

LEX MUNDI PROJECT

**COMPARATIVE STUDY OF "RESIDUAL JURISDICTION"
IN CIVIL AND COMMERCIAL DISPUTES IN THE EU**

SPAIN

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(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

1. Main Legal Sources

In Spain, there are two main legal sources of rules of jurisdiction in civil and commercial matters in addition to Community legislation (e.g. Brussels I Regulation and national legislation implementing EC directives) and Brussels/Lugano Conventions¹, namely, the basic or Organic² Law 6/1985 of July 1, on the Judiciary (the "OLJ"), and the Civil Procedure Act 1/2000, of January 7 (the "CPA")³:

- a. The main legal sources for the national rules of jurisdiction in civil and commercial matters are contained in Articles 4, and 21 to 25 of the OLJ. The rules contained in these articles are specific to cross-border disputes ("international jurisdiction"), and do not apply to national disputes.

It is important to point out that Spanish jurisdictional rules for cross-border disputes in civil and commercial disputes are very similar, if not identical, to the ones foreseen in Brussels I Regulation. Their similarity relies on the fact that when the Spanish rules on international jurisdiction were drafted in 1985, the Brussels 1968 Convention (now Regulation Brussels I) was taken as model.

In general terms, the regulations are divided into the four jurisdictional orders existing in the Spanish jurisdiction: civil, criminal, administrative and labour.

Within the civil order, the national regulations make a distinction, as in Brussels I Regulation, between: (i) Exclusive jurisdiction (e.g., immovable property, corporations, public registries, intellectual property, enforcement of judgments and awards, - Article 22.1 OLJ); (ii) Special jurisdiction for particular types of disputes where one of the parties appears to deserve jurisdictional protection (e.g., consumer and employment contracts - Articles 22.4 and 25 of the OLJ-); (iii) Special jurisdiction for particular matters based on the close connection of the subject matter of the dispute to Spain (e.g., contractual, tort matters and matrimonial matters and parental responsibility, -Article 22.3 of the OLJ-); (iv) Choice of court or voluntary appearance by the defendant (i.e., respectively, express and tacit or implied submission to the jurisdiction of the Courts, Article 22.2 of the OLJ-); (v) General jurisdiction, based on the domicile of the defendant in Spain (Article 22.2 of the OLJ).

- b. On the other hand, Article 36 of the CPA sets forth several specific cases in which the Spanish courts must decline jurisdiction: (i) When the defendant enjoys immunity or the lawsuit is aimed at the seizure of goods and property granted with immunity according to the rules of public international law; (ii) When the subject-matter of the proceedings constitutes an exclusive jurisdiction in favour of a third state under international treaties

¹ Please be aware that the bilateral conventions that will be referred to in Section B below also contain rules on international jurisdiction.

² "*Ley Orgánica del Poder Judicial*". "Organic laws" are those relating to the implementation of fundamental rights and public liberties and other basic laws provided for in the Spanish Constitution. The approval or amendment of organic laws require the overall majority of the Members of Congress.

³ *Ley de Enjuiciamiento Civil*.

or conventions; and finally, (iii) When the defendant does not appear before the court, in cases where Spanish jurisdiction would only be based on tacit or implied submission.

Articles 38 and 63 of the CPA contain specific rules regarding when the Spanish courts decide on or the parties request the need to decline jurisdiction. This will be further explained in Section E below.

2. Specific Rules (or Not) for Transnational Disputes

The rules concerning the international jurisdiction ("*competencia internacional*") of the Spanish courts are different from the rules allocating jurisdiction within existing courts in Spain ("*competencia territorial*"). The rules on international jurisdiction are set out in the OJL, whereas the rules on local jurisdiction are contained in the CPA. The principles underlying both sets of rules are also different. Therefore, only if the Spanish courts have international jurisdiction pursuant to the rules of the OJL may Articles 50 to 67 of the CPA determine which local court is competent to hear the case within the Spanish territory.

3. Specific Rules (or Not) for Article 4(1) Jurisdiction

There is no specific set of rules pursuant to Article 4 of the Brussels I Regulation and, thus, the traditional rules of jurisdiction for cross-border disputes apply.

4. Influence of EU Law

Spanish rules for cross-border disputes are largely influenced by the Brussels Convention and therefore, by Brussels I Regulation. The Spanish regulations were drafted based on the provisions of the Brussels 1968 Convention. Thus, Spanish courts systematically have recourse to the Brussels Convention or Brussels I Regulation and the interpretation made by the European Court of Justice, in order to reinforce one specific interpretation of the national rules or, under certain circumstances, to complete any existing legal vacuum (*analogia iuris*). Consequently, the influence of the Brussels I Regulation and its related case law is paramount.

