Geert van Calster

# European Private International Law

*Second Edition*


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# EUROPEAN PRIVATE INTERNATIONAL LAW

As one of the most definitive texts on the market, *European Private International Law* provides an essential guide for both students and practitioners to the complex field of international litigation within the EU. The private international law of the Member States is increasingly regulated by European law, making private international law ever less 'national' and ever more EU based. Consequentially EU law in this area has penetrated national law to a very high degree, making it an essential area of study and an area of increasing importance to practising lawyers. This book provides a thorough overview of core European private international law, including the Brussels I, Rome I and Rome II Regulations (jurisdiction, applicable law for contracts and tort), while additional chapters deal with the recently adopted Succession Regulation, private international law and insolvency, freedom of establishment, and the impact of PIL on corporate social responsibility.

*To the memories of my mother, Maria Ronsen, and of my youngest brother, Suresh.*

*In liefdevolle herinnering aan Maria Arthur Jeanne Ronsen.*
J'ai le cœur heureux sans peur du lendemain.
*Aan Suresh. 'Tweeling'. Brother in Arms.* Ce même cœur te manque beaucoup.

# European Private International Law

## Second Edition

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*Barrister, Member of the Belgian Bar*


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# PREFACE TO THE FIRST EDITION, 2012

This volume introduces the reader to the most important parts of European private international law. It focuses on what a practitioner, student, and policy-maker will be most confronted with. In doing so, it covers the legislative history of the relevant instruments only insofar as this is required to help understand, and apply, the current provisions. It prioritises the areas which are of most relevance to commercial practice in the EU, leaving out in this volume in particular family law.

European private international law, as this book shows, is evolving fast. It is hoped that this overview both assists daily practice, and enables further study where needed.

Thanks are due to my fellow faculty at KU Leuven, in particular former Dean Paul Van Orshoven, for the opportunity to teach the Conflicts chair at Leuven; to my clients and the lawyers at DLA Piper, for continuously involving me in facts greater than fiction; to my hosts at King's College, London, and Monash University, Melbourne, for showing me the common law angle to many of the issues discussed here; and to my in-laws, Roger and Angelika Garnett Krabbe, for the room in the Montaut attic where I was able to make the first real progress on writing this book.

Recent developments are posted on my blog, www.gavclaw.com.

Geert van Calster
Leuven
14 November, 2012

# PREFACE TO THE SECOND EDITION, 2016

I finalised the first edition of this book in November 2012, noting that 'Recent developments are posted on my blog, www.gavclaw.com.' The pace of these developments have been such as to call for a complete revision of the book less than three years later.

The Brussels I Regulation has been replaced with the Recast. The Insolvency Regulation, too, already has a successor. CJEU and national case-law, in particular on the Brussels I Regulation, comes fast and furious. Ever more cases on the interpretation of Rome I and II are reaching Luxembourg.

I have also taken the opportunity to add a chapter on the Succession Regulation, adopted in 2012, and to insert recent developments in the remaining chapters. The text in this volume reflects the state of the law on 1 January 2016.

Despite all these substantial changes I am confident the book has kept the focus which earned the first edition so much praise. In order to keep this book to a manageable size I have elected not to include too many references to scholarship. I am pleased, however, that many colleagues have invited discussion on a wide variety of legal and practical issues.

Private international law remains an area where academic understanding is best coupled with practical insight. I owe thanks to the many clients who continue to give me insight into the practical reality of international dispute resolution. Hopefully, I have been able to give them a similar insight into the legal machinery behind it all. (Or at the least made their exposure to it less bamboozling.) I am also particularly grateful that they reward me with their confidence now that I have left the nest of international law firms with the start of my own legal practice.

The support, love and confidence of my wife and children continue to be a precondition for my many ventures. Kathleen, Jakob, Klara Maria, Lydia and Richard: the home you provide is much, very much appreciated!

This book is dedicated to the memories of my mother, Maria Ronsen, and of my youngest brother, Suresh.

My mother and my father's love and affection, faith, and dedication to education, have opened all my worlds to me.

That same love and affection have enabled my siblings and I to comfort Suresh through his devastating illness, and to see, through our shared faith, what lies beyond.

Geert van Calster
Münster/Leuven,
3 January 2016

# CONTENTS

# TABLE OF CASES

*Chronological*

*Regulations*

**European Free Trade Area**



**France**



**Germany**

**Hong Kong**



**Ireland (Republic of)**



**Netherlands**



**Switzerland**



**United Kingdom**

**United States of America**



*Decisions*

# TABLE OF LEGISLATION

**Belgium**



**Denmark**



**European Free Trade Area**



**European Union**

*EU Treaties and Conventions*

*Directives*

*Regulations*

*Other Instruments*



*Resolutions*



**Finland**

**France**



**Germany**



**Ireland (Republic of)**



**Italy**



**Lithuania**



**Netherlands**



**United Kingdom**

*Statutory Instruments*



**United States of America**

# TABLE OF CONVENTIONS, TREATIES ETC

# 1

# Introduction

## 1.1 The Concept, Nature and Development of Private International Law

> Sometimes viewed as a rather musty set of doctrinal principles rooted in nineteenth century European jurisprudence, it is in fact a dynamic and rapidly evolving field of direct relevance to sophisticated lawyers working in a broad spectrum of international and transnational contexts.[1]

This quote of course to some degree may be self-serving, as one likes to think that one's area of expertise is exciting, relevant, etc. However even for the practising lawyer not generally interested in the conceptual analysis of law, private international law is an increasingly relevant part of practice in a globalised world, with globalised clients, and with a level of sophistication of those clients even if they are of the SME type (small and medium sized enterprises).

The terminology employed to denote the subject-matter of this volume, varies. The two most commonly used terms are 'conflict of laws' and 'private international law'. The former conjures up *clash of civilisation* type scenarios: *economic exchange brings people into contact; it does not bring them into agreement*.[2] This is not a true reflection of the overall nature of the subject: very often private international law involves calm determination rather than strive, and often (especially in EU private international law) legal certainty takes precedence over suitability.

Private international Law or 'international private law' by contrast would seem to suggest a more mundane view on the 'international' conflicts which I study in this volume. I have opted to employ the term 'private international law' for this volume, especially because the among common lawyers more prevalent use of 'conflict of laws' refers more specifically to the second of the three steps in private international law only.

There are three distinct processes in private international law (more on this below), which have led to varying degrees of convergence or harmonisation: jurisdiction—what court has jurisdiction to hear the case; applicable law—what law will that court apply; and recognition and enforcement of foreign judgments. The classic, narrow view of private international law equates with conflict of laws proper: 'the rules applied by *domestic* courts to determine which laws apply to cases that involve people in different countries or different

[1] D Stewart, 'Private International Law: A Dynamic and Developing Field' (2009) 30 *University of Pennsylvania Journal of International Law* 1121–31.

[2] SP Huntington, *The Clash of Civilisations and the Remaking of World Order* (New York, Simon & Schuster, 1996) 218.

nationalities, or transactions which cross international boundaries'.[3] The broader approach includes jurisdiction and enforcement: what are the rules and needs—if any—for restricting the authority of domestic courts to hear disputes involving foreigners and foreign transactions, and is there/should there be a binding obligation to recognise and enforce judgments resulting from adjudication in foreign courts.[4]

In all three areas of private international law, there has been increasing international convergence or even harmonisation, with the European example being the most advanced (as well as residually disputed). However it is important to keep in mind that private international law conceptually neither seeks nor requires regulatory convergence. Private international law is and remains *national* law, with the potential and evolving exception of a growing number of subject-matter in European law. Lack of convergence in national private international law approaches may be an externality of the nature of these laws but not necessarily one which has traditionally been seen as triggering a requirement for regulatory convergence or harmonisation. Rather, conversely, private international law divergence has acted as a means for regulatory competition[5] (or even an instrument to attract foreign direct investment) and eg the English courts have always been quite happy under common law to entertain claims with a foreign element. Recently, other jurisdictions, too, such as France and the Netherlands, have appreciated the 'commercial' interest in attracting cases through the use of private international law.

Notwithstanding convergence and harmonisation, private international al law remains dramatically different from public international law in two main aspects:[6] it aims to regulate relationships between private parties, not States; it is designed to function primarily at the domestic level, in domestic courts.

There is limited overlap, in particular in sovereign and diplomatic immunity; and government seizure of property,[7] however these will not be addressed in this volume. More recently, the rekindling of the discussions with respect to extraterritoriality of 'public' law (CSR or corporate social responsibility, which is discussed further in this book; and jurisdiction of criminal courts to try crimes committed abroad). With the exception of the latter point, however, private international law does not traditionally relate to 'public' law: criminal law; extradition; immigration or deportation.

## 1.2 Sources of Private International Law

Over and above EU law and national law, the Hague Conference on private international law, established in 1893, is an important source of private international law. It is active in

[3] Stewart (n 1) 1121.

[4] Ibid, 1122.

[5] Alex Mills refers to other benefits attributed to not pursuing harmonisation of substantive law: accountability, legitimacy, cultural diversity. See A Mills, *The Confluence of Public and Private International Law* (Cambridge, CUP, 2009) 186 (with reference to a range of authors).

[6] Stewart (n 1) 1123; Stewart adds a third: private international law functions 'to harmonize and unify diverse national laws and practices in order to facilitate the movement of goods, services, and peoples around the globe'—something, however, which increasing parts of public international law strive to achieve too.

[7] See also A Briggs, *The Conflict of Laws* (Oxford, OUP, 2008) 2.

largely three areas: protection of children, family and property relations; international legal cooperation and litigation (including the 2005 Convention on choice of court agreements); and international commerce and finance law (including a potential future Convention on choice of law for contracts). It has adopted 39 Conventions, and has 72 Members (States), including the EU separately.[8] As the Conference works with Conventions, there is unequal ratification practice.

UNCITRAL works mostly through 'model laws', eg on international commercial arbitration, and the 1980 Vienna Convention on contracts for the international sale of goods (application of which may be excluded by the contracting parties). However one could argue that UNCITRAL is concerned with harmonisation of substantive law, thus falling outside the traditional scope of private international law. Other organisations, such as the Council of Europe, have issued the occasional Conventions, for instance on foreign money liabilities.

## 1.3 The Three Processes of Private International Law, and Standard 'Connecting Factors'

As noted, private international law involves the determination of jurisdiction (forum), applicable law (*lex causae*)—often also denoted as choice of law or conflict of laws proper—and recognition and enforcement. Focus in the classic area of academic development, ie the 19th/early 20th century was on applicable law, especially though the works of Friedrich Carl von Savigny (see further). Practice has recently re-emphasised the relevance of jurisdiction, so much so that once jurisdiction is established parties may be tempted to settle out of court, as the jurisdiction may fairly predictably determine the outcome of the case. Jurisdiction is relevant for a variety of reasons.[9]

### 1.3.1 Procedural Issues

Choice of law never applies to these issues: they always depend on the law of the country where the proceedings are successfully brought: the *lex fori*.[10] Needless to say, what is and what is not part of 'procedure' in itself may be the subject of discussion. Recovery of cost[11] and the possibility of legal aid are fairly undisputed examples of procedural issues. Whether conditional fees are allowed and under what format, another, as is whether the losing party pays the fees of winning party?[12] Obtaining evidence[13] (such as extensive depositions in the

[8] Council Decision 2006/719 on the accession of the Community to the Hague Conference on Private International law, [2006] OJ L297/1. The legal base was what is now Art 67 TFEU (see further), in combination with Art 300 EC: the Treaty Article on the conclusion of international agreements.

[9] See also TC Hartley, *International Commercial Litigation* (Cambridge, CUP, 2009) 6 ff.

[10] See generally G Panagopoulos, 'Substance and Procedure in Private International Law' (2005) 1 *Journal of Private International Law* 69–92.

[11] 'Justice is what you can afford to be done' in practice often turns out to be rather true.

[12] Although in that case recovery of such costs may not always be straightforward at the enforcement stage.

[13] Evidence may play a role though in the substantial part of the trial, eg in assessing damages in tort cases.

US in pre-trial discovery); whether there is trial by jury or not (eg the presence of jury trial in civil cases in the US, cf elsewhere); whether parties need to furnish the bench with their own proof of the foreign law which may apply, or whether the bench is supposed to know this itself (*ius novit curia*): these, too, are definitely part of procedural aspects. Whether statutes of limitation are, is more disputed.

### 1.3.2 Application of the Law

Even when applicable law has been determined, not all judges will apply it in the same way. This is quite obviously the case where provisions of these laws are fairly open-ended (eg 'general wellbeing of the child' in custody cases) and whence the cultural context of the court very relevant. Differences in competence and know-how of the bench play a role here, too. Not all judges in all States will be au fait with securitisation contracts, or patent-licensing agreements. More simply: *Gleichlauf*, the circumstance in which the court with jurisdiction (the forum) applies 'his own' laws (ie the laws of that State) to the dispute, may often seem attractive.[14] Bias (eg against foreign corporations), incompetence and corruption, finally, are evidently strong reasons why one might not (or conversely, prefer to) wish to end up in one court or another.

Carl Friedrich von Savigny (1779–1861)'s *A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time*,[15] the eighth and final volume of his standard work on Roman private law, advocates a 'blindfold' approach to private international law. The rules of private international law identify applicable law without taking account of the contents of that law or of any other.

Von Savigny rejects both the personal focus of tribal law after the fall of the Roman empire (nowadays still present in nationality and personal capacity issues), and the territorial focus of the early Middle Ages (custom applies to a given territory), as well as the predominant attention in the late Middle Ages to what the scope of application of the statute ought to be. Von Savigny's focus is on the *Sitz* or 'seat' of a relationship in law: which legal order has the closest connection to the specific facts at issue, where lies the nexus of the case, which legal order *connects* predominantly to the case. In the von Savigny approach, conflict of laws ought to become neutral. As one might expect, however, there are plenty of opportunities for the court seized, to 'massage' the result of this objective analysis: inter alia by the very classification (see below), the approach to the 'incidental issue' (see further), and the application of public policy exceptions.

Despite discussion and criticism of the impact of von Savigny's work, his working method continues to determine the private international law process especially in the choice of law stage. Determination of applicable law involves three steps.

[14] In fact, sometimes the very opposite is true: especially in cases of express choice of law by commercial parties, one or other of the parties may wish to have say English law applied by a non-English court. For one risks having the truly initiated apply the law in a way which differs from the general understanding of that law.

[15] It is generally available in English in the 1869 translation by William Guthrie, and published in Edinburgh by T & T Clark.

#### *1.3.2.1 Characterisation (French: Qualification) of the Legal Question*

This requires the facts to be accommodated within one—perhaps more—legal categories to which a choice of law rule may be applied. Further details on characterisation are included below. Characterisation is obviously a crucial step. Whether it is harmonised or not, ie whether national courts have full discretion to characterise the issue or not, determines in large degree the applicable law outcome. Briggs employs the rather useful reference to a mail room sorter: the judge needs to put the facts into a particular pigeon hole which in turn will lead to the parcel being delivered on one or other doorstep.[16]

#### *1.3.2.2 Connecting Factor*

Each legal category then has a connecting factor (European law tends to call this the 'linking factor'): which legal system connects most closely with this category of legal questions.

#### *1.3.2.3* Lex Causae

Finally, one applies the substantive law of the legal system identified by step 2: that is, the *lex causae*.

To give a simple example: capacity to marry (qualification) of a Belgian (nationality: connecting factor) is determined by Belgian law (applicable law).

The standard connecting factors may be divided into two categories: personal, and causal.[17] *Personal connecting factors* are:

> domicile; residence, which can be either habitual = ordinary = usual residence or simple residence; and nationality.

*Causal connecting factors* are in the main:

> *Lex domicilii; Lex fori; Lex contractus* (which may or may not be determined by *lex voluntatis*); *Lex loci contractus; Lex loci actus; Lex delicti* (tort), including the *lex loci delicti commissi*, or the *lex damni*; *Lex situs* (typically but not exclusively re real estate); *Lex loci celebrationis* (marriage); *Lex incorporationis; Lex protectionis*.

## 1.4 Characterisation, *Renvoi* and the 'Incidental' Issue or *Vorfrage*

Characterisation (French: qualification) of the legal question, '*requires the facts to be accommodated within one—perhaps more—legal categories to which a choice of law rule may be applied*.'[18] These legal categories essentially are branches of private law: capacity to marry; marriage; marital property law; dependence; hereditary succession; contracts; torts, etc.

[16] Briggs (n 7) 9.
[17] Ibid, 21 ff.
[18] Ibid, 9. See also JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett's Private International Law*, 14th edn (Oxford, OUP, 2008) 42 ff.

Characterisation is a direct result of von Savigny's influence: one employs an objective approach in search of the *Sitz* of the facts. It is not without its faults: in particular, it pays no regard to whether the rule of law chosen to apply in the case was intended to be applied to the facts (whence the US theory of governmental interest analysis, which holds that the State with the greatest interest in having its law applied to a given case, should see it applied). Neither is it without correction: as we shall see in detail below, European private international law often allows for correction of the objective 'Sitz' so as to have the law apply with the 'closest and most real' connection to the case.

Continuing Briggs' mailroom analogy above, it is the manager of the mailroom where the parcel has ended up who will determine what pigeon hole the parcel goes into: is it tort? Is it contract? This is of course a very relevant determination, because not all national private international law uses the same categories. For instance, statutes of limitation are procedural law in some (hence *lex fori*), substantive law in others eg linked to the contract, in which case the *lex contractus* will apply which often will be *lex voluntatis*. It is for this reason that harmonisation by the EU attempts as much as possible to harmonise characterisation, too.

A subcategory of characterisation is the so-called 'incidental' issue or *Vorfrage:* it may very well be that national (or EU, as the case may be) law has determined which applicable law is connected to a given legal category, however before one may apply it, one needs to decide on the actual existence of the category in the facts at issue. It is somewhat telling that only two examples always re-surface when the *Vorfrage* is discussed in scholarship.

In *Ogden v Ogden*,[19] The Court of Appeal for England and Wales had to determine whether the marriage, celebrated in England, between an English and a French national, was valid, even though no parental consent was given. The Court of Appeal held that this is a matter of formal validity of the marriage, a characterisation which leads to the *lex locus celebrationis* and hence the application of English law. This made consent not relevant. Had it been considered part of one's capacity to marry, applicable law would have been the law of the nationality of the person alleged to lack marital capacity (hence French law), and hence the marriage would have been invalid.

In *Schwebel v Ungar*,[20] the Canadian Supreme Court had to decide the case of a Jewish husband and wife, married and domiciled in Hungary. En route to relocate to Israel, they stay in Italy, where the husband divorces the wife by *get*. Neither Hungary nor Italy recognise *get*; however Israel, their subsequent domicile of choice, does. The wife subsequently moved to Canada but remains domiciled in Israel, and went through a second ceremony of marriage. The husband subsequently files for nullity of marriage, on the basis of bigamy. The main question therefore relates to the wife's capacity to marry, a characterisation which under Canadian law calls for the application of *lex domicilii*, meaning Israel. The incidental question, however, relates to the validity of the divorce, which under Canadian law leads to either the *lex domicilii* at the relevant time (Hungary), or Italian law, as *lex loci actus*. The Supreme Court nevertheless applies Israeli law, the law applicable to the main question.

Given the relatively few cases in which the *Vorfrage* is dealt with specifically, many argue that notwithstanding the scholarly relevance of the issue of which law decides

[19] *Ogden v Ogden* [1908] P 46 (CA).
[20] *Schwebel v Ungar* [1964] 48 DLR (2d) 644.

characterisation, and also which one decides the incidental question, in practice they are most often and most probably dealt with in passing. This led to Ehrenzweig famously referring to the *Vorfrage* as *another miscreant of a conceptualism gone rampant*.[21] However, whether characterisation is carried out in accordance with the *lex fori*, not the *lex causae*, even if it may not be subject to great debate in the courts, in practice has a considerable impact.

European law, which is the subject-matter of this volume, has some good examples of the relevance of the issue. For instance, the Regulations which we discuss apply to civil and commercial matters only, not to those resulting from the exercise of public law powers. Whether a particular dispute concerns civil and commercial matters or not, and hence whether it falls within the scope of application of either of these Regulations, may[22] sometimes be adjudicated by the court seized by simple reference to the facts on which the applicant bases his claims.[23,24] On other occasions the adjudicating court will have to assume jurisdiction temporarily and then apply its conflicts rules to determine which law would apply to the relationship, subsequently to assess under that law whether or not the matter truly is 'civil and commercial'.[25]

European Regulations have also quietly harmonised the approach to the *Vorfrage* in contract law and in torts. For instance, the Rome I Regulation on applicable law in contracts, provides in Article 10(1)[26] that

> The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

This cancels out *lex fori* to decide the *Vorfrage*.

Within the context of the insolvency Regulation,[27] the *Vorfrage* takes on a specific form in its Article 13 on 'detrimental' acts, in conjunction with its Article 4(2)(m) on 'the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors' (see further review of this Article in the relevant Chapter, below).

*Renvoi* essentially relates to the question whether a reference, by application of conflict of laws rules, to the laws of State X, includes a reference to all laws of that State, including in other words State X' own private international law rules. There are essentially two types of *renvoi*:

a. *Renvoi* = remission |*Rückverweisung* |*Terugverwijzing*, *herverwijzing*: referral to the *lex fori*
b. *Renvoi* au second degré = transmission |*Weiterverweisung* |*Verderverwijzing*

[21] A Ehrenzweig, *A Treatise on the Conflict of Laws* (St Paul, 1962) 340. See also TS Schmidt, 'The Incidental Question in Private International Law', (1992) II *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 305 ff.

[22] A Dickinson, *The Rome II Regulation* (Oxford, OUP, 2008) 150.

[23] Case C-292/05 *Lechouritou* [2007] ECR I-1519: operations conducted by armed forces are one of the characteristic emanations of State sovereignty and, as a result, actions based upon them by their very nature do not fall within the scope of the Brussels I Regulation on jurisdiction in civil and commercial matters.

[24] But see Case C-172/91 *Volker Sonntag v Hans Waidmann et al* [1993] ECR I-1963, where the ECJ found civil and commercial matters even if that was not clear from the legal tradition of the Member State concerned (and where other Member States, too, may have held differently).

[25] In Case C-271/00 *Gemeente Steenbergen v Baten* [2002] ECR I-10489, whether the Dutch town acted in a civil and commercial matter or not, had to be determined with reference to Dutch procedural and administrative law.

[26] Further detail in the relevant chapter, below.

[27] Regulation 1346/2000, [2000] OJ L160/1. See the discussion of the Regulation in the relevant chapter below.

Advocates of *renvoi* argue that akin to governmental interest analysis, foreign law should only be applied where it is interested in being applied; should foreign law point away from itself, that should be respected. *Renvoi* also plays a role in preventing forum shopping: the case ought to be as closely as possible decided according to what a court would decide which is in all likelihood closest connected to the case. Although one of course wonders why one does not decline jurisdiction altogether (which of course is what English courts regularly do under *forum non conveniens* rules).

Arguments against *renvoi* generally win the day, and certainly have done so principally in EU law. In the case of *renvoi*, the *lex fori* refers to the *lex causae*, whose private international law rules re-refer to the *lex fori*, whose private international law rules in turn re-refer to the *lex causae*, and a carousel starts which has to stop at some point. Simple *renvoi* halts this however there would not seem to be any particular reason why *lex fori* ought to apply, other than to stop the carousel, ie for reasons of convenience: one wonders why one has *renvoi* at all then.

This argument against *renvoi* holds even more strongly in the case of *Renvoi* au second degré: the carousel has to be stopped arbitrarily hence why does one have it at all? In this case, moreover, the burden of proof becomes quite heavy.

Consequently many[28] treaties and indeed national laws simply exclude *renvoi*: EU law does too as a more or less general rule,[29] as do, for reasons of legal certainty, most commercial contracts.[30]

## 1.5 Forum Shopping and *Forum non Conveniens*

Given the relevance of jurisdiction, outlined above, forum shopping is of high importance even to the unsophisticated litigant. Forum shopping is the technique whereby a litigant selects his forum to sue, on the basis of suitability. Suitability lies in any of the reasons outlined above.

Forum shopping is by no means a negative or suspect phenomenon. It arguably only takes on an abusive nature, in those instances where a litigant selects a forum purely on the basis of 'qualities' of the forum which do not serve the rule of law. This would include fora selected for the time they take to decide a case, the technique of the so-called 'torpedo'. In combination with the impossibility of the other party to sue elsewhere,[31] torpedo action literally torpedoes the possibility for the bona fide party to seek timely settlement of his action (justice delayed is justice denied).

[28] But see perhaps recent developments in Australia: A Gray, 'The Rise of *Renvoi* in Australia: Creating the Theoretical Framework' (2007) 30 *University of New South Wales Law Journal* 103–26.

[29] Recent examples of the discussion include in particular *Iran v Berend* [2007] EWHC 132 (QB); and *Dallah Real Estate* [2010] UKSC 46.

[30] A typical clause would read: 'This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of [], excluding its choice of law rules.'

[31] In particular, in the case of the Brussels I Regulation, the strict application of the *lis alibi pendens* rule: see below in the relevant chapter.

According to the doctrine of *forum non conveniens*, as understood in English law, a national court may decline to exercise jurisdiction[32] on the ground that a court in another State, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.[33] *Forum non conveniens* is discussed at length further in this volume.

Finally, forum shopping is sometimes also used in a different sense, referring to choice of law: parties opting for one law to apply to their legal relationships rather than another, for reasons of the chosen law giving the parties possibilities which the other law does not have. The most often used (or at least pondered) use of choice of law in this respect lies with parties, both domiciled in one jurisdiction, nevertheless using the laws of a different State because it offers legal instruments which the other does not possess (trusts, for instance, unknown in civil law jurisdictions). I shall clarify further that although European private international law has a certain amount of sympathy for commercially mature parties employing the law in such a way, it does put a certain amount of obstacles in their way, so as to avoid simple avoidance of the law in cases where the State concerned considers a given law to be particularly sensitive to its legal order.

Forum shopping is often looked at very differently in the common law. For instance in *Martrade Shipping*[34] the High Court considered the appeal against an arbitration award in relation to the applicability of the Late Payment of Commercial Debts (Interest) Act 1998 to charterparties providing for English law and London arbitration.

The vessel was owned by the defendant, a Marshall Islands company. The vessel was registered in Panama and managed by a Liberian company registered in Greece. The vessel was chartered by the owners to the claimant charterers for a time charter trip via the Mediterranean/Black Sea under a charterparty dated 2 July 2005. The charterers were a German company. The vessel was to be placed at the disposal of the charterers on passing Aden, and was to be redelivered at one safe port or passing Muscat outbound/Singapore range in Charterers' option. In the event the vessel loaded cargoes of steel products at Tuapse (Russia), Odessa (Ukraine) and Constanza (Romania) and discharged them at Jebel Ali (UAE), Karachi (Pakistan) and Mumbai (India). Hire was payable in US dollars to a bank account in Greece. The broker named in the charterparty as entitled to commission was Optima Shipbrokers Ltd who were Greek. The charterparty recorded that it was made and concluded in Antwerp.

Consequently, contact with England, other than the governing law and arbitration clause, was non-existent.

Various disputes between the parties were referred to arbitration, including a claim by the Owners for unpaid hire, in respect of which the charterers claimed to be entitled to deduct sums for alleged off-hire, bunkers used during off-hire, and a bunker price differential claim. The tribunal held that the owners were entitled to an award in respect of hire in the sum of US$178,342.73. The tribunal further held that the owners were entitled to interest on that sum calculated at the rate of 12.75% per annum from 23 September 2005 until the date of payment under the 1998 Act.

[32] Although the doctrine may also play a role in the enforcement stage: see C Whytock and C Robertson, 'Forum non Conveniens and the Enforcement of Foreign Judgments' (2011) 111(7) *Columbia Law Review* 1444–521.

[33] The House of Lords, in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, particularly at 476.

[34] *Martrade Shipping v United Enterprises Corporation* [2014] EWHC 1884 (Comm).

The appeal is against the award of interest under the 1998 Act. The charterers contended before the tribunal, and contend on the appeal, that the 1998 Act had no application by reason of section 12(1) which provides:

> This Act does not have effect in relation to a contract governed by a law of a part of the United Kingdom by choice of the parties if—(a) there is no significant connection between the contract and that part of the United Kingdom; and (b) but for that choice, the applicable law would be a foreign law.

Section 12 of the Act therefore provides that where parties to a contract with an international dimension have chosen English law to govern the contract, the choice of English law is not of itself sufficient to attract the application of the Act. Section 12 mandates the application of the penal interest provisions only if one or both of two further requirements are fulfilled. There must be a significant connection between the contract and England (section 12(1)(a)); or the contract must be one which would be governed by English law apart from the choice of law (section 12(1)(b)). Either is sufficient. Popplewell J suggested that this provision has two objectives:

— The Act reflects domestic policy considerations which are not necessarily apposite to contracts with an international dimension. What is required by the significant connecting factor(s) is something which justifies the extension of a deterrent penal provision rooted in domestic policy to an international transaction.
— Subjecting parties to a penal rate of interest on debts might be a discouragement to those who would otherwise choose English law to govern contracts arising in the course of international trade, and accordingly does not make such consequences automatic.

Popplewell J continued

> The s 12(1)(a) criterion of 'significant connection' must connect the substantive transaction itself to England. Whether they provide a significant connection, singly or cumulatively, will be a question of fact and degree in each case, but they must be of a kind and a significance which makes them capable of justifying the application of a domestic policy of imposing penal rates of interest on a party to an international commercial contract. They must provide a real connection between the contract and the effect of prompt payment of debts on the economic life of the United Kingdom. (17)

And further: Such factors may include the following:

(1) Where the place of performance of obligations under the contract is in England. This will especially be so where the relevant debt falls to be paid in England. But it may also be so where other obligations fall to be performed in England or other rights exercised in England. If some obligations might give rise to debts payable in England, the policy considerations underlying the Act are applicable to those debts; and if some debts under the contract are to carry interest at a penal rate, it might be regarded as fair and equitable that all debts arising in favour of either party under the contract should do so.
(2) Where the nationality of the parties or one of them is English. If it is contemplated that debts may be payable by an English national under the contract, the policy reasons for imposing penal rates of interest may be engaged; and if only one party is English, fairness may again decree that the other party should be on an equal footing in relation to interest whether he is the payer or the payee.
(3) Where the parties are carrying on some relevant part of their business in England. It may be thought that persons or companies who carry on business in England should be encouraged

> to pay their debts on time and not use delayed payment as a business tool even in relation to transactions which fall to be performed elsewhere. Moreover a supplier carrying on business in England may fall within the category identified in s 6(2)(a) of those whose financial position makes them particularly vulnerable to late payment of their debts, although these are not the only commercial suppliers for whose benefit the Act is intended to apply. The policy of the Act may be engaged in the protection of suppliers carrying on business in England, whether financially vulnerable or not, even where the particular debts in question fall to be paid by a foreign national abroad.
>
> (4) Where the economic consequences of a delay in payment of debts may be felt in the United Kingdom. This may engage consideration of related contracts, related parties, insurance arrangements or the tax consequences of transactions. (20)

By contrast, a mere London arbitration or English jurisdiction clause cannot be a relevant connecting factor for the purposes of section 12(1)(a).

