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PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

Articles 67 and 71 Brussels Ia Regulation '*Lex Specialis Derogat Lex Generalis*' Principle: Some Critical Remarks

Ilaria Queirolo, Stefano Dominelli *

1. The *lex specialis* principle(s) in the Brussels Ia Regulation

The EU's creation of an integrated judicial space is functional[1] to the "*sound operation of the internal market*"[2]. Fragmentation of private international law and of international civil procedure can constitute a limit to the free movement of decisions, thus becoming an obstacle to the free movement of people[3]. Despite EU international civil procedure wishing to settle and compose the fragmentation of solutions between Member States, at least in a functional spirit to the realization of the internal market, an endogenous fragmentation persists *within* the EU legal order.

* *Ilaria Queirolo is Full professor in International law at the University of Genoa, and has written para. 1, and 2. Stefano Dominelli is Researcher in International law at the University of Genoa, and has written para. 3. The work is unitary in nature, and constitutes an excerpt of their final work conducted in the context the Enhancing Enforcement under Brussels Ia – EN2BRIa, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598, that will be published in the final book. The present work has been subject to blind review, and the content represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.*

1 CARBONE S.M., TUO. C.E., Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012, Turin, 2016, p. 2.

2 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 351, 20.12.2012, p. 1, as amended, recital 4 (hereinafter Brussels Ia Regulation). In the scholarship, see *ex multis*, JENARD P., *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, in OJ C 59, 5.3.1979, p. 1, at p. 4; SALERNO F., *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n.1215/2012 (rifusione). Evoluzione e continuità del "Sistema Bruxelles-I" nel quadro della cooperazione giudiziaria europea in materia civile*, Milan, 2015, p. 1 ff; MOSCONI F., CAMPIGLIO C., *Diritto internazionale privato e processuale. Volume I, Parte generale e obbligazioni*, Milan, 2015, p. 59 ff; CLERICI R., *Art. 81 del Trattato sul funzionamento dell'Unione europea*, in POCAR F., BARUFFI M.C. (eds), *Commentario breve ai Trattati dell'Unione europea*, Padua, 2014, p. 500 ff; MARI L., *Il diritto processuale civile della Convenzione di Bruxelles, I, Il sistema della competenza*, Padua, 1999, p. 2, and p. 9 ff; GEIMER R., *Internationales Zivilprozessrecht*, Cologne, 2015, p. 112 ff; HESS B., KRAMER X., *From Common Rules to Best Practices in European Civil Procedure: An Introduction*, in HESS B., KRAMER X. (eds), *From Common Rules to Best Practices in European Civil Procedure*, Baden-Baden, 2017, p. 9 ff; BASEDOW J., *Aufgabe und Methodenvielfalt des internationalen Privatrechts im Wandel der Gesellschaft*, in RUPP C. (ed), *IPR zwischen Tradition und Innovation*, Tübingen, 2019, p. 1, at p. 6 ff, and HAUSMANN R., QUEIROLO I., *Introduzione*, in SIMONS T., HAUSMANN R., QUEIROLO I. (eds), *Regolamento Bruxelles I. Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, Munich, 2012, p. 4, at p. 9 ff, with further references to legal writings.

3 Uncertainty, if not the impossibility, to enforce abroad rights acquired in a legal system and incorporated into a judicial order becomes a limit to free movement of persons and economic factors. Hence, the necessity for the European Union to the ensure "exportability" of rights acquired in a given Member State also in others, by unifying rules on recognition and enforcement of decisions.Tampere European Council 15 and 16 October 1999, Presidency Conclusions, point 5, and points 33 f ("*In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgement in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgements in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law*"). Already on the necessity to harmonize and unify rules of private international law, see MANCINI P.S., *Utilità di rendere obbligatorie per tutti gli Stati sotto forma di uno o più trattati internazionali alcune regole generali del diritto internazionale privato per assicurare la decisione uniforme tra le differenti legislazioni civili e criminali*, in *Antologia del diritto internazionale privato*, Milan, 1964, p. 54.

Practitioners face an exponential growth of regulations specifically devoted to private international law[4], as well as other substantive law instruments that might contain some private international law provisions therein[5]. Additionally, EU law is not strictly governed by a hierarchy principle between sources of law: regulations (here the Brussels Ia Regulation) do not necessarily take precedence over directives[6], whose content is however subject to national transposition. With the consequence that domestic provisions transposing EU directives fall within the category of EU law that should be taken into consideration by practitioners for the purposes of identifying the proper head of jurisdiction and of rules governing free movement of decisions[7].

Between secondary EU law instruments there is in general no principle of hierarchy: relationships between such legal sources are usually solved according to the temporal principle *lex posterior derogat priori*, but also according to the general maxim *lex posterior generalis non derogat legi priori speciali*. From the combination of the temporal and specialty criteria it follows that a general act prevails over a previous one, but special rules will still stand even if the special rules pre- dates the subsequent general regime.

The above appears to be a very general and straightforward consideration. Yet, a sensitive issue arises. Assuming there is a *lex specialis* pre-dating a *lex generalis*, should the first always prevail where the general regime introduces significant legislative changes? If the new general rules aim to "modernize" the system – should these still be ousted by a pre-existing *lex specialis*? For example: provided that under the Brussels I Regulation a *lex specialis* rule creates an expedited *exequatur* procedure in favor of a contractually weaker party, after the applicability of the Brussels Ia Regulation – which "abolishes" *exequatur tout court*, should the *lex specialis* – which has meanwhile become theoretically inconsistent with the *lex generalis* – still be applicable? Of course, the example is artificially constructed – yet the problem of the "survival" and *automatic* precedence of pre-existing provisions (on jurisdiction[8] or enforcement) over an updated legal framework (which evidently promotes certain values) should be taken into account by the lawmaker.