5. Impact of Other Sources of Law

Spain has not enacted national legislation concerning state immunity, therefore the Spanish courts apply public international law directly. Moreover, constitutional principles and human rights principles influence the Spanish regulation of cross-border issues on a general basis, in particular, in order to guarantee international judicial cooperation in relation with third States and access to the courts. According to Article 24 of the Spanish Constitution, all persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be lack of defence. In a world divided into different States, such protection can only be effectively provided through cooperation with other States. For this reason, the Spanish State is under a constitutional obligation to procure international cooperation with other States. In order to secure cooperation (including the recognition and enforcement of Spanish decisions abroad) the jurisdiction of the Spanish courts is limited to cases where there is a reasonable connection with Spain. On the other hand, if there is no alternative forum, the Spanish courts would accept jurisdiction on the basis of *forum necessitatis*.

6. Other Specific Features

No specific features.

7. Reform

It must be noted that, at least in the short term, no major changes are expected in Spanish jurisdictional rules for cross-border disputes for the time being. However, Final Provision no. 20 of the CPA foresees the drafting of a law on international judicial cooperation in civil and commercial matters which may entail the need of some future adjustments. Such law has not yet been enacted.

(B) Bilateral and Multilateral Conventions

8. Conventions with Third States

The main bilateral and multilateral conventions Spain is a party to that also include provisions dealing with some jurisdictional matters are the following:

- Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention), signed in Lugano on 16 September 1988;
- Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), signed in Warsaw on 12 October 1929;
- Convention on Damage Caused on Foreign Aircraft to Third Parties on the Surface (Rome Convention), signed in Rome on 7 October 1952;
- Convention for the Unification of Certain Rules Relating to Civil Jurisdiction in Matters of Collision between Vessels, signed in Brussels on 10 May 1952
- Convention for the Unification of Certain Rules Relating to Arrest of Sea-going Ships, signed in Brussels on 10 May 1952
- Convention on the Contract for the International Carriage of Goods by Road, (CMR), signed in Geneva on 19 May 1956;
- Convention on Third Party Liability in the Field of Nuclear Energy (Paris Convention), signed in Paris on 29 July 1960;
- Convention on International Carriage by Rail (COTIF), signed in Berne on 9 May 1980;
- International Convention on Civil Liability for Oil Pollution Damage 1992 (CLC), signed in Brussels on 29 November 1969 (this convention is being replaced by its Protocol of 27 November 1992, as amended in 2000);
- Convention on International Carriage of Passengers and their Luggage by Sea (PAL), signed in Athens on 13 December 1974;
- Convention on the Grant of European Patents (European Patent Convention), signed in Munich on 5 October 1973;

- Convention on Community Patent (Luxemburg Convention on Community Patent), signed in Luxemburg on 15 December 1975;
- International Convention on Maritime Liens and Mortgages (Geneva Convention), signed in Geneva on 6 May 1993.

Furthermore, Spain is a party to two bilateral conventions that include jurisdictional rules in matters governed by Brussels I regulation: the one was signed with Rumania on November 17, 1997 and the one entered into with El Salvador, on November 7, 2000. Both bilateral conventions are influenced by Brussels I Regulation and make a distinction, following the latter, among exclusive jurisdiction (e.g., immovable property, corporations, public registers or intellectual property), general, and special jurisdiction (for particular matters, such as contracts, torts, matrimonial matters and parental responsibility), and cases of express or implied submission. Contrary to Brussels I Regulation, however, these conventions do not provide rules for the protection of consumers. .

9. Practical Impact of International Conventions with Third States

International conventions with third States have had little impact on the general practice of the international jurisdiction of the Spanish courts, which, to the contrary, have been greatly influenced by the 1968 Brussels Convention and by the Brussels I Regulation

(C) Applicable National Rules Pursuant to Article 4 of Brussels I Regulation

10. Structure

International treaties, once officially published in Spain, become part of the internal legal system and prevail over national legislation. Therefore, the general structure of the rules of jurisdiction for actions against defendants domiciled in non-EU States is determined by the multilateral and bilateral conventions containing jurisdictional rules to which Spain is party, and which were mentioned in the answer to Question 8 of this Questionnaire. When no international convention is applicable, the jurisdiction of the Spanish courts for actions against defendants domiciled in non-EU States is determined by the OLJ.

The OLJ distinguishes between “*general*” and “*special jurisdiction*”, establishes the “*exclusive jurisdiction*” of the Spanish courts over particular subject-matters and allows the parties to voluntarily submit their disputes to the Spanish courts by means of an agreement (*prorogatio fori*). The concepts used and the jurisdictional criteria adopted are similar to the concepts and criteria used by the Brussels I Regulation. Furthermore, the drafters of the Act carefully avoided incorporating any criteria of jurisdiction which could be characterized as “*exorbitant*”, such as summons within the jurisdiction to a foreign established defendant or the presence of property belonging to the defendant. Under the prevalent Spanish conception, the Constitution requires that the international jurisdiction of the Spanish courts be always based on a link with Spain such that it satisfies a “*reasonable contact. test*”.

