on horizontal liability in Laval and the limits of judicial rights protection*, in S. De Vries, U. Bernitz, S. Weatherhill, *The protection of fundamental rights in the EU after Lisbon,* Oxford University press, 2013, pp. 120ss.

[123] D. Liakopoulos, *Balance between social rights and economic freedoms in the EU case law*, in *International and European Union Legal Matters, working paper series,* 2011, pp. 26ss.

[124] S. Symeonides, *Codifying choice of law around the world*, Oxford University Press, 2014, pp. 348ss. D.p. FernÁNdez

19. The linkage criterion used may be rigid but correct through the proximity principle as an exception clause to ensure a always significant link in the relationship economy and on the concrete case[125]. The clause could be both general as a form of adaptation to rigid rules, following a step by step policy to avoid fragmentation of rules *(Gefahr der Rechtszersplitterung*)[126] as it happens in fact also in art. 15 of the Swiss Private International law, art. 8 of the Dutch Law, in art. 3 of the Macedonian law of 1999, art. 5 of Slovenian code of 1999, in art. 1 of Austrian statutes, in part 4, par. 1 of the Belgian code of 2004, in art. 6 of German code; in art. 2 of Greek code is special (clause of exception/*Ausweichklausel*) and established for certain particular circumstances[127]. The logic of proximity in the case of the transfer of jurisdiction to the organs of the Member State of the law chosen according to the will of the latter and its assessment of the private will creates a certain "rupture" towards the unification of the discipline of international jurisdiction[128], despite the fact that it was provided for in art. 4 of that Regulation n. 650/2012[129]. The clause can also be used to achieve material goals. Such a clause is also envisaged under Regulation "Rome I"[130], as an international privatization solution that will surely bring the expectations of the parties and respects the place where the relationship is located[131]; as well as in Regulation

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Arroyo, *La tendance* à *la limitation de la compétence judiciaire* à *l'épreuve du droit d'accès* à *la justice*, in L. D'avout, D. Bureau, H. Muir-Watt (a cura di), *Les relations privées internationales. Mélanges en l'honneur du Professeur Bernard Audit,* Lextenso editions, 2014, pp. 304ss. D. Liakopoulos, Balance between social rights and economic freedoms in the EU case law, op. cit., pp. 38ss.

[125] A. Abbasi, H. Bazrpach, *Distinction between exception clause and exemption clause*, in *International Journal of Humanities and Cultural Studies*, 2016, pp. 1908ss.

[126] S.m. Bouyahha, *La proximitè en droit international privè de la famille,* ed. L'Harmattan, 2015.

[127] S. Dannemann, *Accidental discrimination in the conflict of laws: Applying considering and adjusting rules from different jurisdictions,* in *Yearbook of Private International Law*, 2008, pp. 113ss. P. Hovaguimian, *The enforcement of foreign judgments under Brussels I bis: false alarms and real concerns,* in *Journal of Private International Law*, 2015, pp. 214ss. T. Kruger, *The disorderly infiltration of EU law in civil procedure,* in *Netherlands International Law Review,* 2016, pp. 4ss.

[128] G. RÜHL, *Who's afraid of comparative law? The (side) effects of unification of private international law in Europe,* in *European Review of Private Law*, 2017, pp. 486ss.

[129] See also: Z. Crespi Reghizzi, *Succession and property rights in EU Regulation No. 650/2012,* in *Rivista di Diritto Internazionale Privato e Processuale*, 2017, n. 3. S. Alvárez González, *Las legítimas en el Reglamento sobre sucesiones y testamentos,* in *Anuario Español de Derecho Internacional Privado,* 2011, pp. 373ss. I.a. Calvo Vidal (ed.), *El nuevo marco de las sucesiones internacionales en la Unión Europea,* Consejo General del Notariado, ed. Marcial Pons, 2014, pp. 46ss. S. Alvárez González, *El Reglamento 650/2012, sobre sucesiones y la remisión a un sistema plurilegislativo: Algunos casos difíciles o, simplemente, llamativos*, in *Revista de Derecho Civil,* 2015, pp. 12ss. R. Arenas García, *El Reglamento 650/2012, relatiu a la competència, la llei aplicable, el reconeixement i l'execució de les resolucions, a l'acceptació i l'execució dels documents públics en matèria de successions mortis causa i a la creació d'un certificat successori europeu,* in *Revista Catalana de Dret Privat,* 2015, pp. 18ss. U. Bergquist et al., *EU Regulation on succession and wills*, ed. Otto Schimidt, 2015, pp. 54ss. A. Bonomi, P. Wautelet et. al., *El Derecho Europeo de Sucesiones. Comentario al Reglamento (UE) nº 650/2012, de 4 de julio de 2012,* ed. Thomson Reuters-Aranzadi, 2015. M.p. Diago Diago, *El matrimonio y su crisis ante los nuevos retos de la autonomía de la voluntad conflictual*, in *Revista Española de Derecho Internacional Privado,* 2014, pp. 52ss. A. Font I Segura, *La remisión intracomunitaria a sistemas plurilegislativos en el Reglamento 650/2012 en materia de sucesiones*, in I.a. Calvo Vidal (ed.), *El nuevo marco de las sucesiones internacionales en la Unión Europea,* Consejo General del Notariado, ed. Marcial Pons, 2014, pp. 78ss. J.l. Glesias Buigues, G. Palao Moreno, *Sucesiones internacionales. Comentarios al Reglamento (UE) 650/2012,* ed. Tirant lo Blanch, 2015, pp. 62ss. G. Khairallah, M. Revillard, *Droit européen des successions internationales. Règlement du 4 juillet 2012,* ed. Defrénois, 2013. D.a. Popescu, *Guide de droit international privé des successions*, ed. Magic Print, 2014. P. Quinzá Redondo, G. Christandl, *Ordenamientos plurilegislativos en el Reglamento (UE) de Sucesiones con especial referencia al ordenamiento jurídico español*, in *Indret,* 2013, pp. 8ss. F.m. Wilke, *Das international Esbrecht nach der neuen EU-Erbrecthsverordnung,* in *Recht der internationalen Wirtschaft,* 2012, pp. 605ss. A. Wysocka, *How can e valid profession iuris be mader under the UE Succession Regulation?,* in *Nederlands international privaatrechet*, 2012, pp. 572ss.

[130] V. Behr, *Rome I Regulation a-mostrly-unified private international law of contractual relationships within-most-of the European Union,* in *Journal of Law and Commerce,* 2011, pp. 238ss. X.e. Kramer, *The interaction between Rome I and mandatory European Union private rules-EPIL and EPL: Communicating vessels?*, in P. Stone, Y. Farah, *Research Handbook on European Union private international law,* Edward Elgar Publishing, 2015, pp. 250ss. A.l. Calvo Caravaca, J. Carrascosa GonzÁlez, *Litigaciòn internacional en la Uniòn Europea II*, ed. Comares, 2017, pp. 106ss.

[131] See in argument the next cases from the Court of Justice: *Intercontainer Interfrigo v. Balkenende Oosthuizen BV and MIC Operations BV* C-133/08 of 6 October 2009; *Heiko Koelzsch v. Luxemburg* C-29/10 of 15 March 2011; *Anton Schlecker v. Melita Josefa Boedeker* C-64/12 of 12 September 2012; *Haeger & Shmidt v GmbH v. Mutuelles du Man Assurance* C-305/12 of 23 October 2014; *Ergo Insurance v. P & C Insurance and Gjensidige Baltic AAS* joined cases: C-359/14 and C-475/14 of 21 January 2016; *KA Finanz AG v. Spaarkassen Versicherung AG Vienna Insurance Group* C-483/14 of 21 January of 7 April 2016. See: J. Kruit, *General average, legal basis and applicable law: The overrated significance of the York-Antwerp rules*,

n. 864/2007 (Rome II)[132] both in the place where the *locus actus* was generated and in the place where the damage event occurred (*locus damni)*[133]. When a single action corresponds to a plurality of events located in different States, the multistate delicts is the linkage criterion provided by the rule in question that will lead to a *dèpeçage* of the case with the consequent application of a plurality of different laws to each of the events. In such a case, it is necessary to consider that the division of the case also acts in the sense of disrupting the conduct of the agent in a way that such behavior must be assessed for each event under the law applicable to the latter[134]. The agent will thus be able to respond to certain events generated by his conduct while he may not have to answer in relation to other events so that the conduct of that anti juridical subject can be considered in a particular order and conforms to the law in another as we have also seen through the judgment of the Court of Justice in the case *Fiona Shevill and others v. Alliance SA* C-68/93 of 7 March 1994[135] and *eDate Advertising GmBH v. X and Olivier Martinez v. NGN Limited,* joined cases: C-509/09 and C-161/10 of 25 October 2011 the principles established by the case law also apply to the interpretation of the concept of a relevant event for the determination of applicable law. This is the *Mosaiktheorie* which, according to the Court, applied to the jurisdiction of defamatory offenses[136]. The Court of Justice by means of the *Dumez France SA y Tracoba Sarl v. Hessiche Landesbank y otros* C-220/88 of 11 October 1990; A. *Marinari v. Lloys Bank plc and Zubaidi Trading Company* C-364/93 of 19 September 1995; R. *Kronhofer v. Marianne Maier and others* C-168/02 of 10 June 2004 stated that no damage was relevant for the purpose of determining the competent *forum* but only where the action: "it has produced its detrimental effects directly to the one who is the immediate victim (...)"[137].

Paris Legal Publishers, 2017, pp. 223ss. A. Milinis, K. Pranevičienė, *Conditions and circumstances which lead to application to the Court of Justice of the European Union and adoption of a preliminary ruling,* in *Baltic Journal of Law and Politics*, 2016. A. Vanhoek, M. Houwerzijl, *Posting and posted workers: The need for clear definitions of two key concept of the posting of workers Directive,* in *Cambridge Yearbook of European Legal Studies,* 2014, pp. 410. U. Grušić, *The european private international law of employment,* Cambridge University Press, 2015, pp. 104ss. J. Hill, M. Ní Schúileabháin, *Charlson & Hills conflicts of laws*, Oxford University Press, 2016. S. Peers, *EU justice and home affairs law*, Oxford University Press, 2016, pp. 375ss. J. Basedow, G. Rühl, F. Ferrari, D. Demiguel Asensi, *Encyclopedia of private international law,* op. cit., pp. 804ss. F. Melin, *Qualification du contrat de commission et loi applicable,* in *Publi*è *sur Dalloz actualit*è, 17 novembre 2014. S. Corneloup, *The impact of EU fundamental rights on private international law*, ed. Nomos, 2016.

[132] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11July 2007 on the law applicable to non-contractual obligations (Rome II). J. Ahern, W. Binchy, *The Rome II Regulation on the law applicable to non-contractual obligations,* ed. Brill, 2009. G. Rühl, *Contractual obligations (PIL)***,** in J. Basedow, K.j. Hort, R. Zimmerman, A. Stier**,** *Encyclopedia of european private law, op. cit.,* D. Einsele, *Kapitelmarketrecht und Internationales Privatrecht,* in *Rabels Zeitschrift f*ür *ausl*ändisches *und internationales Privatrecht,* 2017.

[133] See from the Court of Justice the next cases: *Deo Antoine Homawoo v. GMF Assurances SA,* C-412/10 pf 17 November 2011; *Homawoo v. GMB Assurance SA.* C-412/10 of 17 November 2011; *Andreas Kainz v. Pantherwerke AG.* C-45/13 of 16 January 2014; *Florin Lazar v. Allianz SpA* C-350/14 of 10 December 2015; *Ergo Insurance v. If P&C Insurance AS and Gjensidige Valtic AAS v. PZU Lietura UAB DK* joined cases C-359/14 and C-475/14 of 21 January 2016. A. Dickinson, *The Rome II Regulation: The law applicable to non-contractual obligations,* Oxford University Press, 2010, pp. 288ss. P. Huber, (ed). *Rome II Regulation: Pocket Commentary,* Sellier European Law Publishers, 2011, pp. 460ss. J.v. Hein, *The contribution of the Rome II Regulation to the communitarisation of private international law*, Oxford University Press, 2009, pp. 74ss. A.l. Calvo Caravaca, C. Carrascosa Gonzalez, *Medidas provisionales y cautelares y Reglamento Bruselas I-bis,* in *Rivista di Diritto Internazionale Privato e Processuale,* 2015, pp. 55ss. J. Kruit, *General average, legal basis and applicable law: The overrated significance of the York-Antwerp rules,* Paris Legal Publishers, 2017, pp. 223ss.

[134] A. Dichinson, *The Rome II Regulation. A commentary,* Oxford University Press, 2009, pp. 315ss.

[135] According to the Court: "(...) the place of the event giving rise to the damage, within the meaning of those judgments, can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation (...) to the place where the damage occurred (Erfolgsort) (...) the Courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim's reputation (...) be settled solely by the national Court seized, applying the substantive law determined by its national conflict of laws rules, provided that the effectiveness of the Convention (...)". See in argument: B. YÜKsel, *An analysis of the effectiveness of the EU Institutions in making and interpreting European Union private international law Regulations*, in P. Beaumont, M. Danov, K. Trimmings, B. YÜKsel, *Cross-border litigation in Europe,* Hart Publishing, 2017.

[136] R.M. Pallitto, *The "mosaic theory" in individual rights litigation: On the genealogy and expansion of a concept*, in *Richmond Journal of Law and the Public Interests,* 2013, pp. 388ss.

[137] G. Busseuil, *L'action en r*éparation *du dommage du fait d'un produit d*éfectueux*: le difficile* équilibre *entre harmonisation totale et autonomie proc*édurale *des* États *membres*, in *Europe*, 2010, pp. 8ss.

20. Thus, the equation of the conflicting rule is maintained with respect to the position of the parties and the reasonableness of the use of the rule[138] according to the safeguard clause that makes the rules system more flexible by allowing the Court to depart from the codified criteria when it is clear from the obvious circumstances surrounding the country to treat the single case in a more appropriate manner. The clause arises from the need to prevent a too strict application of the criteria leading to situations of iniquity and the Court will be "forced" to overcome the need for uniformity from the legal basis of the Regulation as the essential aspect of the EU framework[139].

21. No connection criterion is best suited to the principle of proximity to compose the tension that has ever existed in the conflict of laws[140] between the two opposite values of certainty and flexibility[141]. The history of law conflicts[142] has always been characterized by continuous efforts to reach an acceptable internationally liberalized compromise on mostly contractual matters[143]. The goal is to find the right match between the two needs by correcting the excesses of indeterminacy which can concretely lead to an overly wicked wording of the closer connection principle at the time without clear guidelines that must preside over its application.

IV. Recognition, compatibility of EU standards and enforcement of judgments in the case law of the Strasbourg Court

22. Up to now we have seen that the ECtHR has ruled on the manner in which the national Court rules on the application and interpretation of private international law and the recognition of judgments.

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[138] G. Légier, *Le règlement Rome II sur la loi applicable aux obbligations non contractuelles,* in *Juris Classeur Pèriodique*, 2007, pp. 210ss. A. Scott, *The scope of non contractual obligations*, in J. Ahern, J. Binchy (eds.), *The Rome II. Regulation on the law applicable of non-contractual obligations A new international litigation regime,* ed. Brill, 2009, 58ss. P. RÉMy-Corlay, *Mise en oeuvre et règime procèdural de la clause d'exception dans le conflits de lois*, in *Revue Critique de Droit International Privè*, 2003, pp. 38ss.

[139] P. Grolimund, I*nternationales Privat-und Zivilverfahrensrecht der Europäischen Union*, ed. Dike, 2015.

[140] J.p. George et al., *Conflict of Laws,* in *SMU Law Review*, 2011, pp. 176ss.

[141] In particular see the case from the European Court: *Von Hannover v. Germany* of 7 February 2012. The Court held: "(...) especially in conflict of laws cases, the differentiation for all family issues according to nationality and not to habitual residence is a well-known principle which aims at protecting a person's close connection with his or her home country. Therefore, even though the decisiveness of the habitual residence might arguably be considered preferable with regard to pension rights, the decisiveness of a person's nationality cannot be considered to be without objective and reasonable justification (…) it must also be noted that the applicant had been free to choose the application of German law, together with her husband, by notarial certification (...) this description of German law is entirely accurate is perhaps open to doubt (it seems to be based on the ordinary rules of German private international law-Art. 14(4) EGBGB-rather than on the German-Persian treaty which appears to be governing here). Be that as it may, the particular value given to party autonomy is remarkable and quite in line with postmodern thinking (...)". See ex pluribus: L. D'avout, *Droits fondamentaux et coordination des ordres juridiques en droit privé,* in E. Dubout, S. Touzé (eds), *Les droits fondamentaux: charnières entre ordres et systèmes juridiques*, ed. Pedone, 2010, pp. 166ss. F. Mèlin, *Droit international privè: droit des conflits de juridiction, droit des conflits de lois, droit de la nationalitè, condition des ètrangers en France (à jour du règlement (UE) no. 650/2012 applicable le 17 aoùt 2015*, Issy-les-Moulineaux, Gualino, 2014. M.c. Meyzeaud-Garaud, *Droit international privè,* Levallois-Perret, ed. Brèal, 2014. F. Monèger, *Droit international privè,* ed. LexisNexis, 2015. M.l. Niboyet, I. Rein Lesca Stereyres, L. Dimitrov, *Droit international privè,* L.G.D.J., 2015. T. Vignal *Droit international privè,* ed. Sirey, 2014. H. Honsell (Hrsg.), *Internationales Privatrecht,* Helbing Lichtenhahn, 2013. G.walter, T. Domej, *Internationales Zivilprozessrecht der Schweiz: ein Lehrbuch,* ed. UTB GmbH 2012. A. Briggs, *The conflicts of laws,* Oxford University Press., 2013. C.m.v. Clarkson, J. Hill, *The conflict of laws,* Oxford University Press, 2011. D. Hill, *Private International Law,* Edinburgh University Press, 2014. P. Rogerson, *Collier's conflict of laws*, Cambridge University Press, 2013 P. Stone, *Private international law*, Edward Elgar Publishing, 2014. C. Benicke, *Internationales Privatrecht: Mit den Grundzügen des Internationalen Zivilverfahrensrechts,* ed. Springer, 2013. B. Von Hoffmann, K. Thorn, *Internationales Privatrecht: einschlielich der Grundzüge des Internationalen Zivilverfahrensrechts,* C.H. Beck, 2014. A. Junker, *Internationales Privatrecht,* C.H. Beck, 2015. K. Krebs, *Internationales Privatrecht,* L. Müller Publishers, 2015. B. Verschragen, *Internationales Privatrecht: ein systematischer* überblick, ed. Manz, 2012. B. Zöchling-Jud, F. Aspöck, *Internationales Privatrecht: allgemeines IPR, Rom I-Verordnung, Rom II-Verordnung, Sachenrecht, Familienrecht, Erbrecht,* ed. LexisNexis ARD Orac, 2012. L. De Lima Pinheiro, *Direito Internacional Privado*, Almedina, 2014.

[142] See in particular the analysis of D. Earl Childress III, *International conflict of laws and the new conflicts restatement*, in *Duke Journal of Comparative and International Law,* 2017, pp. 363ss.

[143] See, D. Liakopoulos, *Conflicts of law in the European Union law*, in *International and European Union Legal Matters*, 2010, pp. 6ss. V. Jeufner, *Irresolvable norms conflicts in international law,* Oxford University Press, 2017, pp. 156ss.

However, the European Court could address the very content of the rules of private international law. In such a case, the Court's assessment is compared with that which is entrusted to the Constitutional Court in the context of the internal system, but with the structural differences which characterize the type of proceedings and the final judgment, which concludes with the declaratory constitutional illegitimacy [144].

23. The purpose of the European Court in this case is to ensure the safeguarding of human rights in the concrete case and not to the rules considered abstract[145], that is to say those rules which may fall within the scope of the Court's verification, where the Court appointed to apply them has no discretion and can not rely on the public order limit to avoid their application. In case *Marco Gambazzi v. Daimler Chrysler* C-394/07 of 2 April 2009 the Court affirmed: "(...) that the balance to be struck between fundamental rights and public policy was to ensure that the objectives (…) corresponded with the public interest pursued (and were not) disproportionate (...)"[146]. Recipients of the judgment of the European Court of Human Rights may be in such cases bodies with legislative powers, which are obliged to provide, as stated in the Court's judgment[147]. In the case of *Scordino v. Italy* of 29 March 2006, the European Court of Human Rights sanctioned the legislator's conduct with regard to the rules for the application of the compensation rules, which involved the infringement of art. 6 ECHR[148], and indicated to the legislator the measures to be taken[149], proclaiming that: "(...) there is an obligation for States to make their own order compatible with the Convention on Human Rights and to eliminate all possible obstacles to preventing injury being repaired (…) (case *Maestri v. Italy* of 17 February 2004) and the incompatibility of legislation with regard to the lack of guarantees against possible abuse resulting from its application (…) (case *Gillan & Quinton v. United Kingdom* of 12 January 2010)"[150].

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[144] C. Blanc-Fily, *Valeurs dans la jurisprudence de la Cour europèenne des droits de l'homme,* op. cit. P. MarguÉNaud, *La Cour europèenne des droits de l'homme,* ed. Dalloz, 2016.

[145] As the ECtHR stated in its rejecting decision on the case McDonald of 17 June 2008: "(...) In cases arising from an individual appeal, the Court has no task of verifying abstractly the legislation at issue; it must limit itself to the extent possible to examine the issues raised by the case for which it is addressed to it (...)".

[146] J. Oster, *Public policy and human rights,* in *Journal of Private International Law*, 2015, pp. 544ss.

[147] See the case: *Les Saints Monastères v. Greece* of 9 December 1994 par. 55 and the position of the Court. P. MarguÉNaud, *La Cour europèenne des droits de l'homme,* op. cit.

[148] See in particular the par. 126: "(...) La Cour réaffirme que si, en principe, il n'est pas interdit au pouvoir législatif de réglementer en matière civile, par de nouvelles dispositions à portée rétroactive, des droits découlant de lois en vigueur, le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 de la Convention s'opposent, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du litige (...)".

[149] See the case of 9 July 2007 (*X. v. Latvia*), n. 3 and in particular the par. 11: "(...) il résulte de la Convention, et notamment de son article 1, qu'en ratifiant la Convention, les Etats contractants s'engagent à faire en sorte que leur droit interne soit compatible avec celle-ci (...) 15. Bien qu'en principe il ne lui appartienne pas de définir quelles peuvent être les mesures de redressement appropriées pour que l'Etat défendeur s'acquitte de ses obligations au regard de l'article 46 de la Convention, eu égard à la situation de caractère structurel qu'elle constate, la Cour observe que des mesures générales au niveau national s'imposent sans aucun doute dans le cadre de l'exécution du présent arrêt, mesures qui doivent prendre en considération les nombreuses personnes touchées. En outre, les mesures adoptées doivent être de nature à remédier à la défaillance structurelle dont découle le constat de violation formulé par la Cour, de telle sorte que le système instauré par la Convention ne soit pas compromis par un grand nombre de requêtes résultant de la même cause. Pareilles mesures doivent donc comprendre un mécanisme offrant aux personnes lésées une réparation pour la violation de la Convention établie dans le présent arrêt relativement aux requérants. A cet égard, la Cour a le souci de faciliter la suppression rapide et effective d'un dysfonctionnement constaté dans le système national de protection des droits de l'homme. Une fois un tel défaut identifié, il incombe aux autorités nationales, sous le contrôle du Comité des Ministres, de prendre, rétroactivement s'il le faut (...) les mesures de redressement nécessaires conformément au principe de subsidiarité de la Convention, afin que la Cour n'ait pas à réitérer son constat de violation dans une longue série d'affaires comparables. 16. Pour aider l'Etat défendeur à remplir ses obligations au titre de l'article 46, la Cour a cherché à indiquer le type de mesures que l'Etat italien pourrait prendre pour mettre un terme à la situation structurelle constatée en l'espèce (...)".

