



UNIVERSITÀ DEGLI STUDI
DI GENOVA

EN2BRIa

Enhancing Enforcement under Brussels Ia



This Project is funded by the European Union
Justice Programme 2014-2020
JUST-JCOO-AG-2018 JUST 831598

Art. 67 Brussels Ia: Do Theory and Practice Meet (Half-Ways)?

PEPP Programme September 2020

Stefano Dominelli
Researcher in International Law, University of Genoa

Investigation conducted in the framework of "Enhancing Enforcement under Brussels Ia" - EN2BRIa, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598

The content of the Brussels Ia - EN2BRIa, Project, and its deliverables, represent the views of the author only and is his sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.



Overview

- *The En2Bria Project*
- *Art. 67 Brussels Ia Regulation*
- *Concurring (and non) heads of jurisdiction*
- *Sources of «other EU acts»*
- *Partial disconnection: special rules on jurisdiction and general rules on free movement of decisions*
- *Connections and disconnections between PIL and material law*
- *Conclusion and proposal*



The En2Bria Project

- *Enhancing Enforcement under Brussels Ia – EN2BRIa, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598*
- <https://dispo.unige.it/node/1042>
- Shed light on the terms whereby the relationship between Regulation 1215/2012 and other EU law instruments is to be handled, with a view to investigating the impact that the above mentioned issue produces upon the effective application of the EU law
- Increase capacity address issues related to judicial cooperation in civil and commercial matters; improve awareness about the complexities of the relations between Brussels Ia regulation and other EU instruments; improve the legal framework and regulations concerning judicial cooperation in civil matters through the identification of possible solutions to mitigate the main criticalities examined



The Relevant Provision: Art 67

- “*This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments*” (cf Art 67 Reg 44/2001)
- Unilateral coordination
- Choice: *lex specialis*



Art 67: Theory

- «*provisions governing jurisdiction/recognition contained in instruments of the Union or in national legislation harmonised* »
 - *The concurring regime – newest or older – must be MANDATORY [exclusive/additional ground for jurisdiction]*
 - Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs*
 - Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights*
 - Regulation (EU) 2017/1001 ... of 14 June 2017 on the European Union trade mark*
 - Regulation (EU) No 1257/2012 ... 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection*
 - Directive 96/71/EC ... 16 December 1996 concerning the posting of workers in the framework of the provision of services*
 - *OPTIONAL instruments coexisting*
 - Reg. 805/2004 European Enforcement Order for uncontested claims*
 - Reg. 861/2007 establishing a European Small Claims Procedure (as amended)*
 - Reg. 1896/2006 creating a European order for payment procedure (as amended)*
 - Reg. 655/2014 establishing a European Account Preservation Order*
 - *NON overlapping material scope of application*
 - Cf the different material scope of application of Brussels in alimony, or ancillary proceedings in insolvency matters*



Art 67: From Theory to Practice

- What is a «provision governing jurisdiction»?

Very clear: Posting of workers directive, Art 6 [*Additional head of jurisdiction*]

Jurisdiction. In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State



Art 67: From Theory to Practice

- What is a «provision governing jurisdiction»?

Very clear in the negative – A directive that does **NOT** pose a rule on jurisdiction to be harmonised into domestic law

Directive 2009/22/EC on injunctions for the protection of consumers' interests, Art 2(1):

«Member States shall designate the courts or administrative authorities competent to rule on proceedings commenced by qualified entities » [cfr. OLG Hamburg 15.11.2019]

Hence, domestic laws transposing the directive fall **OUTSIDE** the scope of ART 67 Brussels Ia



continues

.... Less clear.... Air Passenger Rights Regulation 261/2004, Art 16 Infringements

*1. Each Member State shall designate a body responsible for the enforcement of **this Regulation** as regards flights from airports situated on its territory and flights from a third country to such airports. Where appropriate, **this body shall take the measures necessary to ensure that the rights of passengers are respected.** The Member States shall inform the Commission of the body that has been designated in accordance with this paragraph.*

2. Without prejudice to Article 12, each passenger may complain to any body designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation at any airport situated on the territory of a Member State or concerning any flight from a third country to an airport situated on that territory.