The general scheme of the OLJ concerning international jurisdiction can be summarised as follows:

- a) Spanish courts have general jurisdiction (i.e. dispute-blind) where the defendant is domiciled in Spain (Article 22.2).

b) Spanish courts will have *exclusive* jurisdiction (Article 22.1) over certain proceedings relating to immovable property, corporations, public registries, intellectual property, enforcement of judgments and awards. The types of cases in which there is exclusive jurisdiction is described in paragraph 17 below.

c) Spanish courts may have non-exclusive *special* jurisdiction (i.e. dispute-specific) where the subject matter of the dispute is closely connected with Spain (). The types of case included are described in Questions 12, 13 and 14 below, and concern disputes derived from contracts, torts, operation of establishments, branches or agencies, and civil claims based on actions giving rise to criminal proceedings.

c) Spanish courts may also have jurisdiction if the defendant expressly or impliedly submits to the Spanish courts (*prorogatio fori*). A choice of court or jurisdiction clause in favour of the Spanish courts will be normally construed in an “exclusive” form, unless the parties have agreed otherwise.

d) Spanish courts have jurisdiction to adopt interim relief with regard to property or persons located in Spain (Article 22.5)

11. General Jurisdiction

General jurisdiction is based on the domicile of the defendant in Spain (Article 22.2 OLJ). However, in practice, when the defendant is domiciled in Spain the jurisdiction of Spanish courts is determined pursuant to the Brussels I Regulation and not to domestic law.

12. Specific Rules of Jurisdiction

a) Contract

In actions arising from contracts, pursuant to Article 22.3 of the OLJ, Spanish courts are competent if the contract was concluded in Spain, or if the obligation must, according to its governing law (*lex contractus*), be performed in Spain. Where the existence or validity of the contract is disputed Article 22.3 may nonetheless be relied upon to determine jurisdiction.

b) Tort

In tort actions, pursuant to Article 22.3 of the OLJ, Spanish courts are competent when:

- (i) The harmful event occurred in Spain. The claimant has an option to sue either at:
 - The place where the injury occurred, (i.e., the place where the invasion of a legally protected interest of another occurred, irrespective of the place where the eventual consequences of the harm are realised), or
 - The place of the tortious conduct (i.e., where the action or omission causing the damage took place).
- (ii) both the author and the injured party are Spanish residents (this rule will only apply where the defendant is only vicariously liable; otherwise Article 2 of Brussels I Regulation applies).

c) Criminal Proceedings

Under Spanish law, the general rule is that civil liability arising from a criminal behaviour is assessed within the criminal proceedings: the same court decides on both criminal and civil aspects. However the legal system grants a victim the right to put aside the civil action. This is not very common in practice, but it is possible. In such a case, the victim can bring the case to the civil jurisdiction being the civil rules the ones determining which will then be the competent court (see Question 12.b above, actions on torts).

Generally, the competent criminal court is the court of the judicial district where the crime has been committed, regardless of the nationality or domicile of the defendant. Furthermore, Spanish courts also have jurisdiction with regard to: (i) Crimes committed by Spaniards outside Spain, provided that the action is considered criminal both in Spain and in the other State concerned. (ii) Crimes of a qualified significance committed by any person outside Spain (e.g. genocide, terrorism, drug trafficking, counterfeiting money). If a Spanish court has jurisdiction to hear specific criminal proceedings, it will also be competent to hear on the civil claim connected to the criminal offence to be tried. Although there is no express rule, this result flows logically from the general rule on civil claims in criminal proceedings.

d) Secondary Establishment

In accordance with Article 22.4 *in fine* of the OLJ, a defendant domiciled in a non-EU State may be sued before the Spanish courts on the basis that such defendant has an establishment, branch or agency in Spain. This jurisdiction is limited to disputes arising out of the operation of such establishment, branch or agency: civil and commercial activities carried out by the legal person through its Spanish establishment. This jurisdictional rule can be relied upon for both contractual and non-contractual disputes.

e) Trust

The legal institution of the trust is unknown to Spanish law. In this regard, please note that Spain has not ratified The Hague Convention of July 1, 1985 on the Law Applicable to Trusts and their Recognition. Accordingly, the Spanish system does not provide for any specific ground of jurisdictions for trusts. The general rules apply (i.e. the domicile of the defendant, the place of performance if the action is an action on contract, etc.)

f) Arrest and/or location of Property

Apart from rules contained in international conventions, Spain has no rule of jurisdiction based on the arrest of property for claims unrelated to the property (for claims related to the property see section (g) below). Spain has ratified the International Convention Relating to the Arrest of Sea-going Ships (Brussels 1952) which grants the courts of the country in which the arrest is made jurisdiction on actions for maritime claims.

According to Article. 22.5 of the OLJ, Spanish courts have jurisdiction to adopt interim relief with regard to property located in Spain. This provision allows for the arrest of any kind of property located in Spain, but only for the purpose of taking provisional and protective measures. ,

g) Additional developments

In actions *relating to rights* over movable property, the Spanish courts have jurisdiction when, at the time of bringing the action, the property is situated in Spain (Article 22.3). This forum is not contemplated in the Brussels I Regulation but only in Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.