[150] Par. 86: "(...) The Government argues that safeguards against abuse are provided by the right of an individual to challenge a stop and search by way of judicial review or an action in damages. But the limitations of both actions are clearly demonstrated by the present case. In particular, in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised. 87. In conclusion, the Court considers that the powers of authorization and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They are not, therefore, "in accordance with the law" and it follows that there has been a violation of Article 8 of the Convention (...)". In the same spirit see the case: *Malik v. United Kingdom* of 28 May 2013

24. The European Convention of Human Rights appeal may concern EU rules and whether these rules are binding on national authorities to enforce them, making State responsibility for breaches of their application problematic. This issue was dealt with the *Bosphorus case* of 30 June 2005 and in the case of *Michaud v. France* of 6 December 2012[151], where the European Court has examined the behavior of the States (Ireland and France) in the light of the obligations deriving from EU Regulations. The perspective will change from the time the EU becomes part of the ECHR, thus excluding the possibility of violating the Convention due to the presence in the EU system of control instruments for the compatibility of acts and their application by national Courts with regard to human rights, so as to ensure "equivalent" protection to that provided by the ECHR[152]. Obviously, as soon as the EU's accession to the ECHR becomes operational, the European Court of Justice should also extend to any violations of human rights in the fulfillment of EU standards[153], abandoning the presumption of equivalence set forth in the *Bos-*

[151] See, A. Jakubowski, K. Wieczyńska, *Fragmentation vs the constitutionalisation of international law: A practical inquiry,* ed. Routledge, 2016. C. Lacchi, *The ECtHR's interference in the dialogue between National Courts and the Court of Justice of the EU: Implications for the preliminary reference procedure,* in *Review of European Administrative Law*, 2015, pp. 96ss.

[152] See in argument: D. Liakopoulos, *Protection of human rights between European Court of Human Rights and Court of European Union,* in *International and European Union Legal Matters,* 2015, pp. 38ss.

[153] In relation on the accession of the Charter of the fundamental rights of EU in European Convention of Human Rights the Court of Justice has been obliged to consult pursuant to art. 218 TFEU and has expressed its opinion (C-2/13 of 18 December 2014-on accession), believing that the agreement would undermine the specificity and autonomy of Union law on the basis of multiple arguments. The Court has basically referred to Art. 53 of the EU Charter and *Melloni* jurisprudence that the application of national standards for the protection of fundamental rights should not undermine the level of protection provided for in the Charter or the primacy, unity and the effectiveness of EU law to show that the accession agreement does not provide for any co-ordination clause between that provision and Article. 53 of the Convention, which allows Contracting States to apply higher-level protection standards than those guaranteed by the European Convention. See in argument: M. Cremona, *Balancing Union and Member States interests: Opinion 1/2008, choice of legal base and the common commercial policy under the Treaty of Lisbon,* in *European Law Review*, 2010, pp. 680ss. J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union, ed.* Nomos, 2014, pp. 815ss. J. Schwarze (ed.), *EU-Kommentar, ed.* Nomos, 2012, pp. 2754ss. A. Kiingenbrunner, J. L. Raptis, *Die Justiziabilitat der Grundrechte-Charta nach dem Reformvertrag von Lissabon,* in *Journal für Rechtspolitik,* 2008, pp. 141ss. D. Thym, S*eparation versus fusion-or: How to accommodate national autonomy and the Charter?*, in *European Common Law Review,* 2014, pp. 393ss. J. Komarek, *The place of constitutional Courts in the EU*, in *European Common Law Review,* 2013, pp. 433ss. J. Snell, *Fundamental rights review of national measures: Nothing new under the Charter,* in *European Public Law,* 2015, pp. 287ss. C. Tomuschat, *Der Streit urn die Auslegungshoheit: die Autonomie der EU als Heiliger Gral. Das EuGH-Gutachten gegen den Beitritt der EU zur EMRK*, in *Europäische Grundrechte-Zeitschrift,* 2015, pp. 142ss. Ch. Hillion, P. Koutrakos (eds.), *Mixed agreements revisited*, Oxford University Press, 2010. I. Pingel, *De Rome* à *Lisbonne: Commentaire article par article des Traitès UE et CE,* ed. L.G.D.J., 2010. V. Skouris, *Dèveloppements rècents de la protection des droit fondamentaux dans l'Union europèenne: Les arrêts Melloni et Åkerberg Fransson,* in *Il Diritto dell'Unione Europea,* 2013, pp. 230ss. S. Peers, T. Hervey, J. Kenner, A. Ward, *The European Union Charter of fundamental rights. A Commentary,* op. cit., A. DASHWOOD, *Mixity in the era of the treaty of Lisbon,* in Ch. Hillion, P. Koutrakos, *Mixed agreements revisited,* Oxford University Press, 2010, pp. 352ss. É. Dubout, *Le niveau de protection des droits fondamentaux dans l'Union europèenne: unitarisme constitutif versus pluralisme constitutionnel. Rèflexions autour de l'arrêt Melloni,* in *Cahiers de Droit Europèen*, 2013, pp. 294ss. N. Cariat, *Le droit de l'Union europèenne et les normes nationales de protection des droits fondamentaux. L'article 53 de la Charte ou la tension entre la primautè et la diffèrenciation*, in *Annuaire de Droit de l'Union Europèenne,* 2013, pp. 144ss. A. Torres Perez, *Melloni in three acts: From dialogue to monologue,* in *European Constitutional Law Review,* 2014, pp. 308ss. E. Alkema, R. Van Der Hule, R. Van Der Hulle, *Safeguard rules in the european legal order: The relationship between article 53 of the European Convention on Human Rights and article 53 of the Charter of Fundamental Rights of the European Union*, in *Human Rights Law Journal*, 2015, pp. 29ss. M. Safjan, *Les dilemmes de l'application de standards plus èlevès de protection des droits fondamentaux sous le prisme de l'identitè constitutionnelle,* in A. Tizzano, A. Rosas, R. Silva De Lapuerta, K. Lenaerts, J. Kokott (a cura di), *La Cour de Justice de l'Union europèenne sous la prèsidence de Vassilios Skouris (2003-2015)*, ed. Bruylant, 2015, pp. 546ss. On the one hand, art. 53 does not oblige States to guarantee a higher level of protection than that of the Convention on the other hand, the same EU Charter must ensure the same level of protection as the Convention so that there is no conflict between the two provisions. More specifically, the Court has highlighted the specificity of the Union's system of monitoring of respect for fundamental rights, in particular the principle of mutual trust in the areas of civil and criminal judicial cooperation, visas, asylum and immigration, namely the area of freedom, security and justice which obliges each Member State to assume respect for fundamental rights by other Member States and the absence of its own jurisdictional powers in the field of foreign policy and security. After the case *Melloni* see the case: *Jeremy F.* C-168/13 PPU of 30 May 2013. The Court of Justice has affirmed that: "(...) the absence of further detail in the actual provisions of the Framework Decision, and having regard to Article 34 EU, which leaves to the national authorities the choice of form and methods needed to achieve the desired results of framework decisions, it must be concluded that the Framework Decision leaves the national authorities a discretion as to the specific manner of implementation of the objectives it pursues, with respect inter alia to the possibility of providing for an appeal with suspensive effect against decisions relating to a European arrest warrant (...)". See in argument: M. Almhofer, J. Hartlieb, *Article 53 of the Char-*

ter of Fundamental Rights of the EU, in *European Yearbook on Human Rights,* 2014, pp. 149-159. A. Tizzano, A. Rosas, R. Silva de Lapuerta, K. Lenaerts, J. Kokott (a cura di), *La Cour de Justice de l'Union europèenne sous la prèsidence de Vassilios Skouris (2003-2015)*, op. cit., L. Besselink, M. Claes, J.h. Reestman, *A Constitutional moment: Acceding to the ECHR (or not)*, in *European Constitutional Law Review,* 2015, pp. 2ss. D. Chalmers, G. Davies, G. Monti, *European Union law,* Cambridge University Press, 2014. P. Craig, *EU Accession to the ECHR: Competence, Procedure and Substance,* in *Fordham International Law Journal*, 2013, pp. 1114-1150. B. De Witte, *Article 53,* in Peers et al. (eds.), *The EU Charter of Fundamental Rights, A Commentary,* Hart Publishing, 2014, pp. 1523-1538. P. GRAGL, *A giant leap for european human rights? The final agreement on the European Union's accession to the European Convention on Human Rights*, in *Common Market Law Review*, 2014. P. 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Jacqué, *The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms,* in *Common Market Law Review*, 2011, pp. 995, 1005. A. Klingenbrunner, J. Raptis, *Die Justiziabilität der Grundrechte-Charta nach dem Reformvertrag von Lissabo*n, in *Journal für Rechtspolitik,* 2008, pp. 139-146. V. Kosta, N. Skoutaris, V. Tzevelekos, *The EU Accession to the ECHR*, Hart Publishing, 2014. M. Kuijer, *The Accession of the European Union to the ECHR: A gift for ECHR's 60th Anniversary or an unwelcome intruder at the party?*, in *Amsterdam Law Forum*, 2011, pp. 17-32. C. Krenn, *Autonomy and effectiveness as common concerns: A path to ECHR accession after Opinion 2/13*, in *German Law Journal,* 2015, pp. 147ss. S. Lambrecht, *The sting is in the tail: CJEU Opinion 2/13 objects to draft agreement on accession of the EU to the European Convention on Human Rights,* in *European Human Rights Law Review,* 2015, pp. 185ss. C. Ladenburger, *Vers l'adhésion de l'Union européenne* à *la Convention européenne des droits de l'homme,* in *Revue Trimestrielle de Droit Européen*, 2011, pp. 20-26. T. Lock, *The future of EU accession to the ECHR after Opinion 2/13: is it still possible and is it still desirable?,* in *Edinburgh School of Law Research Paper Series,* 2015. T. Lock, *The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?*, in *European Constitutional Law Review,* 2015, pp. 239ss. J. Meyer (ed.), *Charta der Grundrechte der Europäischen Union,* ed. Nomos, 2014, pp. 813-826. N. O'meara, *A more secure Europe of rights? The European Court of Human Rights, the Court of Justice of the European Union and EU accession to the ECHR*, in *German Law Journal*, 2011, pp. 1813-1832. S. Peers, *The EU's accession to the ECHR: The dream becomes a nightmare*, in *German Law Journal,* 2015, pp. 213, 222. M. 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Potteau, *Quelle adhésion de l'Union Européenne* à *la CEDH pour quel niveau de protection des droits et de l'autonomie de l'ordre juridique de l'UE?*, in *Revue Générale Droit International Public*, 2011, pp. 77-111. E. Spaventa, *A very fearful Court? The protection of fundamental rights in the European Union after Opinion 2/1*3, in *Maastricht Journal of European and Comparative Law,* 2015, pp. 51ss. D. Szymczak, *L'adhésion de l'Union européenne* à *la Convention européenne des droits de l'Homme. "Serpent de mer" ou "Hydre de Lerne",* in *Politeia,* 2008, pp. 405-418. A. Tizzano, *Quelques réflexions sur les rapports entre les cours européenne dans la perspective de l'adhésion de l'Union* à *la Convention EDH,* in *Revue Trimestrielle de Droit Européen*, 2011, pp. 9-19. T. Lock, *Walking on a tightrope: the Draft ECHR Accession Agreement and the autonomy of the EU Legal Order*, in *Common Market Law Review,* 2011, pp. 1025-1054. T. 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ŁAzowski, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, in *German Law Journal,* 2015, pp. 179ss. J. Fawcett, S. Shah, M. Shuilleabhain, *Human rights and private international law*, op. cit.

phorus judgment[154]. This will avoid a two tiered justice of *forum shopping*/law shopping[155] of Courts by abandoning the standard of a differentiated treatment where the ECHR is the subject of domestic of EU law. Within this spirit we must take into consideration that from the point of view of european legislation it has been possible to ensure the protection of the "weak" categories of the relationship, such as workers and consumers, in all Member States and to adapt to this approach also the rules of private international law through the adoption of Directives and Regulations, as can be seen through Regulation n. 593/2008, so called Rome I[156] on the law applicable to contractual matters[157]. The same uniformity of the conflict rules is functional to the "certainty of applicable law" in recital n.6, 16 and 39 of the Rome I Regulation, which is an essential value in ensuring the protection of human rights[158] which "exorbitant in the sphere of common rules of law applicable to relations between individuals", according to the Court of Justice before the Regulation came into force[159]; and are norms which are allowed to derogate conventionally by introducing a community definition of necessary, restrictive (implementing community law, so called *"burden test"*) implementing rules which essentially incorporates the identification criteria proposed for the safeguarding of its political, social and economical to all situations that fall within their scope. In this spirit we can say that the desire of the EU legislature to restrict the limits of the operation of the euro-

[154] See, D. Spielmann, *L'adhésion de l'Union européenne* à *la Convention européenne des droits de l'homme*, (Réunion conjointe de la Cour de justice de l'Union européenne et de la Cour européenne des droits de l'homme–Réseau des présidents des Cours suprêmes judiciaires de l'Union européenne, Helsinki 6 septembre 2013). A. Tizzano, *Les Cours européennes et l'adhésion de l'Union* à *la CEDH,* in Il *Diritto dell'Unione Europea*, 2011, pp. 12ss. X. Groussot, T. Lock, L. Pech, *Adhésion de l'Union européenne* à *la Convention européenne des droit de l'homme: analyse juridique du projet d'accord d'adhésion du 14 octobre 2001,* in *Fondation Robert Schuman/Question d'Europe,* n. 218 (7 novembre 2011), pp. 5ss.

[155] Especially in the case of insolvency cases as a *forum shopping* fraudulent and pretestuous. See, R. Bork, R. Mangano, *European cross-border insolvency law,* Oxford University Press, 2016.

[156] Commission Regulation n. 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6. See the next cases from the Court of Justice: *Verein für Konsumenteinformation v. Amazon EV Sàrl* C-191/15 of 28 July 2016; *S. Kareda v. S. Benkò* C-249/16 of15 June 2017; *Höszig kft v. Alstom Power Thermal services* C-222/15 of 7 July 2015; *K Finanz v. Sparkassen Versicherung Ag. Wien Insurance group* C-483/14 of 7 April 2016; *H. Lutz v. E. Bäuerle* C-557/13 of 16 April 2015; *Mühlleitner v. Ahmed Yusufi & Wadat Yusufi* C-190/11 of 6 September 2012.

[157] S. Zogg, *Accumulation of contractual and tortious causes of action under the judgments Regulation*, in *Journal of Private International Law,* 2013, pp. 42ss.

[158] E. Jayme, *Party Autonomy in international family and succession law: New tendencies*, in *Yearbook of Private International Law*, 2009, pp. 1ss. R.a. Brand, T. Fish, *An american perspective on the New Japanese Act on General Rules for Application of Laws,* in *Japanese Yearbook of International Law,* 2008, pp. 302ss. V. Behr, *Rome I Regulation. A-mostly-unified private international law of contractual relationships within-most-of the European Union*, in *Journal of Law and Commerce*, 2011, pp. 236ss. J. Carruthers, *Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law?*, in *The International and Comparative Law Quarterly*, 2012, pp. 881ss. C.i. Nagy, *What functions may party autonomy have in international family and succession law? An EU perspective*, in *Nederlands Internationaal Privaatrecht*, 2012, pp. 576ss. C.s.a. Okoli, H.o. Arishe, *The operation of the escape clauses in the Rome Convention, Rome I Regulation and Rome II Regulation,* in *Journal of Private International Law,* 2012, pp. 516ss. B. AÑOveros Terradas, *La autonomía de la voluntad como principio rector de las normas de derecho internacional privado comunitario de la familia*, in J. Forner Delaygua, C. GonzÁLez Beilfuss, R. ViÑAs FarrÉ (a cura di), *Entre Bruselas y la Haya: Estudios sobre la unificaciòn internacional y regional del derecho internacional privado. Liber amicorum Alegrìa Borràs*, op. cit., pp. 120ss. H. Gaudemet-Tallon, *Individualisme et mondialisation: Aspects de droit international privé de la famille,* in The Permanent Bureau Of The Hague Conference On Private International Law (eds.), *A Commitment to Private International Law, Essays in Honour of Hans Van Loon,* op. cit., pp. 184ss. K. Kroll-Ludwigs, *Die Rolle der Parteiautonomie in europäischen Kollisionsrecht,* ed. Mohr Siebeck, 2013, pp. 573ss. L. GanagÈ, *Les méthodes du droit international privé a l'épreuve des conflits des cultures,* in *Recueil des Cours*, 2011, pp. 376ss. L. D'avout, *Droits fondamentaux et coordination des ordres juridiques en droit privé,* in E. Dubout, S. TouzÉ (a cura di), *Les droits fondamentaux: charnières entre ordres juridiques et systèmes juridiques,* ed. Pedone, 2010, pp. 184ss. O.o. Cherednychenko, *EU fundamental rights, EC fundamental freedoms and private law*, in *European Review of Private Law,* 2006, pp. 31ss. A.j. BelohlÁVek, *Rome Convention-Rom I Regulation. Commentary. New EU conflict of laws and rules for contractual obligations,* ed. Juris, 2011, pp. 1758ss. G. Dannemann, S. Vogenauer, *The common european sales law in context. Interactions with english and german law,* Oxford University Press, 2013, pp. 16ss. M. Mcparland, *The Rome I Regulation on the law applicable to contractual obligations*, Oxford University Press, 2015. H. Wais, *Einseitige Gerichtsstandverinbarungen und die Schranken der Parteiautonomie,* in *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 2017.

[159] See in this sense the next cases from the Court of Justice: *Lechouritou* C-292/05 of 15 February 2007 LTU 29/76 of 14 October 1986, par. 3 and 5; *Rüffer* 814/79 of 16 December 1980; *Baten* C-271/00 of 14 November 2002; *Henkel* C-167/00 of 1st October 2002, par. 29. See, P. Hay, T. Varady, *Resolving international conflict. Liber amicorum Tibor Vàrady*, CEU Press, 2009, pp. 142ss.

pean conflict rules set by the Regulation clearly and precisely in the affirmation that are considerations of public interest and can justify in exceptional cases a derogation from EU rules of conflict, by virtue of the necessary mechanisms and rules of application. The forum category is not alien Regulation n. 1215/2012[160] (and of the previous Regulation n. 44/2001)[161] foreseeing the *forum actoris*, the *destinatae solutionis forum* appears to favor one of the substantial parts as the weak part [162] within the framework of a contractual relationship (art. 11 (1) (b)) and of the same line in the context of an insurance relationship concluded between a professional and a consumer according to art. 18, par. 1[163].

25. By its case law the Court of Justice sought to limit and verify the compatibility of the internal rules of the Member States with the EU's freedom and the fundamental principles of european law[164]. A large margin of appreciation has been left to the Court of Justice when it is necessary to define in a binding and uniform manner the scope of application of the rule itself, for example art. 8, 1st par. of the Rome Regulation I referred to the *lex loci protectionis* also referred to in art. 15 dedicated to the regulatory law[165] which do not mention aspects such as those that can be considered for the purposes of determining the violation of an artistic or literary property right. The problem in the case of intellectual property contracts[166] is the transferability of the law itself and the scope of *lex loci protectionis* as regards industrial property rights. The rule of this category of rights is that of ensuring compliance with the rules prohibiting ant competitive effects on intellectual property and international public order as we have seen through *Eco Swiss China time Ltd v. Benetton International BV* of 1st June 1999[167]. A broad inter-

[160] 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, entry in force from 10 January 2015. See in argument: P.A. Nielsen, *The New Brussels I Regulation,* in *Common Market Law Review***,** 2013, pp. 503ss. P. Hay, *Notes on the European Union's Brussels-I "Recast" Regulation,* in *The European Legal Forum*, 2013, pp. 2ss. M. Pohl, *Die Neufassung der EuGVVO-im Spannungsfeld zwischen Vertrauen und Kontrolle,* in *Praxis des Internationalen Privat-und Verfahrensrechts,* 2013, pp. 109ss. A. Nuyts, *La refonte du règlement Bruxelles I*, in *Revue Critique de Droit International Privé*, 2013, pp. 3ss. I.p. Beraudo, *Regards sur le nouveau Règlement Bruxelles I sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, in *Journal du Droit International,* 2013, pp. 742ss. A. Staudinger, *Schiedsspruch und Urteil mit vereinbarten Wortlaut,* in *Festschrift für Friedrich Graf von Westfalen,* Dr. Otto Schmidt Verlag, 2010, pp. 662ss. V. Rijavec, W. Jelinek, W. Brehm, *Die Erleichterung der Zwangsvollstreckung in Europa*, ed. Nomos, 2012, pp. 214ss.

[161] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See the next cases from the Court of Justice: *Bayerische Motoren Werke v. Acacia Srl* C-433/16 of 1st August 2017; *Assens Havn v. Navigators Management (UK) limited* C-368/16 o 13 July 2017; *S. Nogueira and others v. Crewlink Ireland Ltd,* joined cases C-168/16 and C-169/16 of 27 April 2017; *M. Kostanjevel v. F & S Leasing GmbH* C-185/15 of 25 November 2016; *He Jduk v. Energie Agentur NRW GmbH* C-441/13 of 13 March 2015; *A. Kainz v. Pantherwerke AG* C-45/13 of 16 January 2014. C. Kessedjian, *Commentaire de la refonte du règlement nº 44/2001*, in *Revue Trimestrielle De Droit Europèen,* 2011, pp. 128ss. P.a. Nielsen, *The new Brussels I Regulation*, op. cit., pp. 524. A. Nuyts, *La refonte du règlement Bruxelles I bis,* op. cit., pp. 24ss.

[162] V.a. Sinay-Cytermann, *La protection de la partie faible en droit international privè: les exemples du salarië et du consommateur,* in A.A.V.V., *Le droit international privè: Esprit et mèthodes, Mèlanges en l'honneur de Paul Lagard, ed. Dalloz,* 2007, pp. 745ss.

[163] J. Meussen, M. PertegÁS, G. Straetmans (eds), *Enforcement of international contracts in the European Union. Convergence and divergence between Brussels I and Rome I,* ed. Intersentia, 2004, pp. 270ss. M. Wilderspin, *The Rome I Regulation: Comunitarisation and modernisation of the Rome Convention,* in *ERA Forum*, 2008, pp. 260ss. V. Lazic, *Procedural justice for "weaker parties" in cross-border litigation under the EU Regulatory Scheme,* in *Utrecht Law Review,* 2014, pp. 100ss.

[164] In particular see: T. Azzi, *La Cour de justice et le droit international privè ou l'art de dire, parfois tout et son contraire*, in *Mèlanges en l'honneur du Professeur Bernard Audit. Les relations privèes internationales*, ed. L.G.D.J., 2014. D. Bureau, H. Muir Watt, *Droit international privè,* ed. PUF, 2017.

[165] F. Ferrari, S. Leible, *Rome I Regulation. The law applicable to contractual obligations in Europe,* European Law Publishers, 2009, pp. 180ss.

