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UNIVERSITY OF TARTU
Press

School of Law, University of Tartu, Estonia

Dissertation is accepted for the commencement of the degree of Doctor of Philosophy (PhD) in law on Januar 14, 2019, by the Council of the School of Law.

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Commencement will take place on March 25, 2019 at 11.00 in the Faculty of Law, Näituse 20 room K-03.

Publication of this dissertation is supported by the School of Law, University of Tartu.

ISSN 1406-6394
ISBN 978-9949-77-980-2 (print)
ISBN 978-9949-77-981-9 (pdf)

University of Tartu Press
www.tyk.ee

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INTRODUCTION

A. Introduction to the problem

After the Republic of Estonia joined the European Union in 2004, Estonian courts had to start applying various European Union regulations, which had become applicable in the European Union before the 2004 Eastern enlargement. Among these were the European Union regulations on private international law[1] (*hereafter* the 'EU regulations on private international law'). By the time of finishing this dissertation (1 of September 2018), fifteen EU regulations on private international law were applicable in the Republic of Estonia and at least two were foreseen to be applicable at some point in the future.[2] These regulations cover almost all aspects of private international law – some include rules on determining international jurisdiction or applicable law, some establish conditions for the recognition and enforcement of foreign judgments, court settlements and authentic instruments and some deal with cooperation between the courts and other authorities of different Member States on serving documents or taking evidence abroad.

The same issues, which fall under the scope of application of the EU regulations on private international law, are also at the heart of the so-called legal assistance treaties (or 'mutual legal assistance treaties'[3], 'conventions on judicial assistance'[4] or 'conventions on legal cooperation and mutual

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[1] The term 'private international law' is used in this dissertation as referring to both disciplines – international civil procedure and conflict of laws. The author is well aware that in the older Estonian legal literature the term 'private international law' (*rahvusvaheline eraõigus*) has been used as referring only to the applicable law rules and not to the rules on international civil procedure (See: A. Piip. Konfliktinormide ühtlustamine Balti riikides. – Juriidiline Ajakiri Õigus 1937 No 8, p 343, 343; A. Piip. Rahvusvahelise õiguse süsteem. Tartu: K. O./Ü. „Loodus" 1927, p 214; A. Piip. Rahvusvaheline eraõigus. Tartu Ülikool, 1923 a. I semestri loengute kokkuvõte. Tartu: Jürgensi Paljundus 1923, p 1; I. S. Pereterski, S. B. Krõlov. Rahvusvaheline eraõigus. Tartu: RK "Teaduslik Kirjandus" 1948, p 12–13). The author is also aware that in many other legal systems the rules on private international law might not necessarily encompass the rules on international civil procedure. However, for the sake of the reader (and since there can be no doubt that the rules on international civil procedure and applicable law are nowadays, and especially in the context of the European instruments, interrelated and often require similar interpretations), the term 'private international law' is used in the dissertation as referring to both – to the rules on international civil procedure and to the rules on conflict of laws.

[2] For the exact list of these regulations with their relevant dates of entry into force and application, see part: (E) (*Description of the applied methodology*), (a) primary sources.

[3] I. Kucina. The measure of quality of mutual legal assistance treaties. – International Scientific Conference. The Quality of Legal Acts and its Importance in Contemporary Legal Space. 4–5 October 2012. University of Latvia Press 2012, pp 529–539.

[4] A. Anthimos. Recognition of Russian personal status judgments in Greece: A Case Law Survey. Russian Law Journal. Vol II 2014, Issue 3, pp 49–61.

assistance'[5] as these type of treaties are sometimes called in foreign[6] legal literature), which the Republic of Estonia has concluded with third states (*hereafter* the 'legal assistance treaties concluded with third states').[7]

The fact that the EU regulations on private international law and the legal assistance treaties concluded with third states deal with analogous topics puts pressure on the Republic of Estonia to renegotiate (or try to renegotiate) the legal assistance treaties concluded with third states in so far as these treaties conflict with the EU regulations on private international law.

Naturally, it is not in the interest of anyone to have two parallel (but conflicting) regimes at the same time applicable in Estonian courts in international civil cases. Thus, it would be beneficial if the Republic of Estonia would at least try to renegotiate one type of instruments. Since there are more states which are bound by the EU regulations than there are states bound by the legal assistance treaties concluded with third states and since the EU regulations are newer and thus, hopefully, correspond better to the modern needs of commerce and society in general, it would make sense to try to renogatiate the older instruments (the legal assistance treaties concluded with third states) rather than the newer EU instruments. In addition, having a common regime applicable in all over the European Union would itself be something that the Republic of Estonia should aim at, since the main commercial partners of the Republic of Estonia are the other Member States of the EU.[8]

In addition, it could also be argued that the Republic of Estonia has an international obligation to (at least try to) renegotiate the legal assistance treaties cocluded with third states. Such obligation could (currently)[9] be derived from Article 351 of the TFEU,[10] which provides the following:

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[5] D. V. Karapetyan. Jurisdiction, Recognition, and Enforcement of Court Judgments and Arbitral Awards: Analyses and Recommendations to Improve Armenian and Russian Legislation. 28 Review of Central and East European Law 2002, 1, pp 211–270, 229.

[6] Note that similar treaties have been concluded between the other members of the former Soviet block (for example, between the Russian Federation and Latvia). Due to the educational background and language barrier of the author, these treaties and foreign case law are not used as sources for the dissertation and it has been left to the authors from the relevant jurisdictions to determine whether these treaties conflict with the EU regulations as well.

[7] For the exact list of Estonian legal assistance treaties see part (E) (*Description of the applied methodology*), (a) primary sources. For a general overview on the Estonian legal assistance treaties, see: E. Jõks. International Legal Assistance Agreements of Estonia. Juridica International. 1996, I, pp 6–11.

[8] For example, according to the press release of 10 December 2018 by the Statistics Estonia (*Statistikaamet*), in October 2018, the Republic of Estonia exported most of its products to Finland (an EU Member State), the United States of America and to Sweden (also an EU Member State). At the same time, most of the products imported to Estonia came from Finland, Lithuania and Germany. See (in Estonian): https://www.stat.ee/pressiteade-2018-131 (01.01.2019).

[9] In the older versions of the Treaties, the same obligation came (before the Treaty of Amsterdam) from Art 234 and (afterwards) from Art 307 of the Treaty establishing the

> "*To the extent that such agreements*[11] *are not compatible with the Treaties, the Member States or States concerned shall take all appropriate steps to eliminate incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.*"

Article 351 of the TFEU requires the Member States to take steps to eliminate incompatibilities between the legal assistance treaties concluded with third states and the 'Treaties' (that is – the TFEU and the TEU[12])[13]. The reader might at this point ask herself whether Article 351 of the TFEU also covers the incompatibility between the legal assistance treaties concluded with third states and the EU regulations enacted based on the (EU) 'Treaties'. At this point it is worth reminding the reader that all the EU regulations on private international law are enacted on the basis of the (EU) Treaties.[14] Thus, the Republic of Estonia should be considered as being obliged to (at least) try to renegotiate the legal assistance treaties concluded with third states, if such treaties conflict also with the EU regulations. It would be contrary to international law, if the Member States could deviate from their international obligations towards third states simply by enacting EU regulations among themselves.[15] In additional,

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European Community. See respectively: Treaty Establishing the European Community. – OJ C 224, 31.08.1992, pp 6–79; Consolidated Version of the Treaty Establishing the European Community. – OJ C 321E/1, 29.12.2006, pp 37–186. For the Treaty of Amsterdam, see: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997. – OJ C 340, 10.11.1997, pp 1–144; Some Estonian authors have derived the obligation to renegotiate the legal assistance treaties from Art 6(1) of the Treaty of Accession to the European Union 2003. See: I. Nurmela and others. Rahvusvaheline eraõigus. Tallinn: Juura 2008, p 35. For the Treaty of Accession to the European Union 2003, see: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded – Part one: Principles Art 6. – OJ L 236, 23.09.2003, pp 34–35.

[10] Consolidated version of the Treaty on the Functioning of the European Union. – OJ C326, 26.10.2012, pp 47–200.

[11] That is – the agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other (this comes from the first sentence of Art 351 of the TFEU). The Republic of Estonia acceded to the European Union on 1 of May 2004. Therefore, in relation to the Republic of Estonia, the agreements referred to in Art 351 of the TFEU should be international agreements, which were concluded before that date.

[12] Consolidated version of the Treaty on European Union. – OJ C326, 26.10.2012, pp 13–46.

[13] As explained by Art 1(2) of the TFEU the 'Treaties' in the meaning of the TFEU are the TFEU and the TEU.

[14] More precisely, on the basis of Art 81 (ex Art 65) in the current version of the TFEU.

[15] For example, it has been stressed in international legal literature that Article 351(1) of the TFEU may allow derogation not only from Union's primary law, but also from secondary law.

there can be no doubt that the legal assistance treaties and the EU regulations constitute currently applicable competing regimes and as such, in principle, might be 'incompatible' with each other in the general meaning of this term, regardless of whether such conflict could also be regarded as an 'incompatibility' within the meaning of a particular legal instrument, such as the TFEU. The assumption that the legal assistance treaties and the EU regulations on private international law can be 'incompatible' with each other within the meaning of the TFEU is also supported by various communications of the EU, where the Member States have been reminded that they should renegotiate the legal assistance treaties in order to eliminate any incompatibilities with the Community *acquis*, including the EU regulations on private international law.[16] Lastly, also the Court of Justice has confirmed that secondary legislation of the EU cannot be applied in order to ensure the performance by the Member State of obligations arising under an international agreement concluded with non-member countries.[17]

No legal research has so far been carried out in the Republic of Estonia as to the extent of the incompatibilities between the EU regulations on private international law and the Estonian legal assistance treaties concluded with third states. Thus, at the moment, it remains unclear how the Republic of Estonia should fulfil its obligation referred to in Article 351 of the TFEU.

B. Research question

The aim of the dissertation is to determine whether (and to which extent) the Estonian legal assistance treaties concluded with third states are incompatible with the EU regulations on private international law within the meaning of TFEU Article 351. This question constitutes the main research question of the dissertation.

The aim of the dissertation is not to focus on the division of powers between the European Union and the Republic of Estonia in possible renegotiations of the legal assistance treaties concluded with third states.[18] In addition, the

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See: A. Rosas. The States in EU Law of International Agreements Concluded by EU Member States. – Fordham International Law Journal. 2011, Vol 34, Issue 5, p 1304, 1321.

[16] See for example: Council of the European Union, Interinstitutional File: 2008/0259 (COD) 11191/09 ADD 1 REV 1 CODEC 878 JUSTCIV 155, 29/6/2009, p 2. See also: Council of the European Union, Addendum to draft minutes 11806/09 ADD 1 PV/CONS 39 ECOFIN 509, p 5.

[17] *Office National de l'Emploi v Madeleine Minne*. Case C–13/93. Judgment of the Court (Sixth Chamber) of 3 February 1994. Available:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0013 (01.09.2018).

[18] On the division of powers between the European Community and the Member States on renegotiating the legal assistance treaties in the parts dealing with matrimonial matters, parental responsibility and matters relating to maintenance, see: Council Regulation (EC) No

dissertation does not seek to evaluate the possibility or expected successfulness of such renegotiations or even more – to answer the question whether there are some other appropriate steps besides the renegotiations, which the Republic of Estonia could take in order to fulfil the obligation derived from Article 351 of the TFEU. The dissertation is also not concerned with the question which is the exact role of Article TFEU in achieving the balance between international and EU law.[19] Although answers to these questions are relevant in order to decide on the future steps, which the Republic of Estonia should take in order to fulfil its obligation under Article 351 of the TFEU, answering these questions would require a very different research methodology than could be offered by a private international law analysis. Thus, the research question of this dissertation has intentionally been limited only to the question whether (and to which extent) the rules on private international law contained in the Estonian legal assistance treaties concluded with third states and the EU regulations on private international law are incompatible with each other within the meaning of Article 351 of the TFEU.

664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations. – OJ L 200, 31.07.2009, pp 46–51. On the division of powers between the European Community and the Member States on renegotiating the legal assistance treaties in the parts relating to contractual and non-contractual obligations, see: Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non-contractual obligations. – OJ L 200, 31.07.2009, pp 25–30. For a general overview on the division of competences between the union and the Member States while concluding private international law instruments, see the so called "Lugano II" opinion: The Court of Justice of the European Union. Opinion 1/03 of 7 February 2006, Opinion of the Court (Full Court) 2006 ECR 2006, I–1145. See further on this topic: M. Cremona. External Relations and External Competence of the European Union: the Emergence of an Integrated Policy. – P. Craig and G. de Búrca (eds). The Evolution of EU Law 2nd ed. Oxford: Oxford University Press 2011, pp 217–268; A. Dashwood and others. Wyatt and Dashwood's European Union Law. Oxford and Portland Oregon: Hart Publishing 2011, pp 899–951.

[19] For a rather critical view on Art 351 of the TFEU, see: J. Klabbers. The Validity of EU Norms Conflicting with International Obligaitons. – E. Cannizzaro, P. Palchetti and R. Wessel (eds). International Law as Law of the European Union. Martinus Nijhoff Publishers: Leiden 2012, pp 120–121.

C. Structure of the dissertation

The dissertation has been divided into two parts in order to best answer the main research question of the dissertation. The first part of the dissertation (**1. Chapter**) seeks to establish to which extent the EU regulations on private international law and the legal assistance treaties concluded by the Republic of Estonia with third states could potentially have an overlap as to their scopes of application. If the two types of instruments do not share overlapping scopes of application, the incompatibilities between the two types of instruments cannot occur in practice.

Unfortunately it is not so easy to determine to which extent the Estonian legal assistance treaties and the EU regulations on private international law have overlapping scopes of application. While general disconnection clauses[20] on the relationship between the international and EU instruments are often contained in the newer international conventions[21] and EU regulations,[22] the legal assistance treaties concluded with third states do not, in contrast, contain any clear clauses on possible conflicts or even the scopes of application of these treaties. Therefore, the relationship between the legal assistance treaties and the EU regulations remains somewhat unclear, regardless of Article 351 of the TFEU giving priority of application to the legal assistance treaties. Even if an EU instrument (such as the TFEU or a particular private international law regulation) would contain a clause giving priority of application to the legal assistance treaty, the exact relationship between the two types instruments is complicated, as the legal assistance treaties do not contain any clear rules as to their scope of application.

Since the scope of application of the legal assistance treaties remains unclear, one should, in order to establish whether the incompatibilities between the legal assistance treaties and the EU regulations on private international law could potentially arise in practice, first analyse whether it is possible that the scopes of application of the two types of instruments overlap. In order to do so, the first chapter of the dissertation starts by mapping the scope of application of the EU

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[20] A term 'disconnection clause' is generally used in private international law to refer to a clause dealing with a relationship between two different instruments applicable in similar matters.

[21] See for example Art 26 of the draft Hague Convention on the Recognition and Enforcement of Judgments: Hague Conference. Special Commission of the Recognition and Enforcement of Foreign Judgments. February 2017 Draft Convention. Available: https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafdbb.pdf (01.09.2018).

[22] See for example: Arts 67–73 of the Brussels I (Recast) Regulation (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 (recast). – OJ L 351, 20.12.2012, pp 1–32). See in contrast the Small Claims Regulation (Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure. – OJ L 199, 31.07.2007, pp 1–22), which does not have any such provision.

regulations on private international law and then proceeds to establishing the scope of application of the legal assistance treaties concluded with third states. Based on this analysis, a comparison between the scopes of application of the two types of instruments is carried out in order to answer the question whether the scopes of application of the two types of instruments could potentially overlap. This is done throughout the first Chapter of the dissertation with a greater emphasis in the second part of the first Chapter.

The second part of the dissertation (**2. Chapter**) seeks to establish whether in a situation where the scopes of application of the two types of instruments indeed overlap, it would be possible to identify any discrepancies or differences between the provisions of the two types of instruments and whether such discrepancies or differences could be considered as 'incompatibilities' within the meaning of Article 351 of the TFEU.

A mere difference in the wording of the two types of instruments is clear to any reader who has taken it upon herself to casually scroll through the texts of the legal assistance treaties and the EU private international law regulation. However, the fact that the texts of the two types of instruments differ does not necessarily mean that the two types of instruments are 'incompatible' within the meaning of Article 351 of the TFEU – an 'incompatibility' would have to be something more – a different end-result to the parties, if one, but not the other type of instrument, is applied.

Based on the general principle of international law[23] (and as also provided by various disconnection clauses contained in the EU regulations)[24] in case of an overlap between the scopes of application of the two types of instruments, the legal assistance treaties concluded with third states would enjoy priority of application over the EU regulations on private international law. Thus, the two types of instruments cannot be concurrently applied and one might be tempted to conclude that there can never be a conflict between the two types of instruments. However, the incompatibilities between the two types of instruments may still arise if the solution offered by the EU regulations on private international law (would they have been applied), would have fundamentally differed

[23] See Art 30(4)(b) of the Vienna Convention which provides that when the parties to the latter treaty do not include all the parties to the earlier one, as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. See: United Nations. Vienna Convention on the Law of Treaties 1969. Available: http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (01.09.2018). See also Art 351 of the TFEU. On the relationship between Art 30(4)b of the Vienna Convention and Art 351 (former Art 307) of the TFEU, see: P. Manzini, The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law. – European Journal of International Law 2001 Vol 12 No 4, pp 781–782.

[24] See for example Arts 67–73 of the Brussels I (Recast) Regulation, Arts 68–69 of the Maintenance Regulation (Council Regulation (EC) No 4/2009 of 18 December on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. – OJ L 007, 10.01.2009, pp 1–79).

from the solution offered by the legal assistance treaties actually applied by the courts. In these types of situations the application of the legal assistance treaties could often be contrary to the underlying purpose of the EU regulations on private international law, as the courts might, for example, determine jurisdiction or applicable law completely differently under the legal assistance treaties than they would under the EU regulations. Theoretically it would not be impossible, for example, that a court would proceed with a case after having determined that it has jurisdiction under a broad legal assistance treaty, but would stay or even terminate proceedings under the corresponding EU rules due to it not having jurisdiction under these rules. In these kinds of situations, the application of the treaty rules, instead of the rules contained in the EU regulations could constitute an incompatibility within the meaning of Article 351 of the TFEU.

In order to map the possible incompatibilities within the meaning of Article 351 of the TFEU which could arise if the legal assistance treaties are applied instead of the EU regulations, the second Chapter proceeds from a well-known division in modern European private international law: international jurisdiction, applicable law, recognition and enforcement of foreign judgments, court settlements and authentic instruments and international cooperation between the courts and other authorities relating to the service of documents or the taking of evidence abroad.[25]

Based on the analysis carried out in both Chapters, general conclusions are drawn in the end of the dissertation (**Conclusions**) in order to decisively answer the question whether there are any incompatibilities within the meaning of Article 351 of the TFEU between the EU regulations on private international law and the Estonian legal assistance treaties concluded with third states. Hopefully, these conclusions will prove helpful to the Government of the Republic of Estonia in order to decide whether it needs to take any action in order to renegotiate the legal assistance treaties concluded with third states in the future.

D. Theses set forth for the defence

The main hypothesis of the dissertation is that there exist several incompatibilities within the meaning of Article 351 of the TFEU between the EU regulations on private international law and the Estonian legal assistance treaties

[25] On such division, see for example: M. Bogdan. Concise Introduction to EU Private International Law Second Edition. Groningen: Europa Law Publishing 2012, pp 3–5. Note, however, that many authors still limit the concept of '(European) private international law' to the topics of jurisdiction, applicable law and recognition and enforcement of foreign judgments, ignoring the steps that the European legislator has taken in order to strengthen the cooperation between the courts on taking evidence or serving documents abroad. For such, more limited division, see for example: G. Van Calster. European Private International Law. Oxford: Hart Publishing 2013, pp 1–2; J. Fawcett, J. M. Carruthers and P. North. (eds). Cheshire, North & Fawcett Private International Law Fourteenth Edition. Oxford: Oxford University Press 2008, pp 7–9.

concluded with third states. The hypotheses used to prove the main hypothesis are the following:

1. By comparing the wording of the EU regulations and Estonian legal assistance treaties, it is possible to identify 'obvious conflicts' between the two types of instruments. These are the conflicts which appear when the formulations used in the two types of instruments differ from each other.
2. Not all 'obvious conficts' can be described as 'true conflicts'. The 'obvious conflicts' are 'true conflicts', if they constitute an incompatibility within the meaning of Article 351 of the TFEU. The ones which do not, can be described as 'false conflicts'. A 'true conflict' would occur, for example in a situation where, under one type of instrument, the law of one State would be applied to a particular dispute, whereas under another type of instrument the law of another State would apply. Similarly, a 'true conflict' would occur when one type of instrument would allocate jurisdiction to Estonian court, whereas the other would not.
3. Even if, at first sight, the EU regulations on private international law and the legal assistance treaties concluded with third states seem to accord with each other by containing similar rules with similar wording, there could still arise incompatibilities between the two types of instruments within the meaning of Article 351 of the TFEU, if the legal assistance treaties are applied by the courts in practice. Thus, the second type of incompatibilities between the EU regulations on private international law and the legal assistance treaties concluded with third states appears in the form of 'hidden conflicts'. These are the conflicts, which are not apparent when comparing the mere wording of different types of legal instruments.
4. Both, true and false conflicts can be either negative or positive. A 'negative conflict' occurs when there is a gap in the legal regulation, whereas a 'positive conflict' means that the application of the two types of legal instruments lead to different results.
5. The incompatibilities between the EU regulations on private international law and the legal assistance treaties concluded with third states within the meaning of Article 351 of the TFEU arise only in cases where the courts are required to determine jurisdiction or applicable law. No incompatibilities arise between the two types of instruments, if the courts apply the treaty rules on the recognition and enforcement of foreign enforcement titles or when the courts use the treaty rules in order to serve documents or take evidence abroad.

E. Description of the applied methodology

Two primary methods were applied when writing the dissertation. These methods could be referred to as the comparative method and the method of teleological interpretation of legal provisions. The process of solving the main research question of the dissertation by using these methods can be described as follows.

First, the texts of the EU regulations on private international law and the legal assistance treaties concluded with third states and the concepts used in these instruments were compared in order to determine whether there exists any incompatibilities between the provisions of the two types of instruments within the meaning of Article 351 of the TFEU. While doing so, the relevant notions of Estonian legal system, the legal systems of the Contracting Parties to the legal assistance treaties concluded with third states and the autonomous interpretations of the EU regulations by the Court of Justice of the European Union[26] were taken into account in order to determine whether the rules contained in the two types of instruments cover the same legal issues. This was the application of the comparative method.

Although the comparison of the texts of the two types of instruments revealed several inconsistencies between the wordings of the legal assistance treaties and the EU regulations, it was soon established that the mere comparison of the texts of the two types of instruments was not enough in order to answer the main research question of the dissertation. As it became clearer that the incompatibilities between the EU regulations on private international law on one hand and the legal assistance treaties concluded with third states on the other could also arise as hidden conflicts, a systematic and teleological interpretation of the provisions contained in the relevant legal instruments was carried out. Such interpretation proceeded from the theoretical exercise of imagining a situation where a rule contained in the legal assistance treaty would be applied instead of the rule contained in the EU regulation on private international law. The possibility of such application was determined and the consequence of such application then evaluated. If the application of a legal assistance treaty in place of the EU regulations violated the underlying purpose of the EU regulations in question, the existence of an incompatibility within the meaning of Article 351 of the TFEU was assumed.

In order to effectively carry out the comparative and teleologic interpretation of the legal instruments in question, the dissertation used the following sources, which, based on their role, have been divided into the primary and secondary sources.

a) Primary sources

The primary sources for the dissertation were the texts of the EU regulations on private international law and the texts of the legal assistance treaties, which the

[26] With the entry into force of the Lisbon Treaty, the whole court system of the European Union was renamed to the 'Court of Justice of the European Union', comprising of the Court of Justice, the General Court and the Civil Service Tribunal. Although this name-change became effective only as of the entry into force of the Treaty of Lisbon, in order not to confuse the reader, the dissertation uses the term 'Court of Justice of the European Union' when referring to the older case law of the same court. For the Lisbon Treaty, see: Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. – OJ C 306, pp 1–271.

Republic of Estonia has concluded with third states. The existing (or proposed) EU regulations on private international law, which could possibly give rise to conflicts with the legal assistance treaties concluded with third states and which where therefore used as primary sources while writing the dissertation are the following:

- the Brussels I (Recast) Regulation (repealing its predecessor, the Brussels I Regulation),[27]
- the Brussels II *bis* Regulation[28] (repealing the previous Brussels II Regulation)[29] and its amendment proposal,[30]
- the Rome I Regulation,[31]
- the Rome II Regulation,[32]
- the Rome III Regulation,[33]

[27] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. – OJ L 012, 16.01.2001, pp 1–23. The Brussels I Regulation was replaced by the Brussels I (Recast) Regulation, but as provided by Art 66(2) of the Brussels I (Recast) Regulation, the old Brussels I Regulation will continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before the date of application of the Brussels I (Recast) Regulation. Hence, Estonian courts are occasionally still bound to apply the Brussels I Regulation.

[28] Council Regulation (EC) No 2201/2003 of 27 November concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. – OJ L 338, 23.12.2003, pp 1–29.

[29] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. – OJ L 160, 30.06.2000, pp 19–36.

[30] European Commission. Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). COM(2016) 411 final. Available: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF (01.09.2018).

[31] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 177, 04.07.2008, pp 6–16.

[32] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). – OJ L 199, 31.07.2007, pp 40–49.

[33] 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. – OJ L 343, 29.12.2010, pp 10–16. The Rome III Regulation (for the most part) become applicable in Estonian courts as of 11 February 2018, as provided by Art 3(2) of the relevant Commission Decision (European Commission. Commission decision (EU) 2016/1366 of 10 August 2016 confirming the participation of Estonia in enhanced cooperation in the area of the law applicable to divorce and legal separation. C/2016/5137. – OJ L 216, 11.08.2016, pp 23–25). For the proposal on the relevant implementing domestic legislation, see: Justiitsministeerium. Perekonnaseaduse (PKS) muutmise ja sellega seonduvalt teiste seaduste muutmise

- the Maintenance Regulation,
- the Matrimonial Property Regimes Regulation[34] (at the time of finishing this dissertation, not yet applicable in the Republic of Estonia), [35]
- the Propterty Consequences of the Registered Partnerships Regulation[36] (at the time of finishing this dissertation, not yet applicable in the Republic of Estonia),[37]
- the Succession Regulation,[38]
- the European Enforcement Order Regulation,[39]

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seaduse eelnõu (Rooma III). 14.07.2015. Available: http://eelnoud.valitsus.ee/main/mount/docList/4674422a-aee5-436d-b787-9cd8e8b71495#1WM0uM7T (01.09.2018).

[34] 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. – OJ L 183, 08.07.2016, pp 1–29.

[35] According to Art 70(1) of the Matrimonial Property Regimes Regulation the majority of the provisions of this regulation apply from 29 January 2019. Note also that at the time of finishing this dissertation (01.09.2018) the Republic of Estonia had not taken part in the adoption of this regulation. However, since the Government of the Republic of Estonia had expressed a wish to join the regime of the regulation in the future, the regulation was used as a source in the dissertation as it was presumed that it would, at one point, be applicable in Estonia. For the relevant government decision, see: Riigikantselei. Eesti seisukoht nõukogu otsuse, millega antakse luba tõhustatud koostööks kohtualluvuse, kohaldatava õiguse ning otsuste tunnustamise ja täitmise valdkonnas rahvusvaheliste paaride varalisi suhteid käsitlevates asjades, mis hõlmavad nii abieluvarareźiime kui ka registreeritud kooselust tulenevaid varalisi tagajärgi, eelnõu kohta. Available: http://eelnoud.valitsus.ee/main/mount/docList/09abf901-882a-4244-aff1-4a430000f58d#6SNocAGa (01.09.2018).

[36] 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. – OJ L 183, 08.07.2016, pp 30–56.

[37] According to Art 70(2) of the Registered Partnerships Regulation the majority of the provisions of this regulation apply from 29 January 2019. At the time of finishing this dissertation (01.09.2018), the Republic of Estonia had not taken par in the adoption of this regulation. However, since the Government of the Republic of Estonia had expressed a wish to join the regime of this regulation in the future, the regulation was used as a source in the dissertation, as it was presumed that it would be applicable in Estonian courts in the future. For the relevant government decision, see: Riigikantselei. Eesti seisukoht nõukogu otsuse, millega antakse luba tõhustatud koostööks kohtualluvuse, kohaldatava õiguse ning otsuste tunnustamise ja täitmise valdkonnas rahvusvaheliste paaride varalisi suhteid käsitlevates asjades, mis hõlmavad nii abieluvarareźiime kui ka registreeritud kooselust tulenevaid varalisi tagajärgi, eelnõu kohta. Available: http://eelnoud.valitsus.ee/main/mount/docList/09abf901-882a-4244-aff1-4a430000f58d#6SNocAGa (01.09.2018).

[38] 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 L 201, 27.07.2012, pp 107–134.

[39] 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. – OJ L 143, 30.04.2004, pp 15–39.

- the European Order for Payment Procedure Regulation[40] and the regulation amending it,[41]
- the European Small Claims Procedure Regulation and the regulation amending it,[42]
- the Protection Measures Regulation,[43]
- the European Account Preservation Order Regulation,[44]
- the Insolvency (Recast) Regulation[45] (repealing the Insolvency Regulation),[46]
- the Service *bis* Regulation[47] (repealing the previous Service Regulation),[48]
- the Evidence Regulation.[49]

Although there are other European Union regulations, which, among other provisions, contain some rules on private international law (such as, for example, the Trademarks Regulation[50] and the Community Design

[40] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. – OJ L 399, 30.12.2006, pp 1–32.

[41] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure. – OJ L 341, 24.12.2015, pp 1–13.

[42] See previous footnote.

[43] 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. – OJ L 181, 29.06.2013, pp 4–12.

[44] 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. – OJ L 189, 27.06.2014, pp 59–92.

[45] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. – OJ L 141, 05.06.2015, pp 19–72.

[46] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. – OJ L 160, 30.06.2000, pp 1–18.

[47] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. – OJ L 324, 10.12.2007, pp 79–120.

[48] Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. – OJ L 160, 30.06.2000, pp 37–52.

[49] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. – OJ L 174, 27.06.2001, pp 1–24.

[50] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version). – OJ L 78, 24.03.2009, pp 1–42. Note that as of 01.10.2017 a new trademarks regulation became applicable in the EU: Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark. – OJ L 154.16.06.2017, pp 1–99.

Regulation[51]), due to the specific nature of these regulations, they were not used as sources in the dissertation.

The legal assistance treaties which could possibly conflict with the above-mentioned European regulations on private international law are the legal assistance treaties, which the Republic of Estonia has concluded with third states before joining the European Union in 2004. These legal assistance treaties are the following:

- the Estonia-Russia legal assistance treaty,[52]
- the Estonia-Ukraine legal assistance treaty.[53]

Although the Republic of Estonia has concluded two additional legal assistance treaties with three other Member States of the European Union (a treaty[54] with Poland and a treaty[55] with Lithuania and Latvia), these treaties cannot give rise to any conflicts with the EU regulations on private international law as the provisions of the EU regulations override the provisions contained in the treaties concluded with the other Member States of the European Union.[56] The legal assistance treaties concluded with the other Member States were therefore not used as primary sources in the dissertation. However, Estonian case law on these treaties was used as a secondary source, since the legal assistance treaties concluded with the other Member States have almost analogously worded provisions as do the Estonia-Russia and Estonia-Ukraine legal assistance treaties.

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[51] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs. – OJ L 3.05.01.2002, pp 1–24.

[52] Eesti Vabariigi ja Vene Föderatsiooni leping õigusabi ja õigussuhete kohta tsiviil-, perekonna- ja kriminaalasjades. – RT II 1993, 16, 27; For the unofficial English version of the Estonia-Russia legal assistance treaty, see Annex 1 (author's translation). The Annex 1 contains the text of the Estonia-Russia legal assistance treaty as amended by the additional Protocol added to the treaty in 2001. For the said protocol see: Eesti Vabariigi ja Vene Föderatsiooni vahel 1993. aasta 26. jaanuaril sõlmitud lepingu "Õigusabi ja õigussuhete kohta tsiviil-, perekonna- ja kriminaalasjades" juurde kuuluv protokoll. – RT II 2002, 14, 58.

[53] Eesti Vabariigi ja Ukraina leping õigusabi ja õigussuhete kohta tsiviil- ning kriminaalasjades. – RT II 1995, 13/14, 63. For the unofficial English version of the Estonia-Ukraine treaty, see Annex 2 of the present dissertation (author's translation).

[54] Eesti Vabariigi ja Poola Vabariigi vaheline leping õigusabi osutamise ja õigussuhete kohta tsiviil-, töö- ning kriminaalasjades. – RT II 1999, 4, 22.

[55] Eesti Vabariigi, Leedu Vabariigi ja Läti Vabariigi õigusabi ja õigussuhete leping. – RT II 1993, 6, 5.

[56] See, for example: Art 69 of the Brussels I (Recast) Regulation, Art 69 of the Brussels I Regulation, Art 59(1) of the Brussels II *bis*, Art 25(2) of the Rome I Regulation, Art 28(2) of the Rome II Regulation, Art 69(2) of the Maintenance Regulation, Art 75(2) of the Succession Regulation, Art 20(1) of the Service *bis* Regulation, Art 21(1) of the Evidence Regulation.

b) Secondary sources

The secondary sources for the dissertation were the preparatory materials for the legal assistance treaties concluded with third states, the preparatory materials for the EU regulations on private international law, Estonian case law on the legal assistance treaties and Estonian and EU case law on the EU regulations on private international law and legal literature. More precisely, the relevant case law is limited to the Estonian case law by county courts, circuit courts and the Supreme Court and the case law of the Court of Justice of the European Union on the EU regulations on private international law and on the relevant other European instruments.[57]

The Estonian case law, which was used in the dissertation, includes the case law on the legal assistance treaties concluded with the other Member States of the European Union. This case law was used since the wording of the legal assistance treaties concluded with the other Member States is almost identical to the wording of the legal assistance treaties concluded with third states. It is therefore reasonable to expect that Estonian courts would be inclined to interpret the two types of legal assistance treaties in the same way. Hence, the case law on the legal assistance treaties concluded with the other Member States is relevant in order to interpret the provisions of the legal assistance treaties concluded with third states.

The case law of Ukraine and the Russian Federation was not used as a source in the dissertation. The Ukrainian and Russian case law was excluded primarily because the courts of these states are not obliged to apply the EU regulations on private international law. Thus, it was presumed that the case law from these jurisdictions is not instrumental in order to analyse the possible incompatibilities between the EU regulations on private international law and the legal assistance treaties within the meaning of Article 351 of the TFEU. In addition, a choice not to use the case law of these courts was made for practical considerations as it was impossible to obtain a comprehensive overview on the relevant case law from Russian and Ukrainian sources and the author did not want to introduce an element of chance into the research methodology of this dissertation. For similar reasons case law on (or the texts of) the legal assistance treaties concluded between the other members of the former Soviet block was not used as a source in the dissertation.

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[57] Namely, on the Rome Convention and on the Brussels Convention. The latter was a predecessor to the Brussels I Regulation. To a large extent, the Brussels Convention and the Brussels I (Recast) Regulation contain very similar provisions, such as the Rome I Regulation and Rome Convention contain very similar provisions. Thus, the case law of the Court of Justice of the European Union on the Brussels Convention and the Rome Convention can be taken into account when interpreting the Brussels I (Recast) Regulation, the Brussels I Regulation or the Rome I Regulation. For the Brussels Convention, see: 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. – OJ L 299, 31.12.1972, pp 32–42. For the Rome Convention, see: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980. Consolidated version CF 498Y0126(03). – OJ L 266, 9.10.1980, pp 1–19.

The case law used in the present dissertation is limited to the judgments which have been made by the Estonian courts and by the Court of Justice of the European Union until 1 of September 2018 and which are available for the reader in the publicly available databases. The Estonian case law can be found in the following official databases: www.riigiteataja.ee (the county courts' and circuit courts' decisions) and www.riigikohus.ee (the Estonian Supreme Court decisions).

In order to illustrate the relevance of the legal assistance treaties concluded with third states, Annex 3 of the dissertation provides a list of cases in which the Estonian courts have relied on or have interpreted the provisions of the legal assistance treaties concluded with third states. Since some Estonian judgments are not published in the publicly accessible databases, it can, however, be assumed that the number of cases where the legal assistance treaties concluded with third states have been interpreted or relied upon by Estonian courts is possibly bigger than demonstrated by the list provided in Annex 3. In addition, it should be noted that there have been several instances where Estonian courts should have relied on the provisions contained in the legal assistance treaties concluded with third states, but did not do so for reasons which probably have more to do with a lack of knowledge than with any elaborate legal analysis.[58]

F. Overview of the existing legal research on the topic of the dissertation

The dissertation is written by taking into account the relevant writings of Estonian and European legal scholarship. However, to the best knowledge of the author of the dissertation, there is currently no Estonian or European legal literature where the possibility of conflicts between the EU regulations on private international law and the legal assistance treaties concluded by the Republic of Estonia with third states has been analysed from the point of view of private international law. With the exceptions of the writings of the author of the dissertation,[59] the topic of possible conflicts between the EU regulations on

[58] See for example, cases where the nationals or companies of the Contracting Parties to the legal assistance treaties were involved in Estonian proceedings and where the courts made no mention to the legal assistance treaties: Judgment of the Pärnu County Court of 29 November 2009 in a civil case No 2-09-27841; Judgment of the Viru County Court of 17 January 2008 in a civil case No 2-07-10838; Judgment of the Tartu County Court of 15 October 2007 in a civil case No 2-07-18869; Judgment of the Tartu County Court of 8 February 2012 in a civil case No 2-11-31162.

[59] M. Torga. § 490[1] V. Kõve and others. Tsiviilkohtumenetluse seadustik III. Juura 2018, p 231–232; M. Torga. § 316. – V. Kõve and others. Tsiviilkohtumenetluse seadustik II. Juura 2017, p 101; M. Torga. § 70. – V. Kõve and others. Tsiviilkohtumenetluse seadustik I. Juura 2017, pp 413–414, 418, 420; M. Torga. Eesti kohtumenetluses vajalike menetlusdokumentide kättetoimetamine välisriikides. Juridica 2017, III, pp 186, 187–189; M. Torga. Tõendite kogumine välisriikides ning välisriigi kohtutele tõendite kogumiseks abi osutamine. Juridica

private international law and the Estonia legal assistance treaties concluded with third states has been dealt with in Estonian legal literature only as a side question[60] or as a question of public or European law.[61]

In addition, although analogous legal assistance treaties have been concluded between the other states of the former Soviet block[62] and although such treaties have served some attention in international legal literature,[63] to the best knowledge of the author of the dissertation, the topic of possible incompatibilities within the meaning of Article 351 of the TFEU between such treaties and the EU regulations on private international law has so far not been extensively researched in international legal literature.

2017, II, p 97, 98; M. Torga. Rooma III määrus – uus reeglistik lahutusele kohalduva õiguse määramiseks. Juridica 2016, II, pp 132, 133–134; K. Jürgenson and M. Torga. Maksejõuetusmenetluse (uuesti sõnastatud) määrus – samm tervendamise ja rahvusvahelise koostöö suunas. – Juridica 2015 IX, pp 624, 627–628; M. Torga. Välisriigi kohtulahendite ja muude täitedokumentide tunnustamine, täidetavaks tunnistamine ja täitmine Eestis. – Juridica 2015 I, pp 55, 59–60; M. Torga. Välisriigis toimuva tsiviilkohtumenetluse mõju Eesti tsiviilkohtumenetlusele. – Juridica 2014 IX, pp 680, 681–682; M. Torga. Kohalduva õiguse ja selle sisu kindlakstegemine rahvusvahelistes eraõiguslikes vaidlustes. – Juridica 2014 V, pp 406, 408–415; M. Torga. Brüsseli I (uuesti sõnastatud) määrus: kas põhjalik muutus Eesti rahvusvahelises tsiviilkohtumenetluses. – Juridica 2014 IV, pp 304, 307–308; M. Torga. Välisriigist pärit elatiselahendite tunnustamine, täidetavaks tunnistamine ja täitmine Eestis. – Kohtute aastaraamat 2013. Riigikohus, pp 61, 61–62; M. Torga. The relationship between the Baltic private international law treaties and the European rules on jurisdiction and the recognition and enforcement of foreign judgments. – Journal of the University of Latvia "Law" 2013 II, pp 248–259; K. Sein and others. International Encyclopedia for Private International Law Estonia. Alphen aan den Rijn: Kluwer Law International 2013, 33–35; G. Lepik and M. Torga. Hagi tagamine ja esialgne õiguskaitse tsiviilasjades: rahvusvaheline mõõde. – Juridica 2013, X, pp 742, 744–745; E. Põtter and M. Torga. Uus Euroopa pärimismäärus ning selle koht Eesti rahvusvahelises tsiviil(kohtu)menetluses. – Juridica 2013, VII, pp 517, 520–521; M. Torga. Rahvusvahelise kohtualluvuse kontrollimine. – Juridica 2013 III, pp 192, 195–197; M. Torga. Scope of application of private international law treaties concluded between the Republic of Estonia and its Eastern European neighbours. – Kiel Journal of East European Law. 1–2/2012, pp 4–12; M. Torga. Õigusabilepingute kohaldamine tsiviilvaidluste lahendamisel Eesti kohtutes. – Kohtute aastaraamat 2012. Riigikohus, pp 76–81; M. Torga. Characterisation in Estonian Private International Law – a Proper Tool for Achieving Justice between the Parties? – Juridica International 2011 XVIII, pp 84, 85–87.

[60] I. Nurmela and others (2008), p 35.

[61] A. Ehrlich, C. Ginter and T. Tigane. Loyalty to the EU and the Duty to Revise Pre-Accession International Agreements. – Juridica International 2013 XX, pp 121–132; M. Vahar. Euroopa Liidu välispädevuse piirid. Euroopa Liidu ainuvälispädevuse mõju liikmesriikide rahvusvahelistele lepingutele tsiviilõigusalase koostöö näitel. Magistritöö. – Tartu Ülikool, 2010.

[62] Soo, for example, the list of similar Latvian treaties on the web-page of the Ministry of Justice of the Republic of Latvia: https://www.tm.gov.lv/en/participation-in-eu/international-judicial-cooperation (01.09.2018).

[63] A. Anthimos (2014), pp 49–61; I. Kucina (2012), pp 529–539; D. V. Karapetyan (2002), pp 211–270.

1. OVERLAPPING SCOPES OF APPLICATION OF THE LEGAL ASSISTANCE TREATIES AND THE EU REGULATIONS

1.1. Criteria for determining the overlap between the scopes of application of private international law instruments

In order to lay down foundations for the analysis of incompatibilities between the provisions of the EU regulations on private international law and the legal assistance treaties, which the Republic of Estonia has concluded with third states, it is first necessary to determine whether these two types of instruments could possibly have an overlap as to their scopes of application. There are four criteria, which should be taken into account when conducting such analysis. These criteria relate to temporal, material, personal and territorial scope of application of the relevant instruments.[64] Only if the two types of instruments have (at least partly) overlapping temporal, material, personal and territorial scope of application, is it possible for any incompatibilities between the twho types of instruments within the meaning of Article 351 of the TFEU to arise.

The temporal scope of application (*ratione temporis*) of a particular private international law instrument is determined by the date as of which the legal instrument in question applies and the temporal range of proceedings to which such an instrument could be applied. For example, the temporal scope of application of the Brussels I (Recast) Regulation is determined, firstly, by the date as of which the courts of the Member States had to start applying the Brussels I (Recast) Regulation in order to determine international jurisdiction and decide upon the recognition and enforcement of foreign judgments (that is from 10 January 2015). In addition, the temporal scope of application of the Brussels I (Recast) Regulation is limited by the date, as of which civil proceedings had to be commenced in order for the provisions on international jurisdiction contained in the Brussels I (Recast) Regulation to be applicable to such proceedings and the date as of which a particular foreign judgment or another enforcement title had to be made in order for it to benefit from the rules on recognition and enforcement of foreign judgments which are contained in the Brussels I (Recast) Regulation.[65]

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[64] For a similar division on the scope of application of international treaties, see: O. Dörr and K. Schmalenbach (eds). Vienna Convention on the Law of Treaties A Commentary Berlin: Sprinter-Verlag 2012, p 477.

[65] See on this: Arts 66 and 81 of the Brussels I (Recast) Regulation. Note, that Art 66 of the Brussels I (Recast) Regulation retains limited application of the previous Brussels I Regulation. On the temporal scope of application of the previous Brussels I Regulation, see: U. Magnus. Introduction – U. Magnus and P. Mankowski (eds). Brussels I Regulation 2nd Revised Edition. Munich: sellier european law publishers 2012, p 31; P. Mankowski. Arts

The second criterion to be taken into account when evaluating the reach of a particular private international law instrument relates to the nature of the disputes, which the private international law instrument in question could possibly cover (application *ratione materiae*). Correspondingly, the material scope of a particular private international law instrument determines the type of disputes which can give rise to the application of the provisions contained in that instrument. For example, although arbitral disputes are excluded from the material scope of application of the Brussels I (Recast) Regulation,[66] such exception is not made to the Service *bis* Regulation[67] and a similar exception is also missing from the Evidence Regulation.[68] Therefore, although it is generally held that an arbitral tribunal itself cannot request assistance from the authorities of other states as the arbitral tribunals are generally not considered as requesting 'courts' under the various international instruments dealing with cross-border taking of evidence,[69] it can be assumed that, the Evidence and the Service *bis* Regulations could

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61–76. – U. Magnus and P. Mankowski (2012 I), pp 834–846, 882; T. Rauscher. Europäisches Zivilprozessrecht. – T. Rauscher and W. Krüger (eds). Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen. München: C. H. Beck. 5. Auflage, 2017, Rn 474–475; P Stone. EU Private International Law 2nd ed. Massachusetts: Edward Elgar Publishing 2010, pp 47–49; On the temporal scope of application of the new Brussels I (Recast) Regulation and the relationship between the two instruments, see: T. Rauscher. – T. Rauscher and W. Krüger (eds) (2017), Rn 474–475; P. Mankowski. Arts 80 and 81. – U. Magnus and P. Mankowski (eds). Brussels Ibis Regulation. Köln: sellier european law publishers 2016, pp 1111–1114.

[66] On the arbitration exception provided by Art 1(2)d of the Brussels I (Recast) Regulation, see further: J. Harris and E. Lein. A Neverending Story? Arbitration and Brussels I: The Recast. – E. Lein (ed). The Brussels I Review Proposal Uncovered. London: MPG Books Group Ltd 2012, pp 31–56; M. Illmer. Brussels I and Arbitration Revisited The European Commission's Proposal COM(2010) 748 – final. – Rabel Journal of Comparative and International Private Law 2011 Vol 75, No 3, pp 645–670; P. Rogerson. Art 1. – U. Magnus and P. Mankowski (eds). (2016), pp 76–83; Gottwald. Brüssels Ia-VO. Art 1. – T. Rauscher and W. Krüger (eds) (2017), Rn 24–36.

[67] Art 1(1) of the Service *bis* Regulation limits the scope of application of this regulation to civil and commercial matters without excluding arbitration. On the scope of application of the Service *bis* Regulation, see: E. Storskrubb. Civil Procedure and EU Law A Policy Area Uncovered. Oxford: Oxford University Press 2008, pp 95–101; T. Rauscher. EG-ZustellVO Art 25 and 26. – T. Rauscher and W. Krüger (eds) (2017), Rn 1.

[68] Art 1(a) of the Evidence Regulation limits the scope of application of this regulation to civil and commercial matters without excluding arbitration. On the scope of application of the Evidence Regulation, see further: E. Storskrubb (2008), pp 118–124; T. Rauscher. EG-BewVO Art 24. – T. Rauscher and W. Krüger (eds) (2017), Rn 1.

[69] P. W. Amram. Explanatory Report on the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Hague: HCCH Publications 1970, p 26. The arbitral tribunals are generally allowed to request assistance from the national courts of the place where the tribunal is located. These courts can in turn request assistance from the authorities of the other states. On this position, see for example: O. L. Knöfel. Judicial Assistance in the Taking of Evidence Abroad in Aid of Arbitration: a German Perspective. – Journal of Private International Law 2009, Vol 5, No 2, p 281, 284.

theoretically also apply in arbitration cases in national courts. More precisely, provided that the national law of the court making a request under the Evidence or the Service *bis* Regulations so allows, the courts of a Member State can ask assistance under these regulations from the relevant authorities located in the other Member States in order to obtain evidence to be used in the arbitral proceedings taking place in their jurisdictions or serve judicial or extrajudicial[70] documents related to arbitral proceedings. For example, this could be done by Estonian courts as Estonian courts are competent to assist arbitral tribunals in the taking of evidence or service of documents as provided by Estonian national law, (Article 740(1) of the Estonian Code of Civil Procedure[71]).

The third criterion, which has to be considered when determining the scope of application of a particular private international law instrument, relates to the parties to the dispute (application *ratione personae*). The personal scope of application of an instrument can limit the application of the provisions contained in such instrument depending on the nationality or residence of the parties involved. For example, the personal scope of application of a very well-known international instrument – the Vienna Convention on the International Sale of Goods (CISG)[72] has been limited by its Article 1(a), which states that CISG applies to contracts of sale of goods between the parties whose places of business are in different Contracting States to the CISG.[73]

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[70] According to Art 1(1) of the Service *bis* Regulation, the Service *bis* Regulation can be used in order to transmit judicial and extrajudicial documents from one Member State to another. The term 'extrajudicial documents' has not been defined in this context, but since the similar concept as used in the Hague 1965 Service Convention should be interpreted widely, the same should probably be the case with the term used in the regulation. For the meaning of 'extrajudicial documents' within the meaning of the Hague 1965 Service Convention, see: Permanent Bureau of the Hague Conference of Private International Law. Practical Handbook on the Operation of the Hague Service Convention. 3rd ed. Montreal: Wilson & Lafleurm Ltée 2006, paras 65–70. For the Hague 1965 Service Convention, see: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Hague Conference on Private International Law. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=17 (01.09.2018).

[71] Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*). – RT I 2005, 26, 197; RT I, 04.07.2017, 4.

[72] United Nations Convention on Contracts for the International Sale of Goods. United Nations Commission on International Trade Law. Available: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (01.09.2018).

[73] The list of Contracting Parties to the CISG can be found at the UNCITRAL web-page: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (01.09.2018). On the exact scope of application of the CISG, see further: I. Schwenzer (ed). Commentary on the UN Convention on the International Sale of Goods (CISG). Third edition. Oxford University Press 2010, pp 30–47; S. Eiselen and others. UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods. – The Journal of Law and Commerce. 2012, Vol 30, pp 4–16; F. Ferrari. The CISG's sphere of application: Articles 1–3 and 10. – F. Ferrari and others (eds). The Draft UNCITRAL Digest and Beyond: Cases Analysis and Unresolved Issues in the U.N. Sales Convention. Sellier European Law Publishers. 2004, pp 21–95.

Generally, private international law instruments (and civil law instruments in general) have universal personal scope of application. That is, they apply regardless of the nationalities, residences, places of business[74] and so on of the parties to particular proceedings or legal relatiosnhips. Even if a particular instrument refers, for example, to the nationality[75] or residence[76] of a party as connecting factors, it could theoretically still be applicable in all cases, regardless of the nationality or residence of the parties. For example, another very well-known international instrument, the CMR,[77] is applicable irrespective of the place of residence and the nationality of the parties as made clear by its Article 1(1), which simply provides that CMR as a whole is applicable in relation to a contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country irrespective of the place of residence and the nationality of the parties.[78] In contrast, Article 31(a) of the CMR uses the 'ordinary residence' of the defendant as a connecting factor in order to allocate jurisdiction to specific court, but this does not mean as if the application of the CMR as a whole would be limited to cases where the defendant has an 'ordinary residence' in a particular country.[79] Similarly, while the Maintenance Regulation uses the concepts of 'habitual residence',[80] 'domicile'[81] and 'nationality' of a person as connecting

[74] With the exception of the already mentioned CISG.

[75] The principle of nationality was the general connecting factor in Estonian private international law during the Soviet period. See further: K.Sein. See: K. Sein. Law Applicable to Persons Pursuant to Draft Private International Law Act. – Juridica International 2001, p 135. In contrast, principle of nationality was favoured during the period of independence between the two World Wars, see: U. Lender. Rahvusvahelise eraõiguse normidest Tsiviilseadustiku eelnõus. – Juriidiline Ajakiri Õigus 1936 No 3, pp 136, 138–140. By today, residence has to a large extent again replaced nationality as the main connecting factor in Estonian private international law, as evidenced by the provisions of the Private International Law Act (*Rahvusvahelise eraõiguse seadus*). – RT I 2002, 35, 217; RT I, 26.06.2017, 1.

[76] On the use of the principle of residence in Estonian private international law, see: P. Varul and others. Tsiviilseadustiku üldosa seadus Kommenteeritud väljaanne. Tallinn: Juura 2010, pp 65–67; M. Torga. Elukoht tsiviilseadustiku üldosa seaduses: tähendus rahvusvahelises tsiviilkohtumenetluses. – Juridica 2010 VII, pp 473–480.

[77] Convention on the Contract for the International Carriage of Goods by Road (CMR). United Nations. Treaty Series Vol 399, p 189.

[78] On this, see further: M. A. Clarke. International Carriage of Goods by Road: CMR. 6th ed. Routledge: Informa law. 2014, pp 21–22; H. Jesser-Huss. CMR Art 1. – K. Schmidt (ed). Münchener Kommentar zum Handelsgesetzbuch, München: C. H. Beck, 2014, Rn 1.

[79] For example, CMR Art 31(a) would still be applied by a court for terminating proceedings for the lack of jurisdiction as provided by this article even if the defendant does not have an 'ordinary residence' in the jurisdiction of the court applying this provision.

[80] With the exception of the Brussels I Regulations, the European private international law instruments and the Hague conventions generally use 'habitual residence' as the main personal connecting factor for determining jurisdiction and applicable law. On the meaning of this term, see: C. Ricci. Habitual Residence as a Ground of Jurisdiction in Matrimonial

factors, the said regulation has universal personal scope of application. This means that the Maintenance Regulation as a whole is applicable regardless of where the parties to a particular maintenance dispute are habitually resident or domiciled or which nationalities they hold, but the application of an individual rule contained in the Maintenance Regulation could depend on the parties having their habitual residence or a domicile in a particular Member State or on the parties holding a particular nationality. For example, while Estonian courts have to determine jurisdiction in maintenance matters under the Maintenance Regulation even in the cases where neither of the parties is habitually resident in Estonia, Estonian courts can derive jurisdiction from Article 3(a) of the Maintenance Regulation only if the defendant has his habitual residence in Estonia.

Lastly, the territorial criterion determines the territorial reach of a particular private international law instrument (application *ratione loci*). Primarily, such territorial criterion helps to identify the territories where a court has to be located in order for it to be bound by a particular private international law instrument. For example, the rules on the recognition and enforcement of foreign judgement contained in the Estonia-Russia legal assistance treaty can come into play only in Estonian and Russian courts as the Estonia-Russia legal assistance treaty binds only the Republic of Estonia and Russian Federation. In addition, a territorial scope of application of a particular private international law instrument could limit where certain connection factors have to be located in order for the instrument to be applicable. For example, Estonian courts would apply the rules on the recognition and enforcement of foreign judgements contained in the Estonia-Russia legal assistance treaty only in the cases where the judgement in question originates from the court of the 161

Disputes: from Brussels II-bis to Rome III. – A. Malatesta, S. Bariatti, F. Pocar (eds). The External Dimensions of EC Private International Law in Family and Succession Matters. Padova: CEDAM 2008, pp 207–219; M. Bogdan. The EC Treaty and the Use of Nationality and Habitual Residence as Connecting Factors in International Family Law. – J. Meeusen. International Family Law for the European Union. Antwerpen: Intersentia 2007, pp 303–317; R. Lamont. Habitual Residence and Brussels IIbis: Developing Concepts for European Private International Family Law. – Journal of Private International Law 2007, Vol 3, No 2, pp 261–281; P. Rogerson. Habitual residence: the new domicile? – The International and Comparative Law Quarterly 2000, Vol 49, No 1, pp 86–107; P. Stone. The concept of habitual residence in private international law. – Ango-American Law Review 2000, Vol 29, No 3, pp 342–367.

[81] 'Domicile' in this context refers to the concept of domicile as used in Ireland and the United Kingdom. See recital 18 of the Maintenance Regulation. On the concept of 'domicile' in English law, see: L. Collins (ed). Dicey, Morris and Collings on the Conflict of laws. 14th ed. London: Sweet & Maxwell. 2006, pp 122–174; D. McClean and K. Beevers. The Conflict of Laws. London: Thomson Reuters (Legal) Limited 2009, pp 29–51; C. M. V. Clarkson and J. Hill. The Conflict of Laws Fourth Edition. Oxford: Oxford University Press 2011, pp 305–327. For a slightly different version of 'domicile' in Scottish law, see: P. R. Beaumont and P. E. McEleavy. Private International Law A. E. Anton. 3rd edition. Thomson Reuters 2011, pp 154–175.

Russian Federation. In this case the court who has made the judgment must be located in the other Contracting Party to the Estonia-Russia legal assistance treaty.

Determining the possible overlap of temporal, material, personal and territorial scopes of application of the EU regulations on private international law and the legal assistance treaties concluded with third states helps to assess whether the incompatibilities within the meaning of Article 351 of the TFEU could arise if the legal assistance treaties concluded with third states are applied instead of the EU regulations on private international law. Based on this assumption, the following two subsections will firstly map the scope of application of the EU regulations on private international and then analyse the scope of application of the legal assistance treaties concluded with third states. In order to effectively carry out the comparison between the two type of instruments, that is, in order to make any assessment of the possible incompatibility within the meaning of Article 351 of the TFEU, the principles governing the scope of application of the EU regulations on private international law and the legal assistance treaties concluded with third states are first identified in the following two sub-chapters, and then the comparison with the scope of application of the legal assistance treaties is conducted in the second sub-chapter in order to determine whether there could be any overlap between the scopes of application of the two types of instruments.

1.2. The scope of application of the EU regulations on private international law

1.2.1. Temporal scope of application

Estonian courts had to start applying European legislation on 1 May 2004 when the Republic of Estonia joined the European Union. By that time, several of the EU regulations on private international law had already entered into force: the Brussels I Regulation (which was later replaced by the Brussels I (Recast) Regulation), the Brussels II Regulation (which was later repealed by the Brussels II *bis* Regulation and which, currently, is in the process of being once more revised), the Insolvency Regulation (which was later replaced by the Insolvency (Recast) Regulation), the Service Regulation (which was later repealed by the Service *bis* Regulation) and the Evidence Regulation.

By the time of finishing this dissertation (1 September 2018), all EU regulations on private international law[82] had entered into force in relation to the Republic of Estonia (and all of them were applicable),[83] with the exceptions of

[82] For the exact list of these regulations with their relevant dates of entry into force, see part (E) (*Description of the applied methodology*), (a) primary sources.

[83] The last regulations that became applicable in the Republic of Estonia were the European Account Preservation Order Regulation and the Insolvency (Recast) Regulation. According

the Matrimonial Property Regimes Regulation and the Property Consequences of the Registered Partnerships Regulation. The latter two were enacted in the European Union based on the enhanced cooperation[84] of which the Republic of Estonia did not take part in. In contrast, the Rome III Regulation, which was also enacted based on the enhanced cooperation[85] was at the time of finishing this dissertation (1 September 2018) applicable in the Republic of Estonia although the Republic of Estonia was not initially bound by that regulation, but had joined its regime at a later stage.[86] The reasons why the Republic of Estonia did not join the Rome III Regulation at the first place seem to have more to do with political or administrative oversight than with anything else, as the government had proposed to join the regulation already in 2011.[87]

Although the date of entry into force of a particular EU regulation on private international law answers the question as of which date the courts have to start looking into the text of such regulation, it is, however, only a starting point in order to determine the exact temporal scope of application of such instrument. This is so because different EU private international law regulations have

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to the European Account Preservation Order Regulation Art 54 the provisions (with the exception of Art 50) of this regulation were to be applied as from 18 January 2017. As provided by Art 92 of the Insolvency (Recast) Regulation, the majority of the provisions of this regulation were to be applied as of 26 June 2017.

[84] Under the enhanced cooperation procedure, the Member States are allowed to establish advanced integration or cooperation between themselves without the other Member States being involved subject to the conditions of Arts 326–334 of the TFEU.

[85] The Rome III was the first regulation adopted on the basis of enhanced cooperation. On this, see further: B. Campuzano Diàz. Uniform Conflict of Law Rules on Divorce and Legal Separation via Enhanced Cooperation. – B. Campuzano Diàz (ed). Latest developments in EU private international law. Cambridge: Intersentia 2011, pp 23–48; S. Peers. Divorce, European Style: the First Authorization of Enhanced Cooperation. – European Constitutional Law Review 2010 Vol 6 No 3, pp 339–358; K. Boele-Woelki. New Questions in International Divorce Law within the European Union: Enhanced Cooperation. – Merkourios 2009 Vol 26 Issue 70, pp 4–13.

[86] The Rome III Regulation became applicable in Estonian courts on 11 February 2018 (European Commission. Commission decision (EU) 2016/1366 of 10 August 2016 confirming the participation of Estonia in enhanced cooperation in the area of the law applicable to divorce and legal separation. C/2016/5137. – OJ L 216, 11.08.2016, pp 23–25). On the possible impact of the Rome III Regulation on the Estonian private international law, see: M. Torga. Party autonomy of the spouses under the Rome III Regulation in Estonia – can private international law change substantive law? – Nederlands Internationaal Privaatrecht. 2012 Vol 4, pp 547–554; M. Torga. Rooma III määrus. Analüüs perekonnaseaduse (PKS) muutmise ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu (Rooma III) juurde. 2015. Available:
http://eelnoud.valitsus.ee/main/mount/docList/4674422a-aee5-436d-b787-9cd8e8b71495#1WM0uM7T (01.09.2018).

[87] See the action plan of the Government of the Republic of Estonia: Vabariigi Valitsus, 'Eesti Euroopa Liidu poliitika 2011–2015 tegevuseesmärgid (eelnõu 25.11.2011)' 2011. Available: http://valitsus.ee/UserFiles/valitsus/et/riigikantselei/euroopa/eesti-eesmargid-euroopa-liidus/ELPOL_2011-2015_tegevuseesm%C3%A4rgid.pdf (01.09.2018).

different transitional provisions depending on the type of legal questions, which they are intended to cover. Such transational provisions could, firstly, provide a certain *vacatio legis* (a time period between the entry into force and the application of a particular regulation) and, secondly, could limit the application of a particular regulation with time periods during which certain events or connecting factors had to occur or be determined.

An example of the *vacatio legis* period is provided by Article 54 of the European Account Preservation Order Regulation which second sentence provides that this regulation (with the exception of its Article 50 which applied on an earlier stage) applies from 18 January 2017. Article 54 itself was enacted already on 15 of May 2014 leaving a period of almost three years between the regulation's publication and application. Similarly, while the Insolvency (Recast) Regulation had entered into force already in 2015, the majority of its provisions were only applied as of 26 June 2017, as provided by Art 92 of this regulation.

In addition to possible rules on *vacatio legis* (and somewhat complicating matters further), EU private international law regulations often contain elaborate transitional provisions depending on the type of questions, which such instruments are intended to cover. Such provisions often limit the application of a particular regulation with time periods during which certain events must have taken place or certain connecting factors to have been occurred. At this point, it is possible to distinguish four types of provisions which the regulations could contain and which determine the exact temporal scope of application of a particular regulation: (a) provisions on jurisdiction, (b) provisions on the applicable law, (c) provisions on the recognition and enforcement of foreign judgments, court settlements and authentic instruments and (d) provisions on international cooperation between the courts, Central Authorities and other authorities of different Member States.

a) Provisions on jurisdiction

The regulations which contain provisions on international jurisdiction and which, at the time of finishing this dissertation (1 September 2018), were applicable in Estonian courts are the Brussels I (Recast) Regulation, the Brussels II *bis* Regulation, the Maintenance Regulation, the Succession Regulation, the Insolvency (Recast) Regulation, the European Account Preservation Order Regulation and, in some respects also the Small Claims Procedure Regulation,[88] the European Order for Payment Procedure Regulation[89] and the European

[88] The European Small Claims Procedure Regulation does not itself lay down any grounds for jurisdiction. However, the court to which a European Small Claims Procedure claim form has been lodged has to determine whether it has jurisdiction as derived from Art 4(4) of the Small Claims Procedure Regulation in conjunction with the Form A attached to this regulation.

[89] Similarly, the European Order for Payment Procedure Regulation does not lay down any grounds for jurisdiction. However, the court to which an application for the European Order for Payment Procedure has been lodged has to determine whether it has jurisdiction as

Enforcement Order Regulation.[90] The provisions on jurisdiction were also contained in the Matrimonial Property Regimes and the Property Consequences of the Registered Partnerships Regulations, but at the time of finishing this dissertation these two regulations were not yet applicable in the Republic of Estonia.

The provisions on jurisdiction contained in the EU regulations on private international law are generally applied only to the proceedings instituted after the date of application of a particular regulation. If the date of application and the date of entry into force of a particular regulation coincide, such provisions are applied after that particular date. For example, under Article 84 of the Insolvency (Recast) Regulation, the provisions of the Insolvency Regulation (including Article 3: '*International Jurisdiction'*) apply only to insolvency proceedings, which are opened after the entry into force of the Insolvency Regulation (26 June 2017).[91]

Besides the limitation that the provisions on jurisdiction, as containded in a particular regulation, are applicable in the European Union only as of a certain date, certain additional temporal conditions relating to the events of or to the parties to a particular dispute might need to be complied with, in order for these provisions to be actually applicable. For example, as derived from Article 83(1) of the Succession Regulation, the provisions on jurisdiction contained in this regulation can only be applied to the succession of persons, if the deceased died on or after 17 August 2015. The relevant connecting factor (the last habitual residence of the deceased) in this context, must be determinable as falling into a limited time period (that is, on any day after 17 August 2015) in order for the provisions on jurisdiction as contained in the Succession Regulation to be applicable. Similarly, in order for a person to be able to sue another person in the European Union under the rules on special jurisdiction as contained in the Brussels I (Recast) Regulation, the defendant in question must have his domicile in the European Union within the meaning of Articles 62 and 63 at the time that the court is seized. In contrast, under Brussels I (Recast) Regulation Article 7(1)(b) a person having a domicile in the European Union can be sued under this provision in a Member State due to the place of performance of a sales contract to which he is a party being in that Member State, even if the sales contract is to be performed on a date after which the court is seized.

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derived from Art 8 in conjunction with Art 7(2)f of the European Order for Payment Procedure Regulation.

[90] Although the European Enforcement Order Regulation does not contain any 'traditional' rules on jurisdiction, Art 6(1) of the European Enforcement Order Regulation determines which courts are capable of issuing European Enforcement Orders. Thus, Art 6(1) of this regulation could technically be treated as a provision on jurisdiction.