The relationship of the Brussels Ia Regulation with other instruments is generally solved in line with the *lex specialis*

[4] Cf Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, in OJ L 181, 29.6.2013, p. 4; 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, in OJ L 343, 29.12.2010, p. 10; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in OJ L 199, 31.7.2007, p. 1, as amended; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in OJ L 399, 30.12.2006, p. 1, as amended; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in OJ L 7, 10.1.2009, p. 1, as amended; 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, in OJ L 143, 30.4.2004, p. 15, as amended; 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, in OJ L 338, 23.12.2003, p. 1, as amended; Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, in OJ L 178, 2.7.2019, p. 1; 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, in OJ L 183, 8.7.2016, p. 1, as amended; 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, in OJ L 183, 8.7.2016, p. 30, as amended; Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in OJ L 201, 27.7.2012, p. 107, as amended; Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, in OJ L 189, 27.6.2014, p. 59; 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, in OJ L 200, 26.7.2016, p. 1, and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19, as amended.

[5] Most recently, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in OJ L 119, 4.5.2016, p. 1, as amended, art. 79 on jurisdiction ("*1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation. 2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers*"), and art. 82 on stay of proceedings ("*1. Where a competent court of a Member State has information on proceedings, concerning the same subject matter as regards processing by the same controller or processor, that are pending in a court in another Member State, it shall contact that court in the other Member State to confirm the existence of such proceedings. 2. Where proceedings concerning the same subject matter as regards processing of the same controller or processor are pending in a court in another Member State, any competent court other than the court first seized may suspend its proceedings. 3. Where those proceedings are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof*").

[6] For all, ADAM R., TIZZANO A., *Manuale di diritto dell'Unione europea*, Turin, 2017, p. 164.

[7] Amongst the best known are domestic provisions transposing Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in OJ L 18, 21.1.1997, p. 1, art. 6 ("*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*"), as amended in 2020.

[8] To some extent, reflections have been inspired by the existence of rules on jurisdiction contained in the Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, cit. According to its art. 6, proceedings may be instituted in the Member State in whose territory the worker is or was posted. As the head of jurisdiction is not "exclusive" in nature, and thus "concurs" with the fora for the protection of weaker parties in the Brussels Ia Regulation, the dogmatically relevant question remains in terms of consistency and compatibility over time between rules which are mutually exclusive.

principle. This holds true for other sources of EU law (Article 67), and international conventions concluded by the Members State that are not ousted by the regulation (Article 69; Article 71). Of course, also bilateral agreements between a third State and a Member State concluded before the entry into force of the Brussels I Regulation gain precedence over the Brussels Ia Regulation (Article 73).

The *lex specialis* principle operates differently, and for different reasons when it comes to either other sources of EU law or international treaties.

The disconnection clause contained in Article 67 of the Brussels Ia Regulation provides as follows: "*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*"[9].

The reason for this approach in coordination is apparent and self-evident: the Brussels Ia Regulation acknowledges that specific acts, as *lex specialis*, are better placed to address a specific matter, and – for that reason – deserve precedence. There is little concern about whether the special rule was enacted by the European Union before or after the Brussels Ia Regulation[10] (yet, as mentioned, there could be reason for concern). The provision at hand operates a permanent unilateral disconnection in favor of the special regime, provided that this regime concurs with the general one, and a choice between two competing rules must be made. After all, all rules have been adopted by the same legislator, and it can be assumed that this entity has a full grasp of its own legal system – which needs to be coordinated[11]. Moreover, such coordination is not hierarchical in nature; even though there is no formal hierarchy between regulations and directives, the former are directly applicable over domestic legislation. So, if domestic legislations transposes a directive containing a *lex specialis* rule on jurisdiction or on the free movement of decisions, such domestic provisions will gain precedence over the Brussels Ia Regulation[12].

When it comes to international conventions, the coordination of the regulation – its underlying rationale – must consider several scenarios.

The first hypothesis that calls for coordination is that of an international treaty in force between two or more Member States only. No third States are party to such international agreement. The European Union "abrogates" treaties between Member States with a general scope of application. Most of such international agreements were destined to govern the free movement of decisions in "civil and commercial matters". Article 69 of the Brussels I Regulation (so, Regulation 44/20001) seemed restrictive, to some extent, as it provided that the instrument would "*supersede the following conventions*"; for its own part, the Brussels Ia Regulation is clearer about its aim, which is ousting *all* general conventions. Article 69 of the Brussels Ia does not make reference to a list, but specifies that the instrument "*supersede*[s] *the conventions that cover the same matters*… [i]*n particular*" those contained in a specific list drafted by the European Commission following communications of the single Member States. The use of the word "*in particular*" leaves little doubt about the fact that the previous list was not meant to be exhaustive. And there is little surprise about the solution adopted in terms of coordination: as both instruments concerned (an international treaty and the regulation) have a general scope of application (either determining jurisdiction or rules on free movement of decisions in civil and commercial matters), neither of them is a *lex specialis*. Or – put another way – both are *lex generalis*. If this is so, it is perfectly consistent with general approaches that the most recent one will find application. Of course, the unilateral "abrogation" of international treaties with a general scope of application between the Member States does not only create significant problems within the international arena: no State will breach the treaty (by not applying it), as all, bound by EU law, will turn to the more evolved Brussels Ia Regulation.

This brings us to the second main hypothesis of coordination. The concern for "*respect for international commitments*"[13] has led the European Union to ensure precedence of international agreements concluded by a Member State and a third State, if such a treaty was concluded before the entry into force of the Brussels I Regulation[14], i.e. when the Union acquired and exercised competences in the field of judicial cooperation[15] (or before the time of accession to the Union of a given Member State, if it has become part of

[9] In the scholarship, see MANKOWSKI P., Art. 67 Brüssel Ia-VO, in RAUSCHER T. (ed), Europäisches Zivilprozess- und Kollisionsrecht, Band I, Brüssels Ia-VO, Cologne, 2016, p. 1215; ID, Article 67, in MAGNUS U., MANKOWSKI P. (eds), *Brussels Ibis Regulation*, Cologne, 2016, p. 1020, and BORRÁS A., DE MAESTRI M.E., *Articolo 67*, in SIMONS T., HAUSMANN R., QUEIROLO I. (eds), Regolamento Bruxelles I. Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano, Munich, 2012, p. 928.

[10] MANKOWSKI P., Article 67, cit., p. 1021, and KROPHOLLER J., VON HEIN J., Europäisches Zivilprozessrecht: Kommentar su EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO, Frankfurt am Main, 2011, p. 719.