[166] A. METZGER, *Intellectual property (PIL),* in J. Basedow, K.J. Hort, R. Zimmerman, A. Stier, *Encyclopedia of european private law*, op. cit., P. TORREMANS, *Litigating cross-border intellectual property disputes in the European Union private international law framework,* in P. Beaumont, M. Danov, K. Trimmings, B. Yüksel, *Cross-border litigation in Europe,* Hart Publishing, 2017.

[167] In the same spirit: *Renate Ilsinger/Martin Dreschers, administrator in the insolvency of Schlank & Schick GmbH*, C-180/06 of 14 May 2009; *Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v. Oliver Heller* joined cases C-585/08 and 144/09 of 7 December 2010; *Lokman Emrek v. Vlado Sabramovic,* C-218/12 of 17 October 2013; *Armin Maletic, Marianne Maletic v. lastminute.com GmbH, tui* Österreich *GmbH*, C-478/12 of 14 November 2013; *Peter Pinckney v. KDG Mediatech AG* C-170/12 of 31 October 2013; *HI Hotel HCF Sarl v. Uwe Spoering* C-387/12 of 3 April 2014;

pretation of the notion of implementing rules that is potentially applicable in this field allows judges to consider the applicable implementing rules of any third order, compared to the forum and *lex causae*[168], but always linked to the contract in question without that it is always possible to identify *a priori* the laws that may be considered due to the fluidity of the link criterion[169].

This is a restriction that seeks to characterize the necessary enforcement rule and in particular cases[170] where it does not concretely solve an obstacle to the process of european harmonization, modernization of uniform legal norms, namely the strengthening of legal certainty and predictability of conflict resolution[171] towards building a federal common law[172] based on the objectives of the Union in Lagarde's view that: "(...) membership of a national rule in the category of police and security laws remains subject to compliance with the provisions of the Treaty (...)"[173]. A desired application restriction

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Folien Fischer AG and another v. Ritrama Spa C-133/11 of 25 October 2012; *Coty Germany GmbH v. First Note Perfumes NV* case C-360/12 of 5 June 2014; *Pez Hejduk v. Energie Agentur NRW GmbH* case C-441/13 of 22 January 2015; *Jaouad El Majdoub v. Cars On The Web Deutschland GmbH* case C-322/14 of 21 May 2015; *Concurrence Sürl v. Samsung Electronics France SAS and Amazon Services Europe Sürl* case C-618/15 of 21 December 2016. See for the analysis of the above jurisprudence: D. Leczykiwicz, S. Weatherill, *The involvement of EU law in private law relationships*, Hart Publishing, 2013. J. de Werra, *Research handbook on intellectual property licensing*, Edward Elgar Publishing, 2013. L. Bently, B. Sherman, *Intellectual property law,* Oxford University Press, 2014. O. Samsonova, *European Union law concepts as legal transplants: Linguistic difficulties of transferring EU consumer law concepts into Ukranian legal system*, in *Kyiv-Mohyla Law and Politic Journal,* 2015. J. M. Velázquez Gardeta, *Comparative analysis of CJEU and North American jurisprudence in the area of the validity of jurisdiction in online consumer contracts,* in *Boletín Mexicano de Derecho Comparado,* 2017, pp. 428ss. The author has declared that: "(...) the decision takes up the "old" concept, imported from north American judicial culture, of the stream of commerce, whose relevance for the purposes of defending the right to a personal jurisdiction for a specific consumer has been diminished over time (...) the CJEU does not seem to have been wrong in its evidence based formula for determining when a supplier is directing their business towards the Member State where a consumer is domiciled and therefore affording the said consumer a higher level of protection in determining the international jurisdiction of the Courts in the state where they live (...)". See in argument also: P. Torremans, *Intellectual property and private international law,* Edward Elgar Publishing, 2015. T. Rono, *Intellectual property and private international law*, Hart Publishing, 2012, pp. 723ss. A.j. Belohlávek, *Rome Convention. Rome I Regulation. Commentary*, ed. Juris, 2010, pp. 1016ss. European Max Planck Group On Conflict Of Laws In Intellectual Property (Clip), *Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary,* Oxford University Press, 2013. D. Moura Vicente, *La propriété intellectuelle en droit international privé*, in *Recueil des Cours,* 2009. M. PertegÁS, *Cross border litigation in intellectual property rights: Choice of law rules in IP Rules under the Rome I Regulation,* in S. Bariatti, *Litigating intellectual property rights disputes cross-border: EU Regulations, ALI principles, CLIP project*, ed. Cedam, 2010. T. Cook, *Territoriality and jurisdiction in EU IP law,* in *Journal of Intellectual Property Rights,* 2014, pp. 295ss. B.j. Jütte, *Reconstructing european copyright law for the digital single market. Between old paradigms and digital challenges,* Hart Publishing, 2017, pp. 206ss. T. Bjørn Larsen, *Intellectual property jurisdiction strategies where to litigate unitary rights vs. national rights in the EU*, Edward Elgar Publishing, 2017. C. Seville, *EU intellectual property law and policy*, Edward Elgar Publishing, 2016, pp. 517ss. A. Geroldinger, A. Burgstaller, M. Neumayr, A. Geroldinger, G. Schmaranzer (eds), *Internationales Zivilverfahrensrecht,* Verlag ARD Orac GmbH & Co KG, 2014. J.S. Ginsburg, E. Treppoz, *International copyright law U.S. and EU perspectives: Text and cases*, Edward Elgar Publishing, 2016, pp. 626ss. U. Maunsbach, *The CJEU as an innovator. A new perspective on the development of internet related case-law,* in *Masaryk University Journal of Law and Technology*, 2017, pp. 81ss.

[168] A. Sold, *Inappropriate forum or inappropriate law? A choice-of-Law solution to the jurisdictional standoff between the United States and Latin America,* in *Emory Law Journal*, 2011, pp. 1450ss. According to the author: "(...) procedural and systemic advantages are, for the most part, unique to the American legal system. These include extensive pretrial discovery, conspicuously plaintiff-friendly juries, the contingency fee system, large damage awards, and relatively efficient disposition and enforcement of judgments (...)".

[169] See in argument: J. Basedow, J. Drexel, A. Ankur, A. Metzger (eds), *Intellectual property in the conflict of laws,* ed. M. Siebeck, 2004. P. Torremans, *Licenses and assignments of intellectual property rights under the Rome I Regulation*, in *Journal of private international law,* 2008, pp. 398ss. R. Schutze, F. Zoll, *Europäisches Vertragrecht,* C. H. Beck, 2017.

[170] R. D. Berlingher, *General considerations on qualification in private international law,* in *Journal of Legal Studies,* 2015, pp. 56ss.

[171] A. Bonomi, *The role of internationally mandatory rules in an european private international law system,* in *Revista de Drept International Privat si Drept Privat Comparat,* 2006, pp. 166ss.

[172] J. Basedow, *Federal choice of law in Europe and the United States. A comparative account of interstate conflicts,* in *Tulane Law Review,* 2008, pp. 2120ss. D. Solomon, *The private international law of contracts in Europe. Advances and retreats*, in *Tulane Law Review,* 2008, pp. 1711ss. J.j. Kuipers, *European Union law and private international law. The interrelationship in contractual obligations,* Martinus Nijhoff, Publishers 2012. D.s.c. Symeonides, *Codifying choice of law around the world: An international comparative analysis, op. cit.,* S. Sánchez Lorenzo, *Choice of law and overriding mandatory rules in international contracts after Rome I,* in *Yearbook of Private International Law,* 2010, pp. 70ss.

[173] P. Lagarde, *Les lois de police devant la Cour de justice des communautès europèennes,* in R. Schultze, U. Seif, *Richterrecht und Rechtsfortbildung in des Europäisches Reechtsgenerischoft,* ed. Mohr Siebeck, 2003, pp. 90ss.

required by the Regulation could prove to be futile if it is not sufficient for the discretionary exercise of the discretion that the forum considers on whether or not to apply the mandatory rules *(Eingriffsnormen und Parteischutzvorschfriften)*[174] of the law otherwise applicable. The rule should strictly interpreted based on the requirement of the international nature of the contract[175] required for it to be able to make the choice of law[176] within an ever changing space and legal integration.

26. Within this spirit we have to consider that when we speak of harmonization in private, EU and international law we can distinguish between minimum harmonization which involves the EC minimum rules, as a "first floor of rights" which the Member States may individually establish more strict or demanding rules of standards[177]. The minimum harmonization has as objective to diminish the existing tensions of the european economic and political evolution and to open the way for the alternative harmonization which involve alternative methods of harmonization to attain and main goals. On the other hand we could say that we have also an optional harmonization which include any harmonized rules or national rules. The partial harmonization include the govern cross-border transactions and the domestic law. Of course there is a total harmonization, as a hard, strong harmonization which include and permit to save any measures (included conservative measures/*saisies conservatoires*) when it is necessary under proportional and flexible determination of the law at a national level. According to our opinion all the types of harmonization have as objective the transparency, the execution of the procedures, the better understanding of the means and methods for all the parties including States and privates[178].

27. The case of those rules that convey the automaticity of the effectiveness recognized in the measures issued abroad is under discussion. In some cases, the Court may not have the right to review or resort to the public order limit. Such a norm is art. 42 of Regulation n. 2201/2003 (Bruxelles II bis)[179] which obliges: "(...) to execute a decision issued by the judge of the State in which the minor was habitually resident before the international abduction[180], in which the obligation to return the child is established, on the basis of the simple certification of the measure, without any form of opposition (...)"[181]. Going forward with the cases *Gogova v. Ilia Dimitrov Il-*

[174] See, K. Thorn, *Eingriffsnormen,* in F. Ferrari, S. Leible, *Ein neues Internationales Vertragsrecht für Europa. Der Vorschlag für eine ROM I Verordnung,* C.H. Beck, 2007, pp. 129ss.

[175] S. Symeonides, *The Hague principles on choice of law for international contracts. Some preliminary comment*, in *American Journal of Comparative Law*, 2013, pp. 875ss.

[176] A. Shapira, *Protection of private interests in the choice of law process: The principle of rational connection between parties and laws*, in *SMU Law Revew*, 2016

[177] According to Patrick Glenn: "(...) The presumption of conflict should be replaced by a presumption of harmony, and in most instances the presumption of harmony will be justified by underlying harmony. The distinction between national law and foreign law will become less important, and eventually less clear (...)". H. Patrick Glenn, *Harmonization of law, foreign law and private international law*, in *European Review of Private Law*, 1993, p. 48.

[178] See in argument: H. Wagner, *Is harmonization of legal rules an appropriate target? Lessons from the global financial crisis,* in *European Journal of Law and Economics,* 2012, pp. 542ss. H. Micklitz, *The targeted full harmonization approach: Looking behind the curtain,* in G. Howells, R. Schultze (eds), *Modernising and harmonizing modern consumer contract la*w, Sellier European Law Publishers, 2009, pp. 52ss.

[179] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. A proposal for a revised Regulation was adopted by the European Commission on June 30, 2016. Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM(2016) 411 final. See in argument: M. Storme, *Harmonisation of civil procedure and the interaction with substantive private law*, in X.e. Kramer, C.h. Van Rhee, *Civil litigation in a globalizing World,* T.M.C. Asser Press, 2012, pp. 142ss.

[180] L. Elrod, *Please let me stay: Hearing the voice of the child in Hague Abduction cases*, in *Oklahoma Law Review,* 2017, pp. 665ss.

[181] The aforementioned Regulation governs the international aspects of the exercise of parental responsibility, the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, which includes among its objectives the observance of art. 24 of the EU Charter. The Regulation is intended to cite the international abduction of the minor phenomenon which whip the right to establish personal relations and direct contacts with both parents recognized by art. 24 of the EU Charter. The Regulation lays down the European Executive Law on the Right of Visitation and Return of the Illicitly Abolished Child by imposing automatic enforcement, ie without proceeding for the declaration of enforceability of the foreign decision in all the Member States of the decisions made by the competent authorities on the basis of Regulation (Article 40ss). The Charter and Regulation

iev C-215/15 of 21 October 2015 and *E. v. B.* C-436/13 of 1st October 2014[182]. It is a therapeutic choice that seeks to reconcile the conflict between the parents by ensuring the balance in their relationship with their children despite the *modus* disciplined by the Regulation on the termination of marriage[183] does not meet the needs of the child's best interests, but surely adapted to the spirit and the action of the European Union towards the harmonization of the rules of conflict in matrimonial matters where a choice of applicable law was envisaged at the end of the conjugal bond. According to the writer's view in the case of a conflict between a State-individual, international-private autonomy is qualified as a fundamental freedom of the people recognized and protected by various Human Rights Conventions[184], which surely allows the State to decide and attribute its case law while leaving simultaneously an inalienable right of the individual to be included in the sphere of freedom of choice of the law governing its own legal relations with the help of the principle of

sanction the possibility for the child to be heard and read in the light of the child's best interest and for the child's physic health. See in that spirit the case of the Court of Justice: *J. McB* C-400/10 PPU of 5 October 2010 and *Aguirre Zarraga v. Simone Pelz* C-491/10 PPU of 22 December 2010; *O and S and Maahanmuuttovirasto* joined cases C-356/11 and C-357/11 of 6 December 2012; *Eind* C-91/05 which interpreted the Regulation 1612/68 and the judgment: *Parliament v. Council* C-540/03 of 27 June 2006; *Runkin Paul* C-535/06 of 3 September 2009; *Kersten Sundelind Lopez. v. Miguel Enrique Lòpez Lizazo* C-68/07 of 29 November 2007; *Inga Rinau* C-195/08 PPU of 11 July 2008; *Laszlo Hadadi v. Csilla Martz* C-168/08 of 16 July 2009; *Jasna Detiček v. Maurizio Sgueglia* C-403/09 PPU pf 22 December 2009; *Bianca Purrucker v. Guilleruo Vallès Pèrez* C-256/09 of 15 July 2010; *Barbera Mercredi v. Richard Chaffe* C-497/10 PPU of 22 December 2010; *E. v. B.* C-436/13 of 1st October 2014; *C. v. M.* C-376/14 of 9 October 2014; *L. v. M.* C-656/13 of 12 November 2014; *David Bradbrooke v. Anna Aleksadrovicz* C-458/14 PPU of 9 January 2015; *Christophe Bohez v. Ingrid Wiertz* C-4/14 of 6 October 2015; *Vasilka Ivanova Gogova v. Ilia Dimitrov Iliev* C-215/15 of 21 October 2015; *P. v. Q.* C-455/15 of 19 November 2015. See in argument: C.m. Caamiña Domínguez, *Orden pùblico internacional y porhibiciòn de control de competencia judicial internacional: Asunto C-455/15 PPU, P Y Q,* in *Cuadernos de Derecho Transnacional*, 2017, pp. 635-640. M. Heranz Ballesteros, *Conflicto de jurisdicciones y declinación de la competencia: los asuntos Honeywell y Spanair*, in *Cuadernos de Derecho Transnacional,* 2013, pp. 594ss. C. Llorente Gómez de Segura, *Forum non conveniens revisited: el caso Spanair,* in *Cuadernos de Derecho Transnacional,* 2011, pp. 268ss. P. Mceleavy, *Brussels II bis: Matrimonial matters, parental responsibility, child abduction and mutual recognition*, in *The International and Comparative Law Quarterly*, 2004, pp. 504ss. H. Fulchiron, C. Nourissat, *Le nouveau droit communautaire du divorce et de la responsabilitè parentale,* ed. Dalloz, 2005. R. Lammont, *Habitual residence and Bruxelles II-bis: Developing concepts for european private international family law*, in *Journal of Private International Law*, 2007, pp. 262ss. E. Spaventa, *Federalisation versus centralisation: Tensions in fundamental rights discourse in the EU,* in M. Dougan, S. Currie, *50 years of the European Treaties: Looking back and thinking forward,* Hart Publishing, 2009. pp. 356ss. The cases Deticek C-403/09 PPU of 23 December 2009 and especially the case C-497/10 PPU *Mecredi*: the Court does not refer to the child's rights despite the fact that the definition of habitual residence which was the subject of the reference would significantly affect the child relations with her father. See in argument: N. Thomas, B. Gran, K. Hanson, *An independent voice for children's rights in Europe? The role of independent children's rights institutions in the EU,* in *The International Journal of Children's Rights,* 2011, pp. 432ss. G. Van Bueren, *Childrens rights,* in D. Moeckli, S. Shah, S. Siakumaran, *International human rights law,* Oxford University Press, 2017, pp. 292ss. C.m. Caamiña Domínguez, *La sustracción de menores en la Unión Europea,* ed. Colex, 2010, pp. 39ss. M. Melcher, *Private International Law and Registered Relationships: An EU Perspective,* in *European Review of Private Law,* 2012, pp. 1077ss. E. Drywood, *Child-proofing EU law and policy: Interrogating the law-making processes behind asylum and immigration provision,* in *The International Journal of Children's Rights,* 2011, pp. 408ss. N. Ferreira, *The harmonisation of private law in Europe and children's tort liability: A case of fundamental and children's rights mainstreaming,* in *The International Journal of Children's Rights,* 2011, pp. 572ss. I. De Jesus Butler, *Ensuring compliance with the Charter of fundamental rights in legislative drafting: The practice of the European Commission*, in *European Law Review,* 2012, pp. 398ss. A. S. De Sousa Gonçalves, *The Rinau case and the wrongful removal or retention of children*, in *UNIO EU Law Journal,* 2014. T. Rauscher, *Internationales Privatrecht. Mit internationalem Verfahrensrecht,* C. F. Müller, 2017, pp. 684ss. M. Durovic, *European law on unfair commercial practices and contract law,* Hart Publishing, 2016. U. Kilkelly, L. Lundy, *Children's rights*, ed. Routledge, 2017. P. Beaumont, M. Danon, K. Trimmings, B. Yüksel, *Cross-border litigation in Europe,* Hart Publishing, 2017. M. Kränzle, *Heimat als Rechtsbegriff? Eine Untersuchung zu Domicilie und gewöhnlichem Aufenthalt im lichte der EU-Erbrechtverordnung,* M. Siebeck, 2014, pp. 120ss. S. Morano-Foadi, L. Vickers, *Fundamental rights in the EU: A matter for two Courts,* Hart Publishing, 2015, pp. 238ss. M. Montero De Espinosa, A. Fucks, *Case law of the European Union Courts,* in *ERA Forum*, 2016, pp. 132ss.

[182] M. Silinski, *Mutual trust and cross-border enforcement of judgments in civil matters in the EU: Does the step-by-step approach work?,* in *Netherlands International Law Review,* 2017, pp. 116ss.

[183] See in particular: K. Hilbig-Lugani, *The scope of the Brussels IIa Regulation and actions for annulment of marriage brought by a third party after the death of one of the spouses*, in *Praxis des Internationalen Privat-und Verfahrensrecht,* 2017, n. 6

[184] R. Arnold, *The universalism of human rights,* op. cit.,

enhanced cooperation proposed by the european system [185]. Both Regulation n. 2201/2003[186] and n. 805/2004[187] they got the *exequator*, when a system of certification or declaration of automatic execution is expected[188]. In fact, the path of non *exequato*r was followed even in other specific areas, as with Regulation n. 1896/2006 on the European Decree on Injunctions[189] and with n. 4/2009[190] on foodstuffs[191], and then extended to all civil and commercial matters by Regulation n. 1215/2012 that is Bruxelles I bis[192]. Especially in the case of the European injunction it is noted by the Court of Justice, and through its case law in a "systematic" and "teleological" perspective[193] the guarantee of the certainty of the title (especially in the case of public acts and judicial transactions in accordance with the *Wirkungserstreckung* principle) whenever there is in fact no objection to the credit and does not derive the right of the credit

[185] In particular and especially in the sector of divorce separation and family law see: Council Decision (EU) 2016/954 of 9 June 2016 authorizing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships; 2010/405/: Council Decision of 12 July 2010 authorizing enhanced cooperation in the area of the law applicable to divorce and legal separation. See, B. Van Vooren, S. Blockmans, J. Wouters, *The EU's role in global governance: The legal dimension,* Oxford University Press, 2013.

[186] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

[187] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

[188] See the next cases from the Court of Justice: *Walter Vapenik v. Josef Thurner* C-508/12 of 5 December 2013; *Imtech Marine Belgium NV v. Radio Hellenic SA* C-300/14 of 17 December 2015; *Pebros Servizi srl v. Aston Martin Lagonda Ltd* C-511/04 of 16 June 2016. M. Hazelhorst, *Free movement of civil judgments in the EU and the right to a fair trial*, ed. Springer, 2017, pp. 433ss. T. Rauscher, *Internationales Privatrecht. Mit internationalem Verfahrensrecht,* op. cit.

[189] Regulation (EC) No 1896/2006-creating a european order for payment procedure. See from the ECJ the next cases: *Walter Vapenik v. Josef Thurner* C-508/12 of 5 December 2013; *Imtech Marine Belgium NV v. Hellenic Radio SA* C-300/14 of 17 December 2015, which the Court has declared that: "(...) certification is a measure of a judicial nature and is therefore reserved to the Court, and that is necessary to distinguish between the certification of a decision as the european enforcement order itself and the formal act of issuing the certificate and in particular the model contemplated by art. 9 of the rules of procedure (...)". *Pebros Servizi Srl v. Aston Martin Lagonda Ltd v. Aston Martin Lagonda Ltd* C-511/14 of 16 June 2016, which the Court has stated that: "(...) the default judgment was to be counted among the executive title that were to be certified as a european enforcement order, even if it could not, in fact, to be certified as a european enforcement order the pronouncement pronounced *in absentia* when it was impossible to identify the domicile of the defendant also for the purposes of notification (...)". And in case of monitor process see: *Goldbet Sportwetten v. Massimo Sperindeo* C-144/12 of 13 June 2013; *Iwona Szyrocka v. SiGer Technologie GmbH* C-215/11 of 13 December 2012; *Eco Cosmetics GmH v. Virgine Laetitia Barbara Dupuy and Tetyana Bonchyk* joined cases C-119/13 and C-120/13 of 4 September 2014; *Thomas Cook Belgium NV v. Thurner Hotel GmbH* C-245/14 of 22 October 2015; *Flight Refund Ltd vs. Deutsche Lufthansa AG* C-94/14 of 10 March 2016. For the analysis of the above cases see: M. Durovic, *European law on unfair commercial practices and contract law*, Hart Publishing, 2016, pp. 106ss. M. Hazelhorst, *Free movement of civil judgments in the European Union and the right of fair trial*, T.M.C. Asser Press, 2017, pp. 438ss. T. Rauscher, *Internationales Privatrecht mit internationalem Verfahrensrecht*, C.H. Beck, 2017, pp. 686ss. F. Eichel, *Keine rügelose Einlassung in Europäischen Mahverfahren,* in *Revue de Droit Privè de L'Union Europèenne,* 2014. M. Bobek, *Central european judges under the european influence. The transformative power of the EU revisited,* Hart Publishing, 2015, pp. 234ss. P. Gruber, *Die Nichtgerklärung eines europäischen Zahlungsbbefehls,* in *Zeitschrift für des Privatrecht der Europäischen Union*, 2016, pp. 153ss. W. Jelinek, S. Zangl, *Insolvenzordung,* Manz Verlag, 2017.

[190] Council Regulation n. 4/2009 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, 2008 O.J. (L 7) 1. This Regulation is applicable via Regulation 1107/2009, art. 15, 2009 O.J (L 3069) 1, (EC). See from the ECJ the joined cases: *Sophia Marie Nicole Sanders v. David Verhaegen and Barbara Huber v. Manfred Huber,* joined cases C-40013 and C-408/13 of 18 December 2014. In argument: N. Bauguiet, M. Dechamps, J. Mary, *Actualitès en droit de la familie,* ed. Larcier, 2016.