[91] A similar regime was provided by Art 43 of the precedessor to the Insolvency (Recast) Regulation, the Insolvency Regulation. Further, on the temporal scope of application of the older regulation, see further: M. Virgós and F. Garcimartín. The European Insolvency Regulation: Law and Practice. The Hague: Kluwer Law International 2004, pp 30–32.

If the rules on jurisdiction contained in the EU regulations on private international law cannot be applied due to a particular dispute falling outside the temporal scope of application of such provisions, no possible conflicts with similar provisions contained in the Estonian legal assistance treaties could arise if the legal assistance treaties are applied instead of the regulations. For example, in succession disputes no conflicts could arise between the Succession Regulation and legal assistance treaties, if a particular legal assistance treaty is applied in order to determine jurisdiction in a dispute over the succession of a person who died before the date of application of the Succession Regulation (17 August 2015), as it is not the purpose of the Succession Regulation to deal with such disputes.[92]

b) Provisions on the applicable law

The applicable law provisions are contained in the following EU regulations on private international law: the Rome I Regulation, the Rome II Regulation, the Rome III Regulation, the Maintenance Regulation, the Succession Regulation and the Insolvency (Recast) Regulation. The Matrimonial Property Regimes and the Property Consequences of the Registered Partnerships Regulation also contain applicable law provisions, but at the time of finishing this dissertation (1 of September 2018) these two regulations had not yet become applicable in the Republic of Estonia.

As a general rule, the applicable law provisions contained in the EU regulations are applied only to the proceedings instituted and to the occurrences taking place after the date of application, or (in the absence of a separate date of application) the date of entry into force of a particular regulation. For example, the provisions contained in the Rome I Regulation apply only as from 17 December 2009 and only to contracts, which have been concluded as from[93] this date.[94] In order to determine applicable law to contracts, which have been

[92] On the temporal scope of application of the Succession Regulation, see further, for example: E. Põtter and M. Torga (2013), pp 517, 517–518; B. Reinhartz. Arts 83–84. U. Bergquist and others (eds). EU Regulation on Succession and Wills. Commentary. Köln: sellier european law publishers 2015, pp 305–308; H. Engelhardt. FamFG § 105. – H. Engelhardt and W. Sternal (eds). FamFG. Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit. Kommentar. 19. Auflage. München: C. H. Beck: 2017, Rn 16.

[93] Although Art 28 of the Rome I Regulation initially contained the word 'after', this was later replaced by the words 'as from'. See: Corrigendum to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 309, 24.11.2009, p 87.

[94] This comes from Art 28 of the Rome I Regulation. On the temporal scope of application of the Rome I Regulation, see further, for example: G.-P. Calliess and H. Hoffmann. Art 28. – G.-P. Calliess (ed). Rome Regulations Commentary on the European Rules of the Conflict of Laws. The Netherlands: Kluwer Law International 2011, p 352; R. Plender and M. Wilderspin. The European Private International Law of Obligations. London: Sweet & Maxwell 2009, p 100; R. Schultze. VO. (EG) 593/2008 Art 28. – F. Ferrari and others (eds).

concluded before 17 December 2009, other conflict-of-laws instruments[95] must therefore be used by Estonian courts and this is so regardless of the dispute itself having reached the Estonian court after this date. Similarly, the applicable law provisions as contained in the Rome II Regulation are applicable only as from and to the events giving rise to damage which occur (or occurred) after the date of the entry into force of this regulation[96], that is, as from 11 January 2009 as explained by the Court of Justice of the European Union.[97]

If the applicable law provisions contained in the legal assistance treaties are applied by Estonian courts instead of the corresponding provisions contained in the EU regulations in situations where a particular case reaches the court before the date of application of European applicable law provisions or deals with an occurrence falling outside the scope of such provisions, no incompatibility within the meaning of Article 351 of the TFEU could arise between the two types of instruments. For example, if Estonian courts would determine applicable law to contracts concluded before 17 December 2009 (the date of application of the Rome I Regulation) or to non-contractual obligations occurring before 11 January 2009 (the date of application of the Rome II Regulation) under the legal assistance treaties, such application would not cause any incompatibility within the meaning of Article 351 of the TFEU. Thus, it is generally only

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Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar. München: C. H. Beck, 2018, Rn 1–4.

[95] These instruments are the legal assistance treaties, the Rome Convention, the Private Interantional Law Act and the old General Part of the Civil Code Act 1994 (*Tsiviilseadustiku üldosa seadus*. – RT I 1994, 53, 889). Out of these, in practice, the most relevant is the Rome Convention, which determines the applicable law to contracts concluded after the entry into force of the Rome Convention, but before the entry into force of the Rome I Regulation. The Rome Convention entered into force in relation to the Republic of Estonia on 1 October 2006. Note, however, that the Republic of Estonia has never ratified the Rome Convention, but only a special convention enforcing the Rome Convention in the Republic of Estonia, see: Convention on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the Convention on the Law applicable to Contractual Obligations opened for signature in Rome on 19 June 1980, and to the First and Second Protocols on its interpretation by the Court of Justice of the European Communities. 6240/05 COR 2. Available: http://register.consilium.europa.eu/pdf/en/05/st06/st06240-co02.en05.pdf (01.09.2018). On the relationship between the Rome Convention and this special convention, see: Order of the Estonian Supreme Court of 9 December 2008 No 3-2-1-130-08.

[96] This comes from Art 31 of the Rome II Regulation. On the temporal scope of application of the Rome II Regulation, see further, for example: A. Halfmeier and N. Sonder. – G.-P. Calliess (ed) (2011), pp 651–654; R. Plender and M. Wilderspin (2009), pp 468–472; A. Dickinson. The Rome II Regulation: The Law Applicable to Non-Contractual Obligations. Oxford: Oxford University Press 2008, pp 285–290; A. Spickhoff. VO (EG) 864/2007 Art 32. – H. G. Bamberger and others (eds). BeckOK BGB. München: C. H. Beck 2018, Rn 1–8.

[97] *Deo Antoine Homawoo v GMF Assurances SA*. Case C-412/10. Judgment of the Court (Fourth Chamber) of 17 November 2011. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-412/10 (01.09.2018), para 37.

relevant to inquire whether a particular dispute has reached the court before or after the date of application of a relevant EU regulation and whether it deals with the occurrence taking place before or after the date referred to in a particular regulation in order to decide whether any possible conflicts could arise between the scopes of applications of the two types of instruments in practice.

The general rule that a particular occurrence must take place after the date of application of a particular EU regulation in order for the applicable law provisions contained in such instrument to be applied is, however, not without exceptions and the European applicable law provisions can sometimes have a somewhat retrospective effect. This should be kept in mind when assessing the possibility of any incompatibilities within the meaning of Article 351 of the TFEU arising if the treaty rules are applied instead of the provisions of the EU regulations. There are two examples of such a retrospective effect that the applicable law provisions contained in the EU private international law regulations can sometimes have.

The first example is presented by certain applicable law provisions that are contained in the Succession Regulation. The applicable law provisions contained in the Succession Regulation are, as a general rule, applicable only to the succession of persons who die as of 17 August 2015. However, Articles 24–28 of the Succession Regulation dealing with the applicable law to various dispositions and declarations apply even if the relevant declaration or disposition was made before the date of application of these provisions (17 August 2015) and even if the deceased has died before 17 August 2015, as derived from the transitional provisions contained in paras 2–4 of Article 83 of the Succession Regulation.

The second example of a somewhat retrospective effect of the European applicable law provisions is provided by the Maintenance Regulation. Namely, under Article 75(a) of the Maintenance Regulation and in conjunction with Article 5(1) of the declaration[98] made by the European Union when ratifying the Hague 2007 Protocol,[99] Article 15 (‘*Determination of the applicable law’*) of the Maintenance Regulation would be applicable in cases where the maintenance proceedings were initiated after the date of application of the Maintenance Regulation (i.e. 18 June 2011), but the maintenance claimed relates to a period prior to this date. Although the Maintenance Regulation and the Hague 2007 Protocol became applicable in the European Union only on 18 June 2011, these

[98] See: Art 4(1) of the 2009/941/EC: Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. – OJ L 331, 16.12.2009, pp 17–23.

[99] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. Hague Conference on Private International Law. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=133 (01.09.2018). The Hague 2007 Protocol entered into force in 1 August 2013. However, the European Union when signing the Hague 2007 Protocol, declared that it will apply the rules of the Hague 2007 Protocol provisionally from 18 June 2011 (the date of application of the Maintenance Regulation).

instruments have, therefore, a certain retrospective reach in cases which have reached the courts after this date, but where the maintenance is claimed for the period prior to this date. In this point, the European Union seems to have drifted in a bit different direction compared to the other Contracting Parties to the Hague 2007 Protocol.[100]

The mere fact that a particular provision contained in the EU instruments has a retrospective reach, does not necessarily cause an incompatibility within the meaning of Article 351 of the TFEU, if the legal assistance treaties are applied instead of the European provisions having retrospective effect. For example, if Estonian court determines applicable law in a maintenance matter which has reached the court before the date of application of the Maintenance Regulation (i.e. 18 June 2011) for maintenance owed for a period preceding this date, the retrospective effect of Article 15 of the Maintenance Regulation (in conjunction with the declaration made by the European Union when ratifying the Hague Protocol) would not cause an incompatibility within the meaning of Article 351 of the TFEU. This is so, because it was not the purpose of the EU legislator to have the Maintenance Regulation (and the Hague 2007 Protocol) to be applied in the cases reaching the courts before the date of application of the Maintenance Regulation (18 June 2011).[101] An incompatibility within the meaning of Article 351 of the TFEU could, however, arise in a dispute over the validity of a disposition made by a person who died before 17 August 2015 (the date of application of the provisions of the Succession Regulation), if the applicable law to such a disposition was determined under a legal assistance treaty and the court decides the matter after the date of application of the Succession Regulation (17 August 2015). In this case, the court should take into account the transitional rules contained in paras 2–4 of Article 83 of the Succession Regulation and apply the applicable law provisions on dispositions (Articles 24–28 of the Succession Regulation) retrospectively regardless of the date when the deceased who made such disposition died.

[100] As provided by Art 22 of the Protocol, the Protocol does not apply to maintenance that is claimed in a Contracting Party relating to a period prior to its entry into force in that state. This general rule is subject to the exception provided by the declaration that the European Union made while signing the Protocol. One can only assume why the European Union decided to apply the Protocol to the maintenance claimed for the period prior to the entry into force of the Protocol. Probably, the reasons for such a declaration had something to do with the wish to have the Protocol applied in a maximum number of cases in order to strenghten the mutual trust in maintenance judgments as these judgments move around within the European Union without any *exequatur* needed, as provided by the Maintenance Regulation, which became applicable in the European Union at the same time as the Hague 2007 Protocol.

[101] As is highlighted by the fact that the maintenance decisions made in proceeding prior to that date do not enjoy the abolition of *exequatur*, as provided by the the transitional rule contained in Art 75(1) of the Maintenance Regulation.

c) Provisions on the recognition and enforcement of foreign judgments, court settlements and authentic instruments

The EU regulations on private international law, which contain provisions on the recognition and enforcement of foreign judgments,[102] court settlements[103] and authentic instruments[104] are the Brussels I Regulation,[105] the Brussels I (Recast) Regulation, the Brussels II *bis* Regulation, the Maintenance Regulation, the Succession Regulation, the European Enforcement Order Regulation, the European Order for Payment Procedure Regulation, the European Small Claims Procedure Regulation, the Mutual Recognition of Protection Measures Regulation, the European Account Preservation Order Regulation, the Insolvency Regulation[106] and the Insolvency (Recast) Regulation. In addition, such

[102] The term 'judgment' as used in various EU regulations refers to various court decisions regardless of their exact titles. This term covers, however, only those decisions which, before the recognition and enforcement, have been, or have been capable of being, the subject in the state of origin and under various procedures, of an inquiry in adversary (i.e. *inter partes*) proceedings. This was made clear by the Court of Justice of the European Union in a case decided under the old Brussels Convention. See: *Bernard Denilauler v SNC Couchet Frères*. Case 125/79. Judgment of the Court of 21 May 1980. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-125/79 (01.09.2018).

[103] The EU regulations generally distinguish between 'judgments' and 'court settlements'. A court settlement is considered to be something essentially contractual in that its terms depend first and foremost of the parties' intention as opposed to a 'judgment' which is a judicial decision given by a court or tribunal of a Member State deciding on its own authority on the issue between the parties. See: *Solo Kleinmotoren GmbH v Emilio Boch*. Case C-414/92. Judgment of the Court (Sixth Chamber) of 02 June 1994. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-414/92 (01.09.2018).

[104] Simply put, authentic instruments are enforcement titles emanating from other authorities besides courts. More precisely, and as stressed by the Court of Justice of the European Union, the autonomous concept of 'authentic instrument' refers only to the documents which authenticity has been established by a public authority or another authority empowered for that purpose. See: *Unibank A/S v Flemming G. Christensen*. Case C-260/97. Judgment of the Court (Fifth Chamber) of 17 June 1999. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61997CJ0260 (01.09.2018). This definition was later partially taken over in various EU regulations on private international law, see for example: Art 4(3) of the European Enforcement Order Regulation, which states that an 'authentic instrument' is a document which has been formally drawn up or registered as an authentic instrument, and the authenticity of which relates to the signature and the content of the instrument and has been established by a public authority or other authority empowered for that purpose by the Member State in which it originates or an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them.

[105] The Brussels I Regulation has been replaced by the Brussels I (Recast) Regulation, but as provided by Art 66(2) of the Brussels I (Recast) Regulation the Brussels I Regulation will continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before the date of application of the Brussels I (Recast) Regulation (10 January 2015).

[106] Similarly to the Brussels I Regulation, the Insolvency Regulation still applies in the European Union to certain insolvency judgments, regardless of it having a currently applicable

provisions are contained in the Matrimonial Property Regimes and the Property Consequences of the Registered Partnerships Regulations, which at the time of finishing this dissertation (1 of September 2018), were not yet applicable in the Republic of Estonia.

Although the European private international law regulations deal only with the recognition and enforcement of European enforcement titles and the corresponding rules contained in the legal assistance treaties deal with the recognition and enforcement of the titles emanating from the Contractual Parties to the legal assistance treaties (that is, from the Russian Federation or the Ukraine), the provisions on the recognition and enforcement as contained in the two types of instruments could theoretically still give rise to an incompatibility within the meaning of Article 351 of the TFEU, if they are applied in conjunction with the other provisions contained in these instruments, such as the provisions on *lis pendens*. This is the reason why it is necessary to also focus a bit on the temporal scope of application of the provisions on the recognition and enforcement as contained in these two types of instruments.

The temporal reach of the provisions on the recognition and enforcement of judgments as contained in the EU regulations usually only extends to the judgments made or the court settlements reached or the authentic instruments drawn up after the entry into force of a particular regulation and only on the condition that the recognition or enforcement proceedings of such titles were initiated after the entry into force of a particular regulation. However, there are two general exceptions to this rule.[107]

Firstly, it is possible that the provisions on the recognition and enforcement of the enforcement titles as contained in the EU regulations have retrospective effect if a particular judgment was made before the entry into force of a particular regulation, but the proceedings for the recognition or enforcement of such a judgment were initiated after the entry into force of the relevant regulation. Such effect is always subject to certain safeguards, which are intended to secure that the determination of jurisdiction by the original court accorded to the provisions on jurisdiction found in the regulation in question. For example, although as a general rule, the provisions on the recognition and enforcement of judgments as contained in the Brussels I Regulation apply only to the judgments which recognition and enforcement proceedings were instituted after the entry into force of the Brussels I Regulation, it is exceptionally possible to recognize

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successor (the Insolvency (Recast) Regulation). This comes from Art 84(2) of the Insolvency (Recast) Regulation which provides that the old Insolvency Regulation continues to apply to insolvency proceedings which fall within the scope of that regulation and which have been opened before 26 June 2017 (the date of application of the new Insolvency (Recast) Regulation).

[107] For a specific exception relating to maintenance decisions, see Art 75(2) of the Maintenance Regulation. Under this provision, the provisions of the Maintenance Regulation on the recognition and enforcement of judgments have an exceptionally broad retrospective effect extending to all the decisions given in the Member States before the date of application of the Maintenance Regulation.

or enforce judgments of which recognition or enforcement proceedings were instituted before the Brussels I Regulation entered into force, subject to the conditions of Article 66(2) of the Brussels I Regulation being fulfilled. That exception encompasses the situations where the proceedings in the Member State of origin were instituted after the entry into force of the Brussels Convention[108] or the old Lugano 1988 Convention,[109] both in the Member State of origin and in the Member State addressed, or if jurisdiction was founded upon the rules which accorded with those provided for in the Brussels I Regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. To put this rule in a bit more graspable form, one could imagine proceedings which commenced in a Latvian court before the entry into force of the Brussels I Regulation. If the Latvian court, while establishing jurisdiction, relied on the rules contained in the Estonia-Latvia-Lithuania legal assistance treaty and awarded a judgment after the entry into force of the Brussels I Regulation, such judgment could be recognised and enforced in the Republic of Estonia under the Brussels I Regulation.

The second type of cases where the provisions on the recognition and enforcement contained in a particular EU regulation can have retrospective effect deals with cases where both, the date when the proceedings for the recognition and enforcement of a judgment were initiated and the date when the judgment was made, took place before a particular regulation entered into force.[110] For

[108] Note that the Republic of Estonia never became a party to the old Brussels Convention due to it being replaced by the Brussels I Regulation before the 2004 enlargement. The old Brussels Convention contained, to a large extent, relatively similar jurisdictional grounds as do the Brussels I Regulation and the Brussels I (Recast) Regulation. On the reasons, why the Brussels Convention was replaced with the Brussels I Regulation and the relationship between the two instruments, see further: J. Fawcett, J. M. Carruthers and P. North. (eds) (2008), pp 204–209.

[109] The Republic of Estonia never became a member to the old Lugano 1988 Convention. At the time of joining the European Union (1 May 2004) the Lugano 2007 Convention was already being prepared and it was thought it was simpler to join only the new convention. The Lugano 2007 Convention became applicable in the Estonian courts as of 1 January 2010 when the Lugano 2007 Convention entered into force in relation to the European Union. For the old Lugano 1988 Convention, see: Convention on jurisdiction and the enforcement of judgments in civil and commercial matters Done at Lugano on 16 September 1988. – OJ L 319, 25.11.1988, pp 9–48. For the Lugano 2007 Convention, see: Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. – OJ L 147, 10.06.2009, pp 5–43.

[110] See, however, in contrast, the provisions of the Maintenance Regulation, which seem to have retrospective effect provided that the recognition and enforcement of decisions is requested after the date of application of the Maintenance Regulation or (if the decision was given after the date of application of the Maintenance Regulation following proceedings begun before that date) the decisions falls with the temporal scope of application of the Brussels I Regulation for the purposes of recognition and enforcement. On this, see: Art 75 of the Maintenance Regulation.

example, under Article 64(3) of the Brussels II *bis* Regulation, the judgments given before the date of application of the Brussels II *bis* Regulation in proceedings instituted after the entry into force of the Brussels II Regulation are recognised and enforced in accordance with the provisions of the Brussels II *bis* Regulation provided that such judgments relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses or the occasion of these matrimonial proceedings. This solution is not surprising, as the Brussels II *bis* Regulation and the Brussels II Regulation contain relatively similar rules on jurisdiction.

As the two types of exceptions demonstrate, the provisions on the recognition and enforcement of judgments as contained in the EU regulations on private international law can, in limited cases, have retrospective effect provided that the Member State of origin based its jurisdiction on similar provisions as the provisions found in the EU regulation on private international law under which the recognition or enforcement of the judgement in question is sought. This should be kept in mind when determining whether any incompatibilities within the meaning of Article 351 of the TFEU could arise in practice, if the treaty rules are applied instead of the European rules or *vice versa*. If a particular enforcement title falls within the temproral scope of the relevant treaty rules and also within the reach of the provisions contained in the European instrument, an incompatibility within the meaning of Article 351 of the TFEU could theoretically occur, provided, of course, that the other criteria for determining the scope of different instruments coincide.

d) Provisions on the international cooperation between the courts, Central Authorities and other authorities

The EU regulations which, at the time of finishing this dissertation (1 September 2018), were applicable in Estonian courts and which contained provisions on international cooperation between the courts, Central Authorities[111] and other authorities, were the Service *bis* Regulation, the Evidence Regulation, the Brussels I (Recast) Regulation, the Brussels II *bis* Regulation, the Maintenance Regulation, the Insolvency (Recast) Regulation and the European Account Preservation Order Regulation.

[111] Central Authorities are the designated bodies referred to by various EU regulations. Central Authorities are usually entrusted with the tasks of supplying information to other state authorities and forwarding requests between the other authorities of different Member States. See, for example: Art 3 of the Evidence Regulation, Art 3 of the Service *bis* Regulation, Art 49 of the Maintenance Regulation. Similar system of Central Authorities is set up by the Hague instruments, see for example Art 6 of one of the most famous Hague conventions, the Hague 1980 Abduction Convention: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Hague Conference on Private International Law. Available: https://www.hcch.net/en/instruments/conventions/full-text/?cid=24 (01.09.2018).

While the main aim of the Service *bis* Regulation and the Evidence Regulation is to deal with the cooperation between the authorities of different Member States, all the other regulations deal with the cooperation between such authorities only as a side question. For example, while the majority of the rules contained in the Brussels I (Recast) Regulation are concerned with the determination of international jurisdiction or with the recognition and enforcement of foreign judgements, some of its provisions, exceptionally deal with the cooperation between the courts of different Member States. Namely, Article 29(2) of the Brussels I (Recast) Regulation provides for the obligation of the courts of different Member States to exchange information on the dates when they were seised. The purpose of such a rule is probably to avoid confusion, as to which court was seised first, which might arise in the case of any parallel proceedings.[112] Similarly, while the, now replaced, Insolvency Regulation was mostly concerned with the rules on jurisdiction and recognition and enforcement, a more narrow purpose of Article 31 of this regulation was to coordinate main and secondary insolvency proceedings in different Member States by obliging the liquidators of different Member States to communicate information to each other and to cooperate with each other. Such duties have further been specified by the succeeding Insolvency (Recast) Regulation which additionally provides for the duty of cooperation for the courts of different Member States in order to 'improve the coordination of main and secondary insolvency proceedings'.[113]

Similarly, to the rules on the recognition and enforcement, the rules on cooperation contained in the EU instruments deal (from the persective of Estonian courts) with the cooperation with the authorities of the other EU Member States. In contrast, the corresponding provisions contained in the legal assistance treaties deal (again from the perspective of Estonian courts) with the cooperation with the authorities of the other Contracting Parties to these treaties (the Russian Federation and the Ukraine). Naturally, this raises a suspicion that such provisions in the two types of instruments could never conflict in practice. However, as was the case with the provisions on the recognition and enforcement (and in the interest of being thorough), it is presumed that the provisions on cooperation could theoretically conflict if they are applied in conjunction with the provisions dealing with other matters. Hence, the temporal scope of application of the provisions on cooperation as contained in the EU regulations is shortly mapped in the following paragraph.

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[112] According to the European Commission, Art 29(2) was added to the Brussels I (Recast) Regulation to 'improve coordination' between the courts of different Member States. See: Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast). – COM(2010) 748 final, 2010/0383 (COD), p 8.

[113] European Commission. Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings. – COM(2012) 744 final, 2012/0360 (COD), p 8.

As a general rule, the provisions on cooperation as contained in the EU regulations on private international law can only be applied after the date of application of a particular regulation, irrespective of the time when the proceedings in front of the court were initiated. For example, under Article 75(3) of the Maintenance Regulation the provisions contained in the Maintenance Regulation, which deal with the cooperation between Central Authorities, apply to the requests and applications received by the Central Authority as from the date of application of the Maintenance Regulation (18 June 2011). Similarly, while the Evidence Regulation became applicable in the Republic of Estonia only after 1 May 2004 when the Republic of Estonia joined the European Union, the provisions of the Evidence Regulation can theoretically[114] be applied also in proceedings which were initiated before the Estonian accession with the EU. Such, some-what retroactive application of the provisions on cooperation is, however, not possible in the case of the regulations, which are not specifically aimed at improving cooperation between the authorities of different Member States. For example, Article 29(2) of the Brussels I (Recast) Regulation applies only to the legal proceedings instituted after the date of application of this regulation (10 January 2015) as is made clear by Article 66(1) of the said regulation.

In conclusion, the temporal scope of application of a particular provision contained in a EU regulation on private international law depends on the nature and purpose of the provision in question. While the provisions on jurisdiction and applicable law are generally applied only in proceedings initiated after the date of application of particular proceedings and can be further subject to additional conditions such as a contract being concluded or a testator having died after the date of application of a particular regulation, the provisions on the recognition and enforcement of judgements, court settlements and authentic instruments and the provisions on the cooperation between the authorities of different Member States are more likely to have a retrospective effect. This has to be kept in mind when analysing whether the incompatibilities between the legal assistance treaties and the EU regulations on private international law within the meaning of Article 351 of the TFEU can arise in practice, if the legal assistance treaties are applied by Estonian courts instead of the otherwise applicable EU regulations on private international law.

1.2.2. Material scope of application

The incompatibilities within the meaning of Article 351 of the TFEU can arise in practice only if the substantive scopes of application of the EU regulations on private international law, on one hand, and the legal assistance treaties concluded with third states, on the other, overlap. Hence, it is necessary to also determine the material scope of application of the provisions contained in the two types of

[114] 'Theoretically', because hopefully no such proceedings were pending in Estonian courts at the time when this dissertation was finished (1 September 2018).

instruments. Luckily, and in contrast to the legal assistance treaties concluded with third states, the EU regulations on private international law generally contain separate provisions on their material scope of application, which makes it relatively easy to determine which type of cases these instruments are intended to cover.

All the relevant EU regulations on private international law apply only in civil and commercial matters. This is usually explicitly explained in the beginning of the regulations.[115] The lack of reference to civil and commercial matters in the beginning of some of the regulations (such as, for example, in the Succession Regulation) does not mean as if these instruments apply in other matters, such as in public or administrative matters. A general reference to 'civil and commercial matters' has been omitted from the beginning of some regulations, since these regulations only deal with specific type of civil matters, such as succession, divorce or maintenance.

The term 'civil and commercial matters' is an autonomous term often used in the EU instruments and should be considered as independent from the national laws of the Member States. As repeatedly stressed by the Court of Justice of the European Union, the term 'civil and commercial matters' must be interpreted autonomously by reference to the objectives and scheme of a particular regulation in question and to the general principles, which stem from the corpus of national legal systems of the Member States.[116]

The exact meaning of the term 'civil and commercial matters' has been extensively dealt with in the case law of the Court of Justice[117] and does not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).[118] In order to illustrate the measure of precision with which

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[115] See for example Art 1(1) of the Brussels I (Recast) Regulation, Art 1(1) of the Rome I Regulation, Art 1(1) of the Rome II Regulation, Art 1(1) of the Service *bis* Regulation, Art 1(1) of the Evidence Regulation. See in contrast: the Brussels II bis Regulation, the Succession Regulation, the Maintenance Regulation wehere there is no such reference.

[116] See for example: *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*. Case 29–76. Judgment of the Court of 14 October 1976. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-29/76 (01.09.2018), para 3; *Land Oberösterreich v ČEZ as.* Case C-343/04. Judgment of the Court (First Chamber) of 18 May 2006. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=c-343/04&td=ALL (01.09.2018), para 22.

[117] For the most up-to-date and comprehensive overview and analysis of such case law in English, see: P. Rogerson. Art 1, – U. Magnus and P. Mankowski (eds). (2016) pp 63–70. See further: J. Basedow. Civil and Commercial Matters: A New Key Concept of Community Law. – Rett og tolerance: festskrift til Helge Johan Thue, 70 år. Oslo: Gyldendal Akademisk 2007, pp 151–164.

[118] The latter exception has been explicitly included in the newer EU regulations on private international law (see for example: Art 1(1) of the Rome II Regulation, Art 1(1) of the Service *bis* Regulation, Art 1(1) of the Brussels I (Recast) Regulation. See in contrast: Art 1(1) of the Evidence Regulation, Art 1(1) of the Brussels I Regulation) which do not explicitly mention such exception. This exception should, however, be considered to be

the Court has tackled the concept of 'civil and commercial matters' two (out of many) cases will be cited shortly. In the first of these, the Court of Justice of the European Union, found that the concept of 'civil and commercial matters' would not include an action brought by an agent responsible for administering public waterways against a person liable in order to recover the costs related to the removal of a wreck in the exercise of the public authority of the agent.[119] In another,[120] the concept of 'civil and commercial matters' was found to cover a claim by which a Member State seeks to enforce against a person governed by private law a private-law guarantee contract which was concluded in order to enable a third person to supply a guarantee required and defined by that Member State, in so far as the legal relationship between the creditor and the guarantor, under the guarantee contract, does not entail the exercise by the Member State of powers going beyond those existing under the rules applicable to relations between private individuals. As can be seen by these two examples, the meaning for the term 'civil and commercial' matters is given case-by-case in rather particular circumstance. In general, however, the term could be seen as referring simply to private law matters.

Although all the EU regulations on private international law apply in civil and commercial matters, they do not necessarily apply in all civil and commercial matters. In this point, it is worth distinguishing between the two types of civil and commercial matters, which could be excluded from the material scope of application of a particular EU regulation on private international law.

Firstly, since the EU regulations on private international law are intended not to overlap with each other, a particular regulation could exclude those civil and commercial matters, which are already covered (or are intended to be covered) by another Community instrument. For example, the Brussels I (Recast) Regulation Article 1(2)(f) provides that the Brussels I (Recast) Regulation does not apply to wills and succession. The reason for such exclusion was the fact that at the time of the making the Brussels I (Recast Regulation) the Succession Regulation was already applicable in the European Union, having applied already as of 17 August 2015.[121] Similarly, according to Article 1(2)(b) of the Brussels I (Recast) Regulation the said regulation is not applied to bankruptcy,

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relevant in the context of the previous regulations as well as *acta iure imperii* are not civil and commercial matters, as explained by the Court of Justice of the European in *Irini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias*. Case C-292/05. Judgment of the Court (Second Chamber) of 15 February 2007. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-292/05 (01.09.2018).

[119] *Netherlands State v Reinhold Rüffer*. Case 814/79. Judgment of the Court of 16 December 1980. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-814/79 (01.09.2018).

[120] *Préservatrice foncière TIARD SA v Staat der Nederlanden*. Case C-266/01. Judgment of the Court (Fifth Chamber) of 15 May 2003. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-266/01 (01.09.2018).

[121] With the exception of certain provisions which were applied even earlier. See: Art 84 of the Succession Regulation.

proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, as the Insolvency (Recast) Regulation already covers these matters.[122] In addition, neither the Brussels I Regulation, nor the Brussels I (Recast) Regulation or the Maintenance Regulation is applicable to matrimonial property regimes,[123] since the Matrimonial Property Regulation is intended to cover these matters in the future.[124] In addition, neither the Brussels I Regulation, the Brussels I (Recast) Regulation or the Maintenance Regulation covers divorce, as this is a matter over the status of a person, which falls under the scope of application of the Brussels II *bis* Regulation and the Rome III Regulation.[125] As demonstrated by numerous case law of the Court of Justice of the European Union, the exact boundaries between the scopes of application of various regulations are not entirely clear, however, the regulations *in corpore* should cover all civil and commercial matters, except the ones which the European legislator has wished not to deal with at all.

Not surprisingly, the second type of civil and commercial matters, which are often expressly excluded from the substantive scope of application of the EU

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[122] On the insolvency exception to the scope of application of the Brussels I instruments, see, for example: *F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"*. Case C-213/10. Judgment of the Court (First Chamber) of 10 April 2012. Available: http://curia.europa.eu/juris/liste.jsf?num=C-213/10&language=EN (01.09.2018); *Henri Gourdain v Franz Nadler*. Case 133/78. Judgment of the Court of 22 February 1979. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0133 (01.09.2018).

[123] As provided by the European legislator, the notion of 'matrimonial property regime' in this context should be given an autonomous interpretation and should embrace considerations of both spouse's daily management of their property and the liquidation of the property regime as a result of the couple's separation or the death of one of the partners. See: Proposal on the Matrimonial Property Regimes, p 6. For example, according to the case law of the Court of Justice of the European Union, an application for provisional measures to secure the delivery up of a document in order to prevent it from being used as evidence in an action concerning a husband's management of his wife's property, would not fall within the scope of application of the old Brussels Convention (and, consequently, its predecessors – the Brussels I Regulation and the Brussels I (Recast) Regulation), if such management is closely connected with the proprietary relationship resulting directly from the marriage bond. See: *C C.H.W. v G.J.H.* Case 25/81. Judgment of the Court of 31 March 1982. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61981CJ0025 (01.09.2018). On the distinction between the disputes relating to the assets of the spouses which have no connection to the marriage and the disputes relating to the matrimonial property, see further: *Jacques de Cavel v Louise de Cavel.* Case 143/78. Judgment of the Court of 27 March 1979. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0143 (01.09.2018).

[124] At the time of finishing this dissertation (1 September 2018) the Matrimonial Property Regimes Regulation was not yet applicable in the European Union. According to Art 79 of the Matrimonial Proprety Regimes Regulation it was to be applied as of 29 January 2019.

[125] On the distinction between divorce and maintenance decisions see: *Louise de Cavel vs Jacques de Cavel*. Case 120/79. Judgment of the Court (Third Chamber) of 6 March 1980. Available: http://curia.europa.eu/juris/liste.jsf?language=en,T,F&num=120/79 (01.09.2018).

regulations, are the matters, which the European legislator has chosen not to regulate at all. Some of these matters will probably not be regulated any time in the near future due to the lack of any political will to deal with such matters on the European level. For example, it is hard to see the European Union agreeing on any common rules applicable to marriage as the notions of 'marriage' differ considerably between the Member States, with some Member State allowing same-sex marriages and some being very much more conservative. Not surprisingly, even in the context of the Brussels II *bis* Regulation, which deals with the jurisdiction in divorce matters and has been applied in the European Union for over a decade, is there still an ongoing dispute in the legal literature whether the term 'marriage' within the meaning of this regulation should cover same-sex marriages or not.[126] Similarly, no developments on the harmonisation of conflict of laws of rules on the law applicable to personal names has taken place. Although the Court of Justice of the European Union has taken steps to remedy this situation by requiring the Member States to recognise personal names given in the other Member States [127] and although the law applicable to names has been included in the codes of private international law of several Member States,[128] the applicable law to surnames is probably a topic which has not gained the attention of the European legislator. The European legislator is also yet to introduce any rules on the law applicable to property rights or to the legal persons (companies). The European Commission has, however, called for a

[126] For a general overview on this question see: M.N. Shúilleabháin. Cross-Border Divorce Law Brussels II bis. Oxford: Oxford University Press 2010, pp 105–119. See also: W. Pintens. Arts 1–2. – U. Magnus and P. Mankowski (eds). Brussels IIbis Regulation. Munich: sellier european law publishers 2012, pp 57–59; W. Pintens. Marriage and Partnership in the Brussels IIa Regulation. – J. Erauw, V. Tomljenović and P. Volken (eds). Liber Memorialis Petar Šarčević Universalism, Tradition and the Individual. Munich: Sellier European Law Publishers 2006, pp 335, 336–337.

[127] *Stefan Grunkin and Dorothee Regina Paul*. Case C-353/06. Judgment of the Court (Grand Chamber) of 14 October 2008. Available: http://curia.europa.eu/juris/liste.jsf?num=C-353/06 (01.09.2018); *Carlos Garcia Avello v Belgian State.* Case C-148/02. Judgment of the Court of 2 October 2003. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-148/02 (01.09.2018). See in contrast: EKo 30.03.1993, C-168/91, *Christos Konstantinidis vs. Stadt Altensteig – Standesamt ja Landratsamt Calw – Ordnungsamt*. – EKL 1993, lk I–1191.

[128] See, for example: Art 10 of the German Introductory Act to the Civil Code: Einführungsgesetz zum Bürgerlichen Gesetzbuche. Available: http://www.gesetze-im-internet.de/bgbeg/ (01.09.2018). For the newest development in Europe, see Art 29(3) of the new Czech Private International Law Code: Zákon č. 91/2012 Sb., o mezinárodním právu soukromém. Available (in English): http://www.brizatrubac.cz/files/scany-clanku/Translation-Czech-PIL.pdf (01.09.2018). For a general overview on the European rules on the law applicable to personal names, see: M. Lehmann. What's in a Name? Grunkin-Paul and beyond. – Yearbook of Private International Law 2008, 10, pp 135, 150–155. For a critical overview on the problem in Estonian law, see: M. Torga. Isikunimede andmine ja kohaldamine – peidetud probleem Eesti rahvusvahelises eraõiguses. Juridica 2014, 7, pp 520–527.

study to be conducted on the Member States' conflict of laws rules on the law applicable to companies, so the topic might arise one point in the future.[129]

Some civil and commercial matters have been excluded from the scope of all EU regulations also for the reason of such matters already being regulated by other international instruments and therefore not requiring the intervention by the European legislator. For example, questions relating to the legal capacity of natural persons have, to a large extent,[130] been excluded from the scope of application of the EU regulations, which deal with jurisdiction, applicable law or the recognition and enforcement of judgments, court settlements and authentic instruments,[131] since the Hague 2000 Protection of Adults Convention[132] already deals with such matters to a large extent. Similarly, the law applicable to parentage or surrogacy has not served any attention by the Community legislator and it can be presumed that, since the Hague Conference has initiated a parentage/ surrogacy project dealing with private international issues surrounding the status of children,[133] the Community legislator might not be inclined to fill this gap, even though the developments in the Hague have sometimes influenced the developments in Brussels and *vice versa*.[134]

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[129] European Commission. Belgium-Brussels: Study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter. Contract notice 2014/S 149–267126. Available:
http://ec.europa.eu/justice/newsroom/contracts/2014_267126_en.htm (01.09.2018).

[130] See in contrast: Art 1(2)b of the Succession Regulation.

[131] See: Art 1(2)(a) of the Brussels (Recast) Regulation, Art 1(2)(a) of the Brussels I Regulation, Art 1(2)(a) of the Rome I Regulation, Art 1(2)(a) of the Rome III Regulation, Art 1(2)(a) of the Succession Regulation. No such express exception has been added to the Rome II Regulation or the Maintenance Regulation which does not, of course, mean as if these regulations could be used in order to determine jurisdiction or the applicable law in a dispute over the legal capacity of a natural person.

[132] Convention of 13 January 2000 on the International Protection of Adults. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=71 (01.09.2018).

[133] Permanent Bureau. Preliminary Document No 11 of March 2011, "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements". Available: http://www.hcch.net/upload/wop/genaff2011pd11e.pdf (01.09.2018).

[134] A good example of this has been the creation of the rules on maintenance in Brussels and in the Hague. On the interaction between the Hague 2007 Maintenance instruments and the Maintenance Regulation, see: P. Beaumont. International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity. RabelsZ Bd. 2009, 73, pp 509–546. On the interaction between the Hague 2005 Choice of Court Agreements Convention and the old Brussels Convention, see: P. Beaumont. Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status. Journal of Private International Law. 2009, Vol 5 No 1, pp 125, 127–134. For the Hague 2005 Choice of Court Agreements Convention, see: Convention of 30 June 2005 on Choice of Court Agreements. Available:
http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (01.09.2018).

For the purposes of solving the main research question of the dissertation the second type of exclusions from the scopes of application of the EU regulations is more important, since, if a certain type of dispute is excluded from the material scope of application of all (or most)[135] EU private international law regulations, the incompatibilities within the meaning of Article 351 of the TFEU would not arise, if the legal assistance treaties concluded with third states are applied in such disputes. For example, if a broad legal assistance treaty concluded with third state is applied in order to determine jurisdiction or applicable law in a dispute over a parentage – the question, which is yet to be given any attention by the Community legislator – no incompatibilities within the meaning of Article 351 of the TFEU between the two types of instruments could arise. Similarly, no conflicts between the two types of instruments could occur, for example, if the legal assistance treaties are used to determine the applicable law to companies or to the validity of marriage as these matters have not served any attention from the European legislator.

1.2.3. Personal scope of application

Although all the EU regulations on private international law contain rather precise provisions on their material scope of application, these regulations generally lack any provisions as to their personal scope of application. Thus, as a general rule, the scope of application of a particular EU regulation on private international law is not limited by any criteria relating to the parties to a particular dispute.[136] This general rule is, however, not without exceptions as the European Order for Payment Procedure Regulation and the European Small Claims Procedure Regulation only apply in the cases where the domicile or habitual residence of one of the parties at the time of the initiation of the relevant proceedings is in a Member State other than the Member State of the court seised.[137]

Even though the personal scope of application of the EU regulations on private international law is generally not limited, the application of the individual provisions contained in particular regulation can depend on certain personal criteria being filled in a particular case. Such criteria should be taken into account in

[135] The EU regulations dealing only with international cooperation (the Evidence Regulation and the Service *bis* Regulation) do not exclude any specific civil or commercial matters from their scope of application. However, since the legal assistance treaties do not deal with the cooperation between the authorities of the Member States of the European Union and since the Service *bis* Regulation and the Evidence Regulation in turn do not deal with the cooperation with the authorities of the third states, the conflicts between these instruments are more of a theoretical nature. See further on this: Chapter 2.5 of the dissertation.

[136] For example, the Brussels I Regulation applies in all 'civil and commercial matters' and consequently, as one author has put it, does not 'prescribe specific personal requirements'. See: U. Magnus. Introduction – U. Magnus and P. Mankowski (2012 I), p 31.

[137] See correspondingly: Art 3(1) of the European Order for Payment Procedure Regulation, Art 3 of the European Small Claims Procedure Regulation.

order to analyse whetehr any incompatibilities within the meaning of Article 351 of the TFEU could arise if the legal assistance treaties are applied instead of the European regulations. In this point, it is once more worth distinguishing between four types of provisions, which the EU regulations on private international law might contain: (a) the provisions on jurisdiction, (b) the provisions on the applicable law, (c) the provisions on the recognition and enforcement of judgments, court settlements and authentic instruments and (d) the provisions on the cooperation between the courts and Central Authorities.

a) Provisions on jurisdiction

The personal criteria which can trigger the application of a particular provision of jurisdiction contained in an EU regulation on private international law can refer to a party's nationality, habitual residence, domicile or even a mere presence[138] in a particular Member State. For example, Article 3(1)(b) of the Brussels II *bis* Regulation allocates jurisdiction in a divorce case to the court of a Member State only if the court in question is the court of a Member State of the common nationality of the spouses, or in the case of the United Kingdom and Ireland, of the '*domicile*'[139] of both spouses. Thus, the personal connecting factor triggering the application of Article 3(1)(b) of the Brussels II *bis* Regulation is the common nationality (or in the case of the United Kingdom and Ireland) the common domicile of the spouses. This does not, however, mean as if the Brussels II *bis* Regulation as a whole would not be applicable in a divorce case involving the parties who have different nationalities or domiciles. Similarly, the Brussels I (Recast) Regulation as a whole is applied regardless of the domicile, nationality or habitual residence of the parties, but the application of a particular provision contained in this regulation, such as the rules contained in its Chapter II, Section 2 ('*Special jurisdiction'*) can be limited, depending on the domicile, nationality or habitual residence of the parties.

Even if a particular personal criterion contained in an individual European provision on international jurisdiction has not been met in a particular case, the court is not entirely free to disregard such a provision – the court cannot, for example, substitute the European rules with their own national rules. This is so, because the rules on jurisdiction contained in the EU instruments provide for a

[138] See for example, Art 13 of the Brussels II *bis* Regulation which allocates jurisdiction to the court of a Member State where the child is present, provided that the habitual residence of the child in question cannot be established and the jurisdiction cannot be determined on the basis of Art 12 of the Brussels II *bis* Regulation.

[139] The word 'domicile' in this context should not be confused with the term 'domicile' as used in the Brussels I Regulation and the Brussels I (Recast) Regulation. The concept of 'domicile' within the meaning of Art 3(1)(b) of the Brussels II *bis* Regulation refers to the term as it has been used in the legal systems of the United Kingdom and Ireland. On the meaning of 'domicile' under English law, see for example: D. McClean and K. Beevers (2009), pp 29–51; C. M. V. Clarkson and J. Hill (2011), pp 305–327. L. Collins (ed) (2006), pp 122–174.

comprehensive system under which the jurisdiction of the court should be decided in a particular case, unless otherwise expressly provided by a particular regulation. Thus, for example, in a case where a defendant, domiciled in Finland, is being sued in Estonian court in a matter relating to a tort which has taken place in Sweden and where the relevant rules of the Brussels I (Recast) Regulation[140] do not allocate jurisdiction to Estonian court, the court cannot base its jurisdiction on national legislation. The purpose of the European rules, as made clear by the Court of Justice of the European Union in various cases[141] culminating with the famous *Owusu* case,[142] is to protect the reasonable expectations of the defendants who should be able to foresee in which courts they can be sued.[143] The application of the European rules is presumably the best way to protect such foreseeable expectations. The application of national rules instead of the European rules would make it harder for the defendant to be able to foresee whether or not he can be sued in the Member States and the same could be said for the application of the legal assistance treaties even in the case where none of the provisions on jurisdiction as contained in the EU regulations would be applied due to the personal criteria (connecting factors) referred to in

[140] That is, Arts 4(1) and 7(2) of the Brussels I (Recast) Regulation.

[141] See for example: *Besix SA v Wasserreinigungsbau Alfred Kretzchmar GmbH & Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzchmar GmbH & KG (Plafog)*. Judgment of the Court of 19 February 2002. Case C-256/00. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-256/00# (01.09.2018), para 26; *GIE Groupe Concorde and Others v The Master of the vessel "Suhadiwarno Panjan" and Others.* Case C-440/97. Judgment of the Court of 28 September 1999. Available: http://curia.europa.eu/juris/celex.jsf?celex=61997CJ0440&lang1=en&type=TXT&ancre= (01.09.2018), para 24; *Jakob Handte & Co. GmbH v Traitements Mécano-chimques des Surfaces SA.* Case C-26/91. Judgment of the Court of 17 June 1992. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-26/91 (01.09.2018), para 18.

[142] *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others.* Case C-281/02. Judgment of the Court (Grand Chamber) of 1 March 2005. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-281/02# (01.09.2018), paras 40–42. For the support of the solution given in *Owusu*, see: P. Rogerson. Lis Pendens and Third States: The Commission's Proposed Changes to the Brussels I Regulation. – The Brussels I Review Proposal Uncovered. E. Lein (ed.). London: British Institute of International and Comparative Law 2012, pp 103, 112.

[143] Some authors have, however, questioned whether the interpretation of the Brussels Convention given by the Court of Justice of the European Union in *Owusu* should also hold true for all the EU regulations on private international law, such as the Brussels II *bis* regulation. This has been done when analysing whether the national rules that allow the court to stay its proceedings in favour of a court in a third state could be applied if the Brussels II *bis* Regulation does not provide for such a possibility. See for example: E. Pataut. International Jurisdiction and Third States: A View from the EC in Family Matters. –The External Dimensions of EC Private International Law in Family and Succession Matters. A. Malatesta, S. Bariatti (eds.). Padova: CEDAM, 2008, pp 123, 144. See further on this problem: M. N. Shúilleabháin (2010), pp 201–209; W. Pintens. Art 1. – U. Magnus and P. Mankowski (eds). Brussels IIbis Regulation. Munich: sellier european law publishers 2012, pp 57–59.

these particular provisions not being met. Thus, even if the personal criteria relating to the application of a particular provision on jurisdiction which is contained in an EU regulation of private international law are not met in a given case, the conflicts between the regulations and the legal assistance treaties can still arise, if a court derives jurisdiction from the treaty rules in a case where no jurisdiction is provided by the jurisdictional regime of a particular European regulation taken as a whole.

b) Provisions on the applicable law

In contrast to the provisions on jurisdiction, the application of the provisions on the applicable law contained in the EU regulations on private international law does not depend on any personal characteristics relating to the parties to a particular dispute. This is so because these provisions are, by their nature, universal. For example, a court of a Member State may need to apply the Rome I Regulation when determining the applicable law to a contract, even if the parties to such contract are not the nationals of any Member State and do not have their domicile or habitual residence in any of the Member States. Similarly, Estonian court might be bound to apply the Rome II Regulation when determining applicable law in a dispute where the nationals of a third State are arguing over a non-contractual obligation arising from an event giving rise to damage which has occurred outside the territory of the European Union.

Although the applicable law provisions contained in the EU regulations have universal personal scope of application, it is possible that such rules use certain personal connecting factors in order to point to a particular law. A personal connecting factor as an element of a provision on the applicable law[144] should thus be distinguished from the personal scope of application of such a provision. For example, According to Article 21(1) of the Succession Regulation the law applicable to succession as a whole is the law of the state in which the deceased had his habitual residence at the time of death. The personal connecting factor used in this provision is the last habitual residence of the deceased. In contrast, the personal scope of application of Article 21(1) of the Succession Regulation is, however, universal, as this provision can be applied by the court regardless of the domicile, nationality or habitual residence of the parties involved in a succession dispute.

The universal scope of application of the rules on the applicable law contained in the EU regulations on private international law increases the likelihood of possible conflict between the EU regulations on private international law on one hand and the legal assistance treaties concluded with third states on the

[144] For a general overview on the various connecting factors used in the applicable law rules contained in the European instruments, see: K. Siehr. Connecting Factors, Party Autonomy and *Renvoi*. – A. Malatesta, S. Bariatti and F. Pocar (eds). The External Dimension of EC Private International Law in Family and Succession Matters. Padova: Wolters Kluwer Italia Srl 2008, pp 251, 253–255.

other. Such conflict can constitute an incompatibility within the meaning of Article 351 of the TFEU, if the connecting factors used in the two types of instruments differ. In such case the application of the treaty rules instead of the European rules would lead to the application of different substantive laws, which could theoretically be treated as an 'incompatibility' of the two types of instruments.[145]

c) Provisions on the recognition and enforcement of foreign judgments, court settlements and authentic instruments

As was the case with the provisions on the applicable law, the provisions on the recognition and enforcement of foreign judgments and other enforcement titles contained in the EU regulations on private international law have universal personal scope of application. This means that the application of such provisions does not depend on any personal criterion relating to the parties to a particular dispute having been met. For example, it is not necessary for the party applying for the declaration of enforcement of a foreign judgment in a Member State under the Succession Regulation to have his habitual residence or domicile in a Member State. Similarly, in order for the rules on the recognition and enforcement of foreign judgments contained in the Succession Regulation to be applicable, it is not necessary for the judgment in question to have been made between the parties who were domiciled in a Member State or were nationals of a Member State at the time when the judgment was made.

At first sight, the European Order for Payment Procedure Regulation and the European Small Claims Procedure Regulation seem to make an exception to the general rule that the personal scope of application of the provisions on the recognition and enforcement of foreign judgments and other enforcement titles is universal. More particularly, both of these regulations apply only in 'cross-border' cases and as both regulations explain in their Articles 3(1), "*a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised*". However, since the cross-border element in the context of these regulations is determined at the time when the application for a European order for payment is submitted or at the time when the claim form under the European Small Claims Procedure Regulation is received by the court or tribunal,[146] the domicile or the habitual residence of the parties is not a decisive connecting factor in the phase where the enforcement of the European Orders for Payment or the judgments given as a result of the European Small Claims Procedure is sought. Thus, it must be concluded that the provisions on recognition and enforcement contained in these instruments have universal personal scope of application similarly to the corresponding provisions in the other EU regulations on private international

[145] See further on this, Chapter 2.3 of the dissertation.

[146] See correspondingly: Art 3(3) of the European Order for Payment Procedure Regulation, Art 2(1) of the European Small Claims Procedure Regulation.

law. Whether this likens the possibility that the two types of instruments are incompatible within the meaning of Article 351 of the TFEU depends on whether the other criteria for determining the application of the two types of insturments coincide.

d) Provisions on the international cooperation between the courts, Central Authorities and other authorities

Similarly to the provisions on the recognition and enforcement or to the provisions on the applicable law, the provisions on cooperation as contained in the EU instruments generally have universal personal scope of application. For example, the court should make use of Article 29(2) of the Brussels I (Recast) Regulation which obliges the court to provide certain information to a court in another Member State regardless of the nationality, habitual residence or domicile of the persons involved in the relevant proceedings.

In contrast, some provisions on cooperation, as contained in the European regulations have (somewhat hidden) limitations as to their personal scope of application. For example, Article 1 of the Service *bis* Regulation provides that the said regulation applies if a judicial or extrajudicial document has to be transmitted 'from one Member State to another for service there'. While the regulation leaves it open what is exactly meant by a service from one Member State to another, the Court of Justice of the European Union has explained that the Service *bis* Regulation comes into play where the person to be served with the document 'resides abroad'.[147] Such explanation is not, however, overly helpful. For example, it is not clear what constitutes 'residing' in another Member State in this context. According to the authorities, 'residing abroad' can mean a mere registered address in another Member State, in contrast to having a domicile in such state within the meaning of Arts 62 or 63 of the Brussels I (Recast).[148] It is also not entirely sure whether electronic service (a method very often used by Estonian courts)[149] on a person who 'resides abroad', is included in the scope of the Service bis Regulation, though the answer to this question should probably be rather on the side of the affirmative.[150]

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[147] *Krystyna Alder, Ewald Alder v Sabina Orlowska, Czeslaw Orlowski*. Case C-325/11. Judgment of the Court (First Chamber) of 19 December 2012. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0325&from=ET (01.09.2018), para 25. See further on the scope of application of the Service I *bis* Regulation, for example: T. Rauscher. EG-ZustellVO Art 1. – T. Rauscher and W. Krüger (eds) (2017), Rn 9; A. Stadler. EuZustVO. Art 1. – H.-J. Musielak and W. Voit (eds). Zivilprozessordnung. München: Verlag Franz Vahlem GmbH. 2018, Rn 1–4.

[148] T. Rauscher. EG-ZustellVO Art 14. – T. Rauscher and W. Krüger (eds) (2017), Rn 4a.

[149] The possibility to serve documents electronically in Estonian civil proceedings is provided by Art 311^1 of the Code of Civil Procedure.

[150] The question has not attracted overly much attention in legal literature as the electronic service of documents is not possible in all the Member States. Theoretically, electronic service could, however, be considered as postal service within the meanin of Art 14 of the

It has been proposed to amend the Service *bis* Regulation so as to clarify that this regulation applies in cases where the addressee is physically present in a different state compared to the forum state.[151] Even in the absence of such amendment, what is clear, however, is that the application of the Service *bis* Regulation is limited by certain personal criterion relating to the addressee of the document, that is, the criterion of 'residing abroad' if one would borrow from the Court of Justice. Additionally, it is not possible to make use of the provisions of the Service *bis* Regulation in a situation where a person to be served resides, abroad, but outside the territory of the European Union (e.g. in the Russian Federation, in the Ukraine or in some other third country). In this case, Estonian courts should use other international instruments[152] in order to serve documents on such person.

In conclusion, the provisions contained in the EU regulations on private international law generally have universal personal scope of application, though the actual application of particular provisions may depend on certain criteria relating to the persons involved in particular proceedings being met. In the cases where the individual provisions contained in the EU regulations on private international law have universal personal scope of application, it is more likely that the conflict between the EU regulations on private international law and the legal assistance treaties concluded with third states occur, if the treaty rules are applied instead of the European rules. Even if the application of a particular provision contained in the EU regulation of private international law is not triggered due to certain criterion relating to the parties to a dispute not being met, the incompatibilities between the two types of instruments can still occur, depending on the exact nature and purpose of the European provision in question. For example, in the case where the intention of a particular European regulation is not to allocate jurisdiction to Estonian courts, the application of the legal assistance treaties allocating jurisdiction to Estonian courts could give rise to an incompatibility within the meaning of Artice 351 of the TFEU.

Service *bis* Regulation. In contrast, the commentators of the corresponding Hague 1965 Convention have found that electronic service should not be possible under the Hague 1965 Convention: C. Bernasconi and L. Thébault. Practical Handbook on the Operation of the Hague Service Convention. The Hague: HCCH. 2013, p 169.

[151] See: Expert Group on Modernisation of Judicial Cooperation in Civil and Commercial Matters. Minutes of the Expert group on the modernisation of judicial cooperation in civil and commercial matters. Brussels: 2018. Available: http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=15213 (01.09.2018), p 6.

[152] Namely, either the Hague 1965 Service Convention or the legal assistance treaties concluded with third states.

1.2.4. Territorial scope of application

Since only the courts of the Member States are required to apply the European Union legislation, the territorial scope of application of the EU regulations on private international law is limited to the Member States[153] and, more precisely, to the Member States which are bound by particular regulations as some regulations are not applicable in all the Member States. That is, firstly, the regulations passed via enhanced cooperation (the Rome III Regulation, the Matrimonial Proptery Regimes Regulation and the Regulation on the Property Consequences of the Registered Partners) are applicable only in the Member States taking part in the adoption of these regulations or in the Member States which have joined the regime of these regulations at a latter stage.[154] Secondly, Denmark, the United Kingdom and Ireland are not bound by all the European private international law regulations as these states have a special status when it comes to the intsruments passed in the framework of the area of freedom, security and justice.[155]

In exceptional cases the EU regulations on private international law can have an out-of-Union effect and be applicable by the courts of the third states. That could happen if the doctrine of *renvoi*[156] applicable in a particular third state

[153] At the time of finishing the dissertation (1 September 2018) the European Union had 28 Member States. On 1 July 2013, the Republic of Croatia became the 28th Member State of the European Union.

[154] At the time of finishing this dissertation (1 September 2018) the Republic of Estonia was bound by only one regulation passed via enhanced cooperation, that is, the Rome III Regulation, which became applicable in the Republic of Estonia on 11 February 2018, as provided by Art 3(2) of the relevant Commission Decision (European Commission. Commission decision (EU) 2016/1366 of 10 August 2016 confirming the participation of Estonia in enhanced cooperation in the area of the law applicable to divorce and legal separation. C/2016/5137. – OJ L 216, 11.08.2016, pp 23–25).

[155] According to Arts 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty establishing the European Community (OJ C 340, 10.11.1997, p 101) Denmark is not automatically bound by the EU regulations on private international law, but can join the regime of these regulations later via a special agreement concluded with the European Union as has been done in the case of the Brussels I (Recast) Regulation and the Service *bis* Regulation. Arts 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union (OJ C 202, 07.06.2016, p 295) provide a somewhat similar exception for the United Kingdom and Ireland. In contrast to Denmark, the United Kingdom and Ireland can, however, directly take part in the adoption and application of the private international law regulation if they so wish. The exception in relation to the United Kingdom applies of course only until 29 March 2019, i.e until the date on which the United Kingdom is planned to withdraw from the European Union (the so-called Brexit date).

[156] *Renvoi* obliges a court to take into account foreign law in its entirety, including its conflict-of-laws provisions. For example, under Art 6 of the Private International Law Act Estonian courts have to, when applying foreign law, take into account the foreign conflict-of-laws provisions when these refer back to Estonian law (*remission*) and disregard such

would require the court of this state to apply the conflict of laws provisions which are contained in the EU regulations on private international law. For example, as Australian law allows double renvoi in certain civil cases,[157] an Australian court might be required to apply Estonian private interntional law rules, including the rules contained in the EU instruments in australian proceedings involving Estonian parties. From the perspective of this dissertation, such possible application of the EU private international regulations by third state courts has little relevance. Only if the EU regulations would be applied by the courts of the Contracting Parties to the Estonian legal assistance treaties (the Russian Federation and the Ukraine) could such application have any weight in order to answer the question whether (from the perspective of Estonian courts) the EU regulations and legal assistance treaties concluded with such states are incompatible within the meaning of Article 351 of the TFEU. That could be so only if the legal assistance treaties (when applied by Estonian courts) would require Estonian courts to apply the conflict of law rules of the Parties of the Contracting Parties to such states and if the *renvoi* doctrine applicable in these Contracting Parties would refer back to European private international law regulations. This, however, has never been done in the case law referred to in the Annex 3 of this dissertation and probably would never be done as it is unlikely that the legal assistance treaties would be interpreted as containing any *renvoi* provisions making such exercise (even just) theoretically possible.[158]

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provisions when they refer to the law of a third state (*transmission*). On the use of *renvoi* in Estonian private international law, see: K. Jaadla. Renvoi vormid ja doktriinid Eesti perekonna- ja pärimisõiguses. Bakalaureusetöö. – Tartu; Tartu Ülikool 2010; I. Nurmela and others (2008), pp 63–65; I. Nurmela. Välisriigi õiguse kohaldamine. – Juridica 2002 IV, p 254, 259. Different states follow different doctrins of *renvoi*, such as a single *renvoi* or a double renvoi, the differentiating factor being the number and type of references to the procedural laws of the third states that the rules of the forum allow. On the different types of *renvoi* in modern private international law, see, for example: A. Davi. Le renvoi en droit international privé contemporain. – Recueil des cours. 2010, Vol 352, pp 9–521; D. A. Hughes. The Insolubility of *Renvoi* and its Consequences. – Journal of Private International Law. 2010, Vol 6, No 1, pp 195, 197–199.

[157] On Australian doctrine of *renvoi*, see: A. Lu. Ignored no More: Renvoi and International Torts Litigation in Australia. – Journal of Private International Law. 2005, Vol 1, No 1, pp 35–67, R. Mortensen. "Troublesome and Obscure": The Renewal of Renvoi in Australia. – Journal of Private International Law. 2006, Vol 2, No 1, pp 1–26.

[158] There is no explicit *renvoi* provision in neither the Estonia-Ukraine legal assistance treaty, nor the Estonia-Russia legal assistance treaty. Both treaties generally just refer to the 'law of the Contracting Party', which theoretically could include a reference to the conflict-of-law provisions of the Contracting Party. Note, however, that a part of such body of rules would be the same legal assistance treaty where the court proceeded from, so such reference would not make much sense in practice as the court would have to apply again the provisions of the relevant legal assistance treaty. The legal assistance treaties as international agreements would, of course, be prioritized over any national conflicts rules in the courts of the Contracting Parties. On this, see, for example: V. Zvekov, V. P. The New Civil Code of the Russian Federation and Private International Law. – McGill Law Journal. 1999, Vol 44, p 525, 532.

Whether the EU regulations on private international law are applied by the courts in the Member States *ex officio* or at the request of the parties, depends on the particular regulation and the national procedural law of the Member State in question. As derived from Article 288 of the TFEU, the European Union regulations are, directly applicable. However, the application of a particular provision contained in these regulations can depend on the national implementing procedural rules of the Member State. For example, under Estonian national rules of civil procedure, Estonian courts have an *ex officio* duty to apply the provisions on jurisdiction, the provisions on the recognition and enforcement of foreign judgments, court settlements and authentic instruments and the provisions on the cooperation contained in the EU regulations on private international law,[159] but the same is not necessarily true for the European provisions on the applicable law as explained in the following paragraphs. [160]

The obligation of an Estonian court to apply the provisions on jurisdiction, the provisions on the recognition and enforcement of foreign judgments, court settlements and authentic instruments and the provisions on the cooperation contained in the EU regulations on private international law *ex officio* comes explicitly from various provisions of the (Estonian) Code of Civil Procedure. For example, under Article 75(1) of the Code of Civil Procedure, Estonian court is always required to determine whether a claim or another application can be filed to Estonian court – that is, the Estonian court has a duty to determine, *ex officio* and among other things, whether it has jurisdiction in a particular case. Such investigation has to be carried out taking into account the relevant provisions on international jurisdiction, including the applicable EU regulations on private international law. Similarly, Article 619(1) of the Code of Civil Procedure (titled as '*The recognition of a judgment and other enforcement document of the Member State of the European Union'*) points out a requirement for the judge to apply the EU regulations on private international law dealing with the recognition and enforcement of judgments, courts settlements and authentic instruments *ex officio*. Similar requirements come from Articles 241(2) and 316^1(1), which (correspondingly) point the attention of the courts to the need to apply the provisions of the Evidence Regulation and the Service *bis* Regulation *ex officio*.

While the application of the provisions on international jurisdiction, on the recognition and enforcement of foreign judgments, court settlements and authentic instruments and on the cooperation between the authorities of different Member States that are contained in the EU regulations on private international law does not depend on the parties pleading the application of such rules, the same is not entirely true for the European provisions dealing with the

[159] See further on such obligation: M. Torga. Rahvusvahelise kohtualluvuse kontrollimine. – Juridica 2013 III, pp 192, 192–195.

[160] See further on this: I. Nurmela. Arengud Eesti rahvusvahelises eraõiguses. Uus rahvusvahelise eraõiguse seadus. – Juridica 2002 VII, p 467, 468; M. Torga. Kohalduva õiguse ja selle sisu kindlakstegemine rahvusvahelistes eraõiguslikes vaidlustes. – Juridica 2014 V, pp 406, 406–408.

determination of applicable law. Although Article 2(1) of the Estonian Private International Law Act follows a civil law idea[161] that a court has an obligation to apply the relevant foreign law *ex officio*, Estonian case law seems to have occasionally forgotten the existence of this provision[162] and seems to suggest that a court is not required to apply foreign law on its own initiative, if a private international law instrument applicable in a particular case allows the parties to choose Estonian substantive law as the applicable law.[163] This would hold true in both, the cases where the applicable law is to be determined under an EU regulation on private international law or in the cases where the applicable law is determined under an international convention or the provisions of Estonian national law.[164] Thus, Article 2(1) of the Estonian Private International Law Act should be regarded as a general part to the whole Estonian private international law, including the international conventions and the EU regulations on private international law dealing with conflict-of-laws issues.

As shown above, Estonian courts, as the courts located in the territory of the European Union, have to generally apply the provisions contained in the EU regulations on their own initiative just because they are part of the territory where the regulations apply. However, the applicability of an individual rule contained in an EU regulation may sometimes depend on certain additional conditions, having territorial characteristics, being met. For example, the rules on the recognition and enforcement of judgments as contained in various European Union regulations would apply only in cases where a judgment in question emanates from a Member State bound by such regulation. Similarly, the rules on the service of documents as contained in the Service *bis* Regulation can be applied only for the service in another Member State. In the latter case the condition for the application of the Service *bis* Regulation rules is that the

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[161] In contrast, in the common law tradition the parties often have to plead and prove foreign law for it to be applicable. For one of the most comprehensive overview on this principle in English law, see: R. Fentiman. Foreign law in English courts: pleading, proof and choice of law. Oxford: Oxford University Press 1998; On the same principle in Australian law, see: J. MacComish. Pleading and Proving Foreign Law in Australia. – Melbourne University Law Review 2007 Vol 31 No 2, pp 400–442; For a comparative overview, see: T. C. Hartley. Pleading and proof of foreign law: the major European systems compared. – The international and comparative law quarterly 1996 Vol 45 No 2, pp 271–292.

[162] See for example the cases of the Estonian Supreme Court where the choice-of-law problems were completely ignored, although the cases clearly involved a foreign element: Judgment of the Estonian Supreme Court of 23 May 2012 of No 3-2-1-53-12; Judgment of the Estonian Supreme Court of 17 January 2011 No 3-2-1-108-10.