Popplewell J therefore expressly linked the non-applicability of relevant domestic English law (where such as here that law itself suggests the need for there to be a connection between the case and England) to the need to maintain the attraction of England as a seat of international commercial arbitration or indeed litigation. Exactly the kind of attitude in which competing courts fall short.

Another interesting example of an attempt at forum shopping, in this case with respect to recognition and enforcement, is *Yokos v Tomsneft* at the Irish High Court.[35] When should a court being asked to apply the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the 'New York Convention'—look mercifully on forum shopping with a view to the smooth enforcement of such award? Both Yukos Capital and Tomskneft were originally part of the Yukos Group. Tomskneft was later transferred to Rosneft. Arbitral proceedings had taken place in Switzerland, Yukos' attempts at enforcement in Russia failed, as they did in France. Attempts in Singapore are underway.

The Irish court's involvement at first view looks odd. There are no Tomskneft assets in Ireland, nor corporate domicile of any Tomskneft affiliates. As Kelly J noted, the Irish proceedings effectively would serve as a jack for proceedings in other jurisdictions where Tomskneft does hold assets. Waving a successful enforcement order (even if it were in practice nugatory, given the lack of assets) obtained in a 'respectable' jurisdiction would assist with enforcement proceedings elsewhere.

The New York Convention has a pro-enforcement bias; however, in Ireland (and other, especially common law countries) the arbitration act enforcing the Convention runs alongside the application of Irish civil procedure rules 'out of the jurisdiction', and works against a foreign defendant. According to Kelly J: 'In implementing the Convention as it did, the legislature did not attempt to dispense with the necessity to obtain leave to serve out of the jurisdiction in a case where the respondent is not normally resident within it' (59).

US law, too, requires that preliminary to recognising and enforcing a foreign award, *in personam* jurisdiction must be established. Decision on such remains subject to *lex fori*. A jurisdiction which all too happily entertains such cases is then said to employ 'parochial' or 'exorbitant' jurisdictional rules.

[35] *Yukos Capital SARL v OAO Tomskneft VNK* [2014] IEHC 115.

In the case at issue, after referencing prior case law both in Ireland and elsewhere, Kelly J rejected the applicant's request:

> It is a case with no connection with Ireland. There are no assets within this jurisdiction. There is no real likelihood of assets coming into this jurisdiction. This is the fourth attempt on the part of the applicant to enforce this award. There is little to demonstrate any 'solid practical benefit' to be gained by the applicant. The desire or entitlement to obtain an award from a 'respectable' court has already been exercised in the courts of France and is underway in the courts of Singapore. (141)

Note therefore that the court is not unsympathetic to the attempt at employing successful (even if hollow) enforcement in one jurisdiction as a lever in the real target jurisdiction (the one with the assets). Except, in the case at issue, similar attempts had already been or still were underway elsewhere. The case is a very good illustration of the attraction (and uncertainty) of forum shopping, in particular at the enforcement stage; as well as a powerful reminder of the *in personam* jurisdictional rules of the common law.

## 1.6 The Impact of European Law on the Private International Law of the Member States

### 1.6.1 Legal basis

The legal basis for European private international law has evolved as follows.[36]

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**a. Treaty establishing the European (Economic) Community: Article 220 EEC, subsequently Article 293 EC, now repealed**

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

- the prot ection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals,
- the abolition of double taxation within the Community,
- the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries,
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

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[36] For a good overview of the consecutive changes and their implications, see A Dickinson, 'European Private International Law: Embracing New Horizons or Mourning the Past?' (2005) 1(2) *Journal of Private International Law* 197–236; A Fiorini, 'The Evolution of European Private International Law' (2008) 57(4) *International and Comparative Law Quarterly* 969–84.

**b. Maastricht Treaty**

*TITLE VI—PROVISIONS ON COOPERATION IN THE FIELDS OF JUSTICE AND HOME AFFAIRS*

*ARTICLE K*

Cooperation in the fields of justice and home affairs shall be governed by the following provisions.

*ARTICLE K.1*

For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:

1. asylum policy;
2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries;
   (a) conditions of entry and movement by nationals of third countries on the territory of Member States;
   (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;
   (c) combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States;
4. combating drug addiction in so far as this is not covered by 7 to 9;
5. combating fraud on an international scale in so far as this is not covered by 7 to 9;
6. judicial cooperation in civil matters;
7. judicial cooperation in criminal matters;
8. customs cooperation;
9. police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).

**c. Treaty of Amsterdam**

*Article 65*

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:
   — the system for cross-border service of judicial and extrajudicial documents,
   — cooperation in the taking of evidence,
   — the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

*Article 67*

1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

2. After this period of five years:

— the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council,
— the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

3. By derogation from paragraphs 1 and 2, measures referred to in Article 62(2)(b) (i) and (iii) shall, from the entry into force of the Treaty of Amsterdam, be adopted by the Council acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

4. By derogation from paragraph 2, measures referred to in Article 62(2)(b) (ii) and (iv) shall, after a period of five years following the entry into force of the Treaty of Amsterdam, be adopted by the Council acting in accordance with the procedure referred to in Article 251.

5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251:

— the measures provided for in Article 63(1) and (2)(a) provided that the Council has previously adopted, in accordance with paragraph 1 of this article, Community legislation defining the common rules and basic principles governing these issues,
— the measures provided for in Article 65 with the exception of aspects relating to family law.

*Article 68*

1. Article 234 shall apply to this title under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

2. In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security.

3. The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.

*Article 69*

The application of this title shall be subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark and without prejudice to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland.

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Article 68 EC's provision, post Amsterdam, that only courts or tribunals against whose decisions there is no judicial remedy under national law, could petition the Court of Justice for a preliminary ruling, disappeared with the entry into force of the Lisbon Treaty (see below). Pursuant to Article 267 TFEU, the courts and tribunals against whose decisions there is a judicial remedy under domestic law have enjoyed, since that date, the right to refer questions to the Court where acts adopted formerly on the basis of Title IV of the EC Treaty are concerned.[37]

[37] Case C-283/09 *Weryński* [2011] ECR I-601, paras 28 and 29 (Judgment of 17 February 2011); Case C-396/09 *Interedil*, [2011] ECR I-9915, paras 18 ff (Judgment of 20 October 2011).

**d. Treaty on the functioning of the EU—TFEU**

*Article 67*

(ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

*Article 81*

(ex Article 65 TEC)

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extra-judicial cases;
(b) the cross-border service of judicial and extrajudicial documents;
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
(d) cooperation in the taking of evidence;
(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

## 1.6.2 The Development of European Private International Law Policy

As the successive Treaty texts above show, European Union policy on private international law has changed quite dramatically. From a mere and superfluous reference to the

possibility for the Member States to conclude Treaties in the private international law area, EU competence has now grown to a more or less standard competence, subject only to the general limits to EU heads of power, including subsidiarity and proportionality.

In the past, the finely tuned legal basis in successive EU Treaties has required some creativity from the European Commission. For instance, Article 220 EEC as it then stood (it has now been repealed, as the copy above shows), did not list choice of law/applicable law as one of the elements of private international law for which, at least with formal Commission involvement, harmonisation through Treaty could be sought.[38] The special jurisdictional rules for contracts led to an increased possibility of forum shopping, as for jurisdiction for contracts, the (then un-harmonised) determination of applicable law also determined the outcome of characteristic performance, upon which the jurisdictional rule hinges. Similarly, for torts, the 'place giving rise to the damage' and the 'place where the damage occurs' are each in themselves determined differently, depending on the applicable law of the contract. This led the Commission to contemplate the use of the impact, on jurisdiction, of non-harmonised choice of law rules, as a justification or indeed legal basis for harmonisation of choice of law.[39]

Predictability of forum is, as shall be explained at length below, a cornerstone of the jurisdictional regime of the EU. This is apparent both in the relevant statutory instruments themselves, and, perhaps even more so, in their interpretation by the Court of Justice. However, notwithstanding predictability, there are quite a number of instances in the jurisdictional regulations, which lead to a multitude of fora. The preferred European Commission method to ensure predictability, may therefore lie less in promoting singularity of jurisdiction, and ever more in unification of applicable law, both by harmonising substantive law through positive harmonisation (especially in consumer protection law and in other areas where the EU legislator perceives 'weaker' parties in legal relationships), and on harmonising conflicts rules on choice of law.[40]

The European 'conflicts resolution' lies in an ever expanding harmonisation of the rules on all three steps of private international law.[41] The original Treaty foundations for EU intervention in this sector are but a distant memory. As noted, the origins of European private international law lie in Internal Market law. Currently, the emphasis is on the European judicial area, with undeniably a much stronger emphasis on the citizen.

The further harmonisation of substantive EU law may be, some advocate, the next logical step in the European conflicts resolution. Over and above the debate on, inter alia, the draft common frame of reference,[42] a quiet harmonisation revolution has already taken place in those instances where European Regulations have harmonised the approach to the *Vorfrage*

[38] As noted, neither did 'jurisdiction' per se, which of course did not stop the Brussels Convention, with Commission input, from including it.

[39] See also F Pocar, 'Some Remarks on the Relationship between the Rome I and the Brussels I Regulations' in F Ferrari and S Leible (eds), *Rome I Regulation—The Law Applicable to Contractual Obligations in Europe* (Munich, Sellier, 2009) 343–48, 343.

[40] See also Pocar (ibid) 344. Incidentally, Prof Pocar would seem to favour parallelism between forum and applicable law as 'the best way to ensure the coherence of the system and the predictability of its solutions' (344). It might. However, it would also deny the very nature of private international law.

[41] See also S Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 *American Journal of Comparative Law* 174.

[42] Further discussed in the chapter on the Rome I Regulation, below.

in contract law and in torts. The Rome I Regulation on applicable law in contracts, provides in Article 10(1)[43] that:

> The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

This cancels out *lex fori* to decide the *Vorfrage*. A more advanced degree of harmonisation in a similar context is reached by the Rome II Regulation on the law applicable to non-contractual obligations, which defines in Article 15 what shall be the scope of the applicable law; among the list of issues, there are definitely some (eg 'assessment of damages') which some of the Member States would have otherwise classified as being of a procedural nature, hence subject to *lex fori*.

One obvious disadvantage of the current Commission focus, lies in its disregard for the benefits of regulatory competition. As the very existence of debate especially on applicable law shows, Member States have a different approach to a wide variety of issues in private law. Far from merely serving as an obstacle to the Internal Market, this competition is essential in shaping, through commercial trial and error, attractive contractual and other provisions which assist in the creation of an internal market and moreover help European business that act on a global scale.[44]

The *Tampere European Council* is often signalled out as a turning point in the Commission (and Council) approach to private international law. The European Council held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union. The boost which had been given to this part of the EU Treaty in the Treaty of Amsterdam, gave the Commission especially a mandate to put forward proposals in areas of national law which until then had been the exclusive domain of the Member States. The Presidency Conclusions after the meeting, read in relevant part as follows:

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**B. A GENUINE EUROPEAN AREA OF JUSTICE**

28. In a genuine European Area of Justice individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States.

**V. Better access to justice in Europe**

29. In order to facilitate access to justice the European Council invites the Commission, in co-operation with other relevant fora, such as the Council of Europe, to launch an information campaign and to publish appropriate "user guides" on judicial co-operation within the Union and on the legal systems of the Member States. It also calls for the establishment of an easily accessible information system to be maintained and up-dated by a network of competent national authorities.

30. The European Council invites the Council, on the basis of proposals by the Commission, to establish minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the Union as well as special

[43] Further detail in the relevant chapter, below.

[44] See also my contribution 'To Unity and Beyond? The Boundaries of European Private International Law and the European Ius Commune' in A Verbeke et al (eds), *Liber Amicorum Walter Pintens* (Cambridge, Intersentia, 2012) 1459–85.

common procedural rules for simplified and accelerated cross-border litigation on small consumer and commercial claims, as well as maintenance claims, and on uncontested claims. Alternative, extra-judicial procedures should also be created by Member States.

31. Common minimum standards should be set for multilingual forms or documents to be used in cross-border court cases throughout the Union. Such documents or forms should then be accepted mutually as valid documents in all legal proceedings in the Union.

32. Having regard to the Commission's communication, minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs. In addition, national programmes should be set up to finance measures, public and non-governmental, for assistance to and protection of victims.

**VI. Mutual recognition of judicial decisions**

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

34. In civil matters the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgement in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgements in the field of family litigation (eg on maintenance claims and visiting rights). Such decisions would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of civil procedural law.

35. With respect to criminal matters, the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.

36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.

**VII. Greater convergence in civil law**

38. The European Council invites the Council and the Commission to prepare new procedural legislation in cross-border cases, in particular on those elements which are instrumental to smooth judicial co-operation and to enhanced access to law, eg provisional measures, taking of evidence, orders for money payment and time limits.

39. As regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings. The Council should report back by 2001.

The 2005 the Hague programme[45] illustrates the ambitions of the European Commission in this respect:

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**(9) Civil and criminal justice: guaranteeing an effective European area of justice for all**

A European area of justice is more than an area where judgements obtained in one Member State are recognised and enforced in other Member States, but rather an area where effective access to justice is guaranteed in order to obtain and enforce judicial decisions. To this end, the Union must envisage not only rules on jurisdiction, recognition and conflict of laws, but also measures which build confidence and mutual trust among Member States, creating minimum procedural standards and ensuring high standards of quality of justice systems, in particular as regards fairness and respect for the rights of defence. Mutual understanding can be further pursued through the progressive creation of a "European judicial culture" that the Hague Programme calls for, based on training and networking. A coherent strategy in the EU's relations with third countries and international organisations is also needed.

In the field of civil justice, completion of the Programme on mutual recognition of decisions in civil and commercial matters is of the utmost importance. It will involve the adoption of legislative proposals already presented by the Commission, or in the process of being put forward, and launching consultations in order to prepare new legislation not yet subject to mutual recognition (such as family property issues, successions and wills). Another fundamental aspect to be addressed is the enforcement of judicial decisions and mutual recognition of public and private documents. Regarding the EU substantive contract law, a Common Frame of Reference (CFR), to be used as a toolbox to improve coherence and quality of EU legislation, will be adopted in 2009 at the latest.

Regarding criminal justice, approximation and the establishment of minimum standards of several aspects of procedural law (such as ne bis in idem, handling evidence or judgements in absentia) are instrumental in building mutual confidence and pursuing mutual recognition. Concerning the latter, several actions must be carried forward in order to ensure efficient and timely action by law enforcement authorities (such as mutual recognition of non-custodial pre-trial supervision measures, or recognition and execution of prison sentences) and, more generally, to replace traditional mutual assistance with new instruments based on mutual recognition. Eurojust should be considered as the key actor for developing European judicial cooperation in criminal matters. Its role should be supported and its potentialities fully exploited in the light of the experience acquired and in view of future developments. In this context, the Commission will also follow up its previous work and the possibilities afforded by the Constitution, as regards improving the protection of the Union's financial interests.

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The 2010 European Council's *Stockholm Programme*[46] continues on this path:

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As regards civil matters, the European Council considers that the process of abolishing all intermediate measures (the exequatur), should be continued during the period covered by the Stockholm Programme. At the same time the abolition of the exequatur will also be accompanied by a series of safeguards, which may be measures in respect of procedural law as well as of conflict-of-law rules.

Mutual recognition should, moreover, be extended to fields that are not yet covered but are essential to everyday life, for example succession and wills, matrimonial property rights and the property consequences of the separation of couples, while taking into consideration Member States' legal systems, including public policy, and national traditions in this area.

[45] COM(2005) 184.
[46] [2010] OJ C115/1.

The European Council considers that the process of harmonising conflict-of-law rules at Union level should also continue in areas where it is necessary, like separation and divorces. It could also include the area of company law, insurance contracts and security interests.

The European Council also highlights the importance of starting work on consolidation of the instruments adopted so far in the area of judicial cooperation in civil matters. First and foremost the consistency of Union legislation should be enhanced by streamlining the existing instruments. The aim should be to ensure the coherence and user-friendliness of the instruments, thus ensuring a more efficient and uniform application thereof.

The European Council invites the Commission to:

— assess which safeguards are needed to accompany the abolition of exequatur and how these could be streamlined,
— assess whether there are grounds for consolidation and simplification in order to improve the consistency of existing Union legislation,
— follow up on the recent study on the possible problems encountered with regard to civil status documents and access to registers of such documents.

In light of the findings, the Commission could submit appropriate proposals taking into account the different legal systems and legal traditions in the Member States. In the short term a system allowing citizens to obtain their own civil status documents easily could be envisaged. In the long term, it might be considered whether mutual recognition of the effects of civil status documents could be appropriate, at least in certain areas. Work developed by the International Commission on Civil Status should be taken into account in this particular field.

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In 2014, a review of the Stockholm Programs was launched ('Stockholm 2.0' or 'Strasbourg 1.0').[47] Private international law is mentioned in particular with respect to the ambition to codify (or at least the ambition to review the suitability of codification). However, stock-taking and slowing the legislative pace is not mentioned.

Throughout this volume, references are made to specific examples of the ambitious program of both Council and Commission in the development of a harmonised European private international law. The pace and depth of this harmonisation process is such as to have triggered calls for codification of European private international law.[48]

[47] COM(2014) 144.

[48] See for an accurate perception of the challenges involved M Fallon, P Lagarde and S Poillot-Peruzzetto (eds), *Quelle architecture pour un code européen de droit international privé* (Brussels, Peter Lang, 2012).

# 2

# The Core of European Private International Law: Jurisdiction

## 2.1 Summary

### 2.1.1 The Brussels I Recast Regulation

Jurisdiction for civil and commercial matters in courts of the EU Member States is subject to the 'Brussels I' Recast Regulation, *Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*.[1] The Regulation is variously referred to as 'Brussels I', or the 'Judgments Regulation' as well as the 'EEX' Regulation; and, by virtue of this being an amending Regulation, as 'Brussels I bis', 'Brussels Ibis', 'Brussels I Recast' or 'Brussels I Recast Regulation', and finally as Brussels Ia. Its immediate predecessor was Regulation 44/2001 of the same name.[2] The 2012 amendments cause something of a reference dilemma. If these were simple amendments, I would have great sympathy for continuing to refer to it as 'Brussels I'. This was also my initial intuition. However, this probably does not quite fit with the Regulation being a 'recast' which, after all, means that it has taken on quite a different shape, at least in places. It is no longer the same Regulation. Scholarship in French seems likely to settle for Bruxelles I Bis or Bruxelles I bis, as does scholarship in Dutch. German commentators seem less equivocal. The 'bis' suffix, however, does not quite work in English, and calling it Brussels Ia seems to have been done by no one at all. Regulations 44/2001 and 1215/2012 will live alongside each other for some time (the former still applying to all proceedings initiated before 10 January 2015). I think it is best therefore to retain some kind of chronological denoter.

Consequently I will use 'Brussels I Regulation' or 'Brussels I' when I refer to Regulation 44/2001, and 'Brussels I Recast Regulation', 'Brussels I Recast' or simply 'the Regulation' when I refer to Regulation 1215/2012. I have no doubt some readers will take issue with this. I also have no doubt practice may reset its watches once the Brussels I Regulation has lost all practical relevance.

The precursor to the Brussels I Regulation was the Brussels Convention with the same name, of 27 September 1968, generally known as the 'EEX' Convention. This was a classic instrument of international law, a Treaty, sanctioned by but otherwise outside of the EEC Treaty.[3] It entered into force on 1 February 1973. With successive Member States joining up as they entered the Community, the EEX Convention became a re-re-re-amended text.

[1] [2012] OJ L351/1. For the Danish adoption of the Recast, see [2014] OJ L240.
[2] [2001] OJ L12/1.
[3] Indeed until the 1971 Protocol, the Court of Justice did not have jurisdiction to interpret the Convention.

Interestingly, as this was a Convention, rather than EEC law, there are no EEC *travaux préparatoires*. Hence these Conventions work with 'Reports', prepared by officials (national officials, or agents of the European institutions (Council, Commission and/or Parliament)), with a little help from academics. These Reports tend to be less dense than their typical EEC (now EU) counterparts. These non-Union instruments therefore often have an interpretative source which is easier to handle than those of Union law, and continue to this day to inform the application of the Regulations. Indeed the European Court of Justice routinely refers to them in applying European private international law. The CJEU[4] evidently distinguishes where necessary and often argues a contrario (in particular where text has changed) in referring to these Reports.

The Lugano Conventions (a 1988 and a 2007 version) have been developed in parallel first with the EEX convention and subsequently with Brussels I. They apply between the EU and most Member States of the European Free Trade Association. Denmark, and the United Kingdom and Ireland, take up a specific position, the former having negotiated a fairly inflexible opt-out of the EU's private international law laws, the latter two a more flexible opt-in regime.

The overriding principle of the Regulation is that of mutual trust: in *Gasser*,[5] the CJEU noted:

> [I]t must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments.

This extract also clearly shows the 'mission creep' which European private international law displayed from its very origin. The initial Treaty basis for European private international law, Article 220 EEC, reviewed in the previous chapter, required the Member States to negotiate conventions inter alia for the purpose of recognition of judgments.[6] In the ensuing Brussels Convention it was quickly determined that mutual recognition of judgments

[4] Since the Treaty of Lisbon, some confusion has crept in on the exact acronym for the European Courts. The 'Court of Justice of the European Union'—CJEU is the collective term for the EU's judicial arm (see Art 19 of the Treaty on European Union), consisting of three separate courts. The predominant court of relevance to questions of EU private international law is the Court of Justice (CJ), formerly known as the European Court of Justice (ECJ), for most if not all of the relevant cases reach the CJEU via the preliminary review procedure (leading national courts to ask 'Luxembourg' for its authoritative view on a matter of interpretation). It would seem that while 'CJ' would be the most correct form of reference (see also Francis Jacobs in the House of Lords' Select Committee on the EU, www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/128/12805.htm#n8 (para 9), accessed 18 September 2015), the common form for some time was to continue using 'ECJ'. Which is what I decided to do in the first edition of this volume too.

However in the meantime it has become apparent that a considerable majority of scholars refer to the CJEU, even when they mean the ECJ. I am happy to conform. A quick word also on references to the European Court Reports (ECR): this used to be the only official form for referring to judgments of the CJEU. However, in the meantime the ECR ceased publication in April 2014, and has been replaced with the European Case-law Identifier (ECLI). In this volume, I continue to refer to ECR were publication exists (old habits die hard).

[5] Case C-116/02 *Gasser* [2003] ECR I-14693, para 72. Idem in Case C-159/02 *Turner* [2004] ECR I-3565, para 24.

[6] See also K Vandekerckhove in H Van Houtte and M Pertegas Sender (eds), *Het nieuwe Europese IPR: Van Verdrag naar Verordening* (Antwerp, Intersentia, 2001) 11 (in particular n 4).

would be easier to stomach if these judgments were based on the same grounds for jurisdiction. From an institutional point of view, this extension of the mandate was probably acceptable, because the Brussels Convention, even though it was the result of an EEC Treaty instruction, took the form of a classic international Treaty.

'Trust' ordinarily grows between members of a class, confident of each other's capabilities. The 'mutual trust' which the Court emphasised for European private international law, however, has been imposed rather more top-down. The strict *lis alibi pendens* rule of Article 29 Brussels I Recast (obliging courts seized last to give way to those seized first—we shall look at the principle in detail below) has made courts keep a rather beady eye on how their counterparts in the other Member States interpret the Regulation. It has also often made them unconfident in their own application of the regime. This helps explain the increasing amount of preliminary reviews to the European Court of Justice, spurred on by the insistence of the Court that terminology in the Regulation be given an 'autonomous' interpretation.[7]

By their nature, the Brussels I and Recast Regulations take precedence over national law, including procedural law on locus standi and interest to bring a case. A national court therefore must first decide whether it has jurisdiction to hear the case under the Regulation, prior to subsequently (should it find it does have such jurisdiction) reviewing whether the party concerned has an interest in bringing the proceedings.[8]

### 2.1.2 Scope of Application: Subject-Matter

As determined by Article 1 of the Recast Regulation, it applies to 'civil and commercial matters whatever the nature of the court or tribunal'—'en matière civile et commerciale et quelle que soit la nature de la juridiction'. The Regulation exempts matters from its scope of application, including for 'arbitration',[9] a much discussed exemption which is more likely to apply in a business to business (B2B) context than in business to consumer (B2C).[10]

[7] See eg Case C-383/95 *Rutten* [1997] ECR I-57, paras 12–13: 'It is settled law … that, in principle, the Court of Justice will interpret the terms of the [Brussels Convention] autonomously so as to ensure that it is fully effective, having regard to the objectives of Article 220 of the EEC Treaty, for the implementation of which it was adopted. That autonomous interpretation alone is capable of ensuring uniform application of the Convention, the objectives of which include unification of the rules on jurisdiction of the Contracting States, so as to avoid as far as possible the multiplication of the bases of jurisdiction in relation to one and the same legal relationship and to reinforce the legal protection available to persons established in the Community by, at the same time, allowing the plaintiff easily to identify the court before which he may bring an action and the defendant reasonably to foresee the Court before which he may be sued.' Note that the Convention having been replaced by the Regulation, the interpretation of the Convention, mutatis mutandis (especially of course where material changes to the text have been made), applies to the Regulation.

[8] See eg Case C-133/11 *Folien Fischer* ECLI:EU:C:2012:664, in particular Jääskinen AG's Opinion (ECLI:EU:C:2012:226). In this case, the defendant argued that plaintiff had no interest in seeking a negative declaration for liability in tort for alleged breach of competition law, because the defendant arguably was not a competitor of plaintiff in that market nor had sought to be for some time. *Folien Fischer* is reviewed further below, under the special jurisdictional rule of Art 7(2) of the Recast Regulation.

[9] Arbitration is exempt on the basis of it already being covered by the 1958 New York Convention. See further details below and see generally on the sometimes difficult relationship between EU law and arbitration (including using public policy arguments to deny an arbitration clause), G Bermann, 'Reconciling European Union law Demands with the Demands of International Arbitration' (2011) 34 *Fordham International Law Journal* 1192–216.

[10] See S Wolff, 'Tanking Arbitration or Breaking the System to Fix It?' (2009) 15 *Columbia Journal of European Law* 65.

What is meant by 'civil and commercial', and who decides what it is? In the light of the aforementioned Court of Justice insistence on concepts in the Regulation requiring an autonomous 'European' meaning, there has to be one approach rather than reliance on national law. Common perception has it that the qualification 'civil and commercial' implicitly harbours a distinction between 'civil and commercial' law on the one hand, and 'public law', on the other. That same perception assumes that for lawyers of the original Member States (all of them continental, with a civil law system) the distinction is (or at least was) fairly straightforward,[11] no doubt helped by the presence of 'civil' and 'public' or 'administrative' courts in those Member States. However, things were never quite as easy as suggesting that all matters dealt with by 'public' law or 'administrative' courts were excluded from the Brussels Convention/Regulation. Indeed, the Convention already said verbatim that the decisive element was the 'civil/commercial' versus 'public' law nature of the subject-matter, rather than of the court adjudicating on it.[12] Moreover in the 'administrative' law of the original Member States, the correct distinction between these two sets of law has never really been fully settled[13] and continues to lead to complications, eg in public procurement law, education etc.

In *LTU/Eurocontrol*, the CJEU held that the Convention (and now by extension, the Regulation), applies to disputes between a public authority and a private individual, where the former has not acted in the exercise of its public powers.[14,15] *Frahuil* added that the specific legal obligation which lies at the foundation of the claim, determines applicability.[16] Litigation in environmental matters is a current example of how things can get a bit muddled, private enforcement of 'public' law such as competition law undoubtedly a future complication.[17]

### 2.1.3 Scope of Application—Ratione Personae

The Brussels I Regulation was applicable in three cases:

1. The defendant in the legal proceedings was domiciled in a Member State. Its nationality was irrelevant—as is the nationality and domicile of the plaintiff; or
2. A court in a Member State had exclusive jurisdiction on the basis of one of the grounds listed in Article 22 (now Article 24), whatever the domicile of the parties; or
3. At least one of the parties (which could be the plaintiff) was domiciled in one of the Member States and a valid choice of forum clause was made in accordance with Article 23 (now Article 25).

[11] See eg the Schlosser Report, [1979] OJ C59/71, paras 23 ff.

[12] Occasionally, both criminal and administrative courts give judgment in a civil or commercial matter: see ibid, 23.

[13] See eg the service public versus puissance publique discussion in J Schwarze, *European Administrative Law* (London, Sweet & Maxwell, 1992) 14.

[14] Case 29/76 *LTU/Eurocontrol* [1976] ECR 1541, as recalled by Colomer AG in his opinion in Case C-292/05 *Lechouritou* [2007] ECR I-1519, 25. See also Case 814/79 *Ruffer* [1980] ECR 3807, and C-271/00 *Gemeente Steenbergen v Baten* [2002] ECR I-10489.

[15] See also the Evrigenis/Kerameus Report which speaks of the exercise of 'sovereign power' as the distinctive element: [1986] OJ C298/1, para 28.

[16] Case C-265/02 *Frahuil* [2004] ECR I-1543.

[17] See also B Hess, T Pfeiffer, P Schlosser, *The Brussels I Regulation 44/2001—Application and Enforcement in the EU* (Oxford, Hart Publishing, 2008) 22 ff (generally referred to as the Heidelberg Report).

The first and second item in this list have now changed, as I further review below: domicile in the EU of the defendant is no longer required for consumer or employment contracts, and for choice of court, neither party need to be domiciled in the EU. It remains the case, though, that domicile of the defendant in the EU remains a core jurisdictional claim of the Regulation. For natural persons, Article 62 holds that the laws of the Member States determine whether a person is domiciled in that State. For a company, legal person or association of natural persons, Article 63 aims to make the rules more transparent and perhaps encourages harmonisation by listing three possible locations only: statutory seat (a term not known in English or Irish law: hence Article 63(2) refers to registered office or place of incorporation);[18] central administration; principal place of business. These three concepts occurring in the Regulation, they have to be given an autonomous meaning. 'Registered office', central administration and principal place of business are however also concepts used within the context of the Treaty Articles on free movement of establishment. Hence inspiration may probably be sought there.