[191] In argument: Council Decision 2011/432/EU of 9 June 2011 on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (Official Journal L 192 of 22.7.2011). Council Decision 2014/218/EU of 9 April 2014 amending Annexes I, II and III to Decision 2011/432/EU on the approval, on behalf of the European Union, of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (Official Journal L 113 of 16.4.2014). See, O. Edward, R. Lane, *Edward and Lane on European Union law,* Edward Elgar Publishing, 2013.

[192] See in argument the next cases from the Court of Justice: *Assnes Havn v. Navigatos Management (UK) limited* C-368/16 of 13 July 2017; *Hanssen Beleggingen v. Tanja Prast-Knippin* C-341/16 of 5 October 2017; *Brite Strike Techonologies v. Strike Strike Tecnologies SA* C-230/15 of 13 July 2016; *Lazar v. Allianz Spa* C-350/14 of 10 December 2015; *Gazprom v. Lietuvos Respublika* C-536/13 of 4 December 2014. G. Payan, *Droit européen de l'exécution en matière civile et commerciale,* ed. Bruylant, 2012. B. Köhler, *Dual-use contracts as consumer contracts and no attribution of consumer status of a third party to the proceedings under Brussels-I Regulation,* in *Praxis des Internationalen Privat-und Verfahrensrecht*, 2017, n. 6

[193] See, T. Lock, T*he European Court of Justice and internatonal Courts*, op. cit., see in particular Chapter 4.

assessment. This is why the equivalence in the European judicial area of jurisdiction is based on fundamental human rights considerations[194], shared and based on compatible procedural rules or supplemented by the minimum standards of protection provided by the same Regulation. The abolition of the *exequator* involves checking those parameters that are considered essential for the effectiveness and enforceability of a decision taken by a foreign judge to be moved at the time of execution[195]. Within this mechanism, the judge of the Member State of recognition or the judge of the *exequator* is no longer the one who attests the enforceability of such decisions, but in the Court of the home Member State by sending a certificate which must meet specific conditions. It is possible to say that this is a rule that may seem incompatible with certain principles that were reiterated in the decisions of the European Court of Human Rights on the treatment of minors[196]. It is possible to say that this is a rule that may seem incompatible with certain principles that were reiterated in the decisions of the ECtHR on the treatment of minors[197]. The Court expressed itself, through the *Kampanella* judgment of 12 July 2011 concerning the need for the judges of the State in which the child was illegally transferred to consider the elements of the return order given the obligation to ensure the child's best interest[198]. In this regard, the execution of a provisional measure would be "obliged to examine the basis of jurisdiction of a foreign Court", verifying the need to expressly indicate "the basis of their competence"[199] and according to recital n. 33 of the Brussels Regulation I bis: "provisional measures (...) are the responsibility of a Court of a Member State which is not competent to know the substance, their effectiveness under this Regulation should be confined to the territory of the concerned Member State (...)"[200]. Equally important is the ruling *M. Gambazzi v. Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company* C-394/07 of 2 April 2009 and overcoming the old rule: *B. Denilauler v. Snc Couchet Frères* 125/79 of 21 May 1980 the measures which have been made unheard of otherwise (ex parte measures), fall within the scope of the Regulation only in the case of judicial decisions which, before their recognition and execution is requested in a State other than of their origin, have been the subject of, or could have been, subject to contradictory education in the State of origin (...)"[201].

28. We therefore conclude that the ECHR case law is intended to comply with the european legislature. We repeat the case *Povse v. Austria* with regard to the automatic recognition that has been recognized as an important element of a system aimed at preventing the multiplication of cases of abduc-

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[194] S. Hobe, *Europarecht*, Academia Juris-Vahlen Verlag, 2017.

[195] C.M. Caamiña Domínguez, *La "supresiòn" del exequàtur en el R 2201/2003,* in *Cuadernos de Derecho Transnacional,* 2011, pp. 66ss. G. Cuniberti, *Abolition de l'exequatur et présomption de protection des droits fondamentaux,* in *Revue Critique de Droit International Privè,* 2014, pp. 304ss. T. Pfeiffer, *The abolition of exequatur and the free circulation of judgments,* in F. Ferrari, F. Ragno (eds) *Cross-border litigation in Europe: the Brussels I Recast Regulation as a panacea?*, ed. Wolters Kluwer/Cedam, 2016, pp. 188ss. M.thöne, *Die Abschaffung des Exequaturverfahrens und die EuGVVO. Veröffentlichungen zum Verfahrensrecht,* ed. Mohr Siebeck, 2016.

[196] F. Garau Sobrino, *La delcaraciòn de ejecutividad automàtica: Hacia una nueva teoria general del exequatur?,* in *Anuario Espaňol De Derecho Internacional Privado*, 2004, pp. 96ss

[197] R. Rosskopf, *Unaccompanied minors in international, european and national law*, ed. Berliner Wissenschafts Verlag, 2016.

[198] See the case: Š*neersone and Kampanella v. Italy* of 12 July 2011

[199] T. Kruger, L. Samyn, *Brussels II bis: successes and suggested improvements,* in *Journal of Private International Law,* 2016, pp. 134ss.

[200] See in argument from the english jurisprudence the next cases: *Motorola Credit Corporation v. Uzan* (2004) 1 W.L.R. 113 (CA); *Sandisk Corporation v Koninklijke Philips Electronics NV & Ors* (2007) EWHC 332 (Ch) (27 February 2007); *Masri v. Consolidated Contractors International Company SAL & Anor* (includes Addendum) (2008) EWCA Civ 303 (4 April 2008); and a restritive approach in particular in prevalent measures see: *Banco Nacional De Comercio Exterior SNC v Empresa De Telecommunicaciones De Cuba SA & Anor* (2007) EWCA Civ 662 (04 July 2007). See also: L. Merett, *Worldwide freezing orders in Europe*, in *Cambridge Law Journal,* 2007, pp. 496ss. M. Weller, *Der Kommissionsentwurf zur Reform der Brüssel I-VO*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 2012, pp. 44ss. P.a. Nielsen, *The Recast of the Brussels I Regulation*, in M. Bonell, M.l. Holle, P.a. Nielsen (eds.), *Liber Amicorum Ole Lando*, ed. Djøf, 2012, pp. 257ss. H. Muir Watt, D. Bureau, *Droit international privé*, Tome I, ed. PUF, 2014, pp. 182ss, which the author declares that: "(...) La physionomie du contentieux international se transforme, se jouant de plus en plus désormais au stade du provisoire (...)". J. Von Hein, *Die Neufassung der EuGVVO,* in *Recht der Internationalen Wirtschaft*, 2013, pp. 98ss.

[201] S. Morano-Foadi, L. Vichers, *Fundamental rights in the European Union: A matter for two Courts*, Hart Publishing, 2015. N. Boschiero, T. Scovazzi, C. Ragni, C. Pitea, *International Courts and the development of international law*, T.M.C. Asser Press, 2013, pp. 872ss.

tion[202], even in harmony with the Hague system[203], with the aim of defining the dispute in a context of integration between the national systems in which the inquiry required to make the return is entrusted to the judge of the State of the last child's residence before the abduction[204]. On this solution has of course affected, the ruling by the Court of justice for a preliminary ruling in respect of the same case, which reiterated the obligation for the national Court to make the return order, as it was reserved for the Court of origin to carry out an assessment of the facts and Regulations in the light of the child's interest[205]. And then the question that arises is to give greater value and better protect a human right we have to resort to two different Courts dealing with the same human rights issue. We must take into account that in the Union's legislation there is room for flexibility in the ability of the competent Court to transfer the proceedings concerning the return of the minor to the judicial authorities of another Member State with whom the minor has "a particular link" and therefore it is more appropriate to deam with the whole case or part of it "where this corresponds to the child's interest" (as is also envisaged by art. 15 of the Brussels Regulation II-bis)[206]. Basically the link criteria they should find tracing the legal order in a fixed or variable manner, more closely related to matrimonial life, such as the one where the last spouse's residence is located, their common citizenship or the order of the forum. We can not escape the parallelism between private international law and material law. For some countries, the divorce institute for mutual consent appears consistent with the private autonomy that is recognized as eligible to play a role also from the point of view of the law regulating the dissolution of conjugal constraint[207].

29. With the Brussels Regulation II, the principle of *perpetuatio iurisdictionis* is diminished, according to which the criterion refers to "the date on which the (judges) are admitted" thus allowing the Court of origin the obligation to listen to the child by making more the case law of the european visible. Moreover, the refusal of recognition and the execution of a decision is also prevented "when the Court of origin has declared that it has fulfilled that obligation"[208]. In fact, the Regulation allows and shows greater sensitivity to the legal culture of individual states, and the proposed changes make the Court judgment of the child's habitual residence[209] and the maximum innovation in section 3 on the circulation of decisions more smoothly, where (…) it emphasizes the importance of direct cooperation between judges and the search for coordinated solutions, not only with regard to cases of international

[202] S.F. Halabi, *Abstention, parity, and treaty rights: How federal Courts regulate jurisdiction under the Hague Convention on the civil aspects of international child abduction,* in *Berkeley Journal of International Law*, 2014, pp. 148ss. Z. M. Hightower, *Caught in the middle: The need for uniformity in international child custody dispute cases*, in *Michigan State International Law Review*, 2013, pp. 645ss. S.m. Baird, *Stuck in the pipeline: An analysis of the Hague Convention and its effects on those in the process of international adoptions,* in *Journal of International and Comparative Law,* 2016, pp. 5ss.

[203] H. Loo, *In the child's best interests: Examining international child abduction, adoption, and asylum*, in *Chicago Journal of International Law,* 2016, pp. 17ss.

[204] See from the ECtHR the case: *Labassee v. Francia* of 26 June 2014 and *Mennesson v. France* of 26 June 2014. In the argument see: H. Fulchiron, C. Bidaud-Garon, *Reconnaissance ou reconstruction? A propos de la filiation des enfants nés par GPA, au landemain des arrêts Labassée, Mennesson et Campanelli-Paradiso de la Cour européenne des droits de l'homme*, in *Revue Critique de Droit International Privé* 2015, pp. 2 ss.

[205] See the case from the Court of Justice: *Povse v. Alpago* C-211/10 PPU of 1st July 2010.

[206] T. Krueger, *Brussels IIa recast moving forward*, in *Nederlands Internationaal Privaatrecht*, 2017, pp. 462ss.

[207] See: P. Gannagé, *La pènètration de l'autonomie de la volontè dans le droit international privè de la famille,* in *Revue Critique de Droit International Privè,* 1992, pp. 426ss. S. Djemni Wagner, *Evolution du droit communautaire de la famille: le règlement Bruxelles IIbis sur la responsabilitè parentale*, in D. Gadbin, F. Kernaleguen (a cura di), *Le statut juridique de l'enfant dans l'espace europèen*, ed. Bruylant, 2004, pp. 192ss. B. Ancel, H. Muir Watt, *La dèsunion europèenne: le règlement dit Bruxelles II*, in *Revue Critique de Droit International Privè,* 2001, pp. 4110ss. P. Lagarde, *Dèveloppements futurs du droit international privè dans un Europe en voie d'unification. Quelques conjectures*, in *Rabels Zeitschriften für ausländisches und internationales Privatrecht*, 2004, pp. 226ss.

[208] A. C. Olland, *A Judge's Perspective on the Cooperation Mechanism, in Recasting the Brussels IIa Regulation*. Workshop 8 November 2016 (European Parliament, Directorate-General for Internal Policies. Policy Department for Citizens' Rights and Constitutional Affairs, Legal Affairs, PE 571.383), 2016, pp. 55ss.

[209] See also the sentence of the Royal Court of Justice in the case: In re Bates, 1989 WL 1683783, at par. 13: "(...) the Court described "habitual residence" as follows: there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does hasa sufficient degree of continuity to be properly described as settled (...)".

abduction but also in cases of litigation, prolongation and transfer of powers, as well as enforcement of decisions in parental matters (...)"[210].

30. But the ECtHR does not function in the same way. Obviously, the EU legislature has shown greater commitment to safeguard fundamental rights in other areas than the rights of minors related to the recognition of judgments issued in other Member States, as in the case of the European Enforcement Order for claims not contested by Regulation n. 805/2004[211], while eliminating checks at the stage of execution and providing for some limited review possibilities (pursuant to art. 19), while respecting the rights of defense and the fair trial (recitals 10 and 11)[212]. In particular the Court of justice confirmed the approach in case *ASML Netherlands BV v. Semiconductor industry services GmbH (Servis)* C-283/05 of 14 December 2006 that: "(...) a balance must be struck under the Brussels I Regulation to prevent undermin(ing) (...) the rights of the defense (…) this balance must reflect effective judicial protection, itself to be achieved in fulfillment of the common constitutional traditions of the Member States (…) and thereby the ECtHR (...)"[213].

31. Equally important is the fact that the guarantee of fundamental rights also goes hand in hand with the award of national judges a certain margin of appreciation regarding the correct interpretation of the rules on jurisdiction and the recognition of judgments. In this respect, the preamble to the Brussels Regulation I[214] revised by Regulation n. 1215/2012[215] (so called Brusells I bis) which refers to the need for the Court, when applying the rules on jurisdiction and recognition of judgments[216] to take into account the circumstances of the case being examined by ensuring that it is decided by an authority whenever possible when hearing the child (case *Aguirre Zarraga* of 22 December 2010)[217], and has ruled that the competent Court must undertake all the necessary investigations to verify the existence of the child of a child's right of reliance on whether or not his/her transfer abroad (as in *J.Mc.B* of 5 October 2010) "reasonably foreseeable" can be inferred and also the connection of the dispute with a third state, within

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[210] F. Paulino Pereira, *La coopération judiciaire en matière civile dans l'Union Européenne: bilan et perspectives,* in *Revue Critique de Droit International Privè*, 2010, pp. 3ss.

[211] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

[212] M. Roccati, *Le rôle du juge national dans l'espace judiciaire européen, du marché intérieur* à *la coopération civile*, ed. Larcier, 2013.

[213] See, E. Torkrubb, *Civil procedure and EU law. A policy area uncovered*, Oxford University Press, 2008, pp. 150ss. P. Roberson, *Collier's conflict of laws,* Cambridge University Press, 2013, pp. 230ss. A. Briggs, *The conflict of laws*, Oxford University Press, 2013. M. Harding, *Conflict of laws,* ed. Routledge, 2013. J.J. Kuipers, *The right to a fair trial and the free movement of civil judgments,* in *Croatian Yearbook of European Law and Policy,* 2010, pp. 24ss.

[214] See in particular: E. Lein, *The Brussels I review proposal uncovered,* ed. Maklu, 2012.

[215] See in particular the next cases from the Court of Justice: *Emmanuel Lebek v. Janusz Domino* C-70/15 of 7 July 2016; *Universal Music International Holding BV v. Michael Tètreault Shilling* C-12/15 of 16 June 2016; *Virpi Kom v. Pekka Komu and Jelena Komu* C-605/14 of 17 December 2015; *Irmengard Weber v. Mecthilde* Weber C-438/12 of 3 April 2014; in particular in this ultimate case the Court has declared that: "(...) Since the "jurisdiction of the Court first seized (could not be) be formally established (…) the Advocate General confirmed (…) that there was no lis pendens in operation in this case and proceedings in the Court second seized need not be stayed. He relied on dicta (…) to justify that it was inappropriate for it to stay proceedings pending before it (…) the justification for the "reliable assessment" this was premised on the fact that the Court first seized did not have jurisdiction and could not therefore either determine the question of lis pendens nor issue a judgment capable of recognition under Articles 35(1) and 45(1) (...)". *Lokman Emrek v. Vlado Sabranovic* C-218/12 of 17 October 2013; *Daniela Mühlleitner v. Ahmad Yusufi* C-190/11 of 6 September 2012. See, J.P. Beraudo, *Regards sur le nouveau règlement Bruxelles I sul la compètence judiciaire, la reconnaisssance et l'exècution des dècisions en matière civile et commerciale*, in *Journal de Droit International*, 2013, pp. 742ss. L. Grard, *La communautarisation de "Bruxelles I",* in *Revue Gènèrale de Droit International Public,* 2013, pp. 530ss. P. Beaumont, M. Danon, K. Trimmings, B. YÜKsel, *Cross-border litigation in Europe*, Hart Publishing, 2017.

[216] U. Magnus, P. Mankowski, R. Fentiman, *Brussels I Regulation*, Sellier European Law Publishers, 2012. K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symeonides, *Convergence and divergence in private international law. Liber amicorum Kurt Siehr,* Eleven Publishing & Shulthess, 2010, pp. 174ss. P. STONE, Y. FARAH, *Research handbook on EU private international law,* Edward Elgar Publishing, 2015, pp. 250ss.

[217] G. Biagioni, *The Aguirre Zarraga case: Freedom of circulation of judgments goes one step further*, in J. Diez Hochleitner, C. Martinez Capodevila, Y. Frantos Miranda, *Recent trends in the case law of the Court of Justice of the European Union, ed.* Wolters & Kluwer, 2012, pp. 606ss.

the limit allowed by the rules, to ensure good or proper administration of justice, to ensure a better access to justice[218], and the predictability of the outcome of judicial disputes[219].

32. Art. 21 of the above mentioned Regulation lays down the principle of automatic recognition ant the possibility of suspending the request for recognition of a measure if it has been contested by an ordinary means. This means that according to art. 27 of the Regulation any decision shall be automatically recognized in the Member States of the EU [220]. In particular the Court in case *J. Mc.B*. held: "(...) that the Regulation must be interpreted as meaning that "whether a child's removal is wrongful for the purposes of applying that Regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law, in breach of which that removal has taken place (...)". Brussels II bis and the Hague Abduction Convention could be interpreted as having co-extensive definitions and purposes[221]. That means that the Member States could use their Convention jurisprudence to define the scope of the Regulation and the Regulation can apply as intended between Member States, and a radical change in Hague Abduction Convention jurisprudence is prevented[222]. In the question of the possible conflict between the provisional measures adopted by two different judges, the solution remains that of Regulation n. 2201/2003 and also reiterated by the judgment of the Court of Justice: *Italian Leather SpA v. WECO Polstermöbel GmbH & Co* C-80/00 of 6 June 2002 and *Gothaer Allgemeine Versicherung AG and others v. Samskip Gmb*H C-456/11 of 15 November 2012, which the Court did not consider: "(...) not preclusive of recognition any conflicting provisional measure issued in the requested Member State (...)"[223]. In the case of an unknown decision to the law of the Member State, Regulation n. 1215/2012 has taken into account that the measure is "adapted" according to what is provided by the State having "equivalent effect" and "pursuing similar objectives and interests" according to art. 54[224]. Again, in that case, the Court of Justice-in *DHL Express France SAS v. Chronopos*t *SA C-235/09 of 12 April 2011-has confirmed that: "the objectives of this measure should have been achieved by applying the relevant national rules (...) to ensure that the ban is respected (...)"*[225]. This is a regulatory framework in which the principle of certainty and that of the automatic execution of the measure in the European judicial area are balanced and flexibly guaranteed by access to justice and due process[226].

33. The principle of flexibility also arises in art. 7 of Regulation n. 4/2009 of the food aid[227], which allows an action on the basis of the so called *"forum necessitatis"*[228] to be admissible as a direct

[218] See the recital 1 and 3 of Regulation Bruxelles I bis. See, R. Money-Kryle, *Legal standing in collective redress actions for breach of EU rights: Facilitating or frustrating common standards and access to justice?* in B. Hes, M. BergstrÖM, E. Storskrubb, *EU civil justice: Current issues and future outlook,* ed. Bloomsbury, 2016. S.a. De Vries, *European Union and ECHR: Conflict or harmony?,* in *Utrecht Law Review*, 2013, pp. 80ss. J. Meeusen, F. Van Overbeeke, L. Verhaert, *The link between access to justice and european conflict of laws after Lisbon, much ado about nothing?*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 2017.

[219] See the recital n. 15 of Regulation Bruxelles I bis and especially the recital n. 29.

[220] See in argument: E. Sheidung, *Familienrecht,* ed. Beck, 2017, pp. 326ss.

[221] See: D. Liakopoulos, *Article 11 (6)-(8) Brussels II and the child abduction: An analysis and overview,* in *International and European Union Legal Matters, working paper series***,** 2014.

[222] C. Dekar, *J.Mc.B v. L.E.: The intersection of European Union Law and private international law in intra-European Union child abduction,* in *Fordham International Law Journal,* 2011, pp. 1433ss.

[223] M. Bogdan, U. Maunsbach, *European Union private international law: An ECJ casebook,* Europa Law Publishing, 2012.

[224] V. Puljko, *Regulation (EU) n. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with special reference to the relationship between the Regulation and arbitration*, in *Interdisciplinary Management Research,* 2015, pp. 4ss.

[225] M. Pohl, *Die Neufassung der EuGVVO-im Spannungsfeld zwischen Vertrauen und Kontrolle,* op. cit., pp. 111ss.

[226] W.r. Musgrove, *Substantive due process: A history of liberty in the due process clause*, in *University of Saint Thomas Journal of Law & Public Policy,* 2008, pp. 127ss.

[227] See the case from the Court of Justice: *Sophia Marie Nicole Sanders v. D. Verhagen and B. Huber v. M. Huber,* op cit.. See in argument also: H. Péroz, *Le règlement CE n. 805/2004 del 21 avril 2004 portant crèation d'un titre exècutoire europèen pour les crèances incontestèes,* in *Clunet,* 2005, pp. 638ss. L. D'avout, *La circulation automatique des titres exècutoires imposte par le règlement 805/2004 du 21 avril 2004,* in *Revue Critique de Droit International Privè*, 2006, pp. 2ss. A. Sadler, *From the Brussels Convention to Regulation 44/2001. Cornerstones of a european law of civil procedure*, in *Common Market Law Review,* 2005, pp. 1638ss.

[228] *Forum necessitatis* is a legal doctrine "which allows proceedings to brought when there would otherwise be no access

solution to remedy a practical problem and precisely to the finding of a closure rule in a complete system with jurisdictional titles and when no applicable rules confer jurisdiction on a Member State and it is impossible for the case to be brought to the jurisdiction of a third State, or judgment can not reasonably be promoted or cultivated in that country. Thus states exercise their *potestas iudicandi* on the basis of the "need" of eliminating exorbitant holes, overcoming the fragmentation of the application of national subsidiary rules and avoiding a contraction of the overall scope of their jurisdiction. The *forum necessitatis* avoids that the principle considered fundamental in the European judicial area can be prejudiced[229], *rectius* denied with the specification that this principle should be placed not in the preservation of advertising values (for example in the case of public order) but only for the protection of the fundamental rights of the actor. It is thus avoided to refrain from a denial of justice and it is easier to find solutions complying with the ECtHR (art. 6)[230] and the Charter on Fundamental Rights and Freedoms (art. 47)[231]. Of the same spirit is art. 10 of Regulation n. 1259/2010 (the so called Rome III)[232] in matters of divorce and personal separation, under which the judge may disregard the law of a State which does not provide for divorce or discriminate between spouses in relation to access to divorce or separation on grounds of sex, irrespective of whether it is a Member State or of a third State[233].