[163] See, for example, a case that reached the Supreme Court where a foreign party had concluded a sales contract for the sale of stocks of a foreign company and had later sued the other (Estonian) party to the contract in Estonian court. The Supreme Court disregarded claimant's plea to apply foreign law since in the lower courts no such plea was made by the claimant and the lower courts had not, on their own initiative, dealt with the questions of possibly applicable foreign law: 3-2-1-52-10, para 20.

[164] K. Sein and others (2013), p 25. M. Torga. Kohalduva õiguse ja selle sisu kindlakstegemine rahvusvahelistes eraõiguslikes vaidlustes. – Juridica 2014 V, pp 406, 407.

addressee has a residence within the terrotiry of another Member State.[165] Thus, the provisions contained in the European private international law treaties, though applicable in Estonian courts since Estonia is a Member State, may contain additional criteria which determine the territorial reach of such provisions.

If a particular dispute falls outside the territorial reach of the provisions contained in the EU regulations on private international law, the conflicts between the scopes of application of the EU regulations on private international law and the legal assistance treaties would not arise, if the legal assistance treaties are applied instead of the European regulations, provided that there are no so-called hidden conflicts between the provisions of the two types of instruments. In order to analyse the possibility of such (and other, more obvious) conflicts, it is again worth distinguish between (a) the provisions on jurisdiction, (b) the provisions on the applicable law, (c) the provisions on the recognition and enforcement of judgments, court settlements and authentic instruments and (d) the provisions on the cooperation between the courts and other authorities.

a) Provisions on jurisdiction

The rules on jurisdiction contained in the EU regulations on private international law extend to the whole territory of the European Union in a sense that they have to be applied by the courts of the Member States of the European Union and not by the courts of third states. Not even on the phase of the recognition and enforcement of the Union judgments would the courts of a third state check under the EU regulations whether the court in a Member State had jurisdiction to hear the case. The court of a third state could, of course, check whether the court in a Member State determined it's jurisdiction in accordance with the principles applicable in a third state.[166]

Although only the courts of the Member States apply the provisions on jurisdiction contained in the EU regulations on private international law, the application of these provisions can sometimes depend on certain additional territorial

[165] *Krystyna Alder, Ewald Alder v Sabina Orlowska, Czeslaw Orlowski*. Case C-325/11. Judgment of the Court (First Chamber) of 19 December 2012. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CJ0325&from=ET (01.09.2018), para 25.

[166] For such possibility, see for example: Art 23(2)a of the Hague 1996 Parental Responsibility Convention: Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Hague Conference on Private International Law. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=70 (01.09.2018). This convention entered into force in relation to the Republic of Estonia on 1 of June 2003; See also: Art 2 of the Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Hague Conference on Private International Law. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=79 (01.09.2018). Note, however, that the Republic of Estonia is not a party to this protocol.

criteria having been met. Namely, such provisions can include territorial connecting factors or conditions relating to something, which happens in a third state. The existence of these connecting factors or conditions triggers or hinders their application depending on the circumstances of each case. These connecting factors or conditions can be limited to the territory of the European Union or can refer to the territory of a third state.

An example of a provision on jurisdiction, which contains a connecting factor relating to the territory of the European Union, is Article 24(1) of the Brussels I (Recast) Regulation. A court can derive jurisdiction from this provision in proceedings, which have as their object rights *in rem* in immovable property or tenancies of immovable property, if the court in question is the court of a Member State in which such property is situated. As has been explained by the Court of Justice of the European Union, the proceedings, which have as their object rights *in rem* in immovable property in this context include actions which seek to determine the extent, content, ownership or possession of immovable property (located in a Member State) or the existence of other rights *in rem* therein and to provide the holders of those rights with the protection of the powers which attach to their interest.[167]

Estonian courts could not derive jurisdiction from Article 24(1) of the Brussels I (Recast) Regulation in a case where the immovable in question is located in a third state such as in the Russian Federation or the Ukraine. This is justified because, as stressed by the Court of Justice of the European Union, in the case of disputes over the rights *in rem* in immovable property, a court is often required to carry out various checks, inquiries and expert assessments which have to be carried out on the spot[168] and, in the case of tenancies of immovable property, due to the complexity of the tenancy rules, which are the most familiar

[167] For example, the concept would not apply to an action whereby a creditor seeks to have a disposition of a right *in rem* in immovable property rendered ineffective as against him on the ground that it was made in fraud of his rights by his debtor. See: *Mario P. A. Reichert and others v Dresdner Bank.* Case C-115/88. Judgment of the Court (Fifth Chamber) of 10 January 1990. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-115/88 (01.09.2018). As stated in the Schlosser Report, the difference between a right *in rem* and a right *in personam* is that the right *in rem* has effect against the whole world, whereas the latter can only be claimed against a particular person. See: P. Schlosser. Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg, 9 October 1978. – OJ C 59, 5/3/1979; See also: *Norbret Lieber v Willi S. Göbel and Siegrid Göbel.* Case C-292/93. Judgment of the Court (Fifth Chamber) of 9 June 1994. Available:
http://curia.europa.eu/juris/liste.jsf?language=en&num=C-292/93 (01.09.2018), para 14.

[168] *Theodorus Engelbertus Sanders v Ronald van der Putte*. Case 73/77. Judgment of the Court of 14 December 1977. Available:
http://curia.europa.eu/juris/liste.jsf?language=en&num=C-73/77 (01.09.2018), para 13.

to the court where the immovable in question is situated.[169] Hence, the purpose of Article 24(1) of the Brussels I (Recast) Regulation is to make sure that jurisdiction is allocated to the court best placed to hear certain disputes relating to immovable property. If a broad legal assistance treaty would allocate jurisdiction to Estonian court in a dispute where the immovable in question is situated in another Member State, the application of the treaty rules would violate this purpose. In contrast, in the cases where the immovable in question is situated in a third state, Estonian court can still derive jurisdiction from the other provisions of the EU regulations in private international law, since these regulations, as a whole, are applicable in all the courts of the Member States, regardless of whether the conditions for the application of certain provisions, such as Article 24(1) of the Brussels I (Recast) Regulation, are met in a particular case. If the rules on jurisdiction contained in the legal assistance treaties concluded with third states would in such a case allocate jurisdiction to Estonian court as well, no incompatibilities between the legal assistance treaties and the EU regulations on private international law would arise within the meaning of Article 351 of the TFEU if the treaty rules were applied instead of the European rules.

An example of a provision on jurisdiction, which provides for a condition similar to a connecting factor relating to the territory of a third state, is found in Article 33(1) of the Brussels I (Recast) Regulation. This provision allows the court of a Member State, in the case where the proceedings are pending before a court of a third state at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of a third State, to stay its proceedings provided that it is expected that the court of the third state will give a judgment capable of recognition and, where applicable, of enforcement in that Member State and the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. The 'proceedings bending before a court in a third state' as used in Article 33(1) of the Brussels I (Recast) Regulation is not a connecting factor, which would allocate jurisdiction to a certain (third state) court. However, such proceedings are a condition for this provision to be applicable. While Article 33(1) of the Brussels I (Recast) Regulation would only be applicable in the courts of the Member States of the European Union, its application depends on the proceedings being initiated by a party in a third state. Thus, the territorial reach of the provision is dependent on something, which has happened in a third state. The effect of the provision is, in contrast to Article 24(1) of the Brussels (Recast) Regulation, negative in a sense that this provision does not allocate, but instead deprives the court of jurisdiction. If the legal assistance treaties do not provide for a similar deprivation, then the application of the treaty rules instead of the European rules could theoretically lead to an

[169] *Erich Rösler v Horst Rottwinkel.* Case 241/83. Judgment of the Court (Fourth Chamber) of 15 January 1985. Available: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61983CJ0241 (01.09.2018), para 10.

incompatibility within the meaning of Article 351 of the TFEU between the two types of instruments as, under the treaty rules, it would be more likely that irreconcilable judgments are made in different states than it would be when the proceedings are stayed under the Brussels (Recast) Regulation Article 24(1). Whether a possible existence of such irreconcilable judgments might indeed lead to an incompatibility within the meaning of Article 351 of the TFEU will be analysed in Chapter 2.2.5 of the dissertation.

b) Provisions on the applicable law

Similarly to the provisions on jurisdiction, the provisions on the applicable law contained in the EU regulations on private international law are applicable only in the courts of the Member States.[170] Although, as a general rule, only the courts in the Member States apply the applicable law provisions contained in the EU regulations, the territorial reach of these provisions can, however, be wider than the territory of the European Union. For example, a court in a Member State might be obliged to determine applicable law to a tort under the Rome II Regulation regardless of where such tort took place or where the parties of the dispute over this tort reside. This is so because the Rome II Regulation has a universal personal scope of application and would thus be applicable even in cases where the parties to a particular tort dispute are both resident in a third state and where no factual connection between the European Union and the tort in question exists. In this case, it could be said that the provisions of the Rome II Regulation have an indirect effect outside the territory of the European Union, a result which has caused some Member States to even question the competence of the Union to pass the Rome II Regulation.[171] Such principle of universal application also applies in cases of other regulations containing the applicable law provisions (the Maintenance Regulation, the Succession Regulation, the Rome Regulations).

In addition to possible indirect effect outside the territory of the European Union, the provisions on the applicable law contained in the EU regulations on private international law can contain connecting factors, which can lead to the application of the laws of third states. For example, under Article 21(1) of the Succession Regulation a court might be required in a succession case to apply the law of a third state, if the deceased had his habitual residence at the time of his death in a third state. Similarly, under Article 5(1)(a) a court of a Member

[170] Depending on the exact doctrine of *renvoi* applicable in a third state, it is possible that such provisions are also applied by the courts of a third state, but as already explained such possibility bears no meaning in order to answer the main research question of this dissertation.

[171] See for example position of one of the House of Lords' Committee (UK) on the issue: House of Lords European Union Committee. 8th Report of Session 2003–2004. The Rome II Regulation. 2004. Available: https://publications.parliament.uk/pa/ld200304/ldselect/ldeucom/66/66.pdf (01.09.2018), pp 23–24.

State might be required to apply the law of a third state to a divorce, if the spouses have designated such law as the applicable law and they were habitually resident in the third state in question at the time the agreement to apply the law of this state was concluded.

If the territorial reach of the provision on the applicable law contained in the EU regulation on private international law coincides with the territorial reach of the applicable law provision contained in the broad legal assistance treaty, the incompatibilities between the two types of instruments are more likely to arise in practice. Such incompatibilities would occur, if the connecting factors used in the applicable law provisions contained in the two types of instruments differ. For example, if a connecting factor used in the EU regulation on private international law points to the law of a third state, but the connecting factor of the applicable law provision having the same territorial reach points to the law of a Member State, then the two types of provisions would be incompatible with each other within the meaning of Article 351 of the TFEU as they lead to the application of different rules, the result which constitutes an obvious incompatibility.

c) Provisions on the recognition and enforcement of foreign judgments, court settlements and authentic instruments

Similarly to the provisions on jurisdiction contained in the EU regulations on private international law, the European provisions on the recognition and enforcement of foreign judgments, court settlements and authentic instruments can be applied only by the courts of the Member States. Hence the territorial scope of application of these provisions is limited to the Member States. The courts in a third state might, however (and depending on the procedural law of the third state in question), need to take these provisions into account when deciding upon their jurisdiction.[172] Similarly, Estonian court would need to take into account the provisions on the recognition and enforcement of foreign judgments applicable in a third state, if the jurisdiction of Estonian court is founded on Article 102(2)(3) of the Code of Civil Procedure.[173] According to this provision Estonian court can hear a divorce case if a claimant is an Estonian national, but the court can do so only on the condition that the Estonian divorce judgment would later be recognised in the relevant third state. The Estonian

[172] For a similar limitation in the EU law, see Art 12(1) of the Succession Regulation which allows the court seised to rule on the succession to decide not to rule on one or more of the assets located in a third state 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.

[173] Provided, of course, that the Brussels II *bis* Regulation allows Estonian court to derive jurisdiction in a divorce case from Estonian national provisions. This is possible if the preconditions for the application of Art 7(1) of the Brussels II *bis* Regulation have been met. According to this provision: *"Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State"*.

court's power (or any other court's power in a similar circumstance) in carrying out such investigation is, in practice, however (and borrowing the words from a leading American scholar on private international law), "*virtually impossible to administer* […]."[174] The possibility that the European rules on the recognition or enforcement of foreign judgments are applied or taken into account by the courts of third states, does not, however, play any role in determining whether such rules and similar rules contained in the legal assistance treaties are incompatible with each other within the meaning of Article 351 of the TFEU. What matters, is whether these rules have coinciding scopes of application.

While the territorial scope of application of the European provisions on recognition and enforcement is limited to the Member States (Estonian courts apply these provisions because their territory is part of the territory of the European Union) these provisions can have certain connecting factors/conditions relating to certain territories. Namely, the provisions on the recognition and enforcement as contained in the EU regulations apply only for the recognition and enforcement of those enforcement titles which originate from the Member States. For example, Estonian court could not use the Brussels I instruments in order to recognize a Bulgarian judgment handed down before 1 January 2007 when the Republic of Bulgaria became the Member State of the European Union, since the Brussels I Regulation covers only the recognition and enforcement of judgments which are given after the date of entry into force of the Brussels I Regulation in relation to a particular Member State.[175] In order to recognise Bulgarian judgments handed down before it joined the European Union, Estonian court would instead need to apply the provisions contained in the Estonian Code of Civil Procedure[176] as, from the point of view of the Brussels I Regualtion, Bulgaria was considered a third state before it joined the European Union.

Although the scope of application of the provisions on the recognition and enforcement of foreign judgments contained in the EU regulations on private international law is limited to the territory of the European Union and although the territorial reach of such provisions is also limited to the enforcement titles originating from the Member States bound by[177] such regulations, it is possible

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[174] A. T. Von Mehren. Theory and Practice of Adjudicatory Authority in Private International Law: a Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems. General Course on Private International Law. – Recueil des Cours. 2002, Vol 295, pp 9, 52.

[175] This principle can be derived from the transitional provision contained in Art 66(2) of the Brussels I Regulation.

[176] Note, that before the new Code of Civil Procedure entered into force in 2006, the Estonian courts would recognise and enforce foreign judgments only under international agreements. See: Art 377(1) of the old Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*). – RT I 1998, 43, 666.

[177] As already mentioned, not all EU regulations are necessarily applicable in all the Member States. Some have been passed via enhanced cooperation (such as the Registered Partnerships Regulation) between only some Member States and some are not applicable in the UK, Ireland or Denmark due to the special status that these Member States enjoy.

that these provisions contain additional conditions for their application which have territorial characteristics. For example, under Article 34(4) of the Brussels I Regulation Estonian court can refuse to recognize a judgement handed down in another Member State if such judgment is irreconcilable with an earlier decision given in a third state provided that such judgment fulfils the conditions necessary for its recognition in the Member State addressed. This should be kept in mind when analysing the possibilities of any incompatibilities within the meaning of Article 351 arising when the treaty rules are applied instead of the European rules.

In conclusion, since the territorial scope of application and the territorial reach of the provisions on the recognition and enforcement of foreign enforcement titles contained in the EU regulations on private international law is limited to the Member State, the obvious conflicts between these provisions and the similar provisions contained in the legal assistance treaties cannot occur, if the territorial scope of application of the treaty provisions does not extend to the Member States. However, even if the territorial scope of application of the similar provisions contained in the two types of instruments does not overlap, the incompatibilities between these instruments can theoretically still occur if the conditions for the application of the European rules depend on some occurrence in a third state and if such occurrence is hindered by the application of the legal assistance treaties.

d) Provisions on the international cooperation between the courts, Central Authorities and other authorities

The provisions on cooperation between the courts, Central Authorities and other authorities of the Member States contained in the EU regulations do not deal with the cooperation between the courts and authorities of the Member States of the European Union, on one hand, and similar authorities in third states, on the other. Hence, the territorial reach of such provisions is limited to the territory of the European Union. For example, under the Evidence Regulation, Estonian courts could request only the competent courts of the other Member States taking part in the application of this regulation[178] to take evidence. Similarly, Estonian judge can request assistance for the service of documents under the Service *bis* Regulation only if the document is to be served in another Member State taking part in the application of the Service *bis* Regulation.[179] In contrast,

[178] According to recital 22 of the Evidence Regulation Denmark is not participating in the adoption of the Evidence Regulation, and is therefore not bound by it or subject to its application. The same exception does not apply to the United Kingdom or Ireland.

[179] According to recital 29 of the Service *bis* Regulation Denmark does not take part in the adoption of the Service *bis* Regulation and is not bound by it or subject to its application. However, Denmark notified the Union, by letter of 20 November 2007 (Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil and commercial matters. – OJ L 331, 10.12.2008, p 21), of its decision to implement the Service *bis* Regulation and is, thus, bound by this regulation. The United Kingdom and Ireland also took part in the adoption of the Service I *bis* Regulation.

if an Estonian judge wishes to obtain evidence from a third state, he has to use the means provided by the Hague 1970 Evidence Convention,[180] the legal assistance treaties or diplomatic channels of the Republic of Estonia. Similarly, if the judge wishes to serve a document in a third state, he can make use of the Hague 1965 Service Convention, the legal assistance treaties or the diplomatic channels of the Republic of Estonia. Thus, the territorial scope of application of the provisions on cooperation, found in the EU regulations on private international law, does not extend to third states in a sense that such provisions can come into play only if the relevant authority intended to be cooperated with is located in another Member State of the European Union.

Since the territorial scope of application of the European provisions on cooperation between the courts and other authorities is limited to the Member States bound by the EU regulations on private international law including such provisions, the incompatibilities between the European provisions and the similar provisions contained in the legal assistance treaties cannot occur, if the scope of application of the treaty provisions does not extend to the European Union. Whether this indeed is the case, shall be explained in the part of the dissertation, which deals with the scope of application of the legal assistance treaties.

1.3. The scope of application of the Estonian legal assistance treaties concluded with third states

1.3.1. Temporal scope of application

The incompatibilities within the meaning of Article 351 of the TFEU between the legal assistance treaties concluded with third states on one hand and the EU regulations on private international law on the other can arise only if the scopes of application of these two types of instruments coincide. Thus, in order to answer the main research question of the dissertation, it is also necessary to establish the exact scope of application of the legal assistance treaties. Similarly to the previous part of the dissertation, which dealt with the scope of application of the EU regulations on private international law, such analysis starts with establishing the temporal scope of application of the legal assistance treaties.

Although the legal assistance treaties contain provisions on their entry into force[181] and on the extension of these treaties after certain time periods,[182]

[180] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters. Hague Conference on Private International Law. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=82 (01.09.2018). The Hague 1970 Evidence Convention entered into force in relation to the Republic of Estonia on 2 of April 1996.

[181] See: Art 79 of the Estonia-Russia legal assistance treaty, Art 65 of the Estonia-Ukraine legal assistance treaty.

neither the Estonia-Russia legal assistance treaty nor the Estonia-Ukraine legal assistance treaty contains any clear rules on their temporal scope of application. In addition, the legal assistance treaties do not contain any transitional provisions, which would identify the legal relationships or judgments, which these treaties are intended to cover.[183] Thus, the starting point for establishing the temporal scope of application of the legal assistance treaties should be the date of entry into force of these instruments.

The broad legal assistance treaty concluded between the Republic of Estonia and the Russian Federation came into force on 19 March 1995.[184] The Estonia-Ukraine legal assistance treaty entered into force shortly after – on 17 May 1996.[185] It would be reasonable to presume that the temporal scope of application of the provisions contained in the treaties is dependent on these dates. Judging by the case law it is, however, possible that certain provisions contained in the legal assistance treaties have retrospective effect. In this point, it is again worth distinguishing between four types of provisions which the legal assistance treaties could contain and which could have different temporal scopes of application: (a) the provisions on jurisdiction, (b) the provisions on the applicable law, (c) the provisions on the recognition and enforcement of foreign judgments and (d) the provisions on international cooperation between the courts and other authorities of the Contracting Parties.

a) Provisions on jurisdiction

Both, the Estonia-Russia legal assistance treaty and the Estonia-Ukraine legal assistance treaty contain provisions on the determination of international jurisdiction. However, the legal assistance treaties do not contain any clear rules, which would deal with the question what is the exact temporal scope of application of such provisions.

There is nothing in the legal assistance treaties concluded with third states to suggest that the provisions on jurisdiction found in these treaties could have retrospective effect beyond the dates of entry into force of these treaties, nor is there any case law available in the Estonian publicly available case law

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[182] See for example, Art 80(2) of the Estonia-Russia legal assistance treaty, which provides that this treaty stays in force during 5 year periods if neither of the Contracting Parties denounces it.

[183] See in contrast, the transitional provisions contained in the EU regulations on private international law: Brussels I Regulation Art 66, Brussels I (Recast) Regulation Art 66, Brussels II *bis* Regulation Art 64, Maintenance Regulation Art 75, Succession Regulation Art 84, Insolvency Regulation Art 43, Insolvency (Recast) Regulation Art 84, Rome III Regulation Art 18.

[184] Välisministeerium. Välisministeeriumi teadaanne 1. jaanuarist kuni 1. aprillini 1995. a. jõustunud välislepingute nimekiri. – RT II 1995, 10.

[185] Välisministeerium. Välisministeeriumi teadaanded 1. märtsist kuni 1. juunini 1996. a. jõustunud välislepingute nimekiri. – RT II 1996, 19.

databases where such conclusion could be drawn from. However, since the Estonia-Russia legal assistance treaty and the Estonia-Ukraine legal assistance treaty entered into force (respectively) already in 1995 and 1996, it is highly unlikely that the temporal scope of application of the provisions on jurisdiction contained in these instruments could be given any attention in the future Estonian case law as the questions on the temporal scope of these instruments could have arisen only if the actions were filed in Estonian courts around the time when the legal assistance treaties entered into force.

For the purposes of evaluating the possible incompatibilities within the meaning of Article 351 of the TFEU between the legal assistance treaties concluded with third states and the EU regulations on private international law, it can be presumed that the temporal scope of application of the provisions on jurisdiction contained in the legal assistance treaties does not reach beyond the entry into force of these treaties in relation to the Republic of Estonia. Since the first EU regulations on private international law entered into force in relation to the Republic of Estonia in 2004 when the Republic of Estonia joined the European Union, it is sufficient to note that the temporal scope of application of the provisions on jurisdiction contained in the broad legal assistance reaches back (at least) to 2004. Thus, the collisions between the temporal scopes of application of the provisions of jurisdiction contained in the legal assistance treaties and in the EU regulations on private international law are theoretically possible, as the two types of instruments have overlapping temporal scopes of application.

b) Provision on applicable law

The legal assistance treaties concluded with third states contain provisions dealing with applicable law to persons, family matters, succession, non-contractual obligations, contracts and property. Similarly to the provisions on jurisdiction, the provisions on the applicable law contained in the legal assistance treaties do not contain any clear rules as to their temporal scope of application.

Based on the general principle of Estonian private international law[186] and taking into account the fact that no different solution seems to be suggested by

[186] This is best illustrated by the transitional provisions of the Estonian Private International Law Act, which, as a general rule, do not give any retrospective effect to the applicable law provisions contained in the Private International Law: Art 24(1) and (2) of the Law of Obligations Act, General Part of the Civil Code Act and Private International Law Act Implementation Act (*Võlaõigusseaduse, tsiviilseadustiku üldosa seaduse ja rahvusvahelise eraõiguse seaduse rakendamise seadus*. – RT I 2002, 53, 336; RT I, 11.03.2016, 1). Note, however, that as an exception Art 24(2) seems to require Estonian courts to apply the provisions of Private International Law Act after its entry into force retrospectively to all family relationships, regardless of the time when such relationships were entered into. In the preparatory report of the act the said provision was (quite deservingly) referred to as: 'at first sight incomprehensible'. Unfortunately, however, the preparatory report did not move on to clarify the matter. See: Riigikogu. 894 SE I Lepinguväliste kohustuste seaduse,

Estonian case law, it can be presumed that the provisions on the applicable law contained in the legal assistance treaties should be applied only to the events, which have occurred and to the legal relationships, which have arisen after the date of entry into force of the relevant broad legal assistance treaty. [187] For example, the formalities of a contract concluded between a Russian national and an Estonian national after 19 March 1995 (i.e. after the Estonia-Russia legal assistance treaty entered into force between the two Contracting Parties) should be governed by the formal requirements of the law determined under Article 39 of the Estonia-Russia legal assistance treaty.[188]

Whether the presumption that the applicable law provisions contained in the legal assistance treaties should be applied only to the events, which have occurred and to the legal relationships, which have arisen after the date of entry into force of the relevant broad legal assistance treaty should hold true for all the provisions on applicable law contained in such treaties is, however, disputable.

One could argue that the purpose of the applicable law rules in general should be to tie a legal relationship to the law that the parties to such relationship can reasonably foresee as the law applicable at the time that they enter into a particular legal relationship. The fundamental purpose of the applicable law provisions, thus, should be predictability, or 'consistency and predictability' to borrow from a famous English expert on private international law.[189] It is, though, hard to pin-point the origin of such presumption with any specific references to treatises, case law or legal literature since, as one author has put it: "*This lack of interest in such a fundamental question* [i.e. what is the *reason d'être* of private international law] *may be taken as proof that conflicts has*

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tsiviilseadustiku üldosa seaduse ja rahvusvahelise eraõiguse seaduse rakendamise seadus. Seletuskiri "Lepingute ja lepinguväliste kohustuste seaduse", "Tsiviilseadustiku üldosa seaduse" ja "Rahvusvahelise eraõiguse seaduse" rakendamise seaduse" juurde. Available: http://www.riigikogu.ee/?page=eelnou2&op=ems2&eid=894&assembly=9&u=20130610025245 (01.09.2018).

[187] For the same principle in the European rules, see: Rome Convention Art 17, the Rome I Regulation Art 28, Rome II Regulation Art 31, Rome III Regulation Art 18(1), Succession Regulation Art 83(1). For a similar solution in international conventions applicable in Estonia, see: Art 53(1) of the Hague 1996 Parental Responsibility Convention, Art 50(1) of the Hague 2000 Preotection of Adults Convention, Art 22 of the Hague 2007 Protocol, Art 12 of the Hague 1973 Maintenance (Applicable Law) Convention (Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations. Hague Conference of Private International Law. Available:
http://www.hcch.net/index_en.php?act=conventions.text&cid=86 (01.09.2018).

[188] Under Art 39(1) of the Estonia-Russia legal assistance treaty the form of a transaction is determined by the law of the place of the performance of such transaction. In addition, under Art 39(2) of the Estonia-Russia legal assistance treaty transaction dealing with an immoveable and with the rights to such immoveable is determined under the law of the Contracting Party in whose territory the immoveable is situated.

[189] T. C. Hartley. The Modern Approah to Private International Law. International Litigation and Transactions from a Common-Law Perspective. General Course on Private International Law. – Recueil des Cours. 2006, Vol 316, p 33.

become a legal discipline which has passed the pre-paradigmatic stage and now enjoys the status of a "normal science" in which scholarly consensus of the fundamentals prevails".[190] If, however, the objective of certainty or predictability is to be regarded as the main policy consideration of the applicable law rules contained in the legal assistance treaties, it could be questioned whether some applicable law provisions contained in such treaties could have retrospective effect beyond the date of entry into force of the relevant broad legal assistance treaty. In this point, it is worth distinguishing between two types of applicable law provisions that the legal assistance treaties contain.

The first type of provisions deals with legal relationships, which have knowingly been entered into by the parties, or acts, which have been knowingly committed by individuals. Such provisions should not be given retrospective effect beyond the date of entry into force of the relevant broad legal assistance treaty in order to protect the reasonable expectations of the parties. For example, if a Russian national and an Estonian national would have concluded a contract on 18 March 1995 (that is, a day before the Estonia-Russia legal assistance treaty entered into force) the formal requirements of such contract should not be governed by the law referred to by Article 39 of the Estonia-Russia legal assistance treaty. To such a contract, Estonian courts should apply the old General Part of the Civil Code Act which provided for a somehow more benevolent regime than the Estonia-Russia legal assistance treaty – namely under Article 91(1) of the old General Part of the Civil Code Act the parties were entitled to choose the law applicable to the formalities of the contract, whereas no such possibility is provided by the Estonia-Russia legal assistance treaty. This arrangement is very reasonable as, before the application of the Estonia-Russia legal assistance treaty, the law designated by Article 39 of the Estonia-Russia legal assistance treaty would not have been the law, which the parties could have reasonably foreseen, unless they were too well informed for their own good.

The second type of provisions refers to occurrences, which have taken place before a particular legal relationship or an issue in question, arose. For example, it is hard to see why Article 22(1) of the Estonia-Russia legal assistance treaty should not have retrospective effect. Under this provision the legal active capacity of a person is determined under the law of the Contracting Party whose national the person is. Since legal capacity is not something that a person can knowingly influence, it might be justified to extend Article 22(1) of the Estonia-Russia legal assistance treaty retrospectively to cases where the applicant wants to determine that someone lacked legal capacity[191] already before the entry into

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[190] T. M. de Boer. Facultative Choice of Law: the Procedural Status of Choice-of-Law Rules and Foreign Law. – Recueil des Cours. 1996, Vol 257, p 271.

[191] Although Art 23 of the Estonia-Russia legal assistance treaty and Art 23 of the Estonia-Ukraine legal assistance treaty talk about 'limiting the legal capacity of a person' and 'declaring a person lacking legal capacity' the corresponding procedures in Estonian courts would be the 'appointment of a guardian' as regulated by § 526 of the Code of Civil Procedure. This is so, because under Estonian substantive law a person cannot lack legal

force of the Estonia-Russia legal assistance treaty. This is so because the purpose of Article 22(1) of the Estonia-Russia legal assistance treaty cannot be to protect the reasonable expectations of the person lacking legal capacity (as this person, by his mental capacity, might not have much foresight as to an applicable law), but rather to apply the law of the Contracting Party with what the person in question is most closely connected with. In the context of the legal assistance treaties this is presumed to be the law of the nationality of a person.[192]

In conclusion, while the applicable law provisions contained in the legal assistance treaties concluded with third states should generally have temporal reach which reaches back only to the entry into force of the relevant treaties, some of the provisions in the legal assistance treaties could exceptionally have further retrospective effect. What is important in this point, however, is that the applicable law provisions contained in the legal assistance treaties were applicable already at the time when the first EU regulations on private international law entered into force in relation to the Republic of Estonia on 1 of May 2004. Thus, even if the applicable law provisions contained in the legal assistance treaties do not have any retrospective effect beyond the dates of entry into force of the legal assistance treaties, they still have conflicting temporal scopes of application with the corresponding provisions in the EU regulations on private international law.

c) Provisions on the recognition and enforcement of foreign judgments

The legal assistance treaties concluded with third states contain provisions on the recognition and enforcement of 'judgments' of the other Contracting Parties. Such 'judgments' would include any decision handed down by a 'judicial authority', including a notary,[193] of a Contracting Party.[194] Thus, these provisions would be applied also in relation to court settlements approved by a court of a Contracting Party and in relation to authentic instruments issued by the notaries of the Contracting Parties.

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capacity – it is only possible to have limited legal capacity. See: Art 8(2) of the General Part of the Civil Code Act (*Tsiviilseadustiku üldosa seadus*). – RT I 2002, 35, 216; RT I, 20.04.2017, 1.

[192] Whether this law indeed is the law that a person knows the best is, of course, subject to taste. For example, the Estonian legislator, when drafting the Private International Law Act, chose to use 'residence' as the main connecting factor in the conflict-of-laws rules as the most foreseeable law, the European legislator, somewhat in contrast, has preferred to use 'habitual residence' in the Succession Regulation, the Rome Regulations and other regulations dealing with the applicable law.

[193] Notaries are included in the list of 'judicial authorities' within the meaning of the legal assistance treaties even though they are usually not considered as such in other instruments: Art 1(2) of the Estonia-Russia legal assistance treaty, Art 1(2) of the Estonia-Ukraine broad legal assisstance treaty.

[194] For example, in Estonia, notaries notarize certain agreements which are considered to be enforcement instruments. See: Art 2(1)18 and 2(1)18[1] of the Code of Enforcement Procedure (*Täitemenetluse seadustik*). – RT I 2005, 27, 198; RT I, 29.06.2018, 1.

Similarly to the provisions on jurisdiction and applicable law, the treaty provisions on the recognition and enforcement of foreign judgments do not explicitly deal with the question of what is the temporal scope of application of such provisions. It can be presumed that the legal assistance treaties should cover the recognition and enforcement of those judgments, which have been handed down after the relevant treaty came into force between the Republic of Estonia and the relevant other Contracting Party. For example, a Russian judgment made after 19 March 1995 when the Estonia-Russia legal assistance treaty entered into force should be enforced in Estonia under the Estonia-Russia legal assistance treaty. In contrast, it is not so clear whether the treaty rules on the recognition and enforcement of foreign judgments could also be extended to the judgments, which were handed down before the legal assistance treaties entered into force.

In principle, there is nothing in the legal assistance treaties concluded with third states, which would directly forbid the extension of the treaty rules to the judgments handed down before the legal assistance treaties entered into force between the Contracting Parties. The earlier case law[195] of the Estonian Supreme Court seems to support such extension by suggesting that the rules on the recognition and enforcement of foreign judgments contained in the Estonia-Ukraine legal assistance treaty could be extended to Ukrainian judgments handed down before the said treaty came into force. Although this view has been criticized in Estonian legal literature,[196] it has found some support in the subsequent case law of the lower courts.[197] Extending the treaty rules to the judgments, which were handed down before the relevant treaties came into force, can, however, be criticized for the following reasons.

Firstly, extending the treaty rules to the judgments handed down before the entry into force of a particular broad legal assistance treaty would probably not accord with the expectation of the Contracting Parties and the parties to a particular legal relationship. Although the explanatory materials[198] to the legal

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[195] *Turtšin.* Order of the Supreme Court of the Republic of Estonia No 3-2-1-125-00 of 10 November 2000.

[196] H. Vallikivi. Välislepingud Eesti õigussüsteemis: 1992.a. põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus. Tallinn: Õiguskirjastus 2001, pp 88–89.

[197] Judgment of the Viru County Court of 19 May 2008 in a civil case No 2-07-5843.

[198] The explanatory materials on all the legal assistance treaties are available in the archive of the Estonian Ministry of Foreign Affairs and are, by their wording, rather laconic. For example, the Estonia-Ukraine legal assistance treaty has an explanatory letter, signed by the Estonian Ministry of Justice and Chancellor, which contains only five sentences explaining the scope of the Estonia-Ukraine legal assistance treaty. On the civil part of the treaty the explanatory letter to the Estonia-Ukraine legal assistance treaty simply explains that: '*In civil matters the Treaty includes family law matters (conclusion of marriage, divorce, adoption and mutual recognition of family acts), but also guarantees same rights and obligations for the natural and legal persons of the Contracting Parties. The Treaty makes it possible to recognise the validity of legal documents without any additional legalisation'*. See: J. Adams and M. Oviir. Seletuskiri. (*Explanatory letter to the Estonia-Ukraine legal assistance*

assistance treaties concluded with third states do not shed any light to the question what the expectations of the Contracting Parties exactly were when concluding the legal assistance treaties, it can be presumed, based on the general principles of international law,[199] that the Contracting Parties could not have wished for the treaty rules to be applied to the judgments made before the entry into force of these treaties.[200] In addition, the reasonable expectations of the parties involved in the proceedings might suffer if the treaty rules are to be applied retrospectively to the judgments made before the relevant treaties entered into force. For example, a defendant who, before the entry into force of the Estonia-Russia legal assistance treaty was sued in the Russian Federation and who did not appear in these proceedings, knowing that all his assets were safely located in Estonia, might have been negatively surprised if the Russian judgment which, to his best knowledge, was not capable of being recognised in the Republic of Estonia, suddenly became recognisable there due to the entry into force of the Estonia-Russia legal assistance treaty.[201]

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treaty). Available in the archives of the Estonian Ministry of Foreign Affairs, date and place of signing unknown. Note that the Estonia-Russia legal assistance treaty does not have any explanatory letter at all.

[199] See Art 28 ('*Non-retroactivity of treaties'*) of the Vienna Convention. According to this provision: *Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act, which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*. Note that the Republic of Estonia, the Ukraine and the Russian Federation are all Contracting Parties to the Vienna Convention.

[200] For a similar solution in the other international conventions that the Republic of Estonia has joined, see for example: Art 53(2) of the Hague 1996 Parental Responsibility Convention, Art 50(2) of the Hague 2000 Protection of Adults Convention, Art 56(1)(b) of the Hague 2007 Maintenance Convention (Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. Hague Conference on Private International Law. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=131 (01.09.2018). See in contrast: Art 24 of the Hague 1970 Divorce Convention (Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations. Hague Conference on Private International Law. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=80 (01.09.2018), Art 24 of the Hague 1973 Maintenance (Recognition and Enforcement) Convention (Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations. Hague Conference on Private International Law. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=85 (01.09.2018)).

[201] Note, however, that although since 2006 the new Code of Civil Procedure provides for the recognition and enforcement of the judgments which were made before the entry into force of the Estonia-Russia legal assistance treaty, by 2006, such actions might have been time barred in Estonian courts and would definitely have been so at the time of finishing this dissertation (01.09.2018). See: Art 157(1) of the General Part of the Civil Code Act 2002. See also Art 45(2) of the amending law of Art 157(1) of the General Part of the Civil Code Act 2002: Debt Restructuring and Debt Protection Act (*Võlgade ümberkujundamise ja võlakaitse seadus*). – RT I, 06, 12.2010, 01; RT I, 29.06.2014, 109.

Secondly, extending the treaty rules to the judgments handed down before the entry into force of a particular broad legal assistance treaty means that the Estonian authorities might not be able to refuse to recognise such judgments based on Estonian public policy. This is so because the relevant provisions of the legal assistance treaties concluded with third states do not contain any explicit public policy clauses as defences against the recognition and enforcement of foreign judgments,[202] although such defence exists in Estonian national civil procedure[203] which would step in, should the legal assistance treaties not be applicable. Although, the legal assistance treaties contain general provisions allowing the Contracting Party to refuse to provide legal assistance for the other Contracting Party if such assistance violates its sovereignty or threatens its security or violates its general principles of law,[204] it is unclear whether these provisions could also be used as bars against the recognition or enforcement of the judgment of another Contracting Party based on Estonian public policy.

Lastly, extending the treaty rules in Estonian courts to the judgments handed down before the legal assistance treaties concluded with third states came into force is actually not even necessary. This is so because, as from 1 of January 2006 when Article 620(1) of the new Code of Civil Procedure entered into force, Estonian courts recognise foreign judgments unilaterally without requiring the foreign state to recognise Estonian judgments in return. Such recognition is extended also to the judgments handed down before 2006.[205] Thus, the free movement of judgments between the Republic of Estonia and the Russian Federation and the Ukraine is, at least from Estonian side, guaranteed even if the legal assistance treaties would not exist between the relevant Contracting Parties.

In conclusion, while it is undisputed that the treaty rules on the recognition and enforcement of judgments can be extended to the judgments which have

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[202] See: Art 56 of the Estonian-Russian treaty and Art 43 of the Estonia-Russia legal assistance treaty. But see also Arts 18 of both treaties. It is disputable whether the latter provisions operate as grounds of refusal for the recognition and enforcement of judgments of the other Contracting Party.

[203] Estonian Code of Civil Procedure § 620(1)(1). Note, however, that to the best knowledge of the author of this dissertation the said provision has never been applied in Estonian case law and has not served much attention in Estonian legal literature. For a brief introduction to the operation of this provision, see: M. Torga. § 620. – V. Kõve and others (eds) (2018), pp 928–929; Jaadla, K. and Torga, M. Välisriigis sõlmitud samasooliste abielu ja kooselu tunnustamine Eestis. – Juridica 2013, VIII, 598, 599–600. On the operation of public policy clause in the other areas of Estonian private internatinal law, see: R. Jankelevitš. Avalik kord ja imperatiivsed sätted rahvusvahelises eraõiguses. – Juridica 2002 VII, pp 479–486; I. Nurmela and others (2008), pp 65–69.

[204] Art 18 of the Estonian-Russia broad legal assistance treaty, Art 18 of the Estonia-Ukraine legal assistance treaty.

[205] See for example: Order of the Harju County Court of 6 February 2006 in a civil case No 2-06-987; Order of the Viru County Court of 15 October 2008 in a civil case No 2-07-36851; Order of the Harju County Court of 8 May 2008 in a civil case No 2-06-5738.

been made after the legal assistance treaties concluded with third states entered into force, it is not so clear whether such provisions should also cover earlier judgments. What is, however, clear is that the provisions on the recognition and enforcement of foreign enforcement titles contained in the EU regulations on private international law and the legal assistance treaties concluded with third states have at least some overlap as to their temporal scopes of application, since European regulations became applicable after the legal assistance treaties, as demonstrated in the precious sub-chapter of this dissertation.[206] Theoretically, such overlap could lead to the incompatibilities between the two types of instruments within the meaning of Article 351 of the TFEU provided that the material, personal and territorial scopes of application of the relevant provisions contained in the two types of instruments overlap as well.

d) Provisions on international cooperation between the courts and other authorities

The main purposes of the legal assistance treaties is to enable the state authorities of one Contracting Party to provide legal assistance to the authorities of the other Contracting Parties. This is the reason why these types of treaties are often referred to in the legal literature as the 'mutual assistance treaties', 'bilateral judicial assistance treaties' or 'treaties on legal cooperation and mutual assistance'.[207] In civil matters such assistance includes the exercise of procedural acts provided by the legislation of the Contracting Party receiving the request. According to Articles 3 of the legal assistance treaties, such procedural acts include hearing the parties, witnesses and experts, making expertise, conducting judicial examinations and service and transfer of documents. The provisions on cooperation contained in the broad legal assistance treaty deal with the assistance offered to the authorities of the other Contracting Party in the course of performing such procedural acts.

The temporal scope of application of the provisions on cooperation contained in the legal assistance treaties is limited to the time when the treaties entered into force in relation to the Republic of Estonia. This is so because Estonian authorities were able to offer legal assistance to the authorities of the other Contracting Party based on the provisions contained in the legal assistance treaties only as of the time when the relevant treaties entered into force.

Since the legal assistance treaties entered into force several years before the first EU regulations on private international law became applicable in Estonian

[206] Just to briefly remind the reader – the first European regulations, which included provisions on recognition and enforcement (such as the old Brussels I Regulation and the Brussels II Regulation), became applicable in the Republic of Estonia on 1 May 2004 when the country joined the European Union.

[207] See correspondingly: I. Kucina (2012), pp 529–539; A. Anthimos (2014), pp 49–61; D. V. Karapetyan (2002), pp 211–270, 229.

courts,[208] the provisions on cooperation contained in the two types of instruments have at least some overlap as to their temporal scopes of application. Whether this leads to any incompatibilities within the meaning of Article 351 of the TFEU between the two types of instruments depends, again, on whether the material, personal and territorial scopes of application of these provisions overlap as well.

1.3.2. Material scope of application

The incompatibilities within the meaning of Article 351 of the TFEU between the legal assistance treaties concluded with third states on one hand and the EU regulations on private international law on the other may arise only if the material scopes of application of these two types of instruments coincide. While the EU regulations on private international law contain relatively clear rules as to their material scope of application, such rules are missing from the legal assistance treaties concluded with third states. However, based on the wording of the titles of the legal assistance treaties, the provisions contained in such treaties and Estonian case law, certain assumptions can be made as to the material scope of application of these instruments.

The title of the Estonia-Russia legal assistance treaty states that this treaty is to be applied in 'civil', 'family' and 'criminal' matters. The title of the Estonia-Ukraine legal assistance treaty is formulated similarly, but, as the titles of the other legal assistance treaties concluded by the Republic of Estonia,[209] it omits 'family matters'. Such omission should, however, not be given too much importance, since family matters are clearly covered by the Estonia-Ukraine legal assistance treaty as this treaty contains special provisions on various family law matters, such as the provisions on the law applicable to different aspects of marriage (Articles 25–26), to divorce (Article 27) and to the establishment and disputing of parentage (Article 28(1)). Thus, in the context of the legal assistance treaties 'family matters' should be considered as being part of 'civil matters', although in some Contracting Parties there might have historically been some debate over the issue whether this indeed should be so.[210]

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[208] The first regulation that contained the provisions on cooperation was the Evidence Regulation which was applicable in the European Union already before the Republic of Estonia became a Member State on 1 May 2004. According to its Art 24(1) the Evidence Regulation became applicable on 1 July 2001.

[209] The Estonia-Poland broad legal assistance treaty also omits the term 'family matters' from its title, but includes 'employment matters' as a special category. The Estonia-Latvia-Lithuania legal assistance treaty is titled simply as the 'Treaty on the Legal Relationships between the Republic of Estonia, the Republic of Lithuania and the Republic of Latvia.'

[210] See on the historical discussions on the place of family law in the Russian legal system (which perhaps might explain why the Estonia-Russia legal assistance treaty mentions 'family law' aside with 'civil law'): M. I. Braginskii. Civil Law According to Russian Legislation: Developments and Trends. – Simons, W. B. (ed). Private and Civil Law in the Russian Federation. Essays in Honor of F. J. M. Feldbrugge. Leiden: Nijhoff 2009, pp 39–

As one Russian author has put it: "*Various developments in present-day economics and law confirm the tendency towards the merger of land law, family law and labour law with civil law, and the emergence of a single body of private (civil law*)".[211] One can, thus, conclude, that the legal assistance treaties are applicable in all 'civil matters', including family matters. Which matters exactly should be considered as 'civil matters' within the meaning of the legal assistance treaties is, however, not so clear and has been left to be specified by case law. In order to give meaning to the term 'civil matters' as used in the legal assistance treaties, Estonian courts would probably proceed from a division between private and public law known in Estonian national law, though theoretically they should also take into account how such matters are defined in the laws of the relevant other Contracting Party.[212]

The distinction between civil and public matters as recognised in Estonian national law proceeds from three well-known theories: the interest theory, subject theory and the theory of subordination.[213] According to these theories, in order to distinguish between civil and public matters, it is necessary to take into account whether the rule under which a particular legal relationship arose seeks to advance public interest, what is the nature (private or public) of the parties to such a legal relationship and whether one of the parties is exercising its public authority in such a relationship. For example, a particular dispute cannot be characterised as a 'civil matter', if it is based on the acts of a party who, being a public authority, acted in exercise of his authority.[214] However, a mere fact that one of the parties to a dispute is a public authority is not sufficient in order to conclude that a particular dispute is not a civil matter.[215] Only if the state party has acted in the course of its public authority, can a particular legal relationship

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41; M. V. Antokolskaya. Place of Russian Family Law in the System of Branches of Law and Correlation between Family and Civil Law. – Tilburg Foreign Law Review. 1996, Vol 53, Issue 5, pp 53–68. On the relationship between family law and civil law in Estonian legal system, see: P. Varul and others. Tsiviilõiguse üldosa. Tallinn: Juura 2012, pp 26–27; P. Varul. 1. osa § 1. – P. Varul and others. Tsiviilseadustiku üldosa seadus Kommenteeritud väljaanne. Tallinn: Juura 2010, p 1.

[211] M. I. Braginskii (2009), p 49.

[212] As international treaties, the legal assistance treaties should be interpreted autonomously. For example, this requirement could indirectly be drawn from the Vienna Convention Art 27 ('*Internal law and observance of treaties'*) which first sentence provides that: *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.* See also: Arts 31–33 of the Vienna Convention on the interpretation of treaties.

[213] K. Merusk ja I. Koolmeister. Haldusõigus Õpik. Tallinn: Õigusteabe AS Juura 1995, pp 25–26.

[214] As affirmed by: Judgment of the Estonian Supreme Court of 20 June 2008 No 3-2-1-55-08; Order of the Estonian Supreme Court of 20 April 2005 No 3-2-4-1-05; Order of the Estonian Supreme Court of 12 January 2004 No 3-2-1-149-03.

[215] This has repeatedly been stressed in Estonian case law. See for example: Judgment of the Estonian Supreme Court of 17 January 2007 No 3-2-1-133-06; Order of the Estonian Supreme Court of 29 May 1997 3-2-1-71-97.

be considered as 'public'. This solution is very similar to the one found in European law. For example, according to the case law of the Court of Justice of the European Union, the concept of 'civil and commercial matters' as used in the EU regulations on private international law would not cover a legal action brought by natural persons against a state for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare.[216] Such disputes where one of the parties has exercised its state authority would also not be considered as 'civil matters' under Estonian national law, but would instead be solved in administrative courts under the State Liability Act[217] or under the Wartime National Defence Law.[218] According to the established Estonian case law, a dispute cannot be characterised as 'civil' if it arose from a public relationship.[219] As derived from Article 4(1) of the Estonian Code of Administrative Court Procedure,[220] such disputes should be solved in the administrative courts. Thus, if the Estonian courts would interpret the notion of 'civil matters' found in the legal assistance treaties according to Estonian national law, it could be assumed that the material scopes of application of the legal assistance treaties concluded with third states and the EU regulations on private international law overlap. There are, however, two considerations, which have to be taken into account when determining the extent of such overlap.

Firstly, it has to be remembered that some civil and commercial matters are explicitly excluded from the material scopes of application of the EU regulations on private international law. In contrast, the legal assistance treaties concluded with third states do not explicitly exclude any civil and commercial matters from their scope of application, although the courts have occasionally tried to interpret the legal assistance treaties as excluding some civil mattes which are not explicitly mentioned in the texts of the treaties. For example, in one case[221] it was decided that the Estonia-Russia legal assistance treaty should not cover a dispute over a descent of a person, if such dispute is not a paternity dispute

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[216] *Irini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias*. Case C-292/05. Judgment of the Court (Second Chamber) of 15 February 2007. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-292/05 (01.09.2018).

[217] State Liability Act (*Riigivastutuse seadus*). – RT I 2001, 47, 260; RT I, 17.12.2015, 1.

[218] Wartime National Defence Act (*Sõjaaja riigikaitse seadus*). – RT I 1994, 69, 1194; RT I 12.03.2015, 1.

[219] Order of the Estonian Supreme Court of 6 December 2011 No 3-2-4-3-11, para 7; Order of the Estonian Supreme Court of 14 April 2011 No 3-2-4-11, para 6; Order of the Estonian Supreme Court of 15 June 2010 No 3-2-4-1-10, para 8; Order of the Estonian Supreme Court of 5 June 2007 No 3-2-1-63-07, para 8; Order of the Estonian Supreme Court of 27 April 2004 No 3-2-1-49-04, para 17; Order of the Estonian Supreme Court of 14 February 1997 No 3-2-1-21-97; Judgment of the Estonian Supreme Court of 17 October 1996 of 3-2-1-113-96; Judgment of the Estonian Supreme Court of 5 June 1996 No 3-2-1-76-96.

[220] Code of Administrative Court Procedure (*Halduskohtumenetluse seadustik*). – RT I, 23.02.2011, 3; RT I, 28.11.2017, 1.

[221] Order of the Harju County Court of 9 April 2013 in a civil case No 2-12-46762.

explicitly mentioned in Article 29 of the Estonia-Russia legal assistance treaty. Such solution can, however, be criticised, because, according to its title, the Estonia-Russia legal assistance treaty is intended to cover all civil matters. The material scopes of application of the two types of instruments do not overlap if the legal assistance treaties deal with matters that are excluded from the EU regulations. For example, Estonian courts have used the legal assistance treaties in order to recognise and declare enforceable judgments handed down by the arbitral tribunals of the other Contracting Parties,[222] but a similar course of action would not be possible under the EU regulations on private international law, since arbitration is generally excluded from the material scope of application of the EU regulations on private international.[223] Although Estonian case law which has extended the treaty provisions to arbitral awards,[224] could be criticised,[225] these cases demonstrate how the material scope of application of the legal assistance treaties could be broader than the material scope of application of the EU regulations on private international law.

Secondly, it should be taken into account that Estonian courts seem to interpret the term 'civil matters' in the context of the legal assistance treaties slightly more broadly than they would do in purely domestic disputes. For example, Estonian courts have recognised a foreign judgment, which ordered

[222] See: Order of the Viru County Court of 16 October 2008 in a civil case No 2-08-51989; Order of the Harju County Court of 27 June 2008 in a civil case No 2-08-20058; Order of the Harju County Court of 4 June 2008 in a civil case No 2-07-14599; Order of the Harju County Court of 25 March 2008 in a civil case No 2-08-3686; Order of the Harju County Court of 20 September 2007 in a civil case No 2-06-9195; Order of the Harju County Court of 31 July 2007 in a civil case No 2-06-34913; Order of the Harju County Court of 13 July 2007 in a civil case No 2-06-34912; Order of the Harju County Court of 16 February 2007 in a civil case No 2-06-36905; Order of the Viru County Court of 23 January 2007 in a civil case No 2-06-25610; Order of the Tallinn Circuit Court of 30 November 2006 in a civil case No 2-06-4799; Order of the Harju County Court of 22 May 2006 in a civil case No 2-06-4799.

[223] See, however: Art 1(1) of the Evidence Regulation, Art 1(1) of the Service *bis* Regulation.

[224] Order of the Harju County Court of 27 June 2008 in a civil case No 2-08-20058; Order of the Harju County Court of 25 March 2008 in a civil case No 2-08-3686; Order of the Harju County Court of 20 September 2007 in a civil case No 2-06-9195; Order of the Harju County Court of 16 February 2007 in a civil case No 2-06-36905; Order of the Viru County Court of 23 January 2007 in a civil case No 2-06-25610; Order of the Tallinn Circuit Court of 30 November 2006 in a civil case No 2-06-4799; Order of the Harju County Court of 22 May 2006 in a civil case No 2-06-4799.

[225] Since Estonia ratified the New York 1958 Convention in 30 August 1993, that is, before the broad legal assistance treaty entered into force, foreign arbitral awards originating from the Contracting Parties to the legal assistance treaties should be recognised and enforced in Estonia under the New York convention. See: United Nations Conference of International Commercial Arbitration. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Available: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (01.09.2018). The reason why the legal assistance treaties are sometimes used in order to regognise arbitral awards emanating from the other Contracting Parties might have something to do with the fact that in the Russian Federation, national commercial courts are referred to as the courts of arbitration.

the defendant to pay certain public fee to the other Contracting Party under the Estonia-Russia legal assistance treaty.[226] In contrast, under Estonian national law, a state fee would be paid to the state[227] and as such would not form part of an enforcement title, unless the winning party had already paid the state fee and the court had ordered the loosing party to compensate such expense to the winning party. The recognition of such judgment would probably also not be possible under the EU regulations on private international law, since such regulations exclude revenue, customs and administrative matters from their material scope of application[228] and state fees could be considered as part of the revenue claims of the state. Even if such claims would be presented in the form of foreign judgments, they would still not be enforced, because, as one English author has put it: '*a coat of whitewash will not deceive the court*.'[229]

In conclusion, although the material scope of application of the legal assistance treaties concluded with third states seem to be slightly broader than the material scope of application of the EU regulations on private international law, it is clear that the two types of instruments have rather large overlap as to their material scopes of application. As explained above, the two types of instruments also have overlapping temporal scopes of application. Whether this leads to any incompatibilities within the meaning of Article 351 of the TFEU between the two types of instruments depends on whether the personal and territorial scopes of application of the two types of instruments also overlap.

1.3.3. Personal scope of application

The incompatibilities within the meaning of Article 351 of the TFEU between the legal assistance treaties concluded with third states and the EU regulations on private international law can occur only if the personal scopes of application of the two types of instruments overlap. How wide is the possible extent of such overlap, is not entirely clear, since the legal assistance treaties do not contain any clear provisions as to their personal scope of application. The treaties only contain introductory declarations which seem to limit the application of the treaty provisions to certain persons. Whether such limitation should hold true for all the provisions contained in the legal assistance treaties, depends on the

[226] Order of the Estonian Supreme Court of 11 January 2011 No 3-2-1-141-10; Order of the Viru County Court of 3 February 2009 in a civil case No 2-08-86404. See also para 10.2 of the Order of the Estonian Supreme Court of 14 June 2017 No 3-2-1-62-17.

[227] As derived from § 7(1) of the the State Fees Act (Riigilõivuseadus). – RT I, 30.12.2014; RT I, 29.06.2018, 4.

[228] See, for example: Art 1(1) of the Brussels (Recast) Regulation, Art 2(1) of the European Enforcement Order Regulation, Art 2(1) of the European Order for Payment Regulation, Art 2(1) of the European Small Claims Regulation.

[229] A. Briggs. The Conflict of Laws Second Edition. Oxford: Oxford University Press 2008, p 46.

exact nature and purpose of the provision in question. In this point, it is again worth distinguishing between (a) provisions on jurisdiction, (b) provisions on the applicable law, (c) provisions on the recognition and enforcement of foreign judgments and (d) provisions on the cooperation between the courts and other authorities.

a) Provisions on jurisdiction

At first sight, the provisions on jurisdiction, contained in the legal assistance treaties concluded with third states, seem to have universal personal scope of application and should, thus, be applicable in all cases regardless of the nationality, domicile or residence of the parties. For example, a judge might be tempted to apply the Estonia-Russia legal assistance treaty in a case where a Spanish national domiciled in Estonia has sued another Spanish national also domiciled in Estonia for damages for a tort which has been committed in Estonia. This is so, because the relevant provision contained in the Estonia-Russia legal assistance treaty (Article 40(3)), simply states that in the matters of the compensation for damage, the competent court would be the court of the Contracting Party in whose territory the act or other event giving rise to the claim occurred. As this provision makes no reference to the nationality or the residence of the parties, it could be theoretically argued that this provision would be applicable in disputes which are in no way related to the Contracting Party to this treaty (the Russian Federation). This, however, seems highly questionable.

It could be presumed that Estonian courts should apply the treaty provisions only if a particular dispute or the parties to such dispute have certain connection to the other Contracting Party to the relevant legal assistance treaty. Presumably, it cannot be the purpose of the legal assistance treaties to deal with situations where the interests of the relevant Contracting Party are not affected at all.[230] For example, in a case where neither of the parties has their place of residences in the Russian Federation, do not hold Russian nationality and where no other factual circumstances point towards the Russian Federation, it could be hard to see why Estonian courts should determine jurisdiction in such a case under the Estonia-Russia legal assistance treaty.

Even more, if the legal assistance treaties concluded with third states would be applied regardless of the connection to the relevant Contracting Party, both of these legal assistance treaties would be concurrently applicable in all cases and the courts would be faced with an insolvable question as to which treaty

[230] That is not to say, as if the primary purpose of private international rules should be the advancement of interests of other states. This might have been a more classical understanding in (private) international law, but has been discarded in modern private international law doctrine. As one author has put it: "the primary concern of private international law and coupled with this the ultimate justification for applying foreing law is to solve conflicts to which individuals are exposed because of the diversity of laws claiming application to a certain situation" (F. Vischer. General Course on Private International Law. Collected Courses of the Hague Academy of International Law. Vol 232. 1992, p 30).

should enjoy priority of application. Presumably, it could not have been the intention of the Republic of Estonia to conclude irreconcilable treaties[231] and to force its courts to choose between fulfilling different international obligations. Hence, the personal scope of application of the legal assistance treaties has to be limited somehow in order to avoid conflicts between the applications of these treaties.

Since the provisions on jurisdiction, contained in the legal assistance treaties concluded with third states are silent as to their exact personal scope of application, such scope of application has to be determined by looking at the other provisions contained in the treaties. In this point, the first introductory declarations contained in the first Articles of these treaties are the most relevant provisions, as being the only provisions contained in the treaties, which vaguely deal with the scope of application of these treaties.

The declaratory provisions contained in both treaties are worded analogously. For example, Article 1 of the Estonia-Russia legal assistance treaty states the following:

> 1. '*The nationals of one Contracting Party have the same legal protection for their personal and material rights in the territory of the other Contracting Party as the nationals of the other Contracting Party. This applies accordingly to the legal persons established under the legislation of each of the Contracting Party.*
> 2. *The nationals of one Contracting Party have a right to turn freely and without any obstacles to the courts, public prosecutor's office and notaries offices (hereinafter – judicial authorities) and to the other authorities who deal with civil, family and criminal matters, they can appear in front of such authorities, request proceedings, submit claims and make other procedural acts on the same condition as the nationals of the other Contracting Party.'*

The following general assumptions on the personal scope of application of the provisions on jurisdiction contained in the Estonia-Russia legal assistance treaty could be made based on the wording and the position of this provision within the structure of the Estonia-Russia legal assistance treaty.

Firstly, Article 1(2) of the Estonia-Russia legal assistance treaty seems to suggest that the provisions on jurisdiction contained in the Estonia-Russia legal assistance treaty should be consulted by the Estonian courts in the cases where Russian nationals or Russian legal persons[232] are involved in Estonian

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[231] One can, of course, only assume whether at the time of the signing of the legal assistance treaties any attention was given to the possible overlap of these treaties. The prepamatory materials of the treaty which was signed later (the Estonia-Ukraine legal assistance treaties) are extremely laconic and silent on this point. See: J. Adams and M. Oviir. Seletuskiri. (*Explanatory letter to the Estonia-Ukraine legal assistance treaty)*. Available in the archives of the Estonian Ministry of Foreign Affairs, date and place of signing unknown.

[232] The legal assistance treaties do not define the concept of a 'legal person'. However, based on Articles 22(2) of these treaties, according to which the passive legal capacity of a legal person is determined under the law of the Contracting Party in whose territory the legal

proceedings as claimants. This is so because Article 1(2) refers to the 'right to freely turn' to court, which is essentially a right for the claimant. This assumption has also been confirmed by Estonian case law.[233]

Secondly, Estonian courts would probably also need to consult the provisions on jurisdiction contained in the Estonia-Russia legal assistance treaty if the defendant is a Russian national or a Russian legal person. Since Article 1(1) of the Estonia-Russia legal assistance treaty refers to 'legal protection' which has to be given to the nationals and legal persons of the other Contracting Party and since a person can participate in judicial proceedings and hence need legal protection also when he acts as a defendant, a broad reading of Article 1(2) of the Estonia-Russia legal assistance treaty would support the conclusion that the provisions on jurisdiction contained in the Estonia-Russia legal assistance treaty should also be consulted in the cases where the defendant is the national or legal person of the Russian Federation. It should be noted, however, that while there are several cases where the courts have followed this assumption,[234] for the most part, Estonian case law seems to have ignored this problem altogether, as the courts do not often pay very much attention to the nationalities of the parties to a particular dispute when applying the rules on jurisdiction contained in the legal assistance treaties concluded with third states.[235] For example, Estonian

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person in question has been established, it can be presumed that, within the meaning of the legal assistance treaties, a legal person is any legal person which is considered as such under the law of the Contracting Party of origin. For the definition of a legal persons recognised in Estonian national law, see: Art 24 of the General Part of the Civil Code Act. On the notion of legal persons in Russian law, see: Article 48 of the Russian Civil Code (Гражданский кодекс Российской Федерации. (*The Civil Code of the Russian Federation*). Available: http://www.consultant.ru/document/cons_doc_LAW_5142/ (01.09.2018)). For a general overview on the concept and types of Russian legal persons in English, see: V.V. Vitrianskii. The Concept and Varieties of Legal Persons According to the Civil Code of Russia. – Review of Central and East European Law 1995, Vol 21, No 5, pp 501–509.

[233] See, for example: Judgment of the Harju County Court of 21 March 2013 in a civil case No 2-12-46547; Order of the Viru County Court of 11 October 2007 in a civil case No 2-07-35540; Order of the Viru County Court of 28 August 2007 in a civil case No 2-07-23771; Order of the Viru Circuit Court of 14 February 2007 in a civil case No 2-05-519.

[234] Judgment of the Harju County Court of 21 March 2013 in a civil case No 2-12-46547; Order of the Viru County Court of 22 July 2011 in a civil case No 2-10-46672; Judgment of the Viru County Court of 29 October 2007 in a civil case No 2-06-13549; Order of the Viru County Court of 11 October 2007 in a civil case No 2-07-35540; Order of the Viru County Court of 28 August 2007 in a civil case No 2-07-23771. For the similar case law under the Estonia-Ukraine legal assistance treaty, see: Judgment of the Harju County Court of 14 January 2013 in a civil case No 2-12-48448.

[235] See, for example: Order of the Viru County Court of 14 March 2013 in a civil case No 2-13-2551; Judgment of the Harju County Court of 22 November 2012 in a civil case No 2-11-590062; Order of the Pärnu County Court of 22 October 2012 in a civil case No 2-11-59881; Order of the Tartu County Court of 11 April 2012 in a civil case No 2-12-10892; Order of the Tartu County Court of 30 March 2012 in a civil case No 2-11-60758; Order of the Tartu County Court of 7 February 2012 in a civil case No 2-12-4125; Judgment of the Viru County Court of 21 November 2007 in a civil case No 2-02-108.

courts have sometimes applied national provisions on jurisdiction contained in the Code of Civil Procedure in relation to Russian nationals[236] and in some cases the courts have not bothered to deal with the determination of international jurisdiction at all, although the nationals of the other Contracting Party have been involved in the proceedings before the court.[237] Perhaps the reason for such case law has been the unawareness of the courts on the existence of the legal assistance treaties concluded with third states or the courts have just failed to spot the relevant foreign element triggering the application of the provisions on jurisdiction contained in the relevant legal assistance treaties.

Thirdly, it can be concluded from the wording of Article 1 of the Estonia-Russia legal assistance treaty that, in order for this treaty to be applicable in Estonian courts, it is not necessary for (at least) one of the parties involved in particular proceedings to have his place of residence in the Russian Federation. Since Article 1 of the Estonia-Russia legal assistance treaty does not mention a person's place of residence, the residence of a party in the Russian Federation should not itself trigger the application of the provisions on jurisdiction contained in the Estonia-Russia legal assistance treaty. Note, however, that in practice, courts have often relied on the provisions of the Estonia-Russia legal assistance treaty without determining whether one of the parties has Russian nationality or is a Russian legal person.[238] The reasons for this have, perhaps, more to do with general oversight than any legal policy consideratiosn, as in subsequent case law the courts have clearly stressed that the Estonia-Russia legal assistance treaty can only apply if one of the parties is Russian national or legal person.[239]

Taking into account that the EU regulations on private international law do not explicitly exclude Russian or Ukraine nationals as the persons in relation to whom these regulations could apply, it can be concluded that the personal scope of application of the jurisdictional rules contained in the EU regulations on private international law and the legal assistance treaties concluded with third states overlap. This in turn might lead to the incompatibilities between the two types of instruments within the meaning of Article 351 of the TFEU if the legal

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[236] See: Judgment of the Harju County Court of 22 November 2011 in a civil case No 2-11-48978.

[237] See, for example: Judgment of the Pärnu County Court of 29 November 2009 in a civil case No 2-09-27841; Judgment of the Tartu County Court of 15 October 2007 in a civil case No 2-07-18869; Judgment of the Viru County Court of 20 March 2007 in a civil case No 2-05-19252. For a similar case law under the Estonia-Ukraine legal assistance treaty, see: Judgment of the Harju County Court of 28 December 2010 in a civil case No 2-10-46453.