It is worth pointing out that Spanish law does not establish a “doing business” type of connecting factor which allows the courts to hear cases unrelated to the activities conducted.

13. Protective Rules of Jurisdiction

a) Consumer Contracts

(i) Pursuant to Article 22.4 of the OLJ, a consumer may bring a claim before the Spanish courts against a professional domiciled in a non-EU State⁴ when:

⁴ Please note that according to Article 15.2 of the Brussels I Regulation if the professional has a branch, agency or other establishment in a Member State, he/she “shall be deemed to be domiciled” in that Member State for the purposes of establishing jurisdiction over consumers. With regard to Denmark, the same article will be applicable by virtue of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 2005. The Lugano Convention of 1988 contains a similar rule in Article 13. We will assume, therefore, that the professional has no branch, agency or establishment in a Member State, including Spain. An analogous rule is established in the Brussels I Regulation also with regard to insurance contracts and employment contracts. However, the Lugano Convention only contains a similar rule for insurance and not for employment contracts.

(a) It is a contract for the purchase of tangible movable assets on instalment terms or a contract for a loan made to finance such purchase, and the consumer is domiciled in Spain (Article 22.4).

(b) In the case of any other contract for the provision of services or any other contract related to movable assets which involve consumers, (i) the conclusion of the contract was preceded by an offer or by advertising in Spain, or (ii) the consumer has taken in Spain the necessary steps for the conclusion of the contract (Article 22.4). Even though the drafting of this provision is not very clear, it is implied in the rule that the consumer must be domiciled in Spain. The systematic and logic construction of the provision requires this. Otherwise, if the consumer is the defendant, the rule would be counter-productive: the consumer could be brought to a foreign forum (Spain) unrelated to the actual underlying transaction.

(c) In all other cases (i.e., if the consumer is not domiciled in Spain), if the contract is concluded or must be performed in Spain, by virtue of the application of the general rules.

(ii) The reverse situation, where a professional intends to bring a claim before the Spanish courts against a consumer not domiciled in the EU warrants a more detailed answer. As a matter of principle, the Spanish Civil Procedure System sets forth that consumers may be sued in their domicile if the conditions established in paragraphs (i)(a) and (i)(b) above are met. Hence, generally the Spanish courts will reject actions taken in Spain against consumers not domiciled in Spain under similar conditions. Even though this is a situation not expressly contemplated in the OLJ, the Spanish Constitution imposes on the public authorities, including the courts, a duty to guarantee the protection of consumers. It would be inconsistent to deviate from this objective just because the consumer happens to be domiciled in a foreign State, even though the conditions under which the contract was concluded are similar to those that, according to the Spanish legislator, would justify the consumer only being sued where his/her domicile is located.

If the said conditions are not met, the consumer could be sued in Spain under the general rules on jurisdiction. Take the example of an "active" consumer domiciled in a non-EU State who travels to Spain, contracts accommodation for two weeks in a hotel, and leaves without paying. In such a case, the Spanish courts would have jurisdiction on the claim submitted by the Hotel against the consumer for payment under the general rules (see 12.a above).

A further exception may be made in the cases where the parties have agreed to the jurisdiction of the Spanish courts after the dispute has arisen. The reason behind the acceptance of the jurisdiction in such cases lies in the idea that such post-contractual agreements do not involve an asymmetrical situation that has to be balanced by protecting the consumer.

b) Individual Employment Contracts

(i) Pursuant to Article 25 of the OLJ, an employee may bring a claim before the Spanish courts against an employer domiciled in a non-EU State if:

a) The employment contract has been entered into in Spain.

b) The employee performs his job in Spain.

- c) The employer has an establishment, branch, agency or any kind of representation in Spain.
- d) Both employee and employer hold Spanish nationality.
- e) In the case of maritime shipping employment agreements, if the offer that led to the contract has been received in Spain by a Spanish employee.

(ii) For the reverse situation, an employer brings a claim against an employee domiciled in a non-EU state, the same criteria of jurisdiction set forth in Article 25 OLJ will be applicable, with the exception of the employer's establishment branch or agency which only operates when the employer is the defendant, not the claimant. Those criteria intend to favour the access by the employee to the Spanish courts. They were adopted under the assumption that, as a rule, the employee would be the claimant and may require a teleological reduction in the reverse situation, where the employer sues the employee.

c) Insurance Contracts

The OLJ grants jurisdiction pertaining to actions arising from insurance contracts if the domicile of the insurer and the insured are located in Spain (Article 22.4).

Notwithstanding the above, it should be noted that this rule does not prevent other rules of jurisdiction from applying, as the case may be, in contractual matters (including consumer agreements) or non-contractual matters.

d) Distribution Contracts

(i) distributorship agreements. Distributorship agreements lack a specific regulation under Spanish law. For the purpose of applicable jurisdiction rules, this means that claims arising from distributorship agreements are governed by the provisions specified for actions arising from contracts in general, namely in Article 22.3 of the OLJ, as specified in the answer to Question 12(a).