### 2.1.4 The Jurisdictional Rules of the Regulation

The most logical way of studying the Regulation is by reviewing jurisdiction in descending order of exclusivity and specificity: the most specific and exclusive first.[19] This leads to the following matrix:

1. Exclusive jurisdiction, regardless of domicile: Article 24 (previously: 22);
2. Jurisdiction by appearance: Article 26 (previously: 24);
3. Insurance, consumer and employment contracts: Articles 10–23 (previously: 8–21);
4. Agreements on jurisdiction ('choice of forum'): Article 25 (previously: 23);
5. General jurisdiction: defendants domiciled in the Member State where a court is seized: Article 4 (previously: 2)[20]
6. 'Special' jurisdiction: defendants domiciled in another Member State: Articles 7–9 (previously: 5–7);
7. 'Residual' jurisdiction: defendants not domiciled in any Member State: Article 6 (previously: 4);
8. Loss of jurisdiction: *lis alibi pendens* and related actions: Articles 29–32 (previously: 27–30);
9. Applications for provisional or protective measures: Article 35 (previously: 31).

Many ifs and buts apply to each of the entries in the matrix and these will be further studied below. Suffice to say here that, encouraged by the CJEU's hands-on approach to the interpretation of the Regulation,[21] some courts are less inclined than others to rule with confidence on the application of the Regulation.

[18] The special consideration for the UK and Ireland is not just relevant for UK and Irish courts; the courts of other Member States will equally have to apply them where they are called upon to consider whether a company is 'domiciled' in the UK or Ireland.

[19] Similarly: A Briggs, *The Conflict of Laws*, 2nd edn (Oxford, OUP, 2008) 65, and 3rd edn (2013) 66 ff.

[20] Consequently while 'domicile of the defendant' is generally quoted as the overall rule of the Regulation, its actual place in the hierarchy is not altogether very high.

[21] See eg the jurisdictional angle for commercial agency contracts: Case C-19/09 *Wood Floor Solutions* [2010] ECR I-2121.

## 2.2 Detailed Review of the Regulation

Throughout the text below, reference will be made to the discussion, in the Institutions, on the review of the Brussels I Regulation. Of particular relevance are the December 2010 European Commission Proposal;[22] the draft European Parliament Committee Report of June 2011,[23] and a June 2012 'General Approach' document by the Council.[24] All changes were eventually adopted as Regulation 1215/2012.

Reference to the Brussels I Regulation in the analysis below is not merely relevant for historical reasons. In accordance with Article 66 of the Recast Regulation, it applies only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded *on or after 10 January 2015*. Quite a few proceedings currently underway therefore continue to be subject to the Brussels I Regulation.

### 2.2.1 Trust is Good, Control is Better

The overriding principle of Brussels I Recast is that of mutual trust: In *Gasser*,[25] the CJEU noted

> it must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments.

The theme of mutual trust runs through European private international law, extending from the Brussels I Recast into eg the Insolvency Regulation[26] (the CJEU in *Eurofood*).[27]

The CJEU applies the Jurisdiction Regulations employing the following main principles:

— The starting point of the Regulation is that the drafters aim to facilitate recognition and enforcement by agreeing common rules for the adjudication of jurisdiction;
— This adjudication by courts in one Member State is not to be second-guessed by courts of other States; and
— The rules are in principle subject to an autonomous 'European' interpretation.

The combination of all these elements is firmly promoted by the Court as the only road to legal certainty. In doing so it arguably equates 'legal certainty' with 'predictability', an equation which may be debatable. Indeed among practitioners generally and especially those

[22] Commission Proposal COM(2010) 748 of 14 December 2010 for a recast of the Brussels I Regulation.
[23] Tadeusz Zwiefka MEP, PE 467.046v01-00.
[24] Document 10609/12, in particular addendum 1.
[25] Case C-116/02 *Gasser* [2003] ECR I-14693, para 72. Idem in Case C-159/02 *Turner* [2004] ECR I-3565, para 24.
[26] Regulation 1346/2000, [2000] OJ L 160/1, as amended. Now replaced with the new Insolvency Regulation, discussed in the relevant chapter, below.
[27] Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, para 39; see also C-444/07 *MG Probud Gdynia* [2010] ECR I-417.

of common law Member States, there is growing dissatisfaction with the Court's principled disregard for commercial arguments in interpreting the Brussels I Regulation (and presumably its Recast, upon which the CJEU at the time of writing was yet to rule), and with the aforementioned notion of legal certainty.[28] In *Gasser*, the United Kingdom specifically put forward the argument that the Brussels Convention had to be interpreted taking into account the needs of international trade[29]—a suggestion not much entertained by the CJEU.

On the distinction between the common law of conflicts and the civil law/Brussels regimes, Rix LJ noted in *Konkola Copper Mines*:

> The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (and now Council Regulation No. 44/2001 ('the Regulation')) also approaches the risk of inconsistent decisions with the same dislike. However, the techniques of the English common law and of the Regulation are different. The common law ultimately relies on an exercise of discretion to reach what in each case seems to the court to be the right result. The Convention and Regulation state rules designed to avoid inconsistent decisions, but if those rules fail in a particular case to avoid that danger, there can be no fall-back on discretionary powers: see Erich Gasser GmbH v MISAT Srl [2004] 1 Lloyd's Rep 445, Owusu v Jackson (Case C-281/02) [2005] QB 801.[30]

## 2.2.2 Scope of Application: Subject-Matter

### *2.2.2.1 The Existence of an International Element*

Application of the Regulation, and of the Convention before it, requires the existence of an international element. The Brussels Convention included language in its preambles, which referred specifically to the Convention determining the international jurisdiction of the courts of the Member States. It is to this preamble which the Jenard Report refers where it notes

> As is stressed in the fourth paragraph of the preamble, the Convention determines the international jurisdiction of the courts of the Contracting States. It alters the rules of jurisdiction in force in each Contracting State only where an international element is involved. It does not define this concept, since the international element in a legal relationship may depend on the particular facts of the proceedings of which the court is seised. Proceedings instituted in the courts of a Contracting State which involves only persons domiciled in that State will not normally be affected by the Convention; Article 2 simply refers matters back to the rules of jurisdiction in force in that State. It is possible, however, that an international element may be involved in proceedings of this type. This would be the case, for example, where the defendant was a foreign national, a situation in which the principle of equality of treatment laid down in the second paragraph of Article 2 would apply, or where the proceedings related to a matter over which the courts of another State had exclusive jurisdiction (Article 16), or where identical or related proceedings had been brought in the courts of another State (Article 21 to 23).

[28] See eg Andrew Dickinson on Conflict of Laws.net, 8 June 2009 (http://conflictoflaws.net/2009/brussels-i-review-online-focus-group/).

[29] Case C-116/02 *Gasser* [2003] ECR I-14693, para 31.

[30] *Konkola Copper Mines Plc v Coromin Ltd* [2006] APP.L.R. 01/17, para 27.

> It is clear that at the recognition and enforcement stage the Convention governs only international legal relationships since ex hypothesi it concerns the recognition and enforcement in one Contracting State of judgments given in another Contracting State.[31]

In *Owusu*, the CJEU clarified

> the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of Article 2 of the Brussels Convention, from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States. The involvement of a Contracting State and a non-Contracting State, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature. That situation is such as to raise questions in the Contracting State, as it does in the main proceedings, relating to the determination of international jurisdiction, which is precisely one of the objectives of the Brussels Convention, according to the third recital in its preamble.[32]

It expressly confirmed the flexible interpretation of the presence of an 'international' element, in *Lindner*:

> the foreign nationality of one of the parties to the proceedings is not taken into account by the rules of jurisdiction laid down by the Regulation, however (…) a distinction must be made between, on the one hand, the conditions under which the rules of jurisdiction pursuant to that regulation must apply and, on the other, the criteria by which international jurisdiction is determined under those rules. (…) the foreign nationality of the defendant may raise questions relating to the determination of the international jurisdiction of the court seised. In a situation such as that in the main proceedings, the courts of the Member State of which the defendant is a national may also consider themselves to have jurisdiction even though the place in that Member State where the defendant is domiciled is unknown. In those circumstances, application of the uniform rules of jurisdiction laid down by Regulation No 44/2001 to replace those in force in the various Member States would be in accordance with the requirement of legal certainty and with the purpose of that regulation, which is to guarantee, to the greatest extent possible, the protection of defendants who are domiciled in the European Union.[33]

In the case at issue, the fact that the defendant was a foreign national whose domicile was unknown at the time of the proceedings means the courts of the Member State of which the defendant is a national may also consider themselves to have jurisdiction even though the place in that Member State where the defendant is domiciled is unknown.

In its Opinion on the Lugano Convention, the CJEU noted that the Brussels I Regulation unifies the rules on jurisdiction of the Member States, not only for disputes within the EU but also for those with an external element. The obstacles to the functioning of the Internal Market which the Regulation seeks to eliminate follow from disparities between national legislations on jurisdiction, whether the elements external to that jurisdiction have a European, or a non-European element.[34]

[31] Jenard Report, [1979] OJ C59/8.

[32] Case C-281/02 *Andrew Owusu v NB Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ECR I-1383, para 26.

[33] Case C-327/10 *Hypoteční banka as v Udo Mike Lindner* [2011] ECR I-11543, paras 31 ff.

[34] See CJEU Opinion 1/03 *Lugano I* [2006] ECR I-1145, para 144, referred to most recently in Case C-154/11 *Mahamdia* ECLI:EU:C:2012:491, para 40.

That the CJEU readily accepts the presence of an international element was recently illustrated by its finding in *Maletic*.[35] The Plaintiffs (the Maletics) were domiciled in Bludesch (Austria), which lies within the jurisdiction of the Bezirksgericht Bludenz (District Court, Bludenz, Austria). They had booked and paid for themselves, as private individuals, a package holiday to Egypt on the website of lastminute.com. Lastminute.com, a company whose registered office was in Munich (Germany), stated on its website that it acted as the travel agent and that the trip would be operated by TUI, which had its registered office in Vienna (Austria). The booking was made for a particular hotel, the name of which was correctly communicated to TUI by lastminute.com; however, TUI had mismanaged the booking. Upon their arrival in Egypt, the Maletics discovered the mix-up, stayed at the hotel which they had intended, and subsequently sued for the recovery of the extra costs. They brought an action before the Bezirksgericht Bludenz seeking payment from lastminute.com and TUI, jointly and severally.

The Bezirksgericht Bludenz dismissed the action in as far as it was brought against TUI on the ground that it lacked local jurisdiction. According to that court, the Brussels I Regulation was not applicable to the dispute between the applicants in the main proceedings and TUI, as the situation was purely domestic. It held that, in accordance with the applicable provisions of national law, the court with jurisdiction was the court of the defendant's domicile, ie the court at Vienna and not that at Bludenz. As regards lastminute.com, the court held that it had jurisdiction to hear the substantive proceedings on the basis of Article 15 of the Brussels I Regulation, which deals with consumer contracts (it is now Article 17 of the Brussels I Recast).

The booking transaction therefore was a single transaction, even if it led to two separate contracts. Assessed separately, one of those clearly leads to application of the Brussels I Regulation. The other one does not for it is purely domestic.

Does the purely domestic contract become 'international' by association? The CJEU held that it did. It referred to its judgment in *Owusu* that the mere domicile within an EU Member State of just one of the parties involved is enough to trigger the application of the Regulation. In *Owusu*, that finding was not affected by the remainder of the parties and fact being external to the EU. The 'international' element required to trigger the application of the Regulation can therefore be quite flimsy indeed. The Court did not refer to *Lindner*, however, that case in my view is an even stronger indication of the relaxed attitude of the Court vis-à-vis the international element required. In *Maletic*, the Court held that the second contractual relationship cannot be classified as 'purely' domestic since it was inseparably linked to the first contractual relationship which was made through the travel agency situated in another Member State.[36]

[35] Case C-478/12 *Armin Maletic and Marianne Maletic* v *lastminute.com GmbH and Tui Österreich GmbH* ECLI:EU:C:2013:735.

[36] Further, and of less relevance for the current heading, the Court referred to the aim of the consumer title of the Regulation, in particular recitals 13 and 15 in the preamble to Regulation No 44/2001 concerning the protection of the consumer as 'the weaker party' to the contract and the aim to 'minimise the possibility of concurrent proceedings … to ensure that irreconcilable judgments will not be given in two Member States'. Those objectives, the Court held, 'preclude a solution which allows the Maletics to pursue parallel proceedings in Bludenz and Vienna, by way of connected actions against two operators involved in the booking and the arrangements for the package holiday at issue in the main proceedings'.

Of note is that the CJEU's low threshold for an international element in the jurisdictional stage is eagerly looked at by practitioners in the applicable law stage. An equally low threshold there expands the possibility of employing choice of law especially in contractual situations.

### *2.2.2.2 Civil and Commercial Matters*

Article 1(1) states that:

> This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall 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*).

The reference to '*acta iure imperii*' was inserted by the Brussels I Recast Regulation. Prior to this, both the Rome II Regulation on applicable law for non-contractual obligations (reviewed in the relevant chapter) and the Regulation on the European enforcement order[37] already included the term.

The Regulation applies to 'civil and commercial matters whatever the nature of the court or tribunal'. The French text reads 'en matière civile et commerciale et quelle que soit la nature de la juridiction'. The Article adds by way of illustration that the Regulation shall in particular not extend to 'revenue, customs or administrative matters'.

Common perception might suggest that the qualification 'civil and commercial' implicitly harbours a distinction between 'civil and commercial' law on the one hand, and 'public law', on the other. One also might have assumed that for lawyers of the original Member States (all of them continental, with a civil law system) the distinction is (or at least was) fairly straightforward,[38] no doubt helped by the presence of 'civil' and 'public' or 'administrative' courts in those Member States. However things were never quite as easy as suggesting that all matters dealt with by 'public' law or 'administrative' courts were excluded from the Brussels Convention/Regulation. Indeed the Convention already in so many words clarifies that the decisive element was the 'civil/commercial' versus 'public' law nature of the subject-matter, rather than of the court adjudicating on it.[39] Moreover in the 'administrative' law of the original Member States, the correct distinction between these two sets of law has never really been fully settled[40] and continues to lead to complications, eg in public procurement law, education, etc. A good illustration of the latter, incidentally, is Case C-172/91 *Sonntag*, in which the parents of a pupil sought the enforcement in Germany of the civil-law provisions of a judgment given by an Italian criminal court.[41] *Sonntag* was referred to as precedent in

[37] Regulation 805/2004 creating a European Enforcement Order for uncontested claims, [2004] OJ L143/15.

[38] See eg the Schlosser Report, [1979] OJ C59/71, paras 23 ff.

[39] Occasionally, both criminal and administrative courts give judgment in a civil or commercial matter: see ibid, 23.

[40] See eg the service public versus puissance publique discussion in Schwarze (n 15).

[41] Case C-172/91 *Volker Sonntag v Hans Waidmann et al* [1993] ECR I-1963. Herr Sonntag and the regional state authorities argued that the criminal judgment of the Bolzano court related to a claim under public law, since the supervision of pupils by Herr Sonntag in his capacity as a civil servant was a matter that fell within the province of administrative law. The Court held that even though it is joined to criminal proceedings, a civil action for compensation for injury to an individual resulting from a criminal offence is civil in nature; that such an action falls outside the scope of the Convention only where the author of the damage against whom it is brought must be regarded as a public authority which acted in the exercise of public powers; and that in the majority of the legal

C-523/14 *Aertssen*.[42] Aertssen NV, of Belgium, had a gripe with VSB Machineverhuur BV and others, of the Netherlands. Aertssen alleged fraud in VSB's dealings with the company. It employed a well-known feature of Belgian (and French, among others) civil procedure, which is to file complaint with the investigating magistrate. This launches a criminal investigation, to which civil proceedings are attached.

Aertssen's subsequent action of attachment of VSB's accounts in the Netherlands risked being stalled by the Dutch courts' insistence that the group launch new legal action in the country. Aertssen obliged pro forma with this initiation of new proceedings, subsequently to aim to torpedo them. Aertssen would rather the Belgian courts continue with their own, criminal investigation and that action in the Netherlands, other than action in attachment, be put on hold at least until the Belgian proceedings were finalised.

In essence therefore, the case before the CJEU needed to determine whether the Aertssen action in Belgium was of a 'civil and commercial' nature, and if it was, whether the action in Belgium and the Netherlands met the requirements of the *lis alibi pendens* rule of Article 27 (old) of the Brussels I-Regulation. The CJEU replied in the affirmative to both (the *lis alibi pensens* issue is reviewed below). In *Aertssen*, The CJEU used the term 'private law relationship' to describe the legal relationship between the parties concerned. Even though, other than in *Sonntag* where the criminal proceedings were launched by the State prosecutor, Aertssen itself had triggered the criminal investigation, its ultimate aim was to obtain monetary compensation.

Standard references for what exactly has to be understood by 'civil and commercial' are Cases 29/76 *Eurocontrol*, 814/79 *Ruffer* and C-271/00 *Gemeente Steenbergen* and, more recently, Cases C-292/05 *Lechouritou*, C-645/11 *Sapir*, C-320/13 *flyLAL* and C-226/13 *Fahnenbrock*. It is worthwhile spending a bit of time reviewing relevant case-law. A finding that the dispute is not 'civil and commercial' is a 'knock-out' point.[43] The Brussels I Recast does not then apply and the court seized may apply its residual private international law rules.

It is worth pointing out that case-law on 'civil and commercial' applies equally to foreign States conducting activities in the EU. In *Mahamdia*,[44] a former driver working for the Algerian embassy in Germany had at the time of the start of the employment concluded an agreement with the embassy which designated Algerian courts as the courts with exclusive jurisdiction. The Court first of all applied the Vienna Convention on Diplomatic Relations and held that an embassy often acts *iure gestionis*, not *iure imperii*, and that under the Vienna rules, the EU is perfectly entitled to apply the Regulation given that it applies to 'civil and commercial' matters.[45] In that vein, an embassy may very well have to be regarded as an 'establishment' within the meaning of Article 20(2) (on employment contracts).

systems of the Member States the conduct of a teacher in a State school, in his function as a person in charge of pupils during a school trip, does not constitute an exercise of public powers, since such conduct does not entail the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals—that finding of the CJEU would certainly not undisputedly be the position in quite a few Member States.

[42] Case C-523/14 *Aannemingsbedrijf Aertssen en Aertssen Terrassements v VSB Machineverhuur BV et al*, ECLI:EU:C:2015:722.

[43] Field J in *British Airways et al v Sindicato Espanol de Pilotos de Lineas Aereas et al* [2013] EWHC 1657 (Comm),

[44] Case C-154/11 *Ahmed Mahamdia* v *République algérienne démocratique et populaire* ECLI:EU:C:2012:491.

[45] Whether the embassy at issue acted *iure imperii or iure gestionis* was held to be up to the national court to decide.

### *2.2.2.3 Case 29/76* Eurocontrol

In *LTU/Eurocontrol*, Eurocontrol sought enforcement in Germany of an order by the Belgian courts that LTU pay it a sum by way of charges imposed by Eurocontrol for the use of its equipment and services. Eurocontrol is a public body and the use of its services by airlines is compulsory and exclusive. The Court referred unsurprisingly to the only specification in the Convention (all arguments below apply equally to the Regulation): that its provisions apply 'whatever the nature of the court or tribunal to which the matter is referred'. The Court added:

> Therefore, the concept in question must be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention, and, secondly, to the general principles which stem from the corpus of the national legal systems. (at para 3, in fine)

Germany in particular[46] had referred to the (then) future membership to the Convention of common law countries, where the distinction between 'private' and 'public' law is even less straightforward than in civil law countries. The understanding of the concept of 'civil and commercial' therefore becomes a mix of on the one hand, independent interpretation guided by the objectives and scheme of the Convention, and on the other hand the 'ius commune' of national legal systems. The latter in fact may not be of great assistance, precisely because of the lack of common approach in the Member States. The Court continues however with an often overlooked reference, namely that:

> if the interpretation of the concept is approached in this way, in particular for the purpose of applying the provisions of Title III of the Convention, certain types of judicial decision must be regarded as excluded from the area of application of the Convention, either by reason of the legal relationships between the parties to the action or of the subject-matter of the action. (4)

'In particular for the purpose of applying the provisions of Title III of the Convention': this is the Title of the Convention (the Regulation has a similar structure) which concerns recognition and enforcement. Recognition and enforcement were as noted the only parts of private international law which the Member States had specifically been instructed to harmonise via the instrument of Treaties. In my view the specific reference by the Court goes beyond a mere wink at the specific facts of the case. The Court arguably, purposely links Title III to the overall scope of application of the Regulation, because it reasoned that it would not serve any purpose to bring matters within the scope of application of the Convention which would run into trouble at the enforcement stage. The vast majority of the Convention's Parties at the time did not allow for enforcement against public authorities, indeed for quite a few of them this remains a recent development. Given the relevance of Title III to the Court's finding in *Eurocontrol*, I would submit that the Court's core reasoning in that judgment may need revisiting in view of the developments in redress against public authorities.

The Court further held that:

> Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers.

[46] See the summary of its arguments in the ECR.

Other language versions of the judgment read inter alia 'Où l'autorité publique a agi dans l'exercise de la puissance publique'; 'Eine Entscheidung den die Behörde im Zusammenhang met der Ausübung hoheitlicher Befugnisse geführt hat'; 'wanneer de overheidsinstantie krachtens overheidsbevoegdheid handelt'.

'Where the public authority acts in the exercise of its powers' hence would seem to be the overall criterion which the Court suggests in *Eurocontrol*. This amounts to a negative approach to the scope of application in the context of public authorities: using the wording of the Evrigenis/Kerameus Report, the exercise of 'sovereign power' is the distinctive element.[47]

#### *2.2.2.4 Case 814/79* Ruffer

This case concerned an action for the recovery of the costs involved in the removal of a wreck in a public waterway. That recovery was carried out by the relevant State in fulfilment of an obligation under international law. The task was entrusted on the basis of provisions of national law to a particular public authority which enjoyed for that task the status of public authority. The action in recovery was held by the Court as being outside the ambit of the Convention. The fact that in this case the action pending before the national court did not concern the actual removal of the wreck but rather the costs involved in that removal and that the Dutch State was seeking to recover those costs by means of a claim for redress and not by administrative process such as one could find in the national law of other Member States, was not found to be sufficient to bring the matter in dispute within the ambit of the Brussels Convention (13). The Court reiterated the *Eurocontrol* double foundation:

> the area of application of the Convention is essentially determined either by reason of the legal relationships between the parties to the action or of the subject-matter of the action. (14)

#### *2.2.2.5 Case C-271/00* Gemeente Steenbergen

In *Gemeente Steenbergen* v *Luc Baten*, the municipality of Steenbergen in the Netherlands had paid subsistence grants to the former spouse of Mr Steenbergen. The spouse had relocated to the Netherlands. Mr Steenbergen continued to live in Belgium. Gemeente Steenbergen subsequently sought to have the payments reimbursed by Mr Baten. The couple had however agreed a divorce settlement, certified by public notary, in which Mr Baten agreed to pay maintenance for the couple's child, but not for his former wife. Such provision ordinarily extends to third parties. The subsistence payment financed by the municipality covered both the ex-wife and the child. A Dutch court ordered Mr Baten to pay the full claim, on the basis of a provision in the Dutch civil code, which allows the authorities to set aside any agreements between former spouses which have an impact on the mutual maintenance obligations. Upon referral by a Belgian court that was asked to enforce the Dutch judgment, the Court of Justice held that:

> the concept of 'civil matters' encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard

[47] Evrigenis/Kerameus Report, [1986] OJ C298/1, para 28.

> to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in civil matters. (para 37)

In coming to this conclusion, the Court primarily stuck to the *Eurocontrol* formula:

> exclusion of certain judicial decisions from the scope of the Brussels Convention, owing either to the legal relationships between the parties to the action or to its subject matter (para 29)

and subsequently would seem to view both *Eurocontrol* and *Ruffer*, precited as examples of just one application: namely *where the public authority is acting in the exercise of its public powers*. Subsequently, however, it reformulated the *Eurocontrol* formula as requiring an examination of

> the basis and the detailed rules governing the bringing of that action. (*Gemeente Steenbergen*, para 31)

Applied in the particular case at issue, the civil code determines the redress which may be sought; and specifies that these proceedings may be brought before a civil court (ie the court in ordinary)—note of course Article 4 of the Recast Regulation and all other versions before it: the very nature of the court before which the claim is brought cannot be sufficient indication—and that the rules of civil procedure apply. Hence prima facie the case would be one which is governed by the Regulation. However to the degree that the rules of civil procedure subsequently as it were revive public powers by granting public authorities the right unilaterally to trump the contractual arrangements between former spouses, the claim at issue nevertheless is excluded from the scope of application.

The CJEU however would not seem to clarify whether *the mere possibility* for the authorities to trump these arrangements, in itself suffices to take the case outside of the ambit of the Regulation, or whether, conversely, these authorities need to actually deploy these powers. One would imagine that the former would be the most plausible. It is fairly inconceivable for the CJEU to have created a mechanism whereby the procedural behaviour of a public authority would decide the (in)applicability of the Regulation.

Incidentally, the Court in *Gemeente Steenbergen* also reviewed the application of the social security exception. The referring court asked whether if indeed the case does have to be seen as principally falling within the field of application of the Directive, perhaps the exception for social security would apply. The Court applied a strict interpretation, with reference to the Jenard and Schlosser reports: the exception only relates to litigation arising out of relations between the authorities on the one hand, employers and/or employees on the other.

> The Brussels Convention is applicable where the administration exercises a direct right of action against a third party liable for injury or is subrogated as regards that third party to the rights of a victim insured by it, because it is then acting under the rules of the ordinary law. (para 48)

In reaching this conclusion, the Court referred to (then) secondary EC law in support. That was not all that obvious at the time of the judgment, given that the EEX Convention obviously did not qualify as 'EC' law.

Shortly after *Gemeente Steenbergen*, *Frahuil* added that the specific legal obligation which lies at the foundation of the claim determines applicability.[48] That case concerned to and

[48] Case C-265/02 *Frahuil* [2004] ECR I-1543.

fro allegations of impropriety between an importer, its customs clearance agent and a subcontractor of the latter. Even though the underlying payments were all triggered by legislation on customs duties, the legal relationship between Frahuil and Assitalia, the two parties governed by private law who were contesting the main proceedings, was a relationship governed by private law. The Court held that:

> In a case such as the present one in which there are multiple relationships involving a party who is a public authority and a person governed by private law, as well as only parties governed by private law, it is necessary to identify the legal relationship between the parties to the dispute and to examine the basis and the detailed rules governing the bringing of the action.

#### *2.2.2.6 Case C-292/05* Lechouritou

In *Lechouritou*,[49,50] the Court summarised the current position as follows:[51]

> It is to be remembered that, in order to ensure, as far as possible, that the rights and obligations which derive from the Brussels Convention for the Contracting States and the persons to whom it applies are equal and uniform, the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned. It is thus clear from the Court's settled case-law that 'civil and commercial matters' must be regarded as an independent concept to be interpreted by referring, first, to the objectives and scheme of the Brussels Convention and, second, to the general principles which stem from the corpus of the national legal systems …
>
> According to the Court, that interpretation results in the exclusion of certain legal actions and judicial decisions from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter of the action …
>
> Thus, the Court has held that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers …

The Court essentially reiterated the specific cases of *Eurocontrol* and *Ruffer* as one expression of the overall *Eurocontrol* formula: 'the exclusion of certain legal actions and judicial decisions from the scope of the Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject-matter' (para 30). It subsequently yet again focused on public authority as an application, this time formulating it positively:

> Disputes (that) result from the exercise of public powers by one of the parties to the case, as it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships. (para 34).

The applicants in the case argued in vain that illegal or illegitimate acts can never qualify as *acta iure imperii*.

[49] Case C-292/05 *Lechouritou* [2007] ECR I-1519, paras 29–31.

[50] The main proceedings had their origins in the massacre of civilians by soldiers in the German armed forces which was perpetrated on 13 December 1943 and of which 676 inhabitants of the municipality of Kalavrita (Greece) were victims. Plaintiffs sued in Greece for compensation from the German State in respect of the financial loss, non-material damage and mental anguish caused to them by the acts perpetrated by the German armed forces.

[51] With reference to *Eurocontrol* and to Case 814/79 *Netherlands v Rüffer* [1980] ECR 3807, para 7; Case C-271/00 *Baten* [2002] ECR I-10489, para 28; Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, para 20; and Case C-343/04 *ČEZ* [2006] ECR I-4557, para 22.

### *2.2.2.7 C-645/11* Sapir

In *Sapir*,[52] the issues under consideration were the application of the Brussels I Regulation to proceedings brought by a State (Berlin) against a group of defendants, some of whom were based outside the EU, some inside the EU but not in Germany, and only a limited number in Germany. The request for preliminary review had been made in proceedings between, on the one hand, *Land* Berlin and, on the other a number of individuals, concerning the repayment of an amount overpaid in error following an administrative procedure designed to provide compensation in respect of the loss of real property during persecution under the Nazi regime.

Jurisdiction against the non-German-based defendants could only theoretically be established on the basis of Article 6(1) of the Brussels I Regulation (Article 8(1) of the Recast Regulation), which as I review later in this volume, allows for plaintiff to identify an anchor defendant in one Member State, and drag other defendants not based there into those proceedings.

Use of an anchor defendant under the Regulation, however, was of course only possible if the Regulation applied at all. The first issue under consideration was therefore the nature of the proceedings. There was a whiff of 'public law' surrounding the procedure, given its core foundation in administrative law procedures and the involvement of a public authority. However the CJEU, and Trstenjak AG with it, considered these not to be material to the nature of the proceedings. The request for repayment of part of the sum was made on the basis of a provision in German law (unjust enrichment) which was generally available and in which neither the public nature of plaintiff, nor the substantial grounds on the basis of which compensation was granted, played any role: the basis and the detailed rules governing the bringing of the action were unrelated to the authority acting *ius imperii*.

### *2.2.2.8 Case C-302/13* fly LAL

In *fly LAL*,[53] fly LAL sought compensation for damage resulting, first, from the abuse of a dominant position by Air Baltic on the market for flights from or to Vilnius Airport (Lithuania) and, second, from an anti-competitive agreement between the co-defendants. To that end, it applied for provisional and protective measures. The relevant Lithuanian court granted that application and issued an order for sequestration, on a provisional and protective basis, of the moveable and/or immoveable assets and property rights of the co-defendants. A relevant Latvian court decided to recognise and enforce that judgment in Latvia, in so far as the recognition and enforcement related to the sequestration of the moveable and/or immoveable assets and property rights of the defendants. An application by flyLAL for a guarantee of enforcement of that judgment was rejected.

The defendants submitted that the recognition and enforcement of the judgment was contrary to both the rules of public international law on immunity from jurisdiction and the Brussels I Regulation. They argued that the case did not fall within the scope of that Regulation. Since the dispute related to airport charges set by State rules, it did not, they submitted, concern a civil or commercial matter within the meaning of that Regulation.

[52] Case C-645/11 *Land Berlin* v *Ellen Mirjam Sapir et al* ECLI:EU:C:2013:228.

[53] Case C-302/13 *fly LAL-Lithuanian Airlines v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS* ECLI:EU:C:2014:2319.