34. In the matter of separation and divorce, the Court has ruled in *Soha Sahyouni v. Raja Mamisch* C-281/15 of 12 May 2016 based on Regulation n. 1259/2010 and the regulating law art. 4 which does not distinguish between separation and divorce, but applies to all: "(...) situations that are present one or more elements of alienation in relation to the domestic social life of a country and which may involve more legal systems. It therefore intervenes only in situations of an international nature, such as those where spouses have different nationalities or who live in different Member States or a Member State of

to justice (...) In order for a Court to exercise jurisdiction under *forum necessitatis,* there must be (1) some connection with the forum state, and (2) some obstacle preventing the plaintiff from bringing proceedings abroad (...)". See, M. D. Goldhaber, *Corporate human rights litigation in non-U.S. Courts: A comparative scorecard*, in *U.C. Irvine Law Review,* 2013. In particular the Netherlands has reached beyond the French jurisdictional arm by adding that jurisdiction is permitted if it would be unacceptable to expect the plaintiff, who has a sufficient connection with the Netherlands, to bring the suit elsewhere. See in argument: I. Curry-Summer, *Rules on the recognition of parental responsibility decisions: a view from the Netherlands,* in *Nederlands Internationaal Privaatrecht,* 2014, pp. 546ss.

[229] S. Redfiled, *Searching for justice: The use of forum necessitatis,* in *Georgetown Journal of International Law,* 2014, pp. 912ss.

[230] J.J. Fawcett, *The impact of art. 6 (1) of the ECHR in private international law*, in *The International and Comparative Law Quarterly,* 2007, pp. 25ss.

[231] See the relevant cases form the ECtHR: *Klass and others v. Germany* of 6 September 1986; *Silver v. United Kingdom* of 24 September 1982; *Gautrin and others v. France* of 20 May 1998; *Ergi v. Turkey* of 28 July 1998. H.c.h. Hofmann, G.c. Rowe, A.h. Türk, *Administrative law and policy of the EU*, Oxford University Press, 2011, pp. 140. In case C-509/01 *OBB-Personenverkehr A* of 26 September 2013 the Advocate General Jääskinen has declared that: "(...) when a Member State in the exercise of discretion to designate the Court and Tribunals having jurisdiction and the lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from community law has left room for argument of a compliance failure appertaining to the principle of effectiveness, the obligation imposed by the EU law (...)". See in argument also the joined cases: C-444/09 and C-456/09 *Gavieiro and Torres* of 22 December 2010; C-240/09 *Lessochranarske zoskyuperie* of 8 March 2011 and C-249/11 *Hristo Bykanov* of 4 October 2012. In argument see also: S. ALBER, *Recht auf einen wirksamen Rechtbehelf und ein unparteisches Gericht-Art. 47*, in P. Tettinger, K. Stern, *Kölner Gemeinschafts Kommentar zur Europäischen Grundrechte-Charta*, C.H. Beck, 2006, pp. 734ss. L. Burgorgue-Larsen, *La Charte des droits fondamentaux saisie per les jugès en Europe,* op. cit. A. Bailleux, S. Van Drooghenbroeck, X. Delgrande, *La Charte des droits fondamentaux. Invocabilitè, interprètation, application et relations avec la Convention europèen ne des droits de l'homme*, in A.A.V.V., *Les innovations du traitè de Lisbonne,* ed. Bruylant, 2011, pp. 252ss. S. Van Drooghenbroeck, *Le droit international et europèenne des droits de l'homme devant le juge national,* ed. Larcier, 2014. M. Mörk, *An end to the possibilities-on horizontal liability in Laval and the limits of judicial rights protection*, in S. De Vries, U. Bernitz, S. Weatherhill, *The protection of fundamental rights in the EU after Lisbon,* op. cit., T. Kerikmäe, *Protecting human rights in the EU. Controversies and challenges of the Charter of Fundamental Rights,* ed. Springer, 2014, pp. 82ss.

[232] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. See from the Court of Justice: *Saha Sahyouni v. Raja Mamisch* C-281/15 of 12 May 2016. See, I. Viarengo, *The Rome III Regulation in legal practice: Case law and comments*, in *ERA Forum*, 2014, pp. 548ss. J. Mörsdorf-Schulte, *Europäisches internationales Scheidungrecht (Rom III),* in *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 2013, pp. 789ss.

[233] I. Viarengo, *Choice of law agreements in property regimes, divorce and succession: stress-testing, the new European Union Regulations*, in *ERA Forum*, 2016, pp. 544ss.

which at least one of them is not a citizen ("international couples"). We are talking about a Regulation that is inspired by the principle of enhanced cooperation, an indispensable and inevitable tool for enlargement of the Union and of political and democratic values, a source of harmonization and integration of the European legal space. Enhanced cooperation that "(...) must not affect the internal market or social and territorial cohesion, nor should it hinder or discriminate trade between Member States or distort competition (…) in accordance with art. 326 TFEU[234]. On the other hand, a Regulation of international character/universality as has been reported by most of the doctrine because it looks, *rectius* disciplines the life of the couple and not just the couple. In the past, the Court of justice sought to protect the life of the couple based on indirect discrimination (retirement/retribution, breach of Council Directive 2000/78 of 27 November 2000) as a fundamental right through the judgment *Jutta Johannes v. Hartmut Johannes* C-430/97 of 10 June 1999 which the Court answered: in the negative: "(...) asserting that (at that time) "(n)either the national provisions of private international law determining the substantive national law applicable to the effects of a divorce nor the national provisions of civil law substantively regulating those effects fall within the scope of the Treaty (...)"[235]. In cases: *Maruko v. Versorgungsanstalt der deutschen Bühnen* C-267/06 of 1° April 2008 and *Römer v. Freie und Hansestadt Hamburg* C-147/08 of 10 May 2011 such as Article 21 of the Charter of Fundamental Rights of European Union, prohibiting discrimination on the ground, *inter alia*, of sex, racial or ethnical origin, and religious belief, and Article 19, paragraph 1, of the TFEU, whereby the Union is entitled to adopt measures aimed at combating discrimination. The Luxembourg judges had to examine the matter in order to ensure the principle of equality in employment and occupation. Even with the sentence *Maruko* the Court, tried to guarantee the enjoyment of the widow's pension. In practice, the Regulation n. 1259/2010 was based on the equality of the spouses in two respects: (a) the design of the relevant conflict-of-laws provisions is not discriminatory *per sè*; and (b) to avoid the risk that the application of the latter provisions might result in divorce or legal separation (which is in the same level under the present Regulation) being subject to a substantive law placing granting one spouse a preeminent position[236].

35. The ECtHR through the following judgments: *Karner v. Austria* of 24 July 2003; *Kozak v. Polonia* of 14 March 2010, *Schalk and Kopf v. Austria* of 24 June 2010 noted that sexual orientation is tight and the measure must be not only proportionate but also necessary according to art. 12 of the ECHR[237], providing for the marriage between persons of different sex[238] that according to the Court: "(...) it does not entail the obligation for States to allow marriage between persons of the same sex, being reserved to the legislator of the individual States acceding to the European Convention the assessment of the opportunity to foresee such marriage (...)" [239]. The Court also highlighted the differences between the

[234] See the case from the ECK: *Arslan* C-534/11 of 18 July 2013. See in argument: R.L. Holzhacker, P. Luif, *Introduction: Freedom, Security and Justice After Lisbon,* in R. L. Holzhacker, P. Luif (eds.), *Freedom, security and justice in the European Union: Internal and external dimensions of increased cooperation after the Lisbon Treaty,* ed. Springer, 2014. J. Kuipers, *The law applicable to divorce as a test ground for enhanced cooperation,* in *European Law Journal,* 2012, pp. 23ss. S. Peers, *Divorce european style: The first authorization of enhanced cooperation,* in *European Constitutional Law Review,* 2010, pp. 340ss. D.a. Kroll, D. Leuffen, *Enhanced cooperation in practice. An analysis of differentiated integration in EU secondary law*, in *Journal of European Public Policy*, 2015, pp. 354ss. M. Piechowicz, *Evolution of Schengen. An example of enhanced cooperation and differentiated integration model with the area of freedom, security and justice*, in *Polish Political Science Yearbook,* 2017, pp. 124ss.

[235] M.w. Hesselink, *The general principles of civil law: Their nature, roles and legitimacy*, in *Amsterdam Law School Legal Studies Research Paper,* 2011.

[236] See in argument: P. Hay, *Selected essays on comparative law and conflict of laws,* C.H. Beck, 2015, pp. 423ss.

[237] U. Kilkelly, *The CRC in litigation under the ECHR. The CRC and the ECHR. The contribution of the European Court of Human Rights to the implementation of article 12 of CRC*, in T. Liefaard, J. Doek (eds), *Litigating the rights of the child*, ed. Springer, 2014, pp. 195ss. S. Kirchner, *Limits of the negative dimension of article 12 of the European Convention on Human Rights*, Grin Publishing, 2015.

[238] P. Pustorino, *Same-sex couples before the ECtHR: The right to marriage*, in D. Gallo et al. (eds.), *Same-sex couples before national, supranational and international jurisdictions*, ed. Springer, 2014.

[239] L. Hodson, *A marriage by any other name: Schalk and Kopf v. Austria,* in *Human Rights Law Review,* 2011, pp. 172ss. S. Dothan, *Judicial tactics in the European Court of Human Rights*, in *University of Chicago Public Law & Legal Theory Working Paper,* 2011, pp. 162ss. S. Dothan, *In defence of expansive interpretation in the European Court of Human Rights,* in *Cambridge Journal of International and Comparative Law,* 2014, pp. 510ss. M. Grigolo, *Sexualities and the ECHR: Introducing the univer-*

Strasbourg and Brussels systems where the Charter of Fundamental Rights of the European Union, in art. 9, does not mention the differences of sex as a prerequisite for marriage[240], unlike the ECtHR norm. The European Court has admitted that two people of the same sex may enjoy a family life under art. 8 of the European Convention of Human Rights[241]. The difference with the rule of public order is that the norm identifies the precious material interests to be safeguarded in advance. However, the provision leaves a certain margin of uncertainty as to non coinciding with divorce or separation mechanisms that can be qualified as equivalent[242].

V. Private international law and protection of human rights in situations related to the rule of law of third countries and outside the European Union judicial area

36. With the EU's accession to the ECHR, the Strasbourg Court will play an important role in the rules of private international law applicable to realities linked to non EU states. The problem is not so much about the rules on the law applicable to divorce[243] or food contracts, universally applicable

sal sexual legal subject, in *European Journal of International Law,* 2013, pp. 1026ss. L Helfer, E. Voeten, *International Courts as agents of legal change: Evidence from LGBT rights in Europe,* in *International Organization*, 2014, pp. 6ss. P. Johnson, *The choice of wording must be regarded as deliberate: Same-sex marriage and article 12 of the European Convention on Human Rights,* in *European Law Review,* 2015, pp. 210ss. L. Wildhaber, A. Hjartason, S. Donnelly, *No consensus on consensus? The practice of the European Court of Human Rights,* in *Human Rights Law Journal,* 2013, pp. 252ss. K. Dzehtsiarou, *European consensus and the legitimacy of the European Court of Human Rights*, Cambridge University Press, 2015, pp. 48ss.

[240] A. Laquer Estin, *Marriage and divorce conflicts in international perspective*, in *Duke Journal of Comparative & International Law,* 2017, pp. 490ss.

[241] See in argument: S. Fruewald, *Choice of law and same sex marriages,* in *Florida Law Review*, 1999, pp. 823ss. P. Hammje, *Le nouveau règlement (UE) n. 1259/2010 du Conseil du 20 décembre 2010 mettant en oevre une cooperatiòn renforcèe dans le domaine del la loi applicable au divorce et* à *la sèparation de corps*, in *Revue Critique de Droit International Privè*, 2011, pp. 297ss. L. ÁLvarez de Toledo Quintana, *El pacto de elección de lex separationis y lex divorcii en el Reglamento 1259/2010 del Consejo, de 20 de diciembre de 2010,* in *Diario La Ley,* 18 April 2011. S. Idot, *Le divorce international, première utilisation du mécanisme des coopérations renforcées,* in *Europe,* février 2011, pp. 2ss. K. Boele-Woelki, *To be or not to be: Enhanced cooperation in international divorce law within the European Union*, in *Victoria University of Wellington Law Review*, 2008, pp. 780ss. M. Buschbaum, U. Simon, *Les propositions de la Commission européenne relatives* à *l'harmonisation des règles de conflit de loi sur les biens patrimoniaux des couples mariés et des partenariats enregistrés,* in *Revue Critique de Droit International Privé*, 2011, pp. 803ss. J. Foyer, *Le changement de régime matrimonial en droit international privé, entre régles internes et régles internationales, en Liber amicorum Mélanges en l'honneur du professeur Gérard Champenois*, ed. Defrénois, 2012, pp. 273ss. G. Beck, *The legal reasoning of the European Court of Justice of the EU*, Hart Publishing, 2012. S. Theil, *Is the living instrument approach of the European Court of Human Rights compatible with the ECHR and international law*, in *European Public Law,* 2017, pp. 588ss. K. Lenaerts, J. Gutiérrez-Fons, *To say what the law of the EU is: Methods of interpretation and the European Court of Justice*, in *EUI Working Papers,* 2013. J.d. Lüttringhaus, *Übergreifende Begrifflichkeiten im europäischen Zivilverfahrens- und Kollisionsrecht*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2013, pp. 30ss. S. Corneloup (eds), *Droit européen du divorce/European divorce law*, Digione, ed. LexisNexis, 2013, pp. 518ss. K. Boele-Woelki, N. Dethloff, W. Gephart, *Family law and culture in Europe: Developments, challenges and opportunities,* ed. Intersentia, 2014. C. Kohler, W. Pintens, *Entwicklungen im Europäischen personen-und Familienrecht*, in *Zeitschrift für das gesamte Familienrecht*, 2016, pp. 1510ss. E. Lauroba Lacasa, M.E. Ginebra Molins (ed), *Règimes matrimoniaux de participation aux acquêts et autres mècanismes participatifs entre èpoux en Europe,* Società de Lègislation Comparèe, Paris, 2016. J.m. Schepre, *European family law,* op. cit., I. Viarengo, *The Rome II Regulation in legal practice: Case law and comments*, in *ERA Forum*, 2014, pp. 548ss. J. Mörsdorf-Shulte, *Europäisches Internationales Scheidungrecht (Rom III)*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2013, pp. 789ss. B. Lemoine, *Rome III Regulation. Getting divorced in Europe,* in T. Giegerich, D.c. Schmitt, S. Zitzmann, *Flexibility in the EU and beyond*, ed. Nomos, 2017, pp. 252ss. C. Domínguez, *Divorcio privado dictado por un Tribunal religioso de un tercer estado: Asunto C-281/15 Soha Sahyouni y Raja Mamish*, in *Cuadernos de Derecho Transnacional,* 2017, pp. 632ss. G. Rühl, J. Von Hein, *Toward a european code of private international law?,* in *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 2015, pp. 706ss. J. Basedow, *Kodifizierung des Europäaischen Privatrechts?*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 2011, pp. 711ss. M. Reimann, *Choice of law codification in modern Europe: The costs of multi-level law-making*, in *Creighton Law Review,* 2016, pp. 508ss.

[242] See from the ECtHR the next cases: *Johnston v. Ireland* of 18 December 1986; *Oliari and others v. Italy* of 16 September 2015; *Raban v. Romania* of 26 October 2010; *X. v. Latvia* of 26 November 2013, parr. 92-110; *Jeunesse v. Netherlands* of 3 October 2014, pp. 109ss.

[243] I. Sportel, *Divorce in transnational families: Marriage, immigration and family law*, ed. Palgrave, 2016, pp. 53ss. A. MILLS, *The identities of private international law: Lessons from the U.S. and EU revolution*, in *Duke Journal of Comparative & International Law*, 2013.

to all relationships that are being considered in front of the forum of a Member State but to rules on jurisdiction, since non domiciled defendants in a Member State can apply the exorbitant criteria in the national system of the Court seized. In fact, the Brussels system, even in the revised version of the Brussels Regulation I bis[244], grants jurisdiction to civil action for the criminal Court, and thus allows national jurisdiction criteria based on the nationality of the victim (and therefore of the actor)[245]. Given the extent of the jurisdiction conferred on the Courts of the Member States, it is possible in that case to have an orientation of civil action against non domiciled persons in EU space even when sufficient linkage/territorial jurisdiction (*örtliche Zuständigkeit)* is not sufficient of the cause with the Court seized.

37. We must take into account that european law has sought, above all, through its case law to follow the will of its legislator, namely to follow the conflict method rather than other different methods, respecting the consistency and mutual recognition of decisions as is also seen in art. 6 of the Rome I and Rome II Regulations "(...) the rules of conflict of laws in force in the Member States designate the same national law as the Court of the referring Court in order to facilitate the predictability of the outcome of legal disputes (...)"[246]. According to Janssnes: "(...) both the EU and its Member States must be pro-active in strengthening mutual recognition between national authorities, in particular, national judiciaries. This means that EU legislative measures that facilitate the application of the principle of mutual recognition must be accompanied by "trust-enhancing legislation". In the same way, the EU must prevent the emergence of "systemic deficiencies". To that effect, the new EU Framework to strengthen the Rule of Law put forward by the Commission appears to be an interesting initiative (...)"[247]. And according to the writer's opinion the principle of mutual recognition in the recognition of the european judiciaries implies that the executing Member State must accept variations in sentencing levels. The internal market method implies that the service provider is only subject to the law of control of the authorities of the State in which it is established and where he is lending his services in another Member State is guaranteed the recognition of the right to exercise and activity based on the law of a Member State, avoiding such additional restrictions on the law of other Member States. Within this circle, the principle of the State of origin excludes the application of the standard of traditional conflict as it prevents any other law from operating and regulating liberally by facilitating the conditions laid down by the laws of all Member States. It is not a general but specific and concrete enjoyment with derogations and exceptions that meet different needs and interests deserving of specific protection that demonstrate the intrinsic inadequacy of becoming a general method for resolving conflicts of laws[248].

38. In particular, the Court of Justice, as is also apparent from the judgments of the above mentioned cases, certainly takes into account national law which must be justified by overriding reasons of public interest; applied in a non discriminatory way; respects the principle of proportionality in such a way that it is appropriate to attain the aim pursued according to the negotiating matter. In the same vein, european law has also sought to resolve disputed with third countries through *erga omnes* conflict rules

[244] F. Gascón-Inchausti, *La reconnaissance et l'exécution des décisions dans le règlement Bruxelles I bis*, in E. Guinchard (eds), *Le nouveau règlement Bruxelles I bis. Règlement n° 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, ed. Larcier, 2014, pp. 210ss.

[245] Art. 5, par. 4 of Regulation Bruxelles I and art. 7, par. 3 of Regulation Bruxelles I bis. See, M.a. Rodríguez Vázquez, *Una nueva fórmula para la supresión del exequátur en la reforma del reglamento Bruselas I*, in *Cuadernos de Derecho Transnacional,* 2014, pp. 330ss. J. Velázquez Gardeta, *La indefensión del demandado como excepción en el proceso civil internacional dentro de la Unión Europea*, in J. Goizueta, M. Cienfuegos (eds.), *La eficacia de los derechos fundamentales de la UE. Cuestiones avanzadas,* Cizur Mayor, Thomson Reuters-Aranzadi, 2014, pp. 216ss.

[246] L. Bay Larsen, *Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice,* in P. Cardonnel, A. Rosas, N. Wahl (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh,* Hart Publishing, 2012, pp. 142ss. C. Janssens, *The principle of mutual recognition in EU Law*, in Oxford University Press, 2013. M. Köck, *Die einheitliche Auslegung der Rom I, Rom II und Brüssel I Verordnung im europäischen internationalen Privat und Verfahrensrecht,* ed. Ducker & Humblot, 2014.

[247] C. Janssens, *The principle of mutual recognition in EU Law,* in Oxford University Press, 2013. G. Lautenbach, *The concept of the rule of law and the European Court of Human Rights,* Oxford University Press, 2013.

[248] C. Kumpan, *Conflicts of interest,* in J. Basedow, K.J. Hort, R. Zimmerman, A. Stier, *Encyclopedia of european private law,* op. cit.,

seeking recognition and enforcement of judgments issued in third countries following a path of dogmatic perspectives, the development of new methods, tools by guaranteeing and respecting the exegetical principles and criteria of european law, leaving it open and in the way to different kinds of acts and instruments, which surely will cover gloomy gaps in various subjects in the near future.

39. In fact, international practice does not provide unequivocal elements regarding the configurability of States obligation not to apply exorbitant criteria with regard to foreigners, despite the fact that the ECHR has generally pleaded its own power to rule on it, for example in the *McDonald* case of 29 April 2008, the Court held that: "(...) art. 6 implies a control of the rules of jurisdiction in force in the contracting states in order to ensure that the latter do not undermine a right protected by the Convention (...)" [249]. In this respect, the ECtHR considered the criteria of jurisdiction in relation to the two processes in a case where the application of an exorbitant criterion ended in depriving a person of the possibility of exercising his right, giving rise to a real denial of justice. In case *Saileanu v. Romania* of 2 February 2010 the Court was interested in obtaining divorce despite the fact that California civil action was precluded while at the same time being denied the admissibility of the petition in Romania for incompetence of the judge.

40. It is not excluded that in the near future an obligation to modify the exorbitant criteria on the basis of the right to a fair trial under art. 6, par. 1 ECHR and art. 14, par. 1 of the United Nations Civil and Political Rights Act of 1966[250], which were reproduced in art. 47, 2nd par. of the Charter of Fundamental Rights[251]. The Charter of Fundamental Rights certainly strengthens in the EU system the importance of values such as non discrimination[252] to which all persons, including those belonging to third countries, are addressed: in this be interpreted art. 21, par. 2, which prohibits discrimination on grounds of nationality, subject to the provisions of the Treaties and other acts in force[253]. Within this spirit, the other provisions, such as those relating to the due process, must be interpreted. The rule that denies the applicability of the criteria of exorbitant jurisdiction to disputes where persons domiciled or resident in the European judicial area are accused demonstrates the Member States disapproval of those criteria. However, the need to eliminate the Court's recognition of the jurisdiction of the Court of origin also required the need to eliminate the exorbitant criteria in the mutual relations between the Member States. With regard to the law of third states, that objective does not exist and therefore the very basis of the abandonment of exorbitant criteria and of the mutual acceptance of limits on the exercise of jurisdiction in the absence of significant ties with the dispute arises. And let us not forget that the same identification of exorbitant criteria presents numerous margins of uncertainty, as has clearly emerged from the Hague Conference on Private International Law on Jurisdiction and the Enforcement of Foreign Judgments[254],

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[249] *Jackson Mc Donald v. France* of 29 April 2008. In the same spirit see: *Hornsby v. Greece* of 19 March 1997; *Burdov v. Russia* of 6 March 2003; *Sylvester v. Austria* of 9 October 2003; *Jovanovski v. The Former Yugoslav Republic of Macedonia* of 7 January 2010; *Vrbica v. Croatia* of 1st April 2010. See also: L.r. Kiestra, *The impact of the European Convention on Human Rights on private international law,* T.M.C. Asser Press & Springer, 2014, pp. 204ss.

[250] S. Joseph, M. Castan, *The international Covenant on civil and political rights. Cases, materials and commentary,* Oxford University Press, 2014.

[251] F. Picod, S. Von Drooghenbroeck, *Après-midi d'étude. La Charte des droits fondamentaux de l'Union européenne*, ed. Larcier, 2017.

[252] See the case: *D.H. and others v. The Czech Republic* of 13 November 2007. C. Danesi, *How far can the European Court of Human rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence*, in *International Journal of Constitutional Law*, 2011, pp. 794ss. K. Barnes, *Adjudicating equality. Antidiscrimination education jurisprudence in the European Court o Human Rights*, in *Harvard Journal on Racial & Ethnic Justice,* 2017, pp. 206ss.

