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Limitation of Proceedings under Article 12 Successions Regulation (2012)

An Impossible Codification of the Improbable

I Introduction

Private international law at the European level is designed to simplify cross-border transactions and procedures, both through unification of the national solutions and, at the same time, through codification of 'good practices' identified across Member States and beyond. Nevertheless, being young and ambitious, maybe both too much, the codification experiment in fields other than contracts and torts – where the drafters have had the advantage of the well-crafted and well tested Rome Convention and Brussels Convention –,[1] presents two interdependent flaws: hurrying to do all at once and granting to European law the largest scope possible; and ill-conceived palliatives when it appears that such attribution of competence to European law has not been well thought out.

The Successions Regulation (2012),[2] which applies to the succession of persons who die on or after 17 August 2015 (Article 83), offers a good example of such bad legislation in its Chapter II on Jurisdiction.

Articles 4 to 11 of the Regulation attribute to the courts of the Member States full (in principle) jurisdiction to rule on any kind of succession dispute having even a remote connection to them. In particular, pursuant to the general rule of Article 4, 'the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole'. If the deceased had his last habitual residence in a third State, Article 10 para 1 comes into play in order to attribute jurisdiction (always to rule on the succession as

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1 *Rome Convention of 19.6.1980 on the law applicable to contractual obligations; Brussels Convention of 17.9.1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.*

2 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, OJ L201/27.7.2012, p. 107.

a whole) to 'the courts of a Member State in which [any] assets of the estate are located', in so far as one of the following conditions is met: '(a) the deceased had the nationality of the Member State at the time of the death; or, failing that, (b) the deceased had his previous [penultimate] habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed'. Even if the above conditions are not met, the courts of the Member State of the location of the assets still have jurisdiction, but, pursuant to Article 10 para 2, not to rule on the succession as a whole, but to rule on these specific assets. Furthermore, irrespective of whether any Member State court has jurisdiction on the basis of Articles 4 and 10, it is always possible for the parties concerned under Article 5 to make a choice-of-court agreement, but only in favour of the courts of the Member State of which the deceased was a national and the law of which the deceased had chosen to govern their succession; and prorogation may also be tacit (Article 9). Finally, where, despite the extensive jurisdiction recognised with regard to the courts of the Members States, no such court is competent according to the above rules, a Member State court may, if seised, still have jurisdiction *qua forum necessitatis* in accordance with Article 11.

It is manifest that the delimitation of the jurisdiction of the courts of the Member States under the Regulation has something of jurisdictional vertigo. Article 12 para 1 introduces a correction, in the sense that it instructs the courts of the Member States not to issue any decision on assets located in a third State, when it is expected that such a decision will not be recognized or enforced:

Where the estate of the deceased comprises assets located in a third State, the court seised to rule on the succession may, at the request of one of the parties, decide not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State.[3]

The wide jurisdiction of the courts of the Members States is thus accompanied by a limitation; but the limits, conditions (II) and consequences (III) of this limitation are themselves difficult to discern. It should be noted that the second paragraph of Article 12 is out of the scope of this article, because it concerns the right of the plaintiff to define through their request (and the right of the defendant through a possible counterclaim) the object of the dispute; this right is recognised by the national procedural systems[4] and could not be affected through a European regulation respectful of the procedural autonomy of the legal orders of the Member States.

[3] The second paragraph, which enshrines the principle that the parties have decisive power over the scope of the proceedings, and which will not form part of the present discussion, reads as follows: 'Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised'.

[4] See e.g. Article 106 of the Greek Code of Civil Procedure.

II Conditions

Three conditions can be read in Article 12: *(a)* localisation of assets of the estate in a third State; *(b)* probability that the decision to be issued will not be recognized in that third State; *(c)* request of one of the parties (2). Nevertheless, one should also examine a fourth factor, despite its prima facie self-evidence: jurisdiction of a court of a Member State (1).

1 Jurisdiction of a Court of a Member State

Article 12 is applied by the 'the court seised', and it seems that the specific basis, on which the court has founded its jurisdiction, does not play any role. This is however not the case in relation to prorogation of jurisdiction, jurisdiction based on assets of the estate in accordance with Article 10 para 2 and forum necessitatis.