The CJEU held that the provision of airport facilities in return for payment of a fee constitutes an economic activity. (This is different from the foundation judgment in *Eurocontrol*, which in turn was cross-referred in *Sapir*—to which the CJEU in this current judgment refers repeatedly: Eurocontrol is a public body and the use of its services by airlines is compulsory and exclusive). The number of shares held by government in the relevant airlines is irrelevant.

#### *2.2.2.9 Joined Cases C-226/13, C-245/13, C-247/13 and C-578/13 Fahnenbrock ('Direct and Immediate Effect')*

In *Fahnenbrock*,[54] within the context of the service of documents Regulation[55] but arguably with no less relevance for the Jurisdiction Regulation, the issue was the qualification of an action by (German) holders of Greek bonds, against the Greek State, for the involuntary shave they took on those bonds. (A 'collective action clause' *allows a supermajority of bondholders to agree to a debt restructuring that is legally binding on all holders of the bond, including those who vote against the restructuring.*)[56]

Bot AG suggested that in the case at issue, the Greek State, with its retroactive insertion of the collective action clause in the underlying contract, exercised *acta iure imperii* with direct intervention in the contract itself. Not an abstract, general regime (such as a change in overall tax) which only has an impact on said contract. Had the latter been the case, the AG suggested, the change in say tax would of course have been *acta iure imperii*; however, that exercise of sovereign authority would have taken place at a distance from the contract and would have not impacted the 'civil and commercial' nature of the contractual dispute.

The CJEU disagreed with the AG however. Its finding may be distinguishable, in that it emphasises (at 40 and 44 in particular) that for the service of documents Regulation, things need to move fast indeed and hence interpretation even of core concepts of the Regulation needs to proceed swiftly: *'in order to determine whether Regulation No 1393/2007 is applicable, it suffices that the court hearing the case concludes that it is not manifest that the action brought before it falls outside the scope definition of civil and commercial matters*' (49). However in the remainder of the judgment it does refer to precedent in particular under the Brussels I Regulation, hence presumably making current interpretation de rigueur for European civil procedure generally. As noted above, Bot AG opined that the Greek State's intervention in the contracts was direct and not at a distance from the contract. The Court on the other hand essentially emphasised (57) that even though the Greek State, with its retroactive insertion of the collective action clause in the underlying contract, enabled the subsequent vote by the majority of the bondholders (to the dismay of the outvoted applicants), it was the vote, which led directly and immediately to changes to the financial conditions of the securities in question and therefore caused the damage alleged by the applicants—not the Act which enabled it. Not *acta iure imperii* therefore and hence European civil procedure is applicable.

[54] Joined Cases C-226/13, C-245/13, C-247/13 and C-578/13 *Stefan Fahnenbrock et al v Greece* ECLI:EU:C:2015:383.

[55] Regulation 1393/2007, [2007] OJ L324/79.

[56] I found Wikipedia's definition, quoted here verbatim, to be rather to the point hence I am happy to quote it. Consulted 29 July 2015.

I find the 'direct and immediate' effect test not all that convincing. Applicants in the case at issue may be left arguing that identifying the Greek State's intervention as the cause of the change in law, is no application of the butterfly effect (an extremely remote event which is being blamed for downstream effects) but rather an elephant in the Greek bond market room and hence *acta iure imperii*.

In summary, the *Eurocontrol* formula which was put forward so succinctly, still rules happily: litigation may be excluded *by reason either of the legal relationships between the parties to the action or of the subject-matter of the action*. In *Realchemie Nederland*,[57] and in *Sunico*,[58] the Court continued to hold that the scope of the Regulation is *'defined essentially by the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject-matter thereof'*. Yet, the Court[59] has hitherto only ever applied the first criterion, never the last—indeed it is very difficult to conceive an example of what the second application would look like.[60] As such this is not a big problem. In *Eurocontrol*, the formula was set as alternative conditions, not cumulative: either one, or the other. Consequently if the Court found the conditions of one fulfilled, it need not review the other.[61] However it would seem a bit redundant to formulate the exception as presenting two different options when the second option is never seriously entertained—for at the very least, the presence of a second leg in an exception does affect the overall balance of the construction. Moreover, the alternative *Gemeente Steenbergen* formula (*'the basis and the detailed rules governing the bringing of that action')* has in my view only ever had its first leg applied, too.

I have also reviewed above the potentially new alternative test of 'direct and immediate effect' formulated by the CJEU in *Fahnenbrock*. I do not think that this test is likely to assist with legal certainty in practice.

Finally, that the term 'civil and commercial' needs to be applied restrictively has been suggested in scholarship (and discussed in national case-law) but has not as such been held by the Court of Justice. Neither should it. There is a difference here with the exclusions from the scope of application, which I review further below. The subject-matter of the exclusions tends to be quite clearly 'civil and commercial' and is verbatim excluded for quite specific reasons extraneous to them being 'civil and commercial'. Their application therefore needs to be construed restrictively, and directly linked to the reason for them having been excluded. That is different for the core trigger of a matter being 'civil and commercial'

[57] Case C-406/09 *Realchemie Nederland* [2011] ECR I-9773: the Regulation applies to the recognition and enforcement of a decision of a court or tribunal that contains an order to pay a fine in order to ensure compliance with a judgment given in a civil and commercial matter.

[58] Case C-49/12 *The Commissioners for Her Majesty's Revenue & Customs v Sunico ApS and Others* ECLI:EU:C:2013:545, which found that the Regulation covers an action whereby a public authority of one Member State claims, as against natural and legal persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit value added tax fraud in the first Member State.

[59] See by contrast the Opinion of Leger AG in Case C-266/01, *Préservatrice foncière TIARD SA v Staat der Nederlanden* [2003] ECR I-4867, who does distinguish conceptually between both.

[60] See also V Gärtner, 'The Brussels Convention and Reparations—Remarks on the Judgment of the European Court of Justice in *Lechouritou and others v the State of the Federal Republic of Germany*' (2007) 8 *German Law Journal* no 417, fn 29.

[61] See for instance in *Lechouritou*: the fact that the applicants claimed damages in tort—without doubt an action of a civil nature—was of no relevance once the Court had established *acta iure imperii*.

within the meaning of Article 1(1). What matters there is simply ensuring that we properly understand what the Regulation was meant to regulate: there is nothing 'restrictive' or indeed, conversely, expansive about it.

It is noteworthy that the term 'civil matters' also features in Regulation 2201/2003,[62] which, too, has left it undefined. However in *C*, the Court's Grand Chamber held that the two concepts have to be given a meaning fit for the specific purposes of the respective Regulations,[63] hence excluding mutual interchangeability of meaning between the same words used in the two Regulations.

Finally, the *acte clair* doctrine (meaning that national courts need not refer to the CJEU when the interpretation of EU law is sufficiently clear either by virtue of that law itself or following CJEU interpretation in case-law) implies that national courts by now ought to have been given plenty of markers when applying this condition of application of the Brussels I and Recast Regulation. Except of course the *acte* might not be that *clair* at all, as the above overview shows.

A good illustration is *British Airways*.[64] A crucial consideration was whether the English courts had jurisdiction under the Brussels I Regulation to determine the claim brought by BA against SEPLA, a Spanish trade union, for damages and declaratory and injunctive relief. BA alleged that strikes by Spanish airline pilots organised by SEPLA were unlawful under Spanish law. It was suggested that they were in breach of BA's right to freedom of establishment and to provide cross-border services under Articles 49 and 56 TFEU. The International Federation of Airline Pilots' Associations acted as anchor defendant. It was domiciled in the UK at the time the action was introduced (it has since moved to Canada) and the case against both arguably being closely linked within the meaning of Article 6 of the Brussels I Regulation (Article 8 of the Recast Regulation).

The High Court accepted the 'knock-out point' of the defendant that the matter was not 'civil and commercial' and therefore not within the scope of application of the Regulation. Field J argued with reference to the CJEU judgment in *Viking*[65] (or more specifically, the AG's Opinion there) that 'it remains the case that the source of the fundamental freedoms are treaty provisions imposing obligations on states', and that

> a court having to decide whether SEPLA was in breach of Articles 49 and/or 56 TFEU will have to conduct a sensitive balancing exercise in which it weighs SEPLA's constitutional right to strike and the fundamental right to strike which forms part of the general principles of Community Law against the fundamental freedoms enshrined in Articles 49 and 56. In my judgment, such an exercise will involve a resort to notions of public law rather than to private law.

I am not so sure. Firstly, the horizontal (ie between individuals) direct effect of the Treaty Articles concerned is quite established. Moreover, under the *Eurocontrol* and subsequent case-law formula, the public authority involved needs to have acted *iure imperii*. Here the defendant is merely a private organisation, a trade union, perhaps carrying out duties of a

[62] On jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, [2003] OJ L338/1—commonly referred to as the Brussels IIa or Brussels II bis Regulation ('bis' or 'a' on account of it repealing a previous Regulation, 1347/2000).

[63] Case C-435/06 *C* [2007] ECR I-10141.

[64] Note 43 above.

[65] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

quasi-public law nature (the right to strike). It is, however, only if the legal relationship (not the underlying applicable law) between the parties to the action is of a public law nature, giving one of them extraordinary authority which the other lacks, that the Regulation may not apply. There was no indication that the trade union in the specific case had acted in some kind of *iure imperii* matter. This was not, I would have thought, an *acte clair*.

Further application was made by the High Court in *Goldman Sachs v Novo Banco*.[66] Consideration of 'civil and commercial' came up following the restructuring of a Portuguese bank and the role of the Portuguese Central Bank, under its statutory powers, in the transfer of liabilities to a bridge bank, Novo Banco. Hamblen J rejected, in my view justifiably, Novo Banco's arguments that the claim was not civil and commercial, given the statutory intervention of the Central Bank. With reference to CJEU precedent, reviewed above, he held that the nature of the claim, in spite of the factual intervention of the Central Bank, is one in debt, which is a claim based on private law rights conferred by the relevant Facility Agreement and a civil and commercial matter. A novation of the Facility Agreement would not change the nature of that claim; nor does a statutory transfer.

### *2.2.2.10 Exclusions, Among which the Exclusion of Insolvency and Arbitration*

The Regulation excludes (Article 1(2)):

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;
(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
(c) social security;
(d) arbitration;
(e) maintenance obligations arising from a family relationship, parentage, marriage or affinity;
(f) wills and succession, including maintenance obligations arising by reason of death.

Of these exclusions, I review the 'insolvency' and the 'arbitration' exclusion in detail below. The issues sub (a), reworded in the Recast Regulation, were already excluded from the Brussels Convention because they were not considered as having much relevance for international business. The intention was gradually to cover these with different instruments, a process which is still on-going.[67] The rewording in the Recast Regulation anticipates the various forms of relationship which will, or may at some point, be covered by the future relevant European Regulations.

Social security issues are clearly not 'civil or commercial'. They are excluded verbatim to erase any doubt, given their often financial nature.

Maintenance is now covered by the Maintenance Regulation.[68] The Brussels I Regulation used to have a special jurisdictional rule for maintenance payments in Article 5(2), which was superseded once the Maintenance Regulation entered into force.

[66] *Goldman Sachs International v Novo Banco SA* [2015] EWHC 2371 (Comm).

[67] See the various references throughout this volume. The Commission's pace is such as to now propose for these matters one Regulation on all three steps of the private international law cycle.

[68] Regulation 4/2009 on jurisdiction, applicable law, recognition and decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L7/1.

Finally, wills and succession are excluded and are now partially covered by the Succession Regulation, reviewed in the relevant chapter in this volume. The wills and succession exception was applied by the High Court in *Sabbagh v Khoury*.[69] Sana Sabbagh, who lived in New York, claimed that the defendants had variously, since her father's stroke, conspired against both him and her to misappropriate his assets ('the asset misappropriation claim') and, since her father's death, to work together to deprive her of her entitlement to shares in the group of companies which her father ran ('the share deprivation claim'). Wael, first defendant, was the anchor defendant for jurisdictional purposes. He resided and had at all material times resided in London. The other defendants lived or are based abroad.

On the issue of 'wills and succession', the defendants contended in essence that that the claims fall outside the Brussels Regulation because the Regulation does not apply to 'wills and succession' within the scope of Article 1(2)(a). The High Court first of all considered the proposition that exceptions to the scope of application need to be applied restrictively. To my knowledge this has not as such been held by the CJEU. Carr J expressed sympathy with the view that the findings of the CJEU in C-292/08 *German Graphics* in particular (that the insolvency exception not be given an interpretation broader than is required by its objective) could be given broader application, for all exceptions. I am more convinced by the defendants' argument that one needs to be careful to extend the reasoning of *German Graphics* outside the insolvency context, given that its ruling is inevitably influenced by the existence of the Insolvency Regulation—more details on this below.

However Carr J suggested that whether or not restrictive interpretation ought to be followed is not quite the determinant issue, but rather that the exceptions should be applied in similar fashion as the exclusive jurisdictional rules of Article 22 (Article 24 in the Recast). Those jurisdictional rules, which are an exception to the general rule of Article 2 (4 in the Recast), Carr J noted, only apply where the action is 'principally concerned with' the legal issue identified in the Article. 'Have as their object' is the term used in the Regulation, for three out of five of the Article 22(24) exceptions. (For the other two, including those with respect to intellectual property, the term is 'concerned with'. In fact in other language versions the term is 'concerned with' throughout—which has not helped interpretation). 'Have as their object' was indeed applied by the CJEU as meaning 'whose principal subject-matter comprises' in C-144/10 *BVG*[70] with respect to the Article 22(2) exception (now 24(2)). (Not in fact, as Carr J noted, 'principally concerned with', which the ECJ only referred to because it is the language used in Article 27's rule on examination of jurisdiction.)

The stronger argument for siding with the High Court's conclusion lies in my view not in the perceived symmetry between Article 24 (exclusive jurisdictional rules) and Article 1 (scope), but rather in the High Court's reference in passing to the Jenard Report.

> matters falling outside the scope of the Convention do so only if they constitute the principal subject-matter of the proceedings. They are thus not excluded when they come before the court as a subsidiary matter either in the main proceedings or in preliminary proceedings. (C/59/10)

Granted, the result is the same; however, the interpretative route is in my view neater.

Eventually Carr J held that Ms Sabbagh's action was principally concerned with assets and share misappropriation; in short, with conspiracy to defraud. If successful, the action

[69] *Sana Hassib Sabbagh v Wael Said Khoury et al* [2014] EWHC 3233 (Comm).

[70] Case C-144/10 *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts v JP Morgan Chase Bank NA, Frankfurt Branch* [2011] ECR I-3961.

would of course impact on Ms Sabbagh's inheritance. However, that does not justify the exclusion of Brussels I (and the Recast) to her claim.

Interestingly, the High Court was also taken on a short comparative tour of the Succession Regulation (reviewed in relevant chapter), with a view to interpreting the succession exception. Carr J noted that that Regulation may indeed serve as a supplementary means of interpretation of the Jurisdiction Regulation, even though the UK is not bound by the Succession Regulation.

#### 2.2.2.10.1 The Insolvency Exception

Insolvency of course does have direct relevance for business. So much so that a separate regime for the complex set of issues was immediately preferred to inclusion in the Brussels Convention and later in the Regulations. The eventual 'Insolvency' Regulation, Regulation 1346/2000[71] (now succeeded by Regulation 2015/848),[72] reviewed elsewhere in this volume, was 30 years in the making. The scope of application of the Brussels I and Recast Regulation, and the Insolvency Regulation evidently is determined by each other's existence. However, whether they clearly 'dovetail' together when it comes to their respective scope of application is less clear. This issue is further reviewed in the chapter on insolvency.

An action is related to bankruptcy only if it derives directly from the bankruptcy and is closely linked to proceedings for realising the assets or judicial supervision (*Gourdain*).[73] This CJEU finding was included verbatim in the recitals to both the former and the 2015 European Insolvency Regulation (in both: recital 6). Consequently, the scope of application of the Insolvency Regulation must not be broadly interpreted (*German Graphics*).[74] It is the closeness of the link between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether the insolvency exclusion is applicable (*German Graphics*, 29). In the absence of substantive EU insolvency law, the CJEU does not push an autonomous interpretation of the concept and defers largely to national insolvency law. Whether the action is within the scope of the Brussels I Recast Regulation requires examination of the national laws at issue.

In *German Graphics*, an action brought by a seller based on a reservation of title against a purchaser who is insolvent was found *not* to be covered by the exception.

By contrast, in *Gourdain*,[75] the Court applied the exception to a court action amounting to a piercing of the corporate veil. The procedure at issue which allows the action to go beyond the legal person and proceed against its managers and their property was found to be solely based on French bankruptcy law and hence within the insolvency exception.

In *F-Tex*, the procedure at issue was based on the *actio pauliana*: a procedure which enables a creditor (in the insolvency context: the trustee in bankruptcy or the persons to whom he has assigned the right) to revoke any acts carried out fraudulently and to this detriment by a debtor.[76] The action is based on the concepts of *alienatio* (alienation), *eventus fraudis*

[71] [2000] OJ L160/1.
[72] [2015] OJ L141/19.
[73] Case 133/78 *Henri Gourdain v Franz Nadler* [1979] ECR 733, para 4.
[74] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECR I-8421, 25.
[75] n 73.
[76] Colomer AG in Case C-339/07 *Christopher Seagon v Deko Mary Belgium* [2009] ECR I-767, 25 ff.

(detriment), *fraus* (fraud) and *participatio fraudis* (knowledge of the fraud). The *actio pauliana* constitutes an exception to the principle of privity of contract and is effectively an exception to the rule that a person who is not party to a contract may not benefit from or suffer its legal consequences. The action is brought against a third party who has acquired the disputed asset.[77] In the insolvency context, the effects of the *actio pauliana* apply to the whole of the assets and therefore benefit all creditors. What was particular in *F-Tex* was that the *actio pauliana* was not carried out by the liquidator but had been assigned to F-Tex, being the sole creditor of the insolvent company. Under German law, such assignment was possible provided that it benefits the general body of creditors (which evidently here it did). The CJEU found that the right acquired, once it became owned by the assignee, no longer retained a direct link with the debtor's insolvency[78] and therefore was *not* covered by the insolvency exception. Note the contrast with *Seagon*[79] (which I review further in the chapter on insolvency): the *actio pauliana* exercised by the liquidator is covered by the Insolvency Regulation and not by the Brussels I recast.

Exact delineation of the insolvency exception keeps on exercising the CJEU. *ÖFAB*[80] again concerned an assignment. Contractual claims for payment against a Swedish company (Copperhill) had been assigned to Invest, also domiciled in Sweden. Invest brought an action against a former director and a former major shareholder, both domiciled in the Netherlands. Invest sought to have both these individuals held liable for the debts of the company, because they had allegedly allowed that company to continue to carry on in business even though it was undercapitalised and was forced to go into liquidation. The CJEU held that the insolvency exception did not apply, for—per previous case-law—it has to be interpreted narrowly. Here, the actions in the main proceedings did not constitute insolvency proceedings but were brought after Copperhill had been subject to a company reconstruction order (a near-automatic consequence of Swedish company law, I understand, in the event of limited companies having insufficient capital). In any event, the Court held that those actions do not concern the exclusive prerogative of the liquidator to be exercised in the interests of the general body of creditors, but of rights which an individual creditor is free to exercise in its own interests.

In *Nickel & Goeldner*,[81] the CJEU reminded us of the deference to national law which I signalled earlier. The insolvency administrator of Kintra applied to the relevant Lithuanian courts for an order that Nickel & Goeldner Spedition, which has its registered office in Germany, pay its debt in respect of services comprising the international carriage of goods provided by Kintra, for Nickel & Goeldner Spedition, inter alia in France and in Germany. According to the insolvency administrator of Kintra, the jurisdiction of the Lithuanian courts was based on Article 14(3) of the Lithuanian law on the insolvency of undertakings. Nickel & Goeldner Spedition disputed that jurisdiction, claiming that the dispute fell within the scope of, inter alia, the Brussels I Regulation.

[77] Ibid.

[78] Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'* ECLI:EU:C:2012:215.

[79] Case C-339/07 *Christopher Seagon v Deko Mary Belgium* [2009] ECR I-767.

[80] Case C-147/12 *ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV* ECLI:EU:C:2013:490.

[81] Case C-157/13 *Nickel & Goeldner Spedition GmbH v Kintra UAB* ECLI:EU:C:2014:2145.

The CJEU instructed how its earlier case-law (in *Gourdain*, *Seagon*, *German Graphics* and *F-Tex*, all recalled above) needed to be applied:

> It is apparent from that case-law that it is true that, in its assessment, the Court has taken into account the fact that the various types of actions which it heard were brought in connection with insolvency proceedings. However, it has mainly concerned itself with determining on each occasion whether the action at issue derived from insolvency law or from other rules.
>
> It follows that the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings. (26–27)

The action at issue was an action for the payment of a debt arising out of the provision of services in implementation of a contract for carriage. That action could have been brought by the creditor itself before its divestment by the opening of insolvency proceedings relating to it and, in that situation, the action would have been governed by the rules concerning jurisdiction applicable in civil and commercial matters. The fact that, after the opening of insolvency proceedings against a service provider, the action for payment was taken by the insolvency administrator appointed in the course of those proceedings and that the latter had acted in the interest of the creditors does not substantially amend the nature of the debt relied on which continues to be subject, in terms of the substance of the matter, to the rules of law which remain unchanged.

Hence, there is no direct link with the insolvency proceedings and the Brussels I Regulation continues to apply.

Not the procedural context (in particular, whether the liquidator takes the action) but the legal basis of the action determines the insolvency exception. *Nickel & Goeldner* is in my view a useful alternative formulation of the *Gourdain* et al case-law.

### The Insolvency Exception in the Lugano Convention

The *Lugano* Convention has an identical insolvency exception. In *Sabena*,[82] the Swiss Bundesgericht (Federal High Court) held that the request by the liquidators of Sabena (the former Belgian national carrier) to have a Brussels Court of Appeal judgment recognised and enforced in Switzerland falls within the 'insolvency' exception of the Lugano Convention 2007. It cannot therefore enjoy the swift recognition procedure included in that Convention. Instead, a claim under standard Swiss private international law was still possible. (Although, going by the Court's obiter, see below, not promising. That process is still underway at the time of writing.)

The Brussels Court of Appeal in 2011 had held[83] SAirLines AG (the holding company of the former Swiss Air Group) responsible for the insolvency of Sabena by the misapplication of a number of crucial investment agreements (I summarise; but that is, however, the gist of the dispute). SAirlines AG was itself being liquidated in Switzerland. The Bundesgericht relied heavily on CJEU precedent in *Alpenblume*,[84] where the insolvency exception of

[82] *SAirLines AG v Masse en faillite ancillaire de Sabena SA, Bundesgericht* 4A_740/2012 (8 May 2014).
[83] Hof van Beroep Brussel/Cour d'Appel Bruxelles, 27 January 2011, 2004/AR/1114.
[84] Case C-111/08 *SCT Industri AB I likvidation* v *Alpenblume AB* [2009] ECR I-5655.

the Brussels I Regulation was held as applying to a judgment of a court of Member State A regarding registration of ownership of shares in a company having its registered office in Member State A, according to which the transfer of those shares was to be regarded as invalid on the ground that the court of Member State A did not recognise the powers of a liquidator from a Member State B in the context of insolvency proceedings conducted and closed in Member State B. It also referred to *Gourdain*, above, and found that the mere fact that the liquidator is a party to the proceedings is not sufficient to classify the proceedings as deriving directly from the insolvency and being closely linked to proceedings for realising assets.[85] In the case at hand, it might indeed be difficult to argue that the Belgian liquidators' action, while having an impact on the insolvency and the division of the assets, does not directly derive from the bankruptcy and would have existed even without such insolvency occurring.[86]

The Lugano exception was also applied by the English High Court in *Enasarco v Lehman Brothers*.[87] The High Court was asked to stay English proceedings following jurisdictional issues of a derivative agreement between Enasarco and Lehman Brothers Finance (LBF). Swiss liquidators of LBF had already rejected a claim under the agreement, a rejection that was being challenged in the Swiss courts. The derivative agreement was subject to English law and to choice of court exclusively in favour of the English courts. Are the claims with respect to the derivative agreement so closely connected to the insolvency that they are covered by the insolvency exception to the Lugano Convention, consequently freeing the English courts from that Convention's strict *lis alibi pendens* rule? Richards J held they were, allowing the contractual issues under the derivative agreement to be settled by the English courts, and the insolvency matters by the Swiss courts. LBF submitted that the Lugano Convention applied to the present proceedings and also to the proceedings in Switzerland whereby Enasarco was challenging the rejection of its claim and, accordingly, that (now) Article 29 Brussels I Recast (*lis alibi pendens*) required the court to stay the English proceedings in favour of the Swiss proceedings. It was common ground that, if (now) Article 29 applied, the Swiss court was the court first seized. Alternatively, LBF submitted that the High Court should exercise its discretion under (now) Article 30 (re related, but not

[85] Incidentally, for a Lugano-bound court to rely on the CJEU case-law on the insolvency exception in my view is now less obvious, at least as far as the CJEU case-law post the entry into force of the Insolvency Regulation is concerned: the CJEU's judgment on the respective scope of both Regulations is now obviously subject to there being the other, closely related Regulation. The Insolvency Regulation, however, does not apply to Switzerland whence arguably the scope of the stand-alone Lugano insolvency exception need not necessarily evolve alongside that of the Brussels I Insolvency exception.

[86] The judgment does not mean that recognition and enforcement of the Belgian judgment is now totally out of the question. Rather the Bundesgericht has simply held on the applicability of the Lugano Convention. The judgment does not prejudice enforceability under general Swiss private international law. (Although, with the same caveat, the language at para 10 of the judgment does not sound promising: 'Das belgische Urteil fällt aus den dargelegten Gründen nicht in den sachlichen Anwendungsbereich des Lugano-Übereinkommens. Dass das Urteil unter diesen Umständen nach den Regeln des IPRG anzuerkennen wäre, wird nicht geltend gemacht und ist aufgrund der insolvenzrechtlichen Natur der Streitsache auch nicht ersichtlich (vgl BGE 139 III 236 E. 5.3). Bei dieser Sachlage kommt eine Anerkennung und Vollstreckbarerklärung von vornherein nicht in Frage, und es erübrigt sich, darüber zu befinden, ob die Anerkennungsvoraussetzungen gemäss dem LugÜ gegeben wären und ob die Beschwerdegegnerin überhaupt ein genügendes Rechtsschutzinteresse an einer selbstständigen Anerkennungsfeststellung und Vollstreckbarerklärung gemäss Art 33 Abs 2 und Art 38 Abs 1 LugÜ hätte, wie die Vorinstanz annahm, die Beschwerdeführerinnen hingegen bestreiten.'

[87] *Enasarco v Lehman Brothers* [2014] EWHC 34 (Ch).

identical actions) to stay the English proceedings. In the further alternative, it submitted that the High Court should have granted a stay, on case management grounds, of the English claim pursuant to section 49(3) of the Senior Courts Act 1981. (In other words, were Lugano found not to apply.) Richards J of course referred to *Gourdain* and *German Graphics*, and found that the Swiss proceedings could not exist, or have any relevance, outside the Swiss litigation:

> First, they are proceedings which arise, and can only arise, under Swiss insolvency law. Secondly, they form an integral part of the liquidation proceedings, designed to achieve the primary purpose of such proceedings, which is the distribution of the assets available to the liquidators among those creditors whose claims are admitted. The proceedings must take place in the court dealing with the liquidation. Thirdly, the purpose of the proceedings is not simply to establish whether the claimant has a good contractual or other claim, but to determine the amount and the ranking of the claim for the purposes of the liquidation. The ranking of claims is a matter arising exclusively under the relevant insolvency law … Fourthly, the self-contained and special character of the Swiss proceedings is well illustrated by the fact that it does not give rise to res judicata as between the parties in relation to the underlying contractual dispute. (42)

Finally, the exception was recently also applied in *Tchenguiz v Kaupthing*.[88] The High Court had to review the insolvency exception to the Lugano Convention, combined with Directive 2001/24 on the reorganisation and winding-up of credit institutions. Directive 2001/24 applies to UK/Iceland relations following the EFTA Agreement. Mr Tchenguiz, a London-based property developer, claimed against Kaupthing; Johannes Johannsson, a member of Kaupthing's winding-up committee; the accountants Grant Thornton; and two of its partners. While Directive 2001/24 evidently is *lex specialis* vis-à-vis the Insolvency Regulation, much of the CJEU's case-law under the Regulation is of relevance to the Directive too. That is because, as Carr J noted, much of the substantial content of the Regulation has been carried over into the Directive. On the substance of jurisdiction, the High Court found, applying relevant precedent (*German Graphics*, *Gourdain*, etc—see above), that the claims against both Kaupthing and Mr Johansson were within the Lugano Convention and not excluded by Article 1(2)(b) of that Convention. That meant that Icelandic law became applicable law by virtue of Directive 2001/24, and under Icelandic law proceedings against credit institutions being wound up cannot be brought before the courts in ordinary (rather, a specific procedure before the winding-up committee of the bank applies). The findings are especially crucial with respect to the relation between Lugano/Brussels I, Directive 2001/24 and the Insolvency Regulation.

#### 2.2.2.10.2 The Arbitration Exception

The exclusion for arbitration would seem straightforward enough at first sight. However hesitation about the precise scope of the exception was clear in the Schlosser report already.[89] In a perhaps unusual mood of deference,[90] Member States at the time considered that the

[88] *Vincent Aziz Tchenguiz and Ors v Grant Thortnton UK LLP, Kaupthing Bank HF et al* [2015] EWHC 1864.

[89] J Harris and E Lein, 'A Neverending story? Arbitration and Brussels I: The Recast' in E Lein (ed), *The Brussels I Review Proposal Uncovered* (London, British Institute of International and Comparative Law, 2012) (31) 32.

[90] Explained too by the nature of the 1968 Convention, a classic instrument of public international law rather than 'European' law proper.

1958 New York Convention appropriately regulates international arbitration.[91] What was then Article 220 EEC, which as noted above provided the legal basis for the Member States to adopt International Conventions in the area of private international law, referred not just to judicial decisions but also to arbitral awards. It mentioned 'the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.'

*Rich*: The 'Subject-Matter of the Dispute'

In *Rich*,[92] Impianti sued Rich in Italy with a view to establishing the absence of liability. Rich at the same time introduced arbitration proceedings in London, on the basis of an applicable law and dispute resolution clause which was not part of the initial quote (accepted by Impianti) sent by Rich to Impianti. Rich had only later signalled the clause, in a telex message which further specified the agreement. Impianti refused to appoint an arbitrator. Rich sued before the High Court to have the Court appoint the arbitrator. 'Service' of that claims form (or 'summons') 'out of jurisdiction' was only possible following Court approval. However, such approval could not be given if the matter fell under what was then the Brussels Convention. For if it fell under the Convention, the case had to be at least temporarily abandoned following the Convention's *lis alibi pendens* rule: the case was already pending in an Italian court. Both in the English and in the Italian proceedings a preliminary issue of course was whether parties were bound by a duty to go to arbitration.