In this respect, it should be noted that both scholars and case law have denied any analogical application of the rule on local jurisdiction rules contained in the Spanish Agency Agreement Act to proceedings related to distributorship agreements.

(ii) commercial agency agreements. Pursuant to the Additional Provision ("*Disposición Adicional*") of the Spanish Agency Agreement Act, the competence for disputes arising from an agency contract corresponds to the courts of the agent's domicile and any agreement between the parties to submit to a different court would be void. Such provision establishes a *forum actoris* based on the assumption that the agent is the "weaker party" in the agency agreement and must therefore be protected by law to avoid judicial proceedings in circumstances which are favourable to the principal. There has been some discussion on the scope of this rule, domestic or international. If it were to be considered a rule of international jurisdiction, it could not play any role in the sphere of application of the Brussels I Regulation or the Lugano Convention and its practical relevance would be limited to defendants domiciled in a third State. However, according to the prevailing case law, this provision simply establishes a rule of local jurisdiction ("*competencia territorial*") and presupposes that the Spanish courts have jurisdiction according to the general rules on international jurisdiction explained above.

(iii) franchise agreements. The Spanish Franchise Agreement Act does not provide for any specific rules pertaining to jurisdictional matters. Consequently, claims arising from franchise agreements are governed by the provisions specified for actions arising from contracts in general, contained in Article 22.3 of the Spanish Organic Law on the Judiciary, as specified in the answer to Question 12(a).

In this respect, it should be noted that both scholars and case law have denied any analogical application of the rule on local jurisdiction contained in the Spanish Agency Agreement Act to proceedings related to franchise agreements.

e) Protective Rules in Other Matters

Under Spanish law no other specific matter is subject to protective rules of jurisdiction.

14. Rules for the Consolidation of Claims

a) Co-Defendants

Although there is not an express rule, there are reasons to contend that a solution analogous to Article 6.1 of Brussels I Regulation must apply (see paragraph 4 above), thus allowing that a defendant domiciled in a non-EU State (and which is not a signatory of the Lugano Convention) can be sued before Spanish courts as a co-defendant in proceedings brought against a defendant domiciled in Spain. The case-law is scarce and no general conclusions can be drawn from it.

Indeed, the rationale behind Article 6.1 of Brussels I Regulation is perfectly capable of being extended to non-EU domiciled parties: the claims are so closely connected that it is expedient to determine them together in order to avoid the risk of conflicting decisions resulting from separate proceedings. Such connection exists if the claims against the various defendants are substantially the same in law and fact: i.e. the defendants are joint debtors or joint tortfeasors (in the latter case, provided they have a relationship between them established prior to the harmful event).

Moreover, should this conclusion not be accepted, then, *ceteris paribus*, EU-domiciled parties would be treated worse in terms of jurisdictional exposure than non-EU domiciled parties.

b) Third Party Proceedings

Although there is not an express rule, there are reasons to contend that a solution analogous to Article 6.2 for third party intervention of Brussels I Regulation must apply (see paragraph 1.b.4 above), thus allowing a defendant domiciled in a non-EU State (and which is a signatory of the Lugano Convention) to be sued before Spanish courts as a third party in an action concerning a warranty or guarantee or in any other third party proceedings. The third party may protect itself against the risk of being sued in Spain by means of a choice of court clause in favour of other courts or an arbitration clause.

Indeed, the rationale behind Article 6.2 of Brussels I Regulation is perfectly capable of being extended to non-EU domiciled parties: to allow for the joinder of a third party, who guarantees or warrants the

obligations of the defendant or has an obligation to indemnify it with regard to the consequences of the action brought against it, to a pending proceeding so that the judgment may have effects against such third party.

Moreover, should this conclusion not be accepted, then, with all other factors remaining the same, EU-domiciled parties would be treated worse in terms of jurisdictional exposure than non-EU domiciled parties.

c) Counter-Claims

Although there is not an express rule in this regard, it is generally admitted that a solution analogous to Article 6.3 of Brussels I Regulation must apply, thus allowing a party domiciled in Spain that has been sued before a Spanish court by a party domiciled in a non-EU State (and which is neither a signatory of the Lugano Convention) can bring a counterclaim against the former party before the Spanish courts, provided that the counter claim is based on the same contract or facts as the claim.

Indeed, the rationale behind Article 6.3 of Brussels I regulation is perfectly capable of being extended to non-EU domiciled parties: it was the claimant that chose the Spanish forum, hence it could not reasonably refuse to discuss *also* a counter claim based on the same facts or contract as the claim.

d) Related Claims

As a matter of principle, Spanish law does not contain any rules providing for international jurisdiction to be based on the fact that a related action is pending before the Spanish courts (*forum connexitatis*).

e) Any Problems Pertaining to Lack of Harmonisation

The segmentation of the international jurisdiction of the EU courts into two sets of rules, one operating *ad intra* and another *ad extra*, is not perceived as a major problem given the tendency of Spanish courts to align the interpretation of the national rules with that of the Brussels Regulations. However, the fact that the different national rules applicable *ad extra* are not coordinated among EU States and follow very different philosophies results in a kind of "jurisdictional kaleidoscope" vis-à-vis third countries which promotes opportunist forum shopping *within* the EU.