Article 12 does not apply in two cases where it is logically impossible that the conditions for its application be met, precisely because of the jurisdictional basis on which the court is seised. The first such case is absolutely manifest: the court seised under Article 10 para 2 has jurisdiction to rule only on the assets located in its Member State; in consequence, there is no room for the application of Article 12, since this provision deals only with assets located in a third State.

Furthermore, when the parties to the dispute have concluded a choice-of-court agreement under Article 5 covering assets of the estate located in a third State, none of them would rightfully request that such assets be exempted from the jurisdiction of the chosen court. The parties had the opportunity to provide for such an exception upon conclusion of their procedural agreement, and their failure to do so must constitute a tacit waiver of their right to submit the request required for the application of Article 12. The same should apply mutatis mutandis with regard to tacit prorogation by virtue of Article 9.

Finally, Article 12 cannot limit the jurisdiction of the forum necessitatis of Article 11. The Article 11 court itself shapes the extent of its jurisdiction; thus it cannot recognise itself as competent to rule on an asset located in a third State, where it is expected that its decision will not be enforced, because in such event it could not be a forum in the first place. The purpose of the effectiveness of the decision to be issued should be taken into consideration within Article 11 and limit its application; this purpose should not come ex post through Article 12 as an extrinsic limitation of a jurisdiction already shaped.

It follows that the limitation of Article 12 applies only where the jurisdiction of a court of a Member State is based on Article 4 or on Article 10 para 1. A question then can be raised, namely why the European legislator opted for the introduction of a whole article of apparently general application instead of a reservation, following the example of the Swiss law on PIL,[5] within Articles 4 and 10 para 1. Such a reservation could have stated that the jurisdiction of the courts under these Articles does not extend to assets of the estate located in third States, if these States recognise their own courts as having exclusive jurisdiction on these assets. In order

[5] See articles 86 and 87.

to answer this question, one should look at the explicit conditions of Article 12, as well as at the legal consequences it foresees.

2 Explicit Conditions

a) – Localisation of assets of the estate in a third State – Article 12 applies only if the estate comprises assets of any kind situated in a third State. If certain assets are located in a Member State, as such determination is made in accordance with the principles applying in relation to Article 10,[6] the application of Article 12 is not possible with regard to these assets. According to one view, the question of whether an asset is situated in a third State should be answered in accordance with the law of that third State.[7] However, a juxtaposition of Article 12 to Article 10, both of which make use of the same wording ('assets located'), shows that the European legislator had in mind a unique localisation of each asset, so that whatever is located in a Member State cannot be located in a third State at the same time, and *vice versa.* In consequence, the localisation of assets cannot be left to the law of the third State, but must be made on the basis of the criteria of Article 10, so that there are no gaps or overlaps.

b) – Request of one of the parties – The court may not apply Article 12 on its own motion; application of Article 12 is triggered only at the request of one of the parties.[8] Given that, in order for Article 12 to apply, the suit must have the rights on assets of the estate located in a third State as its object, it can be assumed that the relevant request will come from the defendant in the form of a defence.[9] The request must make specific reference to the assets that the defendant wishes to have exempted from the court's decision, as well as to the specific grounds justifying such exception.[10] There is, however, the question of the time at which this defence must be raised in order to be admissible; this depends on the reasons – to be explained below – that can possibly bar the recognition of the decision in the third State.[11]

c) – Decision expected not to be recognised in the State where the assets are located – This condition incorporates the substance and the purpose of Article 12: the court may not issue a decision if it is expected that it will remain unenforced. The main reason for such a denial of recognition and enforcement in a third State is that the latter recognises its own courts as having exclusive jurisdiction to rule on any succession dispute relating to immovable property located

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[6] The localisation of assets in a Member State should become the object of an autonomous interpretation and not be left to the *lex fori* or to the *lex causae.* For this interpretation, recourse can be had to Article 2(g) of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, which defines the term 'the Member State in which assets are situated.' See A. Bonomi, in A. Bonomi, P. Wautelet, *Le droit européen des successions* (Bruylant 2013) art. 10 n° 12.