[11] Cf Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 12, 16.1.2001, p. 1 (hereinafter Brussels I Regulation), recital 24, according to which "… *for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments*". See also KROPHOLLER J., VON HEIN J., *Europäisches Zivilprozessrecht: Kommentar su EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, cit., p. 719.

[12] MANKOWSKI P., *Article 67*, cit., p. 1023.

[13] Brussels Ia Regulation, recital 35.

[14] Brussels Ia Regulation, art. 73(3).

[15] POCAR F. (ed), *The External Competence of the European Union and Private International Law*, Padua, 2007; FRANZINA P. (ed), *The External Dimension of EU Private International Law after Opinion 1/13*, Cambridge, 2017; CREMONA M., MONAR J., POLI S. (eds), *The External Dimension of the Area of Freedom, Security and Justice*, Brussels, 2011; BRAND R.A., *The Lugano Case in the European Court of Justice: Evolving European Union Competence in Private International Law*, in *ILSA Journal of International and Comparative Law*, 2005, 2, p. 297, and MILLS A., *Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?*, in *International & Comparative Law Quarterly*, 2016, p. 541.

the Union after the entry into force of the Brussels I Regulation, unless otherwise provided for during the accession period that might "anticipate" applicability of the instrument). The *rationale* behind it does not necessarily rely on a *lex specialis*-based argument: the Union seeks to relieve Member States of the necessity to choose which imperative and non-derogable regime to give effect to.

The third hypothesis for coordination taken into account by the Regulation concerns international conventions devoted to specific matters. Here, *lex specialis* considerations return as the driving *ratio* to solve the matter of possible conflicts of applicable provisions. According to Article 71, the Brussels Ia Regulation does "*not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments*".

A difference in wording between the 1968 Brussels Convention and the Brussels I Regulation(s) must be highlighted[16]. Article 57 of the former provided that "*This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction and the recognition and enforcement of judgments*". The latter regime, for its part, does not allow Member States to enter into new conventions autonomously; in the context of the regulations, the *lex specialis* principle operates only for *already existing* treaties[17], as the competence in the field of judicial cooperation in civil and commercial matters has been exercised by the Union. It is only this one that will be authorized to (directly or indirectly[18]) conclude new treaties whose scope of application overlaps with the Brussels Ia Regulation. In other words, unlike Article 67, Article 71 does not provide for a "permanent" unilateral disconnection, thus being closer to other coordination mechanisms specifically designed for international treaties.

Special rules, such as in air transport, maritime transport, and similar, deserve priority as they better attain a specific result. Moreover, the Union has an interest in "saving" such international conventions, as these promote certainty and foreseeability beyond the borders of the European judicial space. Such international treaties remain applicable in the relationships between one Member States and a third country, and between Member States only as well.

The Court of Justice of the European Union had some occasions to clarify the operativity of the *lex specialis* principle, and its limits when European and non-European provisions are concurring. The first principle that can be inferred from the case law is that conventions on special matters by no means constitute an absolute autonomous and self-contained regime; for every aspect of the international civil procedure that is not directly addressed in the international convention on special matters, the Brussels Ia Regulation "returns" fully applicable[19].

The second principle that can be inferred from the case law of the Court of Justice of the European Union rendered on Article 71 Brussels I is even more significant, as

[16] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Consolidated version), in OJ L 299, 31.12.1972, p. 32.

[17] Cf ex multis, BORRÁS A., DE MAESTRI M.E., *Articolo 71*, in SIMONS T., HAUSMANN R., QUEIROLO I. (eds), Regolamento Bruxelles I. Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano, Munich, 2012, p. 938, at p. 939.

[18] The European Union can directly participate in negotiations and conclude international agreements, if this is possible in the specific context; should the treaty be discussed in a forum where international regional organisations are not allowed, the Union can authorise Member States to conclude a treaty. Moreover, if an international treaty also covers aspects that go beyond the scope of the Union's competences, also the participation of the Member States is necessary. On the EU treaty making power, see CREMONA M., *Who Can Make Treaties? The European Union*, in HOLLIS D.B. (ed), *The Oxford Guide to Treaties*, Oxford, 2012, p. 93; KUIJPER P.J., WOUTERS J., HOFFMEISTER F., DE BAERE G., RAMOPOULOS T., *The Law of EU External Relations. Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford, 2013, p. 1 ff; ROSAS A., *The Status in EU Law of International Agreements Concluded by EU Member States European Union Law*, in *Fordham International Law Journal*, 2011, p. 1304; MERPI R.L. II, *The Lisbon Treaty and EU Treaty-Making Power: The Next Evolutionary Step and Its Effect on Member States and Third Party Nations*, in *Wayne Law Review*, 2010, p. 795; GEIGER R., *External Competences of the European Union and the Treaty-Making Power of Its Member States Commentary*, in *Arizona Journal of International and Comparative Law*, 1997, p. 319; BARONCINI E., *Il Treaty-Making Power della Commissione europea*, Napoli, 2008, and CELLERINO C., *Soggettività internazionale e azione esterna dell'Unione europea. Fondamento, limiti e funzioni*, Rome, 2015.