The CJEU noted that the New York Convention includes a number of obligations for the courts of the Member States. Consequently the simple fact that a national court is involved is not enough for the issue *not* to be excluded from the Regulation under the 'arbitration' exception. It generally held that 'the Contracting Parties intended to exclude arbitration in its entirety, including [arbitration] proceedings brought before national courts',[93] such as here, the appointment of an arbitrator by a national court, in accordance with national law, as a default option where one of the parties to the agreement refuses to appoint an arbitrator. The CJEU formulated the test for the application of the arbitration exception using the term 'subject-matter of the dispute':

> In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.[94]

Hence the English courts were within their rights to have Rich serve notice on his Italian adversary not to continue proceedings in Italy, though what ought to be understood by the 'subject-matter' really is unclear. In fact, earlier in the judgment, the Court had employed an alternative rule which to my mind is easier to apply: at para 19, it used the term 'a measure adopted by the State as part of the process of setting arbitration proceedings in motion' (here: the appointment of an arbitrator), which therefore 'comes within the sphere

[91] See also Jenard Report, [1979] OJ C59/13.
[92] Case C-190/89 *Marc Rich v Impianti* [1991] ECR I-3855.
[93] Ibid, para 18.
[94] Ibid, para 26.

of arbitration' and is excluded from the Regulation. Even though arguably this might at first sight at least be a narrower category than 'the subject-matter of the dispute', it has to my mind the benefit of being clearer. I cannot be certain, however, for I really fail properly to understand what is meant by the 'subject-matter of the dispute'.

The net result of *Rich* was that there was uncertainty over the inclusion or not of a whole series of procedures which are part of the arbitration process.[95]

### *Van Uden*: Measures 'Ancillary to' Arbitration Proceedings versus Those which 'Are Ordered in Parallel to such Proceedings and are Intended as Measures of Support'

In *Van Uden*,[96] Van Uden Africa Line instituted arbitration proceedings against Deco-Line in the Netherlands, pursuant to the contract between them. It also applied to the courts for interim relief, on the grounds both that Deco-Line was stalling the arbitration proceedings, and that its non-payment of effectively undisputed invoices was endangering Van Uden's liquidity.

I review *Van Uden* below, too, with respect to provisional measures. It is, however, slightly artificial to separate that discussion from the discussion on the application of the Regulation to arbitration proceedings. In *Van Uden*, the fact that the referring court questioned its power to issue provisional measures was obviously influenced by the fact that parties were bound to turn to arbitration.

In general, the CJEU confirmed the twin track which exists under the Regulation, for a request for interim measures:

— Either one applies to the national court which has jurisdiction to hear the substance of the case, by virtue of any of the Regulation's jurisdictional rules: such court also has jurisdiction to issue interim measures (*Van Uden*, 22). This jurisdiction is not subject to any other requirements, in particular not to the *Denilauler* and *Van Uden* criteria—see the review of interim measures, below (Article 35 of the Brussels I Recast).
— Or one applies Article 35's rule on interim measures. That rule effectively acts as an additional exception to the Regulation's scope of application: interim measures in civil and commercial matters are outside the scope of the Regulation where they are issued by courts that have no jurisdiction on the substance of the case. National civil procedure applies, however, as I review in detail below, and the CJEU disciplines this recourse to national civil procedure by insisting on a number of criteria (in short: a territorial link to the case (*Van Uden)*; and the measures being 'interim' only (*Denilauler*)).

What is relevant here, however, is that recourse to Article 35 (Article 24 of the Brussels Convention, as it is referred to in the judgment) cannot be made if the subject-matter of the dispute falls outside the scope of the Regulation (*De Cavel*).[97] However, what is the 'subject-matter' of the dispute? Is it 'arbitration', which Deco-Line is accused of stalling, which would trigger *De Cavel*; or is it a contractual obligation, which Deco-Line is accused of not having properly fulfilled? This, per *De Cavel*, would enable application of Article 35.

[95] See also P Rogerson in U Magnus and P Mankowski (eds), *Brussels I Regulation*, 2nd rev edn (Munchen, Sellier, 2012) 70 (no 39).

[96] Case C-391/95 *Van Uden v Deco Line* [1998] ECR I-7091.

[97] Case 143/78 *De Cavel* [1979] ECR 1055, para 9.

It is in this context that the CJEU then turned to the arbitration exception. When acceding to the Convention, the United Kingdom had attempted to clarify the exception. This included a proposal specifically to allow for the refusal of recognition and enforcement of a judgment in ordinary if an arbitration proceeding between the same parties was underway elsewhere. However, the failure of these attempts at clarification is documented in *Rich*[98] and also in the Schlosser Report.[99] The Schlosser Report does specify that the Regulation (or the Convention as it was) does not apply to

1. Court proceedings which are ancillary to arbitration proceedings, for example:
   (a) the appointment or dismissal of arbitrators;
   (b) the fixing of the place of arbitration;
   (c) the extension of the time limit for making awards;
   (d) the obtaining of a preliminary ruling on questions of substance as provided for under English law.
2. A judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings.
3. Proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. This also applies to court decisions incorporating arbitration awards. (However, the Report specifically notes that if the reward is revoked and the revoking court or another national court itself decides the subject-matter in dispute, the Regulation does apply.)

The CJEU refers to the Schlosser Report in its findings (32), and then linked it to the aforementioned discussion on provisional measures. In doing so, it would seem to have promoted one of the three categories referred to in the Schlosser Report as a generic criterion for exclusion from the Regulation, namely measures being 'ancillary' to arbitration proceedings:

> provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect.[100]

In other words where the Court can make recourse to Article 35 of the Recast Regulation, 'in support of' arbitration proceedings, these measures are not 'ancillary to' arbitration but rather stand-alone, 'parallel' to such arbitration. They are therefore not excluded from the Regulation.

In and of itself, the judgment in *Van Uden* can be appreciated. This is especially so given that the CJEU's finding actually assisted the party which was keenest on having the arbitration proceedings come to a swift conclusion.

However in determining the scope of application of the Regulation's rule for provisional measures, not only does the Court introduce a distinction which I find difficult to make

[98] W Krohn, review of *Rich*, [1992] *American Journal of International Law* 134–42.
[99] [1979] OJ C59/72.
[100] Case C-391/95 *Van Uden v Deco Line* [1998] ECR I-7091.

(what exactly is the difference between on the one hand 'ancillary', and 'parallel', 'supportive' measures on the other?); it also potentially rendered the arbitration exception very hollow indeed. By referring to the 'nature of the rights which they (ie the provisional measures) seek to protect' to determine 'their place in the [Regulation]' (here: that nature is 'contractual'), the CJEU potentially neutralises the arbitration exception to a great degree.

### The *Effet Utile* Sledgehammer in *Allianz v West Tankers*

The difficulty in seeing consistency in the generic criteria employed by the CJEU in *Rich* and *Van Uden* was confounded when the arbitration exclusion subsequently became embroiled in the CJEU's overall insistence on legal certainty and predictability. Its doing so is seen in common law jurisdictions especially as a definitive rejection of the case-specific approach to conflict of laws in the common law, to the more abstract and general approach of civil law and by extension, of EU private international law.[101]

The ins and outs of *lis alibi pendens* are not our main concern here (see further in this volume) however a brief introduction is now required. Indeed some of the seminal judgments on *lis alibi pendens* led directly to the CJEU's quagmire on the arbitration exclusion.

As I review elsewhere in this volume in detail, the *lis alibi pendens* rule of (now) Article 29 of the Recast Regulation, obliges a court to stay proceedings if another Member State court has already been seized in the same matter, and to trust the proper application by the latter of the jurisdictional grounds of the Regulation. This gives malevolent parties a means to obstruct proceedings, by seizing a court in a Member State with no or desperate grounds for jurisdiction, banking on the delay in its judicial proceedings to gain time and 'torpedo' the case of the bona fide party.[102]

The CJEU's refusal to discipline this manoeuvre has undoubtedly sparked a race to court attitude. In *Gasser*,[103] the referring court asked specifically to what extent the excessive and generalised slowness of legal proceedings in the Contracting State where the court first seized is established, is liable to affect the application of the *lis alibi pendens* rule of the Brussels Convention. In the case at issue, Gasser sought to have the Austrian court claim jurisdiction on the basis of an exclusive choice-of-court clause, despite an earlier run to an Italian court by his adversary. The CJEU declined, citing the need for mutual trust referred to above. The Italian court had to be trusted eventually to decline jurisdiction. (As I review below, the Brussels I Recast Regulation has now at least sunk this particular torpedo, by protecting the courts named in a choice of court agreement.)

In *Turner*, the English courts issued an 'anti-suit' injunction[104] barring Mr Grovit and a number of his companies from pursuing court proceedings in Spain which in the view of

[101] See also T Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict' (2005) 54 *International & Comparative Law Quarterly* 813–828. Prof Hartley suggests that the EU and the CJEU in particular give priority to State interests over parties' interests, and obsesses (my words, not his) with systematic interpretation of the legislation.

[102] A manoeuvre often deployed using either Italian or Belgian courts.

[103] Case C-116/02 *Gasser* [2003] ECR I-14693.

[104] These are injunctions whereby a party is prohibited—and non-compliance constitutes contempt of court—from commencing or continuing proceedings before another judicial authority, even one abroad. In the proceedings before the CJEU, the United Kingdom (and indeed the referring court, the House of Lords) preferred the term 'restraining order', partially no doubt because the concept 'anti-suit injunction' more immediately implies restriction of jurisdiction of the foreign court, which the UK knew would not be met favourably by the CJEU, while the notion 'restraining order' sounds more akin to a measure of a procedural kind, which the CJEU in *Van Uden*

the English Courts had been initiated purely with a view to irritate Turner's own action—initiated first—in an English employment tribunal. Mostly on the basis of the principle of mutual trust,[105] the CJEU dismissed the possibility of anti-suit injunctions, effectively telling the English Courts they had to trust the Spanish courts to recognise the vexatious nature of the proceedings in Spain, and eventually to decline jurisdiction and conceding to the English employment tribunal.[106]

*Gasser* and *Turner* effectively meant that anti-suit injunctions aimed at litigation elsewhere in the EU are always incompatible with the Regulation, even when they are issued by the court having jurisdiction under that Regulation. They continue to be used to great effect however in proceedings which clearly fall outside the scope of the Regulation, for instance because the defendants are not based in the EU (and none of the jurisdictional grounds apply which make that irrelevant),[107] or because the matter falls outside the Regulation, for reason of it not being a civil or commercial matter, or for reason of it being excluded (such as in the case of the insolvency exception,[108] reviewed above). They arguably are also acceptable to stop a party from proceeding outside the EU when, under the Regulation, an EU court has jurisdiction.[109] Whether the insolvency Regulation allows for anti-suit injunctions is reviewed in the relevant chapter.

It is also noteworthy that the English courts in particular have found other ways to discipline parties that seek to torpedo action based on choice of court. In one particular part of the *Alexandros* litigation (which I also review in the section on *lis alibi pendens*), the Court of Appeal held[110] on the now (following the Supreme Court's intervention) remaining issue of declarations, damages and indemnities in respect of the owners' proceedings in Greece seeking damages from the insurers, despite proceedings for sums due under the relevant insurance policies having been settled in England pursuant to a choice of forum clause. The left-over issue essentially boils down to the question of whether, despite the CJEU's prohibition of anti-suit injunctions for subject-matter falling within the Regulation, Member States courts are free to award damages to the party suing elsewhere in the EU in spite of a

(Case C-391/95 [1998] ECR I-7091), and in accordance with Art 24 of the Brussels Convention (now Art 35 of the Recast Regulation) had given the green light. The compatibility with the Brussels Convention of anti-suit injunctions directed against the deplorable conduct of the defendant (as opposed to those based upon the argument that the foreign court has no jurisdiction) was also put forward in the leading English authority, *Dicey & Morris*, and referred to by the House: Dicey & Morris: *Conflict of Laws* 13th edn, §12-066, 419.

[105] Leger AG briefly reviewed the application of anti-suit injunctions in common law, identifying a number of additional reasons to reject them for the Convention/Regulation, including the potential for incompatible anti-suit injunctions issued by various jurisdictions, as famously in *Laker Airways* (which had also been quoted in the referral: *Laker Airways Ltd v Sabena Belgian World Airlines*, 235 US App DC 207, 731 F2d 909 (DC Cir. 1984)—one of the seminal cases on comity. Eventually, the House of Lords lifted the English injunction: *British Airways BD v Laker Airways* [1985] AC 85, 84 (Diplock, LJ), 95–96 (Scarman, LJ) (1984).

[106] See also Wolff (n 10) 66.

[107] See eg *Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA* [2012] EWCA Civ 644: anti-suit injunction even against a third party to an arbitration clause, ordering it to halt proceedings in Russia for reason of these being vexatious, and collusive with the party held by the clause; see also *Shashoua v Sharma* [2009] EWHC 957 (Comm): anti-suit injunction preventing the party from pursuing the matter in India. Cooke J explicitly rejected the argument made that the decision of the CJEU in *West Tankers* has an impact on proceedings with third States, whether or not those are Parties to the New York Convention.

[108] See application (although ultimately dismissed) for anti-suit in *SwissMarine Corporation Limited v OW Supply & Trading A/S (in bankruptcy)* [2015] EWHC 1571.

[109] See application eg in *Petter* v *EMC* [2015] EWHC 1498 (QB), confirmed on appeal in [2015] EWCA Civ 828.

[110] *Starlight Shipping Company* v *Allianz Marine & Aviation Versicherungs AG et al* [2014] EWCA Civ 1010.

choice of court agreement between parties. The Court of Appeal held that they are. It justifiably, in my view, distinguished *Turner v Grovit*. In *Turner v Grovit*, the CJEU is concerned with mutual trust and allowing (and indeed trusting) the courts in the other Member States to make their own, proper application of the Regulation. *Turner v Grovit* does not uphold jurisdiction for the other court; rather, it upholds the opportunity for that other court properly to apply the Regulation, which may or may not lead it to uphold jurisdiction.

The judgment of the Court of Appeal reinforces the attraction of English courts as a destination of choice: parties wishing to torpedo (a prospect less likely in the Brussels I bis Regulation) may or may not succeed in convincing alternative courts of their jurisdiction. English courts since *Turner v Grovit* cannot issue anti-suit. However, they may still hold a party liable for having breached the choice of court agreement.

Turning now to the subject-matter of the current heading: discussions on the extent of the arbitration exclusion met with the CJEU's restrictive agenda on anti-suit injunctions in *Allianz v West Tankers*.[111]

The *Front Comor*, a vessel owned by West Tankers and chartered by Erg collided in Syracuse (Italy) with a jetty owned by Erg, and caused damage. The charterparty was governed by English law and contained a clause providing for arbitration in London. Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision. Having paid Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. The action was based on their statutory right of subrogation to Erg's claims. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement. In parallel, West Tankers brought proceedings before the High Court, seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Tribunale di Siracusa: this was the anti-suit injunction, which was granted by the High Court, and appealed to the House of Lords by Allianz and Generali.

The House of Lords referred of course to *Gasser* and *Turner*, however suggested that the prohibition on anti-suit injunctions cannot be extended to arbitration, given its exclusion from the Regulation. The House of Lords specifically referred to the attraction of anti-suit injunctions in ensuring the enforcement of arbitration clauses, and suggested its adoption by courts of the other Member States, too, so as to add to the appeal of the EU as a seat of arbitration.

As an aside, it is interesting to note that the English courts' insistence on wanting to protect agreements to arbitrate also implies a reluctance to issue so-called 'anti-arbitration injunctions'—an order to restrain a party from pursuing arbitration proceedings abroad, particularly where the precise extent of the arbitration clause's cover is disputed. In the recent example of *AmTrust Europe Limited v Trust Risk Group SpA*, the parties had agreed

[111] Case C-185/07 *Allianz v West Tankers* [2009] ECR I-663.

upon the exclusive jurisdiction of the English courts and one of the parties' refusal to stay or discontinue Italian arbitration proceedings was held by the Court of Appeal to be vexatious, oppressive and unconscionable. This was not found sufficient by the High Court, however, to justify an anti-arbitration injunction.[112]

The CJEU was not open to any of these arguments. It firstly granted that the proceedings in the United Kingdom, per *Rich*, did not come within the purview of the Regulation:

> 22. In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (Rich, paragraph 26). More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (Van Uden, para 33).
>
> 23. Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.

However the CJEU then turned to the impact on the proceedings in Italy, where the Court undoubtedly would have jurisdiction (on the basis of (now) Article 7(2), the jurisdictional rule re tort, which I review later), were one to disregard the arbitration clause:

> 24. However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.
>
> 25. It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.
>
> 26. In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.
>
> 27. It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.

[112] *AmTrust Europe Limited v Trust Risk Group SpA* [2015] EWHC 1927 (Comm).

> 28. Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.

There are a number of striking considerations in the judgment. Chief among them,[113] the view of the CJEU that no less than 'unification of the rules of conflict of jurisdiction in civil and commercial matters' is the objective of the Regulation. This is a particularly expansionist view of the aims of the Regulation and one which is testimony to the CJEU's refusal to have case-specific considerations of procedural justice stand in the way of the overall aim of uniformity and predictability. It is also strikingly different from what is (or was, pre-*West Tankers*) the general view of common law as to the nature of the Regulation, as described by Lord Hobhouse in *Turner v Grovit* (albeit vis-à-vis the Convention but with no less applicability to the Regulation): 'It is not the purpose of the Convention to require uniformity but to have clear rules governing jurisdiction.'[114]

'Even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness':[115] that is how the CJEU summarily justifies the rejection of using anti-suit injunctions to safeguard clear exceptions to the Regulation's scope. This is an extensive *effet utile* approach of which I am not convinced. Exceptions, of course, have an impact on the effectiveness of a Regulation. However by having excepted these categories, the drafters specifically acknowledge non-application notwithstanding the consequential impact on the instrument from which they are being exempt.

*West Tankers* of course does not deny the validity of arbitration clauses, and therefore does not rule out that such clause (and the consequential inapplicability of the Regulation) eventually will be vindicated by the court which is not a court of the Member State where the arbitration forum is located.

In the meantime, the High Court has validated the arbitral award,[116] with the decision in Italy still pending. This certainly leads to a number of interesting questions, including whether the High Court validation can be seen as a 'judgment' within the meaning of in the sense of Article 45(1)(d) of the Brussels I Recast Regulation. This would lead to any eventual Italian decision not being enforceable in other Member States.

The High Court has also ruled that the panel was wrong in assuming that the Court of Justice's finding in *West Tankers*, circumscribed its jurisdiction to award damages for breach of an obligation to arbitrate, by virtue of the right of the Respondents to bring proceedings under (now) Article 7(2) before the Italian courts. The tribunal essentially held (as summarised in the judgment) that like the English court, it was bound by the principle of effective judicial protection not to interfere with or deprive the Respondents of that right in European law. Flaux J, seeking support in Kokott AG's very opinion in *West Tankers* (and

[113] See also Wolff (n 10) 67.

[114] Lord Hobhouse of Woodborough in *Turner v Grovit* [2001] UKHL 65, 37.

[115] See a prelude in the external sphere, CJEU Opinion 1/03 *Lugano I* [2006] ECR I-1145, and M Niedzwiedz and P Mostowik, 'Implications of the CJEU "Lugano II" Opinion for European Union's External Actions Concerning Private International Law' (2010) *Yearbook of Polish European Studies* 129–48.

[116] *West Tankers Inc v Allianz Spa & Anor* [2011] EWHC 829 (Comm) (11 March 2011).

the Court of Justice's absence of disagreement on that point), held that the jurisdiction Regulation, as is evident from the Judgment in West Tankers, curtails the English *courts* in their power to issue anti-suit injunctions. However it does not curtail the jurisdiction of the arbitral panel. Leave to appeal was granted.[117]

Further action by the English courts to curtail the implications of *West Tankers* lies in them exercising the full extent of their adjudicative powers outside the strict confines of the case. For instance, in *Toyota v Prolat*,[118] the High Court was asked by Toyota to confirm the existence of an agreement between parties to arbitrate. The arbitral panel, already seized by Toyota, agreed that it would be best for the Court pre-emptively to settle this issue since it suspected any ruling by the tribunal itself would be subject to litigation by Prolat. The agreement (the existence of which was disputed by Prolat; it had employed an authorised agent, whose signings on behalf of Prolat were disputed) concerned the delivery of sugar by Toyota to Prolat. Prolat objected to the jurisdiction of the tribunal. It had itself started proceedings in Naples for damages for various alleged wrongdoings by Toyota, whether for breach of contract or tort.

The interest of the case for this section lies in particular with the concurrent proceedings in Italy and the UK. Should the UK decline? The case was subject to Regulation 44/2001, not to the recast. Cooke J held that:

> This Court is not being asked to interfere with the functions of the Italian court as no form of anti-suit injunction is being sought against Prolat. This Court is being asked to determine whether or not there is an arbitration agreement and to make a declaration in the light of its conclusion.

*West Tankers* was therefore distinguished. Would, had it applied, the Brussels I Recast Regulation have made a difference? Cooke J held that it would not:

> Article 1(2)(d) remains unchanged from the earlier Regulation but is more fully explained in paragraph 12 of the Preamble. I was also referred to Article 73 which states that the Regulation will not affect the application of the New York Convention. (16)

He concluded: 'Although it is not yet in force, it was suggested that some might regard the new Regulation as declaratory of the existing state of the law' (ibid). The jury on that, as I explain below, is out.

Finally, it is also of note that the English courts continue broadly to use anti-suit injunctions to support arbitration in cases which clearly fall outside the scope of the Brussels I Regulation. For instance, the UK Supreme Court confirmed on 13 June the broad use of anti-suit injunctions in *Ust-Kamenogorsk*.[119] The case at issue was peculiar in that no arbitral proceedings had been commenced or were as yet proposed—however, the respondent remained concerned that the appellant would seek to bring further court proceedings in Kazakhstan in breach of the contractual agreement that such disputes should be subject to arbitration in London. As a result the respondent continued with the proceedings. The Supreme Court held that the English courts have a long-standing and well-recognised jurisdiction to restrain foreign proceedings brought in violation of an arbitration agreement, even where no arbitration is on foot or in contemplation.

[117] *West Tankers Inc v Allianz Spa & Anor* [2012] EWHC 854 (Comm) (4 April 2012).
[118] *Toyota Tsusho Sugar Trading Ltd v Prolat SRL* [2014] EWHC 3649 (Comm).
[119] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.

In conclusion, once the Court had stretched the requirement of mutual trust in *Turner*, the Court's findings in *West Tankers* were not all that surprising. However, they are a far cry from *Rich*, where the CJEU saw appointment of an arbitrator by a court as being *part of the process of setting arbitration proceedings in motion*.[120] Safeguarding the desired impact of an arbitration clause by use of an anti-suit injunction arguably ought to be part of that category, too.

#### 2.2.2.10.3 Gazprom: Should Arbitral Anti-Suit Injunctions Follow the *West Tankers* Fate?

In Case C-536/13 *Gazprom*,[121] a tribunal rendered an award holding that proceedings by Lithuania in Vilnius partially breached the arbitration clause in the shareholders' agreement between parties. The arbitral tribunal ordered the Republic of Lithuania to withdraw certain claims filed before the Lithuanian courts and to amend other claims.[122] Gazprom sought enforcement of the Stockholm Chamber of Commerce (SCC) award in Lithuania. The instruction of restraint contained in the award is effectively an anti-suit injunction, albeit rendered by a tribunal instead of a court. The effect of both is the same: does the *West Tankers* rationale therefore hold?

Wathelet AG's Opinion was very critical of the CJEU's finding in *West Tankers*. The AG suggested that the Brussels I Regulation was not applicable in the present case (it falling exclusively within the scope of the 1958 New York Convention) and that, in any event, what is effectively an anti-suit injunction issued by an arbitration tribunal was not contrary to that Regulation. Finally, under the New York Convention, a Member State cannot classify Brussels I's jurisdictional regime as being 'ordre public' and hence capable of leading to refusal of recognition of an arbitral award.

The CJEU itself held in a matter of fact manner that the enforcement of arbitral awards falls outside the Brussels I Regulation, where that enforcement by the court of that State effectively prohibits the party concerned from taking the case to a court in that very Member State. *Rich* was the main formula referred to, among the various precedents: 'reference must be made solely to the subject-matter of the dispute' to assess the scope of Brussels I's arbitral exclusion.

Importantly, *West Tankers* was distinguished particularly on the basis that, in the facts at issue, there was no competing court in another Member State, hence no scope for the principle of mutual trust to be violated. The AG's review of the impact of the recitals newly added by the Brussels I Recast (see below) was not addressed at all by the Court.

The judgment does not solve all outstanding issues, however. Firstly, the Court's reasoning seems to suggest that where competition with a court in another Member State is at issue, the *effet utile* of the Brussels I and Recast Regulation might take the upper hand, as it did in *West Tankers*. Recognition of the award arguably in such case would amount to anti-suit. Further, the Court (this was a Grand Chamber judgment) points out that the award still has to go through the national court's standard recognition and enforcement process,

[120] Case C-190/89 *Marc Rich v Impianti* [1991] ECR I-3855, para 19.

[121] Case C-536/13 *Gazprom OAO* ECLI:EU:C:2015:316.

[122] Relevant summaries of the award and of the Lithuanian proceedings are available at www.newyorkconvention.org/news/gazprom-lithuania-translated-decisions-2013-icca-yearbook-commercial-arbitration or http://ow.ly/Qmtn2, accessed 1 August 2015.

outside the framework of Title III of the Regulation, instead governed by national residual law as well as the New York Convention. Both of these (including through ordre public) might still offer quite a remit for the Lithuanian courts to refuse recognition.

#### 2.2.2.10.4 The Arbitration Exception and the Brussels I Recast

The consequences of *West Tankers* reverberated in the arbitration community and avenues were explored to address the inevitable delay (at the least) in getting arbitration proceedings underway after the Court's findings in *West Tankers*. Many ideas were being kicked around in the build-up to the review of the Brussels I Regulation. The matrix of desiderata became quite complex, however. It was felt there was a need to address the CJEU's hostility in particular vis-à-vis anti-suit injunctions even where these are, as noted, directed towards procedures which would otherwise be exempt from the Regulation. This would either require a formal intervention to remove the Court's overall rejection of such injunctions (unlikely) or a specific mentioning of such injunctions in a tailor-made regime for arbitration under the Regulation (or another means to discourage obstruction of arbitration) (more likely).

Arbitration practice also increasingly, although not in unison, recognised the attraction of having the recognition and enforcement part of the Regulation apply to arbitral awards.[123] Some Member States (eg Germany) do employ the Regulation to recognise foreign decisions which merged an arbitral award.[124] Others, eg England and Wales, do not.[125]

While prima facie arbitration practice was in the end fairly unanimous in rejecting any suggestion to extend the Regulation to arbitration, in reality there are points of contact between the two. Solving the interface between the Brussels I and Recast Regulation, and the New York Convention would seem most urgent for four specific issues: anti-suit injunctions for enforcing the integrity of an arbitration agreement, and the linked issue of declaratory judgments on the validity of the agreement; the appointment of arbiters and other ancillary measures, typically in interlocutory proceedings,[126] including the granting of supportive provisional relief and the taking of evidence by ordinary courts; the recognition and enforcement of arbitral awards;[127] and conflicts between awards and judgments.

The Hess, Pfeiffer and Schlosser Report (also known as the 'Heidelberg Report') suggested two possible ways forward.[128] Either a simple deletion of the exception, and preservation of the priority of the New York Convention using (old) Article 71 of the Regulation. Or alternatively a more proactive embrace of arbitration by including a specific provision on supportive proceedings to arbitration, in particular (but not limited to) giving the courts of the Member State in which the arbitration takes place, exclusive jurisdiction for ancillary proceedings concerned with the support of arbitration.[129] In its Green Paper on

[123] Especially since bringing arbitration under the Regulation in some fashion, would not ipso facto wipe the New York Convention out of the EU: under Art 71, the prevalence of the New York Convention would be safeguarded: see inter alia, Heidelberg Report (n 17) 39, para 130.

[124] Ibid, 33, para 111.

[125] Ibid.

[126] Inter alia signalled by the Dutch report, ibid, 33, para 113, and also of course the fall-out of the *Van Uden* case.

[127] English Report for the Hess et al preparatory report on the review of the Regulation, referred to in relevant part in the Heidelberg Report (n 17) 32 (para 109), and summary of further reports on 34.

[128] Heidelberg Report (n 17) 39, paras 130 ff.

[129] For details see ibid.

the review of the Regulation,[130] the Commission listed a variety of options however limited its intervention to asking stakeholders what they see as the best solution. These stakeholders reacted in large numbers, with differing views on the best way forward.

The absence of consensus, in particular among the Member States, then prompted the European Parliament's *rapporteur* at least (and the EP in full afterwards)[131], to suggest no movement on the issue at all,[132] other than a clearer proviso on the arbitration exclusion, specifying that

> not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question, are excluded from the scope of the Regulation.[133]

Consequently the *rapporteur* called for a more robust protection of arbitration, not by employing a positive intervention of some kind (see above: ie a specific proviso precisely outlining the relationship between arbitration and the Regulation), but rather, because no consensus may be found on such fancy proposal, by ring-fencing arbitration in a more aggressive way. By making recourse to the aggressive format of total exclusion, the *rapporteur* does of course also miss out on the option to include a provision creating an exclusive head of jurisdiction for the Member State in which the arbitration is due to take place, such as suggested in the Heidelberg Report.

In its eventual proposal on the review of the Regulation,[134] the European Commission proposed the specific inclusion of a jurisdictional ground for arbitration,

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Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seized of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.

This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.

Where the existence, validity or effects of the arbitration agreement are established, the court seized shall decline jurisdiction. This paragraph does not apply in disputes concerning matters referred to in Sections 3, 4, and 5 [ie the sections dealing with the protected parties: insurance contracts; consumers; employment contracts] of Chapter II.

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Parliament continued to reject such amendment and stuck to its insistence on keeping arbitration out of the Regulation altogether.[135]

[130] COM(2009) 175.
[131] Resolution of 7 September 2010.
[132] Report of Tadeusz Zwiefka MEP of 29 June 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI), A7-0219/2010.
[133] Ibid, para 10.
[134] COM(2010) 748.
[135] Draft Committee report of 28 June 2011, PE 467.046, as well as draft Committee Report of 25 September 2012, PE496.504.

The June 2012 'General Approach' document by the Council[136] in my view then adopted the worst possible scenario. With respect to arbitration, the Council suggested *not* to adopt the aforementioned suggested Article 29, paragraph 4, and Article 33, paragraph 3 (these suggested amendments were suggested to be deleted in their entirety). And instead to include the following in Article 84:

> 2. This Regulation shall not affect the application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.