15. Rules of Jurisdiction Pursuant to Annex I of Brussels I

a) The rules listed in annex I / b) Practical use of the rules listed in Annex I

No Spanish rule of jurisdiction is listed in Annex 1 of the Brussels I regulation. For instance, under Spanish law there is no *exorbitant* rule of jurisdiction which would consider the fact that a claimant is a Spanish national as a sufficient link for him to have recourse to Spanish courts even against a non-EU domiciled defendant.

c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

There is no known case applying article 4(2) of the Brussels I Regulation, for the reasons stated above.

16. Forum necessitatis

There is not a specific statute under Spanish law allowing a court to exercise jurisdiction on the basis that there is no other forum available having competent jurisdiction to hear the case. However, *forum necessitatis* is generally accepted in order to avoid a 'denial of justice': where non-acceptance of the claim is equivalent to a refusal of recourse to justice. Spanish courts are bound to grant all persons the right to obtain effective protection in the exercise of their rights and legitimate interests of rights and legitimate pursuant to Article 24 of the Spanish Constitution and Article 6 (1) of the European Convention on Human Rights . In any case, *forum necessitatis* remains an exceptional remedy.

There is risk of international 'denial of justice' whenever it is legally impossible for a claimant to access a foreign court or it would be totally unreasonable to expect any person to claim before such court (e.g., the foreign court is competent, but as a matter of fact is incapable of providing effective protection because the country is in a state of war or social turmoil). In these cases, Spanish courts could declare themselves competent provided that there is a link with Spain (e.g. the claimant is a Spanish national or someone domiciled or habitually resident in Spain).

(D) National Jurisdiction & Enforcement of Non-EU Judgments

17. National rules of jurisdiction barring the enforcement of a non-EU judgment

The “exclusive” jurisdiction rules under domestic law prevent recognition and enforcement of non-EU judgments. The provisions governing the recognition and enforcement of non-EU judgments in Spain, in the absence of an applicable Treaty, (Articles 951 to 958 of the CPA of 1881) do not specifically foresee the denial of such enforcement or recognition under the basis of the Spanish courts bearing exclusive competence on the matter at stake. However, this pre-requisite has been undoubtedly required by Spanish case law, as a manner of assuring the effectiveness of Article 22.1 of the OLJ, According to this provision, Spanish courts have *exclusive* jurisdiction for proceedings relating to:

- a) *In rem* rights in, or tenancies of, immovable property located in Spain.
- b) Constitution, validity, annulment and dissolution of a company or partnership domiciled in Spain, or the validity of a decision of their organs.
- c) Validity and annulment of entries in Spanish public registers, for instance the Commercial or the Land Registry.
- d) Registration or validity of patents and other intellectual property rights subject to deposit or registration in Spain.
- e) Enforcement of judgments or arbitral awards in Spain

(E) Declining Jurisdiction

18. *Forum Non Conveniens*

No general rule allows Spanish courts to decline jurisdiction or to stay the proceedings on the grounds of a foreign jurisdiction (irrespective of whether it is in an EU Member State) being in a better position to either address or solve the specific dispute at hand. The *forum non conveniens* doctrine does not correspond with the traditional Spanish jurisdiction system. Therefore, apart from lacking a general and positive rule allowing Spanish courts to apply such an institution, no judicial practice has been developed, not even to try and argue in equivalent terms.

Article 11.2 of the OLJ and Article 247.2 of the CPA allow the courts to reject petitions submitted in manifest “abuse of rights” . However, the courts have not made use of this doctrine in order to decline jurisdiction.

19. Declining Jurisdiction when the Defendant is Domiciled in a Third State

(a) Non-EU Jurisdiction Agreements

One of the reasons why Spanish courts could decline jurisdiction is the existence of a valid choice of court agreement between the parties. Article 22.2 of the OLJ grants Spanish courts jurisdiction on matters where the parties have chosen to litigate in Spain. It derives from such a clear acceptance of party autonomy that Spanish courts must decline jurisdiction when they are shown that a valid agreement exists between the parties by which they had decided to litigate abroad. For Spanish courts validly to decline jurisdiction on that ground, the defendant must raise it by means of a specific jurisdictional motion ("*declinatoria*") regulated under Article 63 of the CPA. The same solution is applicable in the case of arbitral agreements (Article 8 of the Arbitration Act).

(b) Parallel Proceedings in a non-EU court

The possibility of staying proceedings due to the existence of a parallel and previous process being held before a foreign court (*lis pendens*) is not expressly regulated in Spain. Spanish case-law has traditionally opposed to such a possibility. Nonetheless, more recent decisions issued by different Spanish Courts of Appeal and by the Spanish Supreme Court have accepted that possibility, provided that it can be expected that the foreign judgement will meet the conditions to be recognised in Spain. For the court to stay the proceedings, it must be shown that the foreign court was first seized (*prior tempore* rule) and that it has international jurisdiction (according to Spanish standards) to hear the case. Furthermore, the two sets of proceedings must involve the same parties and deal with the same cause of action and the same object.