[253] See the cases of the Court of Justice: *Galleazzo and Benatti* C-101/03 of 2 October 2014; *Runević-Vardyn and Wardyn* C-391/09 f 12 May 2011; *Dafeki* C-366/94 of 2 December 1997; *Sayn-Wittgenstein v. Landeshauptmann von Wien* C-208/09 of 22 December 2010. The Court of Justice int eh above cases has noted that the principle of mutual recognition of family and personal statutes is based in the Union's ordinance on the citizenship of Union, on the freedom of crime and the obligation of loyal cooperation between Member States, the Court of Justice remains competent to verify the legitimacy of the use of the exception in relation to public policy, with the exception of the need to protect the general interest requirements imposed by the State and the proportionality of the restriction on freedom of movement so determined. See: R. Geiger, D.e. Khan, M. Kotzur, E*uropean Union Treaties. A Commentary,* C.H. Beck & Hart Publishing, 2015.

[254] C.a. Whytock, *Faith and scepticism in private international law: Trust, governance, politics and foreign judgments,* in *Erasmus Law Review*, 2015.

during which a black list of criteria to be eliminated in the future convention, but not accepted by the United States because it included some considered irreplaceable in the light of common law[255]. So we can say that in the case of the abolition of "excessive" jurisdictional criteria can be seen in the light of the fundamental right to a fair trial, an enlargement by the EU institutions, overcoming the logic of the reciprocity of the Brussels system, that is to extend tout Court the criteria applicable in internal european relations to disputes involving non EU reality areas[256]. This is a strengthening, *rectius* unification of the credibility of a system that considers the automatic effectiveness of judgments emanating from Member States. The case law of the ECHR could already contribute to strengthening the integration process by directly involving the states, as well as the EU institutions, and supporting the latter in the progressive overlapping of uniform criteria to national ones. This result can help overcome the obstacles still present in the conclusion of a universal convention[257]. The European Institutions have shown in practice guidelines for openness and better justice and greater protection as set out in the Brussels Regulation I to a judgment in a third State as a limit to the recognition of a judgment subsequently rendered in european territory with title and object identity[258]. The decisions of the Court of Justice on the Brussels I Regulation continue to march towards an increasingly particularized jurisprudential framework for the autonomous interpretation of EU private international laws, as declared that: "(…) the key developments (...) in the broadening or gradual expansion of fundamental rights but crucially also adjustments (…) on the grounds of justification for restrictions of those rights (...)"[259].

41. Equally important is the amendment to the Brussels Regulation I bis, where art. 33 and 34 concern the incidence of an identical or related case in a third country. In such a case, the Court of the then Member State may suspend the proceedings where the judgment of the third state can be recognized and is convinced that such suspension is "(...) necessary for the proper administration of justice (...)". Regardless of the parties' domicile *(actor sequitur forum rei),* the choice of the competent forum (art. 25 of the Brussels Regulation I bis) prevails on the forum even if the same dispute has been invoked subsequently[260]. Art. 79 commits the Commission (even in very long terms: 11 January 2022) to submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Regulation including an assessment of the need to further extend the rules on jurisdiction the defendants who are not domiciled in a Member State, in the light of the experience of applying the Regulation and possible developments at international level. We can say that the whole of EU rules in the field of private international law and procedural law is an integrated regional system that, insofar as it fully embraces

[255] See, R.a. Brand, *The 1999 Hague Preliminary Draft Convention text on jurisdiction and judgments: A view from the United States,* in F. Pocar, C. Honorati (a cura di), T*he Hague Preliminary Draft Convention on jurisdiction and judgments,* ed. Cedam, 2005, pp. 3-40.

[256] See, C. Focarelli, *The right of aliens not to be subject to so-called "excessive" civil jurisdiction, in enforcing international human rights*, in B. Conforti, F. Francioni, *Domestic Courts- International studies in human rights,* Martinus Nijhoff Publishers, 1997, pp. 441-447. The jurisprudence of the Court of Justice was oriented in this way with the case: *Mainschiffahrts-Genossenschaft,* C-106/95 of 20 February 1997. See also: P. Lagarde, *Le principe de proximité dans le droit international privé contemporain,* in *Recueil des Cours,* 1986, pp. 32ss. D. Kokkini-Iatridou (a cura di), *Les clauses d'exception en matière de conflits de lois et de conflits de juridiction-ou le principe de proximité,* Martinus Nijhoff Publishers, 1994. A.e. Von Overbeck, *De quelque règles générales des conflits de lois dans les codifications récentes, in Basedow (a cura di), Private Law in the international Arena-Liber amicorum Kurt Siehr*, ed. Springer, 2000, pp. 550ss.

[257] C. Grabenwarter, *European Convention on human rights: ECHR,* C. H. Beck, 2014.

[258] P. Hovaguimian, *The enforcement of foreign judgments under Brussels I bis: false alarms and real concerns*, in *Journal of Private International Law,* 2015, pp. 214ss. T. Ratković, D. Zgrablkić Rotar, *Choice of Court agreements under the Brussels I Regulation (Recast),* in *Journal of Private International Law*, 2013, pp. 246ss. U. Magnus, P. Mankwoski, *European Commentaries on Private International Law Brussels I Regulation,* Sellier European Law Publishers, 2012, pp. 614ss. A. Mukarrum, *The nature and enforcement of choice of Court agreement. A comparative study*, Hart Publishing, 2017.

[259] See also: P. Letto-Vanamo, J. Smits, (eds), *Coherence and fragmentation in european private law,* Sellier European Law publishers, 2012. J. Polakiewicz, T*he EU Law and the ECHR: Will the European Union's accession square the circle?*, in *European Human Rights Law Review,* 2013, pp. 604ss. S.a. Miko, *Norm conflict, fragmentation and the European Court of Human Rights,* in *Boston College Law Review*, 2013.

[260] T. Bosters, *Collective redress and private international law in the European Union,* T.M.C. Asser Press, 2017, pp. 74ss. V. Lazić, S. Stuij, *Brussels I bis Regulation. Changes and challenges of the renewed procedural scheme*, ed. Springer, 2016, pp. 587ss.

commonly shared values, can extend beyond territorial boundaries and facilitate adaptation also of other regulatory systems that are out of the basic principles of the right process[261]. In particular in case *Antonio Gramsci Shipping Corp v. Aivars Lembergs* C-350/13 of 5 June 2014 the question referred to the Court of Justice by the Latvian Court was whether it was compatible with the Regulation for the Courts of a Member State for a Mareva injunction to be enforced in the Courts of another Member State when damage to third parties may occur as a result of such enforcement[262]. In this case, the Court recognized that: "(...) in exceptional circumstances, it can examine the conditions (to determine) jurisdiction (...) the Court plainly refused to give a ruling on the matter. The question therefore remains as to whether a Mareva injunction or similar procedural mechanism granted by the Courts of a Member State, could legitimately constitute an infringement of the rights of third parties in breach of Article 47 of the Charter (...)"[263].

42. In the end we can say that as far as the case is concerned real estate and border rights and/or when found in various countries it is normal to link to *lex rei sitae*. In this case, we can speak of an objective link, based on a relationship that is equidistant from the parties and safeguarding the interest of the state in maintaining the closed end catalog of real rights [264]. Again, we can speak of a form of protection of real law which enjoys certain faculties and at the same time being subject to certain obligations, those of *lex rei sitae*[265]. The fact that any form of registration, transcription or enrollment is required makes the judge in front[266] to a predictable and meaningful law. Thus, on the one hand, the self determination of the interested parties is privileged and on the other hand the certainty of the law, through a certain concrete case that avoids the general and abstract forms. This method does not affect human rights and strengthens the principle of non discrimination.

43. Within the framework of private international law and situations related to the laws of third countries and outside the European Union judicial area, attention is also paid to the protection of interests and rights in the event of insolvency[267]. Regulation n. 1346/2000 on cross border insolvency[268] and Regulation n. 2015/848, which entered into force on 25 June 2017[269] establishes that the Court hearing the

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[261] E. Poillot, I. Rueda, *Les frontières du droit privè europèene/The boundaries of european private law*, ed. Larcier, 2012.

[262] D. Donoho, *Human rights enforcement in the twenty-first century,* in *Georgia Journal of International & Comparative Law,* 2014, pp. 78ss.

[263] See, L. Collins, A. Briggs, J. Harris, Jd. Mcclean, C. Mclachlan, Cgj. Morse (eds), *Dicey, Morris and Collins, The conflict of laws,* ed. Sweet and Maxwell, 2012, pp. 14ss.

[264] P. Beaumont et al. (eds.), *The recovery of maintenance in the European Union and worldwid*e, Hart Publishing, 2014.

[265] Mg. Cubeddu Wiedemann (ed.), *The optional property regime. The Franco-German community of accrued gains,* ed. Intersentia, 2014.

[266] See in this spirit: Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. The Regulations objectives is to clarify the rules applicable to property regimes for international married couples and registered partnerships in order to avoid parallel and possibly conflicting procedures in different EU Member States, for instance on property or bank accounts with entry in force from 29 January 2019. The objectives of the above Regulations are: -to clarife the competence of national Court in case of dissolution or annulment or death of one of the partners; -the law of application which could apply to the case (rules on applicable law); -recognition and enforcement of a judgment on property matters from another Member States; -the non recognition of the civil statutes of the partners which be governed from the national law of each Member State. M. PereÑa Vicente, P. Delgado Martin, M. Heras HernÁNdez, *Nuevas orientaciones de derecho civil en Europa,* ed. Thomson Reuters-Aranzadi, 2015, pp. 632ss. S. Marino, *Strengthening the european civil judicial cooperation: The patrimonial effects of family relationship,* in *Cuadernos de Derecho Transancional,* 2017, pp. 266ss.

[267] J.A. Pottow, *Beyond carve-outs and toward reliance: A normative framework for cross-border insolvency choice of law,* in *Brooklin Journal of Corporate Financial & Commercial Law*, 2014, pp. 8ss. B. Wessels, *Contracting out of secondary insolvency proceedings: The main liquidator's undertaking in the meaning of article 18 in the proposal to amend the EU insolvency Regulation,* in *Brooklyn Journal of Corporate Financial & Commercial Law,* 2014, pp. 68ss. G. Mccormack, *Reconciling european conflicts and insolvency law*, in *European Business Organization Law Review,* 2014, pp. 310ss.

[268] Council Regulation n. 1346/2000 on Insolvency Proceedings, 2000 O.J. (L 160); Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

[269] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. See also: C. Lisanti, L. Sautonie-Laguionie, *Règlement UE n. 2015/848 du 20 mai 2015 relatif aux procèdures d'insolvabilit***è,** in Societè de lègislation comparèe, Trans Europe experts, 2016.

opening of the insolvency proceedings[270] will verify its jurisdiction by its own jurisdiction by providing an area of harmonization in a difficult sector which precludes many rights which must be protected as those debtors, property, freedom of establishment, free movement, satisfaction of creditors and so on[271]. The harmonization in that case according to the perception that legal culture: "(...) has undergone (...) an evolution in the Member States, reflecting a range of influences. To confine such richness within the straightjacket of harmonization is to rob Europe of its past (...) and this dissenting vein is nurtured by the profound belief that Europe is strengthened by its diversity (...) according to the opinion of Weatherhill. In the new silence/omission of Regulation n. 2015/848 to locate the credit law allows you to address the relevant conflict rules of the forum, in particular Rome Regulation I on the law applicable to contractual obligations[272]. In particular, pursuant to art. 2 of the Regulation the principles of uniqueness, universality and exclusivity of the procedure in coordination with art. 6 and 9 are essential for countering and avoiding the phenomenon of *forum shopping*[273], since in matters of bankruptcy jurisdictional jurisdiction also implies the legislative competence of the *lex fori* by applying and identifying the objective and subjective assumptions of opening a competition procedure. The principle of unity and universality of the procedure such as prevention (art. 4.2 (c)) and safeguard (art. 5)[274] remain the necessary foundation for a system involving the coexistence of several protocols even in the case the Court of Justice for the determination, continuation or suspension of the whole proceedings[275].

44. With the first judgments of the Court of Justice, in particular in: *Ekro* BV Vee-en Vleeshandel v. Produktschap voor Vee en Vlees C-327/82 of 18 January 1984 (the first in relation to the legal concepts contained in the Brussels Convention of 1968), *Lechouritou and others v. Federal Republic of Germany* C-292/95 of 8 November 2006; and the following: *Gesellschaft f*ür *Antriebsteknik mBH & Co KG v. Lamellen und Kupplungsbaun Beteilungs KG* C-4/03 of 13 July 2006, cases the Court stated that: "(...) after the opening of a principal insolvency proceeding in a Member State, the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, shall be held, without grounds for refusal based on art. 25(3) and 26 of the same Regulation, to recognize and make all the decisions relating to the principal insolvency proceedings and therefore have no right to order, by applying the legislation of that State, other Member State, enforcement actions on the assets of the debtor declared insolvent situated in the territory of that last State, if it does not allow the law of the opening State and the conditions are not met which is subject to the application of art. 6 and 10 of the said Regulation (...)"[276]. The case law affirms the principle that, where the actions derive from a manifestation of public authority's powers of a party to dispute because of the exercise by virtue of that power exorbitating the sphere of common law rules applicable to relations between individuals, such actions are taken from the Convention (and Regulation n. 44). However, the cases in which such a case law has been formed mainly concern State initiatives to obtain judicial protection of legal situations constituted by the exercise of *imperium* power. Private actions which, for their part, have allowed the Court to rule on the bounds of *imperium* power are little relevant to the issue here since they were in the interests of

[270] B. Wessels, *International insolvency law.* Part II. *European insolvency law*, Wolters Kluwer, 2017.

[271] J.G. Srankling, *The international law of property*, Oxford University Press, 2014.

[272] G. Lardeux, *Droit international privè des obligations contractuelles*, ed. Larcier, 2016.

[273] S. Rammeloo, *From Rome to Rome. Cross-border employment contract. European private international law. Intertemporal law and foreign overriding mandatory laws,* in *Maastricht Journal of European and Comparative Law,* 2017.

[274] F. Ferrari, *La loi applicables aux contrats conclus par les consommateurs (Article 5 de la Convention de Rome),* in *Revue de Droit des Affaires Internationales,* 2008, pp. 234ss. F. Ferrari, *Rome I Regulation*, Selier European Law Publishers, 2015.

[275] J. Armour, *The law and economics debate about secured lending: Lessons for european law-making?*, in H. Eidenmüller, E.m. Kineninger (eds), *The future of secured credit in Europe, in European company and financial law review,* 2008, pp. 4ss.

[276] See also: R. Schuz, *The doctrine of comity in the age of globalization: Between international child abduction and cross-border insolvency,* in *Brooklyn Journal of International Law*, 2014. According to the author: "(...) the Abduction Convention concerns the interests and welfare of children. In contrast, the Model Law deals with purely financial interests. This fundamental difference must affect the interests of states under each regime, and the way in which competing interests are weighed against one another. Nonetheless, there is sufficient common ground between the two instruments to justify a comparison of the uses of comity, both in interpretation and application of their provisions and in the exercise of discretion under each regime (...)"

other individuals. As a result of the interpretation contained in the judgment in question, the ruling on the application of the private law, as well as the effectiveness of foreign judgments, must be governed by common rules or international rules of a different nature than the european law.

45. Continuing in the same spirit with the case: *Gaetano Verdoliva v. Van der Hoeven BV and others* C-3/05 of 10 February 2010, in which the Court states: "(...) the requirements both of uniform application of european law and the principle of equality is that a provision of law community, which does not contain any express reference to the law of the Member States as to the determination of its meaning and its scope, must normally give rise to an autonomous and uniform interpretation throughout the community taking into account the context of the provision and the purpose pursued by the legislation (...)". Equally important is the case: *S. Staubitz v. Schreiber* C-1/04 of 17 January 2006; *Eurofood IFSC Ltd* C-341/04 of 2 May 2006, where the Court has held that: "(...) the injury should constitute a manifest breach of a rule of law considered essential in the legal order of the requested state or of a right recognized as fundamental in the same legal order (...)". In that case, the Court interpreted the Regulation as intended to dissuade the parties to the procedure for the transfer of goods and/ or judicial proceedings from one Member State to another in order to obtain a better legal status. In *INTERDIL* C-396/09 of 20 October 2011, the Court stated that: "(...) the management and control bodies of a company are at its registered office and the management decisions of that company are taken in a manner recognized by third parties in that place, fully applies the presumption introduced by art. 3(1) (…) to exclude any different location of the principal interests of the debtor company (...)". The Court of Justice sought to consider as sufficient elements and to overcome the presumption introduced by the EU legislature on the condition that an overall assessment of all the relevant elements allows the protection of third parties, management and control of the company, as well as the management of its interests, especially if it is located in another Member State of the Union. In case: *C. Seagon v. Deko Marty Belgium* C-399/07 of 12 February 2009 the Court of Justice followed a teleological interpretation claiming that the insolvency Regulation would transpose the content of the old judgment *Gourdain v. Nadler* (C-133/78 of 26 February 1979) also with reference to a jurisdiction in the field of related action, recognizing the principle of *vis attractiva concursus.* In case: *AMI and others* C-294/02 of 17 March 2005 and *German Graphics Graphische Maschinen GmbH v. A. Van Der Schee*, C-292/08 of 10 September 2009 the Court of Justice held that: "(...) the opening of the insolvency proceedings against a buyer of an asset does not affect the rights of the seller established on the property reserve when the property, at the time the procedure is open, is located in the territory of a Member State other than the opening State (...)"[277].

46. In that case, the Court of Justice makes use of the hypothesis of *acte claire*[278], that is to say the situation of the correct application of the European standard, which must be straightforward and intuitive without leaving any margin of doubt as to the way in which the matter should be resolved by allowing a restrictive and uniform interpretation only by means of the references for a preliminary ruling[279]. In fact, the aforementioned cases have also sought to protect the seller in respect of goods outside the opening Member State of the insolvency proceedings [280].

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[277] E. Fongaro, *Droit patrimonial, europèen de la famille,* op. cit.

[278] M. Broberg, *Acte clair revisited: Adapting the acte clair criteria to the demands of the times*, in *Common Market Law Review,* 2008, pp. 385ss.

[279] J. Japrielian, *Le renvoi prèjudiciel en droit de l'Union: Un mècanisme assurant la protection juridictionnelle effective des individus?,* in *Jurisdoctoria* n. 6, 2011. M. Broberg, N. Fenger, *Le renvoi prèjudiciel* à *la Cour de justice de l'Union europèenne*, ed. Larcier, 2013.

[280] Insolvency as a right in itself has deem included in the European Convention on Human Rights through Protocol n.1 additional to the Convention on the Right of Ownership and art. 14 of the Convention on the Prohibition of Discrimination (*Chernetskiy v. Ukraine* of 8 December 2016; *Babiarz v. Poland* of 10 January of 2017; *Burden v. United Kingdom* of 29 April 2008; *Kryvenkyy v. Ukraine* of 12 February 2017) by allowing the ECtHR, through its case law, to qualify the right to property by respecting the personal property, the deprivation of property and the Regulation of the use of goods in accordance with the general interest, to a lesser effect that the privative of the property. The European Court corresponds to an autonomous notion, particularly as regards the definition of good, including intellectual property, rights and interests of a current nature such as claims (*Pressos Compania Naviera SA and others v. Belgium* of 20 November 1995, par. 31; *Krahulec v. Slovakia* of 5 July 2016), the commercial good *(Iatridis v. Greece of 25 March 1999)*, taxes and duties. Within the scope of the goods are also

included legitimate hopes sufficiently based on the law or the domestic case law that obtain the actual enjoyment of the good as is repeated in *Fabris v. Greece* of 7 February 2013, *par. 49-52 and Stamova v. Bulgaria of 19 January 2017;* The European Court recognizes the right to acquire a property on the sole basis of an experience which can not be acted upon the national Court under the old *Slivenko and others v. Latvia* of 23 January 2002. Property deprivation is qualified when the owner is permanently prevented from exercising the faculties that are its content but on the contrary in that case from the deprivation foreseen in the case of insolvency only by the depriving of the property that he was the holder of the judgment in *James and others v. United Kingdom* of 21 February 1986, par. 27ss and *Ljaskaj v. Croatia* of 20 December 2016. Similarly, in the case of measures of asset prevention (seizure and confiscation of goods), the Court has ruled that they may be attributed to the concept of criminal sanction for preventive purposes and considered them to be proportionate to the fight against mafia crime and the circulation of wealth criminal origin within the scope of regulatory measures for the use of justified goods of general interest. The restriction of property according to judgments *Koufaki and Adedy v. Greece* of 7 March 2013, *Da Conceição Mateus and Santos Januàrio v. Portugal* of 8 October 2013 and *Mamatas and altri v. Greece* of 21 July 2016; *Mahorramov v. Azerbaijan* of 25 April 2017; Šidlauskas *v. Lithuania* of 11 July 2017 results in loss of property or restriction of the use of the property or other interference other than foreseen by law must be motivated by the public interest or the general interest. Even then, the Court remains faithful to its broader margin of appreciation when it comes to interventions to implement a social policy or to regulate the consequences of a change in the political regime (*Jan and others v. Germany* of 30 June 2005; *Alentseva v. Russia* of 17 November 2016). Very wide and heterogeneous remains the notion of Regulation on the use of goods in relation to proportionality and the legitimate need for compensation according to the value of the good (*Preite v. Italy* of 17 November 2015). We are talking about concrete and effective protection that implies positive measures, measures to ensure that the right to property is protected also in relations between individuals and in particular to enforce the enforcement procedures of judgments or prosecution procedures (*Fuklev v. Ukraine* of 7 June 2005; *Lengyel v. Hungary* of 18 July 2017 and *Krasteva and others v. Bulgaria* of 1st June 2017). The ECtHR remains consistent with the Court of Justice's general interest pursued by the Union and is proportionate and respectful of the substance of the law in accordance with the judgment *Nold* C-4/73 of 14 May 1974, in case *Interseroh Scrap and metal trading GmbH v. SAM* C-1/11 of 29 March 2012 and *H. Schaible v. Land Baden Württemberg* C-101/12 of 17 October 2013. See in particular the next cases in argument: *Chinnici v. Italy* of 14 April 2015, par. 29; *Odescalchi and Lante della Rovere v. Italy* of 7 July 2015; *D.A. and others v. Italy* of 14 January 2016; *Nardone v. Italy* of 20 October 2015, the ECtHR observed that: "(...) relying on Article 6 par 1 of the Convention, the applicants complained that the proceedings before the Supreme Court of Cassation were unfair as the Court's decision was not sufficiently reasoned. Relying further on Article 13, they complained that they did not have at their disposal an effective domestic remedy in relation to their complaint under Article 8 (...) these complaints must be declared admissible, but that it is not necessary to examine them on the merits (see, *mutatis mutandis*, *Laino v. Italy par.* 29; *Canea Catholic Church v. Greece*, 16 December 1997, par. 50; *Ruianu v. Romania*, par. 75, 17 June 2003; Öcalan *v. Turkey (no. 2)*, par. 213, 18 March 2014) (...)". *Depalle v. France* of 29 March 2010, the ECtHR declared that: "(...) cast doubts on the adequacy of the last instance domestic Court's assessment of the child's best interests (see, *mutatis mutandis*, Šneersone *and Kampanella*, par. 95). In these circumstances, the Court cannot but conclude that the highest domestic Court's analysis was not sufficiently thorough and that, instead, it followed what could be described as an overly formalistic approach (see, *mutatis mutandis*, in the context of Article 6, *Koskina and Others v. Greece*, par. 24, 21 February 2008; *Vasilakis v. Greece*, par. 32, 17 January 2008; *Efstathiou and Others v. Greece*, par. 33, 27 July 2006; *Běleš and Others v. the Czech Republic*, par. 69; *Zvolský and Zvolská v. the Czech Republic*, par. 55) (...) that "generosity" in the interpretation of Article 8 could be explained by the fact that, in that case as in *Chapman v. the United Kingdom)* (...) the Court sought to protect the traditional lifestyle of Gypsies, of which caravan homes and travel are a part. While the applicant does not belong to the category of persons requiring special protection in the eyes of the Strasbourg judges, his "advanced" years and his attachment to the house nonetheless deserved a more nuanced approach (...)". *Arnaud and others v. France* of 15 January 2015; *Gripolovič v. Lithuania* of 10 October 2017; *Lachinkiva v. Russia* of 10 October 2017; *Osipkovs and others v. Latvia* of 4 May 2017; *Vaskrsić v. Slovenia* of 25 April 2017; *Maharramov v. Azerbaijan* of 25 April 2017; *Wolter and Sarfert v. Germany* of 23 March 2017, the ECtHR observed that: "(...) with regard to the imperative of the equal treatment of children born outside and within marriage (see *Fabris*, par. 68, and *Brauer*, par. 43), it now needs to be ascertained whether the strict application of the cut-off date by the domestic authorities in the special circumstances of the present cases struck a fair balance between the competing interests involved (...) to take the following elements into account: knowledge of the persons concerned, status of the inheritance rights involved, and the passage of time in bringing complaints (...) he was not a descendant whose existence was unknown to those who were subsequently designated as heirs. On the contrary, he was initially granted an inheritance certificate by the first-instance Court, which was later withdrawn because he had been born outside marriage. The Court considers that this fact is sufficient to prove that the subsequent heirs' position with regard to their rights to the deceased's estate was known to be controversial. That also seems to be reflected by the fact that the subsequent heirs did not apply for an inheritance certificate themselves, but were only named as heirs after the first applicant had again applied for an inheritance certificate. Furthermore, it has to be taken into account in the first applicant's case that he had already been in possession of the inheritance for a certain period of time (...)". *Baczùr v. Hungary* of 23 March 2017; *Mkhchyan v. Russia* of 7 February 2017; *Valant v. Slovenia* of 24 January 2017; *Saumier v. France* of 12 January 2017; *Gaina v. Croatia* of 30 August 2016; *Lukats v. Romania* of 5 April 2016. See also, S.M. Santistben, P. Sparkes, *Protection of immovables in european legal systems*, Cambridge University Press, 2015, pp. 45ss. M.A. Rozhkova, V.D. Afanasiev, *The matters of intellectual property in the practice of the European Court of Human Rights,* in *Mediterranean Journal of Social Sciences,* 2015, pp. 243ss. A. Seibert-Fohr, M.E. Villiger, *Judgments of the European Court of Human Rights: Effects and implementation,* ed. Nomos, 2017. A. Wowbray, *Subsidiarity and the European Convention on Human Rights,* in *Human Rights Law Review, 2*015, pp. 314ss. A. Sathanapally, *Beyond disagreement open*