[19] Judgment of the Court of 6 December 1994, The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj", Case C-406/92, para. 23 f ("*Article 57 introduces an exception to the general rule that the Convention takes precedence over other conventions signed by the Contracting States on jurisdiction and the recognition and enforcement of judgments. The purpose of that exception is to ensure compliance with the rules on jurisdiction laid down by specialized conventions, since in enacting those rules account was taken of the specific features of the matters to which they relate. That being its purpose, Article 57 must be understood as precluding the application of the provisions of the Brussels Convention solely in relation to questions governed by a specialized convention. A contrary interpretation would be incompatible with the objective of the Convention which, according to its preamble, is to strengthen in the Community the legal protection of persons therein established and to facilitate recognition of judgments in order to secure their enforcement. In those circumstances, when a specialized convention contains certain rules of jurisdiction but no provision as to lis pendens or related actions, Articles 21 and 22 of the Brussels Convention apply*"). On the decision, see BRIGGS A., *The Brussels Convention tames the Arrest Convention*, in *Lloyd's Maritime and Commercial Law Quarterly*, 1995, p. 161; HUBER P., *Fragen zur Rechtshängigkeit im Rahmen des EuGVÜ - Deutliche Worte des EuGH*, in *Juristenzeitung*, 1995, p. 603; HARTLEY T.C., *Admiralty Actions under the Brussels Convention*, in *European Law Review*, 1995, p. 409; MANKOWSKI P., *Spezialabkommen und EuGVÜ*, in *Europäisches Wirtschafts- & Steuerrecht*, 1996, p. 301, and CUNIBERTI G., *L'expertise judiciaire en droit judiciaire européen*, in *Revue critique de droit international privé*, 2015, p. 520. In the sense that if the international convention contains rules on choice of court agreements, they should be applicable instead of those contained in the Brussels I regime, see in the domestic case law Nejvyšší soud (CZ) 16.02.2011 - 4 Nd 418/2010, in unalex CZ-28 ("*According to Article 71(1) Brussels I Regulation, a jurisdictional rule in a convention on particular matters is to be given priority over the jurisdiction provisions in the Brussels I Regulation. This also applies to prorogation agreements. Therefore, if an international convention in relation to particular matters contains provisions on jurisdiction agreements, such provisions are to be given priority over Article 23 Brussels I Regulation*"). Some courts have supplemented the rules of international conventions with domestic rules rather than with rules of the Brussels I regime (contrary to the indication of the Court of Justice of the European Union). To that effect, see OGH 27.11.2008 - 7Ob194/08t, in unalex AT-615 ("*The form of a jurisdiction agreement is not regulated in the CMR. This gap is therefore to be closed by recourse to national law*"), and Cour de cassation (BE) 29.04.2004 - C.02.0250.N - Continental Cargo Carriers nv ./. Zust Ambrosetti e.a., in unalex BE-108 ("*Article 31(1) of the Convention on the International Carriage of Goods by Road (CMR) contains no provision regarding the form and the drafting of a jurisdictional clause by the parties, under which all disputes, a transport under this Convention may give rise to, may be brought before the courts of the signatory countries of the Convention, so that, even in the light of the provision of Article 71(1) of the Brussels I Regulation, these matters are subject to the national law that governs the contract between the parties*").

the Brussels regime becomes the benchmark for the application of international conventions. The *lex specialis* principle is "conditioned", and primacy of international conventions might not be granted despite the disconnection clause. According to the Court of Justice of the European Union, "*… specialised conventions … cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles … of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union. Observance of each of those principles is necessary for the sound operation of the internal market … Article 71 … cannot have a purport that conflicts with the principles underlying the legislation of which it is part. Accordingly, that article cannot be interpreted as meaning that, in a field covered by the regulation, … a specialised convention … may lead to results which are less favourable for achieving sound operation of the internal market than the results to which the regulation's provisions lead*"[20]. For those reasons, rules and principles contained in conventions on special matters must be evaluated against the background of the aims, the wording and the case law delivered on the Brussels Regulation(s). Only to the extent that the former are to no prejudice to the aims of the latter, they can be applied.

Today, this raises some doubts: if the favor of the free movement of the decision certainly amounts to one of the most fundamental values of the internal regime, this, after the applicability of the Brussels Ia Regulation, has significantly evolved in comparison to the times during which the Court of Justice of the European Union delivered its case law.

The Brussels Ia Regulation provides for one last cast of disconnection – i.e. "*common courts*" between Member States (Article 71 bis ff), most notably the Unified Patent Court created by way of an international agreement between *some* Member States with competences over infringement and validity of both unitary patents and European patents[21]. The Unified Patent Court (UPC) should functionally replace[22] national courts that would be competent under the Brussels Ia Regulation[23] and be governed by its own *lis pendens* rule (Article 71 ter), whilst specific rules on the enforcement of decisions contained in the system of the common court will only apply if both the State of origin and the requested State are party to the common court (Article 71 quarter); in other cases, the enforcement of the common court's decision will follow the rules contained in the Brussels Ia Regulation.