Finally, to include a recital as follows (the recital below is recital 12 as it eventually appeared in the Regulation; it differs only in minor editorial point from the Council's suggested recital):

> This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, from referring the parties to arbitration[137] of from staying or dismissing the proceedings and from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.
>
> A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative of incapable of being performed should not be subject to the rules of recognition and enforcement of this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.
>
> On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.
>
> This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of the arbitral tribunal, the powers of the arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

The Council therefore maintained the principal exclusion for arbitration, and emphasised the priority of the New York Convention. However, it also has maintained the confusion over the exact scope of the arbitration exclusion. Its curious use of an extended recital basically reiterates all the points of discussion resulting from the current text and the case-law applying it. Any party wanting to stall, torpedo, or otherwise sabotage proceedings with even a hint of arbitration elements in them, in my view will find itself well served with the recital which—rather adroitly, it has to be said—manages to integrate all unsettled points of discussion in a matter-of-fact way which amounts to sheer denial of the problems that arise in practice.

[136] Document 10609/12, in particular addendum 1.

[137] Footnote *not* in the original text: insertion of this recital in my view (although probably suffering from wishful thinking) might even serve as an argument that *West Tankers* has been overruled: 'referring the parties to arbitration' ought to cover any procedural means employed to facilitate this referral.

With some minor editorial amendments, Parliament supported the Council's view.

Wathelet AG assessed the new recital in *Gazprom*.[138] His review of the 'new' regime of the Brussels I recast, and the contrasting positions of the EC and a number of Member States, support my view that the recast, by incorporating a summary of previous case-law in its recitals, has certainly not clarified things beyond discussion. Wathelet in fact suggested that the recitals rebuke the CJEU and return application of the Regulation to the *Rich* scenario. However, I am not convinced that *Rich* itself necessarily clarifies things. (It, too, like *Van Uden* and like the current recital, uses a confusing variety of criteria.)

## 2.2.3 Scope of Application—*Ratione Personae*

The Brussels I Regulation was applicable in three cases:

1. The defendant in the legal proceedings is domiciled in a Member State. Its nationality is irrelevant—as is the nationality and domicile of the plaintiff; or
2. A court in a Member State has exclusive jurisdiction on the basis of one of the grounds listed in Article 22, whatever the domicile of the parties; or
3. At least one of the parties (which could be the plaintiff) is domiciled in one of the Member States and a valid choice of forum clause has been made in accordance with Article 23.

This core structure has changed in two important ways. Firstly, for two of the three 'protected categories', namely consumers and employees, the condition that the defendant (namely the business in a B2C relation, cq the employer) be domiciled in the EU no longer applies. It does continue to apply for insurance contracts. Secondly, choice of court can now validly be made under the Regulation, even if neither of the parties is domiciled in the EU.

### *2.2.3.1 Domicile*

Article 62

1. In order to determine whether a party is domiciled in the Member State whose courts are seized of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seized of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

Article 63

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or
(b) central administration, or
(c) principal place of business.

[138] Case C-536/13 *Gazprom OAO* ECLI:EU:C:2015:316.

> 2. For the purposes of the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.
>
> 3. In order to determine whether a trust is domiciled in the Member State whose courts are seized of the matter, the court shall apply its rules of private international law.

The core jurisdictional claim of the Regulation is the domicile of the defendant. Ad nauseam: this is the case even if as we discuss further below, the domicile of the defendant is routinely sidelined in the jurisdictional matrix of the Regulation.

#### 2.2.3.1.1 Domicile for Natural Persons

For natural persons, Article 62 holds that the laws of the Member States determine whether a person is domiciled in that State. For a company, legal person or association of natural persons, Article 63 aims to make the rules more transparent and perhaps encourage harmonisation by listing three possible locations only.

Where domicile is a contributing factor in determining jurisdiction (see the heads of jurisdiction, reviewed below), the court seized of the matter shall therefore always apply its own definition of domicile, and only if no domicile can be established on the basis of these laws, will it apply the domicile rules of other Member States. However there may be a head of jurisdiction other than domicile (either through Article 24 or 25, or any of the 'special' grounds of jurisdiction reviewed below), hence domicile of the defendant obviously is not the be all and end all of jurisdiction.

Review of the domicile rules of another Member State is not as bizarre as it may seem at first sight. Firstly, it could very well be that the jurisdiction of the forum on the basis of the Regulation, depends on another Member State's domicile rules. A case in point was the application of Article 23 of the former Brussels I regulation, when domicile of at least one of the parties in the EU was required to be able to assign jurisdiction to a court in the EU. Frequently, a national court had to apply other States' domicile rules in the event of one party with domicile clearly outside of the EU, and one potentially within (but not in the forum state). Further, review of another Member States' domicile rules may be required where the forum court may well have jurisdiction on the basis of its national laws, in accordance with Article 6 of the Regulation, however stays its procedure in favour of a court of another Member State which may have Brussels I-based jurisdiction (on the basis of Article 4's core jurisdictional rule) on the basis of the latter's rules on domicile.[139]

There have been a number of calls to replace the domicile criterion with a more harmonised and factual concept, eg 'habitual residence' linked to a minimum time of residence in the forum. However in practice it is highly uncertain whether such attempt at harmonisation would cancel any let alone all uncertainties which it aims to remedy.

In *Lindner*,[140] the courts of the Czech Republic had to decide whether and how to apply the Regulation to a case where the defendant is a foreign national and has no known place of domicile in the State of the court seized. The consumer was a German national,

[139] See eg *Haji-Ioannou & Ors v Frangos & Ors*, Court of Appeal—Civil Division, 31 March 1999 [1999] EWCA Civ 1148.

[140] Case C-327/10 *Hypoteční banka as* v *Udo Mike Lindner* [2011] ECR I-11543.

living in the Czech Republic, who had taken out a loan from a Czech bank, with choice of court in favour of the 'local court' of the bank, determined according to its registered office.[141] At the time the contract was concluded, Mr Linder was deemed to be domiciled in Mariánské Lázně (Czech Republic). The place where the consumer was domiciled was more than 150 km from Prague, where the 'local court of the bank' designated by the parties to the contract is situated. According to the bank, it brought an action before the' court with general jurisdiction over the defendant' rather than before the 'local court of the bank' since, at the date on which the proceedings were brought, it was unable, for reasons beyond its control, to submit the original contract to its local court and thereby fulfil the statutory requirement that it bring proceedings before the latter court. Under the relevant rules of procedure, the defendant was considered a person whose domicile was unknown.

The CJEU held that (now) Article 18(2) of the Regulation (establishing jurisdiction against consumers in the case of consumer contracts, only in the courts of the domicile of the consumer) should apply where the domicile of the consumer is currently unknown but where there was a last known domicile.[142,143]

#### 2.2.3.1.2 Domicile of a Legal Person

In the words of the former Regulation (at Recital 11), the domicile of a legal person 'must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction'. The mirror provision of Article 62 in the Brussels Convention had provided that:

> For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However, in order to determine that seat, the court shall apply its rules of private international law. (Article 53 of the 1968 Brussels Convention)

The Commission proposal for the recast of the Brussels Convention into a Regulation[144] flagged two reasons for changing the Convention's approach to corporate domicile in the Brussels I Regulation. Firstly, the preference in the Regulation for autonomous concepts

[141] The precise wording being 'in relation to any disputes arising out of this … contract, the local court of the bank, determined according to its registered office as entered in the commercial register at the time of the lodging of the claim, shall have jurisdiction'.

[142] 'Regulation No 44/2001 must be interpreted as meaning that: [i] in a situation such as that in the main proceedings, in which a consumer who is a party to a long-term mortgage loan contract, which includes the obligation to inform the other party to the contract of any change of address, renounces his domicile before proceedings against him for breach of his contractual obligations are brought, the courts of the Member State in which the consumer had his last known domicile have jurisdiction, pursuant to Article 16(2) of that regulation, to deal with proceedings in the case where they have been unable to determine, pursuant to Article 59 of that regulation, the defendant's current domicile and also have no firm evidence allowing them to conclude that the defendant is in fact domiciled outside the European Union; [ii] that regulation does not preclude the application of a provision of national procedural law of a Member State which, with a view to avoiding situations of denial of justice, enables proceedings to be brought against, and in the absence of, a person whose domicile is unknown, if the court seised of the matter is satisfied, before giving a ruling in those proceedings, that all investigations required by the principles of diligence and good faith have been undertaken with a view to tracing the defendant.'

[143] In line with established case-law but somewhat distinct from the recent approach of the Grand Chamber to relax the micro-management of the Regulation by the CJEU, the Court (first chamber) posits its conclusion in a very case-specific way, thus leaving open the question if and how it applies in circumstances outside of those of the actual case.

[144] COM(1999) 348.

as opposed to reliance on Member States' private international law. And secondly, the—in the view of the Commission, consequential—avoidance of negative or positive conflicts of jurisdiction. However, if those were indeed the goals of this intervention, the solution chosen—ie domicile of companies and other legal persons is now defined by three alternative criteria: the statutory seat (or alternatives in the case of the UK and Ireland),[145] the central administration or the principal place of business—would seem to be ill-fated from the start.

Firstly, the use of three alternative criteria without any hierarchy or exclusion between them may of course ensure a high degree of likeliness that no negative conflict of jurisdiction will occur (ie that no court were to come forward claiming jurisdiction) however is less satisfactory on the positive conflicts side: it is now more likely that more than one court will claim jurisdiction. Moreover, as the Commission also explicitly underlines in its proposal, the three alternative criteria correspond to the three criteria in Article 54 TFEU (right of establishment of companies within the EU)—however in fact the goals of Article 54 TFEU and those of the Regulation do not necessarily coincide.

Having three alternative criteria leads to forum shopping which does have one positive effect on the enforcement stage. If the three connecting factors lead to different jurisdictions, a plaintiff is likely to opt for one where enforcement of the judgment against assets of the defendant is the easiest.

It is noteworthy that there is an exception to Article 63 of the Regulation. For the exclusive jurisdictional rule of Article 24(2) (see further below), the 'seat' of the company is determined in accordance with the private international law of the forum.

The Heidelberg Report did not signal any widespread confusion or jurisdiction conflicts as a result of the Article 63 introduction of alternative domicile rules for companies. However I would concur with those reports which raised doubt as to the necessity and clarity[146] of three different—albeit in practice often overlapping—connecting factors, especially given the declared intent of autonomous application.

An interesting application of corporate domicile under the Regulation was recently made by the English Court of Appeal in *Anglo American*.[147] The specific context was the use of the English courts under the Brussels I Regulation, by a Botswana-born plaintiff, against a South Africa incorporated company, part of the Anglo-American plc group of companies. Anglo-American itself is incorporated in England, hence a case against it would have been straightforward (now under Article 4 of the Regulation). However, such a case would not have had any merit. There was no suggestion that Anglo-American was in any way at fault

[145] The special proviso of Art 63(2) only applies 'for the purposes of the United Kingdom and Ireland', meaning where any court—not just a UK or Irish court—is called upon to review whether a corporation has its domicile in these Member States. An Irish court, say, having to decide whether a company has its domicile in France, will apply the statutory seat criterion.

[146] See eg the application of the Brussels Convention rule in the UK Civil jurisdiction and judgments Act 1982, s 42(3): A corporation or association has its seat in the United Kingdom if and only if (a) it was incorporated or formed under the law of a part of the United Kingdom and has its registered office or some other official address in the United Kingdom; or (b) its central management and control is exercised in the United Kingdom. 'Central management and control' clearly is something different than 'administration' or 'central administration', as aptly described by Chambers QC in *King v Crown Energy Trading AG & Anor*, Court of Appeal—Commercial Court, 11 February 2003 [2003] EWHC 163 (Comm): 'That aspect has something of the back office about it.'

[147] *Young v Anglo American South Africa Limited et al* [2014] EWCA Civ 1130.

for the behaviour of one of the employees of one of its corporate affiliates. (An issue further discussed in the chapter on corporate social responsibility.)

It was for the Court of Appeal to decide whether under the rules of the Brussels I Regulation, Anglo-American South Africa could be found to have its central administration in England (place of incorporation and principal place of business not having any calling). Justifiable reference was made to the fact that the concept needs to be given an EU ('autonomous') meaning. CJEU case-law on the exact issue is, however, non-existent—reference in the judgment was made to the *Daily Mail*), to CJEU case-law on the freedom of establishment (which I review in the relevant chapter in this volume), and to relevant German case-law.

Aikens LJ essentially agreed with the analysis in first instance by Smith J, that

> the correct interpretation of 'central administration' in Article 60(1)(b), when applied to a company, is that it is the place where the company concerned, through its relevant organs according to its own constitutional provisions, takes the decisions that are essential for that company's operations. That is, to my mind, the same thing as saying it is the place where the company, through its relevant organs, conducts its entrepreneurial management; for that management must involve making decisions that are essential for that company's operation. (45)

This is in contrast with both the place of incorporation, and the principal place of business:

> the first is the domicile for the purpose of the internal laws of the state where the company is incorporated. It will usually be identified in its Memorandum and Articles of Association or equivalent. The third is the place where the company does its principal 'business'. Where that is must be a question of fact in each case. (39)

The case is an interesting attempt at forum shopping, with a certain relevance for the corporate social responsibility debate: by suggesting that the place of central administration is the very head of the corporate spider's web, plaintiffs can sue directly in Europe. This case shows, however, that such a suggestion is not easily substantiated. Neither would it necessarily assist much at the applicable law stage.

### 2.2.4 The International Impact of the Regulation

> Article 4
>
> 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
>
> 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.
>
> Article 5
>
> 1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.
>
> 2. In particular, the rules of national jurisdiction of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1) shall not be applicable as against the persons referred to in paragraph 1.

> Article 6
>
> 1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.
>
> 2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.

The former Brussels I Regulation had four main weaknesses with respect to its external impact:[148,149]

— the protection (through recognition and enforcement) of judgments given under Member States' residual jurisdiction,[150] without any account for third countries' interests;
— the lack of provisions (a *lis alibi pendens* rule) in the event of jurisdiction exercised under the Regulation, with parallel proceedings in a third State;
— along similar lines (for there is a strong likelihood of parallel proceedings), the exercise of jurisdiction under the Regulation where the subject-matter concerned (typically, one of the exclusive jurisdictional grounds of Article 22 (old) however without the conditions being fulfilled,(eg an action *in rem* vis-à-vis real estate in a third State) is strongly connected to a third State; this is the so-called 'reflexive application'; and finally
— forum clauses in favour of the courts of a third State.

Throughout the Regulation, it is the position of the defendant which is determinant, not that of the plaintiff. (The protection of the protected categories excepted: see below.) The Regulation aims to protect the defendant domiciled in any of the Member States—whatever his or its (in the case of legal persons) nationality—against exorbitant claims of jurisdiction. This protection is only provided for those domiciled in the Member States. Nowhere in the Regulation is this clearer than in Articles 5 and 6. Article 5 firstly confirms that for defendants domiciled in one of the Member States (evidently only for matters falling within the material scope of application of the Regulation, see above), only the grounds of jurisdiction included in the Regulation may be invoked. Article 5(2) adds superfluously that, against such defendants, the residual rules of jurisdiction notified by the Member States cannot apply. This list used to be included as Annex I in the former Brussels I Regulation. It is now published as a European Commission Notice in accordance with Article 76 of the Regulation (which applied a year earlier than the Regulation as a whole).[151] Annex I, now the Notice, contains a number of national jurisdictional claims which were

[148] See also A Layton, 'The Brussels I Regulation in the International Legal Order: Some Reflections on Reflectiveness' in Lein (n 95) 75 (mentioning three of these).

[149] Generally and excellently on the impact of the Brussels regimes on third States: T Kruger, *Civil Jurisdiction Rules of the EU and their Impact on Third States* (Oxford, OUP, 2008).

[150] The meaning of this will become clear below.

[151] Commission Notice 2015/C 4/02, [2015] OJ C4/2.

regarded as being particularly 'exorbitant'.[152] Chief among these is the parochial intuition[153] of France in jurisdictional matters, holding jurisdiction in France over almost any action[154] brought by a plaintiff of French nationality.[155] By virtue of Article 6(2), this large claim of jurisdiction was extended by the Brussels I Regulation (and carried over into the current Regulation) to all those domiciled in France, regardless of nationality (again though: only against those *not* domiciled in the EU). The provision, incidentally, has not been formally checked by the French Constitutional Court on its constitutionality. On 29 February 2012, the French Cour de Cassation decided not to grant leave for the review of constitutionality (or not) of Article 14 of the French Code Civil by the French Constitutional Court.[156] The alleged unconstitutionality at a French level, lies in the perceived 'unfairness' of such trials vis-à-vis the (non-French, indeed by virtue of the Brussels I Regulation the non-EU) defendants. The Cour de Cassation saw no merits in the arguments, arguably mostly on the ground of the diminishing practical impact of the provision. The Cour's decision means that, for the time being at least, the issue will not be sub judice in the French Constitutional Court; however, that does not of course mean that it might not end up at the European Court of Human Rights before long.

Whilst Article 5(2) adds superfluously that 'parochial' national claims cannot be invoked against those domiciled in the EU, Article 6(2) provides equally superfluously that these rules can be invoked against those not domiciled in the EU, by anyone domiciled in the particular Member State concerned. In accordance with Article 6(1), national rules of jurisdiction do not apply to defendants domiciled outside of the EU only in the cases of Articles 24 (exclusive jurisdiction: see further), 25 (choice of court: see further), and the protected categories of consumers and of employees (again: see further).

Importantly, judgments applying the national grounds of jurisdiction in accordance with Article 6 enjoy the recognition and enforcement provisions of the Regulation (as opposed to the subject-matter which escapes the Regulation completely as a result of Article 1). This implies that other Member States called upon to recognise and enforce such judgments, have very limited room for manoeuvre to refuse.[157]

[152] KA Russell, 'Exorbitant Jurisdiction and Enforcement of Judgments: the Brussels System as an Impetus for the United States Action' (1993) 19 *Syracuse Journal of International Law and Commerce* 2; cited by O Struyven, 'Exorbitant Jurisdiction in Private International Law: An Introduction' (1998) *Jura Falconis* 521–48.

[153] K Clermont and J Palmer, 'French Article 14 Jurisdiction, Viewed from the United States', Cornell Law School Research Paper 04-011 (2004) 2 (available on SSRN). The authors suggest the shock value of France's jurisdictional claims needs to be taken with a pinch of salt.

[154] Issues related to real estate are the most commonly applied exception.

[155] See, however, Paris criminal court, 3 March 2011, *Ministère public v Joseph Weiler*, declining jurisdiction in a case initiated by an aggrieved author with no links to France other than nationality, against Prof Weiler, with no links to France at all, for the publication of a book review (not by his hand) in an online law journal.

[156] Cour de Cassation No 11-40101.

[157] See my review of recognition and enforcement, below. See also a very limited extra layer of protection for third State domiciliaries in Art 72 of the Regulation: 'This Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention—, not to recognise judgments given, in particular in other contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.' NB: Art 3 of that Convention is now included in Annex I to the Regulation. It is not entirely clear why the Regulation limits the application of Art 72 to agreements concluded prior to its entry into force. There are in fact only two such agreements: one between the UK and Canada, and one between the UK and Australia. Hence only UK courts and only in limited circumstances will be able to refuse recognition and enforcement of the relevant judgment of another Member State.

The way in which the EU, through the Regulation, condones[158] or, through the enforcement provisions, perhaps even sponsors exorbitant jurisdiction of some of its Member States, has attracted international criticism. However most of the EU Member States which previously (for some of them really quite a long time ago) may have employed such wide reach, have since abandoned it. Moreover, other, non-EU jurisdictions are not averse to similar jurisdictional claims. Consequently it would be fair to say that the theory of 'extraterritorial' EU/Member States jurisdictional claims, far exceeds its practice.[159]

Indeed in its Green Paper on the review of the Regulation, the European Commission's attention to the Regulation's impact in the international legal order did not focus on the perceived inequality vis-à-vis non-EU-domiciled defendants. Instead, it highlighted the issue of 'subsidiary jurisdiction' or 'third State defendants'. In other words, those national jurisdictional rules which do not concern a party domiciled in any of the EU Member States, or any of the exclusive grounds of jurisdiction in (now) Article 24, or finally the choice of court clauses under (now) Article 25. In other words, the EC's concern lay with those domiciled in the EU acting as a *plaintiff*, as opposed to the Regulation's focus on the defendant. Looking at the issue from the point of view of the plaintiff, natural or legal persons domiciled in the EU but not domiciled in the Member State with an 'interesting' and wide jurisdictional claim, cannot—at least on the basis of the Regulation—make recourse to such rules. It has been suggested that this difference is 'hardly according to the principle of establishing an area of freedom, justice and security as described by Article [67 TFEU]'.[160] I disagree, however, that this argument also became the point of view of the European Commission. The Commissions' view is that:

> The good functioning of an internal market and the Community's commercial policy both on the internal and on the international level require that equal access to justice on the basis of clear and precise rules on international jurisdiction is ensured not only for defendants but also for claimants domiciled in the Community. The jurisdictional needs of persons in the Community in their relations with third States' parties are similar. The reply to these needs should not vary from one Member State to another, taking into account, in particular, that subsidiary jurisdiction rules do not exist in all the Member States. A common approach would strengthen the legal protection of Community citizens and economic operators and guarantee the application of mandatory Community legislation.[161]

Hence the Commission invited reflection upon (but obviously encouraged the development of) the necessity and appropriateness of additional jurisdictional grounds for disputes involving third State defendants (subsidiary jurisdiction). It did include a word of caution on the 'international courtesy' implications of such extension (a reference to the international public law issue of 'comity', which I come back to in the chapter on corporate social responsibility, below).

[158] Certainly not 'creates': exorbitant claims are not directly put forward by the Regulation. See, however, the extended 'extraterritorial' or 'external-EU' impact of the Recast Regulation, reviewed further.

[159] Similarly, the Heidelberg Report (n 17) 156 (46).

[160] Ibid, 158 (46).

[161] Ibid, 3.

According to the Commission in its eventual proposal for amendment, each defendant as well as plaintiff in the EU should have 'equal' (what it means in fact is 'identical') access to the courts. It suggested specific additional jurisdictional grounds:

1. The proposal extended the Regulation's special jurisdiction rules to third country defendants.[162] This amendment would likely have had the most impact in the case of contracts (jurisdiction at the place of contractual performance).
2. The EC also proposed that the protective jurisdiction rules available for consumers, employees and insured apply also if the defendant is domiciled outside the EU.[163]
3. The proposal further harmonised the so-called 'residual' jurisdiction rules: ie those where the Member States so far had retained their national private international law rules. Article 4 (now: 6) of the Regulation would have been deleted in its entirety, and two additional fora created for disputes involving defendants domiciled outside the EU.

First, the proposal provided that a non-EU defendant could be sued at the place where moveable assets belonging to him are located, provided their value be proportionate to the value of the claim and provided that the dispute has a sufficient connection with the Member State of the court seized. In such case the presence of assets in the EU was seen to offset the absence of the defendant in the EU:

COM(2010) 748 proposed:

> Article 25
>
> Where no court of a Member State has jurisdiction in accordance with Articles 2 to 24, jurisdiction shall lie with the courts of the Member State where property belonging to the defendant is located, provided that the value of the property is not disproportionate to the value of the claim; and the dispute has a sufficient connection with the Member State of the court seized.

In addition, had the Commission Proposal been accepted, the courts of a Member State would have been able to exercise jurisdiction if no other forum guaranteeing the right to a fair trial were available and the dispute had a sufficient connection with the Member State concerned (*forum necessitatis*). This provision was regarded by the EC to be of particular relevance for EU companies investing in countries with immature legal systems.

The proposed Article 26 read:

> Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:
>
> (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or
> (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seized under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seized.

[162] COM(2010) 748: deletion of 'A person domiciled in a Member State may, in another Member State, be sued' from Art 5, introductory sentence.

[163] COM(2010) 748: deletion of 'domiciled in a Member State' from each of the relevant sub-headings.

Given that in each of these cases, there is a likelihood of clashing jurisdictional claims by third countries, the proposal also introduced a discretionary *lis pendens* rule for disputes on the same subject matter and between the same parties which are pending before the courts in the EU and in a third country. The Commission proposed that a court of a Member State may exceptionally stay proceedings if a non-EU court was seized first, if that court is expected to decide within a reasonable time and if that decision will be capable of recognition and enforcement in that Member State. This amendment aimed at avoiding parallel proceedings in- and outside the EU, the likelihood of which, as noted, would have considerably increased had the EC's additional jurisdictional rules been introduced. There are of course important differences between such 'discretionary *lis alibi pendens*' rule, and *forum non conveniens* (see also elsewhere in this volume). Nevertheless, the introduction, within the Regulation, of a discretionary *lis alibi pendens* rule is an interesting development. Once sampled, Member States' courts might well develop a taste for it outside the specific context of non-EU-based defendants.

The relevant Article in the Commission proposal was Article 34, which read:

> 1. Notwithstanding the rules in Articles 3 to 7, if proceedings in relation to the same cause of action and between the same parties are pending before the courts of a third State at a time when a court in a Member State is seized, that court may stay its proceedings if:
>
> (a) the court of the third State was seized first in time;
> (b) it may be expected that the court in the third State will, within a reasonable time, render a judgment that will be capable of recognition and, where applicable, enforcement in that Member State; and
> (c) the court is satisfied that it is necessary for the proper administration of justice to do so.
>
> 2. During the period of the stay, the party who has seized the court in the Member State shall not lose the benefit of interruption of prescription or limitation periods provided for under the law of that Member State.
>
> 3. The court may discharge the stay at any time upon application by either party or of its own motion if one of the following conditions is met:
>
> (a) the proceedings in the court of the third State are themselves stayed or are discontinued;
> (b) it appears to the court that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time;
> (c) discharge of the stay is required for the proper administration of justice.
>
> 4. The court shall dismiss the proceedings upon application by either party or of its own motion if the proceedings in the court of the third State are concluded and have resulted in a judgment enforceable in that State, or capable of recognition and, where applicable, enforcement in the Member State.

The Council's General Approach document of June 2012 displayed quite a different view on the issue of domicile being the central tenet of the Regulation. By way of reminder (for this has been noted above), the Commission proposal

1. extended the Regulation's special jurisdiction rules to third country defendants;
2. made the protective jurisdiction rules available for consumers, employees and insured also applicable if the defendant is domiciled outside the EU; and
3. further harmonised the so-called 'residual' jurisdiction rulesie with the introduction of two additional fora and the abolition of (then) Article 4.

The Council, by contrast,

1. reinstated the domicile condition for the special jurisdictional rules;[164]
2. reinstated the domicile condition for the protective jurisdictional rules with respect to insurance, but then inserted a slightly confusing section for consumer contracts, and a rather mixed regime for employment contracts.

With respect to *consumer contracts*, the Council re-inserted the reference to (then) Article 4 of the Regulation (albeit in a renumbered 4a fashion, see below), thus in principle reaffirming the domicile criterion. However, it then oddly inserted in Article 16(1):

> A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or**, regardless of the domicile of the other party**, in the courts for the place where the consumer is domiciled.

(The extract in bold is the Council's addition to the Commission proposal.)

I had first assumed that this insertion in Article 16(1) did not trump the Council's re-insertion of Article 4, hence the counterparty would still have to be domiciled in the EU, for the consumer contracts section to apply. However, Parliament's proposed recital 11(f) then suggested otherwise:

> However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect party autonomy, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

This amendment was accepted and the condition of 'directing activities to' the Member State' in what is now Article 17 of the Regulation gained ever more importance for the territorial scope of the Regulation.

As far as *employment contracts* are concerned, here, too, the Council referred to Article 4 (4a) and thus to a domicile criterion, but then added that an employer not domiciled in a Member State may be sued in a court of a Member State, either in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so, or if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Non-EU-based employers, therefore, are now also within the reach of the Regulation. Carrying out the contract in the EU establishes sufficient territorial EU link, to make courts in the EU hear the case.

3. With respect to the subsidiary jurisdiction rules, the Council reinstated Article 4 (now Article 6), and did not support the introduction of either an assets-based rule of forum necessitatis. The proposed Articles 25 and 26 were deleted in their entirety. However the Council did maintain the discretionary *lis alibi pendens* rule (parallel proceedings in a third State), by and large along the lines of the Commission proposal, albeit

[164] And adds an additional rule for rights in rem vis-à-vis cultural objects: 'as regards a dispute concerning rights in rem in, or possession of, cultural objects as defined in Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State, in the courts for the place where the object is situated at the time the court is seised'.

— specifically limited to cases where jurisdiction of the court of the EU Member State is based on the general rule (domicile of the defendant) or on any of the special jurisdictional rules (for the concept, see further below), not on the basis of exclusive jurisdiction, court of choice agreements, voluntary appearance, or the protected categories. This limitation was less clear in the Commission proposal; and
— with a recital to clarify the meaning of 'proper administration of justice':

> When taking into account the proper administration of justice, the court should assess all the circumstances of the particular case. This could include the connections between the facts of the case and the parties and the third State in question, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.
>
> This assessment could also include whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member state would have exclusive jurisdiction.

The amended Regulation therefore addresses only one of the aforementioned four main problems associated with the external (non-EU) impact of the Regulation: a *lis alibi pendens* rule where there are parallel proceedings in a third State. The fact that this rule has been maintained by Council and Parliament is interesting, for the Commission had introduced it precisely because of the new, additional grounds for jurisdiction (the assets rule and forum necessitatis)—neither of which, as noted, has been withheld by the other Institutions. I review this third-country *lis alibi pendens* rule, now included in Articles 33–34, in relevant section, below.

It is noteworthy that of the three institutions, the European Parliament is the most cautious when it comes to simply expanding the reach of the Regulation to 'extraterritorial' or 'extra-EU' scenarios. Parliament's preferred route is to negotiate an international treaty, such as via the Hague process, or at the very least to coordinate European practice with that of third States.[165]

### 2.2.5 The Jurisdictional Rules of the Regulation: A Matrix

The most logical way of studying the Regulation is by reviewing jurisdiction in descending order of exclusivity and specificity: the most specific and exclusive first.[166] This leads to the following matrix:

1. Exclusive jurisdiction, regardless of domicile: Article 24 (previously: 22);
2. Jurisdiction by appearance: Article 26 (previously: 24);
3. Insurance, consumer and employment contracts: Articles 10–23 (previously: 8–21);
4. Agreements on Jurisdiction ('choice of forum'): Article 25 (previously: 23);

[165] See also the report by I Pretelli et al for the European Parliament, *Possibility and terms for Applying Brussels I Regulation (recast) to Extra-European Disputes* (2014), available at www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET%282014%29493024_EN.pdf, accessed 18 September 2015.

[166] Similarly: Briggs (n 19) 65.

5. General jurisdiction: defendants domiciled in the Member State where a court is seized: Article 4 (previously: 2)[167]
6. 'Special' jurisdiction: defendants domiciled in another Member State: Articles 7–9 (previously: 5–7);
7. 'Residual' jurisdiction: defendants not domiciled in any Member State: Article 6 (previously: 4);
8. Loss of jurisdiction: lis alibi pendens and related actions: Articles 29–32 (previously: 27–30);
9. Applications for provisional or protective measures: Article 35 (previously: 31).