47. In the material before the entry into force of Regulation n. 2015/848 the Court of Justice sought to define and reemphasize the notion of "core interests", which should be understood as: "(...) the place where the debtor exercises in a habitual manner and therefore recognizable by third parties management of its interests (…), interpreting it in a strictly factual manner and by favoring the objective elements of stability and continuity over time. In particular, the Court has: "(...) the location of the COMI (Centre of Main Interests) should be ascertainable by third parties does not entirely prevent *forum shopping* at creditors' expense[281]. Indeed, if a company transfers its registered office from one Member State to another, the "ascertainability" criterion protects only new creditors whose debts were incurred after the debtor has relocated its headquarters. In contrast, pre-existing creditors, whose debts were incurred before the transfer, are not protected if the company makes the new headquarters sufficiently public (...)". In particular the authors: Virgós and Garcimartín declared in relation of the Court judgments that: "(...) in the insolvency proceedings opened in Member State 1, the disputed claim would be accepted as a conditional or contingent claim (...) the creditor may bring his case to the Courts of Member State 2 and obtain a money judgment fixing the amount of his claim (...) This judgment cannot be directly enforced in State 2 because this state must recognize the insolvency proceedings opened in State 1 and the effects thereof, in particular the stay of executions by individual creditors. However, pursuant to Regulation n. 44/2001 the money judgment has, in its turn, to be recognized in State 1, "(which means that this claim must be admitted in the insolvency proceedings opened in State (...)"[282].

48. After the proposal of Regulation n. 2015/848, noting in particular the non inclusion of hybrid translation, but only an affirmative restriction according to recitals 33 and 34 that "the Court is not required to open the insolvency proceedings", the Court followed another path of thought through its case law[283] as in the case: *Nike European Operations Netherlands BV v. Sportland Oy* C-310/14 of 10 December 2015, where the Court states that: "(...) if a domestic Court's rules of evidence were not sufficiently rigorous, which led, effectively, to a shifting of the burden of proof to the defendant in an avoidance claim, it would not be regarded as being in line with the principle of effectiveness, for this principle, together with the principle of equivalence, must be taken into account in any case (...)". In this case the principle of effectiveness has been constructed under the effort to ensure that EU law actually takes effect in all Member States and domestic private law or civil procedure is not able to be applied in a relationship or might be interpreted differently from what the parties in the relationship expected[284].

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remedies in human rights adjudication, Oxford University Press, 2012. P. Alstead, *Unlocking human rights,* ed. Routledge, 2014. B. Rainey, E. Wicks, C. Ovey, *Jacobs, White and Ovey. The European Convention on Human Rights*, op. cit., J.P. Costa, *La Cour europèenne des droits de l'homme. Des juges par la libertè,* ed. Dalloz, 2017. C. Grabenwarter, K. Pabel, *Europäische Menschenrechtkonvention*, ed. Helbing & Lichtenhahn Verlag, 2016, pp. 234ss.

[281] P.K. Bookman, *The unsung virtues of global forum shopping***,** in *Notre Dame Law Review***,** 2016, pp. 582ss. According to the author: "(...) Principles of recognition and enforcement must balance many factors, including fairness to defendants and plaintiffs' need for Court access. A federal statute on foreign judgment recognition and enforcement, like the one proposed by the American Law Institute, should recognize and enforce foreign judgments arising out of proceedings that meet basic requirements of fairness (...)".

[282] M. Virgós, F. Garcimartín, *The European Insolvency Regulation: Law and Practice*, Kluwer Law International, 2004, pp. 56-57

[283] In particular see the next cases: *Comitè d'enterprise de Mortel networks SA and others v. Cosme Rogeau liquidator of Nortel networks SA and Cosme Rogeau liquidator of Nortel networks SA v. Alan Robeau Bokm and others* C-649/13 of 11 June 2015; ENEFI v. DGRF C-212/15 of 9 November 2016; S*CI Senior Home v. Gemeinde Wedemark & Hannoversche Volksbank EG,* C-195/15 of 9 December 2016; *Burgo Group Spa v. Illochvona SA and J. Theetten* C-327/13 of 24 October 2014; *R. Schmid v. L. Hertel* C-328/12 of 16 January 2014; *ERSTE Bank Hungary Nyrt v. Magyar Állam and others* C-527/10 of 4 July 2012; *F-TEX SIA v. Lietuvos-Anglijos UAB* C-213/10 of 25 May 2012; *MG Probud Gdynia sp. z.o.o*., C-444/07 of 20 October 2011; *Interedil Srl in liquidation v. Fallimento Interedil srl and Intesa gestione crediti SpA* C-396/09 of 17 November 2011; *Antwerpen Zaza Retail BV* C-112/10 of 15 December 2011; *D. Rastelli and C. Snc v. Jean-Charles Hidoux* C-191/10 of 19 April 2012; *Bank Handlowy y Adamiak w Warszawie SA and PPHU "ADAX"/Ryszard Adamiak v. Christianapol Sp. z.o.o*. C-116/11 of 19 September 2013; *Van Buggenhout and Ilse van de Mierop v. Banque Internationale* à *Luxembourg SA* C-251/12 of 16 January 2014; *H. v. H.K*. C-295/13 of 16 April 2015; *H. Lutz v. E. Bäuerle* C-557/13 of 11 June 2015;

[284] In the same spirit the next cases: *YARA Brunsbüttel GmbH v. Hauptzollamt Itzehoe* C-529/14 of 17 December 2015; *Leonmobili Srl, Gennaro Leone/Homag Holzbearbeitungssysteme GmbH and others* C-353/15 of 24 May 2016; *LBI hf v. Kepler Capital Markets SA and Frédéric Giraux* C-85/12 of 24 October 2013; *SCT Industri AB i likvidation v. Alpenblume AB* C-111/08 of 2 July 2009.

49. In particular with the judgment: *Nickel & Goeldner spedition v. Kintra* C-157/13 of 4 September 2014, the Court held: "(...) that Regulation (...) must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation n. 44/2001, from the application of that Regulation in so far as they come under bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' fall within the scope of Regulation n. 1346/2000 (...)". The Court thus in the notion of: "(...) action arising out of a procedure of insolvency and closely related to it", as elaborated by its previous case law, included an action where the insolvency administrator obtained the payment of a company's claim and declared insolvent on an international freight transport contract, from the moment that "that action found its foundation not in the insolvency of the undertaking, but in the contract previously concluded by the company itself with the defaulting counter party (...)". It referred to the concept of direct action against the administrator of a insolvent company with the ultimate aim of obtaining the repayment of payments made after the insolvency of the company itself: "(...) as such action, from the subject matter of the previous judgment, presupposes the debtor's insolvency status, even if the action in question could have been practiced, in principle, independently of the opening of insolvency proceedings (...)". The main objective is the limitations on the recognition and enforcement of competition decisions, as well as the reference to public policy objections considered in its narrowest sense of the term, which must only concern violations of the principles of the due process and include the protection of fundamental rights such as personal liberties.

50. The last cases cited allow us to take a stand on the topics dealt with and resolved, such as the case of insolvency liquidator against the managers of a legal person to pay a certain sum into the assets of a company in insolvency (case *Gourdain)*; the case of insolvency by the liquidator against a third party (case *Deko Marty*); the irrespective of the domicile or place of residence of the defendant (case *Schmid*)[285]; the validity of a transfer granted by the insolvency liquidator "on the ground that the liquidator had no power to dispose of the assets transferred" (case *SCT Industri*), which the Court declared that: "(...) Article 4(2)(f) of the EIR, seems to restrict the scope of Article 4(2)(f) suggesting that that provision determines the effects of the insolvency proceedings on executions brought by individual creditors, their suspension or prohibition after the opening of collective insolvency proceedings (...)"; the insolvency proceedings against the managing director of a company for reimbursement of payments "after the company became insolvent or after it had been established that the company's liabilities exceeded its assets" (case *H. and Kornhaas)*; the basis of a reservation title against an insolvent purchaser (case *German Graphics*); the insolvency administrator for "the payment of a debt arising out of the provision of services implementing a contract (...)" (case *Nickel*); an *actio pauliana* (case *Reichert*)[286], which the Court declared that: "(...) the *de facto vis attractiva* principle (thus the *de facto* exclusive jurisdiction of the insolvency forum) regarding the non-insolvency related actions one would necessarily violate the jurisdictional provisions (...)"; an action to set aside a transaction brought by an applicant "(...) on the basis of an assignment of claims granted by the insolvency liquidator (...)" (case *F-Tex SIA*) in that case cannot be qualified as insolvency actions, where the Court has held that: "(...) the main action is aimed at refunding the sums received by the defendant by a debtor prior to the opening of an insolvency proceeding against the latter (...)". It should be noted that the Court has tried to include only those actions that are related to the scope of Regulation to the insolvency procedure in accordance with the principle of *vis attractiva concursus*. The line and the basis of the spirit of the Court was based on the right or the obligation which form the basis of the action and find its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings under the Regulation[287].

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[285] Case of the Court of Justice: *R. Schmid v. Lilly Hertel* C-328/12 of 16 January 2014.

[286] Case of European Court of Justice: *M. Reichert Hans-Heinz Reichert and Ingeborg Kockler v. Dresdner Bank AG* C-261/90 of 26 March 1992.

[287] For the analysis of the insolvency cases see ex multis: S. Weatherhill, *Why Object to the Harmonization of Private Law by the EC,* in *European Review of Private Law,* 2004, pp. 634ss. K. Kerameus, *L'harmonisation procédurale dans le monde contemporain, in L. Vogel, La procédure entre tradition et modernité,* èd. Panthéon-Assas, 2010, pp. 10ss. D. Milman, *Personal insolvency law. Regulation and policy*, ed. Routledge, 2017, pp. 2048ss. F. Tolmie, *Corporate and personal insolvency law,* ed.

Wolters, Kluwer, 2013. G. Mccormack, *Something old, something new: Recasting the european insolvency Regulation,* in *The Modern Law Review,* 2016, pp. 122ss. M. Requejo Isidro, *La cooperaciòn judicial en materia de insolvencia transfronteriza en la propuesta de Regulation del Parlamento europeo y del consejo por el que se modifica el Regulation (CE) n. 1346/2000 sobre procedimientos de insolvencia,* in *Annuario Español de Derecho Internacional Privado,* 2013, pp. 218ss. V. Finch, D.milman, *Corporate insolvency law. Perspectives and principles,* Cambridge University Press, 2017, pp. 486ss. S. Gopalan, M. Guihot, *Cross-border insolvency law and multinational enterprise groups. Judicial innovation as and international solution,* in *George Washington International Law Review,* 2016, pp 4ss. S. Mock, *Das geplante neue europäische Insolvenzrecht nach dem Vorschlag der Kommission zur Reform der EuInsVO,* in *Zeitschrift für Gemeinschaftprivatrecht*, 2013, pp. 137ss. A. 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Schmidt, 2010, Art. 1 paras. 2-4. C. Thole, *Sanierung mittels Scheme of Arrangement im Blickwinkel des Internationalen Privat- und Verfahrensrechts*, in *Zeitschrift für Unternehmens und Gesellschaftesrecht*, 2013, pp. 110ss. M. Veder, *The Future of the European Insolvency Regulation-Applicable law, in particular security rights,* in *International Insolvency Law Review*, 2011, pp. 286ss. A. J. Bělohlávek, *Effects of Opening (Commencement) of Insolvency Proceedings on Pending Lawsuits and Similar Proceedings under Article 15 of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings and under Article 18 of the European Parliament and Council Regulation (EU) No 2015/848,* in *Czech Yearbook of International Law*, 2016, pp. 69ss. S. Block-Lieb, *The UK and EU cross-border insolvency recognition: From empire to Europe to Egoing it alone*, in *Fordham International Law Journal*, 2017, pp. 1374ss. F.M. 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Fasquelle, *L'Europe: une opportunité pour les professions d'AJMJ et pour le mandat de justice?*, in *Revue des Procédures Collectives,* 2013, pp. 50ss. G.c. Giorgini, *Le centre des intérêts principaux du débiteur insolvable en droit comparé*, in *Revue Internationale de Droit Com-*

VI. The application of private international law and the effects of the case law of the European Court of Human Rights

51. The European Court's contribution to the consolidation of a set of principles at regional and universal levels such as respect for family relationships[288], child protection, fair trial guarantees, non discrimination [289] and access to justice, has been largely reflected in the EU rules on private international law. The case law of the ECtHR has played a "creative" and "evolutionary" role by promoting a concept of a regional and universal public order which has also been adopted at european level. Coordination between the European Court of Justice and EU institutions is essential, which is not solely based on the propensity to convergent solutions but also to be supported on a more stable regulatory basis. Beyond the influence that the Court of Justice case law can exercise on the interpretation of the national Courts, it does not have the means to prevent the adoption of solutions based on conditions incompatible with human rights.

52. One of the problems that emerges from the practice concerns the consequences of non compliance with the rules of the fair process: a decision of condemnation issued by the Court of Justice of the EU does not block the effects of a foreign judgment. Neither would the available instruments be used for cases of incompatibility between a judgment of the ECHR and a national measure. It needs legislative action in the sense of making it compulsory the suspension of the *exequatur* proceeding[290] until the foreign

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paré, 2012, pp. 868ss. L.c. Henry, *Compétence internationale du Tribunal pour ouvrir une procédure d'insolvabilité en cas de transfert de siège statutaire,* in *Bulletin Joly Entreprises en Difficulté,* 2012, pp. 35ss. L.c. Henry, *De l'art d'articuler la procédure principale et la procédure secondaire,* in *Revue des Sociétés*, 2012, pp. 186ss. L.c. Henry, *Eclairage-Règlement insolvabilité européen et groupes de sociétés: je t'aime moi non plus!*, in *Bulletin Joly Entreprises en Difficulté*, 2012, pp. 355ss. L.c. Henry, *Règlement insolvabilité européen et les groupes: bilan et perspectives. Une approche textuelle*, in *Revue des Procédures Collectives,* 2013, pp. 59ss. L. Idot, *Un nouveau chantier pour les juristes: la révision du règlement "procédures d'insolvabilité*, in *La Semaine Juridique (Europe)*, 2013, pp. 4ss. V. Legrand, *Quelle clôture pour la procédure européenne d'insolvabilité?,* in *Lettre d'Actualité des Procédures Collectives Civiles et Commerciales,* 2013, pp. 112ss. A. Lienhard, *Procédure d'insolvabilité: notion de "centre des intérêts principaux"*, in Recueil Dalloz Sirey, 2011, pp. 2916ss. R. Lowe, *From client money rules to the EC Insolvency Regulation, legislative change beckons,* in *Insolvency Intelligence*, 2014, pp. 48ss. T. Mastrullo, *L'extension de procédure collective pour cause de confusion des patrimoines est-elle compatible avec le règlement numéro 1346/2000?*, in *Revue des Sociétés*, 2010, pp. 594ss. T. Mastrullo, *Procédures d'insolvabilité transfrontalières: la reconnaissance mutuelle conditionnée par le respect du droit d'accès au juge,* in *Revue des Sociétés*, 2011, pp. 8ss and 443-447. M. Menjucq, *L'extension de procédure pour confusion de patrimoines passée au crible du règlement n° 1346/2000: une question* à *suspense!*, in *Revue des Procédures Collectives*, 2010, pp. 2ss. M. Menjucq, *La proposition de règlement modifiant le règlement (CE) n°1346/2000 sur les procédures d'insolvabilité: une* évolution *mais pas de révolution,* in *Revue des Procédures Collectives,* 2013, pp. 20ss. I. Merovach, *European insolvency law in a global context,* in *Journal of Business Law*, 2011, pp. 668ss. I. Merovach, *The new proposed regime for EU corporate groups in insolvency: a critical note*, in *Corporate Rescue and Insolvency,* 2013, pp. 90ss. C. Moille, *Un point sur les conditions de la mise en oeuvre de la procédure intiale d'insolvabilité et son extension,* in *Revue Trimestrielle de Droit Européen,* 2013, pp. 28ss. P. Nabet, *Bref aperçu du projet de la commission pour la révision du règlement (CE) n° 1346/2000 sur l'insolvabilité,* in *Les Petites Affiches,* 2013, pp. 6ss. J. Payne, Cross-border schemes of arrangement and forum shopping, in European Business Organization Law Review, 2013, pp. 564ss. P. Roussel-Galle, *La proposition de révision du règlement n° 1346/2000 sur les procédures d'insolvabilité, entre prudence et audace,* in *La Semaine Juridique* (édition entreprise), 2013, pp. 14ss. J.l. Vallens, *Tourisme judiciaire et insolvabilité: les risques du forum shopping,* in *Revue des Procédures Collectives*, 2012, pp. 10ss. G.f. Schlaefer, *Forum shopping under the regime of the european insolvency Regulation,* in *International Insolvency Institute, International Insolvency Studies,* 2010, pp. 26ss. C. Honorati, G. Corvo, *A double lesson from Interedil: higher Courts, lower Courts and preliminary ruling and further clarifications on COMI and establishment under EU insolvency Regulation,* in *International Insolvency Law Review,* 2012, pp. 655ss. C.H. VAN RHEE, *Harmonisation of civil procedure: An historical and comparative perspective,* in X.e. Kramer, C.h. Van Rhee, *Civil litigation in a globalizing World*, T.M.C. Asser Press, 2012, pp. 41ss. A. Mukarrum, *The nature and enforcement of choice of Court agreement. A comparative study,* op. cit.

[288] D. Liakopoulos, *Approcci sulla politica familiare nel diritto comunitario*, in I. Liakopoulou (a cura di), *Politiche comunitarie e crisi finanziaria*, ed. Universitalia, Series: Parsimony, 2012, pp. 112ss.

[289] See from the ECtHR: *Cusan and Fazzo v. Italy* of 7 January 2014; *Fabris v. France* of 7 February of 2013; *Konstantin Markin v. Russia* of 22 March 2012

[290] See in argument, X.e. Kramer, *Abolition of exequatur under the Brussels I Regulation: Effecting and protecting rights in the European Judicial Area*, in *Nederlands Internationaal Privaatrecht,* 2011, pp. 633-641. X.e. Kramer, *Cross-border rnforcement in the EU: Mutual trust versus fair trial? Towards principles of european civil procedure*, in *International Journal of Procedural Law*, 2011, pp. 204ss. P.a. Nielsen, *The new Brussels I Regulation*, in *Common Market Law Review,* 2013,

judgment is amended to bring it into line with the judgment of the Strasbourg Court[291]. Such a mechanism would eliminate the drawback of the involvement of the executing State in the consequences of a procedure carried out abroad in a way that does not comply with the ECHR rules. On the contrary the Court of Justice did not address what factors would have been considered if the plaintiffs had no other forum options. the Court has refused to explicitly discuss *forum necessitatis*. According to the jurisprudence the Court use international law to justify principles which it does not already agree with or possibly because it is not well known in the EU as a viable doctrine. This way means that the ECJ adopts the approach of the extension of effects (*Wirkungserstreckung*) in particular under art. 54 of the 2012 Brussels I Regulation (Recast). A recognizable judgment still needs to fulfill certain requirements, however[292].

53. The problem has not yet been sufficiently addressed at the level of application of EU recognition standards, although there are two points in the context of the European Judicial Space, which require the adoption of a specific mechanism to ensure greater incisiveness of the function carried out by the European Court; the elimination of the *exequatur* procedure in the Regulations governing the integrated judicial area[293] and the risk that the *exequatur* automaticity would have a multiplier effect on any decision incompatible with the ECtHR.