[238] Order of the Viru County Court of 29 February 2016 in a civil case No 2-15-114486; Order of the Viru County Court of 16 November 2015 in a civil case No 2-15-16503.

[239] Order of the Tartu Circuit Court of 16 August 2017 in a civil case No 2-16-19080; Order of the Tartu County Court of 13 April 2017 in a civil case No 2-17-116786; Order of the Tartu Circuit Court of 15 February 2017 in a civil case No 2-16-9424.

assistance treaties concluded with third states are applied instead of the European regulations.

b) Provision on applicable law

Similarly to the provisions on jurisdiction, the provisions on the applicable law contained in the legal assistance treaties concluded with third states do not give any clear guidelines as to their personal scope of application. Looking at the wording of these provisions, one might be tempted to conclude that these provisions are applicable regardless of the residence or nationality of the parties involved in a particular dispute. This conclusion would, however, be somewhat unfortunate as it would disregard the interests of the Contracting Parties involved and (in some cases and depending a particular applicable law rule) also the reasonable expectations of the parties to a particular legal relationship. This will be demonstrated with the following example.

If a Spanish national, domiciled in Spain, causes in Estonia a car accident where another Spanish national, also domiciled in Spain, gets injured and if thereafter the victim of the accident sues the person causing the accident for damages in Estonian court, the latter would, if the provisions on applicable law contained in the legal assistance treaties would have universal personal scope of application, have to apply the relevant provisions contained in the legal assistance treaties in order to determine the applicable law to such tort claim. Under both, the Estonia-Russia and the Estonia-Ukraine legal assistance treaty, the applicable law in such a case would be Estonian substantive law as the law of the Contracting Party in whose territory the act or other event giving rise to the claim for damage occurred.[240] In contrast, if the legal assistance treaties would not be applicable, Estonian court would determine the applicable law under the Rome II Regulation, which Article 4(2) would lead to the application of Spanish substantive law as the law of the common habitual residence of the parties. It could be argued that since both parties are Spanish nationals living in Spain, the application of Estonian substantive law would not accord with the legitimate expectations of the parties as they can best foresee the law with what they are both best familiar with (that is, the law of their habitual residence)[241] and in any case they could possibly not foresee the application of an international treaty concluded between the Republic of Estonia and a third state. It would also be

[240] This would derive from: Art 40(1) Estonia-Russia legal assistance treaty, Art 33(1) Estonia-Ukraine legal assistance treaty.

[241] The foreseeability argument was used by the European Commission when making the proposal for Art 4(2) of the Rome II Regualation. See p 12 of the relevant Commission Proposal: European Commission. Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligaitons (Rome II). COM(2003) 427 final. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003PC0427&from=EN (01.09.2018)). But see A. Dickinson who, when commentating Art 4(2) of the Rome II Regulation, makes a good point in arguing that a person cannot possibly foresee who he drives over: A. Dickinson (2008), p 336.

hard to see why the Russian Federation or Ukraine would have any interest in Estonian substantive law being applied in a dispute between two Spanish nationals in Estonian court or in the applicable law being determined in such dispute under the legal assistance treaties concluded with these states.

In order to best accord with the reasonable expectations of the parties involved in international civil disputes, it is, thus, preferable that the applicable law provisions contained in the legal assistance treaties concluded with third states would be applied only in civil cases where there exists some kind of connection with the relevant Contracting Parties to the legal assistance treaties. What forms a sufficient connection to a relevant Contracting Party, is, judging by Estonian case law, not entirely clear.[242] In the interest of predictability and legal certainty, it could be proposed that the criterion for applying the applicable law rules contained in the legal assistance treaties concluded with third states should be the same as the criterion for applying the provisions on jurisdiction contained in such treaties. Hence, it is proposed that the provisions on the applicable law should, similarly to the provisions on jurisdiction, be applied in Estonian courts only in international civil cases where the nationals or legal persons of the other Contracting Party are involved.[243]

As demonstrated in the previous sub-Chapter of this disserataion, the provisions on the applicable law contained in the EU regulations on private international law have universal personal scope of application. That is, in the absence of the legal assistance treaties, they would apply even if the litigants in a particular dispute are nationals or legal companies of the Russian Federation or Ukraine. Thus, even though the personal scope of application of the provisions on applicable law as contained in the legal assistance treaties, is limited to the nationals or legal companies of the Russian Federation or Ukraine, the applicable law provisions contained in the two types of instruments still overlap as to their personal scope of application. This in turn might lead to the incompatibilities between the two types of instruments within the meaning of Article 351 of the TFEU if the legal assistance treaties concluded with third states are applied instead of the European regulations.

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[242] Estonian courts have not dealt with the personal scope of application of the applicable law provisions contained in the legal assistance treaties concluded with third states. However, the courts have dealt with this problem in the context of the legal assistance treaties concluded with the other Member States of the European Union. For example, in the cases where *negotiorum gestio* or delicts have taken place in Poland, the courts have not found these connections sufficient in order to trigger the application of the Estonia-Poland broad legal assistance treaty: Judgment of the Tartu Circuit Court of 8 November 2010 in a civil case No 2-08-53577; Judgment of the Tallinn Circuit Court of 29 July 2006 in a civil case No 2-05-15906; Judgment of the Pärnu County Court of 3 March 2006 in a civil case No 2-05-15906.

[243] On this, see further: M. Torga. Kohalduva õiguse ja selle sisu kindlakstegemine rahvusvahelistes eraõiguslikes vaidlustes. – Juridica 2014 V, p 406, 409.

c) Provisions on the recognition and enforcement of foreign judgments

In contrast to the provisions on jurisdiction and the provisions on the applicable law, the provisions on the recognition and enforcement of foreign judgments contained in the legal assistance treaties concluded with third states should probably not be applied only in the cases where the nationals or legal persons of the relevant Contracting Party are involved in Estonian court proceedings dealing with the recognition and enforcement of judgments. Similarly, these provisions probably apply regardless of the nationalities or residences of the parties at the time of the original proceedings leading to such a judgment. A support for this position can be found from the overall objective of the legal assistance treaties, the wording of the provisions in question and Estonian case law as demonstrated in the following paragraphs.

As already stated, the main objective of the legal assistance treaties is to enable the authorities of one Contracting Party to provide legal assistance to the authorities of the other Contracting Party.[244] As established by Articles 3 of both legal assistance treaties concluded with third states, such assistance includes the mutual recognition and enforcement of judgments emanating from the other Contracting Party. In contrast, such assistance would not include the determination of jurisdiction or applicable law under the legal assistance treaties concluded with third states. Thus, the purpose of the treaty provisions on jurisdiction and applicable law seem to differ from the purpose of the provisions on the recognition and enforcement of foreign judgments.

While the treaty provisions on jurisdiction and applicable law are aimed at protecting the interests of the nationals and legal persons of the relevant Contracting Parties, as can be derived from the declaratoruy provisions of these treaties, the provisions on the recognition and enforcement of foreign judgments seem to be primarily concerned with protecting the interests of the parties to the original judgment in question, regardless of their nationality or place or residence at the time that the recognition or enforcement of the judgment is sought. Indirectly, these provisions also seem to protect the interests of the Contracting Partie, as according to Articles 4 of the legal assistance treaties, the relevant Contracting Party and not the judgment's creditors, are entitled to request the recognition and enforcement of a judgment in Estonia.

The declaratory articles that foresee the right of the nationals and legal persons of the Contracting Parties to turn to Estonian courts on the same conditions as Estonian nationals, seems to be a declaratory provision not intended to apply for 'legal assistance' within the meaning of Article 3 of the treaties, as there is no mention of legal assistance in these declaratory provisions. Thus, the declaratory provisions found in Articles 1 of the broad legal assistance treaties which could be interpreted as limiting the scope of application of the provisions on jurisdiction and applicable law, should not limit the application of the provisions on the

[244] This can be inferred from the titles of the treaties which state that the treaties are the treaties of 'legal assistance'.

recognition and enforcement of foreign judgments contained in these treaties. The provisions on the recognition and enforcement of judgments contained in the legal assistance treaties concluded with third states should, thus, have universal personal scope of application. This cocnlusioin has also been supported by Estonian case law, as the Estonian courts have not limited the application of the provisions on the recognition and enforcement of foreign judgments contained in the legal assistance treaties only to the cases where the applicants were the nationals or legal persons of the relevant Contracting Party.[245]

Since the provisions on the recognition and enforcement of foreign judgments contained in the broad legal assistance concluded with third states have universal personal scope of application, it is more likely that such provisions conflict with the similar provisions contained in the EU regulations on private international law, than it would be, if the application of these provisions was limited to only certain types of persons. Whether the universal personal scope of application of these provisions in both types of instruments actually leads to any overlap between the two types of provisions, depends, however, on the question whether the territorial scopes of application of the relevant provisions contained in the two types of instruments overlap as well.

[245] Order of the Tartu County Court of 23 August 2011 in a civil case No 2-11-37524; *Tšiviljov*. Order of the Supreme Court of the Republic of Estonia No 3-2-1-141-10 of 11 January 2011; Order of the Viru County Court of 29 April 2010 in a civil case No 2-05-163; Order of the Viru County Court of 28 September 2009 in a civil case No 2-08-57443; Order of the Viru County Court of 17 June 2009 in a civil case No 2-09-847; Order of the Viru County Court of 3 February 2009 in a civil case No 2-08-86404; Order of the Viru County Court of 16 October 2008 in a civil case No 2-08-51989; Order of the Viru County Court of 15 October 2008 in a civil case No 2-07-36851; Order of the Harju County Court of 27 June 2008 in a civil case No 2-08-20058; Order of the Harju County Court of 25 March 2008 in a civil case No 2-08-3686; Order of the Viru County Court of 16 October 2007 in a civil case No 2-07-3627; Order of the Harju County Court of 20 September 2007 in a civil case No 2-06-9195; Order of the Harju County Court of 31 July 2007 in a civil case No 2-06-34913; Order of the Harju County Court of 13 July 2007 in a civil case No 2-06-34912; Order of the Harju County Court of 8 June 2007 in a civil case No 2-07-18057; Order of the Viru County Court of 19 April 2007 in a civil case No 2-07-2510; Order of the Harju County Court of 16 February 2007 in a civil case No 2-06-36905; Order of the Viru County Court of 23 January 2007 in a civil case No 2-06-25610; Order of the Viru County Court of 5 January 2007 in a civil case No 2-06-35959; Order of the Tallinn Circuit Court of 30 November 2006 in a civil case No 2-06-4799; Order of the Viru County Court of 7 June 2006 in a civil case No 2-06-10248; Order of the Harju County Court of 22 May 2006 in a civil case No 2-06-4799; Order of the Viru County Court of 15 May 2006 in a civil case No 2-06-10493; Order of the Harju County Court of 20 March 2006 in a civil case No 2-05-15199; Order of the Viru County Court of 1 February 2006 in a civil case No 2-06-558; Order of the Estonian Supreme Court of 25 May 2005 No 3-3-4-1-05; Order of the Estonian Supreme Court of 10 November 2000 No 3-2-1-125-00.

d) Provisions on international cooperation between the courts and other authorities

Similarly to the provisions on the recognition and enforcement of foreign judgments, the provisions on international cooperation between the courts and other authorities of the Contracting Parties contained in the legal assistance treaties seem to have an universal personal scope of application. This is so because, judging by the wording of these provisions,[246] their application does not depend on the nationality or residence of the parties to a particular dispute. In addition, there is nothing in the legal assistance treaties supporting the conclusion that such provisions should be applied only when the nationals or legal persons of the Contracting Party are involved in Estonian court proceedings as the declaratory provisions in the beginning of the treaties that contain such limitation make no reference to 'legal assistance'.

The conclusion that the provisions on cooperation contained in the legal assistance treaties concluded with third states have universal personal scope of application has also found support in Estonian case law as these provisions have, for example, been used in order to hear witnesses[247] and parties[248] residing in the other Contracting Party or serving documents on such parties[249] without limiting such requests to the cases where the parties to Estonian court proceedings were the nationals or legal persons of the other Contracting Party.

Since the provisions on cooperation contained in the legal assistance treaties have universal personal scope of application, it is more likely that such provisions conflict with the similar provisions contained in the EU regulations on private international law, than it would be, if the application of these provisions was limited to only certain types of persons. Whether the universal personal scope of application of the provisions on cooperation contained in the legal assistance treaties actually leads to any overlap between the similar provisions contained in the EU regulations on private international law, depends, however, on the question whether the territorial scopes of application of the relevant provisions contained in the two types of instruments also overlap.

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[246] See Arts 2–18 of the legal assistance treaties.

[247] Order of the Viru County Court of 29 November 2007 in a civil case No 2-04-989.

[248] Order of the Viru County Court of 29 October 2007 in a civil case No 2-06-13549; Order of the Viru County Court of 13 November 2006 in a civil case No 2-05-1723.

[249] Order of the Viru County Court of 16 October 2006 in a civil case No 2-05-15890.

1.3.4. Territorial scope of application

Only the courts of the Contracting Parties can generally[250] apply the provisions of the legal assistance treaties concluded with third states. Hence, the territorial scope of application of the legal assistance treaties concluded with third states is limited to the Contracting Parties. Similarly to the EU regulations on private international law the legal assistance treaties concluded with third states do not explicitly deal with the question whether these treaties should be applied *ex officio* by the courts of the Contracting Parties or only when the parties to a particular dispute rely on the provisions contained in these treaties.

Estonian courts have to apply the legal assistance treaties concluded with third states *ex officio*. This obligation has its roots in Article 123 of the Estonian constitution (*Eesti Vabariigi põhiseadus*)[251] which requires the courts to apply international treaty provisions even if such provisions are in conflict with Estonian national laws or legislation.[252] Hence, the courts should not disregard the treaty provisions based on the peculiarities of Estonian national rules of civil procedure. The duty to apply the provisions contained in the legal assistance treaties concluded with third states *ex officio* is also explicitly mentioned in various national provisions on civil procedure. For example, under Article 2(1) of the Estonian Private International Law Act a court has an *ex officio* duty to apply foreign law if it is required by international convention. Similar duty to apply the provisions on jurisdiction contained in the legal assistance treaties concluded with third states *ex officio* can be derived from Article 75(1) of the Code of Civil Procedure under which Estonian court is required to determine on its own initiative whether a claim or another application can be filed to Estonian court. As derived from the wording of Article 20(1) of the Code of Civil Procedure such investigation has to be carried out by taking into account the relevant provisions on international jurisdiction, including the applicable international conventions such as the Estonia-Russia legal assistance treaty and the Estonia-Ukraine legal assistance treaty.

Although Estonian courts as the courts of a Contracting Party have to apply the legal assistance treaties concluded with third states *ex officio*, the applicability of individual rules contained in the legal assistance treaties may depend on certain additional territorial criteria having been met in a particular dispute.

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[250] This general rule is again subject to one exception. Namely, a court in a third state might be bound to apply the applicable law provisions contained in the legal assistance treaties if so required by the particular doctrine of *renvoi* applicable in the third states.

[251] Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*). – RT 1992, 26, 349; RT I, 15.05.2015, 1.

[252] As also stressed in Estonian case law: Order of the Estonian Supreme Court of 21 March in a civil case No 2-16-19080, para 8; Order of the Tartu Circuit Court of 25 March 2015 in a civil case No 2-14-30347. See further on this: L. Mälksoo and others. § 123. – Ü. Madise and others (eds). Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne. 2017. Available: http://www.pohiseadus.ee (01.09.2018), para 123.

If a particular dispute falls outside the territorial reach of the provisions contained in the legal assistance treaties concluded with third states, the overlap between the scopes of application of the EU regulations on private international law and the legal assistance treaties concluded with third states would not take place. In order to analyse the possibility of such overlap, it is once more worth distinguishing between (a) provisions on jurisdiction, (b) provisions on the applicable law, (c) provisions on the recognition and enforcement of foreign judgments and (d) provisions on cooperation between courts and other authorities contained in the legal assistance treaties concluded with third states.

a) Provisions on jurisdiction

The provisions on jurisdiction contained in the legal assistance treaties concluded with third states have to be applied by the courts of the Contracting Parties. Since Estonian courts, as the courts of a Member State of the European Union, also have to apply the EU regulations on private international law, the territorial scope of application of the provisions on jurisdiction contained in these two types of instruments overlap. This, does not however, mean as if the provisions on jurisdiction contained in the legal assistance treaties and the similar provisions contained in the EU regulations on private international law would always seek to be concurrently applicable. This is so, because the application of the provisions on jurisdiction contained in these instruments can depend on certain additional territorial criteria having been met in a particular case.

The provisions on jurisdiction contained in the legal assistance treaties concluded with third states can contain territorial connecting factors, which can trigger or hinder the application of these provisions depending on the circumstances of each case. For example, according to the first sentence of Article 40(3) of the Estonia-Russia legal assistance treaty, the courts of the Contracting Party in whose territory the act or other event giving rise to the claim for damage occurred have jurisdiction over tort claims. The territorial connecting factor used in this provision is the territory of the Contracting Party in whose territory the act or other event giving rise to the claim for damage occurred. If the territory in question is Estonian, then Estonian courts would have jurisdiction under Article 40(3) of the Estonia-Russia legal assistance treaty in a particular case.

The territorial connecting factors used in the provisions on jurisdiction contained in the legal assistance treaties refer only to the territories of the Contracting Parties. If the concurrently applicable European provisions would use different connecting factors, the incompatibilities within the meaning of Article 351 of the TFEU between the provisions on jurisdiction contained in the legal assistance treaties and the similar provisions contained in the EU regulations could arise if the legal assistance treaties are applied instead of the EU regulations on private international law. Whether this indeed, is so, will be demonstrated in the Chapter II of this dissertation.

b) Provision on applicable law

Similarly to the provisions on jurisdiction, the provisions on the applicable law contained in the legal assistance treaties concluded with third states are applicable only in the courts of the Contracting Parties. Thus, the territorial scope of application of such provisions is limited to the territories of the relevant Contracting Parties.

The territorial reach of the individual provisions on the applicable law contained in the legal assistance treaties concluded with third states can, however, be wider than the territory of the Contracting Parties. This is so, because the provisions contained in the legal assistance treaties are aimed at influencing the behaviour of persons who do not necessarily have to have a residence in the Contracting Parties. For example, Article 39 of the Estonia-Russia legal assistance treaty could determine the law applicable to the form of a contract concluded between the parties who are both resident in a third state, provided that one of such parties is a Russian national or legal company who is later involved in Estonian court proceedings investigating the contract in question.

In contrast to the corresponding provisions contained in the EU regulations on private international law, the provisions on the applicable law contained in the legal assistance treaties never contain connecting factors which would lead to the application of the law of a third country. Such provisions generally[253] only refer to the law of a Contracting Party, whereas the EU regulations on private international law could lead to the application of the law of any state, regardless of whether it is a Member State of the European Union.[254] If the application of the relevant rules contained in the EU regulations on private would, in a particular case, lead to the application of the law of a state which is not a Contracting Party and the application of the treaty rules in contrast would lead to the application of the law of the Contracting Party, then the two types of provisions would be incompatible with each other within the meaning of Article 351 of the TFEU. Whether this indeed is so, will be demonstrated in the Chapter II of this dissertation.

c) Provisions on the recognition and enforcement of foreign judgments

Similarly to the other provisions contained in the legal assistance treaties concluded with third states, the provisions on the recognition and enforcement of foreign judgments can only be applied by the courts of the Contracting Parties. In addition, these provisions deal only with the recognition and enforcement of

[253] For an exception to this general principle, see: Art 39(1) of the Estonia-Russia legal assistance treaty and Art 32(1) of the Estonia-Ukraina legal assistance treaty, which both determine that the law applicable to the form of a transaction is the law of the 'place of performance' of such transaction. Such place could theroetically also be a third state.

[254] Art 2 of the Rome I Regulation, Art 3 of the Rome II Regulation, Art 4 of the Rome III Regulation, Art 20 of the Succession Regulation.

judgments originating from the other Contracting Parties.[255] Thus, the territorial reach of such provisions is limited to the territories of the Contracting Parties.

Since the provisions on the recognition and enforcement of foreign judgments contained in the EU regulations on private international law deal only with the recognition and enforcement of judgments, court settlements and authentic instruments originating from the Member States of the European Union and since neither the Russian Federation nor Ukraine is a Member State to the European Union, the relevant provisions contained in the two types of instruments seem to not have overlapping scopes of application. Whether these provisions could still be incompatible with each other within the meaning of Article 351 of the TFEU regardless of having different scopes of application, e.g. through the application of other provisions contained in the treaties, will be evaluated in the part of the dissertation which deals with the possible conflicts between the provisions contained in the two types of instruments (Chapter II).

d) Provisions on international cooperation between the courts and other authorities

Similarly to the provisions on recognition and enforcement, the provisions on cooperation contained in the legal assistance treaties concluded with third states come into play only in the proceedings before the authorities of the Contracting Parties. In addition, such provisions deal only with the cooperation between the authorities of different Contracting Parties. For example, Article 2(1) of the Estonia-Russia legal assistance treaty states that only the authorities of the Contracting Parties have an obligation to provide mutual assistance to the authorities of the other Contracting Parties. Hence, the territorial scope of application of such provisions is limited to the territories of the Contracting Parties.

Since the provisions on cooperation contained in the EU regulations on private international law are applied only if the cooperation between the courts and other authorities of the Member States is at issue, the provisions on cooperation contained in the EU regulations and the legal assistance treaties concluded with third states does not have overlapping scopes of application. Whether the provisions on cooperation contained in the two types of instruments could, through the application of other provisions contained in the legal assistance treaties, still be incompatible with each other within the meaning of Article 351 of the TFEU, will be evaluated in the part of the dissertation which deals with the possible conflicts between the provisions contained in the two types of instruments.

In conclusion, as has been demonstrated in this Chapter, the provisions contained in the EU private international law regulations and in the legal assistance treaties concluded with third states have, to a large extent, overlapping scope of

[255] This is explicitly stressed by Art 50(1) of the Estonia-Russia legal assistance treaty and Art 40(1) of the Estonia-Ukraine legal assistance treaty.

application. While the legal assistance treaties have wider temporal scope of application than the EU regulations, all cases which fall under the temporal scope of application of the EU regulations, fall also under the temporal scope of application of the legal assistance treaties. As to the material scope of application of the two types of insturments, while it might be intellectually stimulating to distinguish between the matters that these instruments cover (civil matters or civil and commercial matters) and the matters that they do not cover (public matters), there can be no doubt that, to a large extent, the matters which these two types of insturments cover are the same.

The main difference between the scopes of application of the two types of instruments appear when comparing the personal and territorial scopes of application of these instruments. While all provisoions in the EU instruments apply regardless of the nationality or residence of the persons involved in the court proceedings, the treaty provisioms on jurisdiction and applicable law apply only in cases involving nationals or legal persons of the relevant Contracting Parties. In such cases the two types of instruments have overlapping personal scope of application.

Similarly to the corresponding provisions found in the EU regulations, the provisions on the recognition and enforcement and the provisions on cooperation contained in the legal assistance treaties enjoy universal personal scope of application. However, in both of these instruments these provisions have limited territorial scope of application, coming into play only if a relevant judgment originates from or assistance is given to or requested from a Contracting Party or a Member State. Thus, the provisions on recognition and enforcement and the provisions on cooperation, as contained in the EU regulations and the legal assistance treaties, do not have overlapping scopes of application and cannot presumably be incompatible with each other within the meaning of Article 351 of the TFEU. Whether they could play any role in creating such incompatibility in conjunction with the application of other provisions will be analysed in the second part of this dissertation.

2. CONFLICTS BETWEEN THE PROVISIONS CONTAINED IN THE LEGAL ASSISTANCE TREATIES AND THE EUROPEAN REGULATIONS

2.1. Types of possible conflicts

2.1.1. Obvious and hidden conflicts

It is possible to identify various types of conflicts between the legal assistance treaties conclude with third states and the EU private international law regulations which can give rise to an incompatibility within the meaning of Article 351 of the TFEU. An obvious conflict between the two types of instruments occurs if there is a clear difference between the wordings of the same type of provisions contained in the two instruments, provided that such difference leads to a different result (different applicable law, different decision on jurisdiction or the recognition or enforcement or on the request for cooperation). A good example of such obvious conflict is presented by the rules on the applicable law to torts which are contained in the two types of instruments.

In the legal assistance treaties the law applicable to tort claims is determined by Article 40(1) of the Estonia-Russia legal assistance treaty and Article 33(1) of the Estonia-Ukraine legal assistance treaty. Under both of these provisions the law of the Contracting Party in whose territory the act or other event giving rise to the claim for non-contractual damage occurred is generally applied to the obligations to compensate for such damage. In contrast, under Article 4(1) of the Rome II Regulation, applicable law to a non-contractual obligation arising out of a tort/delict is generally the law of the country in which the damage occurs,[256] irrespective of the country in which the event giving rise to the damage occurred and irrespective to the country or countries in which the indirect consequences of that event occur. Not only do these provisions differ as to the connecting factors that they contain ('the state where the act or other event giving rise to damage occurs' vs 'the state where the damage occurs'), but they also differ as to the possible laws that they may point to. While the treaty rules can lead to the application of only the laws of the Contracting Parties, Article 4(1) of the Rome II Regulation can lead to the application of any state[257]

[256] See further on this connecting factor: A. Dickinson (2008), pp 318–333; R. Plender and M. Wilderspin (2009), pp 499–534; A. Spickhoff. VO (EG) 864/2007 Art 3. – H. G. Bamberger and others (eds) (2018), Rn 5–10.

[257] The Rome II Regulation provisions are, similarly to the provisions in the other EU applicable law instruments, universal in a sense that they might refer to any law, including the laws of third countries. On this, see further: A. Dickinson (2008), pp 275–276; R. Plender and M. Wilderspin (2009), pp 465–468.

and even to the law of a mere territorial unit of a state, such as Texas or Scotland.[258]

Even if, at first sight, the EU regulations on private international law and the legal assistance treaties concluded with third states seem to accord to each other as containing similar rules with similar wording, there could still arise incompatibilities between the two types of instruments within the meaning of Article 351 of the TFEU if the legal assistance treaties are applied by Estonian courts instead of the EU regulations. Such incompatibilities between the two types of instruments are best referred to as hidden conflicts. In contrast to the obvious conflicts, hidden conflicts are conflicts, which are not apparent when comparing just the wording of different legal instruments, but become apparent, if the courts interpret the terms used in these instruments. An example of such a conflict is the conflict between Article 21(1) of the Estonia-Russia legal assistance treaty and Article 4(1) of the Brussels I (Recast) Regulation and the usage of the terms 'residence' and 'domicile' in these provisions.

Under Article 21(1) of the Estonia-Russia legal assistance treaty, unless provided otherwise by the said treaty, the courts of the place of residence of the defendant are competent to hear civil- and family matters. On the face of it, this rule is very similar to the rule found in Article 4(1) of the Brussels I (Recast) Regulation according to which, subject to the Brussels I (Recast) Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. Taken on their own, the two provisions seem to be perfectly compatible. However, this is not the case when the terms 'residence' and 'domicile' are interpreted taking into account the structure and purpose of the relevant instruments.

In the case of natural persons, the concept of 'domicile'[259] as used in the Brussels I (Recast) Regulation should, according to Article 62(1) of the said regulation, be determined according to the reference to the internal law of the Member State whose courts are seised of a matter. In the case of Estonia, the relevant rules would be contained in Articles 14–15 of the General Part of the Civil Code Act.[260] While the concept of 'domicile' as used in the Brussels I (Recast) Regulation depends on the internal law of the court deciding upon its jurisdiction, the same is probably not be true for the interpretation of the term

[258] This comes from Art 25(1) of the Rome II Regulation.

[259] See further on the term 'domicile' of a natural person as used in the Brussels instruments: P. Vlas. Article 62. – U. Magnus and P. Mankowski (eds). (2016), pp 990–993; A. Spickhoff. VO (EG) 864/2007 Art 3. – H. G. Bamberger and others (eds) (2018), Rn 1; Junker. Rom II–VO Art 3. – F. J. Säcker and others (eds). Münchener Kommentar zur Bürgerlichen Gesetzbuch 7 Auflage. C. H. Beck: München 2018, Rn 1–2; H. Dörner. Rom II Art 3. – R. Schulze (ed). Bürgerliches Gesetzbuch. 9. Auflage. Nomos 2017, Rn 1; M. Weller, F. Nordmeier. Rom II Art 3. – G. Spindler and F. Schuster (eds). Recht der elektronischen Media. Kommentar. C. H. Beck: München 2015, Rn 1.

[260] See further on the interpretation of these provisions: P. Varul and others (2010), pp 61–67; M. Torga (2010), pp 473–480.

'residence' as used in the legal assistance treaties.[261] This is so because the legal assistance treaties concluded with third states are international contracts concluded between two Contracting Parties and as such should, in order to guarantee that these treaties are applied uniformly by the courts of different Contracting Parties, be interpreted autonomously with the reference to the laws of both Contracting Parties.[262] If an autonomous definition, independent of the law of the forum, is to be given to the term 'residence' as used in the legal assistance treaties, it is theoretically possible that Estonian courts would have jurisdiction under Article 4(1) of the Brussels I (Recast) Regulation, but not under the corresponding articles contained in the legal assistance treaties.

While the term 'domicile' as used in Article 4(1) of the Brussels I (Recast) Regulation is to be interpreted with the reference to the internal law of the forum, should the court decide upon its own jurisdiction, the same is not necessarily true for the other terms used in the EU regulations on private international law. As a general rule, the terms used in the European regulations must be interpreted autonomously, which means that they should be given meaning based on the common principles found in the laws of the Member States and by taking into account the purpose and scheme of the relevant instrument in question.[263] These considerations are not relevant when interpreting the terms found in the legal assistance treaties concluded with third states – when interpreting these treaties the starting point should be the texts of these treaties, the purpose and scheme of these treaties and the commonalities in the substantive laws of the relevant Contracting Parties.

In conclusion, the treaty rules and the rules contained in the EU regulations can use different connecting factors, which leads to obvious conflicts between the two types of instruments. Even if the wording of similar provisions contained in the two types of instruments is, at first sight, relatively similar, the

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[261] See, however, cases where Estonian courts used national law in order to give meaning to the term 'residence' as found in the legal assistance treaties: Order of the Tartu Circuit Court of 15 February 2017 in a civil case No 2-16-9424; Order of the Tallinn Circuit Court of 20 January 2015 in a civil case No 2-14-24298.

[262] For the justification of such approach, see: M. Torga. Elukoht tsiviilseadustiku üldosa seaduses: tähendus rahvusvahelises tsiviilkohtumenetluses. – Juridica 2010 VII, pp 473, 475–476. This requirement could also be drawn from the Vienna Convention Art 27 ('*Internal law and observance of treaties'*) which first sentence provides that: *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.* See also: Arts 31–33 of the Vienna Convention.

[263] See for example: *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*. Case 29–76. Judgment of the Court of 14 October 1976. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-29/76 (01.09.2018), para 3; *Land Oberösterreich v ČEZ as.* Case C-343/04. Judgment of the Court (First Chamber) of 18 May 2006. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=c-343/04&td=ALL (01.09.2018), para 22; *C*. Case C-435/06. Judgment of the Court (Grand Chamber) of 27 November 2007. Available: http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0435&lang1=en&type=TXT&ancre= (01.09.2018), para 1.

conflicts between the two types of instruments can still arise if the (formally similar) terms used in these instruments are interpreted according to the principles of autonomous interpretation. Such conflicts should be referred to as the hidden conflicts.

2.1.2. True and false conflicts

Even if there is an obvious difference between the wordings of the provisions contained in the EU regulations on private international law and the provisions contained in the legal assistance treaties, such difference does not necessarily mean that there is a conflict between the two types of instruments when one of them is applied in a particular case. If the application of the treaty rules instead of the European rules leads to an analogous end result, the two types of instruments do not conflict with each other. Hence, some conflicts between the two types of instruments could be referred to as false conflicts. An example of such a false conflict between the EU regulations on private international law and the legal assistance treaties concluded with third states is provided by the application of Article 4(1) of the Rome II Regulation and Article 40(1) of the Estonia-Russia legal assistance treaty in a tort case where the place of damage and the place of the act giving rise to such damage are both located in Estonia.

The rules on the law applicable to tort as found in different instruments were already cited in previous sub-chapter, but just in order to remind the reader: Article 40(1) of the Estonia-Russia legal assistance treaty refers to the law of the Contracting Party in whose territory the act or other event giving rise to the claim for non-contractual damage occurred whereas Article 4(1) of the Rome II Regulation refers to the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective to the country or countries in which the indirect consequences of that event occur. In a case where both, the damage and the act giving rise to damage, both occur in Estonia, the application of Article 40(1) of the Estonia-Russia legal assistance treaty as well as Article 4(1) of the Rome II Regulation would lead to the application of Estonian substantive law. Thus, in that particular case, the rules on the law applicable to non-contractual obligations contained in the two types of instruments do not conflict with each other.

Even though in the case of a false conflict the application of the legal assistance treaties instead of the EU regulations on private international law leads to a similar end result, such false conflicts should still be considered as the incompatibilities within the meaning of Article 351 of the TFEU, since depending on the factual circumstances of a particular case, they have a potential of turning into true conflicts and the legislator should not gamble on certain facts never occurring in practice.

2.1.3. Positive and negative conflicts

A positive conflict between the EU regulations on private international law and the legal assistance treaties concluded with third states occurs when the provisions contained in the two types of instruments have overlapping scopes of application and seek to be concurrently applicable. For example, both, the legal assistance treaties concluded with third states and the EU regulations on private international law contain rules on the applicable law to the formal validity of contracts. Not all positive conflicts are, however, true conflicts. If the provisions contained in the two types of instruments have overlapping scopes of application such provisions can be perfectly compatible with each other, if they use the same connecting factors in order to tie a particular dispute to a certain court or applicable law. A positive conflict can be either a true or false conflict, depending on the factual circumstances of a case. For example, in a dispute over a formal validity of a sales contract concluded by Estonian national with a Russian national, the applicable law rules contained in the Rome I Regulation (Article 11(1)) might lead to the application of the law chosen by the parties, whereas the corresponding rules contained in the Estonia-Russia legal assistance treaty (Article 39(1)) would lead to the application of the law of the performance of the contract. If these laws happen to be the laws of the same country, there would be a false conflict between the two types of instruments. If the connecting factors used in these provisions, however, lead to the application of different states, the conflict between the two types of rules should be considered as true conflict.

A negative conflict between the provisions contained in the EU regulations on private international law and the legal assistance treaties concluded with third states occurs when one instrument has an intentional gap and the other one does not. For example, both, the EU regulations on private international law and the legal assistance treaties provide a comprehensive system of rules on jurisdiction and should generally be taken as a whole without complementing them with the rules on jurisdiction found in other instruments.[264] Supplementing either of the two types of instruments with rules found in other instruments should be exceptionally possible only in cases when the instrument in question itself explicitly provides for such possibility.[265] However, in a case where one

[264] Note, however, that Estonian courts have repeatedly diverged from this rule. See, for example: Order of the Viru County Court of 16 November 2015 in a civil case No 2-15-16503; Order of the Viru County Court of 26 March 2014 in a civil case No 2-13-37483; Order of the Tartu County Court of 7 January 2014 in a civil case No 2-13-22196.

[265] For example, Art 6(1) of the Brussels I (Recast) Regulation points the court to the national law of a particular Member State in certain cases where the defendant is not domiciled in a Member State. For a somewhat similar exercise in divorce cases, see Brussels II *bis* Regulation Art 7(1) and in parental resposibility cases see Brussels II *bis* Art 14. See in contrast the Succession and Maintenance Regulations which do not proovide any such residual jurisdiction. The legal assistance treaties concluded with third states also do not

instrument, such as, for example, Brussels I (Recast) Regulation would include a rule giving Estonian court jurisdiction whereas the other applicable instrument, such as, for example, the Estonia-Russia legal assistance treaty would contain no such rule, a negative conflict between the two types of instruments occurs. A good illustration of such conflict is painted by the Tallinn Circuit Court case from 2015.[266] In this case the claimant had sued a Russian national in Estonian court. As it was not certain whether the Russian national in question lived in Finland or in the Russian Federation, the claimant argued that Estonian court's jurisdiction should be derived from the Brussels I Regulation Article 5(1) since the contract between the parties was to be performed in Estonia, whereas the defendant argued that the Estonia-Russia legal assistance treaty gave no jurisdiction to Estonian courts as the defendant's residence was not in Estonia. The court applied Estonia-Russia treaty since the defendant was a Russian national and decided that it did not have jurisdiction. Would either of the Brussels I Regulations been applicable, the court would probably have had jurisdiction under the provisions of these regulations dealing with contractual matters.[267]

As was the case with positive conflicts, not all negative conflicts are necessarily true conflicts – even if there is a gap in one instrument, this does not necessarily mean that such gap could not be filled by another instrument. For example, the applicable law rules contained in the legal assistance treaties concluded with third states refer only to the law of a Contracting Party. In a case where a particular connecting factor does not lead to the application of a Contracting Party, it cannot be said that there is an intentional gap in the broad legal assistance treaty, since the court has to determine applicable law somehow, otherwise it cannot decide the dispute. If the legal assistance treaties lac applicable law provisions which would fit the situation in front of the court, the court would be justified to determine applicable law under the EU regulations on private international law.

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contain any rules pointing the court to national rules on jurisdiction when determining jurisdiction.

[266] Order of the Tallinn Circuit Court of 26 October 2015 in a civil case No 2-15-109818.

[267] Brussels I (Recast) Regulation art 7(1), Brussels I Regulation Art 5(1). For the relationship between the two Brussels instruments see: T. Rauscher. – T. Rauscher and W. Krüger (eds) (2017), Rn 474–475; P. Mankowski. Arts 80 and 81. – U. Magnus and P. Mankowski (eds) (2016), pp 1111–1114.

2.2. Conflicts between the provisions on jurisdiction

2.2.1. Provisions on general jurisdiction

The rules on general jurisdiction contained in the legal assistance treaties concluded with third states and the EU regulations on private international law are in principle very similar as they all follow the maxim of *actor sequitur forum rei*.[268] However, there are slight differences between the wording and purpose of these rules, which could lead to the incompatibilities within the meaning of Article 351 of the TFEU, if one instrument is applied instead of another. In this point, it is worth distinguishing between the rules on general jurisdiction applicable to natural persons as defendants and the rules on general jurisdiction applicable to legal persons as defendants.

a) Natural persons as defendants

According to the rule on general jurisdiction contained in Articles 21(1) of the legal assistance treaties concluded with third states, a defendant who is a natural person can be sued in a Contracting Party if he or she has a place of residence in the territory of that Contracting Party. This general principle applies in all civil matters, except in those, which have been explicitly dealt with by the other provisions contained in the legal assistance treaties, such as the provisions on divorce,[269] parental responsibility[270] and matters of succession[271].

In European law, a corresponding rule on general jurisdiction to Articles 21(1) of the legal assistance treaties is found in Article 4(1) of the Brussels I (Recast) Regulation. According to this provision, subject to the Brussels I (Recast) Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. This provision is applicable in all civil- and commercial matters, except in those, which have been explicitly excluded from the scope of application of the Brussels I (Recast) Regulation. These exclusions are similar to the matters, which have been excluded from the scope of application of Articles 21(1) of the legal assistance treaties concluded with third states. Hence the provisions on general jurisdiction contained in the Articles 21(1) of the legal assistance treaties and Article 4(1) of

[268] The principle refers to the plaintiff's obligation to go to the defendant's forum. For a theoretical overview of the application of this principle in private international law, see: A. T. von Mehren. Must Plaintiffs Seek out Defendants? The Contemporary Standing of Actor Sequitur Forum Rei. – King's College Law Journal 1998 No 8, pp 23–42.

[269] Art 28(1)–(2) of the Estonia-Russia legal assistance treaty, Art 27(1)–(2) of the Estonia-Ukraine legal assistance treaty.

[270] Art 32 of the Estonia-Russia legal assistance treaty and Art 28(5)–(6) of the Estonia-Ukraine legal assistance treaty.

[271] Arts 45–46 of the Estonia-Russia legal assistance treaty and Arts 37–38 of the Estonia-Ukraine legal assistance treaty.

the Brussels I (Recast) Regulation have overlapping scopes of application and as such are theoretically capable of causing an incompatibility within the meaning of Article 351 of the TFEU.

At first sight, the general rules on jurisdiction found in Articles 21(1) of the legal assistance treaties concluded with third states and the Brussels I (Recast) Regulation Article 4(1) seem to be in accordance with each other. However, if the terms used in these provisions are investigated more closely, it becomes apparent that the two types of provisions are actually quite different. More precisely, the rules on general jurisdiction contained in the two types of instruments use, though similar in wording, different connecting factors.

The Brussels I (Recast) Regulation allocates jurisdiction to the courts of the Member State where the defendant has his 'domicile', while the legal assistance treaties concluded with third states allocate jurisdiction to the court of the 'residence' of the defendant. These two terms are not synonyms as they are given meaning in a different way and may, thus, lead to different end results, that is, to Estonian court either having jurisdiction or not having jurisdiction.

A person's domicile within the meaning of the Brussels I (Recast) Regulation should, according to Article 62(1) of the said regulation, be determined according to the reference to the internal law of the Member State whose courts are seised of a matter or, if a person's domicile in some other Member State is under a question, by the internal law of the relevant other Member State.

In Estonian national law the relevant rules for determining a person's residence are contained in Articles 14–15 of the General Part of the Civil Code Act. According to these provisions a person is deemed to reside where he permanently or primarily lives, but the place of residence of the minor is generally considered to be at the place where his parents or guardian have their place of residence.

While Estonian courts, if they wish to acquire jurisdiction under Article 4(1) of the Brussels I (Recast) Regulation, must give meaning to the concept of 'domicile' as used in the Brussels I (Recast) Regulation, according to the rules contained in the General Part of the Civil Code Act, the same should not be true for the interpretation of the term 'residence' as used in the legal assistance treaties concluded with third states.[272] Since the legal assistance treaties concluded with third states are international contracts concluded between two Contracting Parties, in the interest of uniform application, the provisions and terms contained in such conventions should be interpreted autonomously.[273]

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[272] For the justification of such approach, see: M. Torga. Elukoht tsiviilseadustiku üldosa seaduses: tähendus rahvusvahelises tsiviilkohtumenetluses. – Juridica 2010 VII, pp 473, 475–476. For a different case law, see, however: Order of the Tartu Circuit Court of 15 February 2017 in a civil case No 2-16-9424; Order of the Tallinn Circuit Court of 20 January 2015 in a civil case No 2-14-24298.

[273] This requirement could also be drawn, for example, from the first sentence on the Vienna Convention Art 27 ('*Internal law and observance of treaties'*) which first sentence provides that: *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.* See also: Arts 31–33 of the Vienna Convention.

Such autonomous definitions should be based on the purpose and scheme of the legal instrument in question and should be aimed at finding a common ground in the national laws of the relevant Contracting Parties.[274]

The legal assistance treaties concluded with third states do not give any guidelines on how to interpret the term 'residence' of a natural person as used in these treaties. In addition, analysing the purpose[275] and scheme[276] of the legal assistance treaties is not very helpful in order to give meaning to this term as used in the context of the legal assistance treaties. Hence, one should turn to the national laws of the Contracting Parties in order to give meaning to this term.

Estonian national rules on determining a person's residence were already described – these are the rules contained in Articles 14–15 of the General Part of the Civil Code Act. The relevant rules in Russian and Ukrainian national law are contained in Article 20 of the Russian Civil Code and Article 29 of the Ukrainian Civil Code[277] respectively. According to these provisions and similarly to Estonian national rules a person's residence is deemed to be in the place where he resides 'permanently or most of the time' (Russian Civil Code Art 20(1)) or 'permanently or temporarily' (Ukrainian Civil Code Art 29(1)). This is similar to the solution found in Estonian law, as according to Article 14(1) of the General Part of the Civil Code Act a person residenve is where he 'permanently or mainly lives'. However, Estonian national rules differ from Russian and Ukrainian national rules on the question how to determine the place of residence of a minor.

Under Estonian internal law a minor, that is – a person less than 18 years of age, is deemed to live where his/her parents live (Article 14(1) of the General Part of the Civil Code Act). In contrast, under Russian and Ukrainian internal law only the persons who are less than 14 years of age are deemed to live with

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[274] See for example: *Bank Handlowy v Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp.z o.o.* Case C-116/11. Judgment of the Court (First Chamber) of 22 November 2012. Available: http://curia.europa.eu/juris/liste.jsf?num=C-116/11&language=EN (01.09.2018), para 49; *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA*. Case C-396/09. Judgment of the Court (First Chamber) of 20 October 2011. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-396/09 (01.09.2018), para 42.

[275] As already explained, the purpose of the legal assistance treaties concluded with third states cannot be drawn from the preparatory materials of these treaties. Based on the title and first declaratory provisions contained in the treaties, it can be assumed, however, that the purpose of the treaties is to provide legal assistance to the other Contracting Parties and guarantee equal treatment for Estonian nationals and the nationals of the other Contracting Parties.

[276] The provisions in question (Art 21(1) of the Estonia-Russia legal assistance treaty and Art 21(1) of the Estonia-Ukraine legal assistance treaty) are located in the chapter of the legal assistance treaties titled 'Special part', 'Legal aid and legal relationships in civil- and family matters'.

[277] Цивільний кодекс України (*The Civil Code of the Ukraine*).
Available: http://zakon.rada.gov.ua/laws/show/435-15 (01.09.2018).

their parents.[278] Thus, if an Estonian court would determine a minor's place of residence under Estonian national law, but a Russian or Ukrainian court would determine such place of residence under the national law of these states, it would be possible that the minor in question would have different places of residence in the eyes of Estonian and Russian judges. For example, in a case where a 16-year-old lives in Estonia, but his parents live in the Russian Federation, Russian courts would not regard him as having a residence in the Russian Federation while Estonian courts would not consider him to have a residence in Estonia either. Thus, such a minor could not be sued under the Estonia-Russia legal assistance treaty in either of the Contracting Parties if the term 'residence' as used in this treaty is to be given meaning with the reference to the internal law of the court hearing the case. Presumably, it cannot have been the intention of the treaty makers that a person, who has connections only to the Contracting Parties, could not be sued in either of these states. Hence, an autonomous interpretation of the term 'residence' as used in the Estonia-Russia legal assistance treaty should be adopted. Such autonomous definition does not necessarily have to accord to the notion of 'residence' as used in Estonian national law. It could be argued, for example, that a minor's residence should be determined with a reference to the law of the Contracting Party which uses the lowest age limit to define such a minor.[279]

If an autonomous definition, independent of the law of the forum, is to be given to the term 'residence' as used in the legal assistance treaties concluded with third states, it could theoretically be possible that Estonian courts would have jurisdiction under Article 4(1) of the Brussels I (Recast) Regulation, if that provision was applicable, but not under Articles 21(1) contained in the legal assistance treaties concluded with third states. This could happen if the defendant is a minor whose place of residence in Estonian national law is determined differently than in Ukrainian and Russian national laws. In this case it would be possible that a person could be sued in Estonia under the Brussels I (Recast) Regulation, but not under the broad legal assistance treaty, since Articles 21(1) of these treaties provide that a defendant could be sued in a Contracting Party only if he has a place of residence in a Contracting Party 'unless provided otherwise by the legal assistance treaties'. No such contrary provision can be derived from the legal assistance treaties in general civil and commercial matters.

If a natural person cannot be sued in Estonia under the legal assistance treaties concluded with third states, because his 'residence' is not deemed to be in Estonia within the meaning of these treaties, but could be sued in Estonia under the Brussels I (Recast) Regulation, if that regulation was applicable, the application of the treaty rules instead of the Brussels I (Recast) Regulation would lead to an incompatibility between the two types of instruments within

[278] Art 20(2) of the Russian Civil Code, Art 29(3) of the Ukrainian Civil Code.

[279] For such an argument, see: M. Torga (2010), p 473, 475.

the meaning of Article 351 of the TFEU. Such conflict between the two types of instruments could be described as a true negative conflict since the purpose of the legal assistance treaties would not be to allocate jurisdiction to Estonian courts and the legal treaties do not allow Estonian courts to derive any residual jurisdiction from the European instruments.

(b) Legal persons as defendants

According to the rule on general jurisdiction as contained in Articles 21(1) of the legal assistance treaties concluded with third states, a defendant who is a legal person can be sued in a Contracting Party, if certain connecting factors used in these provisions refer to a Contracting Party in question. Who exactly are 'legal persons' within the meaning of these provisions has been left open by the treaties.

Taking into account the applicable law rule contained in Articles 22(2) of the legal assistance treaties,[280] it could be presumed that, within the meaning of these treaties, a legal person is any legal person, which is considered as such under the Contracting Party of origin. Thus, it is not necessary to define the term 'legal person' autonomously within the meaning of Articles 21(1) of the legal assistance treaties treaties, which provide for a rule on general jurisdiction in the case of legal persons as defendants.

According to Articles 21(1) of the legal assistance treaties a legal person can be sued in a Contracting Party if it has an administrative organ, representative office or branch of the defendant in the territory of that Contracting Party. The wording of the treaties leaves it unclear how these connecting factors should be interpreted and the matter has also not been given any attention in Estonian case law. It could be presumed that a person can be considered as having an administrative organ, representative office or a branch in a particular Contracting Party if provided so by the national law of the Contracting Party in question. For example, as derived from Article § 384(1) of the Estonian Commercial Code, a foreign company would be considered as having a branch in Estonia, if such branch has been registered with Estonian Commercial Register.

In European law, a corresponding rule to Articles 21(1) of the legal assistance treaties is found in Article 4(1) of the Brussels I (Recast) Regulation. According to this provision, subject to the Brussels I (Recast) Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. In order to decide where a legal person has its domicile in a Member State within the meaning of this provision, a complementary rule contained in Article 63(1) is applied. According to the latter provision, a company or other legal person or association of natural or legal persons is domiciled at

[280] According to these provisions, legal active passive capacity of legal persons is determined under the law of the Contracting Party in whose territory the legal person in question has been established.

the place where it has its: a) statutory seat,[281] b) central administration[282] or c) principal place of business.[283]

As shown above, the connecting factors, which allow a legal person or a similar entity to be sued in Estonia differ in the two types of instruments. More precisely, the relevant instruments contain three differences, which could lead to the incompatibilities within the meaning of Article 351 of the TFEU and which, thus, serve further explanation.

Firstly, under the Brussels I (Recast) Regulation a legal person or a similar entity could be sued in Estonia if its statutory seat is located in Estonia. In contrast, the legal assistance treaties concluded with third states do not allow a legal person to be sued in Estonia merely because its statutory seat happens to be in Estonia – the defendant should have its administrative organ, representative office or a branch in Estonia. In case of Estonian companies, the difference is often not important in practice, because the companies registered in Estonian commercial registry (i.e. the companies having statutory seat in Estonia) generally also have their administrative office (location of the board) in Estonia. This is, however, not explicitly required by the relatively new regulation contained in the Estonian Commercial Code.[284] According to the General Part to the Civil Code Act Article § 29(1)[1] a company must simply have an address in Estonia unless 'the law provides otherwise', but the location of the administrative body of the company does not have to be located in Estonia anymore. This is so, because, in connection with the new Estonian e-residency project,[285] the Estonian Ministry of Justice proposed[286] that the requirement, according to which an Estonian company must have its administrative organ in Estonia, should be abolished. Thus, it is possible that Estonian companies, which have their statutory seats in Estonia, have administrative organs, which are not located in

[281] On the meaning of this term, see for example: P. Vlas. Article 63. – U. Magnus and P. Mankowski (eds). (2016), pp 994–995.

[282] On the meaning of this term, see for example: P. Vlas. Article 63. – U. Magnus and P. Mankowski (eds). (2016), p 995.

[283] On the meaning of this term, see for example: P. Vlas. Article 63. – U. Magnus and P. Mankowski (eds). (2016), p 995.

[284] See the repealing provision in Art 81(1) of the Commercial Code (*Äriseadustik.* – RT I 1995, 26, 355; RT I, 17.11.2017, 2). For a similar deletion, see the Foundations Act (*Sihtasutuste seadus*. – RT I 1995, 92, 1604; RT I, 01.07.2017, 1) § 4, Non-profit Associations Act (*Mittetulundusühingute seadus*. – RT I 1996, 42, 811; RT I, 09.05.2017, 1) § 3.

[285] See further on this: Identity Documents Act (*Isikut tõendavate dokumentide seadus*. – RT I 1999, 25, 365; RT I, 21.04.2018, 3) § 20^5–20^{12}; R. Annus. E-residentsus. – Juridica 2014, X, pp 740–750; A. Piik and K. Kala. Estonia: Unique E-Residency Regime – Towards the End of the Nation States As We Know Them? – Computer Law Review International. 2014, 6, pp 186–187.

[286] Vabariigi Valitsus. Valitsuskabineti nõupidamise päevakord. 27.08.2015. Available: https://valitsus.ee/et/uudised/valitsuskabineti-noupidamise-paevakord-12 (01.09.2018). See further: M. Torga, K. Espenberg. E-residentsuse projekti tsiviilõiguslike riskide kaardistamine. Tartu Ülikool RAKE, 2015.

Estonia. This could lead to the possibility that an Estonian court might, depending on the circumstances of a particular case, have jurisdiction over a defendant under the Brussels I (Recast) Regulation (would such regulation be applicable), but not under the legal assistance treaties concluded with third states which have priority of application over the EU regulations.

Secondly, under the Brussels I (Recast) Regulation a legal person could be sued in Estonia, if its principal place of business is located in Estonia. In contrast, a place of business of the defendant in Estonia is not enough in order to trigger the jurisdiction of Estonian courts under the legal assistance treaties concluded with third states. This could again lead to the possibility that an Estonian court might have jurisdiction over a defendant, under the Brussels I (Recast) Regulation (would such regulation be applicable), but not under the legal assistance treaties concluded with third states.

Thirdly, while the legal assistance treaties concluded with third states allow the defendant to be sued in Estonia, if its representative office or branch is located in Estonia, Article 7(5) of the Brussels I (Recast) Regulation allows a defendant to be sued in Estonia based on the location of its branch, agency or other establishment only if the dispute between the parties has arisen from the operation of such branch, agency or other establishment.[287] No similar limitation is provided by the legal assistance treaties. Thus, it is theoretically possible that Estonian courts would have jurisdiction under the legal assistance treaties concluded with third states, but not under the Brussels I (Recast) Regulation, if the dispute does not concern the operation of the branch of the company, but the company has such branch in Estonia.

As demonstrated above, in the case of general jurisdiction over legal persons, it is possible that Estonian courts have jurisdiction under the legal assistance treaties concluded with third states, but not under the Brussels I (Recast) Regulation, would this regulation be applicable. In addition, it could also be possible that Estonian courts would have jurisdiction under the Brussels I (Recast) Regulation, would this regulation be applicable, but not under the legal assistance treaties concluded with third states, which have priority of application over the EU regulations. Thus, incompatibilities in the form of true negative conflicts could arise between the two types of instruments, if the rules on general jurisdiction contained in the legal assistance treaties concluded with third states would be applied instead of Article 4(1) of the Brussels I (Recast) Regulation. Since the end result of the application of one of the instruments differs starkly from the application of the other, as under one instruments the court would hear a case, whereas under other it would not, such conflict should be considered as an incompatibility within the meaning of Article 351 of the TFEU.

[287] On the operation of Article 7(5) of the Brussels I (Recast) Regulation, see for example: P. Mankowski. – U. Magnus and P. Mankowski (eds). (2016), pp 350–360.

2.2.2. Provisions on special jurisdiction

While the general rules of jurisdiction contained in the two types of instruments allocate jurisdiction to the courts of the residence or domicile of the defendant, the rules on special jurisdiction as contained in the two types of instruments grant additional grounds of jurisdiction for the courts of the Member States or Contracting Parties in commercial matters. In this point, the European rules[288] are much more generous, whereas the legal assistance treaties provide rules on special jurisdiction only for the disputes over certain non-contractual obligaitons.

In order to evaluate whether the rules on special jurisdiction contained in the two types of instruments are incompatible with each other within the meaning of Article 351 of the TFEU, it is, thus, worth distinguishing between the rules on (a) special jurisdiction for the disputes over non-contractual obligations and (b) on special jurisdiction for other commercial matters. The rules on juridiciton applicable to other civil cases are discussed in the following sub-chapters.

a) Rules on special jurisdiction for disputes over non-contractual oblications

The legal assistance treaties concluded with third states seem to[289] contain only one rule on special jurisdiction for commercial cases. Namely, Article 40(3) of the Estonia-Russia legal assistance treaty and Article 33(3) of the Estonia-Ukraine legal assistance treaty contain such a rule for the matters of 'obligations to compensate for damage, except the obligations arising from contract and other lawful acts'. These provisions provide claimant a choice between the court of the Contracting Party in whose territory the act or other event giving rise to the claim for damage occurred and the court of the Contracting Party in whose territory the defendant has his/her residence or, in the case of a legal person, his administrative organ, representative office or a branch.

The exact scope of application of Article 40(3) of the Estonia-Russia legal assistance treaty and Article 33(3) of the Estonia-Ukraine legal assistance treaty is unclear. As international treaties, the terms contained in these treaties, including the term 'obligations to compensate for damage', should be interpreted

[288] In European regulations such rules come from Arts 7–9 of the Brussels I (Recast Regulation).

[289] Note however, that it is not entirely sure whether the rules on jurisdiction for disputes over non-contractual disputes as contained in the legal assistance treaties should be regarded as the rules on special or exclusive jurisdiction. Since these rules (Art 40(3) of the Estonia-Russia legal assistance treaty and Art 33(3) of the Estonia-Ukraine legal assistance treaty give the claimant a choice between the court of the residence of the defendant (general jurisdiction) and another forum, they remind a rule on special jurisdiction (see for a similar rule in the Brussels I (Recast) Regulation Art 7(2)). Also, since the matters that these provisions cover do not generally involve any weaker parties, there are, perhaps, no policy reasons why such parties should be deprived of the possiblity to conclude choice of court agreements, which would not be possible if such rules are considered the rules on exclusive jurisdiciton (this comes from Arts 21(2) of the legal assistance treaties).

autonomously by taking into account the wording, but also the purpose and scheme of the treaties in question and similarities in the substantive laws of the relevant Contracting Parties.

Based on the wording of Article 40(3) of the Estonia-Russia legal assistance treaty and Article 33(3) of the Estonia-Ukraine legal assistance treaty it could be presumed that these provisions do not cover all non-contractual obligations recognised in Estonian substantive law. Estonian law of obligations recognises the following non-contractual obligations: non-contractual obligations based on delict, on *negotiorum gestio*, on unjust enrichment, non-contractual obligations relating to the public promise to pay (including competition) and non-contractual obligations to present a thing.[290] Not all these obligations should be covered by the rules on special jurisdiction contained in the legal assistance treaties concluded with third states. This is so because according to the wording of the legal assistance treaties concluded with third states, these treaties are limited to the obligations, which do not arise from 'lawful' acts. For example, a claim for compensation based on a public promise to pay does not arise from an 'unlawful' act as there is nothing *per se* unlawful in a person's action to perform a task in order to get a publicly promised reward. Similarly, it would be hard to see why the claims based on *negotiorum gestio* should fall in the scope of application of Article 40(3) of the Estonia-Russia legal assistance treaty and Article 33(3) of the Estonia-Ukraine legal assistance treaty, since the obligation of the *negotiorum gestor* to compensate for damage is not based on any 'unlawful act' in Estonian national law.[291] What should, however, be covered are the claims based on delicts as such claims undoubtedly relate to the 'obligation to pay for damage' as understood in Estonian national law.[292] In addition, it could be argued that some claims based on unjust enrichment, such as a claim based on Article 1037 of the Estonian Law on Obligations Act should probably be

[290] See Art 3 of the Law of Obligations Act (*Võlaõigusseadus*). – RT I 2001, 81, 487; RT I, 30.12.2017, 3. See further: M. Käerdi and others. Võlaõigusseadus III kommenteeritud väljaanne. Tallinn: Juura 2009, pp X–X, T. Tampuu. Lepinguvälised võlasuhted. Tallinn: Juura 2012; T. Tampuu. Sissejuhatus lepinguväliste võlasuhete õigusesse: üldprobleemid, tasu avaliku lubamise ning asja ettenäitamise õigus. – Juridica 2002, 4, pp 230–241; T. Tampuu. Sissejuhatus lepinguväliste võlasuhete õigusesse: käsundita asjaajamise õigus. – Juridica 2002, 5, pp 336–345; T. Tampuu. Alusetu rikastumise õigus võlaõigusseaduses. Lühiülevaade. – Juridica 2002, 7, pp 454–466; T. Tampuu. Deliktiõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus. – Juridica 2003, 2, pp 71–82; T. Tampuu. Deliktiõiguslik vastutus teisele isikule tekitatud kahju eest. – Juridica 2003, 7, pp 464–474. On the question, how the non-contractual obligations recognised in Estonian substantive law should be characterised in Estonian private international law, see further: I. Kull and M. Torga. Fitting the Estonian Notions of Contractual and Non-Contractual Obligations under the European Private International Law Instruments. – Juridica International 2013, XX, pp 61–68.

[291] Law of Obligations Act Art 1018(1)1.

[292] Law of Obligaitons Act Art 1045.

covered by an 'obligation to pay for damage' within the meaning of the legal assistance treaties.[293]

If one would compare only the wording of the texts of the rules on special jurisdiction contained in the legal assistance treaties and the Brussels I (Recast) Regulation, one might be tempted to conclude that the two types of instruments accord with each other. This conclusion would, however, not be entirely true. According to Art 7(3) of the Brussels I (Recast) Regulation, which is the provision, containing similar rules as Art 40 of the Estonia-Russia legal assistance treaty, in the matters of tort, delict or quasi-delict a person domiciled in a Member State can (besides the Member State where he is domiciled) may also be sued in the courts for the place where the harmful event occurred or may occur. It is settled case law that the term 'tort, delict or quasi-delict' as used in this provision covers all actions which seek to establish the liability of the defendant and which are not related to 'contract' within the meaning of the Brussels I Regulation.[294]

It is true that both the Brussels I (Recast) Regulation Article 7(2) and the legal assistance treaties would allow the claimant to sue the defendant in the Republic of Estonia if Estonia is the defendant's forum state – the legal assistance treaties in the Republic of Estonia as the Contracting Party where the defendant is resident and the Brussels I Regulation Art 2(1) (the Brussels I (Recast Regulation) Art 4(1)) in the Republic of Estonia as the Member State of the defendant's domicile. Both instruments would also allow the claimant to sue the defendant in the Republic of Estonia if the act or other event giving rise to the claim for damage occurred in Estonia. However, in contrast to the legal assistance treaties, the Brussels I (Recast) Regulation Art 7(3) would allow the claimant to sue the defendant in the Republic of Estonia also if the harmful event 'may occur' in Estonia. In addition, the Brussels I (Recast) Regulation Art 7(3) would allow the claimant to sue the defendant in the Republic of Estonia if the damage occurred in the Republic of Estonia. Although this does not directly come from the wording of the Brussels I (Recast) Regulation Art 7(3)), the Court of Justice of the European Union has established that 'the place where the harmful event occurred or may occur' within the meaning of this provision covers both, the place where the damage occurred and the place of the event

[293] See, however, a case where the court found that Art 40 of the Estonia-Russia legal assistance treaty does not cover a claim based on unjust enrichment: Order of the Tallinn Circuit Court of 11 April 2017 in a civil case No 2-16-18753. For a similar case, see: Order of the Viru County Court of 19 February 2013 in a civil case No 2-12-56567.

[294] This was established in: *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*. Case 189/87. Judgment of the Court (Fifth Chamber) of 27 September 1988. Available: http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=189/87&td=ALL# (01.09.2018), para 18. Most recently, this has been upheld by: *ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV*. Case C-147/12. Judgment of the Court (Fifth Chamber) of 18 July 2013. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0147 (01.09.2018), para 32.

giving rise to it, with the result that the defendant may be sued in the courts for either of those places.[295] Also, the concept of 'tort, delict or quasi-delict' as found in the Brussels I Regulation (the Brussels I (Recast) Regulation) seems to have a wider meaning than the term 'obligation to compensate for damage, except the obligations arising from contract and other lawful acts' as used in the legal assistance treaties concluded with third states. For example, while the first term could cover certain claims based on *negotiorum gestio*,[296] this would not be the case with the latter as the actions of *negotiorum gestor* cannot be considered as 'unlawful' as required for the application of the treaty rules.

In a situation where the provisions on non-contractual obligations contained in the Brussels I Regulation (the Brussels I (Recast) Regulation) would allow an Estonian court to hear the matter, but the corresponding provisions of the legal assistance treaties deprive Estonian court of any jurisdiction, the application of the treaty provisions instead of the EU provisions would lead to the incompatibilities within the meaning of the Art 351 of the TFEU between the two types of instruments. This could happen for example in a case where a Russian national files a claim based on tort in Estonian court against a defendant domiciled in Finland who has published a defamatory article on the claimant in Finnish newspaper. It is established[297] that, regarding the harm caused to the claimant in such a case in Estonia, the claimant could sue the defendant in Estonia under the Brussels I (Recast) rules. However, this would not be the case under the Estonia-Russia legal assistance treaty as its Article 40(3) would not allow the claimant to sue the defendant in Estonia. This is so because the act giving rise to damage – the publication of the newspaper – occurred in Finland and only the damage itself – the harm caused to the claimant due to the readers reading the article in Estonia – took place in Estonia. Hence a true negative conflict is bound to arise in this case between the two types of instruments, since the European instrument would give jurisdiction to the court while the broad legal

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[295] The first such a case interpreted an analogous provision in the old Brussels Convention: *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*. Case 21–76. Judgment of the Court of 30 November 1979. Available: http://curia.europa.eu/juris/liste.jsf?&num=21/76 (01.09.2018), para 25. This interpretation has most recently been confirmed by: *Coty Germany GmbH, formerly Coty Prestige Lancaster Group GmbH, v First Note Perfumes NV*. Case 360/12. Judgment of the Court (Fourth Chamber) of 5 June 2014. Available: http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-360/12&td=ALL (01.09.2018), para 46.

[296] P. Mankowski. Article 7. – U. Magnus and P. Mankowski (eds). (2016), pp 272.

[297] *Fiona Shevill, Ixora Trading Inx., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*. Case C-68/93. Judgment of the Court of 7 March 1995. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-68/93 (01.09.2018), para 30. This has been upheld most recently in: *eDate Advertising GmbH v X, Olivier Martinez, Robert Martinez v MGN Limited*. Cases C-509/09 and C-161/10. Judgment of the Court (Grand Chamber) of 25 October 2011. Available: http://curia.europa.eu/juris/liste.jsf?&num=C-509/09 (01.09.2018), para 42.

assistance treaty would deprive Estonian court from acquiring jurisdiction under any instrument.