Many ifs and buts apply to each of the entries in the matrix and these will be further studied below.

### 2.2.6 Exclusive Jurisdiction, Regardless of Domicile: Article 24

The Regulation foresees in five cases of exclusive jurisdiction, regardless of where the defendant is domiciled: rights *in rem* and tenancies of, immovable property; the incorporation of companies and certain other aspects of company law; the validity of entries in public registers; the registration or validity of registered intellectual property rights; and the enforcement of judgments. In contrast with the special jurisdictional rules, the adjudication made by the Regulation is at Member State level only. The Regulation does not confer jurisdiction to a particular court of that Member State: that is for the national rules to decide (in other words the internal rules of jurisdiction for the grounds of jurisdiction listed in Article 24 are not affected by the Regulation).

In the rather exceptional case where exclusive jurisdiction is given to two courts, in particular for the application of Article 24(1), second paragraph, Article 31 prescribes that the court first seized, has exclusive jurisdiction.

The exclusive heads of jurisdiction are said to be required for the proper administration of justice.[168] More importantly, though, they were introduced for very practical reasons. A number of Member States (Germany, Italy most vociforously) considered in particular the heads of jurisdiction with regard to immovable property to be a matter of public policy. Hence a judgment by another Member State disregarding this principle would not have been recognised in those Member States—which would have been a serious obstacle to the free movement of judgments.[169]

It is the subject-matter of the action which is relevant for the purpose of the proper administration of justice, not the capacity of the defendant. Hence the exclusive grounds for jurisdiction apply regardless of the domicile or nationality of the parties, meaning of course that those domiciled outside of the EU may very well fall under a Member State jurisdiction by virtue of Article 24.

[167] Consequently while 'domicile of the defendant' is generally quoted as the overall rule of the Regulation, its actual place in the hierarchy is not altogether very high.
[168] Jenard Report, [1979] OJ C59/29.
[169] Ibid, 35.

Article 24 is given strict interpretation since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, results in them being brought before a court which is not that of any of them.[170]

The matters referred to in this Article are the subject of exclusive jurisdiction only if they constitute *the principal subject-matter* of the proceedings of which the court is to be seized.[171] The English version of the Regulation is the clearest on this point. However, the CJEU and national courts have not always applied this limitation consistently. Indeed in the context of Article 24(4), as I further highlight below, the CJEU has consistently ignored this instruction in the Jenard Report.

The purpose of Article 24 is to protect the interests of the State which has the exclusive jurisdiction. Hence the defendant cannot grant a different court jurisdiction by virtue of Article 26 (voluntary appearance), nor can parties make a choice of court agreement to such effect (Article 25(4)), and a judgment which conflicts with Article 24 must be denied recognition (Article 45(1)(e)(ii)).

### *2.2.6.1 Rights in Rem and Tenancies of Immovable Property*

> Article 24
>
> The following courts shall have exclusive jurisdiction, regardless of domicile:
>
> 1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

Over and above the general reasons for exclusivity, recalled above, in the particular case of rights *in rem*, the essential reason for conferring exclusive jurisdiction on the courts of the State in which the property is situated is that the courts of the *locus rei sitae* are the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices—including customary law[172]—which are generally those of the State in which the property is situated.[173] These are of course considerations which reflect choice of law rather than jurisdiction—and indeed the *lex rei sitae* is generally the applicable law for actions *in rem*.

The more practical element of having to take into account the need to make entries in land registers located where the property is situated is also referred to[174] however would not in fact seem to have been the heaviest on the mind of the drafters.

In *Reichert*, the CJEU clarified the meaning of "proceedings which have as their object rights in rem in immovable property". Dresdner Bank, as creditor, applied by means of an action available under French national law (specifically an *actio pauliana*), to have a donation of immovable property set aside on the ground that it was made by its debtor in

[170] See also Case 73/77 *Theodorus Engelbertus Sanders v Ronald van der Putte* [1977] ECR 2383; Case C-73/04 *Brigitte and Marcus Klein v Rhodos Management Ltd* [2005] ECR I-8667, para 15 and relevant case-law cited there.
[171] Jenard Report, 34.
[172] Ibid, 35.
[173] Case 73/77 *Theodorus Engelbertus Sanders v Ronald van der Putte* [1977] ECR 2383.
[174] Jenard Report, 35.

fraud of its rights. The Court held that rights *in rem* in immovable property as included in Article 24 are

> actions which seek to determine the extent, content, ownership or possession of immovable property 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.[175]

In the case at issue, the *actio pauliana* is

> based on the creditor's personal claim against the debtor and seeks to protect whatever security he may have over the debtor's estate. If successful, its effect is to render the transaction whereby the debtor has effected a disposition in fraud of the creditor's rights ineffective as against the creditor alone. The hearing of such an action, moreover, does not involve the assessment of facts or the application of rules and practices of the locus rei sitae in such a way as to justify conferring jurisdiction on a court of the State in which the property is situated.[176]

Likewise, actions, including preventive action, to halt nuisance emanating from a particular use of immovable property, have as their main object the halting of the nuisance, not the rights *in rem* related to the property concerned.[177]

> It is not sufficient that a right *in rem* in immovable property be involved in the action or that the action have a link with immovable property: the action must be based on a right *in rem* and not on a right *in personam*, save in the case of the exception concerning tenancies of immovable property.[178]

Thus in the case of *Webb v Webb*, the action for a declaration that a person holds immovable property as trustee and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff, did not constitute an action in rem within the meaning of Article 24 of the Regulation.

As for all exclusive grounds of jurisdiction, the 'principal' object of the proceedings has to be rights *in rem* or tenancies. This is not a denoter present in the text of the Regulation but rather, as signalled above, distilled from the Jenard Report and emphasised in case-law. The English and also the German version of the Regulation quite clearly refer to the subject-matter of the interests listed in Article 24 as having to be at the core of the action. The Dutch and French version, by contrast, even after the Recast, might otherwise suggest that the very featuring of those interests in the relevant litigation, might suffice for Article 24 to be triggered (*quod certe non*, as clarified by the CJEU).

The CJEU's finding in *Reichert* does not address all definitional issues with respect to 'rights *in rem*'. As the extract[179] of the case shows, the Court's finding includes one core right *in rem* common to all Member States (property); one awkward presence (possession: not generally a right *in rem*); and finally a 'remainder' category: 'other rights *in rem*'. In *Reichert* and *ad abundantiam* since, the Court emphasises that the notion of 'rights *in rem*' needs to be given an autonomous meaning. This is perfectly in line with its overall application of

[175] Case C-115/88 *Mario Reichert et al v Dresdner Bank* [1990] ECR I-27, para 11.
[176] Ibid, para 12.
[177] Case C-343/04 *Land Oberösterreich* [2006] ECR I-4557.
[178] Case C-294/92 *Webb v Webb* [1994] ECR I-1717.
[179] '[A]ctions which seek to determine the extent, content, ownership or possession of immovable property 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.'

the Regulation. On the other hand the reference to 'other rights *in rem*' clearly showed the Court's challenge in devising an autonomous, European definition.

In *Gaillard*,[180] the Court did offer an abstract notion of 'rights *in rem*', taking inspiration from the Schlosser Report. The case concerned an action for rescission of a contract of sale of immovable property and for damages. The Court quoted the Schlosser Report's statement

> that the difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect erga omnes, whereas the latter can only be claimed against the debtor.[181]

It is the *erga omnes* character which is determinant for the Court. In the case at issue the CJEU held that:

> Even if, in some circumstances, proceedings for rescission of a contract for the sale of immovable property may have some impact on the title to the property, they are none the less based on the personal right that the claimant obtains under the contract entered into between the parties and consequently may only be raised against the other party to the contract. By raising these proceedings, one party to the contract seeks to be released from his contractual obligations towards the other party, by reason of the latter's failure to perform the contract. Furthermore, the decision of the court which is to decide the case is capable of having effect only as regards the party against whom the order of rescission is made. It follows that the proceedings do not have as their object rights which relate directly to immovable property and can be raised erga omnes.

That the proceedings have consequences for the property of the good is insufficient for the suit to fall within Article 24(1).

The yardstick for whether proceedings have *erga omnes* character, in the absence of European harmonisation, is and remains national law. This was evidenced in *Weber v Weber*.[182] Ms I Weber ('I') and Ms M Weber ('M') were co-owners to the extent of 6/10 and 4/10, respectively, of a property in Munich. On the basis of a notarised act of 20 December 1971, a right *in rem* of pre-emption over the 4/10th share belonging to M was entered in the Land Register in favour of I. By a notarial contract of 28 October 2009, M sold her 4/10th share to Z GbR, a company incorporated under German law, of which one of the directors was her son, Mr Calmetta, a lawyer established in Milan. According to one of the clauses in that contract, M, as the seller, reserved a right of withdrawal valid until 28 March 2010 and subject to certain conditions.

Being informed by the notary who had drawn up the contract in Munich, I exercised her right of pre-emption by letter of 18 December 2009. On 25 February 2010, by a contract concluded before that notary, I and M once more expressly recognised the effective exercise of the right of pre-emption by I and agreed that the property should be transferred to her for the same price as that agreed in the contract for sale signed between M and Z GbR. However, the two parties asked the notary not to carry out the procedures for the registration of the transfer of property in the Land Register until M had made a written declaration before the same notary that she had not exercised her right of withdrawal or that she had waived that right arising from the contract concluded with Z GbR within the period laid

[180] Case C-518/99 *Richard Gaillard v Alya Chekili* [2001] ECR I-2771.
[181] [1979] OJ C59/(71) 120.
[182] Case C-438/12 *Irmengard Weber v Mechthilde Weber* ECLI:EU:C:2014:212.

down, which expired on 28 March 2010. On 2 March, I paid the agreed purchase price of €4 million.

By letter of 15 March 2010, M declared that she had exercised her right of withdrawal from the contract of 28 October 2009. By an application of 29 March 2010, Z GbR brought an action against I and M, before the District Court of Milan, seeking a declaration that the exercise of the right of pre-emption by I was ineffective and invalid, and that the contract concluded between M and that company was valid.

On 15 July 2010, I brought proceedings against M before the Landgericht München, seeking an order that M register the transfer of ownership of the 4/10th share with the Land Register.

The Court of Justice first of all had to decide whether an action seeking a declaration that a right *in rem* in immovable property has not been validly exercised falls within the category of proceedings which have as their object right *in rem* in immovable property, within the meaning of Article 22(1) of Regulation No 44/2001. It held that it did, with the required amount of deference to national law: a right of pre-emption, such as that provided for by paragraph 1094 of the BGB, which attaches to immovable property and which is registered with the Land Register, produces its effects not only with respect to the debtor, but guarantees the right of the holder of that right to transfer the property also vis-à-vis third parties, so that, if a contract for sale is concluded between a third party and the owner of the property burdened, the proper exercise of that right of pre-emption has the consequence that the sale is without effect with respect to the holder of that right, and the sale is deemed to be concluded between the holder of that right and the owner of the property on the same conditions as those agreed between the latter and the third party.

#### *2.2.6.2 Specifically with Respect to the Extension to Tenancies*

The raison d'être of the extension to tenancies is the fact that tenancies are closely bound up with the law of immovable property and with the provisions, generally of a mandatory character, governing its use, such as legislation controlling the level of rents and protecting the rights of tenants, including tenant farmers (*Hacker v Euro-Relais*).[183] The extension to 'tenancies of immovable property' does not add the qualification 'rights *in rem*', hence Article 24(1) with respect to tenancies, applies to any proceedings concerning rights and obligations arising under an agreement for the letting of immovable property, irrespective of whether the action is based on a right *in rem* or on a right *in personam* (*Lieber*).[184]

The Jenard Report indicates specifically that the Convention draftsmen intended to cover inter alia disputes over compensation for damage caused by tenants,[185] and in *Rösler* the Court extended the reach of Article 24(1) with respect to tenancies, generally to disputes concerning the respective obligations of landlord and tenant under the agreement.[186] Only disputes which are only indirectly related to the use of the property let, such as those concerning the loss of holiday enjoyment and travel expenses, do not fall within the exclusive jurisdiction (*Rösler*).[187]

[183] Case C-280/90 *Hacker v Euro-Relais* [1992] ECR I-1111, para 8.
[184] Case C-292/93 *Lieber* [1994] ECR I-2535, paras 10, 13, 20.
[185] Jenard Report, 34–35.
[186] Case 241/83 *Rösler v Rottwinkel* [1985] ECR 99.
[187] Ibid.

While the advantage of this wide approach is indeed to ensure that almost all potential disputes between landlord and tenant will be caught by the Article 24(1) exclusive ground of jurisdiction,[188] the Heidelberg Report nevertheless suggested that this is too inflexible in the case of tenancy of office space, and hence suggested amending the Regulation on this point.[189] The Commission had picked this up in its final proposal, which read in relevant part

> in agreements concerning tenancies of premises for professional use, parties may agree that a court or the courts of a Member State are to have jurisdiction in accordance with Article 23;

In other words for professional use only, the Commission had intended for parties to be able to avoid the exclusive jurisdiction by choice of court. This however was not withheld by Council and Parliament.

Regardless of the extensive line taken by the Court as described above, in line with the overall requirement strictly to apply the exclusive grounds of jurisdiction, the principal aim of the agreement does have to be of a tenancy nature for it to be caught by Article 24(1). More complex agreements of the travel operator type, which include transport arrangements, etc, are not covered by Article 24,[190] neither are timeshare club memberships[191,192] where these do not provide for a clear link between the membership and one specific property actually to be used by the member.

The simple presence of a tour operator in the chain of parties, however, must not confuse. Tour operators quite regularly, by virtue of contractual or statutory arrangements, are subrogated in the rights and duties of the landlord. '*[T]hrough subrogation, one person steps into the shoes* of another in order to enable the former to exercise rights belonging to the latter',[193] so that, in such case, the tour operator is not acting in its capacity as a professional tour operator but as if it were the owner of the property in question. In such case, the dispute takes place as if it were between landlord and tenant, and Article 24(1) has full impact. A study of the precise contractual arrangements therefore is necessary for one to appreciate whether Article 24(1) applies in the context of relations with tour operators.

Article 24(1) has two ancillary rules:

### *2.2.6.3 Short-Term Holiday Lets*

Firstly, Article 24(1), 2° grants additional jurisdiction to the courts of the domicile of the defendant, in cases which effectively involve holiday lets only, subject to conditions which do not need much clarification:

> However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member

[188] JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett's Private International Law*, 14th edn (Oxford, OUP, 2008) 280.

[189] Heidelberg Report (n 17) para 319.

[190] Case C-280/90 *Hacker v Euro-Relais* [1992] ECR I-1111, paras 11 ff.

[191] Case C-73/04 *Klein v Rhodos Management* [2005] ECR I-8667.

[192] Such time-share contracts are covered by the Art 17 ff protection for consumer contracts: see the Commission proposal leading to the adoption of Regulation 44/2001, COM(1999) 348, 16.

[193] Case C-8/98 *Dansommer* [2000] ECR I-393, para 37.

> State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State.

This rule is exactly the situation where Article 31 (1) of the Regulation might come in. The landlord might well want to sue in the more natural forum of Article 24(1), while the consumer would normally be more inclined to sue in the Member State of his domicile. In such instance, Article 31 clearly rewards the party who got there first.

#### *2.2.6.4 Contractual Action in Combination with* Actio in Rem

Further, Article 8(4) of the Recast Regulation allows for contractual action to be combined with an action *in rem* against the same defendant, which is useful in particular in mortgage actions:

> A person domiciled in a Member State may also be sued …
>
> in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

#### *2.2.6.5 The Incorporation of Companies and Certain Other Aspects of Company Law*

> Article 24
>
> The following courts shall have exclusive jurisdiction, regardless of domicile: …
>
> 2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law.

This 'exclusive' ground for jurisdiction, too, may lead to a need to apply Article 31, as not all Member States apply the same definition of 'seat' of a company. The cancellation in this particular case of the three-tier 'harmonised' EU definition of company domicile in Article 63 of the Regulation is meant to safeguard exclusive jurisdiction. In practice, however, Article 31 may lead to one having to settle for the court first seized (provided the plaintiff can make a valid case that under the private international law rules of the forum, the company concerned has its 'seat' there).

The specific aim of the exclusive jurisdiction in the event of Article 24(2) is to avoid conflicting judgments being given as regards the existence of a company or as regards the validity of the decisions of its organs.[194] The courts of the Member State in which the company has its seat appear to be those best placed to deal with such disputes, inter alia because it is in that State that information about the company will have been notified and made public.[195]

[194] Jenard Report, 35.
[195] Case 73/77 *Sanders* [1977] ECR 2383, paras 11 and 17.

By analogy with *Webb v Webb*, referred to above, Article 24(2) needs to be interpreted strictly. Notwithstanding the differences in the language versions of Article 24(2), referred to above, it is not sufficient that the legal action has some link with a decision adopted by an organ of the company for the exclusive jurisdiction to apply. It follows that Article 24(2) covers only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or under the provisions governing the functioning of its organs, as laid down in its Articles of Association (*Hassett*),[196] inter alia because these are the cases where consultation of the publication formalities applicable to a company may be necessary. Disputes regarding the manner in which company organs exercise their functions,[197] are not covered by Article 24(2) (*Hassett*).[198] If all disputes involving a decision by an organ of a company were to come within the scope of that article, that would mean that all legal actions brought against a company—whether in matters relating to a contract, or to tort or delict, or any other matter—would almost always come within the jurisdiction of the courts of the Member State in which the company has it seat.[199] Indeed it would mean that it would be sufficient for a company to plead as a preliminary issue that the decisions of its organs that led to the conclusion of a contract or to the performance of an allegedly harmful act are invalid in order for exclusive jurisdiction to be unilaterally conferred upon the courts where it has its seat. This would at the same time make the jurisdiction in such cases extremely unpredictable, as it would depend on whether such defence was or was not claimed, for the case to have to be heard exclusively in the Member State where the company has its seat (*BVG*).[200]

Further support for this view is found in the Jenard Report.[201]

An important application lies in *not* applying Article 24(2) in cases where a defendant claims that a company representative had no authority to enter into a forum clause under Article 25 of the Regulation.[202]

[196] Case C-372/07 *Hassett* [2008] ECR I-7403, para 26.

[197] In the case of *Hassett*, the applicants were doctors who were members of the MDU. The MDU is a professional association, established as a company incorporated under English law and having its registered office in the United Kingdom. The MDU's mission is inter alia to provide indemnity to its members in cases involving professional negligence on their part. Accordingly, the doctors sought an indemnity and/or a contribution from the MDU in respect of any sum which either of them might be required to pay by way of indemnity to the relevant health board. The Board of Management of the MDU, relying on Arts 47 and 48 of the company's articles of association, under which any decision concerning a request for an indemnity comes within its absolute discretion, refused to grant their requests.

[198] See for instance the rejection by the CJEU of application of Art 24(2) in Case C-302/13 *fly LAL-Lithuanian Airlines v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS* ECLI:EU:C:2014:2319. That the exclusive jurisdictional rule of Art 24(2) may be at issue in that case (which might have led the court with whom enforcement is sought, to refuse such) was clearly a desperate attempt to rebuke jurisdiction. One assumes the flimsiest of arguments might have been that the board or a director would have had to approve the actions leading to the infringement of competition law. The national court should not have entertained this argument, let alone sent it to Luxembourg. The CJEU replied courteously that 'seeking legal redress for damage resulting from alleged infringements of European Union competition law, must (not) be regarded as constituting proceedings which have as their object the validity of the decisions of the organs of companies within the meaning of that provision'.

[199] Case C-372/07 *Hassett* [2008] ECR I-7403.

[200] Case C-144/10 *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts v JPMorgan Chase Bank NA, Frankfurt Branch* [2011] ECR I-3961, para 34.

[201] Jenard Report, 35. According to the Report, 'Article 16(2) of the convention provides for exclusive jurisdiction in proceedings which are "*in substance*" concerned with the validity of the constitution, the nullity or the dissolution of the company, legal person or association, or with the validity of the decisions of its organs' (emphasis added).

[202] See eg the High Court in *CALYON v Wytwornia Sprzetu Komunikacynego PZL Swidnik* SA [2009] EWHC 1914 (Comm) 93 ff.

The Court's case-law on this point differs from the issues under consideration in Article 24(4), reviewed below. Per *GAT*,[203] the court seized must at the very least halt its proceedings until the Court (if that is different) which by application of Article 24(4) has jurisdiction on the validity of the patent has ruled on that validity. The CJEU distinguishes between the two on the basis of what it suggests is a much closer link between the jurisdictional ground in Article 24(4), and the dispute at issue. In any procedure launched because of an alleged patent etc. infringement, the validity of that patent lies at the core of the dispute. By contrast, the Court held in *BVG* that in a dispute of a contractual nature, questions relating to the contract's validity, interpretation or enforceability are at the heart of the dispute and form its subject-matter. Any question concerning the validity of the decision to conclude the contract, taken previously by the organs of one of the companies party to it, must be considered ancillary. While it may form part of the analysis required to be carried out in that regard, it nevertheless does not constitute the sole, or even the principal, subject of the analysis.[204]

In *fly LAL*,[205] the CJEU again emphasised the need to apply Article 24(2) restrictively. That the rule might have been at issue in the case (which would have led the court with whom enforcement is sought to refuse such) was clearly a desperate attempt to escape enforcement. The national court should not have entertained it, let alone sent it to Luxembourg. The CJEU replied courteously that

> seeking legal redress for damage resulting from alleged infringements of European Union competition law, must (not) be regarded as constituting proceedings which have as their object the validity of the decisions of the organs of companies within the meaning of that provision.

One assumes the flimsiest of arguments might have been that the board or a director would have had to approve the actions leading to the infringement—however, that was clearly rejected by the CJEU.

Article 24(2) was also applied by the High Court in *Sabbagh v Khoury*.[206] Sana Sabbagh, who lived in New York, claimed that the defendants had variously, since her father's stroke, conspired against both him and her to misappropriate his assets ('the asset misappropriation claim') and, since her father's death, to work together to deprive her of her entitlement to shares in CCG, the group of companies which her father ran ('the share deprivation claim'). Wael, the first defendant, was the anchor defendant for jurisdictional purposes. He resided and has at all material times resided in London. The other defendants lived or are based abroad. On the issue of Article 24(2), the defendants argued in essence that the claims fall outside the Brussels Regulation because the Regulation does not apply to the validity of CCG organs within the scope of Article 24(2) ('the Article 22 issue' in the judgment, because it was held under the Brussels I Regulation), and the natural and appropriate forum for determining them is Lebanon, where most parties were domiciled ('the forum issue'). This issue not only raised the question of whether the action would at all fall within the Article 24(2) remit; but also, whether in that case that Article needs to be applied reflexively,

[203] Case C-4/03 *Gesellschaft fur Antriebstechnik—GAT* [2006] ECR I-6509.

[204] Case C-144/10 *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts v JPMorgan Chase Bank NA, Frankfurt Branch* [2011] ECR I-3961, paras 37–39 and 45–46.

[205] Case C-302/13 *fly LAL-Lithuanian Airlines v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS* ECLI:EU:C:2014:2319.

[206] *Sana Hassib Sabbagh v Wael Said Khoury et al* [2014] EWHC 3233 (Comm).

given that the companies concerned are incorporated in Lebanon. Here inevitably reference was made to *Ferrexpo*, reviewed below. The High Court, however, held that no question of reflexive application arises. The challenge to the corporate decisions was not one of ultra vires or other 'corporate' validity, but rather one of their proper characterisation or correctness. They are not therefore substantially concerned with the Article 24(2) exceptions.

In *Ferrexpo*,[207] the English High Court applied Article 24(2) reflexively. Mr Babakov, a Russian, trading through a variety of companies with registered offices in England (collectively known as 'Gilson'), was engaged in a long-running litigation against Mr Zhevago, of Ukrainian nationality, who also traded through a variety of companies, with registered offices in Switzerland (collectively known as 'Ferrexpo'). At the core of the dispute was control over a Ukrainian mining company named OJSC.

In 2005, Babakov filed in Ukraine, with a view to having a number of shareholder resolutions declared void. These were taken in 2002 and had decided that Gilson's shares in OJSC were invalid and had to be transferred to Ferrexpo. In 2010 a Ukrainian court held that the shareholder resolutions were indeed invalid. Babakov subsequently initiated new proceedings in Ukraine, with a view to having the Gilson shares in OJSC restored. On 23 November 2011 the Ukrainian court ordered for Ferrexpo to be joined to this proceeding.

Ferrexpo started a procedure against Gilson in England on 22 November 2011, with a view to declaring that the Ferrexpo shares in OJSC were valid. Gilson argued that the English court had no jurisdiction, for a reflexive application of (now) Articles 24(2) and (now) 30 (part of the *lis alibi pendens* rule) of the Brussels I Regulation required it to desist. Ferrexpo argued that (1) the English courts had jurisdiction on the basis of (now) Article 4 of the Brussels I Regulation, and Gilson's domicile in the UK; and (2) it would not receive a fair trial in Ukraine, the issue would be resolved quickly in an English court, and the English courts enjoy 'trust and confidence'.

In *Owusu*, the CJEU famously held that where the (in that case also English) national court had jurisdiction by reason of Article 4 of the Jurisdiction Regulation, it could not decline such jurisdiction on the basis that a court of another State was a more appropriate forum: *forum non conveniens* has no place in the Brussels regime. However, what Owusu did not resolve was whether this also applies where the European court wishing to decline jurisdiction does so because the issue at stake is one of the interests listed in Article 24 of the Regulation (exclusive jurisdictional rules), which just so happens to be located outside of the EU (in the case at issue: shareholder resolutions of a Ukrainian company are the core of the dispute).

The High Court held that Article 24 should so apply: jurisdiction was denied. Reference to the CJEU in *Ferrexpo* would have been merited—although the English courts arguably are reluctant to do so, having burnt their fingers so badly in *Owusu*.

The precise scope of the corporate exception in the Rome Regulation at the time of writing was sub judice at the CJEU in *KA Finanz*.[208] I review that case in the chapter on the Rome I Regulation.

[207] *Ferrexpo AG* v *Gilson Investment Ltd and others* [2012] EWHC 721 (Comm).
[208] Case C-483/13 *KA Finanz AG Sparkassen Versicherung AG Vienna Insurance Group*.

### *2.2.6.6 The Validity of Entries into Public Registers*

> Article 24
>
> The following courts shall have exclusive jurisdiction, regardless of domicile: …
>
> 3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

This provision does not require lengthy commentary. It covers in particular entries in land registers, land charges registers and commercial registers.[209] Of note is that it only applies to proceedings which have as their object the validity of such entry: *not* to the legal consequences of same, the conditions for entry to the registers, action undertaken against a party unwilling to cooperate with the registration, etc.

### *2.2.6.7 Proceedings Concerned with the Registration or Validity of Patents, Trade Marks, Designs or other Similar Rights Required to be Deposited or Registered*

> Article 24
>
> The following courts shall have exclusive jurisdiction, regardless of domicile: …
>
> 4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.
>
> Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

As with all the other grounds for exclusive jurisdiction, the matters referred to in this sub para will be the subject of exclusive jurisdiction only if they constitute *the principal subject-matter* of the proceedings of which the court is to be seized (Jenard Report, referred to above). Simple actions for infringement do not fall within Article 24 but are covered by Article 7(2) of the Regulation. Per *GAT*, where in the course of such action of infringement, the validity of the patents, etc, is challenged (by way of defence), the court with the infringement claim must not entertain the question of validity,[210] however it is unclear whether the infringement proceedings have to be stayed until the court with exclusive jurisdiction has ruled, or perhaps even transferred to that court. In view of the exceptional nature of Article 24, one would assume that the most likely interpretation has to be the former—however special jurisdictional rules themselves are an exception to the general rule of the domicile of the defendant, hence there might not be a reason for it to trump Article 24 on that point. The proposed Commission amendment to this part of Article 24 merely specifically endorsed the *GAT* judgment, however did not address the uncertainty as to whether the procedure in such case needs to be stayed or rather completely transferred. Neither does the eventual Regulation.

[209] Jenard Report, 35.
[210] Case C-4/03 *Gesellschaft fur Antriebstechnik—GAT* [2006] ECR I-6509.

The reach of Article 24(4) is all the more apparent in interim proceedings for provisional measures, which routinely coincide with a procedure on the substance. This therefore raises the question of the relationship between Article 24(4) and provisional measures, including Article 35, which concerns provisional measures (and which will be looked at in detail below). In *Solvay*,[211] the referring court asked, in essence, whether the fact that a defence of invalidity of a patent has been raised in interim proceedings for a cross-border prohibition against infringement, in parallel to main proceedings for infringement, is sufficient, and, if so, under what formal or procedural conditions, for Article 24(4) to become applicable.

Cruz Villalon AG, after a brief 'tour d'horizon' of the various procedural realities that might exists, opined that Article 24(4) is not applicable when the validity of a patent is raised only in interim proceedings, only in so far as the decision likely to be adopted at the end of those proceedings does not have any final effect. Whether the latter is the case depends on the applicable (national) law.

The CJEU itself adopted a more or less similar approach: Article 24 and Article 35 are part of different Titles of the Regulation. Hence they are very different in nature and quite unconnected. However on the other hand, the application of one part of the Regulation may of course have an impact on the remainder, hence one cannot simply apply different parts of the Regulation in splendid isolation. The CJEU notes that according to the referring court, the court before which the interim proceedings have been brought does not make a final decision on the validity of the patent invoked but makes an assessment as to how the court having jurisdiction under Article 24(4) of the Regulation would rule in that regard, and will refuse to adopt the provisional measure sought if it considers that there is a reasonable, non-negligible possibility that the patent invoked would be declared invalid by the competent court. Hence there is no risk of conflicting decisions: the interim proceedings that have been brought will not in any way prejudice the decision to be taken on the substance by the court having jurisdiction under Article 24(4).

'… does not make a final decision': this effectively means that the Court simply states that as long as the main condition of Article 35 is met (measures covered by Article 35 need to be 'provisional' see further, below), Article 24(4) does not interfere with a court's jurisdiction under Article 35. The remaining crucial consideration after *Solvay*, which was hinted at the by the referring court but not quite captured by the CJEU, is the impact of Article 24(4) on interim measures based *not* on Article 35 of the Regulation, but rather on other Articles of the Regulation (see also below, in the review of Article 35).

It is noteworthy that the intellectual property enforcement Directive,[212] while providing for minimum harmonisation of a number of procedural standards, has no impact on either jurisdictional or indeed applicable law (the Rome I and II Regulations, see below). The Directive requires all Member States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy, and so creates a level playing field for right holders in the EU. All Member States will have a similar set of measures, procedures and remedies available for right holders to defend their intellectual property rights (be they copyright or related rights, trademarks, patents, designs, etc.) if they are infringed.

[211] Case C-616/10 *Solvay SA* v *Honeywell Fluorine Products Europe BV and Others* ECLI:EU:C:2012:445. See further in this volume for the Art 8 aspects of this judgment.