54. On the other hand, there is a fundamental role for judges of the Court of Justice. An obligation on a Court called upon to enforce a judgment issued in another Member State to refer the case to the Court of Justice for a preliminary ruling when the foreign judgment to be reserved was the subject of a judgment of the ECHR, that would contribute to greater certainty in the proper application of fundamental rules and also in the recognition of decisions issued in another Member State. It should also be noted that, despite the pertinent nature of the rules on the effectiveness of judgments issued in another Member State, some recognition limits can be drawn from the preamble of the Brussels Regulation I bis: this is recital n. 30 which permits a party who opposes the execution of a decision issued in another Member State to invoke "(...) as far as possible and in accordance with the legal system of the requested Member State (…) the grounds for refusal provided for by national law (...)". Secondly, recital n. 38 states that "(...) the present excludes jurisdiction against a foreign country, even if subsequently issued, may be challenged for revocation (...)"[294]. According to the Court of Justice, the application of the necessary

pp. 504ss. L.j.e. Timmer, *Abolition of exequatur under the Brussels I Regulation: Ill conceived and premature?*, in *Journal of Private International Law,* 2013, pp. 130ss. G. Cuniberti, I. Rueda, *Abolition of exequatur: Addressing the commission's concerns*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2011, pp. 288ss. A. Dickinson, *The revision of the Brussels I Regulation. Surveying the proposed Brussels I bis Regulation–solid foundations but renovation needed,* in *Yearbook of Private International Law,* 2010, pp. 248ss. P. Schlosser, *The abolition of exequatur proceedings-Including public policy review?,* in *Praxis des Internationalen Privat-und Verfahrenrechts,* 2010, pp. 102ss. P. Beaumont, E. Johnston, *Abolition of exequatur in Brussels I: Is a public policy defence necessary for the protection of human rights?,* in *Praxis des Internationalen Privat-und Verfahrenrechts*, 2010, pp. 106ss. P. Beaumont, E. Johnston, *Can exequatur be abolished in Brussels I whilst retaining a public policy defence?,* in *Journal of Private International Law,* 2010, pp. 250ss. M. de Cristofaro, *The abolition of exequatur proceedings: Speeding up the free movement of judgments while preserving the rights of the defense*, in *International Journal of Procedural Law,* 2011, pp. 452ss. A. Schulz, *The abolition of exequatur and State liability for human rights violations through the enforcement of judgments in european family law*, in A.A.V.V., A *Commitment to Private International Law-Essays in Honour of Van Loon,* ed. Intersentia, 2013, pp. 517ss.

[291] J. Je Timmer, *Abolition of exequatur under the Brussels I Regulation: ILL conceived and premature?*, in *Journal of Private International Law,* 2013, pp. 130ss.

[292] T. Lock, *Das Verhältnis zwischen dem EuGH und internationalen Gerichten,* ed. Mohr Siebeck, 2010, pp. 152ss.

[293] P. Beaumont, *The European Court of justice priorities. The abolition of exequatur over fundamental rights*, in J. Diez-Hochleitner, C. Martinez Capdevila, I. Blazquez Navarro, Y. Frutos Miranda, *Recent trends in the case law of the Court of Justice of the European Union,* Wolters & Kluwer, 2012, pp. 622ss. A. Schutz, *The abolition of exequatur and State liability for human rights violations through the enforcement of judgments in european family law*, in A.A.V.V., *A commitment to private international law. Essays in honour of Hans Van Loon*, op. cit., 2013, pp. 516ss. J. Je Timmer, *Abolition of exequatur under the Brussels I Regulation: III conceived and premature?,* op. cit., pp. 130ss. J. Rutgers, *Judicial decisions on private international law*, in *Netherlands International Law Review*, 2017, pp. 164ss.

[294] See the proposal of the Commission of 3 January 2011 (Doc. COM (2010) 748 def. 2), in relation on the artt. 45 and 46: "(...) recognition and execution of a foreign decision in case they seem to be inconsistent with the fundamental values codified in the European Convention on Human Rights. Thus, the European Court of Human Rights (ECHR) can have an impact on the approach followed by national judges when applying private international law rules and play a role in shaping the extent of the

implementing rules of the Member States, in particular those which serve as a protective function of the weak part to the traditional compatibility and european proportionality tests by obliging the Court to compare the rules which are applicable on the basis of the result sought, namely to ensure that the minimum protection provided for them is respected. This is a necessary application that acknowledges the relevance and possible application of foreign provisions guaranteeing a discipline that goes beyond the minimum standards of protection provided for by the applicable national enforcement standards. Most of the applicable enforcement rules do not function as preventative limiters to the operation of private international law but conceived as "alternatives" to be used as appropriate and convenient as simple vectors of European construction.

55. Equally important, the unitary approach to succession is chosen and privileged through Regulation n. 650/2012 (entered into force on 17 August 2015)[295] which is directed towards the last habitual residence of the *de facto*, of the citizenship and/or of the residence of the married community (*Zerrüttungsprinzip*) inspired by the Hague Convention on the law applicable to succession because of the death of August 1, 1989[296]. According to art. 20 the law of application has universal application, and applies even where it is not a Member State of the Union. The word in *professio iuris*[297] according to art. 22 considers it necessary to declare a unilateral wish of the latter as it has also been stated in the judgment of the Court of Justice: *M. Matoušková* C-404/14 of 6 October 2015. The exclusion of the *professio iuris* in the case of certain goods responds to the need to avoid the division of the succession statute between several laws that the same spirit of the Regulation sought to refuse[298]. The coincidence between *forums* and *ius* has the purpose of eliminating *forum shopping*[299] and/or *forum running* according to the ruling:

exception of public order, that cannot be intended as purely national-oriented, in isolation from the human right standards at the European level. The approach followed in the field of judicial cooperation in civil matters by the EU institutions-especially the EU Court of Justice- seems to be consistent with the ECHR case law. Though sometimes the need to ensure the proper functioning of the internal market seems to raise doubts as to the place of human rights as regards conflict of laws and jurisdiction, main principles such as due process and access to justice have always been considered as having a pre-eminent role. The enactment of the Charter of the economic duties and rights of the European Union will open the way towards a better placement also for non-EU citizens. However, some questions relating to the need for better coordination between ECHR and EU Court are still open: the EU adhesion to the ECHR could be a significant step in that direction (...)".

[295] Commission Regulation n. 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions, Acceptance and Enforcement of Authentic Instruments in Matters of Succession, and the Creation of a European Certificate of Succession, 2012 O.J. (L 201) 107.

[296] A. Bonomi, P. Wautelet, *Le droit europèen des successions,* ed. Bruylant, 2016.

[297] P. Perreau-Saussine, *La professio iuris et l'unitè de la succession*, in H. Bosse-Platiére, N. Damas, Y. Dereu, *L'avenir europèen du droit des successions internationales*, ed. LexisNexis, 2011. F. LledÓ Yagüe, F. Vanrell, J.Á. Torres Lana, Ó.M. Balmaseda, *El patimonio sucesorio. Reflexiones para un debate reformista,* ed. Dykinson S.L., 2014. S. Vrellis, *The professio iuris in EU Regulations*, in *ELTE Law Journal,* 2015, pp. 12ss. According to the author: "(...) Regarding matters of succession, where the extent of the professio iuris is more restricted than in other relations, the Succession Regulation after having established as a general rule the application of the law of the State in which the deceased had his habitual residence at the time of death, offers to the de cujus the possibility to choose, as applicable to his succession as a whole, instead of that law, 'the law of the State whose nationality he possesses at the time of making the choice or at the time of death; and, if the de cujus possesses multiple nationalities, he may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death. In such a way the options of the de cujus are increasing (...)".

[298] A. Ripoll Soler, *Hacia un nuevo modelo de planificación sucesoria notarial: La professio iuris*, in *Revista de derecho civil. Notarios y Registradores,* 2016. J.m. Fontanellas Morell, *La professio iuris sucesoria*, ed. Marcial Pons, 2010. E. Garcia Cueto, *Una aproximación al Reglamento 650/2012 (I): La professio iuris*, in *La Notaría*, 2014, pp. 106ss.

[299] C.a. Whytock, *The evolving forum shopping system,* in *Cornell Law Review***,** 2011, pp. 484ss. According to the author: "(...) forum shopping is not simply a matter of analyzing substantive and procedural law to estimate the comparative expected values of claims. It also depends on plaintiffs' expectations about two types of Court decisions: Court access decisions and choice-of-law decisions. In a Court access decision, a Court determines whether it will allow a plaintiffs claim to proceed in that Court. For example, Court access decisions in the United States include subject matter jurisdiction, personal jurisdiction, and forum non conveniens decisions. If a Court grants a motion to dismiss for lack of subject matter or personal jurisdiction or based on the forum non conveniens doctrine, the plaintiffs claim cannot proceed in that Court. A plaintiff is unlikely to incur the costs of filing a lawsuit in a particular Court unless she believes that there is some chance of a favorable Court access decision. Stated more generally, other things being equal, the higher a plaintiffs expectation that a particular Court will make a favorable Court access decision, the more likely she is to file a lawsuit in that Court (...)". See also: F.K. JUENGER, *Forum shopping, domestic and international,* in *Tulane Law Review,* 1989, pp. 554 **"(...)** forum shopping connotes the exercise of the plaintiffs option to bring a lawsuit in one of several different Courts (...)".

E. Mikołajczyk v. M.L. Czarnecka and *S. Czarnecki* C-294/15 of 13 October 2016 under: "(...) the application of the jurisdiction rules of the *forum actoris* (...)"[300]. On the same spirit also the sentence: *Pula Parking d.o.o. v. Sven Klaus Tederahn* C-551/15 of 09 March 2017 where the Court determines that: "(...) the term "Court", for the purposes of that Regulation, encompasses not only the judicial authorities, but also any authority competent in that area which exercises judicial functions and which satisfies certain conditions listed in that provision (...)". Obviously, the habitual residence and/or the status of a third State in the same way as citizenship are two fundamental criteria for judging the discretion of the judge on the basis of links being subjective or objective different or subsidiary to those provided for by the Regulation as has been confirmed in the judgment of the Court: *Zulfikonasić v. Slaven Gajer* C-484/15 of 09 March 2017. In the case of a conflict of laws[301], the *erga omnes* character of the Regulation (principle also adopted by the case law of the Court, through the judgment: *A. Kubicka* C-218/16 of 17 October 2017) applies only to provisions which enter into the circle of foreign decisions and acts[302], that is from third countries and in that case the national legislation should be applied. That possibility does not apply to the rules on jurisdiction where, under the Regulation, they are not subject to the condition that they may be applicable in *ratione personae* as provided for in Regulation n. 44/2001 and n. 2201/2003, which provided for an express reminder of national jurisdiction, that is, residual jurisdiction. The exclusion of *renvoi* could have some significance if a dispute regarding the succession is referred to a Court of a State not bound by the Regulation. In the same spirit under Rome Regulation it is possible to take into account the "circumstances of the case". And in the event that a succession proceeding: "can not reasonably be prosecuted either done or becomes impossible" according to art.11 of the Regulation serves a sufficient and concrete link with the third state and its jurisdiction. It presents this forum as a *forum necessitatis* that aims to compensate for the abolition of residual national competences[303].

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[300] J.P. Costa, *La Cour europèenne des droits de l'homme. Des juges par la libertè,* op. cit.

[301] C.A. Whytock, *Conflict of laws, global governance, and transnational legal order,* in *UC Irvine Journal of International, Transnational, and Comparative Law,* 2016, pp. 122ss. According to the author: "(...) conflict of laws also only partially meets the third criterion for legality in the TLO framework. This criterion is that the norms are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state (...) but conflict-of-laws norms have been produced primarily at the national level-including the aforementioned codifications, common law rules, and hybrid forms (...)". See also: R. SOMSSICH, *Cohabitation of EU Regulations and national laws in the field of conflict of laws*, in *ELTE Law Journal*, 2015, pp. 69ss

[302] The judgment of the Court of Justice *Tecom Mican, SL v. José Arias Dominguez* C-223/14 of 11 November 2015, made a distinction between public and extra judicial acts, stating that the extrajudicial act includes: "(...) private acts when their formal transmission to the recipient resident abroad is necessary for the exercise, the proof or the protection of a right or legal claim in civil or commercial matters (...)". See the Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012. See in argument: Ch. Pamboukis, *Les actes publics et la méthode de la reconnaissance*, in P. Lagarde, *La reconnaissance des situations en droit international privé, Actes du colloque international de La Haye du 18 Janvier 2013*, ed. Pedone, 2013, pp. 134ss. C. A. Monznís, *New developments in the scope of the circulation of public documents in the European Union,* in *Zeitschrift fùr Zivilprozess international: Jahrbuch des internationalen Zivilprozessrechts,* 2013, pp. 246ss. M. Fallon, P. Lagarde, S. Poillot Peruzzetto, *The place of International agreements and European Law in a European code of private international law,* ed. Peter Lang, 2012, pp. 186ss. M. Gardeñes Santiago, *Les exigences du marché intérieur dans la construction d'un code européen de droit international privé, en particulier la place de la confiance et de la reconnaissance mutuelle,* in M. Fallon, P. Lagarde, S. Poillot-Peruzzetto, *Quelle architecture pour un code européen de droit international privé?*, ed. Peter Lang, 2011, pp. 106ss. J. Fitchen, *Recognition, acceptance and enforcement of authentic instruments in the succession Regulation,* in *Journal of Private International Law*, 2012, pp. 324ss. J.J. Forner Delaygua, *Concepto de "documento extrajudicial" en el Reglamento (CE) n.º1393/2007, de notificaciones,* in *Diario La Ley,* 2016, pp. 4ss. M. Guzmán Zapater, *La libre ciruculación de los documentos públios en materia de estado civil en la UE: El Reglamento UE 2016/1191 del PE y del Consejo*, in *Revista de Derecho de la Unión Europea,* 2016. P. Gréciano, *Droit de l'Union Européenne et médiation linguistique*, in *International Journal for the Semiotics of Law*, 2015, pp. 4ss. M. Font I Mas, *El documento público extranjero en España y en la Unión Europea: Estudios sobre las características y efectos del documento público,* ed. Bosch, 2014.

[303] See in succession law: M. Gorè, *La professio iuris,* in *Rèpertoire du Notariat,* 2012, pp. 763ss. A. Bonomi, *Successions internationales: conflits de lois et de juridictions*, in *Recueil des Cours*, 2010, pp. 72ss. E. Lein, *A further step towards a European Code of Private International Law: The Commission's Proposal for a Regulation on Succession*, in *Yearbook of Private International Law,* 2009, pp. 108ss. A. Bonomi, *Choice-of-law aspects of the future EC Regulation in matters of succession. A first glance at the commission's proposal,* in K. Boele-Woelki, T. Einhorn, D. Girsberger, S. Symeonides (eds.), *Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr,* Eleven International Publishing, 2010, pp. 158ss. G. Khairallah, M. Revillard, *Perspectives du droit des successions européennes et internationales: Étude de la proposition*

VII. Conclusions

56. As we have understood the attempt to harmonize family law[304], and not only is based on the horizontal point of view of family values between states and in a vertical manner to international and supranational human rights guarantee instruments and in the jurisprudential interpretation of themselves [305].

57. Finally, we can say that the aforementioned cases law has shown that every system of conflict has its own solutions to the attribution of legal force in the forum to foreign decisions or acts, always trying to bring other conflicts with the state of origin. These are cooperative and alternative techniques compared to those of spatial localization of the case, which aim to overcome the differences between individual systems. Despite the years of unification and harmonization in the system of private, EU and international law[306], the development of conflict rules are still evolving. The methodical and substantive

de règlement du 14 octobre 2009, ed. Défrenois, 2010. A. Bonomi, C. Schmid (eds), *Successions internationales. Réflexions autour du future règlement européen et de son impact pour la Suisse,* ed. Schulthess, 2010. B. Ancel, *Convergence des droits et droit européen des successions internationals: Proposition de Règlement du 14 octobre 2009*, in C. Baldus, P. C. Müller-Graff (eds), *Europäisches Privatrecht in Vielfalt geeint durch Gruppenbildung im Sachen-Familien-und Erbrecht? Droit privé européen: l'unité dans la diversité. Convergences en droit des biens, de la famille et des successions?,* Sellier European Law Publishers, 2011, pp. 185ss. J. Harris, *The proposed EU Regulation on succession and wills: Prospects and challenges*, in *Trust Law International,* 2008, pp. 181ss. S. Godechot-Patris, *Le nouveau droit international privé des successions: entre satisfactions et craintes...,* in *Recueil Dalloz,* 2012, pp. 2464ss. H. 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Holliday, *Some Aspects of Scots Private International Law of Succession Taking Account of the Impact of the EU Succession Regulation,* in *Centre for Private International Law*, *University of Aberdeen, Working Paper* No. 2015/6. A. Dutta, S. Herrler (eds), *Die Europäische Erbrechtsverordnung*, ed. Beck, 2014, pp. 132ss. C. Majer, *Die Geltung der EU-Erbrechtsverordnung für reine Drittstaatensachverhälte*, in *Zeitschrift für Erbrecht und Vermögensnachfolge,* 2011, pp. 447ss. A. Dutta, *Das neue internationale Erbrecht der Europäischen Union-Eine erste Lektüre der Erbrechtsverordnung*, in *Zeitschrift für das gesamte Familienrecht,* 2013, pp. 12ss. H. Gaudemet-Tallon, *Les règles de compétence judiciaire dans le règlement européen sur les successions,* in G. Khairallah, M. Revillard (eds), *Droit européen des successions internationales,* ed. Lextenso 2013, pp. 127ss. F.M. 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Lafuente Sánchez, *Hacia un sistema unitario europeo en materia de ley aplicable a las sucesiones internacionales*, in *Cuadernos de Derecho Transnacional*, 2013, pp. 366ss. P. Bourgues, C. Montagne, *La circulation des modèles normatifs,* ed. PUF, 2017. According to the writer's view and the above mentioned bibliography, the following syllogism of thought is reached, which: despite the rich and plentiful jurisprudence and european legislation in the international private sector, the danger of malfunctioning and non total harmonization is still very high of the fragmentation that characterizes the Regulations in force, each definitely dedicated to a specific disciplinary aspect, but often lack the necessary links with other. The scope of the decision making process is facilitated by automatic recognition and the abolition of *exequatur,* but the application of the applicable law in all matters and especially in family protection still shows a lack of elections, based on the habitual residence that allows transfers of goods and people from one country to another while remaining faithful to the principles of the Union. Opportunities granted by private international law have filled many gaps, but at the same time they also allow "escape" from the rigors of the norms of certain countries in favor of more liberal, democratic and/or necessary solutions to deal with new realities as new types of marriage between people the same sex, civil unions, goods purchased in various countries with laws that continue to remain faithful to religious system of enhanced cooperation and the smooth functioning of the internal market is one of the fundamental principles of the Union, which is paving the way for a balance of uniformity and flexibility which seeks to highlight the benefits of enhanced cooperation, at least the rules of private international law.

[304] J. Mair, E. Örücü, *Juxtaposing legal systems and the principles of european family law on parental responsibilities,* ed. Intersentia, 2010.

[305] E. Fongaro, *Droit patrimonial, européen de la famille*, ed. LexisNexis, 2013.

[306] M. Harding, *The harmonisation of private international law in Europe: Taking the character out of family law?,* in

guidelines to be adopted must not only take into account the principles set out in the legal field but also transpose the fundamental assessments of european law. It is up to the Union to formulate a policy regarding private international law that links an inward looking internal market with a broadly developed external private law. The elaboration of a full faith and credit[307] clause in EU law would be a major step towards the rights and freedoms enshrined as fundamental principles for a democratic system that will prevail only after it has been adequately balanced with the interest in freedom of circulation[308].

58. The need to ensure, within the EU, an effective system of justice through the application of the principles of necessity and proportionality results in the effectiveness of the protection of rights as a goal not only of a fair process but also of a case law attributed to which avoids disproportionate and unacceptable interventions that unjustifiably undermine the very substance of supranational justice that is the effective protection of human rights[309].

59. The logic behind a "differentiated" and/or multilevel integration[310] that has been pursued for years in the human rights sector is a threat to the unity and coherence of EU law, a threat that can be countered by institutional mechanisms which seek to increase the quality of application of the law and European Union law, as is also apparent from the case law of the Court of Justice for a preliminary ruling. There is no doubt that the case law of both the European Court of Human Rights and the Court of justice is in the line of the "progressive privatization of the marriage relationship", *rectius* of the unification of a system of "a new European family" [311] which by now "broadens a free and certain autonomy" in having their relationship in the new european international context[312]. In particular, it appears that the Court of Justice, in order to resolve the problems caused by the difficult reconciliation of the different positions of the Member States, according to a European "spirit" based on its own european principles, above all of subsidiarity and many times leading to proportionality and proximity, has been pushing for an interpretative road of the Union's norms by seeking "creative" ways of filling legislative and legal gaps.

60. In particular, the Court of Justice may take into account the ECtHR's guidelines in the interpretation of the public order limit even with regard to the problems that may arise in the recognition and enforcement of judgments. Failure to respect the guarantees of the right process would at the same time constitute a violation of both the ECHR and the EU principles. Obviously, it is difficult to predict the obligation to refer the matter to the Court of Justice for a preliminary ruling when an appeal to the European Court on issues that may affect the enforceability of a foreign judgment has not yet been

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Journal of Private International Law, 2014, pp. 204ss. T.L. Waerstad, *Harmonising human rights law and private international law*, in *Oslo Law Review,* 2016. M. Weller, *Mutual trust: In search of the future of european private international law,* in *Journal of Private International Law*, 2015.

[307] M.S. Quintanilla, C.A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law,* in *Southwestern Journal of International Law,* 2011, pp. 37ss. T.c. Halliday, G. Shaffer, *Transnational legal orders,* Cambridge University Press, 2015, pp. 287ss.

[308] S. Corneloup, *The impact of EU fundamental rights on private international law*, op. cit.

[309] J. Fawcett, S. Shah, M. Shuilleabhain, *Human rights and private international law,* op. cit.

[310] E. Van Schagen, *The development of european private law in a multileval legal order,* ed. Intersentia, 2016.

[311] U.c. Walter, *Internationales Familienrecht,* Verlag Österreich, 2017, pp. 258ss.

[312] J. Bridje, T. Bond, L. Gribbin, M. Reardon (eds.), *A practical approach to family law*, Oxford University Press, 2012. A. BRIGGS, *The conflict of laws*, op. cit., B. Díaz Campuzano, *The coordination of the EU Regulations on divorce and legal separation with the proposal on matrimonial property regimes*, in *Yearbook of Private International Law*, 2012, pp. 234ss. B. DÍAZ CAMPUZANO, *Uniform conflict of law rules on divorce and legal separation via enhanced cooperation*, in B.D. Campuzano, *Latest developments in EU private international law,* ed. Intersentia, 2011, pp. 23-48. P. de Vareilles-Sommiéres (ed.), *Forum shopping in the european judicial area*, Hart Publishing, 2013. R. Di Noto, *Le droit au respect de la vie privée et familiale, nouveau paradigme en droit international privé des personnes?,* in R. Alleweldt, R. Callsen, J. Dupendant (eds), *Human rights abuses in the contemporary world*, ed. Peter Lang, 2012. A. Büchler, *The right to respect for private and family law*, in A. Büchler, H. Keller, *Family forms and parenthood*, ed. Intersentia, 2016, pp. 32ss. J. Eekelaar, J. Maclean, *Family justice: The work of family judges in uncertain times,* Hart Publishing, 2013. B. Langhendries, *La loi applicable au divorce* à *l'aune du réglement Rome III,* in *Revue du Droit des* Étrangers, 2012, pp. 5ss. H. Péroz, *Le choix de la loi applicable au divorce international: Nouvelle perspective pour les praticiens,* in *La Semaine Juridique,* 2012, pp. 1202ss.

concluded. They oppose the fundamental requirements of certainty and speed that are judicial area and which strictly delimit the grounds of opposition. It is not yet clear haw the judicial function of the Court of Justice can be redefined in order to improve coordination with the Court of Strasbourg and thus strengthen the fundamental human rights guarantees. Ultimately, we must conclude with an optimistic invitation recalling the famous saying: where there is a will there is a way!