

Draft EU Matrimonial Property Regulations - Selected issues of jurisdiction

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Focus

- Art. 5 : 'Jurisdiction in other cases'
 - Case A : 'Henk and Marjan'
 - Case B : 'Pedro and Alba'
- Art. 14 : 'Provisional and protective measures' - Case C : 'Helena and Pavlos'
- Art. 9/12/13 - Case D : 'Christelle and Dieter'

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I. Art. 5

A. Case A : Henk and Marjan

- Henk and Marjan, 2 Dutch citizens, married in the Netherlands – live in Belgium
- Separation – divorce is heard before a court in Brussels (Art. 3 Brussels *I Ibis*)
- No agreement to give divorce court jurisdiction for division of matrimonial assets (art. 4)
- Which court to hear the dispute?

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I. Art. 5

A. Case A : Henk and Marjan

- Art. 5 : list of competent courts:
 - 1st) Common habitual residence
 - 2nd) Last common habitual residence (if still used by one of the partners)
 - 3rd) Defendant's habitual residence
 - 4th) Common nationality (domicile) of the spouses

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I. Art. 5

A. Case A : Henk and Marjan

- 1°) List closely follows model of Art. 3 Brussels IIbis Reg.
- Only exception : habitual residence of plaintiff (*'forum actoris'*) not retained
- To be commended from policy point of view – *e.g.* if Marjan settles in Spain after separation
- Possible difficulty compensated by *forum necessitatis* (art. 7)

I. Art. 5

A. Case A : Henk and Marjan

- 2°) Parallelism between Art. 5 and Art. 3 Brussels I *bis* Reg. → divorce court will in many cases also decide matrimonial property issues
 - Automatically under Art. 4
 - Could also be the case under Art. 5
 - but not necessarily (*e.g.* if divorce proceedings between Marjan and Henk in the Netherlands)

I. Art. 5

A. Case A : Henk and Marjan

- Art. 5 does not exclude splitting up between divorce court and court dealing with matrimonial assets – fundamental flaw? No :
 - Consolidation is most probable outcome (certainly if spouses wish to consolidate), splitting up the exception
 - Divorce court (under Brussels IIbis) not always most appropriate (*e.g. Hadadi*)
 - Lack of consolidation will not necessarily lead to practical difficulties or conflicting decisions

I. Art. 5

A. Case A : Henk and Marjan

- Consolidation of all family disputes? In case of divorce :
 - Divorce: art. 3 Brussels *Ibis* Reg.
 - Maintenance : art. 3 Reg. 4/2009 (own consolidation rule – art. 3 indents c & d)
 - Matrimonial assets : consolidation if spouses agree
- Lack of consolidation mainly because of very broad rules of jurisdiction under Brussels *Ibis*

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I. Art. 5

A. Case A : Henk and Marjan

- 3°) Distinctive feature of Art. 5 :
hierarchical list – no 'menu' with
freedom to choose
- To be preferred to freedom of art. 3
Brussels Ibis

I. Art. 5

A. Case A : Henk and Marjan

- 4°) Final note on Art. 5 : also useful in other cases than divorce or death of one of the spouses – *e.g.* spouses wish to modify their regime and need approval from the court (*e.g.* under French law – art. 1397 Civil Code)
- Jurisdiction of common habitual residence of spouses will work in most cases – spouses will seek a change where they live
- In other cases : possibility for spouses to choose court of law chosen (art. 5-2)

I. Art. 5

B. Case B : Pedro and Alba

- Pedro & Alba, two Spanish citizens, live together in Paris since 5 years
- Intend to marry and remain in France
- Seek advice from a local notary on matrimonial contracts – suggestion to adopt a separation of assets combined with a choice for French law
- May Pedro & Alba already settle on a court for future disputes?

I. Art. 5

B. Case B : Pedro and Alba

- Two possible choices :
 - Art. 5-2 : possibility for the spouses (*not* for partners) to make an *ex ante* choice for the court whose law has been chosen (artt. 16-17)
 - Art. 4 spouses may also agree (*ex ante* and *ex post*) to extend jurisdiction of divorce court to matrimonial assets under Art. 4 – 'generic' choice

I. Art. 5

B. Case B : Pedro and Alba

- However, limited scope for choice under art. 5-2
- Recital 16 Preamble : limited to situations outside death/divorce (*e.g.* change of regime)

I. Art. 5

B. Case B : Pedro and Alba

- If spouses include an 'art. 5-2 choice' in their pre-nup agreement – *e.g.* for court of French courts, courts of the law chosen?
- If divorce between Pedro & Alba
 - _ Before French courts : choice presumably valid (or may be reconfirmed)
 - _ Before Spanish courts : choice not valid – French courts may not be seized of matrimonial assets issue (and choice may not be reconfirmed – art. 10 – duty for court to examine its jurisdiction *ex officio*)

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I. Art. 5

B. Case B : Pedro and Alba

- This needs reconsidering – suggestion:
 - _ No choice permitted by spouses in case of succession
 - _ In case of divorce : generic choice for divorce court and choice for court of law chosen should be both possible along same lines (i.e. “at any time”, even “before the proceedings”)
- In both cases risk inherent to choice of court in long term contract is similar

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II. Art. 14

Case C : Helena and Pavlos

- Helena & Pavlos, two Greek citizens living in Brussels, split up
- Helena wants to make sure that Pavlos, who does business as a consultant through a self owned company, will not sell or transfer the shares in company, which she deems to be part of joint assets
- Which court?

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II. Art. 14

Case C : Helena and Pavlos

- Art. 14 : any court? Limitation through 'real connection' requirement (ECJ – *van Uden*) ?
- Special jurisdiction comes on top of possibility to request ppm from court having jurisdiction on the merits ('two-in-one')

III. Art. 12/13/9

Case D : Christelle and Dieter

- Christelle, French citizen, and Dieter, German citizen, reside in Saarbrücken where they were married
- Upon separation, Christelle moves to France
- Christelle and Dieter initiate divorce proceedings almost simultaneously:
 - Christelle in France
 - Dieter in Germany

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III. Art. 12/13/9

Case D : Christelle and Dieter

- Issue : which court should hear the divorce *and* the matrimonial assets issue?
- Divorce : Art. 19 Brussels IIbis Reg.
- strong *lis alibi pendens* rule
- *Quaere* matrimonial assets?

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III. Art. 12/13/9

Case D : Christelle and Dieter

- Need for a separate regulation mechanism since jurisdiction is only partly based on Brussels *Ibis* rules and assessment of jurisdiction is separate
- However, not much room for parallel proceedings...
- In case of Christelle / Dieter : only German courts have jurisdiction under Art. 5 to hear matrimonial assets dispute
- Even less room for related actions (art. 13)

III. Art. 12/13/9

Case D : Christelle and Dieter

- Art. 12 - *Lis alibi pendens* rule based on 1st court seized principle with art 9. rule on time of seisin - superfluous?
- *Lis alibi pendens* mechanism not only necessary to avoid parallel proceedings, but also to regulate the initial 'messy' period
- Very interesting features : art. 12(2) :
 - _ Obligation for court 1st seized to establish its jurisdiction within 6 months
 - _ Possibility for court 2nd seized to request information from court 1st seized on date on which it was seized, whether it has established jurisdiction, etc

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