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 IIbis)

• No agreement to give divorce court jurisdiction for division of matrimonial assets (art. 4)

• Which court to hear the dispute?
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 IIbis 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 IIbis 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 IIbis

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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 IIbis

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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 \textit{ex officio})
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
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?
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' )
Christelle, French citizen, and Dieter, German citizen, reside in Saarbrucken where they were married.

Upon separation, Christelle moves to France.

Christelle and Dieter initiate divorce proceedings almost simultaneously:
- Christelle in France
- Dieter in Germany
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 IIbis 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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