[20] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08, para. 49 ff. On the decision, see MAGRONE M.E., *Trasporto merci: Convenzione ad hoc applicabile solo se prevedibile e in grado di limitare liti parallele*, in *Guida al Diritto*, 2010, 21, p. 96; KUIJPER P.J., *The Changing Status of Private International Law Treaties of the Member States in Relation to Regulation No. 44/2001 - Case No. C-533/08, TNT Express Nederland BV v. AXA Versicherung AG*, in *Legal Issues of Economic Integration*, 2011, p. 89; TUO C.E., CARPANETO L., *Connections and Disconnections Between Brussels Ia Regulation and International Conventions on Transport Matters*, in *Zbornik Pravnog fakulteta u Zagrebu*, 2016, 2-3, p. 141. On art. 71 of the Brussels Ia Regulation and corresponding provisions in the Brussels Convention and the Brussels I Regulation), see also in particular MANKOWSKI P., *Article 71*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Cologne, 2016, p. 1044; CARBONE S.M., *From Speciality and Primacy of Uniform Law to its Integration in the European Judicial Area*, in CARBONE S.M. (ed), *Brussels Ia and Conventions on Particular Matters. The case of Transports*, Rome, 2017, p. 17; TUO C.E., *Brussels Ia and International Transports Conventions: the Regulation's «Non Affect» Clause through the Lens of the CJEU Case Law*, in *idem*, p. 33; CARPANETO L., *On Collisions and Interactions between EU law and International Transport Conventions*, in *idem*, p. 63; ESPINOSA CALABUIG R., *Brussels Ia Regulation and Maritime Transport*, in *idem*, p. 107; PUETZ A., *Brussels Ia and International Conventions on Land Transport*, in *idem*, p. 141; SOLETI P.F., *Brussels Ia and International Air Transport*, in *idem*, p. 181; CELLE P., *Jurisdiction and Conflict of Laws Issues between Contracts of Transport and Insurance*, in *idem*, p. 215; CARREA S., *Brussels Ia and the Arrest of Ships: from the 1952 to the 1999 Arrest Convention*, in *idem*, p. 237; BORRÁS A., DE MAESTRI M.E., *Articolo 71*, cit., p. 938; RUBIO Á, *La regla de especialidad en el artículo 57 del Convenio de Bruselas de 1968*, in *An Der Mar*, 1995, p. 273; BARIATTI S., *La giurisdizione e l'esecuzione delle sentenze in materia di brevetti di invenzione nell'ambito della C.E.E.*, in *Rivista di diritto internazionale privato e processuale*, 1982, p. 484; BELMONTE A., *Sul coordinamento tra l'art. 57 della Convenzione di Bruxelles del 1968 e le altre convenzioni disciplinanti la competenza giurisdizionale*, in *Giustizia civile*, 2005, p. 586; CARBONE S.M., *La nuova disciplina comunitaria relativa all'esercizio della giurisdizione e il trasporto marittimo*, in *Rivista di diritto internazionale privato e processuale*, 1988, p. 633; CERINA P., *In tema di rapporti tra litispendenza e art. 57 nella Convenzione di Bruxelles del 27 settembre 1968*, in *Rivista di diritto internazionale privato e processuale*, 1991, p. 953; GAJA G., *Sui rapporti fra la Convenzione di Bruxelles e le altre norme concernenti la giurisdizione e il riconoscimento di sentenze straniere*, in *Rivista di diritto internazionale privato e processuale*, 1991, p. 253; GUADAGNA F., *Il sequestro di nave e lo spazio giudiziario europeo*, in *Il diritto marittimo*, 2005, p. 1424, and VASSALLI DI DACHENHAUSEN T., *I rapporti tra Convenzione di Bruxelles con le altre convenzioni sulla competenza giurisdizionale e l'esclusione delle sentenze in materia civile e commerciale*, in *Jus*, 1990, p. 119. See also in the case law, excluding the compatibility of the regime of negative declaratory actions and *lis alibi pendens* in the CMR with the Brussels regime, Judgment of the Court (Third Chamber), 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV, Case C-452/12, para. 42 ff. Commenting the decision, other than the already quoted scholarship, HARTENSTEIN O., *Rechtshängigkeit und Rechtskraft – Neues vom EuGH zur negativen Feststellungsklage im Anwendungsbereich der CMR*, in *Transportrecht*, 2014, p. 61; ANTOMO J., *Transportrecht: Beachtlichkeit der negativen Feststellungsklage bei Einwand der Rechtshängigkeit nach Art. CMR Artikel 31 CMR Artikel 31 Absatz II CMR*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2014, p. 222; TREPPOZ É., *La résolution perturbatrice européenne des conflits de conventions en matière de contrats de transport*, in *Revue des contrats*, 2014, p. 251, and PENASA L., *Decisioni di rilievo internazional-processualistico. Due sentenze della Corte di giustizia sulla litispendenza europea*, in *Int'l Lis*, 2014, p. 65.

[21] Agreement on a Unified Patent Court, in OJ C 175, 20.6.2013, p. 1.

[22] MANKOWSKI P., *Article 71b*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Cologne, 2016, p. 1075, at p. 1079.

[23] According to art. 24(4) of the Brussels Ia Regulation, "*in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence*", exclusive competence is for "*the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place. Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State*". International jurisdiction in intellectual property matters is thus already a complex regime; for a domestic Trade Mark, the Brussels Ia Regulation is applicable to both online and offline infringements; in the case of an EU Trade Mark, jurisdiction for infringement matters is Regulation 2017/1001, Art. 125; on the validity of a domestic Trade Mark, the Brussels Ia Regulation provides for exclusive jurisdiction, whilst for the validity of an EU Trade Mark, the EU Trade Mark Court shall have exclusive jurisdiction.

However, it must necessarily be noted that the process surrounding the activity of the UPC has been slowed down (but not brought to a halt[24]) by a decision of the German Constitutional Court[25] given that, as can be read on the English press release, the ratification of the treaty would amend the German Constitution without the necessary two-thirds majority[26].

2. The *lex specialis* principles between art. 67 and art. 71 Brussel Ia Regulation

Provided different venues for coordination are given within the Brussels Ia Regulation, the question become whether the approaches followed in the case in regard to one provision can or should be extended to the other. On the one hand, one could wonder whether the "fill the gap" approach that has emerged in the case law related to Article 71, should be valid for Article 67 as well. From a teleological perspective, the Brussels Ia Regulation is the main instrument, that could be supplemented in some parts by other special acts of the European Union itself. It seems perfectly consistent with this approach to make recourse to the Brussels Ia Regulation for any aspect that might not be covered by the special EU act at hand.

On the other hand, more doubts arise about the possibility and the opportunity to transpose the "conditional *lex specialis* principle" developed by the Court of Justice of the European Union also in the context of Article 67. Such doubts are grounded in the *rationale* behind the additional requirements (super)imposed[27] by the Court in the context of Article 71, as well as to the critiques that can be made against such an approach. The provision makes no reference[28] to *any* additional requirement of compatibility of international conventions. In this sense, purposive "*interpretation gain*[s] *the upper hand over verbal and textual interpretation*"[29]. Yet, it could be argued against such methodology, that Article 71 can only be triggered for conventions already concluded by the Member States before the entry into force of the first Brussels I Regulation, as the competence on the point has been absorbed by the European Union. If this is true, all such conventions were already known to the European lawgiver at the moment of the adoption of both the Brussels I Regulations, thus accepting these conventions *without any need* to conform to a minimum European standard in their application between Members States. Otherwise, Article 71 would have clearly provided for this. Additionally, the introduction of a fundamental requirement, the necessity for conventions to conform to European standards of judicial cooperation, raises by itself uncertainties as practitioners would necessarily have to verify the case law of the Court of Justice despite the plain wording. Moreover, other than the few judgments already delivered by the Court, it will fall in the first place upon domestic courts and practitioners to advocate on whether a specific convention fulfils the "conditional *lex specialis*" requirement. With possible fragmented approaches and a solution within the European judicial space before the new intervention of the Court of Justice[30].