Similarly, since not all non-contractual obligations which would be covered by Article 7(2) of the Brussels I (Recast) Regulation would fall under the scope of application of the relevant provisions on non-contractual obligations as contained in the legal assistance treaties concluded with third states, it is possible that Estonian court would, in the same case, have jurisdiction under Article 7(2) of the Brussels I (Recast) Regulation, should this regulation be applicable, but not under the legal assistance treaties. This could happen, for example, in the case of a claim against the *negotiorum gestor* to compensate for damage. Under Estonian Estonian substantive law the obligation of the *negotiorum gestor* to compensate for damage is not based on any 'unlawful act'[298] and therefore it is highly unlikely, that claims made against him would be covered by the provision on non-contractual obligations as contained in the legal assistance treaties. If the relevant place of 'damage' that has occurred due to the actions of the *negotiorum gestor*, however, occur in Estonia and the defendant does not have a residence (within the meaning of the legal assistance treaties) or domicile (within the meaning of the Brussels I (Recast) Regulation) in Estonia, then Article 7(2) of the Brussels I (Recast) Regulation would probably allocate jurisdiction to Estonian courts, whereas the legal assistance treaties would not.

b) Rules on special jurisdiction for disputes over other commercial matters

The legal assistance treaties concluded with third states contain special jurisdiction provisions only for non-contractual matters. In contrast, the European instruments contain special jurisdiction provisions for several other types of matters,[299] which might lead to the incompatibilities between the two type of instruments when the rules contained in the legal assistance treaties are applied instead of the rules contained in the European regulations. For example, under the Brussels I (Recast) Regulation Article 7(1) a person domiciled in a Member State may be sued in the Republic of Estonia, as in another Member State, in matters relating to contract, if the place of performance of the obligation in question took place in Estonia. The legal assistance treaties concluded with third states do not foresee similar ground of jurisdiction for commercial matters. Similarly, Article 8(1) of the Brussels I (Recast) Regulation provides that a defendant can be sued in another Member State, if he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. In a case where a person does not have a place of residence in Estonia within the meaning of the legal assistance treaties, but he is a number of defendants of whom one is sued already in Estonia, Estonian courts

[298] Law of Obligations Act Art 1018(1)1.

[299] See Arts 7–9 of the Brussels I (Recast Regulation).

could draw jurisdiction from Article 8(1) of the Brussels I Recast Regulation, but not from the legal assistance treaties. Similarly, under Article 8(3) of the Brussels I Recast Regulation a person can be sued in another Member State compared to the Member State of his domicile if in such other Member State on a counter-claim arising from the same contract or facts on which the original claim was based, the original claim is pending. No similar ground is provided by the legal assistance treaties, which would lead to a different decision on jurisdiction if the legal assistance treaties are applied instead of the European rule.

In the cases where the special jurisdiction provisions contained in the European instruments allow claimant to file her claim in the Republic of Estonia, but the legal assistance treaties deprive Estonian courts of any jurisdiction, the incompatibilities between the two types of instruments in the form of true negative conflict and within the meaning of Art 351 of the TFEU are bound to arise if the treaty rules are applied instead of the EU rules. This has already also happened in Estonian case law.[300]

As was the case with the rules on special jurisdiction for non-contractual obligations, the incompatibility between the rules on special jurisdiction for other types of matters as contained in the two types of instruments would generally take the form of an apparent true negative conflict, since the European instrument would entitle the court to hear the matter while the broad legal assistance treaty would deprive Estonian court from acquiring jurisdiction.

2.2.3. Provisions on exclusive jurisdiction

The majority of the provisions on jurisdiction contained in the legal assistance treaties concluded with third states can be considered as the provisions on exclusive jurisdiction. The exclusive nature of these provisions means that the claimant and the defendant cannot derogate from such rules by an agreement. In contrast, the rules on general jurisdiction (Articles 21(1) in both legal assistance treaties) can be deviated by the agreement between the parties, although the parties are not allowed to change the exclusive competences of the courts by agreement (Articles 21(2) in both legal assistance treaties). Although the legal assistance treaties concluded with third states do not expressively specify which provisions provide for the 'exclusive competence' of the courts within the meaning of these articles, it can be presumed that all provisions on jurisdiction of the legal assistance treaties, except the provisions on general jurisdiction and perhaps the rules on jurisdiction for the disputes over non-contractual obligations,[301] should be characterised as the provisions on exclusive jurisdiction.

[300] Order of the Tallinn Circuit Court of 26 October 2015 in a civil case No 2-15-109818.

[301] Just to remind the reader – it is disputable whether the rules on jurisdiction for disputes over non-contractual disputes as contained in the legal assistance treaties should be regarded as the rules on special or exclusive jurisdiction. Since these rules (Art 40(3) of the Estonia-Russia legal assistance treaty and Art 33(3) of the Estonia-Ukraine legal assistance treaty

This is so, because these provisions provide for the exceptions from the general rule of jurisdiction and should thus be interpreted restrictively.

In the context of the legal assistance treaties the provisions, which provide the claimant with a choice between the courts in different Contracting Parties (the provisions on special jurisdiction) are, by their nature, also provisions on exclusive jurisdiction. This is so, because, while these provisions offer the claimant a choice, it is nevertheless not possible to derogate from these provisions by agreement. Thus, the alternative grounds of jurisdiction provided by these provisions should be characterised as exclusive. For example, the provisions on divorce and marriage annulment, while providing a claimant with a choice between the forums in different Contracting Parties cannot be derogated by the agreement of the spouses.

The provisions on exclusive jurisdiction contained in the legal assistance treaties concluded with third states cover a wide range of civil matters, including family-, succession- and commercial matters. Some of these matters do not fall in the scope of the EU regulations on private international law. For example, Article 23(1) of the Estonia-Russia legal assistance treaty, which determines jurisdiction in the matters of limiting a person's legal capacity or declaring a person incapable, can never be in conflict with the EU instruments, as all the relevant EU regulations on private international law exclude the capacity of persons from their scope.[302]Similarly, the EU regulations do not deal with jurisdiction in international adoption,[303] whereas the legal assistance treaties contain rules on jurisdiction for such cases.[304] In addition, the following provisions on jurisdiction contained in the legal assistance treaties concluded with third states do not have a competing provisions in the EU regulations: the provisions on jurisdiction for the cases of declaring a person missing or dead, establishing the fact of death, establishing or disputing parenthood, establishing birth from a

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give the claimant a choice between the court of the residence of the defendant (general jurisdiction) and another forum, they remind a rule on special jurisdiction (See for a similar rule in the Brussels I (Recast) Regulation Art 7(2)). Also, since the matters that these provisions cover do not generally involve any weaker parties there are, perhaps, no policy reasons why such parties should be deprived of the possiblity to conclude choice of court agreements, which would not be possible if such rules are considered as the rules on exclusive jurisdiction (this comes from Arts 21(2) of the legal assistance treaties).

[302] See, for example: Art 1(2) of the Brussels I (Recast) Regulation; Recital 10 of the Brussels II *bis* Regulation; Art 1(2)a of the Maintenance Regulation.

[303] See the relevant exclusions in Art 1(2)(a) of the Brussels I (Recast) Regulation and Art 1(3)(b) of the Brussels II *bis* Regulation. Note that, the Republic of Estonia is a Contracting Party to the Hague Adoption Convention, but this convention does not directly deal with the problems of international jurisdiction in inter-country adoptions. See: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption. Hague Conference on Private International Law. Available: http://www.hcch.net/index_en.php?act=conventions.text&cid=69 (01.09.2018).

[304] Art 34 of the Estonia-Russia legal assistance treaty, Art 29(5) of the Estoniaa-Ukraine legal assistance treaty.

marriage, the provisions on on guardianship and curatorship of adults.[305] Consequently, since there is no competition between the two types of instruments in regard to these matters as these matters fall outside of the scope of the EU regulations, the incompatibilities within the meaning of Art 351 of the TFEU between the EU regulations and the provisions dealing with these matters in the legal assistance treaties cannot arise. However, there are some matters, which fall under the scope of application of both, the legal assistance treaties concluded with third states and the EU regulations on private international law. Namely, both types of instruments deal with jurisdiction in the matters of (a) divorce and marriage annulment, (b) parental responsibility, (c) succession and (d) other matters, which are considered as general civil matters under the legal assistance treaties, but which have prompted the Union legislator to create special rules on exclusive jurisdiction for such matters. The incompatibilities within the meaning of Article 351 of the TFEU can, thus, arise between the provisions contained in the two types of instruments dealing with these matters.

a) Divorce and marriage annulment

In matters of divorce and marriage annulment the legal assistance treaties concluded with third states offer claimant a choice: as a general rule, the authorities of the Contracting Party whose nationals the spouses were at the time of making the application for divorce or marriage annulment are competent to decide upon a divorce or marriage annulment, when, however, the spouses have a common residence in the territory of the other Contracting Party the authorities of that Contracting Party are also competent.[306] The claimant can, thus, choose between these two *fora*, provided that the conditions for turning to either of the courts are met. In addition, when, at the time of making the application, one spouse is a national of one Contracting Party and the other a national of the other Contracting Party, and one of them resides in the territory of one Contracting Party and the other in the territory of the other Contracting Party, the authorities of both Contracting Parties are competent.[307] Hence, the spouses are, depending on the circumstances of each case, offered a choice between turning to the authorities in different Contracting Parties. In Estonia such authorities would, either be vital statistics offices (*Perekonnaseisuamet*), notaries or courts. [308]

[305] Note that there is no urgent necessity to deal with the determination of capacity, guardianship and curatorship of adults in European private international law as there is already an existing Hague instrument for these matter – the Hague 2000 Protection of Adults Convention – which the Member States can join and which many Member States have already signed.

[306] See Art 28 of the Estonia-Russia legal assistance treaty and Art 27 of the Estonia-Ukraine legal assistance treaty.

[307] Ibid.

[308] According to Art 9 of the Estonian Family Law Act (Family Law Act (*Perekonnaseadus*). – RT I 2009, 60, 395; RT I, 09.05.2017, 1) a marriage can be annulled only by a court. According to Art 65(2) of the Family Law Act the application for a divorce has to be

In European law, jurisdiction in matrimonial matters (divorce, legal separation, marriage annulment) is regulated by the Brussels II *bis* Regulation.[309] Similarly to the legal assistance treaties conclude with third states, the Brussels II *bis* Regulation offers claimants a choice between different forums in different states. For example, under Article 3 of the Brussels II *bis* Regulation a claimant could file his application, among others, in a Member State where the defendant is habitually resident or in another Member State where the claimant himself is habitually resident and where he has resided for at least a year immediately before the application was made or for at least six months immediately before the application was made if he also happens to be the national of that Member State.

As regards to divorce and marriage annulment of the marriages of opposite-sex couples, the conflicts between the two types of instruments can arise in practice if the legal assistance treaties concluded with third states are applied instead of the Brussels II *bis* Regulation. This is due to the fact that the grounds of jurisdiction for divorce and marriage annulment matters as found in the Brussels II *bis* Regulation are considerably wider than the respective grounds of jurisdiction found in the legal assistance treaties concluded with third states. For example, in a case where both spouses have Russian nationality, but one of them resides in Estonia and the other one in Russia, if the spouse residing in Russia files an application for a divorce to an Estonian court, the Estonia-Russia legal assistance treaty Article 28 would prohibit Estonian court from hearing the matter. In contrast, under Article 3(1)(a) third indent of the Brussels II *bis* Regulation, Estonian court would be required to hear the matter, since the habitual residence of the defendant is located in Estonia. Hence, there appears to be an incompatibility between the two types on instruments within the meaning of Article 351 of the TFEU in the form of a true negative conflict, as the legal assistance treaties could deprive Estonian court of any jurisdiction, while the Brussels II *bis* Regulation would allow Estonian court to hear the matter.

The incompatibility between the rules on divorce and marriage annulment as contained in the two types of instruments could theoretically be avoided if the provisions on divorce and marriage annulment contained in the legal assistance treaties are read together with the provisions on general jurisdiction of the treaties (Articles 21 in both treaties) and are, thus, considered as the rules on special jurisdiction. Under the general rule of jurisdiction (Articles 21(1) of the treaties), the defendants could be sued in the Contracting Parties if their

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filed to either a court, if there is a disagreement between the parties over a divorce or the circumference relating to the divorce, or if a vital statistics office is not competent to grant a divorce. A vital statistics office can grant a divorce, if the spouses agree on the divorce and if both spouses are resident in Estonia. Notaries are capable to divorce spouses if there is an agreement to divorce between the spouses: Art 3(8) of the Vital Statistics Registration Act (*Perekonnaseisu toimingute seadus*). – RT I 2009, 30, 177; RT I, 30.12.2017, 1.

[309] See further on the jurisdiction in such matters: A. Borrás. Arts 3–9 – U. Magnus and P. Mankowski (2012 II), pp 86–109. M. N. Shúilleabháin (2010), pp 131–183.

residence is in the Contracting Party in question. Hence, it could be argued that the spouses as defendants could be sued in Estonia under these provisions, if their residence is in Estonia. This solution is problematic, since the treaty rules on general jurisdiction explicitly state that defendants can be sued in the Contracting Party based on their residence 'unless provided otherwise by the treaties' and the treaty rules on divorce and marriage annulment do explicitly provide otherwise. In addition, the rules on jurisdiction for divorce and marriage annulment should, perhaps, not be considered as rules on special jurisdiction in order not to give the spouses the possibility to conclude choice of court agreements under Articles 21(2) of the treaties in order to avoid any possibility of one spouse forcing his or her conditions upon the other spouse while getting married. Therefore, while tempting, the courts should not overcome the incompatibility between the rules on divorce and marriage annulment as found in the two types of instruments by considering the relevant treaty rules to be the rules on special jurisdiction.

At the moment, it is not yet clear wether the Estonian courts could apply the Brussels II *bis* Regulation in the cases where the applications are made for the divorces or marriage annulments of same-sex marriages, although some support for such a solution can be found in Estonian legal literature.[310] International position on this question seems to be mixed, with some authors being more hesitant[311] than others[312] when considering whether the term 'matrimonial matters' as used in the regulation should also refer to same-sex marriage. Even if the Brussels II *bis* Regulation would deal with the divorces and marriage annulments of same-sex couples, no conflicts between the Brussels II *bis* Regulation and the legal assistance treaties concluded with third states could arise if the claimant files an application for divorce or marriage annulment of a same-sex marriage to an Estonian court. This is so because the legal assistance treaties should be read as not covering such matters (or at least not covering such matters yet), since the rules on same-sex marriage are not provided for in either Estonian,[313] Ukrainian or Russian national laws. Thus, it could be assumed that the autonomous concepts of 'marriage' as used in the legal assistance treaties concluded with third states should not cover same-sex marriages either. Hence, at least when it comes to the rules on jurisdiction for divorce or marriage annulment for same-sex couples, the two types of instruments cannot be incompatible with each other within the meaning of Article 351 of the TFEU.

No conflicts between the two types of instruments can arise also in the cases, where the applicant files an application for a legal separation to an Estonian court. This is so because the legal assistance treaties do not explicitly deal with

[310] K. Jaadla and M. Torga (2013), pp 598, 601–602.

[311] W. Pintens. Art 1 – U. Magnus and P. Mankowski (2012 II), pp 57–59.

[312] M. N. Shúilleabháin (2010), pp 105–119.

[313] Note, however, that the Estonian legislator has relatively recently passed a law allowing the same-sex partners to enter into a registered partnership: Art 1(1) of the Registered Partnerships Act (*Kooseluseadus*). – RT I, 16.10.2014, 1.

legal separation and legal separation is also not dealt with in Estonian, Russian or Ukrainian national law. Thus, it is unlikely that the autonomous definition of 'divorce or marriage annulment' as used in the legal assistance treaties concluded by the Republic of Estonia should cover legal separation and there can be no incompatibility between the EU rules and the treaty rules within the meaning of Article 351 of the TFEU in this regard.

b) Parental responsibility

Parental responsibility matters concurrently fall under the scope of application of the Brussels II *bis* Regulation and the legal assistance treaties concluded with third states. Under the Brussels II *bis* Regulation Article 8 the parental responsibility matters[314] should, as a general rule and subject to exceptions provided by Articles 9, 10 and 12, be heard by the courts of the Member State where the child has his or her habitually residence. In contrast, under the legal assistance treaties concluded with third states, the nationality of the child is often the relevant connecting factor for establishing the jurisdiction in parental responsibility matters. For example, while under Articles 30(1) and 32 of the Estonia-Russia legal assistance treaty the dispute over a custody of a child would be determined by the court where the parent and the child have a common residence, in a situation where one parent and the child live in different Contracting Parties, Articles 30(2) and 32 of the treaty would give jurisdiction to the courts of the Contracting Party which nationality the child holds. Similarly, in the dispute over guardianship or curatorship over a child, Article 35(1) of the Estonia-Russia legal assistance treaty gives jurisdiction to the courts of the Contracting Party which national the child in question is. Since the rules of the legal assistance treaties concluded with third states use different connecting factors than the corresponding rules found in the Brussels II *bis* Regulation, the incompatibilities between the two types of instruments within the meaning of Article 351 of the TFEU would occur if the treaty rules on parental responsibility deprive court of the jurisdiction whereas the rules of the Brussels II *bis* Regulation would allocate jurisdiction in such matters to the court. For example, in a case where a Russian father living in Finland files an application for determining the custody rights in relation to a child who lives in Estonia, but has a Russian nationality, the Estonia-Russia legal assistance treaty Article 30(2) and 32 would deprive Estonian court from hearing the matter, since these provisions allow only Russian courts as the courts of the Contracting Party which national the child is to hear the matter. In contrast, if the Estonia-Russia legal assistance treaty would not be applicable, Estonian court could derive jurisdiction from

[314] The term 'parental responsibility' in the context of the Brussels II *bis* Regulation would include guardianship and curatorship – matters, which are dealt separately from custody under the legal assistance treaties concluded with third states. On the meaning of the term 'parental responsibility' in the context of the Brussels II *bis* Regulation, see: W. Pintens. Art 1. – U. Magnus and P. Mankowski (2012 II), pp 56, 72–73.

Article 8(1) of the Brussels II *bis* Regulation, since the child in question is habitually resident in Estonia. Thus, a true negative conflict between the two types of instruments occurs, as one instrument allocates jurisdiction to an Estonian court while the other deprives the court of jurisdiction and does not allow recourse to the first instrument. Thus, the two types of rules can, in this respect, be regarded as being incompatible with each other within the meaning of Article 351 of the TFEU.

Even if the connecting factors for parental responsibility matters, which have been used in different instruments and which are relevant in a particular case, seem to lead to the same result (that is – 'habitual residence of the child' under the Brussels II *bis* Regulation and 'common residence of the parent and the child' under the legal assistance treaties concluded with third states), the incompatibilities within the meaning of Article 351 of the TFEU may still arise, if these connecting factors are given different meaning by Estonian courts. It has already been argued that the term 'residence' as used in the legal assistance treaties concluded with third states, should be regarded as an autonomous concept, which is given meaning by taking into account national laws of the relevant Contracting Parties. Similarly, it is established[315] that the term 'habitual residence' of the child as used in the Brussels II *bis* Regulation should be regarded as an autonomous concept. According to the case law[316] of the CJEU, a child's habitual residence, for the purposes of Brussels II *bis* Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration of the child in a social and family environment. This might not necessarily be the criterion for determining the 'residence' of a minor within the meaning of the legal assistance treaties concluded with third states as the relevant national rules of the Contracting Parties regard the residence of the minor to be in a place where his legal guardian lives,[317] regardless of the social integration of the minor in that environment. Hence, it is possible that a hidden true negative conflict occurs as relatively similar rules contained in the two types of instruments lead to different end results in a particular case, since the connecting factors used in these rules should be given meaning differently. This also would lead to an incompatibility between the two types of rules within the meaning of Article 351 of the TFEU.

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[315] *A*. Case C-523/07. Judgment of the Court (Third Chamber) of 2 April 2009. Available: http://curia.europa.eu/juris/celex.jsf?celex=62007CJ0523&lang1=en&type=TXT&ancre= (01.09.2018), para 35.

[316] *Barbara Mercredi v Richard Chaffe*. Case C-497/10. Judgment of the Court (First Chamber) of 22 December 2010. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-497/10 (01.09.2018), para 56.

[317] Art 20(2) of the Russian Civil Code and Art 29(3) of the Ukrainian Civil Code.

c) Maintenance

Maintenance matters are another matter which concurrently fall under the scope of application of both, the European instruments (the Maintenance Regulation) and the legal assistance treaties concluded with third states.[318] As will be demonstrated in the following paragraphs, the two types of rules dealing with maintenance matters can, similarly to the rules previously discussed, be incompatible with each other within the meaning of Article 351 of the TFEU.

Under the Maintenance Regulation Article 3 the jurisdiction in all maintenance matters[319] is generally allocated to the court of either the Member State of the habitual residence of the maintenance creditor or the maintenance debtor.[320] In contrast, the rules on maintenance as found in the legal assistance treaties exclusively allocate jurisdiction (in case of maintenance owed to a child) to the courts of the nationality of the child[321] or (in case of spousal maintenance) to the court of the Contracting Party where the defendant has his or her residence.[322]

As regards to the rules on jurisdiction dealing with maintenance obligations towards children as found in the two types of instruments, the difference between the two types of instruments is clear, since the connecting factors ('habitual residence' vs 'nationality') used in the two types of instruments differ considerably. This difference can lead to the application of different laws in the same factual circumstances. For example, in a case where a child living in Estonia, but having a Russian nationality, claims maintenance from a father living in Russia, the Estonia-Russia legal assistance treaty Article 32(1), in conjunction with either Article 30(2) or 31, would give jurisdiction to Russian courts, but not to Estonian courts. In the same factual circumstance the Maintenance Regulation Article 3(b) would allocate jurisdiction to Estonian court. Since in the same factual circumstance the EU rules and the treaty rules (respectively) allocate to or deprive Estonian court of jurisdiction, the two sets of rules are clearly incompatible with each other within the meaning of Article 351 of the TFEU

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[318] See Art 21 (spousal maintenance) and Art 32 (maintenance for children) in the Estonia-Russia legal assistance treaty and, respectively, Art 21 and 28(5)–(6) of the Estonia-Ukraine legal assistance treaty.

[319] Under Art 1(1) of the Maintenance Regulation the regulation applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity. In this respect, the Maintenance Regulation takes over the wide definition given by Art 1(1) of the Hague 2007 Maintenance Protocol. On the meaning of 'maintenance obligations' as used in the Maintenance Regulation, see further: M. Torga. Drawing a Demarcating Line between Spousal Maintenance Obligations and Matrimonial Property in the Context of the New Instruments of European Union Private International Law. – L. Walker and others (Eds). Hart Publishing: London. 2014, pp 426–442.

[320] Subject to the exceptions contained in Maintenance Regulation Arts 3(c)–(d) and 4–7.

[321] Art 32 in conjunction with Arts 30(2) and 31 of the Estonia-Russia legal assistance treaty, Art 28(3)–(5) of the Estonia-Ukraine legal assistance treaty.

[322] Art 21(1) of the Estonia-Russia legal assistance treaty, Art 21(1) of the Estonia-Ukraine legal assistance treaty.

and such incompatibility arises in the form of a true negative conflict between the two sets of rules. In practice, of course, the difference between the two types of rules might not play arole (for example, if both, claimant and the respondent, have a place of residence and a habitual residence in Estonia), but the mere possibility of the rules pointing to different courts in different factual circumstance is enough to identify an inconsistency within the meaning of Article 351 of the TFEU.

Similarly to the rules on jurisdiction dealing with maintenance obligations towards children the rules on jurisdiction dealing with spousal maintenance as contained in the two types of instruments contain different connecting factors (for example, 'residence of the spouse' vs 'habitual residence' of the claimant or the defendant). Since the connecting factors in this point again differ in the two sets of instruments, it is possible that at the same set of factual circumstance the courts would have jurisdiction under one instrument, but not under another. For example, in a case where a maintenance creditor is a spouse living in Estonia and holding a Russian nationality and the defendant is a spouse living in Russia and holding Estonian nationality, Article 21(1) of the Estonia-Russia legal assistance treaty would give jurisdiction only to Russian courts and not to the courts of Estonia, whereas Estonian courts would, would the Maintenance Regulation be applicable, have jurisdiction under Maintenance Regulation Article 3(a). This again means that the two sets of rules are, in this respect, incompatible with each other within the meaning of Article 351 of the TFEU.

d) Succession

On the European level, the jurisdiction rules for succession matters are provided by the Succession Regulation. As a general rule, the Succession Regulation allocates jurisdiction to the courts of the place of the last habitual residence of deceased, although this general rule is subject to various exceptions.[323] Similarly to the term 'habitual residence' of a child, as used in the Brussels II *bis* Regulation, the term 'last habitual residence of the deceased', as used in the Succession Regulation, should be interpreted autonomously.[324]

Under the legal assistance treaties concluded with third states the authorities of the Contracting Party in whose territory the deceased had his last place of residence have jurisdiction in succession matters over movables.[325] The term 'last place of residence' of the deceased as used in the legal assistance treaties concluded with third states should similarly to the term 'last habitual residence' of the deceased, as used in the Succession Regulation, be given an autonomous

[323] See: Succession Regulation Arts 5, 9, 10 and 11.

[324] See further on the meaning of this autonomous definition: Recitals 23–24 to the Succession Regulation which give guidelines on how to determine the decead's last habitual residence. See on this also: R. Frimston. – U. Berquist and others (eds) (2015), pp 61–63.

[325] Estonia-Russia legal assistance treaty Art 42(1), Estonia-Ukraine legal assistance treaty Art 34(1).

meaning. However, in the context of the legal assistance treaties concluded with third states, such term should seek to find a common ground only between the national laws of the Contracting Parties not between the national laws of the Member States of the European Union. Thus, it is possible that Estonian courts might interpret the terms 'last habitual residence' and 'last place of residence' as used in the two types of instruments, differently, the main difference being again the way that a 'residence of a minor' is given meaning under the two types of instruments.[326] Since the legal assistance treaties and the EU regulations are interpreted differently, the meaning of the last habitual residence of the deceased, as used in the Succession Regulation, could theoretically differ from a similar concept, the last residence of the deceased, as used in the legal assistance treaties concluded with third states. This might give rise to the incompatibilities between the two types of instruments within the meaning of Art 351 of the TFEU if the treaty rules are applied instead of the Succession Regulation. Such incompatibilities would occur in the form of true hidden conflicts, because they become apparent only when the courts interpret the relevant provisions of the legal assistance treaties concluded with third states.

In addition, the incompatibilities between the two sets of rules within the meaning of Article 351 of the TFEU can arise since the rules contained in the two types of instruments proceed from a different understanding as to the division of competences between different courts. Namely, under the Succession Regulation, only one court can generally have jurisdiction in a succession matter[327] – the jurisdiction cannot be divided between the courts of different Member States depending on the type of the assets which form part of the deceased's estate.[328] In contrast, under the legal assistance treaties concluded with third states, the division of jurisdiction between the courts of different Contracting Parties is possible. For example, under Article 45(1) of the Estonia-Russia legal assistance treaty the authorities of the Contracting Party in whose territory the deceased had his last place of residence generally have jurisdiction in the case of succession to movables, while under Article 45(3) of the same treaty the authorities of the Contracting Party in whose territory the immovable is situated have jurisdiction over succession to this immovable. Thus, in a situation where a Russian national who is habitually resident in Estonia dies in Estonia leaving behind an apartment in Moscow and a car in Estonia, the disputes over the succession to the car could be heard by Estonian court while the dispute over the succession to the apartment could not. In contrast, if the Estonia-Russia legal assistance

[326] Just to remind the reader: under the legal assistance treaties minors who have attained 14 years of age could, taking into account the common parts in Ukrainian, Russian and Estonian law, have a place of residence independent of their parents. Whether the same would hold true under the Succession Regulation, is not yet made clear by the Court of Justice of the European Union which would be the ultimate interpreter of the terms used in the Succession Regulation.

[327] See primarily Art 4 of the Succession Regulation.

[328] Within the exception of Art 10(2) of the Succession Regulation.

treaty would not exist, Estonian court would have jurisdiction in this case regarding the whole succession matter – the jurisdiction of Estonian court would derive from Article 4 of the Succession Regulation, as the last habitual residence of the deceased at the time of his death was in Estonia. Similarly, in a case where a Russian national, whose last habitual residence was in Finland, leaves behind an apartment in Tallinn, the Succession Regulation would not allow Estonian court to solve the succession matter as the jurisdiction of the Finnish court as the court of the last habitual residence of the deceased would be exclusive, while the Estonia-Russia legal assistance treaty would give Estonian court jurisdiction in a succession over the succession to the apartment in question. Hence, the incompatibilities within the meaning of Article 351 of the TFEU between the rules of jurisdiction for succession disputes contained in the two types of instruments are bound to occur because the connecting factors used in the two types of instruments differ. Once again, these incompatibilities would arise in the form of true negative conflicts, since one instrument would seek to allocate jurisdiction to Estonian courts, whereas the other would deprive Estonian courts of jurisdiction.

e) Other civil matters

Although both of the two types of instruments provide rules on exclusive jurisdiction only for matters relating to divorce and marriage annulment, parental responsibility, maintenance and succession, the EU regulations widen this list and provide rules on exclusive jurisdiction also for some other types of cases. Whether this fact itself constitutes an incompatibility within the meaning of Article 351 of the TFEU depends on how the cases falling under the relevant rules on exclusive jurisdiction found in the EU instruments would be dealt under the legal assistance treaties.

The European rules which contain rules on exclusive jurisdiction in matters for which the legal assistance treaties do not provide such rules are contained in the Matrimonial Property Regimes Regulation,[329] the Registered Partnerships Regulation[330] and in Article 24 of the Brussels I Recast Regulation.

[329] The exact classification of the rules contained in the Matrimonial Property Regimes Regulation as the rules of exclusive jurisdiction is somewhat disputable, since the Matrimonial Property Regimes Regulation Art 7 provides the parties the possibility to deviate from the other rules of jurisdiction contained in the Matrimonial Property Regimes Regulation (Arts 4–6) by a choice-of-court agreement. However, since Arts 4–6 do not follow the classical division between the general rule of jurisdiction (following the respondent) and the special rules of jurisdiction, the provisions contained in the Matrimonial Property Regimes regulation are considered as the rules on exlcusive jurisdiction which can, to a limited extent and as provided by Art 7, be deviated from by a choice-of-court agreement.

[330] The exact classification of the rules contained in the Registered Partnerships Regulation as the rules of exclusive jurisdiction is again disputable, since the Registered Partnerships Regulation Art 7 provides the parties the possibility to deviate from the other rules of jurisdiction contained in the Registered Partnerships Regulation (Arts 4–6) by a choice-of-

In the matters falling under the substantial scope of application of the first of these instruments, the Matrimonial Property Regimes Regulation, Estonian courts would determine jurisdiction under Articles 21(1) (the provision on general jurisdiction) of the legal assistance treaties, if a particular dispute would otherwise fall under the scope of application of these treaties. Since the connecting factors used in Articles 21(1) of the legal assistance treaties ('place of residence' of the defendant) and in the Matrimonial Property Regimes Regulation Chapter II ('common habitual residence of the spouses', 'common nationality of the spouses' or 'the chosen court', naming but few) differ considerably, the incompatibility within the meaning of Article 351 of the TFEU between the two type of instruments is bound to arise, if the legal assistance treaties are applied by Estonian courts instead of the Matrimonial Property Regimes Regulation in order to determine jurisdiction in matrimonial property matters. Such incompatibility would, again, arise in the form of a true negative conflict. Although at the time of finishing this dissertation (1 of September 2018), the Matrimonial Property Regulation had not yet become applicable in the European Union[331] and it was not yet clear whether the Republic of Estonia would join the regulation's regime in the future, it would be wise to consider such incompatibility in any future renegotiations of the legal assistance treaties.

The incompatibility within the meaning of Article 351 of the TFEU would, however, not arise between the rules on exclusive jurisdiction contained in the Registered Partnerships Regulation and the rules on general jurisdiction contained in the legal assistance treaties, regardless of the provisions contained in the Registered Partnerships Regulation being almost identical to the provisions contained in the Matrimonial Property Regimes Regulation. This is so because, at the time of finishing this dissertation (1 of September 2018), registered partnerships were known in Estonian national law,[332] but not in Russian or Ukrainian law. Hence, the disputes over the property consequences of such unions did not fall under the substantial scope of application of the legal assistance treaties as the terms used in these treaties, such as the term 'spouses' which could theoretically cover registered partners, should be given autonomous meaning. However, it is not impossible that the Contracting Parties to the legal assistance treaties would, at one point, introduce registered partnerships to their legal system. Therefore, it would, again, be wise to keep in mind that the rules on jurisdiction which are contained in the two types of instruments contain different connecting

court agreement. However, since Arts 4–6 of the Registered Partnerships Regulation do not follow the classical division between the general rule of jurisdiction (following the respondent) and the special rules of jurisdiction, the provisions contained in the Registered Partnerships Regimes regulation are considered as the rules on exlcusive jurisdiction which can, to a limited extent and as provided by Art 7, be deviated from by a choice-of-court agreement.

[331] According to it's Art 70, the Matrimonial Property Regimes Regulation became applicable in the EU only as of 29 of January 2019.

[332] Art 1(1) of the Registered Partnerships Act (*Kooseluseadus*). – RT I, 16.10.2014, 1.

factors, which might lead to an incompatibility within the meaning of Article 351 of the TFEU if the treaty rules are applied instead of the EU rules in the disputes over the property consequences of the registered partnerships. By that time, the Registered Partnerships Regulation would certainly be applicable in the European Union[333] and possibly also in the Republic of Estonia if it chooses to join the regime of the Registered Partnerships Regulation at one point.

The Brussels I Recast Regulation provides for exclusive grounds of jurisdiction for various other civil and commercial matters, like disputes over immovables, trademarks, enforcement and so on. For example, Article 24(1) of the Brussels I (Recast) Regulation allows the clamant to sue the defendant in the Republic of Estonia if the object of the claim is a tenancy of an immovable property situated in Estonia. In contrast, in such matters the applicable rules from the legal assistance treaties (the rules on general jurisdiction as found in Articles 21 of the treaties) might not allocate jurisdiction to Estonian courts. This could happen, for example, in a situation where a Russian national who is resident in Moscow rents an apartment in Tallinn to another Russian national resident in Estonia. In a case where the tenant wishes to dispute the termination of the lease contract by the landlord, his claim would fall under Article 24(1) of the Brussels I (Recast) Regulation[334] and the said Article would give Estonian court jurisdiction, whereas the rules on general jurisdiction contained in the Estonia-Russia legal assistance treaty (Article 21(1)) would not. Similarly, if a Russian national would file a claim, which object is a right *in rem*[335] in immovable property located in Finland against the defendant resident in Estonia, Article Art 24(1) of the Brussels I Recast Regulation would deprive Estonian court of jurisdiction, whereas Estonia-Russia legal assistance treaty Article 21(1) would allow Estonian court to hear the case, since the defendant is resident in Estonia. Similarly, in the case where a Russian national would file a claim in Estonian court where he wants to dispute the enforcement of a judgment in Finland, he could do so under the legal assistance treaties, if the defendant in such matter would have a place of resiecnce in Estonia. Under Article 24(5) the claimant would need to turn to Finnish court in the same set of circumstance. This is, perhaps, one of the most colourful examples of the differences between the two types of instruments, as Estonian courts would undoubtedly find it

[333] The Registered Partnerhips Regulation is (similarly to the Matrimonial Property Regimes Regulation) applied in the EU only as of 29 of January 2019. See: Art 70 of the Registered Partnerships Regulation.

[334] *Theodorus Engelbertus Sanders v Ronald van der Putte*. Judgment of the Court of 14 December 1977. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-73/77# (01.09.2018), para 15. See also: L. L. Pinheiro. Article 24. – U. Magnus and P. Mankowski (eds). (2016), p 568.

[335] On the meaning of a claim *right in rem*, see further, for example: L. L. Pinheiro. Article 24. – U. Magnus and P. Mankowski (eds). (2016), pp 564–750.

rather hard to assess the enforcement procedure in Finland.[336] Therefore, the incompatibilities between the two types of instruments within the meaning of Article 351 of the TFEU and in the form of true negative conflicts would arise if such cases would reach Estonian courts.

As was explained above, the treaty rules and the European rules do not contain other rules on exclusive jurisdiction which could have overlapping scopes of application. However, in this point it is worth mentioning one interpretation method that the Estonian courts have recently started using when interpreting certain exclusive jurisdiction provisions which are contained only in the legal assistance treaties.[337] These provisions deal with determining exclusive jurisdiction in the disputes over the legal capacity of adults, however, the method used by the courts could bear meaning also for the other provisions on jurisdiction which are contained in the legal assistance treaties.

In the recent line of case law, Estonian courts have started interpreting the provisions on jurisdiction in capacity disputes by taking into account the declaratory provisions which are contained in the beginning of the legal assistance treaties.[338] Simply put, the courts conclude that since these provisions aim at guaranteeing equal rights to both, Estonian nationals and the nationals of the relevant Contracting Parties, the rules on jurisdiction found in the legal assistance treaties should be interpreted in a way as giving the nationals of the Contracting Parties the same rights to turn to Estonian courts as Estonian nationals would have under European private international law regulations or (as was the case in the case law cited) under Estonian national rules on jurisdiction applicable in the absence of international agreements and EU instruments. This would mean that, for example, in a non-contractual dispute where the rules on jurisdiction contained in the legal assistance treaties would not allocate jurisdiction to Estonian courts, but jurisdiction would be allocated under the relevant rule of the Brussels I (Recast) Regulation (Article 7(2)), would it be applicable, it would be possible for the judge to sort of 'jump' from the legal assistance treaties to the Brussels I (Recast) Regulation Article 7(2) and derive jurisdiction from this provision in order to ensure the the main purpose of the legal assistance treaty as reflected in its first declaratory provision – to safeguard for the nationals of the Contracting Parties same rights as for the Estonian nationals – would be fulfilled. While this solution is not technically beautiful, since the courts blatantly disregard the provisions on jurisdiction contained in

[336] Note, however, that Under Estonian national rules (Art 121 of the Estonian Code of Civil Procedure) Estonian courts could hear such cases, if the Brussels I (Recast) Regulation and foreign treaties would not be applicable, but the defendant has a place of residence in Estonia – a set of circumstance which would, in practice, luckily never happen.

[337] Namely, Arts 23(1) of both, the Estonia-Russia legal assistance treaty and Estonia-Ukraine legal assistance treaty.

[338] See: Order of the Harju County Court of 3 February 2015 in a civil case No 2-14-57389; Order of the Harju County Court of 22 May 2015 in a civil case No 2-15-6600; Order of the Harju County Court of 28 February 2015 in civil case No 2-15-8571.

the the legal assistance treaties, it certainly protects the nationals of the Contracting Parties and, in a way, helps to overcome the incompatibility between the two types of instruments within the meaning of Article 351 of the TFEU. However, it would be preferable if the pioneer on the road which the courts have started to take would instead be the legislator[339] as it is somewhat unfortunate that the courts have to ignore clear rules on jurisdiction contained in the treaties in order to uphold the assumed intention of the legislator while drafting, negotiating and ratifying the provisions in the legal assistance treaties. The incentive for the courts has, in this point, perhaps, been simply the reality of life – in order to allow Russian nationals who have lived in Estonia for a considerable number of years, sometimes even for a lifetime, to sue in Estonian courts, one simply has to bend the rules a bit in order to not force such persons to go to court in a country where they might never have stayed even for a holiday.

If the courts will choose to stride forth on this sort of avenue, it would be preferable if they would explain their reasoning a bit further. At the moment, the reasoning of the courts seem to simply rely on Article 1 of the legal assistance treaties without any reference to other legal rules, such as ECHR,[340] which Article 6 provides a person a right to a fair trial and Article 14 prohibits discrimination.

While the rules on jurisdiction, as such, do not necessarily violate the rights referred to in Articles 6 and 14 of the ECHR, if such rules are applied in a discriminatory manner and in a way as to take away a person's right to turn to a court in the country where he lives in a non-contenious matter, there is, perhaps, a merit in looking into this line of argumentation, especially because all the Contracting Parties to the legal assistance treaties are also the Contracting Parties to the ECHR Convention.[341]

Also, from the private international law point of view, the existing case law lacks a logical link between the achieved end result and Articles 1 of the legal assistance treaties as the courts have not clearly explained, whether they either avoid to apply the specific provisions contained in the legal assistance treaties, whether they disregard such provisions or whether they apply the provisions contained in the EU regulations instead of the treaty provisions or whether they solve the case *ex aequo et bono*. In addition, it is not clear whether the reliance on the declaratory first articles of the legal assistance treaties is something that the claimant (or the applicant, as the case may be) has to initiate or is it something that the courts themselves are responsible to rely on. While this sort

[339] Either through not extending the legal assistance treaties after their 5-year expiry periods pass the next time or through (in conjunction with the Union) renegotiating the legal assistance treaties concluded with third states.

[340] European Convention on Human Rights. Council of Europe. Available: https://www.echr.coe.int/Documents/Convention_ENG.pdf (01.09.2018).

[341] See the relevant web-page of the Council of Europe where the ratifications and signatuures of the ECHR Convention are listed: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=SH6c8zEI (01.09.2018).

of detail might, at first sight, be burdensome and pointlessly detailed, it would help to draw any generalisations as to when the exercise based on Articles 1 of the legal assistance treaties should be done, which in turn would ensure legal certainty for anyone who would potentially be submitted to such rules.

It is also unclear what is the exact extent of such exercise – at the moment such exercise has, in the case law, been reserved only for the cases where the courts determined international jurisdiction. It would be interesting to see whether in the future, claimants could also rely on the declaratory provisions in the beginning of the legal assistance treaties in order to change the otherwise applicable law under the legal assistance treaties. One might want to argue that it is not part of a legal protection, as provided by the first declaratoruy Articles of the legal assistance treaties to have a certain law as the applicable law, as Estonian or Russian or any other law as such is not per se 'better' or more 'protecting' than any other law. The courts have, however, not given this any thought in their judgments.

2.2.4. Provisions on choice-of-court agreements

Both, the legal assistance treaties concluded with third states and the EU regulations on private international law, contain provisions on choice-of-court agreements. These provisions are similar in a sense that they generally do not allow parties to exclude the jurisdiction of the courts, which have jurisdiction under the provisions of exclusive jurisdiction contained in the relevant instruments.[342] For example, Estonia-Russia legal assistance treaty Article 21(2) expressly states that the exclusive competence of the courts cannot be changed by an agreement of the parties. Similarly, under Article 25(4) of the Brussels (Recast) Regulation,[343] agreements conferring jurisdiction have no legal effect if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24 of the Brussels I (Recast) Regulation.

As already explained, the grounds for exclusive jurisdiction contained in the two types of instruments differ. This means that the choice-of-court agreements conferring jurisdiction to Estonian courts which are valid under one instrument might not be valid under the other. For example, Estonia-Russia legal assistance treaty does not contain any exclusive jurisdiction provision for the disputes,

[342] See, however, Art 12(1)(b) of the Brussels II *bis* Regulation which allows the spouses and the holders of parental responsibility in certain cases to derogate from the general rules of jurisdiction for parental responsibility matters contained in Art 8(1) of the Brussels II *bis* Regulation. See also, for example, Maintenance Regulation Art 4.

[343] Note that the possibility to conclude a choice-of court agreement is also provided, to a limited extent, by the Maintenance Regulation (Art 4), the Succession Regulation (Art 5), the Matrimonial Property Regimes Regulation (Art 7) and the Registered Partnerships Regulation (Art 7). However, since the conflict between the provisions of the legal assistance treaties and these provisions were already analysed in the previous sub-chapter on the exclusive jurisdiction, these provisions are not analysed again in this sub-chapter.

which object is a right *in rem* in immovable property. In a situation where the parties would conclude a choice-of-court agreement in favour of a Russian court, but the immovable in question would be situated in the Republic of Estonia, the Estonia-Russia legal assistance treaty Article 21(2) would deprive Estonian court of its jurisdiction if there is a written agreement of the parties conferring jurisdiction to a Russian court. In contrast, in the same case, the Brussels I Recast Regulation Art 24(1) would, if it would be applicable, allocate jurisdiction to Estonian court as the court of the Member State where the immovable in question is situated and regardless of any choice-of-court agreement between the parties in favour of the courts of another Member State[344] or a third state.[345] Such differences between the exclusive grounds of jurisdiction contained in the two types of instruments lead to the incompatibilities within the meaning of Article 351 of the TFEU if the parties have concluded a choice-of-court agreement in a matter dealt by the provisions on exclusive jurisdiction contained in the relevant instruments. Such incompatibilities would again take the form of the true negative conflicts as under one type of instrument the court would have jurisdiction, but not under the other.

Under the legal assistance treaties concluded with third states a choice-of-court agreement must be in writing in order for it to be effective. This comes from the second sentences of Articles 21(2) of the treaties. In contrast, the EU regulations can be more relaxed about the form requirements for the choice-of-court agreements. For example, under Article 25(1) of the Brussels I (Recast) Regulation a choice-of-court agreement can, for it to be effective, also be in a form which accords with practices which the parties have established between themselves or in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. In a situation where an Estonian court does not have jurisdiction under a choice-of-court agreement, because such agreement is not 'in writing' within the meaning of the legal assistance treaties concluded with third states, but accords to the formal requirements provided by the Brussels I (Recast) Regulation, the incompatibilities within the meaning of Article 351 of the TFEU between the two types of instruments would occur. Again, such incompatibilities would take the form of true negative conflict as the legal assistance treaties concluded with third states would deprive Estonian court of jurisdiction while the relevant EU instrument would allocate, if it would be applicable, jurisdiction to Estonian court. Thus, the two types of instruments are incompatible with each other for both reasons, because they prescribe different formal requirements for the choice-of-court agreements and because they allow choice-of-court agreements in different sets of cases.

[344] For the support of such conclusion, see: U. Magnus. Article 25. – U. Magnus and P. Mankowski (eds). (2016), p 598.

[345] For the support of such conclusion, see: L. L. Pinheiro. Article 24. – U. Magnus and P. Mankowski (eds). (2016), pp 562–563.

2.2.5. Provisions for special contracts (consumer contracts, employment contracts, insurance contracts)

The legal assistance treaties concluded with third states do not contain any rules on jurisdiction which would specifically have been tailored for certain types of contracts. In contrast, the Brussels I (Recast) Regulation contains separate chapters on consumer contracts (Section 4 of the Brussels I (Recast) Regulation), on individual contracts of employment (Section 5 of the Brussels I (Recast) Regulation) and on insurance contracts (Section 3 of the Brussels I (Recast) Regulation).

The fact that specific rules on jurisdiction, dealing with consumer contracts, individual employment contracts and insurance matters, are left out of the legal assistance treaties concluded with third states, does not mean that the two types of instruments would not be competing with each other in the cases where Estonian courts have to determine jurisdiction in these kinds of matters.

In consumer, employment and insurance matters, under the legal assistance treaties concluded with third states, jurisdiction would be determined under the general rules of jurisdiction contained in Articles 21 of the legal assistance treaties. This could lead to an incompatibilities within the meaning of Article 351 of the TFEU between the two types of instruments, because it would theoretically be possible that under one type of instrument Estonian court would have jurisdiction, whereas under the other type of instrument Estonian court would not have jurisdiction. Such incompatibility between the two types of instruments would arise in the form of a true negative conflict, but in contrast to the true negative conflicts that were already described in precious chapters, in the present case such true negative conflict would mostl likely appear by Estonian court not being allowed to hear the matter under the European instrument, but being required to hear the matter under a relevant legal assistance treaty. This possibility can be illustrated by the following case.

In a case where a Russian national, living in Estonia and acting as a consumer, would order online a product from a Finnish company's web-page, under the Brussels I (Recast) Regulation Article 18(1) he would be able to sue the Finnish company in Estonia since he has a domicile within the meaning of that provision in Estonia. In contrast, under the Estonia-Russia legal assistance treaty Article 21(1) he could not sue the defendant in Estonia, because the defendant does not have a residence in Estonia within the meaning of this provision.

At the first sight the solutions offered to this case in the two types of instruments contrast starkly with each other as under the Brussels I (Recast) Regulation, Estonian courts would have jurisdiction, since it is the purpose of the relevant rule (Article 18) of the Brussels I (Recast) Regulation to protect the consumers living in Estonia, whereas under Article 21(1) of the other type of instrument, the legal assistance treaty concluded with the Russian Federation, Estonian courts would be prohibited from hearing the case. There is, however, one theoretical way of overcoming this conflict – the courts could theoretically rely on Article 1(1) of the Estonia-Russia legal assistance treaty and, in the

interest of protecting the Russian national who, in the described case, is the consumer, might allow him to sue the Finnish defendant in Estonia by deciding either that the Estonia-Russia legal assistance treaty is not applicable altogether or that Article 21(1) of the legal assistance treaty should be read and interpreted in conjunction with the Brussels I (Recast) Regulation.

Similar problems arise if a consumer, not domiciled in Estonia within the meaning of the Brussels I (Recast) Regulation, has concluded a written choice-of-court agreement in favour of an Estonian court with the defendant, not domiciled in Estonia within the meaning of the regulation. In such a case, if one of the Parties would be a national or a company of the Russian Federation, under the Estonia-Russia legal assistane treaty Article 21(2) such choice-of-court agreement would be perfectly valid. However, under the relevant rules contained in the Brussels I (Recast) Regulation (Article 19) such choice-of-law agreement would most likely not be valid. Hence, under the legal assistance treaty, the consumer could, in this case, be sued in Estonia whereas under the Brussels I (Recast) Regulation he could not. This again leads to the incompatibility within the meaning of Article 351 of the TFEU between the two types of instruments and such incompatibility would again appear in the form of a true negative conflict.

2.2.6. Provisions on *lis pendens*

The incompatibilities between the two sets of rules within the meaning of Article 351 of the TFEU can also arise when the rules on *lis pendens* as contained in the two sets of instruments are applied. The *lis pendens* rules are broadly speaking the rules which allow the courts to stay or terminate proceedings in favour of the courts in other states in order to avoid the possibility of irreconcilable judgments.[346]

The legal assistance treaties concluded with third states provide for a *lis pendens* rule in favour of the courts of the other Contracting Parties. For example, under Article 21(3) of the Estonia-Russia legal assistance treaty, when the same proceedings between the same parties on the same issue and on the same ground are brought in the courts of two Contracting Parties and if both courts have jurisdiction under the Estonia-Russia legal assistance treaty, the court, which initiated proceedings in the second place, must terminate the proceedings. In contrast, the EU regulations on private international law, with the exception of the Brussels I (Recast Regulation),[347] contain only those *lis pendens* rules, which allow to stay the proceedings in favour of the courts of another Member

[346] On lis pendens in general, see, for example: M. B. Fabrizio. Lis Alibi Pendens and Related Actions in Civil and Commercial Matters within the European Judicial Area. Yearbook of Private International Law 2009. Vol 11, 2010, pp 511–564.

[347] See Art 33 of the Brussels I (Recast) Regulation.

State.[348] In addition, according to the case law of the CJEU, the EU regulations on private international law deprive the courts of the Member States which have jurisdiction under the EU regulations, from the right of staying the proceedings in favour of the courts of a third state, even if such possibility would be possible under their national law of civil procedure.[349] Thus, it could be possible that Estonian court might be bound to stay or terminate proceedings under one type of instrument while required to hear the matter under the other. For example, Estonian court might be bound to terminate proceedings in favour of the proceedings which have already started in the Russian Federation in a divorce case, whereas no such right would come from the applicable European rules (the Brussels II *bis* Regulation Article 19). This means that the two types of instruments are incompatible with each other within the meaning of Article 351 of the TFEU and such incompatibilities would, again, arise in the form of true negative conflicts, as one type of instrument would provide, while the other would deprive Estonian court of jurisdiction.

2.3. Conflicts between the provisions on the applicable law

2.3.1. Provisions on the applicable law to passive and active legal capacity of persons

Similarly to the rules on jurisdiction, the rules on applicable law, as contained in the EU regulations and in the legal assistance treaties concluded with third states, which have overlapping scope of application, can be incompatible with each other within the meaning of Article 351 of the TFEU. The first type of the applicable law rules which can have (at least partially) overlapping scope of application in both types of instruments are the rules on the applicable law to passive and active legal capacity of persons.

While there is no regulation in the EU which would deal entirely with the questions of the law applicable to passive or legal capacity of persons, such questions have been dealt with in European regulations as side questions in other matters. Namely, under Article 26(a) of the Succession Regulation the capacity of a person making a disposition of property upon death to make such a disposition is considered as a question to which the applicable law would be determined under Articles 24 and 25 of the Succession Regulation. The capacity of a person to make such dispositions is therefore considered as a side question which is governed by a law governing the disposition or agreement to succession determined under the Succession Regulation Articles 24 and 25 respectively.

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[348] See, for example, Art 17 of the Matrimonial Property Regimes Regulation, Art 17 of the Succession Regulation, Art 12 of the Maintenance Regulation.

[349] *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others.* Case C-281/02. Judgment of the Court (Grand Chamber) of 1 March 2005. Available: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-281/02# (01.09.2018).

Another exception to the general rule that the EU instruments do not deal with the law applicable to capacity of persons is provided by Article 13 of the Rome I Regulation according to which in a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

In the legal assistance treaties concluded with third states the applicable law provisions dealing with active and passive legal capacity of persons are found in the very beginning of the chapter dealing with the determination of the applicable law (Articles 22–23 in both, Estonia-Russia and Estonia-Ukraine legal assistance treaty). In the case of physical persons, these provisions point to the law of the nationality of the person in question. This connecting factor differs from the connecting factors used in Articles 24–25 of the Succession Regulation and in Article 13 of the Rome I Regulation. Thus, at least in the limited extent to which the EU regulations deal with the questions of the law applicable to certain aspects of capacity, the two sets of rules are incompatible with each other within the meaning of Article 351 of the TFEU. Such incompatibility would rise in the form of a true positive conflict as the two sets of instruments would point to the application of the laws of different states. It would be an apparent conflict as it is clear to the reader of these two sets of provisions that the connecting factors used in these provisions, considerably differ and that, hence, the law applicable under these provisions might differ as well depending on the exact factual circumstance of a particular case.

So far the European legislator has not expressed any plans to regulate the law applicable to capacity of persons as a main issue in a particular regulation on private international law and it is unlikely of it to ever happen, as the Hague 2000 Protection of Adults Convention, to a large extent, covers these questions.[350] Hence, the incompatibilities within the meaning of Art 351 of the TFEU between the provisions on the law applicable to active and legal capacity of persons contained in the legal assistance treaties and the EU regulations on private international law are expected to arise in relatively small number of cases.

[350] See Arts 13–21 of the Hague 2000 Protection of Adults Convention. As explained by Art 3(a) of the Convention, the measures that the courts can take under the rules of the convention may deal, among other things, with the determination of incapacity.

2.3.2. Provisions on the applicable law to guardianship and curatorship over adults

So far, the European legislator has not dealt with the question which law should be applicable to guardianship and curatorship over adults, though this problem has been addressed by the Hague Conference.[351] Consequently, the incompatibilities between the rules on determining the applicable law to guardianship and curatorship over adults contained in legal assistance treaties concluded with third states[352] cannot be incompatible with any EU rules within the meaning of Art 351 of the TFEU as the two types of instruments do not share an overlapping scope of application in this regard.

It is also probable that no incompatibilities in this point would arise due to any future legislation. This is so because the Union is probably not interested in drawing up any regulation on this matter as the Hague 2000 Convention on the Protection of Adults already deals with this law applicable to guardianship and curatorship over adults and many of the Member States are the Contracting States to that Convention.[353]

2.3.3. Provisions on the applicable law to parentage, adoption and surrogacy

Similarly to the law applicable to guardianship and curatorship over adults, the law applicable to parentage and adoption has not been dealt with by the EU legislator. Although the rules on the applicable law to parentage[354] and adoption[355] are contained in the legal assistance treaties concluded with third states, no incompatibility within the meaning of Article 351 of the TFEU can, thus, arise between the two types of instruments in this point. The conflicts may thereotically arise between the legal assistance treaties concluded with third states and other international instruments to which the Republic of Estonia is a Party to, such as the Hague 1996 Parental Responsibility Convention,[356] but

[351] See Arts 13–21 of the Hague 2000 Protection of Adults Convention. As explained by Art 3(c) of the Convention, the measures that the courts can take under the rules of the convention may deal, among other things, with guardianship, curatorship and analogous institutions.

[352] Art 35 of the Estonia-Russia legal assistance treaty; Art 30 of the Estonia-Ukraine legal assistance treaty.

[353] For the exact list of the Hague 2000 Convention Contracting Parties, see the relevant sub-site of the Hague Conference web-page:
https://www.hcch.net/en/instruments/conventions/status-table/?cid=71 (01.09.20018).

[354] Art 29 of the Estonia-Russia legal assistance treaty; Art 28(1) of the Estonia-Ukraine legal assistance treaty.

[355] Art 33 of the Estonia-Russia legal assistance treaty; Art 29 of the Estonia-Ukraine legal assistance treaty.

[356] See the applicable law rules in Chapter III of the Hague 1996 Parental Convention.

these conflicts are not important in order to answer the main research question of this dissertation.

The rules on the law applicable to parentage contained in the legal assistance treaties are worded in rather general terms – for example, Article 29 of the Estonia-Russia legal assistance treaty refers to 'establishing parenthood'. Such questions could theoretically cover the question whether a surrogate mother becomes a mother of the child she has carried. This proposition could especially hold true for the Estonia-Ukraine legal assistance treaty, since surrogacy is allowed in Ukraine[357] (although was not yet allowed in Estonia at the time of finishing this dissertation on 1 of September 2018[358]). However, even if the applicable law provisions contained in the legal assistance treaties concluded with third states would cover surrogacy, no incompatibilities between the treaty rules and the EU regulations on private international law would occur in this respect since the law applicable to surrocacy, similarly to the law applicable to parentage and adoption, is not dealt with by the European legislator, though there had been some initiatives to deal with the private international law aspects of this topic on the international level.[359]

2.3.4. Provisions on the applicable law to parental responsibility

Although the Brussels II *bis* Regulation deals with jurisdiction in parental responsibility matters, the law applicable to such matters has not yet been dealt with by the European legislator.[360] This is probably due to the fact that the Hague 1996 Parental Responsibility Convention, which Chapter III contains the choice-of-law rules for parental responsibility matters, has been ratified by all the Member States of the European Union.[361] Thus, there is no need to unify the

[357] Article 123 of the Ukrainian Family Law Code: Сімейний кодекс України. (*The Family Law Code of the Ukraine).* Available: http://zakon.rada.gov.ua/laws/show/2947-14 (01.09.2018).

[358] Article 132 of the Penal Code (*Karistusseadustik*). – RT 2001, 61, 364; RT I, 29.06.2018, 4.

[359] Namely, the Council of General Affairs and Policy of the Hague Conference has convened an expert group to explore the feasibility of advancing work in this area of law. See more on this at the web-page of the Hague Conference: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (01.09.2018).

[360] This topic will also not be a part of the revised Brussels II *bis* Regulation as can be seen from the proposal for the revised regulation: European Commission. Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). COM(2016) 411 final. Available:
https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF
(01.09.2018).

[361] See the status of the Hague 1996 Parental Responsibility Convention on the Hague Conference web-page: http://www.hcch.net/index_en.php?act=conventions.status&cid=70 (01.09.2018).

rules on the law applicable to parental responsibility on the European level. Since the law applicable to parental responsibility has not been dealt with by the European legislator, no incompatibilities within the meaning of Article 351 of the TFEU between the EU regulations on private international law and the rules on applicable law to parental responsibility as contained in the legal assistance treaties[362] can occur if the latter are applied by Estonian courts.

2.3.5. Provisions on the applicable law to the conclusion of marriage and marriage annulment

Although both legal assistance treaties concluded with third states contain rules on the law applicable to the conclusion of marriage and marriage annulment,[363] such rules are left out of the material scope of the European regulations on private international law, including from the Rome III Regulation, which Article 1(2)b explicitly states that the Rome III Regulation does not apply to the existence, validity or recognition of marriage. Hence, in this respect, the two types of instruments, once again, are not incompatible with each other within the meaning of Article 351 of the TFEU.

2.3.6. Provisions on the applicable law to the consequences of marriage (except maintenance)

Both legal assistance treaties concluded with third states contain rules on determining the applicable law to personal and material rights of spouses towards each other.[364] The same issues which fall under the scope of application of these provisions partially also fall under the scope of application of the Matrimonial Property Regimes Regulation, which deals with the law applicable to matrimonial property regimes, that is, as explained by Art 3(1)(a) of the regulation, with the law applicable to the set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution.

Note, that at the time of finishing this dissertation (1 September 2018), the Republic of Estonia was not yet bound by the Matrimonial Property Regimes Regulation, which had been passed via enhanced cooperation excluding the Republic of Estonia and which became applicable in the participating Member

[362] Arts 30–31 of the Estonia-Russia legal assistance treaty; Art 28(2)–(4) of the Estonia-Ukraine legal assistance treaty.

[363] See rules determining the law applicable to the validity of marriage: Art 28(3) of the Estonia-Russia legal assistance treaty; Art 27(3) of the Estonia-Ukraine legal assistance treaty.

[364] Art 27 of the Estonia-Russia legal assistance treaty; Art 26 of the Estonia-Ukraine legal assistance treaty.

States on 29 January 2019. However, since it was not impossible that the Republic of Estonia would have joined the regime of the Matrimonial Property Regimes Regulation at one point in the future,[365] the regulation was taken into account in order to analyse whether it's application in Estonian courts could lead to any incompatibilities within the meaning of Article 351 of the TFEU.

According to Article 22 of the Matrimonial Property Regulation, as a general rule, the law applicable to the matrimonial property regime of the spouses is the law that the spouses have chosen to apply. If no choice of law is made, the applicable law is determined under Article 26 which firstly points to the law of the state of the spouses' first common habitual residence after the conclusion of marriage and, failing that, to the law of the state of the spouses' common nationality at the time of the conclusion of the marriage and, failing that, to the law of the state with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances of the case. This regulation is slightly different from the rules contained in the legal assistance treaties concluded with third states as will be explained below.

Firstly, the legal assistance treaties concluded with third states do not allow the spouses to choose the law applicable to the property consequences of marriage. Secondly, the rules contained in the legal assistance treaties allow recourse only to the national laws of the Contracting Parties. Hence, the law of the forum is much more important connecting factor in the legal assistance treaties than it is in the Matrimonial Property Regimes Regulation. For example, although under the Estonia-Russia legal assistance treaty Article 27, as a general rule, the material rights of spouses are determined either by the law of the Contracting Party in whose territory they have a common residence, failing that, whose nationals they both are or, failing that, in whose territory they had their last common resident, however, if the spouses did not have a common residence in the territories of the Contracting Parties, the law of the Contracting Party whose authority is hearing the matter would be applied. As the rules on the applicable law to property consequences of marriage contained in the Matrimonial Property Regimes Regulation and in the legal assistance treaties differ, it is possible that Estonian courts would need to apply different laws in situations where the applicable law is determined under different instruments. Such incompatibility would arise in the form of a true positive conflict as the two sets of instruments would both seek the application of different laws. Even if the applicable law rules contained in the two types of instruments would point to the application of the law of the same state, there would always be an

[365] Note that the Government of the Republic of Estonia had expressed a wish to join the regime of the regulation in the future: Riigikantselei. Eesti seisukoht nõukogu otsuse, millega antakse luba tõhustatud koostööks kohtualluvuse, kohaldatava õiguse ning otsuste tunnustamise ja täitmise valdkonnas rahvusvaheliste paaride varalisi suhteid käsitlevates asjades, mis hõlmavad nii abieluvarareźiime kui ka registreeritud kooselust tulenevaid varalisi tagajärgi, eelnõu kohta. Available: http://eelnoud.valitsus.ee/main/mount/docList/09abf901-882a-4244-aff1-4a430000f58d#6SNocAGa (01.09.2018).

incompatibility between the two types of rules within the meaning of Article 351 of the TFEU, since the legal assistance treaties always deprive spouses of the ability to choose the applicable law to their matrimonial property regime, whereas the EU regulation would grant such right to the spouses to a limited extent.[366]

It is not clear whether the term 'marriage' within the meaning of the legal assistance treaties concluded with third states could also cover registered partnerships. Hence, it is also unclear whether any incompatibilities within the meaning of Article 351 of the TFEU could potentially arise between the provisions of the legal assistance treaties and the Property Consequences on the Registered Partnerships Regulation, which, at the time of finishing this dissertation (1 of September 2018), similarly to the Matrimonial Property Regimes Regulation had not yet became applicable in the European Union.[367]

At the time of finishing this dissertation (1 of September 2018) registered partnerships were known in Estonian national law,[368] but not in Russian or Ukrainian law. Hence, even if the Republic of Estonia would join the Registered Partnerships Regulation in the future, Estonian courts should not interpret the term 'marriage' within the meaning of the legal assistance treaties as referring also to registered partnerships, as the common autonomous definition of marriage as used in the legal assistance treaties should not include such unions, unless the Russian Federation and Ukraine changed their rules on this point considerably.[369] Thus, no incompatibilities could arise between the provisions on applicable law contained in the legal assistance treaties concluded with third states and similar provisions found in the Registered Partnerships Regulation[370] within the meaning of Article 351 of the TFEU as these two types of instruments have different material scope of application.

[366] For example, under Art 22(1) of the Matrimonial Proptery Regimes Regulation, the spouses choice is limited to the law of the State where the spouses or future spouses, or one of them, is habitually resident at the time the agreement is concluded or the law of the State of nationality of either spouse or future spouse at the time the agreement is concluded.

[367] The Registered Partnerhips Regulation was (similarly to the Matrimonial Property Regimes Regulation) applied in the EU only as of 29 of January 2019. See: Art 70 of the Registered Partnerships Regulation.

[368] Art 1(1) of the Registered Partnerships Act (*Kooseluseadus*).

[369] For example, in Ukraine, Article 51 of the consitution specifically proovides that marriage can be concluded only between a man and a woman, which illustrates quite well, the country's view as to same-sex unions. See: Конституція України (*Ukrainian Constitution*). Available: http://zakon.rada.gov.ua/laws/show/254к/96-вр (01.09.2018).

[370] See Chapter III of the Registered Partnerships Regulation.

2.3.7. Provisions on the applicable law to divorce and legal separation

Both, the legal assistance treaties concluded with third states and the European regulations contain rules on the law applicable to divorce and marriage annulment. In the legal assistance treaties such rules are found, respectively, in Article 28 and 27 of the Estonia-Russia and Estonia-Ukraine legal assistance treaty. Among the European regulations these matters fall under the scope of application of the Rome III Regulation.[371] The rules contained in the two sets of instruments are at least partly incompatible with each other within the meaning of Article 365 of the TFEU, as will be explained below.

Under the treaty rules, the law of the Contracting Party whose nationals the spouses were at the time of making the application is generally applied to divorce. If, however, at the time of making the application, one spouse is a national of one Contracting Party, the other the national of the other Contracting Party and one of them lives in the territory of one Contracting Party and the other in the territory of the other Contracting Party, the courts of the Contracting Parties should apply their own law to divorce. In contrast, Article 5 of the Rome III Regulation allows spouses to choose the law applicable to divorce, whereas the legal assistance treaties concluded with third states do not. Such difference means that there is always an incompatibility within the meaning of Article 351 of the TFEU in the form of a true positive conflict between the two types of instruments, since the applicable law rules contained in these instruments could lead to the application of the laws of different states.