[7] See A. Bonomi (n 6) art. 12 n°7.

[8] A condition that is disputable *de lege ferenda,* see below under *e).*

[9] Or from the plaintiff in case of a counterclaim, but this case need not be analysed separately.

[10] These requirements are usually imposed in relation to defenses and objections by procedural rules, in Greek by Article 262 of the Code of Civil Procedure.

[11] See below under *c).*

in its territory, and, hence, that third State considers the courts of all other States as lacking jurisdiction.[12] However, the wording of the provision seems to be too wide to be limited to this sole ground for non-recognition but suggests it covers other reasons, such as the outright refusal by this State to recognise any foreign judgment, the absence of reciprocity, the refusal by this State to admit the indirect jurisdiction of the courts seised by virtue of the Regulation, the conflict with a prior judgment or *lis pendens,* or even the contrariety of the judgment with the public order of the third State concerned.[13]

None of these reasons should be admitted to influence the application of Article 12.

The reason connected to the denial of the third State to admit the indirect jurisdiction of the court seised by virtue of the Regulation cannot be distinguished from the main ground of non-recognition already examined.[14] The denial of the third State to recognise any foreign judgment at all, as well as the equivalent reason of lack of reciprocity, are questions of a political nature that, in the absence of an explicit and clear legislative provision, should not be left to the discretion of the courts. For instance, the Greek legislator has made such an option in Articles 3 and 4 of the Code of Civil Procedure[15] in relation to sovereign immunity and to immovable property located abroad, wherefrom it follows *a contrario* the clear political choice that no person having recourse before the Greek courts be left without judicial protection in any other conceivable constellation of territorial competence of these courts.

Furthermore, the court seised should not examine the probability of non-recognition on the ground that there is already a decision of a court of a third State where the assets of the estate under question are located or on the ground of *lis pendens* by virtue of proceedings initiated in that State. This is because the authority of *res iudicata* of judicial decisions originating from third States and the *lis pendens* due to proceedings initiated in third States fall outside the scope of the Regulation. Article 17 of the Regulation regulates *lis pendens* only in relation to proceedings initiated before the courts of Member States, and recognition under Article 39 concerns only decisions given in a Member State. The questions of *res iudicata* and *lis pendens* that fall outside the scope of the Regulation are governed by the national procedural systems.[16] In consequence, no such reason may prevent, by virtue of Article 12, the court from ruling.

It follows that lack of reciprocity and indirect jurisdiction, on the one hand, and *lis pendens* and *res iudicata,* on the other, are not valid grounds for the invocation of Article 12.

Finally, the reason of contrariety of the decision to be issued with the public policy *(ordre public)* of the third State leads the reasoning to its outer limits and, hence, to the core of the provision, as it can be shown in the following example. Assume a national of a State following

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[12] See also art. 96 para 1(b) & 2 Swiss Law on PIL, only in relation to immovable property.

[13] A. Bonomi (n 6) art. 12 n° 4: *le refus pur et simple de cet État de reconnaître toute décision étrangère, l'absence de réciprocité, le refus de cet État d'admettre la compétence indirecte des juridictions saisies en vertu du Règlement, la contrariété avec une décision antérieure ou la litispendance, ou même la contrariété de la décision avec l'ordre public de l'État tiers concerné.*

[14] See above under *c).*

[15] Royal Decree No. 657/1971; the Code has been recently profoundly modified through Law No. 4335/2015, but Articles 3 and 4 have remained untouched.