The reason behind the superimposition of an additional requirement to the *lex specialis* principle is evident. Fundamental values of the Brussels Ia Regulation cannot be derogated from even by special rules that should take primacy. Yet, this necessity does so evidently exist in the context of Article 67: all relevant concurring provisions are adopted by the EU lawmaker who should bear responsibility (and not practitioners on a case by case approach) for eventually ensuring consistency with fundamental "quasi-constitutional" values of Brussels I.

3. Article 67 Brussels Ia Regulation: A Critical Reading of Its Scope of Application

Considering the growing fragmentation of special rules on jurisdiction (mainly) contained in other rules of EU, Article 67 Brussels Ia Regulation is destined to acquire particular relevance in the near future as it governs the disconnection between the *lex generalis* and the *lex specialis*. Nonetheless, some perplexities on the very scope of application of the provision at hand remain.

Article 67 Brussels Ia provides that "*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*".

The first question relates to the terminology "*instruments of the Union*". The definition finds no counterpart in the Treaty on the Functioning of the European Union, which rather adopts a different terminology[31]. The choice in wording of Article 67 seems thus odd at first, as it could have used more common terminologies – regulations, directives and decisions, or categories that are widely known, such as "secondary EU law"[32] with binding effects. How-

[24] ERCOLI P., *Germany Plans Second Attempt at Ratifying Unified Patent Court Agreement*, July 7, 2020, available online.

[25] BVerfG, Beschluss des Zweiten Senats vom 13. Februar 2020, 2 BvR 739/17.

[26] Act of Approval to the Agreement on a Unified Patent Court is void, Press Release No. 20/2020 of 20 March 2020.

[27] MANKOWSKI P., *Article 71*, cit., p. 1051.

[28] BORRÁS A., DE MAESTRI M.E., *Articolo 71*, cit., p. 942.

[29] MANKOWSKI P., *Article 71*, cit, p. 1051.

[30] TUO C.E., *Regolamento Bruxelles I e convenzioni su materie particolari: tra obblighi internazionali e primauté del diritto dell'Unione europea*, in *Rivista di diritto internazionale privato e processuale*, 2011, p. 377.

[31] Part six (Institutional and financial provisions), Title I (Institutional provisions), Chapter 2 (Legal acts of the Union, adoption procedures and other provisions), refers to "legal acts of the Union" (Section 1). Article 288 therein purports the well-known list of regulations, directives, decisions, recommendations and opinions. Art. 216, in Part five (External action), Title V, refers to "international agreements". The word "instrument(s)" is used in other contexts, such as the solidarity clause in art. 222 ("The Union shall mobilise all the instruments at its disposal"), or to refer to "financial instruments" in the field of monetary union.

[32] Commenting on the provision, KROPHOLLER J., VON HEIN J., *Europäisches Zivilprozessrecht: Kommentar su EuGVO, Lugano-*

ever, if it assumed that the wording used by the lawgiver is by no means casual, but is rather well pondered and expressive of a specific intention, one cannot avoid dwelling on what "*instruments of the Union*" are for the scope of application of the provision at hand. A deliberate choice to abandon consolidated references to normative acts should point towards the conclusion that Article 67 has an "inclusive" nature and wishes to extend its scope of application "beyond" established categories. This seems overall consistent with the underlying *lex specialis* principle and objective.

The intention to extend the scope of application of the provision finds comfort in other language versions of the regulation. The Italian version refers to "*atti dell'Unione*"[33], whilst the German one to "*Unionsrechtsakten*"[34]. It should however be noted that the terminology used in such language versions is not translated into "*instruments*", but rather into "*acts*". These expressions appear preferable than the word "*instrument*", as "*acts*" are generally referred to as "acts adopted by the Union", thus secondary law. Consistent with the idea that the terminology should refer to "acts" rather than "instruments", the evolution between the Brussels I and the Brussels Ia Regulation should be highlighted. The former entailed a recital, which could have offered some guidance on the point. Recital 24 expressly made reference to "*atti comunitari*"[35] or to "*Gemeinschaftsrechtsakten*"[36], thus essentially referring to secondary law in the Italian and German version (whilst the English version still kept the word "*instruments*"[37]). Nonetheless, the Brussels Ia Regulation does not entail a similar recital in its text. Such evolution in the content of the explanatory parts of the regulation might have little impact on the interpretation of Article 67; it could simply be the result of an (assumed) clarity of the provision, which requires no guidance. Or, it could be seen as the will to intentionally avoid any guidance on whether aArticle 67 should be applicable to "instruments" other than secondary law *stricto sensu*.

There is little doubt about the fact that regulations do fall within the scope of application of the provision, whereas directives – that are not directly applicable and require national transposition – fall within the scope of application of the second prescription of the rule (i.e. "*national legislation harmonised pursuant to such instruments*"), if they contain uniform rules on international jurisdiction or on the free movement of decisions.

The possibility to extensively interpret Article 67 Brussels Ia raises the question as to whether this provision governs the relationship between the *lex generalis* and special exclusive heads of jurisdiction contained in the Founding Treaties themselves, as may be, for example, the case for exclusive jurisdiction of the Court of Justice of the European Union for non-contractual liability of the Union itself or for jurisdiction in employment matters (Article 270 TFEU). Before the Irish courts, liability against the Union was sought for copyright infringement, and the Irish Supreme Court[38] approached the matter of coordination between instruments in the light of the general theory of hierarchy of law, assuming primacy of the Founding Treaties is not achieved by virtue of the disconnection clause contained in the Brussels regime. Even though this solution finds no significant comfort in the case law of the Court of Justice of the European Union, it seems to some extent agreeable that Article 67 operates a disconnection clause between "acts" or "instruments" adopted by the European Union between which there is no formal hierarchy – which is not the case the case between provisions contained in EU primary law and secondary law.

For this reason, and understood in the terms of "provisions adopted by the Union", it should also be excluded that Article 67 operates anytime there binding rule for the European Union, as is the case of international customary law[39]. Public international law, binding upon the Union,

Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO, cit., p. 718, explicitly refer to "*sekundären Unionsrecht*".

[33] "*Il presente regolamento non pregiudica l'applicazione delle disposizioni che, in materie particolari, disciplinano la competenza, il riconoscimento e l'esecuzione delle decisioni e che sono contenute negli atti dell'Unione o nelle legislazioni nazionali armonizzate in esecuzione di tali atti*".