While the Rome III Regulation also deals with the law applicable to legal separation, the law applicable to separation has been left outside of the material scope of the legal assistance treaties. This is so because legal separation has not been mentioned in the treaties and because the relevant (Estonian, Russian, Ukrainian) national laws do not provide for rules on legal separation.

2.3.8. Provisions on the applicable law to maintenance

Similarly to the rules on the law applicable to divorce, the rules on the applicable law to maintenance are contained in both, the legal assistance treaties concluded with third states and in the European regulations on private international law. On the European level, such rules are contained in the Maintenance Regulation, whereas in the legal assistance treaties such rules are contained, in case of the

[371] Read further on the Rome III regulation: I. Viarengo. The Rome III Regulation in legal practice: case law and comments. – ERA Forum: scripta iuris Europaei, Vol 15, Issue 4 2014, pp 547–559; Torga, M. Party Autonomy of the Spouses under the Rome III Regulation in Estonia: Can Private International Law Change Substantive Law? – Nederlands Internationaal Privaatrecht, Vol 30, Issue 4, pp 547–554; Basedow, J. European Divorce Law: Comments on the Rome III Regulation. – A.-L. Verbeke. Confronting the Frontiers of Family and Succession Law: Liber amicorium Walter Pintens, 2012, pp 135–150.

Estonia-Russia legal assistance treaty, in Articles 27 (spousal maintenance) and 30–31 (maintenance obligations towards children) and, in case of the Estonia-Ukraine legal assistance treaty, in Articles 26 (spousal maintenance) and 28 (maintenance obligations towards children).

As a general rule, under Article 15 of the Maintenance Regulation in conjunction with Article 3 of the Hague 2007 Protocol, maintenance matters are generally[372] covered by the law of the habitual residence of the creditor. In contrast, the rules contained in the legal assistance treaties generally refer to (in case of maintenance obligations towards children) to the law of nationality of the child or (in case of spousal maintenance obligations) to the law of common residence or nationality of the spouses. Thus, the two sets of rules include different connecting factors which could lead to the application of different laws depending on the exact factual circumstances presented to the judge. Thus, the two sets of rules are incompatible with each other within the meaning of Article 351 of the TFEU and such an incompatibility would again arise in the form of a true positive conflict.

2.3.9. Provisions on the applicable law to succession and wills

Similarly to the rules on the law applicable to divorce and maintenance, the rules applicable to succession are contained in both, the legal assistance treaties concluded with third states and in the European regulations on private international law. On the European level, such rules are contained in the Succession Regulation, whereas in the legal assistance treaties such rules are contained in Articles 42–44 of the Estonia-Russia legal assistance treaty and Articles 34–36 of the Estonia-Ukraine legal assistance treaty.

The rules on the law applicable to succession contained in the legal assistance treaties are rather complex as the treaties follow the principle of separation. This means that it is possible that different laws are applied to the succession of different parts of the estate of the deceased. For example, under Article 42 of the Estonia-Russia legal assistance treaty, the right to inherit movable property is governed by the law of the Contracting Party in whose territory the deceased had his last place of residence, whereas the right to inherit immovable property is governed by the law of the Contracting Party in whose territory the immovable property is located. This solution is in contrast with the regime found in the Succession Regulation which determines the law applicable to succession as a whole.[373] Additional difference between the two types of instruments is provided by Article 22 of the Succession Regulation which allows a party to choose the law applicable to his succession, while the legal assistance treaties

[372] This is subject to expections found in Arts 4–8 of the Hague 2007 Protocol.

[373] See for the general rule on the applicable law contained in Art 21(1) of the Succession regulation, which provides that the law applicable to succession 'as a whole' is the law of the State of the last habitual residence of the deceased at the time of his death.

concluded with third states do not provide for such party autonomy. Hence, the two types of instruments are incompatible with each other within the meaning of Article 351 of the TFEU, as they could, depending on the factual circumstances of the case, point to the application of the law of different states.

Besides determining applicable law to succession, both, the Succession Regulation and the legal assistance treaties concluded with third states, provide separate applicable law rules for determining the validity of wills. While the Succession Regulation also includes provisions on the law applicable to succession agreements (Articles 25–26), no such rules are found in the legal assistance treaties concluded with third states. In this point, the specific provisions in the two types of instruments are, thus, not incompatible with each other within the meaning of Article 351 of the TFEU, because the relevant provisions on applicable law have different material scope of application. However, since the legal assistance treaties determine applicable law to succession, in the absence of the specific rules on the applicable law to succession agreemetns, the two types of instruments when taken as a whole are still incompatible with each other.

The two type instruments both deal with the law applicable to the validity of wills. These rules are divided into the rules dealing with formal validity of wills and the rules dealing with material validity of wills. The rules on the applicable law to formal validity of wills contained in the Succession Regulation are designed to be compatible with the provisions of the Hague 1961 Testamentary Dispositions Convention.[374] The rules dealing with the formal validity of wills contained in the legal assistance treaties[375] differ slightly from the provisions of the Hague 1961 Testamentary Dispositions Convention as they limit the evaluation of the formal validity of a will to the law of only two states. For example, under Article 44 of the Estonia-Russia legal assistance treaty the form of a testament is determined by the law of the Contracting Party whose national the deceased was at the time of his/her death, but it is also sufficient if the law of the Contracting Party in whose territory the testament was made is complied with. In contrast, Article 1(c) of the Hague 1961 Testamentary Dispositions Convention allows the court to hold a testamentary disposition valid also, for example, under the law of a place in which the testator had his domicile at the time he made the disposition.

As to the rules on the law applicable to material validity of wills, such rules are contained in the Succession Regulation,[376] but not in the legal assistance treaties concluded with third state. Thus, in this regard the two sets of rules are not incompatible with each other within the meaning of Article 351 of the TFEU.

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[374] This comes from Art 75(1) second indent of the Succession Regulation. For the Hague 1961 Testamentory Dispositions Convention, see: Convention of 5 October 1961 of the Conflict of Laws Relating to the Form of Testamentory Dispositions. Hague Concerence. Available: https://www.hcch.net/en/instruments/conventions/full-text/?cid=40 (01.09.018).

[375] Art 44 of the Estonia-Russia legal assistance treaty; Art 36 of the Estonia-Ukraine legal assistance treaty.

[376] Arts 24 and 26 of the Succession Regulation.

2.3.10. Provisions on the applicable law to the disappearance, absence and presumed death of persons

While the legal assistance treaties concluded with third states contain applicable law rules for declaring a person death or missing,[377] similar rules are missing from the European instruments. The questions relating to the disappearance, absence or presumed death of natural persons have been excluded even from the material scope of application of the Succession Regulation.[378] Thus, in this area of law, the two types of instruments are not incompatible with each other within the meaning of Art 351 of the TFEU.

2.3.11. Provisions on the applicable law to rights *in rem*

Although the legal assistance treaties concluded with third states contain rules on the law applicable to ownership of movables and immovables,[379] the European legislator is yet to provide rules for determining applicable law to rights i*n rem*. Thus, the incompatibilities within the meaning of Art 351 of the TFEU between the provisions dealing with the applicable law to rights *in rem* contained in the two types of instruments cannot occur if the treaty rules on the applicable law to ownership are applied by Estonian courts.

2.3.12. Provisions on the applicable law to contracts and other transactions

The legal assistance treaties concluded with third states contain rules on the law applicable to form of transactions, including contracts. For example, under Article 39 of the Estonia-Russia legal assistance treaty the form of a transaction is determined under the law of the performance of the transaction, except transactions dealing with an immovable and the rights to such immovable – these contracts are governed by the law of the Contracting Party in whose territory the immovable in question is situated. Neither of the legal assistance treaties contain rules on the applicable law to the substance of contracts. In this point the two type of instruments, thus, cannot incompatible with each other.

The European legislator has not yet provided rules for determining applicable law to all types of transactions. However, the European legislator has provided rules for determining applicable law to certain types of transactions, to contracts. These rules are contained in the Rome I Regulation. Similarly to the legal

[377] Estonia-Russia legal assistance treaty Arts 25, Estonia-Ukraine legal assistance treaty Arts 24.

[378] Art 1(2)(d) of the Succession Regulation.

[379] Art 38 of the Estonia-Russia legal assistance treaty; Art 31 of the Estonia-Ukraine legal assistance treaty.

assistance treaties concluded with third sates, the Rome I Regulation contains rules on determining the law applicable to formal validity of contracts. These rules differ considerably from the corresponding rules contained in the legal assistance treaties concluded with third states. Firstly, the rules contained in Article 11 of the Rome I Regulation allow the court to regard several types of contracts as formally valid if such contracts satisfy the formal requirements of the law, which the parties have chosen to apply to the substance of contract. No such party autonomy is provided by the rules of the legal assistance treaties concluded with third states. Secondly, the rules contained in the legal assistance treaties concluded with third states generally[380] allow recourse only to the national laws of the Contracting Parties, while under the Rome I Regulation, in principle, the law of any state in the world could be applicable to a formal validity of contracts.[381] Thirdly, the two types of instruments often use different connecting factors in order to tie the applicable law and particular circumstances of each case. For example, under the Rome I Regulation Article 11(4) the form of a consumer contract would be governed by the law of the country where the consumer has his habitual residence. In contrast, the legal assistance treaties concluded with third states do not give any special treatment to consumer contracts. Hence the incompatibilities within the meaning of Article 351 of the TFEU between the provisions contained in the two types of instruments are bound to occur if the court determines formal validity of a contract as the two sets of rules contain different connecting factors for identifying such law. Since the legal assistance treaties contain applicable law rules only for the formal validity of contract and not for material validity or any other matter that the law applicable to contract could cover, the possible incompatibilities can arise in only limited number of cases when the court is faced with a contract that it has to determine the applicable law to.

2.3.13. Provisions on the applicable law to non-contractual obligations

Both, the legal assistance treaties concluded with third states, and the European regulations, contain rules on the law applicable to non-contractual obligations. In the legal assistance treaties, such rules are contained in Article 40 of the Estonia-Russia legal assistance treaty and Article 33 of the Estonia-Ukraine

[380] For an exception to this general principle, see: Art 39(1) of the Estonia-Russia legal assistance treaty and Art 32(1) of the Estonia-Ukraina legal assistance treaty, which both determine that the law applicable to the form of a transaction is the law of the 'place of performance' of such transaction. Such place could theroetically also be a third state, though considering that all the ohter provisions in the legal assistance treaties refer to the law of a Contracting State, it is an option that could be doubted in.

[381] This comes from Art 2 of the Rome I Regulation. See further on this, for example: R. Plender and M. Wilderspin (2009), pp 98–99; A. Spickhoff. VO (EG) 593/2008 Art 2. – H. G. Bamberger and others (eds) (2018), Rn 1; F. Ferrari. VO (EG) 593/2008 Art. 2. – F. Ferrari and others (eds) 2018, Rn 1–2.

legal assistance treaty. On the European level, such rules are contained in the Rome II Regulation.

While the Rome II Regulation covers a wide range of non-contractual obligations, such as non-contractual obligations arising out of delicts (Chapter II), unjust enrichment (Article 10), *negotiorum gestio* (Article 11) and from the dealings prior to the conclusion of a contract (*culpa in contrahendo*) (Article 12), legal assistance treaties contain applicable law rules for more limited types of non-contractual obligations. For example, Articles 40(1) and (2) of the Estonia-Russia legal assistance treaty provides applicable law rules only for 'obligations to compensate for damage, except the obligations arising from contract and other lawful acts'. It would be hard to see why the claims based on *negotiorum gestio* should fall in the scope of application of Article 40(3) of the Estonia-Russia legal assistance treaty and Article 33(3) of the Estonia-Ukraine legal assistance treaty, since the obligation of the *negotiorum gestor* to compensate for damage is not based on any 'unlawful act' in either Estonian national law.[382] What should, however, be covered by the treaty provisions in this point, are the claims based on delicts as such claims undoubtedly relate to the 'obligation to pay for damage'.[383] In addition, it could be argued that some claims based on unjust enrichment, such as a claim based on Article 1037 of the Estonian Law on Obligations Act should probably be covered by an 'obligation to pay for damage' within the meaning of the legal assistance treaties.[384] As regards to non-contractual obligations that do not fall under the material scope of this provision, the two types of instruments cannot contain incompatible rules within the meaning of Article 351 of the TFEU.

According to both legal assistance treaties the non-contractual obligations which do fall under the material scope of application of Article 40(3) of the Estonia-Russia legal assistance treaty and Article 33(3) of the Estonia-Ukraine legal assistance treaty, are governed by the law of the Contracting Party in whose territory the act or other event giving rise to the claim for damage occurred or, if the person suffering damage and the person causing damage are the nationals of the same Contracting Party, the law of the Contracting Party to which court the claimant has submitted his claim against the defendant. Thus, in some circumstances the provisions of the legal assistance treaties indirectly offer the claimant a choice between the laws of two Contracting Parties, depending on the court where the claimant decides to submit his claim. In contrast, Article 14 of the Rome II Regulation allows much wider party autonomy as, subject to this provision, the parties may choose any law as the law applicable to non-

[382] Law of Obligations Act Art 1018(1)1.

[383] See, for example, Estonian Law of Obligaitons Act Art 1045.

[384] See, however, a case where the court found that Art 40 of the Estonia-Russia legal assistance treaty does not cover a claim based on unjust enrichment: Order of the Tallinn Circuit Court of 11 April 2017 in a civil case No 2-16-18753. See also: Order of the Viru County Court of 19 February 2013 in a civil case No 2-12-56567.

contractual obligation.[385] Although there are restrictions to such autonomy, parties are able to choose any law applicable to the non-contractual obligation in question. This contrasts with the regulation of the legal assistance treaties, under which only claimant has a limited opportunity to influence the determination of applicable law. Hence, the two sets of rules are incompatible with each other within the meaning of Article 351 of the TFEU as they could, in the same set of circumstance, potentially lead to the application of different laws.

2.3.14. Provisions on the applicable law to other matters

The legal assistance treaties concluded with third states do not contain applicable law rules for any other matters. For example, the legal assistance treaties do not deal with the question, which law is applicable to the responsibility arising from *culpa in contrahendo* or to the substance of a contract. If such topics are already dealt by the European legislator or should the European legislator choose to enact rules for determining applicable law in the matters not covered by the legal assistance treaties concluded with third states, no incompatibilities within the meaning of Art 351 of the TFEU can arise between the two types instruments as these matters would fall outside the material scope of application of the legal assistance treaties.

2.4. Conflicts between the provisions on the recognition and enforcements

2.4.1. Impossibility of direct conflicts

The EU regulations on private international law deal only with the recognition and enforcement of judgments, courts settlements and authentic instruments originating from the other Member States.[386] In contrast, the legal assistance treaties concluded with third states deal only with the recognition and enforcement of judgments originating from the relevant Contracting Parties to such treaties.[387] Thus, it seems, at first sight, that it is not possible that the provisions on the recognition and enforcement contained in the two types of instruments could give rise to any direct conflicts. It could, however be possible, that the

[385] Note, however, that Art 14(1) stands some limits on the party autonomy as regards to the time when such agreement has to be concluded or the paries who can conclude such agreement.

[386] See, for example: Art 22 of the Account Preservation Order Regulation, Art 4 of the Protection Measures Regulation, Art 39(1) of the Succession Regulation, Art 21(1) of the Brussels II *bis* Regulation, Art 36(1) of the Brussels I (Recast) Regulation.

[387] Art 50 of the Estonia-Russia legal assistance treaty; Art 40 of the Estonia-Ukraine legal assistance treaty.

provisions contained in one type of instrument could influence the application of the other type of instrument and that such influence could amount to an incompatibility within the meaning of Article 351 of the TFEU in connection with the application of other types of private international law rules or rules on civil procedure contained in the two types of instruments or other instruments.

2.4.2. Indirect application of the provisions

The provisions on the recognition and enforcement of judgements, court settlements or authentic instruments contained in the legal assistance treaties could indirectly influence the application of the provisions on jurisdiction contained in the European instruments if the latter refer to the provisions on recognition. For example, although Estonian court might, in a particular case, have jurisdiction under an EU instrument, the court might be barred from exercising such jurisdiction, if there exists a possibility that the judgment of the court would not be recognised in the Contracting Party to the broad legal assistance treaty. There is only one example where this could happen and it is provided by Article 12(1) of the European Succession Regulation.

Under Article 12(1) of the European Succession Regulation, where the estate of the deceased comprises of assets located in a third state (such as the Contracting Party), Estonian court as the court seized to rule on the succession may, at the request 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. If the rules on recognition contained in the legal assistance treaties would provide that the judgment of Estonian court would not be recognised, Estonian court should not hear the matter even though under the treaty rules, should these be applied, it might have to hear the matter. Thus, the treaty rules on recognition would lead to the incompatibility within the meaning of Article 351 of the TFEU between the rules on jurisdiction contained in the two types of instruments. In turn, the rules on recognition as contained in the legal assistance treaties, thus have indirect effect on conflict between the provisions of jurisdiction that are contained in the other type of instrument. Since the rules on recognition that are contained in the legal assistance treaties might be almost identical to the relevant rules on recognition that are contained in the European Succession Regulation and since such conflict cannot be identified by merely interpreting the autonomous concepts contained in these rules, such conflict would be not just hidden, but hidden to the extent of being almost invisible.

Article 12(1) of the European Succession Regulation is the only EU provision on jurisdiction which application is dependent on the provisions allowing the foreign court to recognise the European judgment. Hence, the possibility that the rules on recognition and enforcement as contained in the legal assistance treaties indirectly create conflict between the provisions on jurisdiction which are contained in the two types of instruments is rather limited.

In addition, although Estonian court might, in a particular case, have jurisdiction under an EU instrument, the court might be barred from exercising such jurisdiction, if there exists a judgment originating from a Contracting Party to the broad legal assistance treaty concluded with third state, provided that such judgment is recognisable in Estonia under the provisions of the relevant broad legal assistance treaty. The EU regulations do not explicitly bar courts from declining jurisdiction, if there exists a judgment from a third state and if such judgment would be irreconcilable with the judgment made by the court, should the case be heard. However, such obligation would come to the Estonian court from either, Article 371(1)4 or 428(1)2 of the Estonian Code of Civil Procedure. Thus, in conjunction with Estonian national rules, the provisions on the recognition and enforcement of judgments as contained in the legal assistance treaties concluded with third states would influence the application of the rules on jurisdiction as contained in the European private international law regulations.

Although the provisions on the recognition and enforcement of judgments contained in the legal assistance treaties concluded with third states and the EU regulations on private international law could influence the application of the provisions on jurisdiction contained in the other type of instrument, such influence does not necessarily mean that there is an incompatibility within the meaning of Article 351 of the TFEU between the two types of instruments. The EU regulations are silent as to the effect that the rules on the recognition and enforcement contained in international conventions should have on the provisions on jurisdiction contained in the EU regulations on private international law. Thus, it could be concluded that this is a question which has been left to be decided by the national legislator as has been done by Articles 371(1)4 and 428(1)2 of the Estonian Code of Civil Procedure. 2.5. Conflicts between the provisions on cooperation

2.5.1. Impossibility of direct conflicts

The EU regulations on private international law deal only with the cooperation between the courts and other authorities of the Member States.[388] Such cooperation could take the form of serving documents, taking evidence or providing assistance to foreign maintenance creditors. In contrast, the legal assistance treaties concluded with third states deal only with the cooperation between the authorities of the relevant Contracting Parties.[389] In civil matters, such assistance includes the exercise of procedural acts provided by the legislation of the Contracting Party receiving the request, for example, hearing the parties, witnesses

[388] See for example Art 1(1) of the Service *bis* Regulation, Art 1(1) of the Evidence Regulation, Art 55 of the Maintenance Regulation, Art 57 of the Insolvency (Recast) Regulation, Art 14(6) of the European Account Preservation Order Regulation.

[389] Art 2(1) of the Estonia-Russia legal assistance treaty; Art 2(1) of the Estonia-Ukraine legal assistance treaty.

and experts, making expertise, conducting judicial examinations or service and transfer of documents.

Since the EU regulations on private international law deal only with the cooperation between the courts of the Member States, whereas the legal assistance treaties concluded with third states deal only with the cooperation between the authorities of the relevant Contracting Parties, it is not possible that the provisions on cooperation contained in the two types of instruments could give rise to any direct conflicts. It could, however be theoretically possible, as was the case with the rules on recognition and enforcement as contained in the two types of instruments, that the provisions contained in one type of instrument could influence the application of the other type of instrument.

2.5.2. Indirect application of the provisions

In contrast to the rules on recognition and enforcement, the provisions on cooperation contained in the legal assistance treaties do not have any indirect influence on the corresponding provisions in the European regulations. Hence, the two types of provisions cannot be considered as being incompatible with each other within the meaning of Article 351 of the TFEU.

CONCLUSIONS

The dissertation set up to determine whether the Estonian legal assistance treaties, which the Republic of Estonia has concluded with the Russian Federation and the Ukraine, are incompatible within the meaning of Article 351 of the TFEU with various European private international law regulations, which at the time of finishing this dissertation (1 of September 2018) were also applicable in Estonian courts.

In order to do determine whether any incompatible within the meaning of Article 351 of the TFEU existed between the two types of instruments, the dissertation first analysed whether the two types of instruments have overlapping scopes of application. It was presumed that in the absence of such overlap, no incompatibilities between the two types of instruments could arise.

In order to map the scope of application of the two types of instruments, temporal, material, personal and territorial scopes of application of the two types on instruments were evaluated. It was concluded that all four types of private international law provisions which are contained in the two types of instruments have partially overlapping temporal and material scopes of application, with the legal assistance treaties having wider material scope of application than the European regulations. It was also concluded that the provisions on jurisdiction and applicable law as contained in the legal assistance treaties have narrower personal scope of application than the corresponding provisions contained in the European instruments. As to territorial scope of application, the provisions contained in the two types of instruments do not differ from each other with the exception of the provisions on recognition and enforcement and the provisions on international cooperation. The latter two types of provisions have different territorial scopes of application which do not overlap with each other. It was, thus assumed, that these provisions cannot give rise to any direct conflicts which would be considered as incompatibilities within the meaning of Article 351. However, in the interest of being thorough, it was decided to analyse whether these rules could, in conjunction with other rules, give rise to any indirect conflicts.

As the two types of instruments had at least partially overlapping scopes of application, they could in, principle, give rise to the incompatibilities within the meaning of Article 351. Whether this would actually happen if either of the rules would be applied instead of the other was analysed in Chapter II of the dissertation. Based on the analysis carried out in Chapter II the following conclusions can be made in order to answer the main research question of the dissertation – are the rules contained in the legal assistance treaties concluded with third states incompatible with the rules contained in the European private international law regulations?

The answer to the main research question was found to be positive, but with certain limitations. The incompatibilities within the meaning of Article 351 of the TFEU between the EU regulations on private international law and the legal

assistance treaties concluded with third states can arise only in the cases where the courts are required to determine jurisdiction or applicable law under the legal assistance treaties. No incompatibilities between the two types of instruments arise if the courts apply the treaty rules on the recognition and enforcement of foreign judgments or if the courts make use of the cooperation mechanisms provided by the legal assistance treaties concluded with third states.

The first type of situations where the incompatibilities within the meaning of Article 351 of the TFEU between the two types of instruments could arise, are the situations where Estonian courts are required to apply the provisions on jurisdiction contained in the legal assistance treaties concluded with third states. Application of such provisions could often lead to the result that a person could be sued in Estonian courts even if such possibility is not provided by the European regulations on private international law. In addition, the legal assistance treaties concluded with third states could bar claimants from successfully initiating Estonian court proceedings, even if they would have such possibility under some European regulation on private international law. Hence, the application of the provisions on jurisdiction contained in the legal assistance treaties concluded with third states could often go against the fundamental idea behind the provisions on jurisdiction contained in the EU regulations on private international law – to guarantee the right of the claimant to turn to a court in a place which is considered as the most appropriate and predictable forum under the relevant European rules.

The conflicts between the rules on jurisdiction contained in the two types of instruments arise either as true obvious conflicts or as true hidden conflicts. While the first are easily noticeable, the latter are apparent only when different provisions contained in the various instruments are applied in conjunction. A true conflict between the rules on jurisdiction occurs when under one sets of rules the claimant can turn to Estonian court, whereas under the other sets of rules she has no such right. Sometimes such conflict is not apparent just by looking at the wording of the text of the relevant provisions (a hidden conflict), but would become apparent if the rules are given meaning by taking into account their purpose and position in the overall system of private international law acts (obvious conflicts). However, both the hidden and obvious true conflicts between the legal assistance treaties and the EU regulations on private international law constitute incompatibilities between the two types of instruments within the meaning of Article 351 of the TFEU. Such incompatibilities can be, in the case of the provisions on jurisdiction, be negative conflicts, which means that one type of rule seeks to be applied and allocate to jurisdiction to the court jurisdiction, whereas the other type of instruments seeks a result where no provisions are applied in order to deprive the court of jurisdiction.

The second type of situations where the incompatibilities within the meaning of Article 351 of the TFEU between the two types of instruments could arise, are the situations where Estonian courts are required to apply the provisions on the applicable law contained in the legal assistance treaties concluded with third states. Although not all provisions on the applicable law contained in the legal

assistance treaties give rise to such incompatibilities, there are several cases where the provisions of the legal assistance treaties concluded with third states use different connecting factors than similar provisions in the EU regulations on private international law and where the application of different instruments would thus lead to the application of the laws of different states. Even if the legal assistance treaties concluded with third states and the EU regulations on private international law lead to the application of the law of the same state, there is often still an inherent conflict written into these provisions, as some of them allow party autonomy while the others often do not. Such true conflicts amount to the incompatibilities within the meaning of Article 351 between the different types of instruments, as the litigants are awarded different rights under the two sets of regimes and thus treated fundamentally differently. These incompatibilities can also be described as positive conflicts as the two types of rules both seek to be applied, but would point to the laws of different states.

The legal assistance treaties concluded with third states and the EU regulations on private international law are designed to deal with conflicts which arise, if the litigants from different jurisdictions or with different backgrounds meet in Estonian courts. The two types of instruments, thus, contain the rules, which could be described as the rules on conflict. As has been demonstrated in the present dissertation, such conflict rules in turn conflict with each other and the relationship between the legal assistance treaties concluded with third states and the European regulations on private international law could, thus, be described as a conflict of conflicts. It is up to the Estonian and European legislators to make common efforts to solve this conflict and until this has been done, Estonian courts would, unfortunately, be in an uncomfortable position where they, if they abide by the legal assistance treaties, have to continue delivering judgments, which go against the purpose and text of the European rules on private international law.

As was demonstrated in the dissertation, the courts sometimes use rather novel methods when interpreting the legal assistance treaties, in order to overcome the problem of incompatibility between the two types of instruments. Such technique involves interpreting the legal assistance treaties by taking into account their first declaratory provisions and the underlying idea that these provisions seem to hide – the equal treatment of Estonian nationals and the nationals of the Contracting Parties. While this is one way to overcome the inconsistencies between the two types of instruments, it is not a very eloquent one. Although in good spirit, the courts unashamedly ignore specific provisions contained in the legal assistance treaties. In addition, the reasoning of the courts in this matter has been too laconic to be comprehensible, at least from the point of view of private international law – it is not clear, for example, whether the courts have omitted from applying the specific rules on jurisdiction contained in the broad legal assistance treaties, whether they have applied the EU rules instead of these rules, whether they have applied the two types of rules concurrently or whether they have simply solved the case *ex aequo et bono*. In addition, it is not clear whether the reliance on the declaratory first articles of

the legal assistance treaties is something that the claimant (or the applicant, as the case may be) has to initiate or is it something that the courts themselves are responsible to proceed with. It is also unclear what is the exact extent of such exercise – at the moment such exercise has, in the case law, been reserved only for the cases where the courts determined international jurisdiction. It would be interesting to see whether in the future, claimants could also rely on the declaratory provisions in the beginning of the legal assistance treaties in order to change the otherwise applicable law under the legal assistance treaties.

Unfortunately there is no other way to overcome the inconsistencies between the two types of provisions than by using the general provisions in the beginning of these treaties. The courts cannot, for example, use much of their imagination in order to give meaning to the connecting factors used in the legal assistance treaties and the EU regulations, since the rules for giving meaning to these terms are clear – the terms in the EU instruments must be interpreted autonomously as provided by the CJEU and the terms used in the legal assistance treaties must be interpreted autonomously taking into account common understandings in the laws of the relevant Contracting Parties.

While the courts should be commended for their efforts to overcome the inconsistencies between the two types of instruments, it should not be the job of the courts to do so and it would be preferable if the legislator would take steps in order to harmonise the rules contained in the legal assistance treaties concluded with the third states and the European rules on private international law.

As both, the Estonia-Russia and the Estonia-Ukraine legal assistance treaty can be renewed after a certain period of time, the Republic of Estonia could consider whether the benefits arising from these treaties, namely the possibility of cooperating with the judicial authorities of the relevant Contracting Parties, would be more important than the benefits that could arise from European private international law regulations if they would be applicable in all types of civil cases regardless of the nationality or place of registration of the participants in particular proceedings. Considering the confusion that the legal assistance treaties have created in legal theory and case law and considering that such treaties are applicable in considerably large number of cases, it would not be, perhaps, such a big loss if the treaties are not renewed. One can, perhaps, assume that there are ways to deliver a political message that the reasons for not extending the treaties do not have anything to do with the courtesy between the states, but rather with the wish to harmonise one's national private international law rules. It is, however, also understandable how this message may sound to those who are not that well versed in the art of writing private international law rules.

Whether the legislator will take any steps to remedy the current situation will be seen in the future. Until then, the situation in Estonian private international law will remain to be a conflict of conflict rules.

RESÜMEE

Konfliktireeglite konflikt – Euroopa rahvusvahelise eraõiguse määruste ja kolmandate riikidega sõlmitud õigusabilepingute vahekord

Sissejuhatus

A. Uuritava õigusliku probleemi selgitus

Pärast Eesti liitumist Euroopa Liiduga 2004. aastal tekkis Eesti kohtutel kohustus hakata kohaldama erinevaid Euroopa rahvusvahelise eraõiguse määruseid, mis tollel hetkel juba Euroopa Liidus kehtisid. Seisuga 1. september 2018 oli Euroopa Liidus jõustunud viisteist rahvusvahelise eraõiguse määrust ning vähemalt kahe osas võis eeldada, et need tulevikus Eesti suhtes jõustuvad.[390] Need määrused (edaspidi: "EL rahvusvahelise eraõiguse määrused") reguleerivad pea kõiki rahvusvahelise eraõiguse valdkondi – neis on reeglid nii rahvusvahelise kohtualluvuse kontrollimise, kohalduva õiguse kindlaksmääramise, kohtulahendite, kohtulike kokkulepete ja ametlike juriidiliste dokumentide tunnustamise, täidetavaks tunnistamise ja täitmise kui ka kohtute ja muude ametiasutuste koostöö kohta tsiviilasjade lahendamisel.

Täpselt samasugused küsimused, mis langevad EL rahvusvahelise eraõiguse määruste kohaldamisalasse, on reguleeritud ka nn laiapõhjaliste õigusabilepingutega, mille Eesti on sõlminud teatud kolmandate riikidega (edaspidi: "kolmandate riikidega sõlmitud õigusabilepingud[391]"). Asjaolu, et EL rahvusvahelise eraõiguse määrused ja kolmandate riikidega sõlmitud õigusabilepingud tegelevad sisuliselt samade õiguslike probleemidega paneb Eesti Vabariigile kohustuse õigusabilepinguid nende partnerriikidega läbi rääkida (või vähemalt proovida lepinguid läbi rääkida) ulatuses, milles need lepingud lähevad vastuollu EL

[390] EL rahvusvahelise eraõiguse määruste täpne loetelu on leitav käesoleva sissejuhatuse punktist E. Töö allikaks olid nende määruste (ja ka muude EL õigusaktide) inglise keelsed versioonid ning seda kahel põhjusel: esiteks koostati töö inglise keeles ning teiseks esineb määruste eesti keelsetes versioonides (vaatamata nende ametlikule staatusele) sageli erinevusi võrreldes määruste inglise, saksa jms keelsete versioonidega. Sellised erinevused on tingitud ilmselt asjaolust et EL faktiliseks töökeeleks ei ole eesti keel, mis on endaga kaasa toonud tulemuse, kus määruste eesti keelsetes versioonides on mõnikord kasutatud termineid, mis ei vasta Eesti või EL rahvusvahelise eraõiguse loogikale. Eelnevast tulenevalt on ka käesolevas sissejuhatuses tahtlikult viidatud töö põhiallikatele keeles, milles neid kasutati st inglise keeles ning viidetest arusaamise huvides on viidetes kasutatud ka inglise keelset lühendamist jms. Lugejal on huvi korral võimalik EL seadusandluse eesti keelsed versioonid hõlpsasti üles leida, kasutades selleks eur-lex.europa.eu võrguaadressi lihtotsingut, mis võimaldab EL instrumente eri keeltes nende numbri järgi otsida.

[391] Õigusabilepingute loetelu on sarnaselt EL määruste loetelule leitav käesoleva sissejuhatuse punktis E.

rahvusvahelise eraõiguse määrustega. Täpsemini tuleb kohustus kolmandate riikidega sõlmitud õigusabilepinguid läbi rääkida Eesti Vabariigile Euroopa Liidu Toimimise Lepingu (ELTL)[392] artikkel 351 teisest lausest, mille järgi:

> *Juhul, kui nimetatud* [st kolmandate riikidega sõlmitud] *lepingud ei ole kooskõlas aluslepingutega, kasutavad asjassepuutuvad liikmesriigid kõiki vajalikke vahendeid kindlakstehtud vastuolude kõrvaldamiseks. Sel puhul abistavad liikmesriigid vajaduse korral üksteist ning kui see on põhjendatud, võtavad vastu ühise seisukoha.*

Kuigi ELTL artikkel 351 nõuab, et EL liikmesriigid võtaksid meetmeid, et kaotada õigusabilepingute vastuolud nn aluslepingutega (ELTL ja Euroopa Liidu Lepinguga[393]), tuleks tähele panna, et kõik EL rahvusvahelise eraõiguse määrused on vastu võetud viidatud aluslepingute alusel. Seega on Eesti Vabariik kohustatud võtma meetmeid kaotamaks vastuolud ka kolmandate riikidega sõlmitud õigusabilepingute ja EL rahvusvahelise eraõiguse määruste vahel. Kuigi Euroopa Liit ei ole siiani Eesti Vabariiki märkimisväärselt survestanud selliste meetmete võtmiseks, on Euroopa Liidu institutsioonid mitmel korral[394] Eesti Vabariigile meelde tuletanud kohustust viia kolmandate riikidega sõlmitud õigusabilepingud EL *acquis*'ga kooskõlla. Hetkel puudub ühene arusaam selle kohta, millises ulatuses on kolmandate riikidega sõlmitud õigusabilepingud ja EL rahvusvahelise eraõiguse määrused omavahel vastuolus, mistõttu ei ole selge ka see, milline on Eesti Vabariigile ELTL artiklist 351 tuleneva kohustuse täpne ulatus.

B. Uurimisülesande püstitus

Eelnevast tulenevalt on käesoleva doktoritöö eesmärgiks teha kindlaks, millises osas on EL rahvusvahelise eraõiguse määrused vastuolus kolmandate riikidega sõlmitud õigusabilepingutega. Doktoritöö eesmärgiks ei ole vastata küsimusele, kes täpselt (st kas Euroopa Liit või Eesti Vabariik) peaks võtma samme, et kolmandate riikidega sõlmitud õigusabilepinguid läbi rääkida. Samuti ei ole doktoritöö eesmärgiks vastata küsimusele, kas sellised läbirääkimised on üldse võimalikud. Kuigi nendele küsimustele vastuse leidmine on enne võimalike läbirääkimiste alustamist vaieldamatult oluline, vääriks nendele küsimustele vastamine eraldi uurimuse läbiviimist. Lisaks ei kujutaks neile küsimustele vastamine enam õigusteaduslikku analüüsi, vaid kalduks pigem valdkonda, millega

[392] Consolidated version of the Treaty on the Functioning of the European Union. – OJ C326, 26.10.2012, pp 47–200.

[393] Consolidated version of the Treaty on European Union. – OJ C326, 26.10.2012, pp 13–46.

[394] Council of the European Union, Interinstitutional File: 2008/0259 (COD) 11191/09 ADD 1 REV 1 CODEC 878 JUSTCIV 155, 29/6/2009, p 2. See also: Council of the European Union, Addendum to draft minutes 11806/09 ADD 1 PV/CONS 39 ECOFIN 509, p 5.

peaks tegelema poliitikateadus. Käesoleva väitekirja autor on teadlikult seadnud eesmärgiks vastata vaid küsimusele, milline on EL rahvusvahelise eraõiguse määruste ja Eesti õigusabilepingute võimalik vastuolu, kuivõrd sellele küsimusele on võimalik vastata kasutades rahvusvahelise eraõiguses tuntud õiguslikke meetodeid.

C. Väitekirja struktuur

Et eelmises lõigus kirjeldatud uurimisküsimusele vastata, on doktoritöö jaotatud kaheks osaks. Töö esimeses peatükis (**1. peatükk**) otsitakse vastust küsimusele, kas EL rahvusvahelise eraõiguse määrustel ja kolmandate riikidega sõlmitud õigusabilepingutel võib olla kattuv kohaldamisala. Vastupidiselt EL rahvusvahelise eraõiguse määrustele ei sisalda kolmandate riikidega sõlmitud õigusabilepingut ühtegi normi, mis määraks selgelt kindlaks nende lepingute kohaldamisala. Kuna kolmandate riikidega sõlmitud õigusabilepingute täpne kohaldamisala on ebaselge, on selleks, et kindlaks teha, millal need õigusabilepingud ja EL rahvusvahelise eraõiguse määrused üksteisega vastuollu lähevad, kõigepealt vaja analüüsida, kas kaht tüüpi instrumentide kohaldamisalad saavad üldse omavahel kattuda. Selle küsimuse vastamiseks kaardistatakse doktoritöös kõigepealt EL rahvusvahelise eraõiguse määruste kohaldamisala ning seejärel määrates kindlaks kolmandate riikidega sõlmitud õigusabilepingute kohaldamisala. Võrreldes õigusabilepingute kohaldamisala EL määruste omaga, otsitakse seejuures vastust küsimusele, kas kolmandate riikidega sõlmitud õigusabilepingute kohaldamisala võib kattuda EL rahvusvahelise eraõiguse määruste kohaldamisalaga.

Doktoritöö teine osa (**2. peatükk**) otsib vastust küsimusele, kas juhul, kui EL rahvusvahelise eraõiguse määruste ja kolmandate riikidega sõlmitud õigusabilepingute kohaldamisala üksteisega kattub, võivad kaht liiki instrumentide vahel tekkida vastuolud ELTL artikli 351 tähenduses. Juhul, kui kolmanda riigiga sõlmitud õigusabileping on vastuolus EL rahvusvahelise eraõiguse määruse sätetega, peab Eesti kohtunik prioriteedi andma kolmanda riigiga sõlmitud õigusabilepingule. Kuna kahe instrumendi kohaldamine viib erineva tulemuseni, tekib õigusabilepingute eelistamisel ELTL artikli 351 tähenduses vastuolu. Hõlbustamaks võimalike vastuolude kindlakstegemist on töö teine peatükk jaotatud alaosadeks, mis lähtuvad rahvusvahelise eraõiguse peamistest uurimisvaldkondadest: kohtualluvuse kontrollimine, kohalduva õiguse kindlaksmääramine, kohtulahendite, kohtulike kokkulepete ja ametlike juriidiliste dokumentide tunnustamine, täidetavaks tunnistamine ja täitmine ning kohtute ja muude asutuste vaheline koostöö rahvusvaheliste tsiviilvaidluste lahendamisel.

Töö lõpus esitatakse töös tehtud peamised järeldused (**Kokkuvõte**). Sh esitatakse kokkuvõttes selgitus selle kohta, kas sissejuhatuses püsitatud uurimishüpoteesid leidsid kinnitust. Loodetavasti on selliste järelduste esitamine abiks Eesti Vabariigi Valitsusele otsustamaks, kas õigusabilepingud vajaksid tulevikus teiste lepinguriikidega uut läbirääkimist.

D. Kaitsmisele esitatavad väited

Doktoritöö peamised hüpoteesid, mida töö avalikul esitlusel kaitstakse, on järgmised:

1. Võrreldes kolmandate riikidega sõlmitud õigusabilepingute ja EL rahvusvahelise eraõiguse määruste sõnastust on võimalik tuvastada mitmeid ilmseid konflikte[395] kaht tüüpi instrumentide vahel;
2. Osad ilmsed konfliktid EL rahvusvahelise eraõiguse määruste ja kolmandate riikidega sõlmitud õigusabilepingute vahel ei kujuta endast vastuolusid ELTL artikli 351 tähenduses. Ilmsed konfliktid, mis selliseid vastuolusid endast ei kujuta, on ebaehtsad konfliktid. Ehtne konflikt võib avalduda nt juhul, kui ühe instrumendi alusel kohaldaks Eesti kohus ühe riigi õigust, teise lepingu alusel aga teise riigi õigust või kui ühe instrumendi alusel saaks Eesti kohus vaidlust lahendada, teise instrumendi alusel aga mitte.
3. Isegi, kui esmapilgul tundub, et EL rahvusvahelise eraõiguse määrused ja kolmandate riikidega sõlmitud õigusabilepingud vastavad mingis küsimuses üksteisele, võivad siiski tekkida vastuolud ELTL artikli 351 tähenduses, kui kolmandate riikidega sõlmitud õigusabilepinguid praktikas kohtute poolt kohaldamist leiavad. Eelnevast tulenevalt on teist liiki vastuoludeks, mis kaht liiki instrumentide vahel olemas on nn peidetut konfliktid. Need on ehtsad konfliktid, mis ei nähtu pelgalt erinevate instrumentide sõnastuse võrdlemisest.
4. Mõlemad – nii ehtsad kui ebaehtsad konfliktid – võivad olla kas negatiivsed või positiivsed konfliktid. Negatiivne konflikt tähendab sisuliselt seda, et õiguslikus regulatsioonis on mingi lünk, positiivne konflikt aga seda, et kaht liiki instrumendil on konkureeriv kohaldamisala.
5. Vastuolud EL rahvusvahelise eraõiguse määruste ja kolmandate riikidega sõlmitud õigusabilepingute vahel ELTL artikkel 351 tähenduses kerkivad üksnes situatsioonides, kus Eesti kohtud peavad selliste õigusabilepingute alusel kontrollima kohtualluvust või kindlaks määrama kohalduvat õigust. Vastuolusid ei teki, kui kohtud kohaldavad kolmandate riikidega sõlmitud õigusabilepingutes sisalduvaid neid sätteid, mis reguleerivad kohtulahendite ja muude täitedokumentide tunnustamist ja täidetavaks tunnistamist ning koostööd välisriikide ametiasutustega tsiviilasjade lahendamisel.

[395] Käesolevas töös kasutatakse kahe instrumendi vahelistele vastuoludele viitamisel võõrkeelse algega sõna „konflikt“ (inglise keeles *conflict*) estofiilidele suupärasema „vastuolu“ asemel. Seda on tehtud tahtlikult ja põhjusel, et lugejal oleks lihtsam eristada tavakeelset „vastuolu“ „vastuolust“ ELTL artikli 351 (inglise keeles *incompatibility*) tähenduses.

E. Metoodika kirjeldus

Doktoritöö kirjutamisel kasutati kahte meetodit. Esiteks kasutati doktoritöö kirjutamisel nö võrdlevat meetodit – võrreldi EL rahvusvahelise eraõiguse määruste ja kolmandate riikidega sõlmitud õigusabilepingute sätteid, et teha kindlaks, kas nende instrumentide vahel esineb vastuolusid ELTL artikkel 351 tähenduses. Lihtsalt kahe instrumendi võrdlemine ei ole aga piisav, et doktoritöö uurimisküsimusele vastata, kuna vastuolud kaht liiki instrumendi vahel võivad esineda ka nö peidetud konfliktidena. Eelnevast tulenevalt kasutati doktoritöö kirjutamisel ka süstemaatilise tõlgendamise meetodit, kuivõrd võimalike vastuolude kindlakstegemiseks on vajalik arvesse võtta erinevate õigusaktide eesmärki ja struktuuri ning õigusaktide omavahelist vahekorda ja suhet muude rahvusvahelise eraõiguse reeglitega.

Töös kasutatud metoodika on tinginud ka töö allikate valiku. Töö allikad on võimalik jagada kaheks – esmasteks ehk nö põhiallikateks ja teisesteks ehk toetavateks allikateks. Töö esmasteks allikateks on EL rahvusvahelise eraõiguse määruste ja kolmandate riikidega sõlmitud õigusabilepingute tekstid.

EL määrused, mis on doktoritöö põhiallikaks, on järgmised:

- Brüsseli I (uuesti sõnastatud) määrus,[396] mis asendab varasemat Brüsseli I määrust;[397]
- Brüsseli II *bis* määrus[398] (ja selle muutmisettepanek[399]) mis asendab varasemat Brüsseli II määrust;[400]
- Rooma I määrus;[401]

[396] Brussels I (Recast) Regulation (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 (recast). – OJ L 351, 20.12.2012, pp 1–32.

[397] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. – OJ L 012, 16.01.2001, pp 1–23.

[398] Council Regulation (EC) No 2201/2003 of 27 November concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. – OJ L 338, 23.12.2003, pp 1–29.

[399] European Commission. Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). COM(2016) 411 final. Available: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF (01.09.2018).

[400] Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses. – OJ L 160, 30.06.2000, pp 19–36.

[401] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 177, 04.07.2008, pp 6–16.

- Rooma II määrus;[402]
- Rooma III määrus;[403]
- ülalpidamiskohustuste määrus;[404]
- abieluvaramäärus[405] (käesoleva väitekirja lõpetamise hetkel (01.09.2018) veel Eesti Vabariigi suhtes mittesiduv[406]);
- registreeritud partnerite varasuhete määrus[407] (käesoleva väitekirja lõpetamise hetkel (01.09.2018) veel Eesti Vabariigi suhtes mittesiduv[408]);
- Euroopa pärimismäärus;[409]
- Euroopa täitekorralduse määrus;[410]

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[402] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). – OJ L 199, 31.07.2007, pp 40–49.

[403] 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. – OJ L 343, 29.12.2010, pp 10–16.

[404] Council Regulation (EC) No 4/2009 of 18 December on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. – OJ L 007, 10.01.2009, pp 1–79.

[405] 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. – OJ L 183, 08.07.2016, pp 1–29.

[406] Eesti Vabariik oli siiski avaldanud soovi määruse režiimiga tulevikus liituda: Riigikantselei. Eesti seisukoht nõukogu otsuse, millega antakse luba tõhustatud koostööks kohtualluvuse, kohaldatava õiguse ning otsuste tunnustamise ja täitmise valdkonnas rahvusvaheliste paaride varalisi suhteid käsitlevates asjades, mis hõlmavad nii abieluvarareźiime kui ka registreeritud kooselust tulenevaid varalisi tagajärgi, eelnõu kohta. Available: http://eelnoud.valitsus.ee/main/mount/docList/09abf901-882a-4244-aff1-4a430000f58d#6SNocAGa (01.09.2018).

[407] 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. – OJ L 183, 08.07.2016, pp 30–56.

[408] Väitekirja lõpetamise aja seisuga oli riiklikul tasandil avaldatud soovi määrusega tulevikus liituda: Riigikantselei. Eesti seisukoht nõukogu otsuse, millega antakse luba tõhustatud koostööks kohtualluvuse, kohaldatava õiguse ning otsuste tunnustamise ja täitmise valdkonnas rahvusvaheliste paaride varalisi suhteid käsitlevates asjades, mis hõlmavad nii abieluvarareźiime kui ka registreeritud kooselust tulenevaid varalisi tagajärgi, eelnõu kohta. Available: http://eelnoud.valitsus.ee/main/mount/docList/09abf901-882a-4244-aff1-4a430000f58d#6SNocAGa (01.09.2018).

[409] 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 L 201, 27.07.2012, pp 107–134.

[410] 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. – OJ L 143, 30.04.2004, pp 15–39.

- Euroopa maksekäsumenetluse määrus[411] koos selle parandusmäärus;[412]
- Euroopa väiksemate kohtuvaidluste menetluse määrus[413] koos selle parandusmäärusega;[414]
- kaitsemeetmete menetluse määrus;[415]
- Euroopa pangakontode arestimise määrus;[416]
- maksejõuetusmenetluse (uuesti sõnastatud) määrus,[417] mis asendas varasemat maksejõuetusmenetluse määrust;[418]
- dokumentide kättetoimetamise määrus II,[419] mis asendas varasemat dokumentide kättetoimetamise määrust;[420]
- tõendite kogumise määrus.[421]

Kolmandate riikidega sõlmitud õigusabilepingud, mille Eesti sõlmis enne Euroopa Liiduga liitumist ja mis võivad eelnevalt nimetatud EL rahvusvahelise

[411] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. – OJ L 399, 30.12.2006, pp 1–32.

[412] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure. – OJ L 341, 24.12.2015, pp 1–13.

[413] Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007 establishing a European Small Claims Procedure and Regulation (EC) No 1896/2006 creating a European order for payment procedure. – OJ L 341, 24.12.2015, pp 1–13.

[414] See previous footnote.

[415] 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. – OJ L 181, 29.06.2013, pp 4–12.

[416] 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. – OJ L 189, 27.06.2014, pp 59–92.

[417] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. – OJ L 141, 05.06.2015, pp 19–72.

[418] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. – OJ L 160, 30.06.2000, pp 1–18.

[419] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000. – OJ L 324, 10.12.2007, pp 79–120.

[420] Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. – OJ L 160, 30.06.2000, pp 37–52.

[421] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. – OJ L 174, 27.06.2001, pp 1–24.

eraõiguse määrustega vastuollu minna, on nn Eesti-Vene õigusabileping[422] ja Eesti-Ukraina õigusabileping[423]. Kuigi Eesti on sõlminud kaks õigusabilepingut ka teiste Euroopa Liidu liikmesriikidega (Poola,[424] Läti ja Leeduga[425]), ei saa viimati nimetatud õigusabilepingud minna vastuollu EL määrustega, kuna EL määrused asendavad tulenevalt määruste lõpus olevatest rakendussätetest neid lepinguid.

Töö teisesteks allikateks on Eesti kohtute praktika kolmandate riikidega sõlmitud õigusabilepingute ning EL rahvusvahelise eraõiguse määruste kohta, EL rahvusvahelise eraõiguse instrumentide kohta käiv Euroopa Liidu Kohtu praktika ja õigusabilepingute ning EL rahvusvahelise eraõiguse määruste ettevalmistavad materjalid.

Eesti kohtupraktikast kasutatakse lisaks teiste EL liikmesriikidega sõlmitud õigusabilepingute kohta käivat praktikat. Seda põhjusel, et nende õigusabilepingute tekstid on väga sarnased kolmandate riikidega sõlmitud õigusabilepingute tekstidele. Doktoritöös ei kasutata kolmandate riikidega sõlmitud õigusabilepingute lepinguosaliste riikide (st Ukraina ja Vene) kohtupraktikat, kuivõrd nende riikide kohtud ei ole kohustatud EL rahvusvahelise eraõiguse määruseid kohaldama. Seega ei ole nende riikide kohtupraktika eelduslikult abiks tegemaks kindlaks, kas kolmandate riikidega sõlmitud õigusabilepingute ja EL määruste vahel esineb ELTL artikli 351 tähenduses vastuolusid.

Doktoritöö allikaks olev kohtupraktika on kogutud ajavahemiku 01.05.2004–01.08.2019.a. kohta. Neist esimene kuupäev on Eesti liitumine Euroopa Liiduga ning teine doktoritöö kirjutamise lõpetamise kuupäev. Illustreerimaks kolmandate riikidega sõlmitud õigusabilepingute tähtsust praktikas, on doktoritööle lisatud loetelu nende õigusabilepingute kohta tehtud Eesti kohtupraktikast.

Doktoritöö kirjutamisel on mõistagi arvestatud ka õiguskirjanduses toodud seisukohtadega, kuid doktoritöö autorile teadaolevalt ei ole ei Eesti ega välisriikide õiguskirjanduses siiani teiste autorite poolt analüüsitud, milline peaks olema Eesti poolt kolmandate riikidega sõlmitud õigusabilepingute ning EL rahvusvahelise eraõiguse määruste omavaheline vahekord. Kuigi Eesti õigusabilepingutele sarnaseid lepinguid on sõlminud ka teised EL liikmesriigid, ei ole

[422] Eesti Vabariigi ja Vene Föderatsiooni leping õigusabi ja õigussuhete kohta tsiviil-, perekonna- ja kriminaalasjades. – RT II 1993, 16, 27. Lepingut on hiljem parandatud selle lisaprotokolliga: Eesti Vabariigi ja Vene Föderatsiooni vahel 1993. aasta 26. jaanuaril sõlmitud lepingu "Õigusabi ja õigussuhete kohta tsiviil-, perekonna- ja kriminaalasjades" juurde kuuluv protokoll. – RT II 2002, 14, 58. Lepingu inglise keelne tõlge on lisatud doktoritööle (Lisa I).

[423] Eesti Vabariigi ja Ukraina leping õigusabi ja õigussuhete kohta tsiviil- ning kriminaalasjades. – RT II 1995, 13/14, 63. Lepingu inglise keelne tõlge on lisatud doktoritööle (Lisa II).

[424] Eesti Vabariigi ja Poola Vabariigi vaheline leping õigusabi osutamise ja õigussuhete kohta tsiviil-, töö- ning kriminaalasjades. – RT II 1999, 4, 22.

[425] Eesti Vabariigi, Leedu Vabariigi ja Läti Vabariigi õigusabi ja õigussuhete leping. – RT II 1993, 6, 5.

doktoritöö autorile teadaolevalt sarnast probleemi ka teiste riikide rahvusvahelise eraõiguse alases kirjanduses siiani põhjalikult analüüsitud.

1. Õigusabilepingute ja EL määruste kattuv kohaldamisala

1.1. Kriteeriumid hindamaks rahvusvahelise eraõiguse instrumentide kohaldamisala kattumist

Selleks, et kindlaks teha, millised on EL rahvusvahelise eraõiguse määruste ja kolmandate riikidega sõlmitud õigusabilepingute omavahelised vastuolud, tuleb kõigepealt kindlaks teha, millises osas kaht tüüpi instrumentide kohaldamisala kattub. Seejuures saab eristada nelja kriteeriumi, mille alusel instrumentide kohaldamisala ulatust hinnata: ajaline, sisuline, isikuline ja territoriaalne. Üksnes juhul, kui kaht tüüpi instrumentidel on kattuv ajaline, sisuline, isikuline ja territoriaalne kohaldamisala, võib kahe instrumendi vahel tekkida vastuolu ELTL artikli 351 tähenduses. Sellele eeldusele tuginedes kaardistatakse järgmises kahes alapeatükis EL määruste ning õigusabilepingute kohaldamisala. Seejuures tehakse kõigepealt kindlaks kaht tüüpi instrumentide kohaldamisala määramise üldreeglid ning seejärel määratakse kindlaks, kas instrumentidel võib olla kattuv kohaldamisala.

1.2. EL rahvusvahelise eraõiguse määruste kohaldamisala

1.2.1. Ajaline kohaldamisala

Eesti kohtud hakkasid EL määruseid kohaldama 1. mail 2004, kui Eesti Vabariik liitus Euroopa Liiduga. Käesoleva väitekirja kirjutamise lõpetamise ajaks (01.09.2018) olid kõik sissejuhatuse punktis E viidatud määrustest Eesti Vabariigi suhtes jõustunud kahe erandiga (abieluvaramäärus ning registreeritud partnerite varasuhete määrus).

Vaatamata sellele, et konkreetse EL määruse jõustumise kuupäev määrab kindlaks, millise hetke seisuga peavad Eesti kohtud sellise määruse sätetest lähtuma hakkama, on see kuupäev üksnes alguspunktiks määramaks kindlaks konkreetse määruse ajalist kohaldamisala. Seda põhjusel, et EL määrused sisaldavad erinevaid nn üleminekusätteid sõltuvalt küsimustest, mida nad reguleerivad. Taolised üleminekusätted võivad esiteks ette näha nö *vacatio legis* perioodi määruse jõustumis- ja rakendamiskuupäeva vahel ning teiseks piirata määruse sätete kohaldamisala teatud ajaliselt määratavate ühendavate seostega. Näiteks võivad määrused ette näha, millal mingi ühendav seos peab olema aset leidnud, et määruse konkreetsed sätted kohalduks. Siinjuures on mõistlik eristada nelja liiki sätteid: a) sätted kohtualluvuse kontrollimise, b) kohalduva õiguse määramise, c) täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise ning d) rahvusvahelise koostöö kohta tsiviilasjade lahendamisel.

a) Kohtualluvuse kontrollimise sätted

Eesti kohtute jaoks siduvad määrused, milles sisaldusid sätted kohtualluvuse kontrollimise kohta, olid käesoleva väitekirja kirjutamise lõpetamise seisuga (01.09.2018) järgmised: Brüsseli I (uuesti sõnastatud) määrus, Brüsseli II *bis* määrus, ülalpidamiskohustuste määrus, Euroopa pärimismäärus, maksejõuetusmenetluse (uuesti sõnastatud) määrus, Euroopa pangakontode arestimise määrus ja tinglikult ka väiksemate kohtuvaidluste menetluse määrus, Euroopa maksekäsumenetluse määrus ning Euroopa täitekorralduse määrus.

EL määrustes sisalduvaid kohtualluvuse kontrollimise sätteid kohaldatakse reeglina üksnes kohtumenetlustes, mis on alanud pärast määruste kohaldamiskuupäeva. Lisaks sellele võib määrustes sisalduvate kohtualluvuse kontrollimise sätete ajaline kohaldamisala olla piiratud täiendavate kriteeriumitega, mis seonduvad menetlusosaliste tegudega või muude sündmustega, nt küsimustega, millal (pärimisasjas) pärija suri või millal oli isikul alaline elukoht mõnes liikmesriigis.

Juhul, kui EL määrustes sisalduvaid kohtualluvuse kontrollimise reegleid ei saa kohaldada põhjusel, et mingi vaidlus langeb konkreetse määruse ajalisest kohaldamisalast välja, ei saa tekkida ka vastuolu ELTL artikli 351 tähenduses EL määruse ja kolmandate riikidega sõlmitud õigusabilepingu vahel.

b) Kohalduva õiguse määramise sätted

Kohalduva õiguse määramise sätted sisaldusid väitekirja kirjutamise lõpetamise aja seisuga (01.09.2018) järgmistes EL määrustes: Rooma I, II ja III määrused, ülalpidamiskohustuste määrus, Euroopa pärimismäärus ja maksejõuetusmenetluse (uuesti sõnastatud) määrus.

Üldreeglina kohaldatakse EL määrustes sisalduvaid kohalduva õiguse määramise sätteid üksnes kohtumenetlustes, mis algatatakse ning asjaolude suhtes, mis leiavad aset pärast konkreetse määruse kohaldamiskuupäeva. Kui Eesti kohtud kohaldavad kohalduva õiguse määramisel õigusabilepingute sätteid kaasustes, mis jõuavad kohtutesse enne konkreetse määruse kohaldamiskuupäeva või asjaolude suhtes, mis toimusid enne kuupäeva, millele määruses viidatakse, ei teki sellise kohaldamise tulemusel vastuolu EL määruste ja kolmandate riikide vahel sõlmitud õigusabilepingute vahel ELTL artikli 351 tähenduses. Seda aga siiski ühe erandiga. Nimelt võib EL määruste kohalduva õiguse sätetel teatud juhtudel olla tagasiulatuv mõju. Sellise mõjuga on osad Euroopa pärimismääruse ning ülalpidamiskohustuste määruse sätetest. Pelgalt asjaolu, et nendes määrustes sisalduvatel kohalduva õiguse määramise sätetel on tagasiulatuv mõju, ei tähenda aga ilmtingimata, et määruse asemel õigusabilepingu sätete kohaldamine toob ilmtingimata kaasa vastuolu ELTL artikli 351 tähenduses.

c) Kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätted

EL määrused, mis sisaldasid väitekirja kirjutamise lõpetamise seisuga (01.09.2018) täitedokumentide tunnustamise, täidetavaks tunnistamise või täitmise sätteid, olid järgmised: Brüsseli I (uuesti sõnastatud) määrus, Brüsseli I määrus,[426] Brüsseli II *bis* määrus, ülalpidamiskohustuste määrus, Euroopa pärimismäärus, Euroopa täitekorralduse määrus, Euroopa maksekäsumenetluse määrus, Euroopa väiksemate kohtuvaidluste menetluse määrus, kaitsemeetmete määrus, Euroopa pangakontode arestimise määrus, maksejõuetusmenetluse (uuesti sõnastatud) määrus ja maksejõuetusmenetluse määrus[427].

EL määrustes sisalduvate tunnustamise, täidetavaks tunnistamise ja täitmise sätete ajaline kohaldamisala katab reeglina vaid täitedokumente, mis koostatakse pärast konkreetse määruse kohaldamiskuupäeva. Sellest põhimõttest on aga kaks erandit: mõnikord võib sellistel sätetel olla tagasiulatuv mõju varem koostatud täitedokumentide suhtes, mõnikord võib olla lubatud, et ka kohtulahendi tunnustamist, täidetavaks tunnistamist või täitmist oleks taotletud enne määruse kohaldamiskuupäeva, et määrus sellise täitedokumendi suhtes kohalduks.

Kuigi EL määrused ja õigusabilepingud reguleerivad erinevatest riikidest pärit täitedokumentide tunnustamist, täidetavaks tunnistamist ja täitmist, võib kaht tüüpi instrumentide sätete vahel siiski tekkida vastuolu ELTL artikli 351 tähenduses, kui neid sätteid kohaldatakse koostoimes teiste (nt *lis pendens*) sätetega, mistõttu on oluline kaht tüüpi instrumentide vaheliste vastuolude hindamisel arvestada EL määruste tunnustamise, täidetavaks tunnistamise ja täitmise sätete ajalise kohaldamisaga.

d) Rahvusvahelise koostöö sätted

EL määrused, mis sisaldasid väitekirja kirjutamise lõpetamise seisuga (01.09.2018) sätteid rahvusvahelise koostöö kohta tsiviilasjade lahendamisel, olid järgmised: dokumentide kättetoimetamise määrus II, tõendite kogumise määrus, Brüsseli I (uuesti sõnastatud) määrus, Brüsseli II *bis* määrus, ülalpidamiskohustuste määrus, maksejõuetusmenetluse (uuesti sõnastatud) määrus ja Euroopa pangakontode arestimise määrus.

Üldreeglina kohaldatakse EL määrustes sisalduvaid koostöö sätteid üksnes pärast konkreetse määruse kohaldamiskuupäeva, olenemata sellest, millal konkreetne kohtuasi, mille raames koostööd tehakse, algas. EL määrustes sisalduvad koostöö sätted tegelevad vaid teiste EL liikmesriikidega tehtava koostööga.

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[426] Brüsseli I määrus oli väitekirja kirjutamise lõpetamise seisuga asendatud Brüsseli I (uuesti sõnastatud) määrusega. Viimase art-st 66(2) tulenevalt kohaldati aga vana määruse sätteid jätkuvalt teatud täitedokumentide tunnustamisel ja täidetavaks tunnistamisel.

[427] Sarnaselt Brüsseli I määrusele oli maksejõuetusmenetluse määrus käesoleva väitekirja kirjutamise lõpetamise seisuga asendatud määruse uusversiooniga (maksejõuetusmenetluse (uuesti sõnastatud) määrus), kuid seda tuli maksejõuetusmenetluse (uuesti sõnastatud) määruse art 84(2) kohaselt jätkuvalt kohaldada teatud täitedokumentide suhtes.

Kontrastina tegelevad õigusabilepingute analoogsed sätted koostööga õigusabilepingute partnerriikide ametiasutustega. Eelnevaga tuleb arvestada, hindamaks võimalikke vastuolusid kaht tüüpi instrumentide vahel ELTL artikli 351 tähenduses.

1.2.2. Sisuline kohaldamisala

Vastuolud kaht tüüpi instrumentide vahel ELTL artikli 351 tähenduses saavad tekkida vaid siis, kui nende instrumentide sisuline kohaldamisala kattub. EL määrused kohalduvad üksnes tsiviil- ja kaubandusasjades.

Tsiviil- ja kaubandusasjade mõiste on autonoomne termin, mida sisustab esmajoones Euroopa Kohus. Üldistatult ei hõlma tsiviil- ja kaubandusasjad halduse-, maksu- ega tolliasju.

Kuigi EL määrused kohalduvad tsiviil- ja kaubandusasjades, ei pruugi määrused kohalduda kõikides tsiviil- ja kaubandusasjades. Siinjuures on mõistlik eristada kaht tüüpi tsiviil- ja kaubandusasju, mis võivad olla konkreetse määruse kohaldamisalast välistatud: need, millega tegeleb mõni teine EL määrus ning need, mis on välja jäetud kõikide määruste kohaldamisalast. Teist tüüpi tsiviilasjad on väitekirja eesmärki silmas pidades olulisemad, kuna juhul, kui mingi vaidlus ei lange oma sisu poolest EL määruste kohaldamisalasse, ei saa tekkida ka vastuolu kahe instrumendi vahel ELTL artikli 351 tähenduses, kui õigusabilepinguid kohaldatakse sellistes asjades määruste asemel.

1.2.3. Isikuline kohaldamisala

EL määrustes ei sisaldu sätteid määruste isikulise kohaldamisala kohta. See tähendab, et määruste isikuline kohaldamisala on universaalne – neid kohaldatakse reeglina,[428] sõltumata menetlusosaliste kodakondsusest, elukohast vms. Vaatamata sellele, et konkreetse määruse kui terviku isikuline kohaldamisala ei ole piiratud, võib üksikutel sätetel, mis sellises määruses sisalduvad, olla piiratud isikuline kohaldamisala. Siinjuures on jällegi mõistlik eristada nelja liiki sätteid: a) sätted kohtualluvuse kontrollimise, b) kohalduva õiguse määramise, c) täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise ning d) rahvusvahelise koostöö kohta tsiviilasjade lahendamisel.

a) Kohtualluvuse kontrollimise sätted

Isikuline kriteerium, mis võib tingida EL määruses sisalduva konkreetse kohtualluvuse kontrollimise sätte kohaldamisala, võib seonduda isiku kodakondsuse, hariliku viibimiskoha, alalise elukoha või isegi pelga viibimiskohaga.

[428] Sellest reeglist teevad erandi Euroopa väiksemate kohtuvaidluste menetluse määrus ja Euroopa maksekäsumenetluse määrus, mis tulevad mõlema määruse art 3 kohaselt kohaldamisele vaid juhul, kui vähemalt ühe menetlusosalise alaline elukoht on Euroopa Liidus.