(c) "Exclusive" Jurisdiction in a non-EU State

Articles 36.2.2 and 38 of CPA clearly state that Spanish courts should, *ex officio*, decline jurisdiction where, under an international convention, the case belongs to the exclusive jurisdiction of another State .. The court must, in those cases, convene a hearing on its own accord in which both the parties and the Public Prosecutor must participate. If the Spanish court confirms that another State holds exclusive jurisdiction over that dispute, then it must decline its own.

According to academic legal opinion, Spanish courts should also decline jurisdiction in the absence of an international convention in cases analogous to those for which Spanish courts have exclusive jurisdiction, to the extent that the foreign State claims such exclusive jurisdiction. In these cases, the most probable place of enforcement of a Spanish judgment will be the territory of the State claiming exclusive jurisdiction and therefore such judgment would become unenforceable.

20. Declining Jurisdiction When the Defendant is Domiciled in the EU

a) Non-EU Choice of court clause

The Spanish courts would apply the principle of private autonomy established in the Regulation by analogy in order to decline jurisdiction in favour of the chosen court, within the limits set out by same Regulation. In the case of consumer, insurance and employment contracts, the limitations established in Articles 13, 17 and 21 would be observed (e.g. the courts would only decline jurisdiction if the choice of jurisdiction clause was agreed after the dispute has arisen). Furthermore, no choice of jurisdiction clause will be given effect if the subject matter belongs to the exclusive jurisdiction of a Member State according to Article 22.

b) Non-EU Parallel proceeding

Spanish courts may stay the proceedings in favour of a non-EU court by means of an analogical application of the principle established in Article 27 on *lis pendens* and under similar conditions as those set out in said Article. This analogical application pre-supposes that the subject matter is not under the exclusive jurisdiction of an EU court and that the hypothetical ruling of the non-EU court is capable of being recognised in Spain.

c) Non-EU Exclusive jurisdiction

The Spanish court should decline jurisdiction in favour of a non-EU court if there is an international treaty or convention with the third State recognising its exclusive jurisdiction. Furthermore, according to scholarly opinion, Spanish courts should also decline jurisdiction in favour of a non-EU court in cases similar to those contemplated in Article 22 of the Brussels I Regulation (under the so called "*effet réflexe*"), provided that the third State establishes in its law a corresponding exclusive jurisdiction.

(F) The Adequate Protection (or lack thereof) of EU Nationals and/or Domiciliaries through the Application of Domestic Jurisdictional Rules

21. Use of National Jurisdictional Rules to Avoid an Inadequate Protection in Non-EU Courts

The only recent cases we are aware of concern matrimonial disputes and the courts have only referred to the absence of adequate protection in the foreign courts by way of "*obiter dicta*". Nevertheless, as explained (see Question 16), the doctrine of *forum necessitatis* is widely accepted in Spain

22. Lack of Jurisdiction Under National Rules Having the Effect to Deprive EU Plaintiffs of an Adequate Protection

(a) Claims from EU Consumers against non-EU defendants

As far as we are aware, there are no relevant cases where the Spanish courts have found not to have jurisdiction or have declined jurisdiction.

(b) Claims from EU Employees against non-EU Employers

The Supreme Court has, in several cases, declined jurisdiction to hear a case brought against a defendant domiciled in a non-EU State. In particular, we can refer to the Supreme Court rulings dated December 28th, 2005, June 15th, 2004, and January 12th, 2004. However, neither the services were rendered in Spain nor the other connecting factors established in Article 25 OLJ (see Question 13.b above) were present.

(c) Claims from EU Plaintiffs in Community Regulated Matters

As far as we are aware, there are no relevant cases where the Spanish courts have found not to have jurisdiction or have declined jurisdiction to hear a product liability case or an EU-competition law case. As pertains commercial agents, we are not aware of any Supreme Court Judgement which has declined jurisdiction to hear a claim brought by an EU domiciliary. However there are indeed several rulings of other Courts which, in cases involving arbitration clauses establishing the seat of arbitration in non-EU States, decline jurisdiction under the above referred grounds. In this respect, it is suitable to mention the Judgment of the Court of Appeal of Barcelona dated June 1, 2004.

23. Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

We are not aware of any relevant cases.

24. The Risk that EU Rules and Principles be Put in Jeopardy Because of the Application of National Jurisdictional Rules

In cases where Community legislation seeks to establish a minimum common standard of protection within the internal market based upon the consideration of one of the parties as a "weak party", this protection should be uniform also with regard to the jurisdiction of the courts wherever the relevant transaction takes place within the EU (e.g., the consumer consumes in Europe), without consideration of the domicile of the defendant (as is also the case for exclusive jurisdiction). For instance, "active" consumers (i.e., consumers who do not consume in the market where they have their domicile but rather in another Member State, in the course of a sojourn, etc.) are faced with an informational deficit and/or *lacunae* of protection where the domicile (or establishment) of the counterparty is not in the EU and jurisdiction is determined by the national rules. In the case of active consumers international jurisdiction may not be based on the consumer' domicile, but the rule on jurisdiction should be the same

for all consumers consuming in Europe. The proper functioning of the internal market requires uniform rules concerning the demand-side of the market - the consumer side -, when the freedom to consume in any location of the EU is inherent in the freedom of movement of persons.