[34] "*Diese Verordnung berührt nicht die Anwendung der Bestimmungen, die für besondere Rechtsgebiete die gerichtliche Zuständigkeit oder die Anerkennung und Vollstreckung von Entscheidungen regeln und in Unionsrechtsakten oder in dem in Ausführung dieser Rechtsakte harmonisierten einzelstaatlichen Recht enthalten sind*".

[35] "*Lo stesso spirito di coerenza esige che il presente regolamento non incida sulle norme stabilite in tema di competenza e riconoscimento delle decisioni da atti normativi comunitari specifici*".

[36] "*Im Interesse der Kohärenz ist ferner vorzusehen, dass die in spezifischen Gemeinschaftsrechtsakten enthaltenen Vorschriften über die Zuständigkeit und die Anerkennung von Entscheidungen durch diese Verordnung nicht berührt werden*".

[37] "*Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments*".

[38] High Court of Ireland, Kearns & Anor v. European Commission [2005] IEHC 324 (21 October 2005).

[39] The issue of the coordination of the Brussels Ia Regulation, or the lack thereof, with international customary law has received particular attention due to the position of Advocate general Szpunar, and the subsequent decision of the Court. In an opinion delivered following a request from Italian courts on the applicability of the Brussels I Regulation to actions for damages against recognized organizations classifying ships for foreign States under international obligations and treaties, Advocate general Szpunar argued that "*Article 71 of Regulation No 44/2001 solely concerns conventions to which the Member States were party at the time when that regulation was adopted. The static nature of that provision sits ill with the evolving nature of customary international law which, moreover, is binding both on the Member States and on the European Union. Indeed, to take the view that Article 71 of Regulation No 44/2001 determines the relationship between that regulation and the principle of customary international law concerning the jurisdictional immunity of States is to suggest that the EU legislature wished to 'freeze' customary international law in the state it was in when that regulation was adopted. Such a solution would be clearly incompatible with Article 3(5) TEU, in accordance with which the European Union is to contribute to the strict observance and the development of international law*". In these terms, it becomes clear how delicate the issue of the relationship between immunities and EU civil procedure, and their proper coordination is, and how relevant its assessment for the correct functioning of the rules surrounding judicial cooperation in civil and commercial matters becomes. See Opinion of Advocate general Szpunar delivered on 14 January 2020, Case C-641/18, LG v Rina SpA, Ente Registro Italiano Navale, para. 134, and Judgment of the Court (First Chamber) of 7 May 2020, LG v Rina SpA and Ente Registro Italiano Navale, Case C-641/18. Both the Court and Advocate general have concluded that "*Article 1(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction*

might contain some *negative* heads of jurisdiction, namely State immunities. However, Article 67 Brussels Ia should not disconnect the *lex generalis* in favor of State immunities. Notwithstanding that international customs are under some conditions a parameter of validity of EU secondary law[40], these do not appear fit to trigger the EU disconnection clause, as they are not "*contained in instruments of the Union*".

Lastly, a question remains. Different approaches have emerged in the case law when it comes to the applicability of either Article 67 or Article 71 Brussels Ia Regulation for international conventions to which the European Union has become party to. The European Union has become party to the 1999 Montreal Convention[41]. Some domestic courts have resolved the issue of coordination between the special international regime and the Brussels Ia Regulation in the light of Article 71[42], whilst other courts have solved the matter in the light of Article 67[43]. Other courts have argued for their jurisdiction, without addressing the matter of coordination of relevant instruments either under Article 67 or Article 71 Brussels Ia Regulation[44]. The scholarship is however generally of the view that Article 67 Brussels Ia Regulation should also find application for international agreements concluded by the European Union as, by virtue of Article 216(2) TFEU, "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*"[45]. The choice between the two competing disconnection clauses is relevant, as if one concedes that the additional conditions super-imposed by the case law of the Court of Justice of the European Union in the context of Article 71 should not apply to Article 67, a higher degree of certainty and foreseeability on the application of the legal regime follows.

and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that an action for damages brought against private-law bodies in respect of classification and certification activities carried out by those bodies as delegates of a third State, on behalf of that State and in its interests, falls within the concept of 'civil and commercial matters' within the meaning of that provision. The principle of customary international law concerning the jurisdictional immunity of States does not preclude the application of Regulation No 44/2001 in proceedings relating to such an action". This, as specified by the Court, "*provided that that classification and certification activity is not exercised under public powers, within the meaning of EU law, which it is for the referring court to determine*". Domestic courts have already addressed similar questions in the past, advocating that despite the action relating to damages, and being thus contractual in nature, the origin of the claim touches upon the sovereign rights of a State that are delegated to an agent. Whereas classification activities are *acta iure imperii*, and possible contextual insurance activities are *acta iure gestionis*, the impossibility of properly distinguishing the two has led courts to conclude in favor of State immunity of Rina as agent of a foreign State. See in the case law Trib. di Genova 8 March 2012, Abdel Naby Hussein Mabrouk Aly ed altri c. RINA S.p.a., in *Il diritto marittimo*, 2013, p. 145. In legal writings on the immunity of classification societies, see BASEDOW J., WURMNEST W., *Third-Party Liability of Classification Societies*, Berlin, 2005; LAGONI N., *The Liability of Classification Societies*, Berlin, 2007; PULIDO BEGINES J.L.P., *The EU Law on Classification Societies: Scope and Liability Issues*, in *Journal of Maritime Law and Commerce*, 2005, p. 487; ANTAPASSIS A.M., *Classification Societies' Liability: A Comparison With Emphasis To Greek Law*, in HUYBERCHTS M. (ed), *Marine Insurance at the Turn of the Millennium*, Vol. II, Oxford, 2000, p. 57; BRIGNARDELLO M., *La normativa comunitaria in materia di safety nella navigazione marittima*, in TRANQUILLI LEALI R., ROSAFIO E.G. (eds), *Sicurezza, Navigazione e trasporto*, Milan, 2008, p. 187; BASEDOW J.,WURMNEST W., *The Liability of Classification Societies Toward Ship Buyers*, in *Il diritto marittimo*, 2008, p. 278; COMENALE PINTO M., *La responsabilità delle società di classificazione di navi*, in *Il diritto marittimo*, 2003, p. 7; CORONA V., *La responsabilità delle società di classificazione*, in ANTONINI A. (ed), *Trattato breve di diritto marittimo*, *Vol. III: Le obbligazioni e la responsabilità nella navigazione marittima*, Milano, 2010, p. 413; LOPEZ DE GONZALO M., *La responsabilità delle società di classifica*, in *Diritto del commercio internazionale*, 1997, p. 651; MICCICHÈ L., *In tema di responsabilità extra-contrattuale delle società di classificazione*, in *Il diritto marittimo*, 2006, p. 1135; RIMABOSCHI M., *Natura giuridica della responsabilità delle società di classificazione verso i terzi: il caso "Redwood"*, in *Il diritto marittimo*, 2011, p. 37; TURCI M., *La responsabilità delle società di classifica verso i terzi: il caso dello Star of Alexandria*, in *Il diritto marittimo*, 1997, p. 1174, and QUEIROLO I., DOMINELLI S., *Statutory Certificates e immunità funzionale del Registro Italiano Navale*, in *Il diritto marittimo*, 2013, p. 152.