[16] See for example Articles 222 and 323 of the Greek Code of Civil Procedure.

the *Sharia* in some archaic form,[17] who dies intestate in a Member State where he had his habitual residence, leaving as his legal heirs his son and daughter and an estate comprising two buildings of comparable value, one in the above Member State and the second in the State of his nationality. The Member State court of the deceased's last habitual residence has jurisdiction under Article 4, and, in accordance with Article 21, the succession as a whole is governed by the law of this Member State. The applicable law contains a provision under which 'the children shall inherit by equal portions',[18] a provision whose application is expected, however, to be contrary to the *ordre public* of the State of the deceased's nationality, which presumably follows a principle by virtue of which the female heir's portion is half the male's portion. The daughter seises the court of Article 4 requesting the distribution of the estate. If the court applies Article 12 by the book, then it could proceed to the distribution of the building situated in the Member State in equal portions and disregard the building located in the third State. This would be to the detriment of gender equality, since *ex hypothesi* the courts of the third State would adjudicate to the son at least two thirds of the building located there.[19] If the court of the Member State does not apply Article 12 and gives a ruling also covering the building located in the third State, the decision would probably not be recognised and the result would be the same. It must be noted that one faces the same impasse also in the event of the basic ground for application of Article 12, namely that no foreign decisions are recognised in the third State when such decisions concern immovable property located there. It thus seems that Article 12 offers no solution in the precise case where the problem is most acute. This is examined below (III), since it touches the powers of the court seised, i.e. the legal consequences of Article 12.

d) – Some conclusions – The only situation in which Article 12 serves its purpose is where the third State of the location of the assets does not recognise foreign courts' jurisdiction to hear disputes relating to such assets (practically always immovable property); and where, for this reason, it is expected that the decision of the court seised on the basis of Articles 4 or 10 para 1 will probably (if not certainly) not be recognised in that third State. Even in such a case, however, as well as in the event that the decision of the court of a Member State is liable to run counter to the public policy of the third State, the limitation of proceedings under Article 12 does not seem capable of contributing to the realisation of justice in the individual case, as perceived in the legal order of the Member State court seised.[20]

e) – (i) In relation to the party's request: de lege ferenda – Three further conclusions can be derived from the above interpretation, two of which *de lege ferenda*. First, if Article 12 applies as such only with regard to immovable property located in a third State, its application should not depend on the request of any of the parties. The character of the jurisdiction of the courts of a third State to hear disputes relating to immovable property located in its territory is not altered depending on whether it is invoked or not by a party to a dispute before a court of

[17] E.g. the one applied by Greek courts to Greek Muslims.
[18] See for example article 1813 para 3 of the Greek Civil Code.
[19] 'At least', because if the court of the third State took into consideration the distribution already effected in the Member State, it would adjudicate to the son $^5/_6$ of the building located there.
[20] See above under *c)*.

a Member State. And the concern not to give judgments expected to remain unenforced is of public interest and should not be left to the initiative of private parties. Second, this should also be the case not only in relation to the defendant's right under Article 12, but also with regard to the procedural agreements of the parties under Articles 5, 7 and 9. In other words, whereas Article 12, as it stands, does not apply in the event of prorogation, due precisely to the requirement of a request by one of the parties,[21] the proper *de lege ferenda* solution should be that the limitation imposed by Article 12 applies even in the face of an (explicitly or tacitly) expressed contrary wish of all the parties.

(ii) In relation to the party's request: de lege lata – The second conclusion deriving from the fact that Article 12 applies as such only regarding immovable property located in a third State, is related to the time at which the defendant must raise the relevant defence: the law of the third State – as well as the localisation of the assets of the estate there – is *ex hypothesi* known or deemed to be known by the defendant already at the time of the initiation of the proceedings before the Member State court, thus the relevant defence must be raised upon appearance. Furthermore, given that the Article 12 defence is similar to the motion to dismiss due to lack of jurisdiction, its procedural treatment should be the same as that reserved to the challenge of Article 9 para 2:[22] the request under Article 12 must be raised prior to any defence as to the substance.[23]

III Legal Consequences

The adoption of the condition of the party's request seems to be due to the fact that the European legislator had in mind an application of Article 12 much wider than the one proposed in the present analysis. This seems to be also the reason justifying the shaping of the legal consequences of this provision. Article 12 provides that, if its conditions are met, the court seised may decide not to rule on the assets located in a third State. Consequently, first, as it derives also from the heading of the Article, the object of the limitation is not the jurisdiction of the court but the subject matter of the proceedings. The courts of the Member State remain competent to rule on the assets located in the third State, but they just elect not to do so. Second,