Õigusabilepingute kohtualluvuse sätete kohaldamine määruse analoogsete sätete asemel võib kaasa tuua ELTL artikli 351 kohase vastuolu ning seda isegi juhul, kui kohus jätaks samas kaasuses EL määrust kohaldades määruse kohtualluvuse sätted kohaldamata põhjusel, et sättes sisalduv isikuline kriteerium ei ole konkreetses kaasuses täidetud. Seda põhjusel, et EL määruse kui terviku eesmärgiks sellises kaasuses oleks vältida võimalust, et vaidlus jõuaks Eesti kohtusse. Kui õigusabileping võimaldab Eesti kohtul samas kaasuses asja lahendada, tekib kaht tüüpi instrumentide vahel vastuolu ELTL artikli 351 tähenduses.

b) Kohalduva õiguse määramise sätted

Kohalduva õiguse määramise sätetel, mis EL määrustes sisalduvad, ei ole piiratud isikulist kohaldamisala. Vaatamata sellele, et määrustes sisalduvate kohalduva õiguse sätete isikuline kohaldamisala on universaalne, võivad sellised sätted sisaldada isikulisi ühendavaid seoseid.

Kuna EL määrustes sisalduvate sätete kohaldamisala on universaalne, on tõenäoline, et määruse sätete ning õigusabilepingute vastavate sätete vahel võib tekkida vastuolu ELTL artikli 351 tähenduses, kui õigusabilepinguid kohaldatakse määruste asemel tsiviilasjade lahendamisel. Sellised konfliktid leiavad aset siis, kui kaht tüüpi instrumendid kasutavad erinevaid ühendavaid seoseid, mis viivad eri riikide õiguse kohaldamisele. Näiteks võivad kaht tüüpi instrumendid kasutada erinevaid isikulisi ühendavaid seoseid.

c) Kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätted

Sarnaselt kohalduva õiguse määramise sätetele ei ole EL määrustes sisalduvate kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätete isikuline kohaldamisala piiratud. Kas see suurendab võimalust, et õigusabilepingute sätete kohaldamisel EL määruste sätete asemel tekib vastuolu ELTL artikli 351 tähenduses, sõltub sellest, kas teised kriteeriumid, mille alusel kaht tüüpi instrumentide kohaldamisala konflikti hinnata, omavahel kattuvad.

d) Rahvusvahelise koostöö sätted

Sarnaselt kohalduva õiguse määramise sätetele ja kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätetele on ka EL määrustes sisalduvate koostöö sätete isikuline kohaldamisala reeglina universaalne, kuid konkreetete sätete kohaldamine mingis kaasuses võib sõltuda teatud isikulistest ühendavatest seosest.

1.2.4. Territoriaalne kohaldamisala

Kuna üksnes EL kohtud kohaldavad EL määruseid, on määruste territoriaalne kohaldamisala piiratud liikmesriikidega, täpsemini liikmesriikidega, mis on konkreetse määrusega seotud. Erandjuhtudel saab osadel EL määrustel olla ka EL väline ulatus, seda eelkõige juhtudel, kui EL määrusega ette nähtud reegleid kohaldab välisriigi kohus tänu välisriigi *renvoi* doktriinile.

Vaatamata asjaolule, et konkreetse määruse kui terviku territoriaalne kohaldamisala on piiratud EL riikidega, kus seda rakendatakse, võib määruses sisalduva üksiksätte kohaldamine sõltuda täiendavatest ühendavatest seostest, millel on territoriaalne iseloom. Näiteks kohaldatakse EL määrustes sisalduvaid koostöö sätteid vaid juhul, kui ametiasutus, kellega koostööd tehakse, asub mõnes teises määrusega seotud liikmesriigis.

Üldreeglina ei teki kaht tüüpi instrumentide territoriaalse kohaldamisala vahel vastuolu, kuna instrumentides sisalduvate sätete territoriaalne ulatus on erinev. Siiski on võimalik, et kaht tüüpi instrumentide sätete territoriaalsete kohaldamisalade vahel on nö peidetud konfliktid. Selliste konfliktide kindlakstegemiseks on jällegi mõttekas eristada nelja sorti sätteid: a) sätted kohtualluvuse kontrollimise, b) kohalduva õiguse määramise, c) täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise ning d) rahvusvahelise koostöö kohta tsiviilasjade lahendamisel.

a) Kohtualluvuse kontrollimise sätted

EL määrustes sisalduvate kohtualluvuse kontrollimise sätete territoriaalne kohaldamisala on piiratud EL liikmesriikidega, kus selliseid sätteid kohaldatakse. Teatud juhtudel võib selliste sätete kohaldamine sõltuda täiendavatest territoriaalse iseloomuga ühendavatest seostest, mida konkreetsed sätted sisaldavad. Kaasustes, kus kohaldatav õigusabileping annab Eesti kohtule õiguse asja lahendada, kuid kus (õigusabilepingu puudumisel) kohaldatav EL määrus Eesti kohtule kohtualluvust tänu mingi asjaolu asumisele või toimumisele väljaspool Eestit ei annaks, tooks õigusabilepingu kohaldamine kaasa vastuolu kahe instrumendi vahel ELTL artikli 351 tähenduses.

b) Kohalduva õiguse määramise sätted

Sarnaselt kohtualluvuse kontrollimise sätetele kohalduvad EL määrustes sisalduvad kohalduva õiguse määramise sätted üldreeglina vaid EL kohtutes. Kui selliste sätete territoriaalne ulatus kattub õigusabilepingute vastavate sätete territoriaalse ulatusega, võib tekkida vastuolu ELTL artikli 351 tähenduses.

c) Kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätted

EL määrustes sisalduvaid kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätteid saab kohaldada vaid EL kohtutes, kuigi ka muute riikide kohtutel võib olla kohustus nendega vaidluste lahendamisel arvestada.

Kohtulahendite tunnustamise, täidetavaks tunnistamise ja täitmise sätted, mis EL määrustes sisaldavad, võivad kasutada territoriaalseid ühendavaid seoseid, kuid sellised ühendavad seosed on piiratud EL liikmesriikidega. Seega ei saa nende sätete ja neile vastavate õigusabilepingute sätete vahel tekkida ilmseid konflikte.

d) Rahvusvahelise koostöö sätted

EL määrustes sisalduvad rahvusvaheise koostöö sätted tulevad sarnaselt eelnevalt käsitletud sätetele kohaldamisele vaid EL kohtutes ning neil on territoriaalne ulatus, mis hõlmab vaid liikmesriike. Seega ei saa nende sätete ja neile vastavate õigusabilepingute sätete vahel tekkida ilmseid konflikte.

1.3. Kolmandate riikidega sõlmitud õigusabilepingute kohaldamisala

1.3.1. Ajaline kohaldamisala

Vastuolud kaht tüüpi instrumentide vahel ELTL artikli 351 tähenduses saavad tekkida vaid juhul, kui nende kohaldamisalad kattuvad. Seega tuleb selliste vastuolude kindlakstegemiseks määrata ka kolmandate riikidega sõlmitud õigusabilepingute kohaldamisala. Sarnaselt EL määruste kohaldamisala analüüsiga alustatakse ka õigusabilepingute kohaldamisala analüüsi lepingute ajalise kohaldamisala kindlaksmääramisega.

Õigusabilepingutes sisalduvad küll sätted nende jõustumiskuupäeva kohta,[429] kuid õigusabilepingud ei selgita, millisest hetkest alates neid kohaldatakse. Eesti-Vene õigusabileping jõustus 19.03.1995, Eesti-Ukraina õigusabileping 17.05.1996. Võib eeldada, et õigusabilepingute kui terviku kohaldamiskuupäev algab viidud kuupäevadest. Osadel õigusabilepingutes sisalduvatel sätetel võib aga olla nende kuupäevadega võrreldes tagasiulatuv jõud. Siinjuures on jällegi mõttekas eristada nelja sorti sätteid: a) sätted kohtualluvuse kontrollimise, b) kohalduva õiguse määramise, c) täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise ning d) rahvusvahelise koostöö kohta tsiviilasjade lahendamisel.

[429] Eesti-Vene õigusabilepingu art 79, Eesti-Ukraina õigusabilepingu art 65.

a) Kohtualluvuse kontrollimise sätted

Õigusabilepingud ei selgita, milline on neis sisalduvate kohtualluvuse kontrollimise sätete ajaline kohaldamisala. Teisalt ei ole õigusabilepingutes ka midagi sellist, millest saaks järeldada, et sellistel sätetel on tagasiulatuv mõju. Seega kohaldatakse õigusabilepingute kohtualluvuse sätteid alates lepingute jõustumiskuupäevadest algatatud menetlustes. Eelnevast tulenevalt on EL määrustes ja õigusabilepingutes sisalduvatel kohtualluvuse kontrollimise sätetel suures osas kattuv ajaline kohaldamisala.

b) Kohalduva õiguse määramise sätted

Kohalduva õiguse määramise sätteid, mis õigusabilepingutes sisalduvad, määravad kindlaks kohalduva õiguse isikutele, perekonnaasjadele, pärimisele, lepinguvälistele kohustustele, lepingutele ja asjaõigustele. Need sätted ei täpsusta, milline on nende ajaline kohaldamisala. Võib siiski eeldada, et selliseid sätteid saab kohaldada üksnes alates lepingute jõustumisest ning üldreeglina vaid sündmuste suhtes, mis on aset leidnud ning õigussuhete suhtes, mis tekivad pärast konkreetse lepingu jõustumiskuupäeva. Seda aga ühe erandiga. Nimelt saab eristada kaht liiki kohalduva õiguse määramise sätteid, mis õigusabilepingutes sisalduvad: need, mis tegelevad õigussuhetega, millesse isikud on teadlikult astunud, ning need, mis viitavad ühendavate seostena asjaoludele, mis ei sõltu menetlusosalistest. Lähtudes kohalduva õiguse määramise normide üldisest eesmärgist, ei ole viimaste puhul põhjust, miks neil ei saaks olla tagasiulatuvat mõju. Näiteks Eesti-Vene õigusabilepingu artikli 22(1) kohaselt võiks isiku teovõimele kohalduva õiguse määrata ka juhul, kui küsimuse all on isiku teovõime enne Eesti-Vene lepingu jõustumist Eesti Vabariigi suhtes. Eelnevast tulenevalt on EL määrustes ja õigusabilepingutes sisalduvatel kohalduva õiguse määramise sätetel suures osas kattuv ajaline kohaldamisala.

c) Kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätted

Sarnaselt eelnevalt käsitletud sätetele hakkasid Eesti kohtud ka õigusabilepingutes sisalduvaid kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätteid kohaldama alates õigusabilepingute Eesti suhtes jõustumisest, kusjuures Eesti kohtupraktika[430] näib toetavat arusaama, et sellistel sätetel on tagasiulatuv mõju st et neid sätteid saab kohaldada ka enne õigusabilepingute jõustumist tehtud täitedokumentide suhtes. Sellist praktikat saab siiski kritiseerida lähtudes isikute ettenähtavate ootuste kaitse põhimõttest. Eelnevast tulenevalt on EL määrustes ja õigusabilepingutes sisalduvatel

[430] *Turtšin.* Order of the Supreme Court of the Republic of Estonia No 3-2-1-125-00 of 10 November 2000.

kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätetel suures osas kattuv ajaline kohaldamisala.

d) Rahvusvahelise koostöö sätted

Sarnaselt eelnevalt käsitletud sätetele hakkasid Eesti kohtud ka õigusabilepingutes sisalduvaid rahvusvahelise koostöö sätteid kohaldama alates õigusabilepingute Eesti suhtes jõustumisest, kusjuures lepingutes ei ole midagi sellist, mis annaks alust arvata, et sellistel sätetel on tagasiulatuv mõju. Eelnevast tulenevalt on EL määrustes ja õigusabilepingutes sisalduvatel rahvusvahelise koostöö sätetel suures osas kattuv ajaline kohaldamisala.

1.3.2. Sisuline kohaldamisala

Vastuolud EL määruste ja õigusabilepingute vahel ELTL artikli 351 tähenduses saavad tekkida vaid juhul, kui kaht tüüpi instrumentidel on kattuv sisuline kohaldamisala. Seega on selliste vastuolude hindamiseks vaja kindlaks määrata ka õigusabilepingute sisuline kohaldamisala.

Õigusabilepingutes puuduvad selged erireeglid selle kohta, millistes vaidlustes neid kohaldatakse. Õigusabilepingute pealkirjadest tuleneb, et lepinguid kohaldatakse tsiviil- perekonna ja kriminaalasjades (Eesti-Vene õigusabileping) või lihtsalt tsiviil- ja kriminaalasjades (Eesti-Ukraina õigusabileping). Eelnevast tulenevalt on EL määruste ja õigusabilepingute sisuline kohaldamisala suuresti kattuv.

1.3.3. Isikuline kohaldamisala

Õigusabilepingutes puuduvad selged reeglid selliste lepingute isikulise kohaldamisala kohta. Küll aga sisaldub mõlemas õigusabilepingus artikkel 1, mis näib piiravat osade õigusabilepingute sätete isikulist kohaldamisala. Siinjuures on jällegi mõttekas eristada nelja liiki sätteid: a) sätted kohtualluvuse kontrollimise, b) kohalduva õiguse määramise, c) täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise ning d) rahvusvahelise koostöö kohta tsiviilasjade lahendamisel.

a) Kohtualluvuse kontrollimise sätted

Esmapilgul näib, et õigusabilepingute kohtualluvuse kontrollimise sätetel on universaalne isikuline kohaldamisala st et need sätted kohalduvad, sõltumata sellest, milline on poolte kodakondsus, kus nad elavad või harilikku viibimiskohta omavad. Selline lahendus ei saa ilmselt olla õigusabilepingute eesmärgiks – ilmselt ei ole õigusabilepingute eesmärgiks reguleerida kaasuseid, millel õigusabilepingute partnerriikidega kokkupuudet ei ole.

Ilmselt saab õigusabilepingute kohtualluvuse kontrollimise sätete isikulist kohaldamisala piirata õigusabilepingute esimeste deklaratiivsete sätetega. Neist sätetest tulenevalt peaks Eesti kohus õigusabilepingutes sisalduvaid kohtualluvuse kontrollimise sätteid kohaldama kaasustes, milles on menetlusosalisteks õigusabilepingute partnerriikide kodanikud või äriühingud. Õigusabilepingutes sisalduvate kohtualluvuse kontrollimise sätete kohaldamiseks ei ole aga vajalik nt see, et ühel menetlusosalisel oleks õigusabilepingu partnerriigis elukoht või asukoht.

Kuna EL määrustes sisalduvatel kohtualluvuse kontrollimise sätetel on universaalne isikuline kohaldamisala, on õigusabilepingute ning EL määruste kohtualluvuse kontrollimise sätetel vähemalt osaliselt kattuv isikuline kohaldamisala.

b) Kohalduva õiguse määramise sätted

Sarnaselt kohtualluvuse kontrollimise sätetele ei näe ka õigusabilepingutes sisalduvad kohalduva õiguse määramise sätted ette piiranguid selles osas, milliste isikute suhtes neid kohaldatakse. Ilmselt kohalduvad need sätted siiski üksnes kaasustes, kus asjaosalisteks on õigusabilepingute partnerriikide kodanikuid või äriühingud.

Kuigi kohalduva õiguse määramise sätetel, mis õigusabilepingutes sisalduvad, on piiratud isikuline kohaldamisala, võivad sellised sätted vastuollu minna EL määrustes sisalduvate kohalduva õiguse määramise sätetega, kuna viimaste isikuline kohaldamisala on universaalne.

c) Kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätted

Vastupidiselt kohtualluvuse kontrollimise ja kohalduva õiguse määramise sätetele ei kohaldata õigusabilepingutes sisalduvaid kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätteid üksnes vaidlustes, mille osapoolteks on õigusabilepingute partnerriikide kodanikud või äriühingud. Seda põhjusel, et õigusabilepingute eesmärgiks on nende artiklitest 3 tulenevalt õigusabi osutamine partnerriikide ametiasutustele, osa sellisest õigusabist on aga partnerriigi täitedokumentide tunnustamine, täidetavaks tunnistamine ja täitmine. Menetlusosaliste kodakondsus sellise õigusabi osutamisel õigusabilepingute artiklite 3 kohaselt rolli ei mängi. Õigusabilepingutes sisalduvatel tunnustamise, täidetavaks tunnistamise ja täitmise sätetel on seega universaalne isikuline kohaldamisala, mis suurendab tõenäosust, et sellised sätted lähevad vastuollu EL määrustes sisalduvate sarnaste sätetega.

d) Rahvusvahelise koostöö sätted

Sarnaselt täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätetele on õigusabilepingutes sisalduvatel koostöö sätetel universaalne isikuline kohaldamisala. See on jällegi tuletatav õigusabilepingute artiklist 3. Eelnev

suurendab tõenäosust, et õigusabilepingutes sisalduvad koostöö sätted lähevad vastuollu EL määrustes sisalduvate sarnaste sätetega.

1.3.4. Territoriaalne kohaldamisala

Reeglina kohaldavad vaid õigusabilepingute partnerriikide kohtud õigusabilepingute sätteid. Seega on selliste sätete territoriaalne kohaldamisala piiratud õigusabilepingute liikmeteks olevate riikide territooriumiga. Konkreetsetel sätetel, mis õigusabilepingutes sisalduvad, võib aga olla piiratud kohaldamisala sõltuvalt teatud territoriaalsetest kriteeriumitest. Siinkohal on jällegi mõttekas eristada nelja liiki sätteid: a) sätted kohtualluvuse kontrollimise, b) kohalduva õiguse määramise, c) täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise ning d) rahvusvahelise koostöö kohta tsiviilasjade lahendamisel.

a) Kohtualluvuse kontrollimise sätted

Õigusabilepingutes sisalduvad kohtualluvuse kontrollimise sätted kohalduvad vaid õigusabilepinguriikide kohtus. Kuna ka EL määrustes sisalduvad kohtualluvuse kontrollimise sätted kohalduvad Eesti kui EL liikmesriigi kohtutes, konkureerivad kohtualluvuse kontrollimise sätted, mis kaht tüüpi instrumentides sisalduvad, omavahel. Eelnev ei tähenda aga, et nende sätete eesmärgiks oleks sarnastel juhtudel kohalduda. Seda põhjusel, et konkreetsete sätete kohaldamiseks võib vajalik olla teatud territoriaalsete ühendavate seoste esinemine.

Õigusabilepingutes kasutatavad territoriaalsed ühendavad seosed viitavad vaid lepinguriikide territooriumile. Kui samaaegselt kohalduda sooviv EL määruse kohtualluvuse säte kasutab teistsugust territoriaalset ühendavat seost, mis viitab nt mõne teise EL riigi territooriumile, ei pruugi kahe instrumendi vahel tekkida vastuolu ELTL artikli 351 tähenduses.

b) Kohalduva õiguse määramise sätted

Sarnaselt kohtualluvuse kontrollimise sätetele kohaldatakse õigusabilepingutes sisalduvaid kohalduva õiguse määramise sätteid vaid õigusabilepingu liikmesriikide kohtutes. Seega on selliste sätete territoriaalne kohaldamisala piiratud õigusabilepingute liikmesriikidega. Õigusabilepingutes sisalduvate konkreetsete kohalduva õiguse määramise sätete territoriaalne ulatus võib aga sõltuda teatud territoriaalsetest ühendavatest seostest, mida sellised sätted sisaldavad. Kui sellised ühendavad seosed erinevad EL määruste kohalduva õiguse määramise sätetes kasutatavatest ühendavatest seostest, võib kaht sorti sätete vahel tekkida vastuolu ELTL artikli 351 tähenduses.

c) Kohtulahendite ja muude täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätted

Sarnaselt muudele õigusabilepingutes sisalduvatele sätetele kohaldavad ka neis lepingutes sisalduvaid tunnustamise, täidetavaks tunnistamise ja täitmise sätteid vaid õigusabilepingute liikmesriikide kohtud. Lisaks tegelevad sellised sätted vaid õigusabilepingute partnerriikide täitedokumentide tunnustamise, täidetavaks tunnistamise või täitmisega. Seega on selliste sätete territoriaalne kohaldamisala piiratud õigusabilepingute liikmesriikidega.

d) Rahvusvahelise koostöö sätted

Sarnaselt õigusabilepingutes sisalduvatele tunnustamise, täidetavaks tunnistamise ja täitmise sätetele, on õigusabilepingutes sisalduvate rahvusvahelise koostöö sätete territoriaalne kohaldamisala piiratud õigusabilepingute liikmesriikidega. Reguleerivad need sätted ju üksnes õigusabilepingute liikmesriikide vahelist koostööd, lisaks tulevad nad kohaldamisele vaid õigusabilepingute liikmesriikide kohtutes.

2. Õigusabilepingutes ja EL määrustes sisalduvate rahvusvahelise eraõiguse sätete konfliktid

2.1. Võimalike konfliktide liigid

2.1.1. Ilmsed ja peidetud konfliktid

Võimalik on eristada mitmeid erinevaid konflikte, mis õigusabilepingute ja EL määruste vahel võivad tekkida ning mis võivad endast kujutada vastuolu ELTL artikli 351 tähenduses. Ilmne konflikt kaht tüüpi instrumendi vahel ilmneb siis, kui kahe instrumendi sõnastus on selgelt erinev ning selline erinevus viib erineva lõpptulemuseni st kohalduva õiguse või kohtualluvuseni või erineva otsustuseni täitedokumendi tunnustamise või koostöö osutamise osas.

Isegi, kui esmapilgul näib, et kahe instrumendi sõnastus on mingi küsimuse osas samasugune ning, et kaks instrumenti kasutavad samasuguseid ühendavaid seoseid, võib kahe instrumendi vahel ikkagi esineda ELTL artikli 351 tähenduses vastuolu. Selliseid vastuolusid oleks ilmselt kõige parem nimetada peidetud konfliktideks ning sellised peidetud konfliktid on tuvastatavad, kui konkreetsetes sätetes sisalduvatele ühendavatele seostele antakse tähendus rahvusvahelise eraõiguse tõlgendamismeetodite kaudu.

2.1.2. Ehtsad ja ebaehtsad konfliktid

Isegi, kui kahe instrumendi sätete sõnastuse vahel on ilmselge erinevus, ei tähenda see ilmtingimata, et kahe instrumendi vahel esineb vastuolu ELTL artikli 351 tähenduses. Kui õigusabilepingute kohaldamine viib samasugusele

tulemusele EL määruste kohaldamisega, ei ole kaht tüüpi instrumendid omavahel vastuolus. Eelnevast tulenevalt võib mõningaid konflikte kaht tüüpi instrumendi vahel nimetada ebaehtsateks konfliktideks. Kui aga erinev sõnastus tingib erineva lõpptulemuse, on tegemist vastuoluga ELTL artikli 351 tähenduses ja sellistel juhtudel saab rääkida ehtsast konfliktist kahe instrumendi vahel.

2.1.3. Positiivsed ja negatiivsed konfliktid

Positiivne konflikt kaht tüüpi instrumendi vahel leiab aset juhul, kui kaht tüüpi instrumentidel on kattuv kohaldamisala. Kõik positiivsed konfliktid ei ole aga ehtsad konfliktid, kuna erinevates instrumentides sisalduvad sätted võivad kasutada samu ühendavaid seoseid.

Negatiivne konflikt kaht tüüpi instrumendi vahel leiab aset juhul, kui üks instrument näeb tahtlikult ette lünga, teist tüüpi instrument aga mitte. Sarnaselt positiivsetele konfliktidele ei ole kõik negatiivsed konfliktid ehtsad konfliktid – isegi, kui üht tüüpi instrumendis on lünk, ei tähenda see ilmtingimata, et sellist lünka ei saaks teist tüüpi instrumendiga täita.

2.2. Konfliktid kohtualluvuse kontrollimise sätete vahel

2.2.1. Üldise kohtualluvuse sätted

Õigusabilepingutes sisalduvad üldise kohtualluvuse sätted on oma olemuselt sarnased EL määrustes sisalduvatele üldise kohtualluvuse sätetele – mõlemad lähtuvad nn *actor sequitur forum rei*[431] põhimõttest. Kaht tüüpi instrumentides sisalduvad üldise kohtualluvuse sätted on aga oma sõnastuslikult mõneti erinevad, mis võib viia vastuoluni ELTL artikli 351 tähenduses. Siinjuures on mõttekas eristada füüsilistele isikutele ja juriidilistele isikutele kohalduvaid üldise kohtualluvuse sätteid.

a) Füüsilised isikud kostjatena

Mõlema õigusabilepingu artiklis 21(1) sisalduva üldreegli kohaselt saab füüsilisest isikust kostjat hageda tema elukohas. EL õiguses sisaldub analoogne üldreegel Brüsseli I (uuesti sõnastatud) määruse artiklis 4(1), mille kohaselt saab füüsilisest isikust kostjat hageda tema alalises elukohas. Esmapilgul näib, et need reeglid on omavahel kooskõlas. Tegelikult on need reeglid aga küllaltki erinevad. Seda põhjusel, et nad kasutavad erinevaid isikulisi ühendavaid

[431] *Actor sequitur foorum rei* põhimõtte kohaselt peab hageja minema kostjat hagema viimase kohtusse. Vt lähemalt selle põhimõtte kohta: A. T. von Mehren. Must Plaintiffs Seek out Defendants? The Contemporary Standing of Actor Sequitur Forum Rei. – King's College Law Journal 1998 No 8, pp 23–42.

seoseid. Isiku elukohta õigusabilepingute tähenduses ning isiku alalist elukohta Brüsseli I (uuesti sõnastatud) määruse tähenduses sisustatakse nimelt erinevalt.

Brüsseli I (uuesti sõnastatud) määruse tähenduses tuleks isiku alalist elukohta tulenevalt määruse artiklist 62(1) sisustada lähtudes selle riigi riigisisesest õigusest, kus isikul oletatavasti alaline elukoht on. Eesti puhul oleks selliseks riigisiseseks õiguseks tsiviilseadustiku üldosa seaduse (TsÜS)[432] artiklid 14–15, mille kohaselt on isiku elukoht seal, kus ta peamiselt viibib, alaealiste puhul aga seal, kus nende vanem või eestkostja elab. Õigusabilepingutes sisalduva elukoha mõiste sisustamiseks ei tohiks kohtud aga pöörduda üksnes Eesti riigisisese õiguse poole. Seda põhjusel, et õigusabilepinguid tuleks tõlgendada autonoomselt. Õigusabilepinguid autonoomselt tõlgendades tuleks aga alaealise elukohta sisustada teisiti, kui seda tehtaks TsÜS alusel. Ilmelt peaks alaealise elukohaks lugema tema enda faktilist elukohta, kui ühe õigusabilepingu lepinguriigi õiguses nii ette nähakse.

Kuna kaht tüüpi instrumentides sisalduvaid isikulisi ühendavaid seoseid (elukoht vs alaline elukoht) tuleks mõneti erinevalt sisustada, võib see kaasa tuua olukorra, kus ühe instrumendi alusel saab kostjat Eesti kohtus hageda, teise alusel aga mitte. Sellist konflikti saab kirjeldada kui ehtsat negatiivset konflikti, kuna ühe instrumendi eesmärgiks on vaidlus Eesti kohtule allutada, teise eesmärgiks aga mitte. Sellise konflikti näol on ühtlasi tegemist vastuoluga ELTL artikli 351 tähenduses.

(b) Juriidilised isikud kostjatena

Tulenevalt mõlema õigusabilepingu artiklis 21(1) sisalduvast üldreeglist saab kostjat, kes on juriidiline isik, hageda õigusabilepingu pooleks olevas riigis, kui esinevad viidatud sätetes sisalduvad ühendavad seosed. Täpsemini saab juriidilist isikut õigusabilepingu pooleks olevas riigis hageda, kui selle riigi territooriumil asub juriidilise isiku haldusorgan, esindus või filiaal. EL määrustes sisaldub vaste sellele regulatsioonile Brüsseli I (uuesti sõnastatud) määruse artiklis 4(1), mille järgi saab juriidilist isikut hageda tema alalises asukohas. Määruse artikli 63(1) kohaselt loetakse juriidilise isiku alaliseks asukohaks tema põhikirjajärgset asukohta, juhatuse asukohta ning peamist äritegevuse kohta.

Brüsseli I (uuesti sõnastatud) määruse regulatsioon erineb õigusabilepingute omast kolmel viisil. Esiteks saab määruse alusel juriidilist isikut Eestis hageda mh siis, kui Eestis on juriidilise isiku põhikirjajärgne asukoht. Sarnane võimalus õigusabilepingutes puudub. Teiseks saab määruse alusel juriidilist isikut Eestis hageda, kui Eestis on sellise isiku tegevuskoht, vastavat võimalust õigusabilepingud jällegi ette ei näe. Kolmandaks saab määruse artikli 7(5) kohaselt juriidilist isikut tänu tema filiaali Eestis asumisele hageda vaid sellise filiaali tegevusest tulenevates vaidlustes, õigusabilepingud sellist piirangut aga ette ei näe.

[432] General Part of the Civil Code Act (*Tsiviilseadustiku üldosa seadus*). – RT I 2002, 35, 216; RT I, 20.04.2017, 1.

Eelnevast tulenevalt on põhimõtteliselt võimalik, et Eesti kohtutel on üht tüüpi instrumendist tulenevalt võimalik lahendada vaidlust, kus kostjaks on juriidiline isik, teist tüüpi instrumendist tulenevalt aga mitte. Seega saab kaht tüüpi instrumendi vahel esineda ehtne negatiivne konflikt. Kuna kahe instrumendi kohaldamise tulemus erineks kardinaalselt, on sellise konflikti näol tegemist vastuoluga ELTL artikli 351 tähenduses.

2.2.2. Valikulise kohtualluvuse sätted

Kaht tüüpi instrumentides sisalduvad valikulise kohtualluvuse sätted annavad hagejale üldise kohtualluvuse sätete kõrval lisavõimaluse kostja hagemiseks. EL määrused on sellise lisavõimaluse andmise osas võrreldes õigusabilepingutega oluliselt heldemad. Õigusabilepingud näevad valikulise kohtualluvuse sätted ette vaid lepinguväliste võlasuhte vaidluste jaoks.

a) Lepinguväliste võlasuhete vaidluste valikulise kohtualluvuse sätted

Õigusabilepingud, täpsemini Eesti-Vene õigusabilepingu artikkel 40(3) ja Eesti-Ukraina õigusabilepingu artikkel 33(3), sisaldavad valikulise kohtualluvuse regulatsiooni vaid lepinguväliste kohustuste jaoks. Nende sätete kohaselt saab hageja valida, kas hageda kostjat lepinguriigis, kus tegu või muu sündmus, mis oli kahju tekkimise aluseks, aset leidis või lepinguriigis, kus kostjal on elukoht või (juriidilise isiku puhul) haldusorgan, esindus või filiaal.

Õigusabilepingute regulatsioon erineb mõneti vastavast EL regulatsioonist. Nimelt võimaldab Brüsseli I (uuesti sõnastatud) määruse artikkel 7(3) hagejal kostjat hageda ka juhul, kui kahjustav sündmus alles võib Eestis aset leida, õigusabilepingud sellist võimalust aga ette ei näe. Lisaks on Brüsseli I (uuesti) sõnastatud määruse artiklil 7(3) laiem kohaldamisala võrreldes õigusabilepingute asjakohase regulatsiooniga – määruse artikkel 7(3) võimaldaks Eestis hagi esitada ilmselt ka teatud käsundita asjaajamise asjades, õigusabilepingud sellist võimalust aga ette ei näe.

Juhul, kui üht tüüpi instrumendis sisalduvad valikulise kohtualluvuse sätted võimaldavad Eesti kohtul hagi menetleda, teist tüüpi instrumendis sisalduvad valikulise kohtualluvuse sätted aga mitte, tekib kaht tüüpi instrumendi vahel vastuolu ELTL artikli 351 tähenduses. Selline vastuolu esineb ehtsa negatiivse konfliktina.

b) Muude kaubandusvaidluste valikulise kohtualluvuse sätted

Õigusabilepingud ei näe ette valikulise kohtualluvuse sätteid muude tsiviilvaidluste jaoks. Brüsseli I (uuesti sõnastatud) määruse artikkel 7 samas selliseid sätteid sisaldab. Näiteks on Brüsseli I (uuesti sõnastatud) määruse artikliga 7(1) valikulise kohtualluvuse sätted ette nähtud lepinguliste vaidluste jaoks. Kuna kaht tüüpi instrumentide regulatsioon erineb, võib siinkohal jällegi tekkida vastuolu ELTL artikli 351 tähenduses, kui õigusabilepinguid kohaldatakse Eesti

kohtutes EL regulatsiooni asemel. Tegemist on jällegi ehtsa negatiivse konfliktiga kaht tüüpi instrumentide vahel.

2.2.3. Erandliku kohtualluvuse sätted

Enamik õigusabilepingutes sisalduvatest kohtualluvuse kontrollimise sätetest kujutavad endast erandliku kohtualluvuse sätteid. Sätete erandlik iseloom tähendab seda, et neist ei saa menetlusosalised kokkuleppel kõrvale kalduda.

Õigusabilepingutes sisalduvad erandliku kohtualluvuse sätted tegelevad perekonna-, pärimis- ja kaubandusvaidlustega. Osad neist vaidlustest ei lange EL määruste sisulisse kohaldamisalasse. Vaidluste puhul, mis EL määruste sisulisse kohaldamisalasse ei kuulu, ei saa kaht tüüpi instrumentide vahel tekkida ka vastuolu ELTL artikli 351 tähenduses. On siiski rida asju, mis langevad mõlemat tüüpi instrumentide sisulisse kohaldamisalasse ning mille puhul on ELTL artikli 351 kohase vastuolu tekkimine võimalik, kuna üht tüüpi instrument näeb ette erandliku kohtualluvuse regulatsiooni. Sellised tsiviilasjad on järgmised: a) lahutamise ja abielu kehtetuks tunnistamise asjad, b) vanemliku vastutuse asjad, c) pärimisasjad ning d) muud kaubandusvaidlused, mille osas näevad EL määrused ette erandliku kohtualluvuse regulatsiooni, õigusabilepingud aga üldise kohtualluvuse regulatsiooni.

a) Lahutamine ja abielu kehtetuks tunnistamine

Lahutamise ja abielu kehtetuks tunnistamise asjades annavad õigusabilepingud üldreeglina hagejale valikuvõimaluse hageda kas riigis, mille kodanikud abikaasad olid või riigis, kus avalduse esitamise ajal oli abikaasade ühine elukoht (Eesti-Vene õigusabilepingu art 28, Eesti-Ukraina õigusabilepingu art 27). EL õiguses näeb vastava regulatsiooni ette Brüsseli II *bis* määrus, mille artikkel 3 annab abikaasadele võrreldes õigusabilepingute regulatsiooniga ette suurema valikuvõimaluse – nt saab hageja Brüsseli II *bis* määruse kohaselt hageda kostjat viimase elukohariigi kohtus. Kuna eri tüüpi instrumentides kasutatavad abieluasjades kohtualluvuse kontrollimisel erinevaid ühendavad seosed, võib praktikas nende instrumentide vahel tekkida vastuolu ELTL artikli 351 tähenduses. Selline vastuolu esineb jällegi ehtsa negatiivse konflikti näol.

Teoreetiliselt saaks vastuolu kaht tüüpi instrumendi vahel abieluasjades vältida, kui õigusabilepingutes sisalduvaid abielusätteid loetaks valikulise kohtualluvuse säteteks. Selline lahendus oleks aga problemaatiline, kuna abieluasjades ei peaks pooltel ilmselt olema võimalust sõlmida kohtualluvuse kokkuleppeid.

Konflikt kaht tüüpi instrumentide vahel ei saa tekkida samasooliste abieluasjades, kuna õigusabilepingute sisulisse kohaldamisalasse samasooliste abielud ei lange. Konflikti ei teki ka juhul, kui hageja soovib hagis, et kohus kuulutaks välja tema ja kostja vahelise lahuselu, ning seda põhjusel, et ka sellised asjad ei lange õigusabilepingute sisulisse kohaldamisalasse.

b) Vanemlik vastutus

Vanemliku vastutuse asjad langevad samaaegselt Brüsseli II *bis* määruse ja õigusabilepingute sisulisse kohaldamisalasse. Kaht tüüpi instrumendid kasutavad sarnaste vanemliku vastutuse vaidluste puhul küllaltki erinevaid ühendavaid seoseid: Brüsseli II *bis* määrus nt lapse harilikku viibimiskohta, õigusabilepingud aga lapse kodakondsust. Eelnevast tulenevalt võib juhul, kui õigusabilepinguid kohaldatakse Brüsseli II *bis* määruse asemel, tekkida kaht tüüpi instrumendi vahel vastuolu ELTL artikli 351 tähenduses. Selline vastuolu esineb jällegi ehtsa negatiivse konfliktina.

c) Ülalpidamiskohustused

Ka ülalpidamiskohustused langevad nii õigusabilepingute kui ka EL määruste kohaldamisalasse. EL määrustest reguleerib kohtualluvust ülalpidamisasjades ülalpidamiskohustuse määrus. Kuna kaht tüüpi instrumendid sisaldavad jällegi sätteid, mis kasutavad erinevaid ühendavaid seoseid, võib kaht tüüpi instrumentide vahel tekkida ELTL artikli 351 tähenduses vastuolu, kui nende rakendamine konkreetses kaasuses viib erineva lõpptulemuseni. Selline vastuolu esineb jällegi ehtsa negatiivse konfliktina.

d) Pärimine

EL õiguses näeb pärimisasjades kohtualluvuse sätted ette Euroopa pärimismäärus. Üldreeglina alluvad pärimisvaidlused Euroopa pärimismääruse kohaselt pärandaja viimase hariliku viibimiskoha kohtule. Õigusabilepingute kohaselt alluvad vallasjade pärimise asjades vaidlused pärandaja viimase elukoha riigi kohtule (Eesti-Vene õigusabilepingu art 42(1), Eesti-Ukraina õigusabilepingu art 34(1)). Kuna pärandaja viimane harilik viibimiskoht Euroopa pärimismääruse tähenduses ning pärandaja viimane elukoht õigusabilepingute tähenduses on erinevad ühendavad seosed, millel saab olla eriline faktiline tähendus nt alaealiste puhul, võib kahe instrumendi vahel tekkida vallasasjade pärimise asjades vastuolu ELTL artikli 351 tähenduses. Selline vastuolu esineb jällegi ehtsa negatiivse konfliktina.

Kinnisasjade pärimise asjade jaoks näevad kaht tüüpi instrumendid ette veel erinevamad ühendavad seosed, mistõttu on ka sellistes asjades kahe instrumendi vahelise vastuolu tekkimine enam kui tõenäoline. Vastuolu tekkimise tõenäosust suurendab ka asjaolu, et õigusabilepingud eristavad kohtualluvuse kontrollimisel vallas- ja kinnisasjade pärimise asju, Euroopa pärimismäärus seda aga ei tee.

e) Muud tsiviilasjad

Lisaks eelnevalt viidatud tsiviilasjadele näevad EL määrused erandliku kohtualluvuse sätted ette ka mõnede muude tsiviilasjade jaoks. Täpsemini sisalduvad

erandliku kohtualluvuse sätted abieluvaramääruses, registreeritud partnerite varasuhete määruses ja Brüsseli I (uuesti sõnastatud) määruse artiklis 24.

Kuna abieluvaramäärus ja registreeritud partnerite varasuhete määrus näevad ette erinevad ühendavad seosed võrreldes õigusabilepingute artiklites 21(1) sisalduvate üldise kohtualluvuse sätetega, saavad kaht tüüpi instrumendid omavahel ELTL artikli 351 tähenduses vastuollu minna juhul, kui Eesti Vabariik otsustab tulevikus nende kahe EL määrusega ühineda. Registreeritud partnerite varasuhete määruse osas eeldaks vastuolu tekkimine siiski seda, et registreeritud partnerlus kui instituut leiaks tunnustamist ka õigusabilepingute partnerriikide õiguskorras, kuivõrd õigusabilepingute termineid, sh terminit „abielu", tuleks tõlgendada autonoomselt.

Ka vaidlustes, mille osas Brüsseli I (uuesti sõnastatud) määruse artikkel 24 näeb ette erandliku kohtualluvuse regulatsiooni, võib kaht tüüpi instrumentide vahel tekkida ELTL artikli 351 tähenduses vastuolu. Seda jällegi põhjusel, et Brüsseli I (uuesti sõnastatud) määruse artikkel 24 kasutab võrreldes õigusabilepingute artiklitega 21(1) erinevaid ühendavaid seoseid, mis võib kaasa tuua kahe instrumendi vahelise ehtsa negatiivse konflikti.

Eesti kohtupraktikas on õigusabilepingutes sisalduvate erandliku kohtualluvuse sätete puhul, millel ei ole nende sisulise kohaldamisala osas EL määrustes vastet, välja pakutud viis, kuidas saaks õigusabilepingute erandliku kohtualluvuse sätetest mõneti mööda minna. Selline viis võiks teoreetiliselt olla aluseks ka nende erandliku kohtualluvuse sätete, millega reguleeritud asjad langevad oma sisu poolest nii EL määruste kui ka õigusabilepingute kohaldamisalasse, vahelise vastuolu vältimiseks. Nimelt on kohtud läbi õigusabilepingute esimeste deklaratiivsete artiklite, mis annavad Eesti ja õigusabilepingu partnerriigi kodanikele võrdse õiguskaitse, jätnud õigusabilepingute erandliku kohtualluvuse sätted mõningatel juhtudel lihtsalt kohaldamata.[433] Teoreetiliselt saaks sellise tõlgendamisviisi kaudu ületada kahe instrumendi vahelisi vastuolusid ELTL artikli 351 tähenduses, kuid eelistatav oleks, et võimalike vastuolude ületamisega tegeleks esmajoones seadusandja ning mitte kohtud.

2.2.4. Kohtualluvuse kokkulepete sätted

Mõlemat tüüpi instrumentides sisalduvad kohtualluvuse kokkulepete sätted. Kuna eri instrumentides sisalduvad erandliku kohtualluvuse sätted erinevad üksteisest, erinevad ka juhud, mil pooled saavad sõlmida kohtualluvuse kokkuleppeid. Eelnev tähendab, et välistatud ei ole situatsioon, kus Eesti kohus peaks üht tüüpi instrumendi kohaselt kohtualluvuse kokkuleppele õigusjõu andma, teist tüüpi instrumendi kohaselt aga mitte.

Kuna ka kokkulepete jaoks ette nähtud vorminõuded erinevad, võib juhtuda, et üht tüüpi instrumendi puhul loetaks kohtualluvuse kokkulepe kehtivaks, teise

[433] Vt: Order of the Harju County Court of 3 February 2015 in a civil case No 2-14-57389; Order of the Harju County Court of 22 May 2015 in a civil case No 2-15-6600; Order of the Harju County Court of 28 February 2015 in civil case No 2-15-8571.

puhul aga mitte. See toob jällegi kaasa kahe instrumendi vahelise vastuolu ELTL artikli 351 tähenduses, kuna ühe instrumendi alusel võib vaidlus Eesti kohtule alluda, teise puhul aga mitte. Selline vastuolu esineks jällegi ehtsa negatiivse konfliktina.

2.2.5. Lis pendens sätted

Konfliktid kaht tüüpi instrumendi vahel saavad aset leida ka juhul, kui Eesti kohtud kohaldavad õigusabilepingutes sisalduvaid *lis pendens* sätteid EL lepingutes sisalduvate *lis pendens* sätete asemel. *Lis pendens* sätted on üldistatult öeldes sätted, mis lubavad kohtul menetluse teise kohtuasjaga seoses peatada.[434]

Õigusabilepingud lubavad menetluse peatada üksnes teise õigusabilepingu partnerriigi kohtumenetlusega seoses (Eesti-Vene õigusabilepingu art 21(3), Eesti-Ukraina õigusabilepingu art 21(3)). Kontrastina näevad EL instrumendid reeglina ette vaid sellised *lis pendens* sätted, mis lubavad menetluse peatada vaid teise Euroopa Liidu liikmesriigi kohtus käiva menetlusega seoses.[435] Seega on teoreetiliselt võimalik olukord, kus üht tüüpi instrumendi alusel peaks Eesti kohus menetluse peatama, teist tüüpi instrumendi alusel aga mitte. Eelnevast tulenevalt võib jällegi kaht tüüpi instrumendi vahel tekkida vastuolu ELTL artikli 351 tähenduses. Sellist vastuolu saaks jällegi kirjeldada kui ehtsat negatiivset konflikti.

2.3. Konfliktid kohalduva õiguse määramise sätete vahel

2.3.1. Isikute õigus- ja teovõimele kohalduva õiguse määramise sätted

Sarnaselt kohtualluvuse kontrollimise sätetele saavad ka kaht tüüpi instrumentides sisalduvad kohalduva õiguse määramise sätted omavahel ELTL artikli 351 tähenduses vastuollu minna. Esimesed õigusabilepingutes sisalduvatest kohalduva õiguse määramise reeglitest on isikute õigus- ja teovõimele kohalduva õiguse määramise reeglid.

EL määrused ei tegele reeglina isiku teovõimele kohalduva õiguse määramisega, kuid sellest põhimõttest teevad erandi Euroopa pärimismääruse artikkel 26(a) ja Rooma I määruse artikkel 13. Mõlemad kasutavad võrreldes õigusabilepingute regulatsiooniga (Eesti-Vene õigusabilepingu art 22–23, Eesti-Ukraina õigusabilepingu art 22–23) teovõimele kohalduva õiguse määramisel erinevaid ühendavaid seoseid. Kuna kaht tüüpi instrumendid võivad seega samas vaidluses

[434] Vt selle instituudi kohta üldiselt nt: M. B. Fabrizio. Lis Alibi Pendens and Related Actions in Civil and Commercial Matters within the European Judicial Area. Yearbook of Private International Law 2009. Vol 11, 2010, pp 511–564.

[435] Erandiks on siin Brüsseli I (uuesti sõnastatud) määruse art 33, mis lubab menetluse peatada ka kolmandas riigis käiva menetlusega seoses.

näha ette erineva õiguse kohaldamise, on instrumendid ses osas üksteisega ELTL artikli 351 tähenduses vastuolus. Selline vastuolu esineb ehtsa positiivse konfliktina.

2.3.2. Eestkostele ja hooldusele kohalduva õiguse määramise sätted

EL seadusandja ei ole tegelenud eestkostele ja hooldusele kohalduva õiguse määramise küsimusega, mistõttu ei saa EL määrused ja õigusabilepingute asjakohased sätted (Eesti-Vene õigusabilepingu art 35, Eesti-Ukraina õigusabilepingu art 30) selles küsimuses ka üksteisega vastuolus olla, kuna kahel instrumendil puudub ses osas kattuv sisuline kohaldamisala.

2.3.3. Põlvnemisele, lapsendamisele ja surrogaatemadusele kohalduva õiguse määramise sätted

Sarnaselt eestkoste ja hoolduse asjadele ei ole EL seadusandja tegelenud ka põlvnemisele, lapsendamisele või surrogaatemadusele kohalduva õiguse määramise küsimusega. Seega ei saa kaht tüüpi instrumendid ka selles küsimuses üksteisega vastuolus olla, kuna kahel instrumendil puudub ses osas kattuv sisuline kohaldamisala.

2.3.4. Vanemlikule vastutusele kohalduva õiguse määramise sätted

Sarnaselt eelnevale ei ole EL seadusandja sätestanud ka vanemliku vastutuse asjades kohalduva õiguse määramise reegleid. Seega ei saa ka selles küsimuses esineda kaht tüüpi instrumentide vahel vastuolu ELTL artikli 351 tähenduses.

2.3.5. Abielu sõlmisele ja tühisuse tuvastamisele kohalduva õiguse määramise sätted

Sarnaselt eelnevale ei ole EL seadusandja sätestanud abielu sõlmimisele ja tühisusele kohalduva õiguse määramise reegleid. Seega ei saa ka selles küsimuses esineda kaht tüüpi instrumentide vahel vastuolu ELTL artikli 351 tähenduses.

2.3.6. Abielu õiguslikele tagajärgedele (va ülalpidamiskohustustele) kohalduva õiguse määramise sätted

Abielu õiguslikele tagajärgedele (va ülalpidamiskohustustele) kohalduva õiguse määramise reegleid ei ole EL sarnaselt eelnevale samuti sätestanud. Seda siiski ühe erandiga – kohalduva õiguse määramise reeglid näeb ette abieluvaramäärus, mis kasutab võrreldes õigusabilepingute asjakohase regulatsiooniga (Eesti-Vene õigusabilepingu art 27, Eesti-Ukraina õigusabilepingu art 26) erinevaid ühendavaid seoseid. Eelnev võib jällegi viia vastuoluni ELTL artikli 351 tähenduses, kui Eesti kohus määrab abikaasade varasuhetele kohalduva õiguse õigusabilepingute alusel ning kohaldab õigust, mida EL määruste alusel ei kohaldataks. Sellise võimaliku vastuolu näol on jällegi tegemist ehtsa positiivse konfliktiga.

2.3.7. Lahutamisele ja lahuselule kohalduva õiguse määramise sätted

Mõlemat tüüpi instrumendid sisaldavad sätteid lahutamisele kohalduva õiguse määramise kohta. EL määrustes sisalduvad sellised sätted Rooma III määruses, õigusabilepingutes aga Eesti-Vene õigusabilepingu artiklis 28 ja Eesti-Ukraina õigusabilepingu artiklis 27.

Kuna mõlemat tüüpi instrumendid kasutavad lahutamisele kohalduva õiguse määramisel erinevaid ühendavaid seoseid, võib kaht tüüpi instrumendi vahel jällegi sõltuvalt konkreetse kaasuse asjaoludest tekkida vastuolu ELTL artikli 351 tähenduses. Selline vastuolu esineks jällegi ehtsa positiivse konfliktina. Vastuolu kaht tüüpi instrumendi vahel ei teki lahuselu väljakuulutamise asjades, kuna seda tüüpi vaidlused ei lange õigusabilepingute sisulisse kohaldamisalasse.

2.3.8. Ülalpidamiskohustustele kohalduva õiguse määramise sätted

Mõlemat tüüpi instrumendid tegelevad ka ülalpidamiskohustustele kohalduva õiguse määramisega. EL määrustest tegeleb selle küsimusega ülalpidamiskohustuste määrus, õigusabilepingutes sisalduvad vastavad sätted Eesti-Vene õigusabilepingu artiklites 27 ja 30–31 ning Eesti-Ukraina õigusabilepingu artiklites 26 ja 28. Kuna mõlemat tüüpi instrumendid kasutavad kohalduva õiguse määramisel erinevaid ühendavaid seoseid, võib kaht tüüpi instrumendi vahel jällegi sõltuvalt konkreetse kaasuse asjaoludest tekkida vastuolu ELTL artikli 351 tähenduses. Selline vastuolu esineks jällegi ehtsa positiivse konfliktina.

2.3.9. Pärimisele ja testamentidele kohalduva õiguse määramise sätted

Mõlemat tüüpi instrumendid tegelevad ka pärimisasjades kohalduva õiguse määramisega. EL määrustest tegeleb selle küsimusega Euroopa pärimismäärus, õigusabilepingutes sisalduvad vastavad sätted Eesti-Vene õigusabilepingu artiklites 42–44 ning Eesti-Ukraina õigusabilepingu artiklites 34–36. Kuna mõlemat tüüpi instrumendid kasutavad kohalduva õiguse määramisel erinevaid ühendavaid seoseid, võib kaht tüüpi instrumendi vahel jällegi sõltuvalt konkreetse kaasuse asjaoludest tekkida vastuolu ELTL artikli 351 tähenduses. Selline vastuolu esineks jällegi ehtsa positiivse konfliktina.

2.3.10. Isikute teadmata kadumisele, eemalolekule ja surnuks tunnistamisele kohalduva õiguse määramise sätted

EL seadusandja ei ole reguleerinud isikute teadmata kadumisele, eemalolekule või surnuks tunnistamisele kohalduva õiguse määramise reegleid. Seega ei saa selles küsimuses esineda kaht tüüpi instrumentide vahel ka vastuolu ELTL artikli 351 tähenduses, kuna kaht tüüpi instrumendil ei ole ses osas kattuvat sisulist kohaldamisala.

2.3.11. Asjaõigustele kohalduva õiguse määramise sätted

EL seadusandja ei ole reguleerinud ka asjaõigustele kohalduva õiguse määramise reegleid. Seega ei saa ka selles küsimuses esineda kaht tüüpi instrumentide vahel vastuolu ELTL artikli 351 tähenduses.

2.3.12. Lepingutele ja muudele tehingutele kohalduva õiguse määramise sätted

Õigusabilepingutes sisalduvad vaid tehingu vormile kohalduva õiguse määramise reeglid (Eesti-Vene õigusabilepingu art 39, Eesti-Ukraina õigusabilepingu art 32), muudele lepingutega seotud küsimustele kohalduva õiguse määramise reegleid õigusabilepingud ei sisalda. Osas, milles õigusabilepingud reguleerivad lepingutele kohalduvat õigust, lähevad õigusabilepingute reeglid ELTL artikli 351 tähenduses vastuollu Rooma I määrusega, mis EL tasandil lepingutele kohalduva õiguse määramise küsimusega tegeleb. Seda põhjusel, et kaht tüüpi instrumendid kasutavad erinevaid ühendavaid seoseid kohalduva õiguse määramiseks, mis võib kaasa tuua selle, et samas kaasuses peaks Eesti kohus sama lepingu vormile erinevate instrumentide alusel kohalduva õiguse määrama erinevalt. Sellisel juhul tekiks kaht tüüpi instrumendi vahel ehtne positiivne konflikt.

2.3.13. Lepinguvälistele kohustustele kohalduva õiguse määramise sätted

Mõlemat tüüpi instrumendid sisaldavad kohalduva õiguse määramise reegleid lepinguväliste võlasuhete vaidluste jaoks. EL instrumentidest sisalduvad sellised reeglid Rooma II määruses, õigusabilepingutes on sellised reeglid leitavad Eesti-Vene õigusabilepingu artiklis 40 ning Eesti-Ukraina õigusabilepingu artiklis 33. Kuna kaht tüüpi instrumendid kasutavad siinjuures jällegi erinevaid ühendavaid seoseid, võib nende vahel tekkida ELTL artikli 351 tähenduses vastuolu, kui õigusabilepingutes sisalduvaid kohalduva õiguse määramise sätteid kohaldatakse Rooma II määruse sätete asemel. Selline vastuolu kujutaks endast jällegi ehtsat positiivset konflikti.

2.3.14. Muudele küsimustele kohalduva õiguse määramise sätted

Õigusabilepingud ei sisalda muudele, kui eelnevalt toodud küsimustele kohalduva õiguse määramise sätteid. Seega ei saa tekkida ka ELTL artikli 351 tähenduses vastuolu õigusabilepingute ja nende EL määruste sätete vahel, mis sisaldavad kohalduva õiguse määramise sätteid muude vaidluste jaoks.

2.4. Konfliktid täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätete vahel

2.4.1. Otseste konfliktide võimatus

EL määrused tegelevad vaid EL liikmesriikide täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmisega. Õigusabilepingud tegelevad kontrastina vaid õigusabilepingu partnerriikide täitedokumentidega. Kuna kaht tüüpi instrumentides sisalduvatel tunnustamise, täidetavaks tunnistamise ja täitmise sätetel on seega erinev territoriaalne kohaldamisala, ei saa nende sätete vahel tekkida ka vastuolu ELTL artikli 351 tähenduses. Siiski on teoreetiliselt võimalik, et sellised sätted tekitavad ELTL artikli 351 tähenduses vastuolu mõnede muude rahvusvahelise eraõiguse sätete vahel, kui neid rakendatakse selliste, muude sätetega koostoimes.

2.4.2. Sätete kaudne kohaldamine

Õigusabilepingutes sisalduvad tunnustamise, täidetavaks tunnistamise ja täitmise sätted võivad kaudselt tekitada vastuolu kaht tüüpi instrumentide kohtualluvuse kontrollimise sätete vahel, kui tunnustamise sätted koostoimes EL määrustes sisaldavate kohtualluvuse kontrollimise sätete või muude Eesti kohtutes kehtivate sätetega viiksid tulemuseni, kus üht tüüpi instrumendi alusel vaidlus Eesti kohtule allub, teist tüüpi instrumendi alusel aga ei tohiks Eesti kohus asja lahendada. Sellist võimalust saab jaatada vaid väga piiratud juhul – kui vaidlus alluks Eesti kohtule samaaegselt nii Euroopa pärimismääruse artikli 12(1) kui ka õigusabilepingute pärimisasjade kohtualluvuse sätete alusel ning kui esineks mõni õigusabilepingute kohane alus jätmaks Eesti kohtu lahend tunnustamata.

2.5. Konfliktid rahvusvahelise koostöö sätete vahel

2.5.1. Otseste konfliktide võimatus

EL määrused tegelevad vaid koostööga EL liikmesriikide ametiasutuste vahel. Õigusabilepingud tegelevad koostööga õigusabilepingute partnerriikide ametiasutustega. Eelnevast tulenevalt ei saa kaht tüüpi instrumentide vahel tekkida otsest konflikti, kuna nendes sisalduvate koostöö sätete territoriaalne kohaldamisala ei kattu.

2.5.2. Sätete kaudne kohaldamine

Vastupidiselt tunnustamise, täidetavaks tunnistamise ja täitmise sätetele ei saa kaht tüüpi instrumentides sisalduvad koostöö sätted tekitada kaht tüüpi instrumentide vahel konflikte ka kaudselt st koostoimes teiste rahvusvahelise eraõiguse sätetega.

Kokkuvõte

Väitekirja eesmärgiks oli hinnata, mil määral on kolmandate riikidega sõlmitud õigusabilepingud ja EL rahvusvahelise eraõiguse määrused omavahel ELTL artikli 351 tähenduses vastuolus. Selleks määrati väitekirjas kõigepealt kindlaks mõlemat liiki instrumentide kohaldamisala ning seejärel hinnati võimalikke vastuolusid, mis kaht tüüpi instrumentides sisalduvate rahvusvahelise eraõiguse sätete vahel tekkida võivad.

Kaht tüüpi instrumentide kohaldamisala kattuvuse hindamiseks eristati ning analüüsiti väitekirja esimeses peatükis instrumentide ajalist, sisulist, territoriaalset ja isikulist kohaldamisala. Väitekirjas leiti, et kõigil neljal rahvusvahelise eraõiguse sätete liigil, mis õigusabilepingutes ja EL määrustes sisalduvad, on osaliselt kattuv ajaline ja sisuline kohaldamisala. Lisaks leiti, et õigusabilepingutes sisalduvatel kohtualluvuse kontrollimise ja kohalduva õiguse määramise sätetel on piiratum isikuline kohaldamisala võrreldes EL määrustes sisalduvate sarnaste sätetega. Territoriaalse kohaldamisala osas erinesid kaht liiki instrumentides sisalduvad tunnustamise, täidetavaks tunnistamise ja täitmise ning rahvusvahelise koostöö sätted. Kuna tunnustamise, täidetavaks tunnistamise ja täitmise sätetel ning rahvusvahelise koostöö sätetel ei olnud kattuvat territoriaalset kohaldamisala, siis eeldati väitekirjas, et sellised sätted ei saa omavahel ka vastuollu minna, kuid selliseid sätteid arvestati siiski hindamaks, kas nad võiksid koostoimes muude rahvusvahelise eraõiguse sätetega tingida konflikti muud tüüpi rahvusvahelise eraõiguse sätete vahel.

Kuna kaht tüüpi instrumentidel on vähemalt osaliselt kattuv kohaldamisala, hinnati väitekirja teises peatükis võimalust, et sellised konkureerivad sätted viivad erineva lõpptulemuseni, kui Eesti kohus üht tüüpi instrumenti teise asemel kohaldaks. Selline lõpptulemus võib endast kujutada vastuolu ELTL artikli 351 tähenduses.

Väitekirja põhiküsimusele st kas kaht tüüpi instrumendid võivad üksteisega ELTL artikli 351 tähenduses vastuolus olla, vastati väitekirjas jaatavalt. Vastuolud tekivad aga üksnes kohtualluvuse kontrollimise ning kohalduva õiguse määramise sätete vahel. Vastuolusid ei teki kaht tüüpi instrumentides sisalduvate täitedokumentide tunnustamise, täidetavaks tunnistamise ja täitmise sätete ning rahvusvahelise koostöö sätete vahel, kui õigusabilepinguid kohaldatakse EL määruste asemel.

Juhul, kui kohus kohaldab õigusabilepingutes sisalduvaid kohtualluvuse kontrollimise sätteid EL vastavate sätete asemel, võib kaht tüüpi instrumentide vahel tekkida ELTL artikli 351 tähenduses vastuolu, kuna ühendavad seosed, mida kohtualluvuse kontrollimisel eri instrumentide järgi kasutatakse, erinevad üksteisest. Eelnev võib sageli viia tulemuseni, kus üht tüüpi instrumendi alusel vaidlus Eesti kohtule alluks, teist tüüpi instrumendi alusel aga mitte. Eelnevalt kirjeldatud vastuolud on ehtsad konfliktid ses mõttes, et nad kujutavad endast vastuolu ELTL artikli 351 tähenduses. Mõnikord on sellised konfliktid peidetud konfliktid, kuna neid saab tuvastada vaid rahvusvahelise eraõiguse tõlgendusmeetodite abil erinevates sätetes kasutatud, vormiliselt sarnastele mõistetele sisu

andmise kaudu. Enamasti on sellised konfliktid aga ilmsed st nad lähtuvad asjaolust, et erinevad normid kasutavad selgelt erinevaid ühendavaid seoseid kohtualluvuse kontrollimisel. Igal juhul on sellised konfliktid aga negatiivsed st üht tüüpi norm näeb Eesti kohtule kohustuse midagi teha, samas kui teist tüüpi norm näeb Eesti kohtule ette kohustuse millegi tegemisest hoiduda.

Vastuolud ELTL artikli 351 tähenduses kaht tüüpi instrumentide vahel võivad tekkida ka juhul, kui Eesti kohtud kohaldavad õigusabilepingutes sisalduvaid kohalduva õiguse määramise reegleid nende EL paariliste asemel. Vastuolud tekivad siinjuures jällegi juhul, kui kohalduva õiguse määramise sätetes kasutatavad ühendavad seosed omavahel erinevad. Konfliktid kaht tüüpi instrumentides sisalduvate kohalduva õiguse määramise sätete vahel võivad olla nii ilmsed kui ka peidetud sõltuvalt sellest, kas asjakohastes sätetes kasutatud ühendavate seoste erinevus on lugejale ilmne või mitte. Igal juhul on sellised konfliktid aga positiivsed st üht tüüpi norm näeb Eesti kohtule kohustuse midagi teha, samas kui teist tüüpi norm näeb Eesti kohtule ette kohustuse teha midagi eelnevast erinevat.

Eesti kohtupraktikas on püütud vastuolusid kaht tüüpi instrumentide vahel ületada küllaltki innovaatiliselt, jättes kõrvale õigusabilepingutes selgelt kirjas oleva. Ilmselt peaks seadusandja võtma samme kaht tüüpi instrumentide vahelise vastuolu ületamiseks, et kohtunikud ei peaks selliste innovaatiliste viiside väljatöötamisega oma pead vaevama. Seni kuni selliseid samme võetud ei ole, võib seisu Eesti rahvusvahelises eraõiguses aga kokku võtta järgnevalt: esineb konfliktireeglite konflikt.

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ABBREVIATIONS

Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Brussels I (Recast) Regulation	Regulation (EU) No 1205/2012 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 (recast)
Brussels II Regulation	Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses
Brussels II *bis* Regulation	Council Regulation (EC) No 2201/2003 of 27 November concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
Brussels Convention	Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
Community Design Regulation	Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs
Estonia-Latvia/Lithuania legal assistance treaty	Eesti Vabariigi, Leedu Vabariigi ja Läti Vabariigi õigusabi ja õigussuhete leping
Estonia-Poland legal assistance treaty	Eesti Vabariigi ja Poola Vabariigi vaheline leping õigusabi osutamise ja õigussuhete kohta tsiviil-, töö- ning kriminaalasjades
Estonia-Russia legal assistance treaty	Eesti Vabariigi ja Vene Föderatsiooni leping õigusabi ja õigussuhete kohta tsiviil-, perekonna- ja kriminaalasjades
Estonia-Ukraine legal assistance treaty	Eesti Vabariigi ja Ukraina leping õigusabi ja õigussuhete kohta tsiviil- ning kriminaalasjades
European Enforcement Order Regulation	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
ECHR Convention	European Convention on Human Rights
European Order for Payment Procedure Regulation	Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure
European Small Claims Procedure Regulation	Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

Evidence Regulation	Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters
Hague 1961 Testamentary Dispositions Convention	Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions
Hague 1965 Service Convention	Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters
Hague 1970 Divorce Convention	Convention of 1 June 1970 of the Recognition of Divorces and Legal Separations
Hague 1970 Evidence Convention	Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters
Hague 1973 Maintenance (Applicable	Convention of 2 October on the Law
Law) Convention	Applicable to Maintenance Obligations
Hague 1973 Maintenance (Recognition and Enforcement) Convention	Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
Hague 1980 Abduction Convention	Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
Hague 1993 Adoption Convention	Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
Hague 1996 Parental Responsibility Convention	Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
Hague 2000 Adults Convention	Convention of 13 January 2000 on the International Protection of Adults
Hague 2005 Choice of Court Agreements Convention	Convention of 30 June 2005 on Choice of Court Agreements
Hague 2007 Maintenance Convention	Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance
Hague 2007 Protocol	Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations
Insolvency Regulation	Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings
Insolvency (Recast) Regulation	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

Lugano 1988 Convention	Convention on jurisdiction and the enforcement of judgments in civil and commercial matters Done at Lugano on 16 September 1988
Lugano 2007 Convention	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
Maintenance Regulation	Council Regulation (EC) No 4/2009 of 18 December on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations
Protection Measures Regulation	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
New York 1958 Convention	United Nations Conference of International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
Rome Convention	Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980
Rome I Regulation	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
Rome II Regulation	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)
Rome III Regulation	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
Service I Regulation	Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters
Service *bis* Regulation	Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil and commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000
Succession Regulation	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
Trademarks Regulation	Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version)

Treaty of Accession to the European Union 2003	The Treaty of Accession 2003 of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia Signed in Athens on 16 April, 2003
Treaty of Amsterdam	Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997
Treaty of Lisbon	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007
TEU	Consolidated version of the treaty on European Union 2012
TFEU	Consolidated version of the treaty on the functioning of the European Union 2012
Vienna Convention	Vienna Convention on the Law of Treaties 1969

ANNEX 1. Estonia-Russia legal assistance treaty

Treaty between the Republic of Estonia and the Russian Federation on legal assistance and legal relationships in civil, family and criminal matters
Passed on 26 January 1993

The Republic of Estonia and the Russian Federation by assigning great importance for the development of mutual legal assistance in civil, family and criminal matters, agreed on the following:

I part
GENERAL PROVISIONS

Art 1. Legal protection

1. *The nationals of one Contracting Party have the same legal protection for their personal and material rights in the territory of the other Contracting Party as the nationals of the other Contracting Party.*
   This applies accordingly to the legal persons established under the legislation of each of the Contracting Parties.
2. *The nationals of one Contracting Party have a right to turn freely and without any obstacles to the courts, public prosecutor's office and notarial offices (hereinafter – judicial authorities) and to the other authorities who deal with civil-, family- and criminal matters, they can appear in front of such authorities, request proceedings, submit claims and make other procedural acts on the same condition as the nationals of the other Contracting Party.*

Art 2. Legal assistance

1. *Judicial authorities of the Contracting Parties provide mutual legal assistance in civil, family and criminal matters in accordance with the provisions of the present Treaty.*
2. *Judicial authorities also provide legal assistance to other authorities in whose competence the matters referred to in point 1 of the present Art fall, including the administrative matters.*
3. *Other authorities in whose competence the matters referred to in point 1 of the present Art fall shall send the requests for legal assistance via judicial authorities.*

Art 3. The extent of legal assistance

Legal assistance includes the exercise of procedural acts provided by the legislation of the Contracting Party receiving the request, such as hearing the parties, accused persons being tried, witnesses and experts, making expertise, conducting judicial examinations, handing over evidence, initiating surveillance of persons who have committed a crime and the extradition of such persons, recognition and enforcement of the judgments made in civil cases, service and transfer of documents and, at the request of the other Contracting Party, providing data on the punishments of the accused person.