40 Cf Judgment of the Court of 16 June 1998, A. Racke GmbH & Co. v Hauptzollamt Mainz, Case C-162/96.

41 See 2001/539/EC: Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), in OJ L 194, 18.7.2001, p. 38.

42 Cass. Civ. Sez. Unite 8 July 2019, n. 18257 ("*L'art. 71, comma 2, lettera a), del Regolamento, stabilisce il criterio per dirimere i conflitti nell'ipotesi di concorrente applicabilità della normazione convenzionale e di quella europea, individuandolo nel principio di specialità, in funzione del quale, in via generale, prevale la disciplina convenzionale internazionale su quella eurounitaria, ove siano, in relazione a tutti i criteri di collegamento, entrambe astrattamente applicabili. Al riguardo deve, tuttavia, rilevarsi, che secondo quanto indicato nel par. 3 dell'art. 17 del Regolamento, la sezione quarta, relativa alle regole determinative della competenza giurisdizionale in tema di contratti con i consumatori, non si applica ai "contratti di trasporto che non prevedono prestazioni combinate di trasporto ed alloggio per un prezzo globale". Nella specie, secondo la univoca prospettazione delle parti, il contratto ha ad oggetto esclusivamente la prestazione riguardante il trasporto aereo. A completamento del quadro normativo di diritto dell'Unione Europea, deve aggiungersi il Regolamento CE n. 261 del 2004 che istituisce "Regole comuni in materia di compensazione ed assistenza ai passeggeri in caso di negato imbarco, cancellazione del volo o ritardo prolungato e che abroga il Regolamento n. 295 del 1991" il quale, tuttavia, non contiene criteri riguardanti la competenza giurisdizionale ma detta esclusivamente la griglia minima di tutela in favore di viaggiatori aerei che si trovino nelle peculiari indicazioni in esso indicate. Può concludersi, pertanto, nel senso dell'applicabilità, in via generale dei criteri di radicamento della giurisdizione contenuti nell'art. 33, comma 1, della Convenzione di Montreal, sia perché in relazione di specialità rispetto alla parte del Regolamento Bruxelles 2 bis (n. 1215 del 2012) che ha ad oggetto i criteri determinativi della giurisdizione nelle materie civili e commerciali da esso regolato, sia perché lo stesso Regolamento contiene una disposizione (art. 17 par. 3) che esclude, in via espressa, la fattispecie contrattuale dedotta nel presente giudizio dall'ambito delle regole riguardanti la determinazione della giurisdizione nei contratti asimmetrici, sia infine perché il Regolamento CE sul trasporto aereo n.261 del 2004 non riguarda la giurisdizione*"). See also Cass. Civ., Sezioni Unite, 13 February 2020, n. 3561.

43 LG Bremen, 5 June 2015 - 3 S 315/14 ("*Zur Entscheidung über den materiell-rechtlichen Schadensersatzanspruch ergibt sich die internationale Zuständigkeit deutscher Gerichte aus Art. 33 des Montrealer Übereinkommens zur Vereinheitlichung bestimmter Vorschriften über die Beförderung im internationalen Luftverkehr vom 28.5.1999 (ABl. L 194 vom 18.7.2001, S. 39). Dieses beansprucht gemäß Art. 67 EuGVVO (nicht Art. 71 EuGVVO, vgl. Oberhammer in Stein/Jonas, ZPO, 22. Aufl. [2010], Art. 71 EuGVVO Rz. 3 mit FN 36; vgl. auch Slonina in Burgstaller/Neumayr/Geroldinger/Schmaranzer, Internationales Zivilverfahrensrecht [18. Lfg., Wien 2015, i. Ersch.], Art. 67 Rz. 8 mit FN 21) Vorrang gegenüber der EuGVVO und verdrängt insofern die Zuständigkeit aus Art. 5 Nr. 1 lit. b) EuGVVO (vgl. Geimer in Geimer/Schütze, Europäisches Zivilverfahrensrecht, 3. Aufl. [2010], Art. 5 Rz. 45)*"). See DOMINELLI S., SANNA P., *Sulla determinazione dell'autorità giurisdizionale competente a conoscere di una domanda di compensazione pecuniaria per ritardo di un volo: certezze, dubbi e riflessioni sul coordinamento tra strumenti normativi a margine della causa Ryanair C-464/18 della Corte di giustizia dell'Unione europea*, in *Il diritto marittimo*, 2020, p. 398, at p. 401, text and footnote.

44 Tribunale Napoli, 7 February 2011.

45 KROPHOLLER J., VON HEIN J., *Europäisches Zivilprozessrecht: Kommentar su EuGVO, Lugano-Übereinkommen 2007, EuVTVO, EuMVVO und EuGFVO*, cit., p. 719, and PUETZ A., *Rules on Jurisdiction and Recognition or Enforcement of Judgments in Specialised Conventions on Transport in the Aftermath of TNT: Dynamite or Light in the Dark?*, in *The European Legal Forum*, 2018, p. 117, at p. 125.