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[21] See above under *b).*

[22] Article 9 establishes jurisdiction, based on appearance, of the courts of a Member State whose law had been chosen by the deceased – a national of this Member State – to govern their estate. This Article reads as follows:
1. Where, in the course of proceedings before a court of a Member State exercising jurisdiction pursuant to Article 7, it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings who were not party to the agreement enter an appearance without contesting the jurisdiction of the court.
2. If the jurisdiction of the court referred to in paragraph 1 is contested by parties to the proceedings who were not party to the agreement, the court shall decline jurisdiction. In that event, jurisdiction to rule on the succession shall lie with the courts having jurisdiction pursuant to Article 4 or Article 10.

[23] This is because Article 9 Successions Regulation should be applied on the basis of the principles developed for Article 18 Brussels Convention and which are still good law for the application of the relevant provisions of Brussels I and Ibis Regulations. See ECJ 24.6.1981, *Elefanten Schuh,* 150/80, ECR 1671 also ECJ 24.10.1981, *Rohr,* 27/81, ECR 2431·31.3.1982, *G.H.W. v G.J.H.,* 25/81, ECR 1189 14.7.1983, *Gerling,* 201/82, ECR 2503.

the limitation is not mandatory for the court but discretionary. This is reasonable, if one bears in mind the reasons which, in the European legislator's view, could justify the limitation of the proceedings. However, if one admits that the only such reason is in reality the exclusive jurisdiction of the courts of the third State then it would be reasonable that the court be *obliged* not to rule: when the third State provides for the exclusive jurisdiction of its courts to hear disputes relating to rights on the object of the enforcement, the court of the Member State should be obliged, not just entitled, not to rule on such assets. An interpretative correction of the provision towards this sense would be *contra legem.* Nevertheless, it is probable that the courts will impose such an interpretation in practice, making without exception a systematic use of the power offered to them under such circumstances.

However, if it appears reasonable, in the event that the conditions of Article 12 are met, that the court seised is obliged not to rule on assets located in a third State, then there is an autonomous interest in making an effort to understand why the legislator chose instead to grant to the judge just an option. However simplistic it seems, it is not improbable that the introduction of Article 12 in the final draft of the Regulation without any particular preparation is simply due to the jurisdictional vertigo caused by the imperialism of the bases for jurisdiction; an imperialism that the purpose of Article 12 was to limit, admittedly cowardly and awkwardly. In front of the established will to extend the jurisdiction of the courts of the Member States up to its outer limits, it seemed that a general limitation be needed, a general clause, instead of a careful case-by-case delimitation of the ambit of each of the bases of jurisdiction provided in the Regulation. But then again, the generality and vagueness of the limitation imposed a softening: not an obligation but discretion; not a lack of jurisdiction but just 'non-ruling'.

All these conceptual nuances could be meaningful precisely in those specific cases which Article 12 cannot deal with: where the public policy of the court of the Member State is in conflict with the public policy of the third State. Taking the example of the conflict between gender equality and sons' precedence over daughters,[24] the only solution that could lead to a judicial decision fitting in the European concept of justice is the following: to adjudicate to the daughter the whole building lying in the Member State of the court seised and to the son the whole building located in the third State. Even if the enforcement of such a decision in the third State offends that State's public policy, its non-recognition in combination with its acknowledgment by the court of the third State can lead that court to give a second decision with the same result: to adjudicate the whole building lying in the third State to the son. It could be said that, taking the vagueness of the letter of Article 12 into account, there is enough interpretative room for the European judge to proceed to such weighing within a global vision of the estate as a whole, despite its split depending on the localisation of its assets, and in the light of the fate of the assets located in the third State in accordance with that third State's law.[25] Such a view is pragmatic and must be approved. But the question remains: if this, at the end of the day, is the purpose of Article 12 then why is it not said?

[24] See above under II 2 *c).*
[25] See also A. Bonomi (n 6) art. 12 n°14-15.