Art 4. Order of communication

While providing legal assistance the authorities of the Contracting Parties communicate with each other through the Ministry of Justice of the Republic of Estonia,

Prosecutors Office of the Republic of Estonia and the Ministry of Justice of the Russian Federation and the Head Prosecutors Office of the Russian Federation.

Art 5. Language

1. *The requests on the legal assistance will be composed in the language of the requesting Contracting Party and the translation to the Contracting Party receiving the request will be added to the request.*
2. *When providing the legal assistance the documents are drawn up in the language of the Contracting Party receiving the request and the translation to the language of the requesting Contracting Party will be added to them.*

Art 6. Drawing up documents

Documents, which the judicial and other authorities send through legal assistance, have to be certified by a stamp.

Art 7. Form for the request for legal assistance

In the request for legal assistance the following has to be provided:

1) *the name of the requesting authority;*
2) *the name of the receiving authority;*
3) *the name of the case in relation to which the assistance is requested;*
4) *the names of the parties, accused persons, persons being tried or the persons declared guilty, their nationality, field of occupation and permanent place of residence or location;*
5) *the names of their representatives and addresses;*
6) *the content of the instruction, in criminal matters also the description of the circumstances of the crime committed and its juridical qualification.*

Art 8. Order for fulfilling the request

1. *While carrying out the request for legal assistance the judicial authority to which the request has been addressed shall apply its own law. However, at the request of the requesting authority it can apply the procedural law of the Contracting Party, which has made the request for legal assistance if such provisions are not contrary to the legislation of the requested state.*
2. *When the judicial authority to which the request is made is not competent to carry out the request for legal assistance it will transmit the request to the competent judicial authority and will inform the requesting authority of such transmission.*
3. *When so requested the judicial authority to whom the request for legal assistance is made will inform the requesting authority of the time and place of carrying out the request.*
4. *After performing the request for legal assistance the judicial authority to which the request is made shall send the documents to the requesting authority; if the request could not have been carried out, it shall return the request and provide information on the circumstances impeding the carrying out of the request.*

Art 9. Order for servicing documents

1. *The receiving authority shall serve the documents according to the rules applicable in its state, provided that the documents have been drawn up in its language or supplemented with attested translation. If the documents are not drawn up in the language of the receiving authority or are not supplemented with translation, the*

documents are served on the person being served if he is willing to voluntarily receive them.

2. *The exact address of the person being served and the name of the document being served have to be included in the request for service. When the address included in the request for service turns out to be incomplete or inaccurate, the receiving authority shall apply the methods provided by its own law in order to determine the exact address of the person being served.*
3. *The authority receiving the request serves the documents as soon as possible. If the documents are not served within three months of the date when the receiving authority received them, the receiving authority will inform under Art 4 of the present Treaty the requesting authority of the non-service and the reasons of the non-service.*

Art 10. Acknowledgement the service of documents

The acknowledgement of service is registered according to the rules applicable in the Contracting Party to whom the request for legal assistance is made. The time and place of service and the person to whom the document was served have to be included in the acknowledgement of service.

Art 11. Serving the documents and hearing the nationals by diplomatic or consular agents

The Contracting Parties have a right to serve documents on and hear their own nationals by diplomatic or consular agents. This has to be carried out without the application of any compulsion.

Art 12. Calling the witness or expert abroad

1. *When during the preliminary inquiry or court proceedings in the territory of one Contracting Party it is necessary to call a witness or an expert residing in another Contracting Party, a request must be made to the appropriate authority of this Contracting Party with the instruction to serve the writ of summons.*
2. *The writ of summons must not contain any sanction for the case of failure to appear.*
3. *A witness or an expert who has, regardless of his/her nationality, voluntarily appeared under the writ of summons in front of the appropriate organ in another Contracting Party cannot be subjected to any criminal or administrative responsibility, taken under custody or punished in relation to an act which has been committed before he crossed the state border. These persons cannot also be subjected to any criminal or administrative responsibility or be punished in relation to their statements as witnesses or opinions given as experts or in relation to the act, which is the object of the investigation.*
4. *This privilege does not apply to witness or expert if he has does not, within 15 days of the moment when he was informed that his/her presence is not necessary, leave the territory of the requesting Contracting Party. The time when the witness or expert cannot leave the territory of the Contracting Party due to the circumstances beyond his/her power is not taken into account to calculate this time period.*
5. *The witnesses and experts who, under the writ of summons, have come to the territory of another Contracting Party have a right to receive compensation from the requesting authority for the expenses related to their travelling and staying abroad and for the loss of salary incurred while being absent from work; additionally, the experts have a right to receive payment for carrying out expertise. The writ of*

summons must contain information on which payments are made, at the request of persons; the requesting Contracting Party shall pay advance payment in order to compensate for the corresponding expenses.

Art 13. The validity of documents

1. *Documents which have been drawn up in the territory of one Contracting Party or which have been attested by a public authority (permanent translator, expert etc.) within the limits of its powers and according to the relevant form and which have been attested by seal, have to be received in the territory of another Contracting Party without the need for any other attestation.*
2. *Documents, which are considered official documents in the territory of one Contracting Party, have the same official evidential force in the territory of another Contracting Party.*
3. *Other documents, which allow transactions with material assets, have to be attested by notary in the place where such transactions were concluded.*

Art 14. The expenses relating to the provision of legal assistance

1. *Contracting Party to whom the request for legal assistance is made shall not demand compensation for carrying out the request. The Contracting Parties bear all the expenses incurred in their territory when providing legal assistance.*
2. *Judicial authority to which the request has been submitted informs the requesting authority the sum of expenses. When the requesting authority collects the payment for the expenses from the person who is obliged to compensate such expenses the sums collected shall be collected in favour of the Contracting Party who collected them.*

Art 15. Providing information

At the request, the Ministry of Justice and the Prosecutors Office of the Republic of Estonia and the Ministry of Justice and the Head Prosecutors Office of the Russian Federation shall provide information for each other on the legislation, which was applicable or is applicable in their states and on the application of such legislation by the judicial authorities.

Art 16. Free legal aid

The nationals of one Contracting Party are provided with free legal aid in the courts and other authorities of the other Contracting Party and they are guaranteed free proceedings on the same grounds and having the same advantages as the nationals of the other Contracting Party.

Art 17. Transmitting family certificates and other documents

The Contracting Parties shall, at the request of each other, send through diplomatic channels without translation and for free the certificates on the registration of family registry documents and other documents (on the education, employment etc.) which concern the personal or material rights of the nationals of the other Contracting Party.

Art 18. Refusal to provide legal assistance

Legal assistance is not provided if the provision of it may damage the sovereignty or security of the receiving Contracting Party or if it would be contrary to the general principles of the law of the receiving Contracting Party.

II Part
SPECIAL PROVISIONS
I Section

LEGAL ASSISTANCE AND LEGAL RELATIONS IN CIVIL- AND FAMILY MATTERS

Art 19. Exemption of court fees

The nationals of one Contracting Party are exempted from bearing the court expenses in the territory of other Contracting Party on the same grounds and to the same extent as the nationals of that Contracting Party.

Art 20. Issuing documents on the personal, family and material status of a person

1. *A document on personal, family and material status of a person which is necessary in order to receive permission on the exemption of court fees is issued by the competent organ in whose territory the applicant resides or stays.*
2. *When the applicant does not have a residence or a place of stay in a territory of a Contracting Party the document issued or attested by diplomatic or consular agent of his/her state is sufficient.*
3. *The court, which decides upon the exemption on court fees, may ask additional explanation from the organ who has issued the document.*

Art 21. Jurisdiction of court

1. *Unless provided otherwise by the present Treaty the courts of the Contracting Parties are competent to hear civil- and family matters if the defendant has a place of residence in their territory. They are competent in the actions filed against legal persons if the administrative organ, representative office or branch of the legal person is located in the territory of their Contracting Party.*
2. *The courts of the Contracting Parties will also hear the case if this has been agreed by the parties in writing. When such agreement exists the court terminates proceedings at the request of the defendant if the request has been made before the objections on the nature of the application have been made. The exclusive competence of the courts cannot be changed by an agreement of the parties.*
3. *When the same proceedings between the same parties on the same issue and on the same ground are brought in the courts of both Contracting Parties and both courts are competent under the present Treaty the court which initiated proceedings later shall terminate the proceedings.*

Art 22. Legal passive capacity and legal active capacity

1. *Legal active capacity of a person is determined under the law of the Contracting Party whose national the person is.*
2. *Legal passive capacity of a legal person is determined under the law of the Contracting Party in whose territory the legal person has been formed.*

Art 23. Limiting the active legal capacity of a person or declaring the person incapable

1. *In the matters of limiting the active legal capacity of a person or declaring the person incapable the law of the Contracting Party is applied and the courts of the Contracting Party are competent whose national the person is.*

2. *When the authority of one Contracting Party determines that there are grounds for limiting the active legal capacity of a person or declare incapable a person whose place of residence or place of stay is in the territory of this Contracting Party, it will inform of it the appropriate authority in the other Contracting Party. When the authority informed in such a way declares that it lets the authority of the place of residence or the place of stay of a person to take further measures or does not inform of its opinion within three months, the authority in the place of residence or the place of stay of the person can deal with the matter of limiting the active legal capacity of a person or the matter of declaring the person incapable in accordance with the law of its state when the grounds for such matters are also provided by the law of the Contracting Party whose national the person is. The decision on limiting the legal capacity of a person or declaring the person incapable has to be sent to the competent authority in the other Contracting Party.*
3. *Points 1 and 2 of the present Art are also applied in the cases where the declaration on limiting the active legal capacity of a person or the declaration on the incapability of a person is being declared null and void.*

Art 24.

In urgent cases, the authority of the place of residence or the place of stay of a person whose capacity is being limited or who is to be declared incapable can, on its own initiative, take relevant measures in order to protect the person in question or his/her property. The decisions on the measures taken have to be sent to the appropriate authority in the Contracting Party whose national the person under question is; these decisions have to be declared null and void if the authority of this Contracting Party decides otherwise.

Art 25. Declaring a person missing or dead and establishing the fact of death

1. *In the matters of declaring a person missing or dead or establishing the fact of death of a person the competent authorities are the authorities of the Contracting Party whose national the person was at the time when, according to the last information, he/she was alive.*
2. *The authorities of one Contracting Party can declare a national of another Contracting Party missing or dead or establish the fact of his/her death at the request of the persons living in its territory when the rights and interests of these persons are grounded on the law of that Contracting Party.*
3. *In the patters provided by points 1 and 2 of the present Art the authorities of the Contracting Parties shall apply their own law.*

Art 26. Conclusion of marriage

1. *The preconditions for the conclusion of marriage are determined for each person entering the marriage by the law of the Contracting Party whose national he/she is. In addition, the restrictions of the Contracting Party in whose territory the marriage is concluded have to be followed.*
2. *The form of the conclusion of marriage is determined by the law of the Contracting Party in whose territory the marriage is concluded.*

Art 27. Personal and material rights of spouses

1. *Personal and material rights of spouses are determined by the law of the Contracting Party in whose territory the spouses have a common residence.*

2. *When one spouse lives in the territory of one Contracting Party, the other in the territory of the other Contracting Party, their personal and material rights are determined by the law of the Contracting Party whose nationals they are.*
3. *When one spouse is a national of one Contracting Party, the other a national of the other Contracting Party and one of them lives in the territory of one Contracting Party and the other in the territory of the other Contracting Party, their personal and material rights are determined by the law of the Contracting Party in whose territory they had their last common residence.*
4. *When the persons mentioned in point 3 of the present Art did not have a common residence in the territories of the Contracting Parties, the law of the Contracting Party whose authority is hearing the matter shall be applied.*

Art 28. Divorce and annulment of marriage

1. *In divorce matters the law of the Contracting Party whose nationals the spouses were at the time of making the application shall be applied and the authorities of that Contracting Party are competent to hear the matter. When the spouses have a residence in the territory of the other Contracting Party the authorities of that Contracting Party are also competent.*
2. *When, at the time of making the application, one spouse is a national of one Contracting Party, the other a national of the other Contracting Party and one of them lives in the territory of one Contracting Party and the other in the territory of the other Contracting Party, the authorities of both Contracting Parties are competent. They will apply the law of their own Contracting Party.*
3. *In the annulment of marriage matters the law of the Contracting Party which, according to Art 26 was applied to the conclusion of marriage, shall be applied. The jurisdiction of the courts will be determined under points 1 and 2 of the present Art.*

Art 29. Legal relationships between parents and children

Establishing and disputing parenthood and the establishment of birth from a marriage are governed by the law of the Contracting Party whose nationality the child holds by birth.

Art 30.

1. *The relationship between parents and children is determined by the law of the Contracting Party in whose territory they have a common residence.*
2. *When one parent and the children live in the territory of the other Contracting Party, their relationship is determined by the law of the Contracting Party whose national the child is.*

Art 31.

The relationship between the illegitimate child and his/her mother and father is determined by the law of the state whose national the child is by birth.

Art 32.

In the legal relationships referred to in Arts 29–31 the courts competent to make decisions are the courts of the Contracting Party, which laws have to applied in these cases.

When the claimant and the defendant live both in the territory of one Contracting Party the courts of that Contracting Party are also competent when Arts 29 and 31 are followed.

Art 33. Adoption

1. *The law of the Contracting Party who's national is the person adopting the child is applied to adoption.*
2. *When the persons adopting the child are spouses of whom one is the national of one Contracting Party the other is the national of the other Contracting Party the adoption has to accord to the law applicable in the territories of both Contracting Parties.*
3. *When the child is the national of one Contracting Party, but the adopter is the national of the other Contracting Party the consent of the child has to be established to the adoption if, according to the law of the Contracting Party of the nationality of the child this is required, and the consent of the legal representative of the child and also the competent authority of this Contracting Party.*

Art 34.

1. *The authority of the Contracting Party which national is the person adopting the child is competent to decide upon adoption.*
2. *In the cases referred to in point 2 of Art 33 and in case where the person adopting the child lives in the territory of one of the Contracting Parties and the child lives in the territory of the other Contracting Party, the authority of the Contracting Party in whose territory the person adopting the child lives or in whose territory the spouses have their current or had their last common residence or place of stay are competent.*

Art 35. Guardianship and curatorship

1. *In the matters of guardianship and curatorship over the nationals of Contracting Parties, provided that the present Treaty does not provide otherwise, the guardian or curator of the Contracting Party whose national is the person under guardianship or curatorship are competent. In these cases the law of this Contracting Party is applied.*
2. *The relationship between the person holding the guardianship or curatorship and the person under guardianship or curatorship are determined by the law of the Contracting Party whose guardianship authority determined the guardian or curator.*

Art 36.

1. *When the measures of guardianship or curatorship are necessary for the interest of person under guardianship or curatorship whose place of residence or place of stay is in the territory of the other Contracting Party the guardianship or curatorship authority of that Contracting Party has to inform the competent authority under point 1 of Art 35 without delays.*
2. *In urgent matters the guardian or curator of the other Contracting Party may apply necessary measures, but has to inform the competent authority under point 1 of Art 35 of the measures taken without delays. The measures taken will be in force until that authority decides otherwise.*

Art 37.

1. *The guardianship or curatorship authority competent according to point 1 of Art 35 may hand over the guardianship or curatorship to the competent authorities of the other Contracting Party if the place of residence or place of stay or property of the person under guardianship or curatorship is located in that Contracting Party. Such handing over is valid only if the authority receiving such request agrees to take over the guardianship and curatorship and informs of it the authority making the request.*
2. *The authority that, according to point 1 took over the guardianship or curatorship will exercise it according to the law of its Contracting Party. Such authority is not competent to decide upon the questions which relate to the status of the person under guardianship or curatorship, but it can give consent to the conclusion of marriage which is necessary under the law of the Contracting Party whose national this person is.*

PROPERTY RELATIONSHIPS

Art 38. Ownership

1. *The ownership to immovable property is determined under the law of the Contracting Party in whose territory the immovable in question is situated.*
2. *The ownership to vehicles, which have to be registered in the national registries, is determined by the law of the Contracting Party in whose territory the authority registering the vehicles is located.*
3. *The origination or termination of property rights to the right of ownership or other assets is determined by the law of the Contracting Party in whose territory the assets were at the time when the act or other event giving rise to the origin or termination of such right occurred. The origination or termination of property rights to the assets, which are the object of a transaction is determined by the law of the performance of transaction provided that the parties have not agreed otherwise.*

Art 39. Form of a transaction

1. *The form of a transaction is determined under the law of the place of performance of such transaction.*
2. *Transaction dealing with an immoveable and with the rights to such immoveable is determined under the law of the Contracting Party in whose territory the immoveable is situated.*

Art 40. Compensating for damage

1. *Obligations to compensate for damage, except the obligations arising from contract and other lawful acts, are determined under the law of the Contracting Party in whose territory the act or other event giving rise to the claim for damage occurred.*
2. *When the person causing the damage and the person suffering the damage are the nationals of the same Contracting Party, the law of the Contracting Party in whose court the application is made shall be applied.*
3. *In the matters referred to in points 1 and 2 of the present article the competent court is the court of the Contracting Party in whose territory the act or other event giving rise to the claim for damage occurred. The person suffering the damage may also bring a claim in the courts of the Contracting Party in whose territory the defendant has his/her residence.*

SUCCESSION

Art 41. Principle of equal rights

The nationals of one Contracting Party are considered equal to the nationals of the other Contracting Party living in the territory of the Contracting Party in their right to draw up wills or declare null the wills to the assets which are located in the territory of the other Contracting Party or in the rights which have to be exercised in there, but also in the right to acquire, by succession, assets or rights. The assets and rights are transferred to them on the same conditions, which are applied to the nationals of the Contracting Party who live in its territory.

Art 42. Right to inherit

1. *The right to inherit movable property is governed by the law of the Contracting Party in whose territory the deceased had his last place of residence.*
2. *The right to inherit immovable property if governed by the law of the Contracting Party in whose territory the immovable property is located.*

Art 43. Escheat

When, according to the law of a Contracting Party, an escheat (which the state inherits according to the law) goes to the state, movable property is given to the state whose national the deceased was at the time of his/her death, but the immovable property will go to the state in whose territory it is located.

Art 44. Form of a testament

The form of a testament is determined by the law of the Contracting Party whose national the deceased was at the time of his/her death. However, it is sufficient if the law of the Contracting Party in whose territory the testament was made is complied with. This provision is also applied to the annulment of testament.

Art 45. Jurisdiction in succession matters

1. *The authorities of the Contracting Party in whose territory the deceased had his/her last place of residence will proceed with the cases of succession of movables, except in the cases provided by point 2 of the present Art.*
2. *When all the movables, which belonged to the deceased are located in the Contracting Party where the deceased did not have his/her last place of residence, the authorities of this Contracting Party proceed with the cases of succession, under the application of the successor or the legatee, if all the successors so agree.*
3. *The authorities of the Contracting Party in whose territory the immoveable is situated proceed with the succession over this immovable.*
4. *The provisions of the present Art will also be applied to the disputes over succession.*

Art 46. Measures for the protection of the assets of the deceased's estate

1. *The authorities of one Contracting Party take measures under their law for the protection of assets forming part of an estate located in the territory of that Contracting Party, which are left by the nationals of the other Contracting Party.*
2. *The authorities responsible for taking the measures for the protection of the assets forming part of the estate are obliged to inform the consul of the other Contracting Party without delays of the death of the deceased and the persons who have declared their right to inherit, of the circumstances known to them which concern*

the persons having right to inherit and of their place of stay, of the existence of will, of the extent and value of the assets forming the estate to be inherited, but also of the measures taken for the protection of the assets forming part of the estate.

3. *When so requested by the diplomatic or consular agency, all movable property and documents of the deceased are given over to such organ.*

Art 47.

The diplomatic or consular agencies of one Contracting Party have a right to represent the interests of the nationals of this state in the succession matters in front of the authorities of the other Contracting Party without any special authorization being required when such nationals cannot, due to being away or for other compelling reasons, to protect their rights and interests in time and if they have not appointed any representatives.

Art 48.

When a national of one Contracting Party died at the time of staying in the territory of the other Contracting Party where he/she did not have permanent place of residence, his/her things are, under the list of such things, handed over to the diplomatic or consular agencies of the Contracting Party whose national the deceased was.

Art 49. Handing over the deceased's estate

1. *When the movable assets belonging to the estate of the deceased or the monetary payment received for the sale of the immovable or movable assets belonging to the estate of the deceased has to be handed over, after the proceedings on succession, to the successors whose place of residence or place of stay is in the territory of the other Contracting Party, the movable assets or the monetary payment is handed over to the diplomatic or consular agency of that Contracting Party.*
2. *The authority competent in the succession matters makes an order on the handing over of the assets belonging to the estate of the deceased to the consular or diplomatic agencies.*
3. *These assets can be handed over to the successors if:*
   1) *all the claims of the creditors which have been made by the deadline specified by the law of the Contracting Party in whose territory the assets of the estate are situated have been paid or secured;*
   2) *all the fees relating to the succession have been paid or secured;*
   3) *the competent authorities have given, if necessary, a permission for the transport of the assets.*
4. *The payments are transferred according to the law applicable in the territory of the Contracting Party.*

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

Art 50. Recognition and enforcement of the judgments made in civil and family and administrative matters and also of the judgments made in criminal matters according to which a person was obliged to indemnify damages or pay a fine

The Contracting Parties mutually recognize and enforce enforceable judgments of the judicial authorities handed down in civil and family and administrative matters and also the judgments handed down in criminal matters according to which a person was obliged to indemnify damages or pay a fine. When according to Art 16 of the present

Treaty there existed no right for a legal aid, the fees of court, including the fees for the defence lawyer shall be enforced.
The decisions of the custodial, guardian authorities and the family act registries and the decisions of other authorities made in civil and family matters which do not require, by their nature, any enforcement, are also recognised without any special procedure being required.

Art 51. Examination of the requests for the enforcement of judgments

1. *The courts of the Contracting Party in whose territory the judgment has to be enforced are competent to examine the requests for enforcement.*
2. *The request for the enforcement of judgment is made to the court, which made the decision at the first instance. The request, which has been submitted to the court which made the decision at the first instance is transferred to the court which is competent to decide upon the request for enforcement.*
3. *The requisites of the request are determined by the law of the Contracting Party in whose territory the judgment has to be enforced.*

Art 52.

It is necessary to add to the permission for enforcement:

1) *A copy of the judgment attested by the court, official document on the entry into force of the judgment, unless this comes directly from the text of the judgment, but also the document on the enforcement of the judgment, if the judgment was previously enforced in the territory of the requesting Contracting Party. In the case where such document is not provided, it is considered that the judgment has not been enforced before;*
2) *a documents which provides that the defendant who did not participate in the process, but, according to the rules of procedure, had to participate, had been served in due time and in appropriate form with the writ of summons.*

Art 53.

When the court has doubts when issuing the permission for enforcement, it can ask explanations from the person, who has initiated the request for the enforcement, but also ask explanations on the essence of the request from the debtor and, if necessary, ask explanations from the court which made the judgment.

Art 54. Enforcement procedure

The enforcement procedure is regulated by the law of the Contracting Party in whose territory the judgment has to be enforced.

Art 55.

To the expenses relating to the enforcement the law of the Contracting Party in whose territory the judgment has to be enforced is applied.

Art 56. Refusal from the recognition or enforcement of judgments

It is possible to refuse to recognise or give permission for the enforcement of a judgment on the condition that:

1) *the person initiating the request or the defendant did not participate in the proceedings since he/she or his/her representative was not served the writ of summons in due time and in due form;*

2) *when, on the same legal dispute and between the same parties in the territory of the Contracting Party in whose territory the judgment has to be recognised, a judgment which has entered into force has been made or if the authority of this state has already started proceedings in the same matter;*
3) *when, according to the provisions of the present Treaty and, in the cases not provided by the present Treaty, if according to the law of the Contracting Party in whose territory the judgment has to be enforced, the matter falls into the exclusive competence of the authority of this state.*

Art 57.
The provisions of Arts 50–56 shall also be applied to the court settlements approved by courts.

Art 58. Transport of things and transfer of sums
The provisions of the present Treaty on the enforcement of judgments do not concern the legislation of the Contracting Parties on the transfer and transport of sums and assets received as a result of the enforcement of judgments.

II Section

LEGAL ASSISTANCE IN CRIMINAL MATTERS. CONDUCT OF CRIMINAL PROCEDURE

Arts 59–78 have been left out of this translation, as these Arts do not concern the matters dealt with in the dissertation.

III Part
FINAL PROVISIONS

Art 79. Entry into force of the Treaty
The present Treaty will be ratified and will enter into force after 30 days from the exchange of the letters of ratification.

Art 80. Term for the validity of the Treaty
1. *The present Treaty will be in force for five years from the date of entry into force.*
2. *The present Treaty will continue to be in force in the next five-year period unless either of the Contracting Parties denounces it by informing of it with a note to the other Contracting Party at least six months before the end of the term of validity of the present Treaty.*

Concluded in Moscow, on 26 January 1993, in two exemplary, one in Estonian and in one in Russian, while both texts have equal force.

In the name of the Republic of Estonia	***In the name of the Russian Federation***
Minister of Justice K. KAMA	***Minister of Justice N. FJODOROV***

ANNEX 2. Estonia-Ukraine legal assistance treaty

Treaty between the Republic of Estonia and the Ukraine on legal assistance and legal relationships in civil and criminal matters
Passed on 15 February 1995

The Republic of Estonia and the Ukraine, which are from now on referred to as the 'Contracting Parties' by regarding as important the development of mutual legal assistance in civil and criminal matters, agreed on the following:

The first part.
GENERAL PROVISIONS

Art 1. Legal protection

1. *The nationals of one Contracting Party have the same legal protection for their personal and material rights in the territory of the other Contracting Party as the nationals of the other Contracting Party.*
   This applies accordingly to the legal persons established under the legislation of each of the Contracting Parties.
2. *The nationals of one Contracting Party have a right to turn freely and without any obstacles to the courts, public prosecutor's office and notarial offices (hereinafter – judicial authorities) and to the other authorities who deal with civil- and criminal matters, they can appear in front of such authorities, request proceedings, submit claims and make other procedural acts on the same condition as the nationals of the other Contracting Party.*
3. *In the meaning of the present Treaty the family matters are considered to form part of the civil matters.*

Art 2. Legal assistance

1. *Judicial authorities of the Contracting Parties provide mutual legal assistance in civil and criminal matters in accordance with the provisions of the present Treaty.*
2. *Judicial authorities also provide legal assistance to other authorities in whose competence the matters referred to in point 1 of the present Art fall.*
3. *Other authorities in whose competence the matters referred to in point 1 of the present Art fall shall send the requests for legal assistance via judicial authorities.*

Art 3. The extent of legal assistance

Legal assistance includes the exercise of procedural acts provided by the legislation of the Contracting Party receiving the request, such as hearing the parties, accused persons being tried, victims of a crime, witnesses and experts, making expertise, conducting judicial examinations and handing over evidence. Initiating surveillance of persons who have committed a crime and the extradition of such persons, recognition and enforcement of the judgments made in civil cases, service and transfer of documents and, at the request of the other Contracting Party, providing data on the punishments of the accused person.

Art 4. Order of communication

While providing legal assistance the authorities of the Contracting Parties communicate with each other through the Ministry of Justice of the Republic of Estonia and

the Prosecutors Office of the Republic of Estonia and the Ministry of Justice of the Ukraine and the Prosecutors Office of the Ukraine, unless otherwise provided by the present Treaty.

Art 5. Language

1. *The requests on the legal assistance will be composed in the language of the requesting Contracting Party and the authenticated translations to the Contracting Party receiving the request will be added to the request.*
2. *The translation will be authenticated by the official translator, notary, official of the requesting authority or by the diplomatic or consular agency of the requesting Contracting Party.*

Art 6. Drawing up documents

Documents, which the judicial and other authorities send through legal assistance have to be authenticated by the signature of the competent person and by the seal of the requesting authority.

Art 7. Form for the instruction for legal assistance

In the instruction for legal assistance the following has to be provided:

1) *the name of the requesting authority;*
2) *the name of the receiving authority;*
3) *the name of the case in relation to which the assistance is requested;*
4) *the first and family names of the parties, accused persons, persons being tried or the persons declared guilty, their nationality, field of occupation and permanent place of residence or location and, in the case of legal persons, their name and place of location;*
5) *the names of their representatives and addresses;*
6) *the content of the instruction, in criminal matters also the description of the circumstances of the crime committed and its juridical qualification under the criminal code of the requesting Contracting Party.*

Art 8. Order for fulfilling the request

1. *While carrying out the request for legal assistance the judicial authority to which the request has been addressed shall apply its own law. However, at the request of the requesting authority it can apply the procedural law of the Contracting Party, which has made the request for legal assistance if such provisions are not contrary to the legislation of the requested state.*
2. *When the judicial authority to which the request is made is not competent to carry out the request for legal assistance it will transmit the request to the competent judicial authority and will inform the requesting authority of such transmission.*
3. *The judicial authority to which the request for legal assistance is made will inform the requesting authority of the time and place of carrying out the request.*
4. *After performing the request for legal assistance the judicial authority to which the request is made shall send the documents to the requesting authority; if the request could not have been carried out, it shall return the request and provide information on the circumstances impeding the carrying out of the request.*

Art 9. Order for servicing documents

1. *The receiving authority shall serve the documents according to the rules applicable in its state, provided that the documents have been drawn up in its language or supplemented with attested translation. If the documents are not drawn up in the language of the receiving authority or are not supplemented with translation, the documents are served on the person being served if he is willing to voluntarily receive them.*
2. *The exact address of the person being served and the name of the document being served have to be included in the request for service. When the address included in the request for service turns out to be incomplete or inaccurate, the receiving authority shall apply the methods provided by its own law in order to determine the exact address of the person being served.*

Art 10. Acknowledgement the service of documents

The acknowledgement of service is registered according to the rules applicable in the Contracting Party to whom the request for legal assistance is made. The time and place of service and the person to whom the document was served have to be included in the acknowledgement of service.

Art 11. Serving the documents and hearing the nationals by diplomatic or consular agents

The Contracting Parties have a right to serve documents on and hear their own nationals by diplomatic or consular agents. This has to be carried out without the application of any compulsion.

Art 12. Calling the victim of the crime, witness or expert abroad

1. *When during the preliminary inquiry or court proceedings in the territory of one Contracting Party it is necessary to call the victim of a crime, a witness or an expert residing in another Contracting Party, a request must be made to the appropriate authority of this Contracting Party with the instruction to serve the writ of summons.*
2. *The writ of summons must not contain any sanction for the case of failure to appear.*
3. *The victim of a crime, a witness or an expert who has, regardless of his/her nationality, voluntarily appeared under the writ of summons in front of the appropriate organ in another Contracting Party cannot be subjected to any criminal or administrative responsibility, taken under custody or punished in relation to an act which has been committed before he crossed the state border. These persons cannot also be subjected to any criminal or administrative responsibility or be punished in relation to their statements as witnesses or opinions given as experts or in relation to the act, which is the object of the investigation.*
4. *This privilege does not apply to the victim of a crime, witness or expert if he has does not, within 15 days of the moment when he was informed that his/her presence is not necessary, leave the territory of the requesting Contracting Party. The time when the victim of a crime, witness or expert cannot leave the territory of the Contracting Party due to the circumstances beyond his/her power is not taken into account to calculate this time period.*
5. *The victims of a crime, witnesses and experts who, under the writ of summons, have come to the territory of another Contracting Party have a right to receive compensation from the requesting authority for the expenses related to their travelling and staying abroad and for the loss of salary incurred while being absent from work;*

additionally, the experts have a right to receive payment for carrying out expertise. The writ of summons must contain information on which payments the persons have a right to; at the request of persons, the requesting Contracting Party shall pay advance payment in order to compensate for the corresponding expenses.

Art 13. The validity of documents

1. *The documents drawn up or authenticated by the appropriate authority of one Contracting Party, which have been sealed and authenticated by the signature of the competent person, have the right of document in the territory of the other Contracting Party without any other attestation. This also applies to copies and translations, which have been authenticated by the relevant authority.*
2. *Documents, which are considered official documents in the territory of one Contracting Party, have the same official evidential force in the territory of another Contracting Party.*

Art 14. The expenses relating to the provision of legal assistance

1. *The Contracting Parties bear the expenses relating to the provision of legal assistance in their territory.*
2. *Authority to whom the request has been submitted informs the requesting authority the sum of expenses. When the requesting authority collects the payment for the expenses from the person who is obliged to compensate such expenses the sums collected shall be collected in favour of the Contracting Party who collected them.*

Art 15. Providing information

At the request, the Ministry of Justice and the Prosecutors Office of the Republic of Estonia and the Ministry of Justice and the Prosecutors Office of the Ukraine shall provide information for each other on the legislation, which was applicable or is applicable in their states and on the application of such legislation by the judicial authorities.

Art 16. Free legal aid

In the cases provided by the laws of the Contracting Parties, the nationals of the other Contracting Party are provided with free legal aid in the courts and other authorities of the Contracting Party and they are guaranteed free proceedings on the same grounds and having the same advantages as the nationals of this Contracting Party.

Art 17. Transmitting family certificates and other documents

1. *The authorities registering family acts in one Contracting Party send, upon the request of the judicial authorities of the other Contracting Party, directly transcripts of family acts registrations for the official use.*
2. *Upon the request of the nationals of one Contracting Party for the transfer of certificates on the registration of family acts, are sent directly to the authority registering family acts in the other Contracting Party. The applicant shall receive these documents from the Contracting Party whose organ issued the documents.*
3. *The documents on the education, work experience and other information which concerns the personal and material rights and interests of the national are delivered and transmitted according to point 2 of the present Art.*
4. *The documents referred to in points 1–3 of the present Art are transmitted without translations and for free.*

Art 18. Refusal to provide legal assistance

Legal assistance is not provided if the provision of it may damage the sovereignty or security of the receiving Contracting Party or if it would be contrary to the general principles of the law of the receiving Contracting Party.

The second part.
SPECIAL PROVISIONS
1. Section. LEGAL ASSISTANCE AND LEGAL RELATIONS IN CIVIL- AND FAMILY MATTERS

Art 19. Exemption of court fees

The nationals of one Contracting Party are exempted from bearing the court expenses in the territory of other Contracting Party on the same grounds and to the same extent as the nationals of that Contracting Party.

Art 20. Issuing documents on the personal, family and material status of a person

1. *A document on personal, family and material status of a person which is necessary in order to receive permission on the exemption of court fees is issued by the competent organ in whose territory the applicant resides or stays.*
2. *When the applicant does not have a residence or a place of stay in a territory of a Contracting Party the document issued or attested by diplomatic or consular agent of his/her state is sufficient.*
3. *The court, which decides upon the exemption on court fees, may ask additional explanation from the organ who has issued the document.*

Art 21. Jurisdiction of court

1. *Unless provided otherwise by the present Treaty the courts of the Contracting Parties are competent to hear civil- and family matters if the defendant has a place of residence in their territory. They are competent in the actions filed against legal persons if the administrative organ, representative office or branch of the legal person is located in the territory of their Contracting Party.*
2. *The courts of the Contracting Parties will also hear the case if this has been agreed by the parties in writing. When such agreement exists the court terminates proceedings at the request of the defendant if the request has been made before the objections on the nature of the application have been made. The exclusive competence of the courts cannot be changed by an agreement of the parties.*
3. *When the same proceedings between the same parties on the same issue and on the same ground are brought in the courts of both Contracting Parties and both courts are competent under the present Treaty the court which initiated proceedings later shall terminate the proceedings.*

Art 22. Legal passive capacity and legal active capacity

1. *Legal active capacity of a person is determined under the law of the Contracting Party whose national the person is.*
2. *Legal passive capacity of a legal person is determined under the law of the Contracting Party in whose territory the legal person has been formed.*

Art 23. Limiting the active legal capacity of a person or declaring the person incapable

1. *In the matters of limiting the active legal capacity of a person or declaring the person incapable the law of the Contracting Party is applied and the courts of the Contracting Party are competent whose national the person is.*
2. *When the authority of one Contracting Party determines that there are grounds for limiting the active legal capacity of a person or declare incapable a person whose place of residence or place of stay is in the territory of this Contracting Party, it will inform of it the appropriate authority in the other Contracting Party. When the authority informed in such a way declares that it lets the authority of the place of residence or the place of stay of a person to take further measures or does not inform of its opinion within three months, the authority in the place of residence or the place of stay of the person can deal with the matter of limiting the active legal capacity of a person or the matter of declaring the person incapable in accordance with the law of its state when the grounds for such matters are also provided by the law of the Contracting Party whose national the person is. The decision on limiting the legal capacity of a person or declaring the person incapable has to be sent to the competent authority in the other Contracting Party.*
3. *Points 1 and 2 of the present Art are also applied in the cases where the declaration on limiting the active legal capacity of a person is being declared null and void or where the active legal capacity of the person is being restored.*
4. *In urgent cases, the authority of the place of residence or the place of stay of a person whose capacity is being limited or who is to be declared incapable can, on its own initiative, take relevant measures in order to protect the person in question or his/her property. The decisions on the measures taken have to be sent to the appropriate authority in the Contracting Party whose national the person under question is; these decisions have to be declared null and void if the authority of this Contracting Party decides otherwise.*

Art 24. Declaring a person missing or dead and establishing the fact of death

1. *In the matters of declaring a person missing or dead or establishing the fact of death of a person the competent authorities are the authorities of the Contracting Party whose national the person was at the time when, according to the last information, he/she was alive.*
2. *The authorities of one Contracting Party can declare a national of another Contracting Party missing or dead or establish the fact of his/her death at the request of the persons living in its territory when the rights and interests of these persons are grounded on the law of that Contracting Party.*
3. *In the patters provided by points 1 and 2 of the present Art the authorities of the Contracting Parties shall apply their own law.*

Art 25. Conclusion of marriage

1. *The preconditions for the conclusion of marriage are determined for each person entering the marriage by the law of the Contracting Party whose national he/she is. In addition, the restrictions of the Contracting Party in whose territory the marriage is concluded have to be followed.*
2. *The form of the conclusion of marriage is determined by the law of the Contracting Party in whose territory the marriage is concluded.*

Art 26. Personal and material rights of spouses

1. *Personal and material rights of spouses are determined by the law of the Contracting Party in whose territory the spouses have a common residence.*
2. *When one spouse lives in the territory of one Contracting Party, the other in the territory of the other Contracting Party their personal and material rights are determined by the law of the Contracting Party whose nationals they are.*
3. *When one spouse is a national of one Contracting Party, the other a national of the other Contracting Party and one of them lives in the territory of one Contracting Party and the other in the territory of the other Contracting Party, their personal and material rights are determined by the law of the Contracting Party in whose territory they had their last common residence.*
4. *When the persons mentioned in point 3 of the present Art did not have a common residence in the territories of the Contracting Parties, the law of the Contracting Party whose authority is hearing the matter shall be applied.*

Art 27. Divorce and annulment of marriage

1. *In divorce matters the law of the Contracting Party whose nationals the spouses were at the time of making the application shall be applied and the authorities of that Contracting Party are competent to hear the matter. When the spouses have a residence in the territory of the other Contracting Party the authorities of that Contracting Party are also competent.*
2. *When, at the time of making the application, one spouse is a national of one Contracting Party, the other a national of the other Contracting Party and one of them lives in the territory of one Contracting Party and the other in the territory of the other Contracting Party, the authorities of both Contracting Parties are competent. They will apply the law of their own Contracting Party.*
3. *In the annulment of marriage matters the law of the Contracting Party, which, according to Art 25 was applied to the conclusion of marriage shall be applied. The jurisdiction of the courts will be determined under points 1 and 2 of the present Art.*

Art 28. Legal relationships between parents and children

1. *Establishing and disputing parenthood and the establishment of birth from a marriage are governed by the law of the Contracting Party whose nationality the child holds by birth.*
2. *The relationship between parents and children is determined by the law of the Contracting Party in whose territory they have a common residence.*
3. *When one of the parents or children lives in the territory of the other Contracting Party, their relationship is determined by the law of the Contracting Party whose national the child is.*
4. *The relationship between the illegitimate child and his/her mother and father is determined by the law of the state whose national the child is by birth.*
5. *In the legal relationships referred to in points 1–4 of the present Art the courts competent to make decisions are the courts of the Contracting Party which laws have to applied in these cases.*
6. *When the claimant and the defendant live both in the territory of one Contracting Party the courts of that Contracting Party are also competent when points 1–4 of the present Art are followed.*

Art 29. Adoption

1. *The law of the Contracting Party whose national is the person adopting the child at the time of making the application is applied to the adoption. When the person adopting the child is the national of one Contracting Party but his/her place of residence is in the territory of the other Contracting Party, the law of this Contracting Party is applied.*
2. *When so required by the law of the Contracting Party whose national the child is, it is necessary to establish the consent of the child being adopted, the consent of his/her representative, the permission of the competent state authority; the limitations are applied to the adoption which is related to the change of residence to the other state of the child being adopted.*
3. *When a child is adopted by the spouses of which one is the national of one Contracting Party, but the other is the national of the other Contracting Party, it is necessary to follow the requirements prescribed by the laws of the both Contracting Parties. When the place of residence is in the territory of one Contracting Party the law of this Contracting Party is applied.*
4. *The provisions of the abovementioned points accordingly apply to the declaring the adoption void and its invalidation.*
5. *In the matters of adoption, declaring the adoption void and invalidating the adoption, the authority of the Contracting Party whose national the person adopting the child is at the time of making the application is applied. When the person being adopted is the national of one Contracting Party, but lives in the territory of the other Contracting Party where is also the place of residence of the person adopting the child, the authority of this Contracting Party is also competent.*

Art 30. Guardianship and curatorship

1. *Unless otherwise provided by the present Treaty, the matters of guardianship and curatorship over the nationals of Contracting Parties, provided that the present Treaty does not provide otherwise, the guardianship or curatorship authority of the Contracting Party whose national is the person under guardianship or curatorship are competent. In these cases the law of this Contracting Party is applied.*
2. *The relationship between the person holding the guardianship or curatorship and the person under guardianship or curatorship are determined by the law of the Contracting Party whose guardianship authority determined the guardian or curator.*
3. *When the measures of guardianship or curatorship are necessary for the interest of person under guardianship or curatorship whose place of residence or place of stay is in the territory of the other Contracting Party the guardianship or curatorship authority of that Contracting Party has to inform the authority competent under point 1 of the present Art without delays.*
4. *In urgent matters the guardianship or curatorship authority of the other Contracting Party may apply necessary measures, but has to inform the guardianship or curatorship authority competent under point 1 of the present Art of the measures taken without delays. The measures taken will be in force until that authority decides otherwise.*
5. *The guardianship or curatorship authority competent according to point 1 of the present Art may hand over the guardianship or curatorship to the competent authorities of the other Contracting Party if the place of residence or place of stay or property of the person under guardianship or curatorship is located in that state.*

Such handing over is valid only if the authority receiving such request agrees to take over the guardianship and curatorship and informs of it the authority making the request.

6. *The authority who, according to point 5 of the present Art took over the guardianship or curatorship will exercise it according to the law of its Contracting Party. Such authority is not competent to decide upon the questions which relate to the status of the person under guardianship or curatorship, but it can give consent to the conclusion of marriage which is necessary under the law of the Contracting Party whose national this person is.*

Art 31. Ownership

1. *The ownership to immovable property is determined under the law of the Contracting Party in whose territory the immovable in question is situated.*
2. *The ownership to vehicles, which have to be registered in the national registries, is determined by the law of the Contracting Party in whose territory the authority registering the vehicles is located.*
3. *The origination or termination of property rights to the right of ownership or other assets is determined by the law of the Contracting Party in whose territory the assets were at the time when the act or other event giving rise to the origin or termination of such right occurred. The origination or termination of property rights to the assets, which are the object of a transaction is determined by the law of the performance of transaction provided that the parties have not agreed otherwise.*

Art 32. Form of a transaction

1. *The form of a transaction is determined under the law of the place of performance of such transaction.*
2. *Transaction dealing with an immoveable and with the rights to such immoveable is determined under the law of the Contracting Party in whose territory the immoveable is situated.*

Art 33. Compensating for damage

1. *Obligations to compensate for damage, except the obligations arising from contract and other lawful acts, are determined under the law of the Contracting Party in whose territory the act or other event giving rise to the claim for damage occurred.*
2. *When the person causing the damage and the person suffering the damage are the nationals of the same Contracting Party, the law of the Contracting Party in whose court the application is made shall be applied.*
3. *In the matters referred to in points 1 and 2 of the present Art the competent court is the court of the Contracting Party in whose territory the act or other event giving rise to the claim for damage occurred. The person suffering the damage may also bring a claim in the courts of the Contracting Party in whose territory the defendant has his/her residence.*

Art 34. Right to inherit

1. *The right to inherit movable property is governed by the law of the Contracting Party in whose territory the deceased had his last place of residence.*
2. *The right to inherit immovable property if governed by the law of the Contracting Party in whose territory the immovable property is located.*

3. *The nationals of one Contracting Party are considered equal to the nationals of the other Contracting Party living in the territory of the Contracting Party in their right to draw up wills or declare null the wills to the assets which are located in the territory of the other Contracting Party or in the rights which have to be exercised in there, but also in the right to acquire, by succession, assets or rights. The assets and rights are transferred to them on the same conditions, which are applied to the nationals of the Contracting Party who live in its territory.*

Art 35. Passing of the estate to the state

When, according to the law of a Contracting Party, an escheat which the state inherits according to the law goes to the state, movable property is given to the state whose national the deceased was at the time of his/her death, but the immovable property will go to the state in whose territory it is located.

Art 36. Form of a testament

The form of a testament is determined by the law of the Contracting Party whose national the deceased was at the time of his/her death. However, it is sufficient if the law of the Contracting Party in whose territory the testament was made is complied with. This provision is also applied to the annulment of testament.

Art 37. Jurisdiction in succession matters

1. *The authorities of the Contracting Party in whose territory the deceased had his/her last place of residence will proceed with the cases of succession of movables, except in the cases provided by point 2 of the present Art.*
2. *When all the movables, which belonged to the deceased are located in the Contracting Party where the deceased did not have his/her last place of residence, the authorities of this Contracting Party proceed with the cases of succession, under the application of the successor or the legatee, if all the successors so agree.*
3. *The authorities of the Contracting Party in whose territory the immoveable is situated proceed with the succession over this immovable.*
4. *The provisions of the present Art will also be applied to the disputes over succession.*

Art 38. Measures for the protection of the assets of the deceased's estate

1. *The authorities of one Contracting Party take measures under their law for the protection of assets forming part of an estate located in the territory of that Contracting Party, which are left by the nationals of the other Contracting Party.*
2. *The authorities responsible for taking the measures for the protection of the assets forming part of the estate are obliged to inform the consul of the other Contracting Party without delays of the death of the deceased and the persons who have declared their right to inherit, of the circumstances known to them which concern the persons having right to inherit and of their place of stay, of the existence of will, of the extent and value of the assets forming the estate to be inherited, but also of the measures taken for the protection of the assets forming part of the estate.*
3. *When so requested by the diplomatic or consular agency, all movable property and documents of the deceased are given over to such organ.*
4. *The diplomatic or consular agencies of one Contracting Party have a right to represent the interests of the nationals of this state in the succession matters in front of the authorities of the other Contracting Party without any special authorization*

being required when such nationals cannot, due to being away or for other compelling reasons, to protect their rights and interests in time and if they have not appointed any representatives.

5. *When a national of one Contracting Party died at the time of staying in the territory of the other Contracting Party where he/she did not have permanent place of residence, his/her things are, under the list of such things, handed over to the diplomatic or consular agencies of the Contracting Party whose national the deceased was.*

Art 39. Handing over the deceased's estate

1. *When the movable assets belonging to the estate of the deceased or the monetary payment received for the sale of the movable or immovable assets belonging to the estate of the deceased has to be handed over, after the proceedings on succession, to the successors whose place of residence or place of stay is in the territory of the other Contracting Party, the movable assets or the monetary payment is handed over to the diplomatic or consular agency of that Contracting Party.*
2. *The authority competent in the succession matters makes an order on the handing over of the assets belonging to the estate of the deceased to the consular or diplomatic agencies.*
3. *These assets can be handed over to the successors if:*
   1) all the claims of the creditors which have been made by the deadline specified by the law of the Contracting Party in whose territory the assets of the estate are situated have been paid or secured;
   2) all the fees relating to the succession have been paid or secured;
   3) the competent authorities have given, if necessary, a permission for the transport of the assets.
4. *The payments are transferred according to the law applicable in the territory of the Contracting Party.*

2. Section. RECOGNITION AND ENFORCEMENT OF JUDGMENTS

Art 40. Recognition and enforcement of the judgments made in civil matters and also of the judgments made in criminal matters according to which a person was obliged to indemnify damages

1. *The Contracting Parties mutually recognize and enforce enforceable judgments of the judicial authorities handed down in civil matters and also the judgments handed down in criminal matters according to which a person was obliged to indemnify damages.*
2. *The decisions of the custodial, guardian authorities and the family act registries and the decisions of other authorities made in civil and family matters which do not require, by their nature, any enforcement, are also recognised without any special procedure being required.*

Art 41. Examination of the requests for the enforcement of judgments

1. *The courts of the Contracting Party in whose territory the judgment has to be enforced are competent to examine the requests for enforcement.*
2. *The request for the enforcement of judgment is made to the court, which made the decision at the first instance. The request, which has been submitted to the court,*

which made the decision at the first instance, is transferred to the court which is competent to decide upon the request for enforcement.

3. *The requisites of the request are determined by the law of the Contracting Party in whose territory the judgment has to be enforced.*
4. *It is necessary to add to the permission for enforcement:*
   1) *A copy of the judgment attested by the court, official document on the entry into force of the judgment, unless this comes directly from the text of the judgment, but also the document on the enforcement of the judgment, if the judgment was previously enforced in the territory of the requesting Contracting Party;*
   2) *a documents which provides that the defendant who did not participate in the process, was, at least once, served in due time and in appropriate form with the writ of summons.*
   3) *The attested translations of the documents referred to in subparagraphs 1–2 of the present point.*
5. *When the court has doubts when issuing the permission for enforcement, it can ask explanations from the person, who has initiated the request for the enforcement, but also ask explanations on the essence of the request from the debtor and, if necessary, ask explanations from the court, which made the judgment.*

Art 42. Enforcement procedure

1. *The enforcement procedure is regulated by the law of the Contracting Party in whose territory the judgment has to be enforced.*
2. *To the expenses relating to the enforcement the law of the Contracting Party in whose territory the judgment has to be enforced is applied.*

Art 43. Refusal from the recognition or enforcement of judgments

It is possible to refuse to recognise or give permission for the enforcement of a judgment on the condition that:

1) *the person initiating the request or the defendant did not participate in the proceedings since he/she or his/her representative was not served the writ of summons in due time and in due form;*
2) *when, on the same legal dispute and between the same parties in the territory of the Contracting Party in whose territory the judgment has to be recognised, a judgment which has entered into force has been made or if the authority of this state has already started proceedings in the same matter;*
3) *when, according to the provisions of the present Treaty and, in the cases not provided by the present Treaty, if according to the law of the Contracting Party in whose territory the judgment has to be enforced, the matter falls into the exclusive competence of the authority of this state.*

Art 44 Recognition of court settlements

The provisions of Arts 40–43 shall also be applied to the court settlements approved by courts.

Art 45. Transport of things and transfer of sums

The provisions of the present Treaty on the enforcement of judgments do not concern the legislation of the Contracting Parties on the transfer and transport of sums and assets received as a result of the enforcement of judgments.

III Section LEGAL ASSISTANCE AND LEGAL RELATIONS IN CRIMINAL MATTERS

Arts 46–64 have been left out of this translation, as these Arts do not concern the matters dealt with in the dissertation.

The third part.
FINAL PROVISIONS

Art 65. Entry into force of the Treaty
The present Treaty will be ratified and will enter into force after 30 days from the exchange of the letters of ratification, which takes place in Tallinn.

Art 66. Term for the validity of the Treaty
1. *The present Treaty will be in force for five years from the date of entry into force.*
2. *The Treaty will continue to be in force in the next five-year period unless either of the Contracting Parties denounces it by informing of it with a note to the other Contracting Party at least six months before the end of the term of validity of the present Treaty.*
3. *The present Treaty may be amended and supplemented by the order of its conclusion.*

Concluded in Kiev, on 15 February 1995, in two exemplary, one in Estonian and one in Ukrainian, while both texts have equal force.

In the name of the Republic of Estonia	***In the name of the Ukraine***
A. Tarand	***V. Masol***

ANNEX 3. Overview on the Estonian case law on the legal assistance treaties concluded with third states

The following information is collected from the publicly accessible Estonian case law databases www.riigiteataja.ee and www.nc.ee and includes the information on the decisions, which have been made by the Estonian courts between 1 June 1998 and 1 September 2018. According to the publicly available databases, within this twenty-year period, the Estonian courts have relied upon or interpreted the provisions of the legal assistance treaties concluded with third states in 139 decisions (125 on the Estonia-Russia legal assistance treaties and 14 on the Estonia-Ukraine legal assistance treaty). Of these, 8 were made by the Supreme Court, 17 by the appellate courts (11 by Tallinn Circuit Court, 5 by Tartu Circuit Court and 1 by Viru Circuit Court) and 114 by the county courts (64 by Viru County Court, 37 by Harju County Court, 7 by Tartu County Court and 6 by Pärnu County Court). Note, however, that, for the reasons which have more to do with administrative deficiencies than legal policy, not all Estonian court decisions are published in the publicly available databases. Hence, the number of cases where the courts have interpreted or relied upon the provisions of the legal assistance treaties concluded with third states is probably higher than indicated in the following list. The list should, therefore, be taken only as an illustration of the practical relevance of the legal assistance treaties concluded with third states in practice.

Estonian case law on the Estonia-Russia legal assistance treaty

1. Order of the Estonian Supreme Court of 21 March in a civil case No 2-16-19080
2. Order of the Tartu County Court of 13 April 2017 in a civil case No 2-17-116786
3. Order of the Harju County Court of 14 November 2017 in a civil case No 2-17-14181
4. Order of the Tartu Circuit Court of 16 August 2017 in a civil case No 2-16-19080
5. Order of the Estonian Supreme Court of 14 June 2017 No 3-2-1-62-17
6. Order of the Tallinn Circuit Court of 11 April 2017 in a civil case No 2-16-18753
7. Order of the Tartu Circuit Court of 15 February 2017 in a civil case No 2-16-9424
8. Order of the Harju County Court of 30 June 2016 in a civil case No 2-16-9461
9. Order of the Viru County Court of 12 August 2016 in a civil case 2-16-107045
10. Order of the Harju County Court of 10 May 2016 in a civil case No 2-16-5731
11. Order of the Viru County Court of 4 March 2016 in a civil case No 2-15-16498
12. Order of the Viru County Court of 29 February 2016 in a civil case No 2-15-114486
13. Order of the Tallinn Circuit Court of 12 February 2016 in a civil case No 2-15-8286
14. Order of the Viru County Court of 16 November 2015 in a civil case No 2-15-16503
15. Order of the Viru County Court of 29 October 2015 in a civil case No 2-15-115288
16. Order of the Viru County Court of 27 October 2015 in a civil case No 2-15-108120
17. Order of the Tallinn Circuit Court of 26 October 2015 in a civil case No 2-15-109818

18. Order of the Tallinn Circuit Court of 1 January 2015 in a civil case No 2-15-101760
19. Order of the Harju County Court of 28 August 2015 in a civil case No 2-15-8571
20. Order of the Harju County Court of 18 August 2015 in a civil case No 2-15-11578
21. Order of the Viru County Court of 22 June 2015 in a civil case No -15-106021
22. Order of the Harju County Court of 22 May 2015 in a civil case No 2-15-6600
23. Order of the Tartu Circuit Court of 25 March 2015 in a civil case No 2-14-30347
24. Order of the Viru County Court of 13 March 2015 in a civil case No 2-15-599
25. Order of the Harju County Court of 28 February 2015 in civil case No 2-15-8571
26. Order of the Harju County Court of 3 February 2015 in a civil case No 2-14-57389
27. Judgment of the Tallinn Circuit Court of 26 January 2015 in a civil case No 2-14-5927
28. Order of the Tallinn Circuit Court of 20 January 2015 in a civil case No 2-14-24298
29. Order of the Estonian Supreme Court of 17 December 2014 No 3-2-1-140-14
30. Order of the Viru County Court of 24 October 2014 in a civil case No 2-14-55551
31. Order of the Viru County Court of 15 October 2014 in a civil case No 2-14-27750
32. Order of the Harju County Court of 10 October 2014 in a civil case No 2-14-52942
33. Judgment of the Pärnu County Court of 16 September 2014 in a civil case No 2-12-51000
34. Order of the Viru County Court of 4 September 2014 in a civil case No 2-14-14430
35. Order of the Pärnu County Court of 14 August 2014 in a civil case No 2-14-54427
36. Order of the Viru County Court of 7 August 2014 in a civil case No 2-13-45152
37. Order of the Harju County Court of 2 July 2014 in a civil case No 2-14-51225
38. Order of the Viru County Court of 4 June 2014 in a civil case No 2-14-9053
39. Judgment of the Harju County Court of 15 April 2014 in a civil case No 2-14-7845
40. Judgment of the Harju County Court of 31 March 2014 in a civil case No 2-13-30528
41. Order of the Viru County Court of 26 March 2014 in a civil case No 2-13-37483
42. Order of the Viru County Court of 25 March 2014 in a civil case No 2-13-48077
43. Order of the Tartu County Court of 7 January 2014 in a civil case No 2-13-22196
44. Order of the Tartu County Court of 18 December 2013 in a civil case No 2-13-23716
45. Order of the Tallinn Circuit Court of 11 December 2013 in a civil case No 2-13-29276
46. Order of the Viru County Court of 24 October 2013 in a civil case No 2-13-24865
47. Judgment of the Harju County Court of 21 June 2013 in a civil case No 2-13-30977
48. Order of the Viru County Court of 26 September 2013 in a civil case No 2-13-24205
49. Judgment of the Tallinn Circuit Court of 30 August 2013 in a civil case No 2-12-12614
50. Order of the Tartu Circuit Court of 26 June 2013 in a civil case No 2-12-54710
51. Order of the Harju County Court of 9 April 2013 in a civil case No 2-12-46762
52. Judgment of the Harju County Court of 21 March 2013 in a civil case No 2-12-46547
53. Order of the Viru County Court of 14 March 2013 in a civil case No 2-13-2551
54. Order of the Viru County Court of 19 February 2013 in a civil case No 2-12-56567

55. Order of the Viru County Court of 6 February 2013 in a civil case No 2-12-42075
56. Judgment of the Harju County Court of 22 November 2012 in a civil case No 2-11-590062
57. Order of the Pärnu County Court of 22 October 2012 in a civil case No 2-11-59881
58. Judgment of the Harju County Court of 6 August 2012 in a civil case No 2-12-19974
59. Judgment of the Viru County Court of 26 June 2012 in a civil case No 2-10-25311
60. Order of the Tartu County Court of 11 April 2012 in a civil case No 2-12-10892
61. Order of the Tartu County Court of 30 March 2012 in a civil case No 2-11-60758
62. Order of the Tartu County Court of 7 February 2012 in a civil case No 2-12-4125
63. Order of the Viru County Court of 27 December 2011 in a civil case No 2-11-47701
64. Judgment of the Harju County Court of 22 November 2011 in a civil case No 2-11-48978
65. Order of the Tartu County Court of 23 August 2011 in a civil case No 2-11-37524
66. Order of the Viru County Court of 22 July 2011 in a civil case No 2-10-46672
67. Judgment of the Tartu Circuit Court of 1 July 2011 in a civil case No 2-09-60282
68. Order of the Estonian Supreme Court of 11 January 2011 No 3-2-1-141-10
69. Order of the Viru County Court of 10 May 2010 in a civil case No 2-10-14670
70. Order of the Viru County Court of 29 April 2010 in a civil case No 2-05-163
71. Judgment of the Estonian Supreme Court of 9 December 2009 No 3-2-1-119-09
72. Order of the Viru County Court of 28 September 2009 in a civil case No 2-08-57443
73. Judgment of the Tallinn Circuit Court of 25 June 2009 in a civil case No 2-06-16756
74. Judgment of the Viru County Court of 17 June 2009 in a civil case No 2-09-847
75. Judgment of the Viru County Court of 8 June 2009 in a civil case No 2-08-80450
76. Judgment of the Viru County Court of 8 April 2009 in a civil case No 2-07-19764
77. Judgment of the Viru County Court of 6 April 2009 in a civil case No 2-08-89257
78. Order of the Pärnu County Court of 10 February 2009 in a civil case No 2-08-70800
79. Order of the Viru County Court of 3 February 2009 in a civil case No 2-08-86404
80. Order of the Viru County Court of 9 January 2009 in a civil case No 2-08-91480
81. Judgment of the Viru County Court of 19 December 2008 in a civil case No 2-08-11357
82. Judgment of the Tallinn Circuit Court of 27 November 2008 in a civil case No 2-07-30362
83. Order of the Viru County Court of 16 October 2008 in a civil case No 2-08-51989
84. Order of the Viru County Court of 3 October 2008 in a civil case No 2-04-632
85. Order of the Pärnu County Court of 17 September 2008 in a civil case No 2-08-53850
86. Judgment of the Pärnu County Court of 8 July 2008 in a civil case No 2-08-2368
87. Order of the Viru County Court of 25 June 2008 in a civil case No 2-07-44523
88. Order of the Harju County Court of 4 June 2008 in a civil case No 2-07-14599
89. Judgment of the Viru County Court of 19 May 2008 in a civil case No 2-07-5843
90. Order of the Harju County Court of 6 May 2008 in a civil case No 2-06-34914
91. Judgment of the Viru County Court of 3 March 2008 in a civil case No 2-07-39040

92. Judgment of the Viru County Court of 21 November 2007 in a civil case No 2-02-108
93. Order of the Harju County Court of 19 November 2007 in a civil case No 2-07-32086
94. Judgment of the Viru County Court 29 October 2007 in a civil case No 2-06-13549
95. Order of the Viru County Court of 16 October 2007 in a civil case No 2-07-3627
96. Order of the Viru County Court of 11 October 2007 in a civil case No 2-07-35540
97. Order of the Viru County Court of 1 October 2007 in a civil case No 2-07-39323
98. Order of the Viru County Court of 28 August 2007 in a civil case No 2-07-23771
99. Order of the Harju County Court of 31 July 2007 in a civil case No 2-06-34913
100. Order of the Harju County Court of 13 July 2007 in a civil case No 2-06-34912
101. Order of the Harju County Court of 29 June 2007 in a civil case No 2-06-38512
102. Judgment of the Harju County Court of 28 June 2007 in a civil case No 2-05-17184
103. Judgment of the Viru County Court of 20 June 2007 in a civil case No 2-06-1102
104. Order of the Harju County Court of 8 June 2007 in a civil case No 2-07-18057
105. Order of the Viru County Court of 19 April 2007 in a civil case No 2-07-2510
106. Judgment of the Viru County Court of 20 March 2007 in a civil case No 2-05-19252
107. Order of the Viru Circuit Court of 14 February 2007 in a civil case No 2-05-519
108. Judgment of the Viru County Court of 5 January 2007 in a civil case No 2-06-35959
109. Order of the Harju County Court of 11 December 2006 in a civil case No 2-06-17049
110. Order of the Viru County Court of 8 December 2006 in a civil case No 2-05-17832
111. Judgment of the Harju County Court of 1 December 2006 in a civil case No 2-05-2243
112. Order of the Tallinn Circuit Court of 30 November 2006 in a civil case No 2-06-4799
113. Judgment of the Viru County Court of 13 November 2006 in a civil case No 2-05-1723
114. Order of the Viru County Court of 30 October 2006 in a civil case No 2-06-21642
115. Order of the Viru County Court of 7 June 2006 in a civil case No 2-06-10248
116. Order of the Harju County Court of 22 May 2006 in a civil case No 2-06-4799
117. Order of the Viru County Court of 15 May 2006 in a civil case No 2-06-10493
118. Order of the Viru County Court of 27 March 2006 in a civil case No 2-06-5343
119. Judgment of the Viru County Court of 27 March 2006 in a civil case No 2-05-15271
120. Order of the Harju County Court of 20 March 2006 in a civil case No 2-05-15199
121. Order of the Viru County Court of 1 February 2006 in a civil case No 2-06-558
122. Order of the Viru County Court of 23 December 2005 in a civil case No 2-04-1399
123. Order of the Viru County Court of 23 December 2005 in a civil case No 2-1606/05
124. Order of the Estonian Supreme Court of 25 May 2005 No 3-3-4-1-05
125. Order of the Estonian Supreme Court of 17 December 1998 No 3-2-1-132-98

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1. Order of the Viru County Court of 22 September 2014 in a civil case No 2-14-22825
2. Judgment of the Harju County Court of 14 January 2013 in a civil case No 2-12-48448
3. Judgment of the Harju County Court of 23 October 2012 in a civil case No 2-12-3147
4. Order of the Viru County Court of 27 December 2011 in a civil case No 2-11-61214
5. Order of the Viru County Court of 26 March 2009 in a civil case No 2-08-69264
6. Order of the Harju County Court of 27 June 2008 in a civil case No 2-08-20058
7. Order of the Harju County Court of 8 May 2008 in a civil case No 2-06-5738
8. Order of the Viru County Court of 7 April 2008 in a civil case No 2-06-36850
9. Order of the Harju County Court of 25 March 2008 in a civil case No 2-08-3686
10. Order of the Harju County Court of 27 February 2008 in a civil case No 2-07-55944
11. Order of the Viru County Court of 12 June 2007 in a civil case No 2-07-10234
12. Order of the Harju County Court of 16 February 2007 in a civil case No 2-06-36905
13. Order of the Viru County Court of 23 January 2007 in a civil case No 2-06-25610
14. Order of the Estonian Supreme Court of 10 November 2000 No 3-2-1-125-00

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