3. The sanctions laid down by Member States for infringements of this Regulation shall be effective, proportionate and dissuasive.



continues

Air Passenger Rights Regulation

- Is the «*right to complain before a competent body*» a head of jurisdiction for the purposes of Art 67 Brussels Ia Regulation?
 - Domestic law perspective: The complaint only starts a public law scrutiny over the air carrier, with possible fines – it gives no rights to compensation for the individual who is not party to the procedure
 - CJEU: Air Passenger Rights Regulation does not contain rules on international jurisdiction (Ryanair; Case C-464/18, 11 April 2019, para 24)
 - METHODOLOGY: lump-sum based right invoked, but a right nonetheless.
- So, the «*right to complain before a competent body*» is NOT a «*provision governing jurisdiction... contained in instruments of the Union*»



continues

- *What is an «... instrument of the Union»?*
- Secondary law = Regulation, or domestic laws implementing Directives
- Are the founding treaties TEU and TFEU an «*Instrument of the Union*»?
 - [2005] IEHC 324; Art. 235, 240, 288 TFEU
- Whereas international customary law might be a parameter of validity of EU secondary law, do they trigger Art. 67 Brussels I bis Regulation?



Amongst the issues: An eye on rules on free movement of decisions and special rules on jurisdiction

- Can art. 45 Brussels Ia be supplemented by *special heads of jurisdiction*?
 - Negative declaratory action by the employer before the wrong court of posting (art. 6 posting of workers directive)
 - Negative declaratory action by data controller against data processor, to trigger stay of proceedings of the action promoted by the data subject (GDPR)



Is it all about «disconnection» or also «false reversed disconnection» as well?

- If the aim is to shed light on the terms whereby the relationship between Regulation 1215/2012 and other EU law instruments is to be handled, the question cannot be limited to the effects of direct influence by way of immediate disconnection in favor of the *lex specialis*.
- There are a number of special provisions that operate themselves a unilateral and formal “reversed disconnection” in favor of the *lex generalis*”, in the sense that they themselves make clear they are to no prejudice to the (now) Brussels Ia Regulation.
- Yet, the (substantive) validity of similar assertions is to be assessed, explored, and tested



continues

- *Testing the Geo-Blocking Regulation and factual connecting factors*

It is true that the geo-blocking Regulation wishes to unilaterally coordinate itself with Brussels Ia. Such coordination is pursued by making clear that a professional that does not block or limit consumers' access to an online interface is not "on those grounds alone, considered to be directing activities to the Member State where the consumer has the habitual residence or domicile" for the purposes of international jurisdiction. Yet, this tentative unilateral coordination appears unsatisfactory at least, for example, for a website using German language, a commercial domain, euro as value for payment, offering e-products or e-services (thus absent material delivery). In this sense, European institutions could give further clarifications for the coordination of the two instruments.

The relationship between substantive law and international civil procedure becomes blurred, and pave the way to possible abuses, which court and institutions might be called to settle in the future to ensure the proper functioning of the internal market and the protection of consumers, other than correction application of the rules surrounding judicial cooperation in civil and commercial matters. Professionals could state their intention not to trade with Austrian consumers, even though they cannot be prevented from accessing the website. This with an evident *vulnus* in the protection of weaker parties, if such declarations are fraudulently made.



continues

- *There are also «disconnections» in the scope of application between material law and private international law – even though these do not formally fall within the scope of application of Art. 67 Brussels Ia Regulation, they might be a prejudice to a systemic application of EU law and the rules on judicial cooperation in civil matters:*
- *On the definition of consumers - May 2019, Pillar Securitisation Sàrl v Hildur Arnadottir, Case C-694/17.*
 - *Under Directive 2008/48 on credit agreements for consumers, as transposed by the relevant domestic law, contracts above 75.000,00 euros might not be considered as “consumer contracts”*
 - *There is no such a limit in the Brussels Ia Regulation*
 - *It follows that the same contracts is subject to a protective regime on the side of international jurisdiction, and not necessarily on the side of the applicable law*



Conclusions

There are a number of «direct» and «indirect» connections and disconnections in the Brussels regimes, most of which still appear to be somewhat hidden, making the task for coordination particularly harder in a very fragmented scenario, particularly to practitioners who deal with highly technical matters in a relatively small number of cases.



Proposal

Can the “codification” of EU international civil procedure better settle (some of) the problems?



Thank you for your attention!

stefano.dominelli@unige.it