(G) Residual Jurisdiction under the new Brussels II Regulation

25. Applicable National Rules Pursuant to article 14 of the New Brussels II Regulation (Parental Responsibility)

Similarly to national regulation for cross-border disputes in civil and commercial matters, the national regulations on matrimonial matters and the matters of parental responsibility is contained in Article 22.3 of the OLJ.

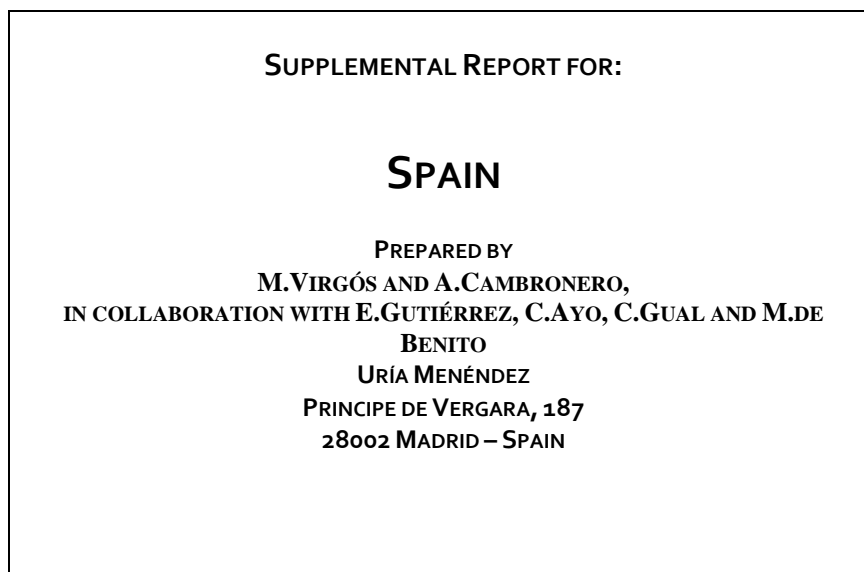
Pursuant to paragraph 4 of this Article, Spanish courts will be competent to hear a case on parental responsibility in either of the following situations:

- (i) Whenever the child is habitually resident in Spain at the time of the lawsuit. This means that Spanish courts will be competent to hear a claim on parental responsibility even though the legal domicile of the child and the claimant's (e.g. the child himself, his father, his mother, or any third party with legal standing) are located in another State; or
- (ii) Whenever the claimant is Spanish or is habitually resident in Spain. According to the interpretation of Spanish legal scholars, the term *claimant* appears to be limited to the people directly related in the material relationship; that is to say, child, father and mother.

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26. NA

27. Conventions with Third States in Matters of Parental Responsibility (and maintenance of children)

What are the international (and in particular bilateral) conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility (and maintenance of children)?

The existing conventions concluded between Spain and non-EU countries that include rules of jurisdiction in matters of parental responsibility are the following:

- [Convention concerning the Powers of Authorities and the Law Applicable in respect of the Protection of Minors](#), done at The Hague on 5 October 1961
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children minors, done at Luxemburg on 20 May 1980.
- [Convention on the Civil Aspects of International Child Abduction](#), done at The Hague on 25 October 1980
- Convention between the Kingdom of Spain and the Kingdom of Morocco on Judicial Cooperation, Recognition and Enforcement of Judgements regarding Custody, Right of Access and Return of Children Minors, done at Madrid on 30 May 1997.

28. Jurisdiction as a Ground for Resisting the Enforcement of non-EU Judgment in Matters of Parental Responsibility

Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these "exclusive" rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)

Spanish residual jurisdiction concerning parental responsibility applies where (i) the Brussels II Regulation does not apply, and (ii) neither do international conventions to which Spain is a party – within their scope of application.

Spanish residual jurisdiction concerning parental responsibility is contained in article 22.3 of the Spanish Organic Law on the Judiciary. According to this provision, Spanish courts are competent to hear a case on parental responsibility in either of the following situations:

- (i) whenever the **child** has his **habitual residence** in Spain at the time of the lawsuit (if the child merely has a temporary residence in Spain, Spanish courts are only competent to adopt interim or precautionary measures); or
- (ii) if the parental responsibility is exercised by the parents (or only one of them), whenever the **claimant** (mother, father or child) has Spanish **nationality** or has his/her **habitual residence** in Spain

The above criteria or *fora* are **not exclusive**. Consequently, non-EU judgments relating to matters of parental responsibility cannot be denied recognition or enforcement in Spain on the basis that the Spanish courts are the only competent ones.

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