[212] Directive 2004/48, [2004] OJ L195/16. The Commission's report on the application of the Directive identified no issues with specific relevance for either jurisdiction or applicable law: COM(2010) 779.

Finally, Article 24(4) is impacted by the early revision of the Brussels I Recast. Regulation 542/2014[213] forms part of the rather complex set of arrangements to introduce the Unified Patents Court (UPC),[214] introduced by the mechanism of 'advanced cooperation' (meaning not all Member States are subject to it). Leaving aside the complex set of arrangements at the substantive law level, I just want to highlight here one or two interesting characteristics at the pure conflicts/jurisdiction level.

The Commission justified its proposed amendment as having has a twofold objective. Firstly, to ensure compliance between the UPC Agreement and the recast Brussels I Regulation. So far, so uncontested. These revisions concern in particular the clear inclusion of the UPC (as well as the Benelux Court) within the Regulation's definition of a 'court'; and the revision of the (rather complex) regime of Article 71 with respect to international agreements and their relationship with the Brussels I Regulation.

The second objective, however, was in my view misleadingly represented by the Commission as necessarily forming part of the UPC package: the issue of jurisdiction vis-à-vis defendants not domiciled in the EU. The newly inserted Article 71b essentially and as a rule lets the 'common courts' (ie the UPC and the Benelux Court) usurp national jurisdiction (for those States that have subscribed to the common court—remember this is an instrument of enhanced cooperation): the proposal on this issue read:

> 1. The common court shall have jurisdiction where, under this Regulation, the courts of a Member State party to an agreement establishing a common court have jurisdiction in a matter governed by that agreement.

The proposal then prima facie at least suggested that all jurisdictional rules of the Regulation apply regardless of third State domicile:

> 2. Where the defendant is not domiciled in a Member State, and this Regulation does not otherwise confer jurisdiction over him, the provisions of Chapter II shall apply as if the defendant was domiciled in a Member State. Article 35 shall apply even if the courts of non-Member States have jurisdiction as to the substance of the matter.

Chapter II includes all jurisdictional rules, including the basic rule of domicile of the defendant (the new Article 4, previously Article 2).

This prima facie conclusion was supported by the (proposed) newly inserted sentence in recital 14:

> Uniform jurisdiction rules should also apply regardless of the defendant's domicile in cases where courts common to several Member States exercise jurisdiction in matters coming within the scope of application of this Regulation.

The Commission version of the newly proposed Article 71b(3), however, would then seem to contradict this by stating:

> 3. Where the defendant is not domiciled in a Member State and no court of a Member State has jurisdiction under this Regulation, the defendant may be sued in the common court if:
>
> (a) property belonging to the defendant is located in a Member State party to the agreement establishing the common court;

[213] [2014] OJ L163/1.
[214] Regulation 1257/2012, [2012] OJ L361/1.

(b) the value of the property is not insignificant compared to the value of the claim;
(c) the dispute has a sufficient connection with any Member State party to the agreement establishing the common court.

That got me very confused: if, per Article 71b(2), jurisdiction shall be determined '*as if the defendant was domiciled in a Member State*', how then can there still be a need for Article 71b(3)? Is it because the proposal aims to introduce a reflexive application (meaning one which also works where the exclusive jurisdictional ground points away from the EU) of Article 22(4) (Article 24(4) in the new Regulation)—ie the exclusive jurisdictional ground for registration or validity of intellectual property rights?

Interestingly, Article 71b(3) (proposed) reinstated, for the common courts and whence for patent disputes only, the 'assets' rule vis-à-vis third State defendants which the European Commission had failed to introduce as a general rule in the recast Regulation (see above, in the relevant section).

It is also noteworthy that the proposal acknowledges that courts in third States may have jurisdiction, and that in that case EU (common) courts may still issue provisional measures.

The subsequent Council General approach[215] to the amendment clarified one or two things. In particular, it provided more detail of the criteria that will feed into the application of the assets rule. It also further explained the need for extra jurisdictional rules (the fact that Common Courts do not have residual, national jurisdictional rules to fall back on where the Regulation in ordinary does not apply). However, it maintained the awkward provision that Chapter II will apply regardless of the defendant's domicile, adding 'as appropriate' (not specifying that appropriateness only exists in application of the assets rule, for instance) and deleting the provision 'as if the defendant was [*sic*] domiciled in a Member State'. It does not clarify whether Article 24(4) applies reflexively.

In my view it would have been better to make the link to residual jurisdiction (Article 4) much clearer, to drop the reference to pretend domicile of the defendant, and to focus solely on the assets rule. Subsequent agreement with the European Parliament[216] essentially confirmed the Council approach. The eventual provision includes an asset rule which prima facie only applies for damage taking place outside the EU resulting from infringement by non-doms. How and whether the assets rule applies vis-à-vis damage inside the EU caused by non-doms is still not clear to me, neither is whether the EU institutions properly reflected on the comity implications of the new rule, in relations with third States.

### *2.2.6.8 Proceedings Concerned with the Enforcement of Judgments*

> Article 24
>
> The following courts shall have exclusive jurisdiction, regardless of domicile: (…)
>
> 5. In proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

The key word for this exclusive jurisdictional ground is 'enforcement'. 'Proceedings concerned with the enforcement of judgments' means 'those proceedings which can arise from recourse to force, constraint or distraint on movable or immovable property in order to ensure the

[215] 29 November 2013, available at http://goo.gl/CXQEmC, accessed 3 September 2015.
[216] 30 January 2014, available at http://goo.gl/HhbCf7, accessed 3 September 2015.

effective implementation of judgments and authentic instruments'.[217] Difficulties arising out of such proceedings come within the exclusive jurisdiction of the courts for the place of enforcement, as was already the case in a number of bilateral Treaties concluded between a number of the original States, and also in the internal private international law of those States.

The Jenard Report does not quote a specific reason for the reasoning behind this exclusivity, however one assumes that such proceedings are so intimately linked to the use of judicial authority and indeed force, that any complications in their enforcement ought to be looked at exclusively by the courts of the very State whose judicial authorities are asked to carry out the enforcement. In the words of the Court of Justice (*Reichert*):

> the essential purpose of the exclusive jurisdiction of the courts of the place in which the judgment has been or is to be enforced is that it is only for the courts of the Member State on whose territory enforcement is sought to apply the rules concerning the action on that territory of the authorities responsible for enforcement.[218]

There must have been a 'judgment': proactive steps taken to facilitate an eventual judgment, which are in other words preparatory to the enforcement of a decision, eg freezing injunctions, are outside the scope of the Article (*Reichert*).[219] The strict interpretation also means that the Article 24(5) ground for jurisdiction must not thwart jurisdiction of other courts who would have jurisdiction had the case not been brought as part of an enforcement difficulty. For instance, the court which has jurisdiction on the basis of Article 24(5) cannot hear the defence against enforcement which is based on a request for compensation with a different mutual debt (*AS-Autoteile Service*).[220]

A rare discussion of Article 24(5) may be found in *Dal Al Arkan* at the Court of Appeal for England and Wales.[221] The Court of Appeal suggested that the High Court's reading of Article 24(5) of the Brussels I Regulation in *Choudhary*[222] was *per incuriam* (meaning, in short, without reference to relevant statutory law and case-law and hence not subject to the rule of precedent).

Neither the Convention, the Regulation nor the Jenard Report clarify specifically for Article 22(5) (old) whether the Article applies against non-EU-domiciled defendants. In *Choudhary*, the Court of Appeal had held that it does not. However it had refrained from citing any relevant statutory or (CJEU) case-law authority. In *Dar Al Arkan*, the Court of Appeal suggested that this renders judgment in *Choudhary per incuriam* in terms of CJEU and scholarly authority. This is in my view the right approach: the raison d'etre for Article 24(5) is a specific and narrowly construed one, as it is for all other parts of Article 24. *Reichert*, above, and the Jenard Report convincingly argue that in cases such as these, there ought to be *Gleichlauf* (concurrence) between court and applicable law.

Outside the narrow confines of *Reichert* and *Autoteile Service* in particular, there is no reason not to extend the jurisdictional rule to defendants domiciled outside of the EU. Their non-dom status is immaterial to the proceedings. (Note that the issue of the 'reflexive' nature of Article 24(5) is not resolved by this judgment; nor by the Brussels I recast, which

[217] Jenard Report, 36, with reference to Braas, *Précis de procedure civile*.
[218] Case C-261/90 *Reichert v Dresdner Bank* [1992] ECR 2149, para 26.
[219] Ibid, re *actio pauliana*.
[220] Case 220/84 *AS-Autoteile Service* [1985] ECR 2267.
[221] *Dal Al Arkan* [2014] EWCA Civ 715.
[222] *Chaitan Choudhary v Damodar Prasat Bhatter et al* [2009] EWCA Civ 1176.

does clarify (recital 14) that indeed non-EU domicile of the defendants is not relevant for the application of Article 24 of the new Brussels I Regulation.)

#### *2.2.6.9 Reflexive Application of the Exclusive Jurisdictional Rules?*

A reflexive or 'mirror' effect of the Regulation would imply that, should one of the jurisdictional grounds of the Regulation refer to a State outside of the EU, the court in the EU with which the case is pending can or indeed has to relinquish its jurisdiction in favour of the foreign court. Reflexive application of the Regulation has been pondered in the context of choice of court (see discussion in the relevant section) and for the application of the exclusive jurisdictional rules. Whether the courts are allowed to, or indeed even may be required to, relinquish jurisdiction in favour of non-EU (Lugano) States was pondered in the run-up to and the aftermath of *Owusu*, reviewed below; however, it was not entertained by the CJEU in its eventual judgment. As I note in the relevant section, Article 33's new *lis alibi pendens rule*, accompanied by a recital, suggests that reflexive application for exclusive jurisdictional rules is possible—but not compulsory.

### 2.2.7 Jurisdiction by Appearance/Prorogation: Article 26

> 1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.
>
> 2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.

Jurisdiction by appearance or 'submission', also referred to as 'voluntary appearance' or 'prorogation', was thought of in particular vis-à-vis the 'exorbitant' jurisdictional claims of some of the Member States:[223] these cannot in principle be invoked against those with domicile in another Member State, however they can voluntarily be submitted to. Article 26 generally assists legal certainty by acting as an implicit choice of forum clause. Indeed submission trumps any prior explicit choice of forum between the parties: plaintiff evidently has given its consent by initiating the procedure in the court concerned; the defendant consents by its appearance.[224] Submission however is not possible for cases included in Article 24, although it is possible for the cases included in the sections dealing with the protected categories.[225]

[223] Jenard Report, 38—France's rules were singled out.

[224] Case C-150/80 *Elefanten Schuh* [1981] ECR 1671, para 11.

[225] Case C-111/09 *Vienna Insurance Group* [2010] ECR I-4545, para 30: '[A]lthough in the fields concerned by Sections 3 to 5 of Chapter II of that regulation the aim of the rules on jurisdiction is to offer the weaker party stronger protection (see, in that regard, Case C-463/06 *FBTO Schadeverzekeringen* [2007] ECR I-11321, para 28), the jurisdiction determined by those sections cannot be imposed on that party. If that party deliberately decides to enter an appearance, Regulation No 44/2001 leaves him the option to defend himself as to substance before a court other than those determined on the basis of those sections.'

Whether the defendant must be domiciled in the EU, is the object of some discussion. Most of the arguments pro and contra use *a contrario* reasoning, for instance by contrasting with Article 25 (which did use to refer to either or the parties having to have domicile in the EU), or refer simply to the Jenard Report.[226] However it would seem that the discussion now ought to be fairly settled, given that Article 6 of the Regulation (and Article 4 in the former Regulation before it) explicitly provides that if the defendant is not domiciled in the EU and neither Article 24 nor 25 apply, national private international law of the Member States determines jurisdiction. Member State law of course typically allows for submission too, but the Regulation does not force Member States to do so.

There is no submission if the defendant merely appears to contest jurisdiction. Quite a few of the language versions of the 1968 Convention (eg in English, the Convention read '*solely to contest the jurisdiction*'—emphasis added) seemed to suggest that the protective force of the second sentence of Article 26 was lost from the moment the defendant argued on the merits of the case. In *Elefanten Schuh*, however, the Court held that given that civil procedure in quite a few of the Member States requires that a party proceed with a defence on the merits lest it lose the possibility to raise this defence at all, the objectives of the Convention/Regulation (legal certainty, and rights of the defence)[227] would be jeopardised were no defence on the merits at all possible so as not to lose the protection of the second sentence. The Court consequently set aside the majority of language versions and held that defence on the merits does not amount to submission, provided the rejection of jurisdiction is not entered after the very first defence on the merits.[228] This is now reflected in all language versions of the Regulation.[229]

In *Goldbet*,[230] the Court of Justice emphasised the stand-alone nature of Regulation 1896/2006, the European order for payment procedure.[231] The Regulation provides for a simplified procedure to ensure rapid enforcement of non-contested pecuniary claims. The Regulation, however, leaves the underlying jurisdictional rules untouched. The procedure takes place in camera up until the debtor has been notified of an order being made against him. From that moment on, of course, the debtor may contest, and the Jurisdiction Regulation takes over. The standard procedure is to contest in shorthand format, following a prescribed form. However, in the case at issue, the debtor had replied by issuing a lengthy contestation as to the substance of the claim, without *expressis verbis* contesting the jurisdiction of the court. The question that subsequently arose was whether this submission, seeing as it did not contest jurisdiction, could count as voluntary appearance under

[226] Jenard Report, 38: 'Article 18 governs jurisdiction implied from submission. *If a defendant domiciled in a Contracting State* is sued in a court of another Contracting State which does not have jurisdiction under the Convention' (emphasis added). The Report, however, mentions this in passing only—relying to such degree on every single reference in the Jenard Report in the face of the text of the Convention/Regulation itself would not necessarily seem warranted. See also above re the in my view problematic impact of the preparatory reports generally.

[227] Case C-150/80 *Elefanten Schuh* [1981] ECR 1671, para 14.

[228] Idem: Case 27/81 *Rohr* [1981] ECR 2431.

[229] See also the Commission proposal which led to the Regulation, COM(1999) 348, 19: '[A] defendant who enters an appearance may contest the jurisdiction of the court seised no later than the time at which he is considered by national law as presenting his defence on the merits. In other words, the fact of presenting a defence on the merits may render the argument contesting the jurisdiction nugatory only if that argument is presented no later than the defence on the merits.'

[230] Case C-144/12 *Goldbet Sportwetten GmbH v Massimo Sperindeo* ECLI:EU:C:2013:393.

[231] [2006] OJ L399/1.

Article 26 of the Jurisdiction Regulation. That Article prescribes that one has to contest jurisdiction in *limine litis*, for otherwise the opportunity to do so is lost. In other words, the argument revolved around the contestation, in substance, of the order for payment: was that the '*limine*' (the very start of the proceedings) in the application of Article 26?

No, said the CJEU: that would imply that the order for payment procedure and the procedure held in application of the Jurisdiction Regulation are one and the same, flawless procedure. Which the provisions of the former dictate they most certainly are not: according to Article 6(1) of Regulation 1896/2006, jurisdiction is determined under the rules of in particular Regulation 44/2001, now the Recast.[232]

The second paragraph of Article 26 was added in the recast Regulation.

## 2.2.8 Insurance, Consumer and Employment Contracts: Articles 10–23

### *2.2.8.1 Protected Categories—Generally*

It is a feature of both the jurisdiction Regulation and the Regulations concerning applicable law (in particular Rome I and Rome II, see below), to have protective measures to the benefit of what are seen as weaker parties. These weaker categories are perceived as needing protection against abuse which would result from standard clauses in contracts forced upon them by the contracting party with the upper hand. The original Brussels Convention's angle to the protected categories was practical rather than in itself subscribing to the view that such regime was needed. With a number of original Member States having such protective clauses, the drafters of the Convention predicted complications at the recognition and enforcement stage:

> Failure to take account of the problem raised by these rules of jurisdiction might not only have caused recognition and enforcement to be refused in certain cases on grounds of public policy, which would be contrary to the principle of free movement of judgments, but also result, indirectly, in general re-examination of the jurisdiction of the court of the State of origin.[233]

In harmonising the jurisdiction stage for categories such as these described below, the Convention highlighted the immediate link between the first and the final step of private international law. One could have continued to allow Member States to refuse recognition on the basis of public policy, including consumer protection, etc. However this would have simply postponed the uncertainty to the third stage. It was considered much preferable, with a view to legal certainty, to seek harmonisation at the very first stage.[234] A similar approach of course was adopted vis-à-vis the exclusive jurisdictional grounds of Article 24.

For the protected categories, the Convention and subsequently Regulation chose a middle way in terms of party autonomy. For insurance and consumer contracts[235] it did not opt for a single jurisdiction (in contrast with the matters of exclusive jurisdiction falling

[232] Counsel in this case therefore was close to having being penalised for having been too active early on in a legal procedure.

[233] Jenard Report, 28.

[234] Ibid, 29.

[235] Employment contracts were only included in the Regulation—neither the original Brussels Convention nor the later amendments included them.

under Article 24). 'A choice, albeit a limited one, exists between the courts of the different States where *the plaintiff* is a protected person' (emphasis added).[236] The specificity for the protected categories indeed lies in their position as a plaintiff. They can insist that they be sued in their place of domicile, however that is not out of the ordinary: that is the general rule of Article 4. Rather, they are protected in that they can insist to sue themselves in their Member State of domicile—the *forum actoris*—if they are consumer or insured (insureds in fact have an even bigger choice), or (as added in the Regulation) their place of employment in the case of contracts for employment. As reported in the Jenard Report, the drafters of the Brussels Convention opted not to impose these fora too restrictively, rather, to insert conditional options for choice.

It is noteworthy that the condition of inequality is assumed. Actual inequality need not be proven.[237]

The provisions for the protected categories are reinforced by Article 45 of the Regulation: courts in the other Member States are bound not to recognise judgments held in breach of provisions on the protected categories. Oddly, the previous version of the Regulation (Article 35) did not extend this to the then newly inserted category of employment contracts—an error now corrected.

Below I review the two sections which lead to most disputes in practice: consumer contracts, and contracts for employment. Where the text of the Regulation speaks for itself, we let it do exactly that.

The Regulation's sections on the protected categories are self-sufficient. If the conditions for application of any of the sections are met, no reference outside them has to be made: see the use of the words 'jurisdiction shall be determined by this section'.

### *2.2.8.2 Consumer Contracts*

Section 4 Jurisdiction over Consumer Contracts

Article 17

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7,[238] if:

(a) it is a contract for the sale of goods on instalment credit terms; or
(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in

[236] Jenard Report, 29.
[237] Although in the specific case of insurance of large risks, the Regulation expands the possibilities of choice of forum: the insured can be assumed to act in a professional capacity for risks of this nature.
[238] *Sic*. This is a typo in the original text and needs to read 'point 7 of Article 5' instead.

disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 18

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 19

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen;

2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

A first and crucial thing to note is that the consumer title, like the title on employees (but *not* the title on insurance contracts) applies regardless of the domicile of the defendant, where that defendant is the company. That is clear with the insertion of 'regardless of the domicile of the other party' in Article 18, and of 'an employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1', in Article 21. It is also reiterated by recital 14 of the Regulation, which reads:

A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.

However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

Article 17 lists the conditions for this section to apply. These are quite different from the Brussels convention, which read in relevant part (Article 13):

In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called the `consumer', jurisdiction shall be determined by this Section, without prejudice to the provisions of Articles 4 and 5(5), if it is:

1. a contract for the sale of goods on instalment credit terms, or
2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods, or

3. any other contract for the supply of goods or a contract for the supply of services and
   (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and
   (b) the consumer took in that State the steps necessary for the conclusion of the contract. Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This Section shall not apply to contracts of transport.

#### 2.2.8.2.1 Contract

First of all, there has to be a 'contract'. It has been difficult for the CJEU to define 'contract' within the meaning of Article 17 without wading into national territory on what a 'contract' implies. Purely unilateral commitments do not suffice however this is not always easy to discern.[239] The Court's view on 'contract' within the meaning of Article 17 is stricter than its view on 'contract' in the broader jurisdictional rule for contracts in Article 7(1)(a) (discussed below): ie a relationship will be more easily accepted as 'contractual' under Article 7 than it is under Article 17. In *Gabriel*,[240] and *Engler*[241] the Court held that the consumer contracts heading is applicable only in so far as, first, the claimant is a private final consumer not engaged in trade or professional activities (see below), second, the legal proceedings relate to a contract between that consumer and the professional vendor for the sale of goods or services which has given rise to reciprocal and interdependent obligations between the two parties[242] and, third, following the addition of this condition in Regulation 44/2001, that the condition with respect to 'directing activities' is fulfilled (see also below).

There are Member States which accept there being a contract even without there being 'reciprocal and interdependent obligations between the two parties'.

#### 2.2.8.2.2 Consumer Contract

Further, the contract has to be a 'consumer' contract. *Gruber* is the standard reference.[243] Johann Gruber, an Austrian farmer, had purchased tiles from a store in Germany. The tiles were destined to be used partly for private and partly for business purposes. To assess the

[239] See Case C-180/06 *Ilsinger* [2009] ECR I-3961. There was indeed some discussion as to whether the finding on this point in *Engler* (Case C-27/02 *Engler* [2005] ECR I-481) had to be revised given the changing in wording in the consumer title, between the Brussels Convention and the Regulation. In particular, the condition that the consumer took in that State the steps necessary for the conclusion of the contract no longer exists in the Regulation. The CJEU nevertheless held that in particular because of the reference to 'matters related to a contract concluded by' in Art 17(1), the Regulation, too, requires an element of mutual obligations.

[240] Case C-96/00 *Gabriel* [2002] ECR I-6367.

[241] Case C-27/02 *Engler* [2005] ECR I-481, para 29.

[242] The Court did, however, hold that there was a contract within the meaning of Art 7(1).

[243] Case C-464/01 *Gruber* [2005] ECR I-439.

conditions newly introduced by regulation 44/2001, one had best review the conditions which applied previously: Article 13 of the Brussels Convention was worded as follows:

> In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called "the consumer", jurisdiction shall be determined by this Section … if it is:
>
> 1. a contract for the sale of goods on instalment credit terms; or
> 2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
> 3. any other contract for the supply of goods or a contract for the supply of services, and
>    (a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and
>    (b) the consumer took in that State the steps necessary for the conclusion of the contract …

In *Gruber* the CJEU first of all revisited its findings in *Benincasa*, where it stated that the concept of 'consumer' for the purposes of the first paragraph of Article 13 and the first paragraph of Article 14 of the Brussels Convention must be strictly construed, reference being made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract and not to the subjective situation of the person concerned, since the same person may be regarded as a consumer in relation to certain supplies and as an economic operator in relation to others. The Court held in *Benincasa* that only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by the Convention to protect the consumer as the party deemed to be the weaker party. Such protection is unwarranted in the case of contracts for the purpose of a trade or professional activity.[244]

Given that the rule for the protected categories is an exception to the standard rule, the burden of proof has to lie with the person invoking the exception. In the case of purchase for dual use, such as in *Gruber*, it is for the person invoking the protection, to show that the business use of the purchase is only negligible. For that purpose, the national court should take into consideration not only the content, nature and purpose of the contract, but also the objective circumstances in which it was concluded.[245]

The 'objective evidence' of the case ought normally to suffice, without having to review whether the seller could have been aware of the business purpose. Should the objective evidence not suffice, then the awareness of the buyer may play a role, albeit with a presumption in favour of the buyer: for even if jurisdiction for the protected categories is an exception, nevertheless consumers ought not to be casually deprived of the protection of the relevant title of the Regulation. Here the CJEU instructs the national courts to determine whether the other party to the contract could reasonably have been unaware of the private purpose of the supply because the supposed consumer had in fact, by his own conduct with respect to the other party, given the latter the impression that he was acting for business purposes. That would be the case, for example, where an individual orders, without giving further

[244] Case C-269/95 *Benincasa* [1997] ECR I-3767, paras 16–18 and as summarised by the Court in *Gruber*, para 36.

[245] *Gruber*, paras 46–47.

information, items which could in fact be used for his business, or uses business stationery to do so, or has goods delivered to his business address, or mentions the possibility of recovering value added tax.[246]

#### 2.2.8.2.3 Type of Contract—and Application of 'Direction of Activities' in an Internet Context

Article 17 next lists the categories of contracts which are covered by the exception. It includes two specific contracts and one generic. However the generic category only applies if the consumer has in some way been actively recruited across border. The precise wording of the relevant provision was adapted with a view to specifying its application in an e-commerce context.[247] In comparison with the provision in the Brussels Convention, what was then Article 15 of Regulation 44/2001 introduced three major changes:

— 'any other contract for the supply of goods or a contract for the supply of services' had been replaced with 'in all other cases';
— the specific indication of exactly what type of activity of the seller had to precede the contract (a specific invitation, or advertising), was replaced with two alternatives: either 'activities pursued in' the Member State of the consumer's domicile; or 'directed towards' that State; and
— finally the deletion of the condition that the consumer must have taken necessary steps for the conclusion of his contract in his home State.

In its proposal for what became Regulation 44/2001, the European Commission listed the application of the consumer contracts title to e-commerce as one of just four 'chief innovations' of the jurisdictional rules of the Regulation as compared to the Convention: 'the material scope of the provisions governing consumer contracts has been extended so as to offer consumers better protection, notably in the context of electronic commerce'.[248] Specifically within the context of what became Article 15, the proposal states:

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The criteria given in Article 13(3) of the Brussels Convention have been reframed to take account of developments in marketing techniques. For one thing, the fact that the condition in old Article 13 that the consumer must have taken the necessary steps in his State has been removed means that Article 15, first paragraph, point (3), applies to contracts concluded in a State other than the consumer's domicile. This removes a proved deficiency in the text of old Article 13, namely that the consumer could not rely on this protective jurisdiction when he had been induced, at the co contractor's instigation, to leave his home State to conclude the contract. For another, the consumer can avail himself of the jurisdiction provided for by Article 16 where the contract is concluded with a person pursuing commercial or professional activities in the State of the consumer's domicile directing such activities towards that State, provided the contract in question falls within the scope of such activities.

The concept of activities pursued in or directed towards a Member State is designed to make clear that point (3) applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction. The contract is thereby

[246] Ibid, paras 48 ff.

[247] For an overview outside the context of the Jurisdiction Regulation too, see Z Tang, 'Exclusive Choice of Forum Clauses and Consumer Contracts in E-Commerce' (2005) 1 *Journal of Private International Law* 237–68.

[248] COM(1999) 348, 7.

treated in the same way as a contract concluded by telephone, fax and the like, and activates the grounds of jurisdiction provided for by Article 16.

The removal of the condition in old Article 13(3)(b) that the consumer must have taken necessary steps for the conclusion of the contract in his home State shall also be seen in the context of contracts concluded via an interactive website. For such contracts the place where the consumer takes these steps may be difficult or impossible to determine, and they may in any event be irrelevant to creating a link between the contract and the consumer's State. The philosophy of new Article 15 is that the co contractor creates the necessary link when directing his activities towards the consumer's State.

…

The Commission has noted that the wording of Article 15 has given rise to certain anxieties among part of the industry looking to develop electronic commerce. These concerns relate primarily to the fact that companies engaging in electronic commerce will have to contend with potential litigation in every Member State, or will have to specify that their products or services are not intended for consumers domiciled in certain Member States. One such concern relates to the perceived problems with the notion of "directing his activities" in Article 15, first paragraph, point (3), which is considered difficult to comprehend in the Internet world.

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The Commission proposal and indeed the eventual Regulation hence acknowledge the difficulties in applying the consumer protection provisions in an internet context. The text of the Regulation does not actually offer any definitive guidance as to how it ought to be applied.[249] The most specific statutory angle under which to attach internet jurisdiction became 'the direction of activities towards the Member State of the consumer.' Precisely how 'interactivity' is to be determined in the internet context, was not specified by the proposal. Consequently this proviso led to speculative analysis as to the level of website interaction which triggers (now) Article 17.[250] The Article itself, as noted, employs 'directed to' and 'by any means'. In a joint 'Statement on Articles 15 and 73',[251] Council and Commission specifically mentioned that the language or currency which a website uses do not constitute a relevant factor. Likewise, as already noted, the fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction. Hence the question remains what does trigger the application of Article 17 in an internet context.

In my view, the changes to the consumer title in what was Article 15 are neither here nor there. They were announced as having been introduced with specific consideration for the internet however they seemed to provide little in the way of real guidance which would address the very uncertainty for E-tailers which they professed to address.

In the Joined Cases *Pammer* and *Alpenhof*,[252] the Court of Justice handed national courts a number of criteria to help them apply the Article in an internet context.

[249] The Commission itself nearly acknowledged as much by announcing in its explanatory memorandum that notwithstanding the application of the express provisions for the internet context, it would hold a hearing on the topic.

[250] L Gillies, 'Addressing the "Cyberspace Fallacy": Targeting the Jurisdiction of an Electronic Consumer Contract' (2008) 16 *International Journal of Law & Information Technology* 242, 253.

[251] [2001] OJ L12/1.

[252] Joined Cases C-585/08 and C-144/09, *Peter Pammer* v *Reederei Karl Schlüter GmbH & Co KG* (C-585/08) and *Hotel Alpenhof GesmbH* v *Oliver Heller* (C-144/09) [2010] ECR I-12527.

In *Pammer*, Mr Pammer, whose domicile was in Austria, booked a crossing by freight liner, with Reederei Karl Schlüter, a company established in Germany, however through an intermediary company, whose seat was also in Germany and which operated in particular via the internet. The intermediary company had promised all kinds of facilities on board the ship which Mr Pammer found were not actually on board—whence he refused to board the ship and sought compensation. Reederei Karl Schlüter contended that it did not pursue any professional or commercial activity in Austria and raised the plea that the Austrian court lacked jurisdiction.

In *Alpenhof*, after finding out about the hotel from its website, Mr Heller reserved a number of rooms for a period of a week. His reservation and the confirmation thereof were effected by email, the hotel's website referring to an address for that purpose. Mr Heller then found fault with the hotel's services and left without paying his bill despite Hotel Alpenhof's offer of a reduction. Hotel Alpenhof then brought an action before an Austrian court. Mr Heller raised the plea that the court before which the action had been brought lacked jurisdiction. He submitted that, as a consumer, he could be sued only in the courts of the Member State of his domicile, namely the German courts, pursuant to what was then Article 15(1)(c) of Regulation 44/2001.

The Court first of all remarked that the conditions for application which consumer contracts must fulfil are now worded more generally than they were in the Brussels Convention, in order to ensure better protection for consumers with regard to new means of communication and the development of electronic commerce (para 59). In particular the use of the words 'by any means' indicated, in the view of the Court, a wider range of activities (para 61). However as the Court acknowledged, the wording of the Regulation does not make it clear whether the words 'directs such activities to' refer to the trader's intention to turn towards one or more other Member States or whether they relate simply to an activity turned de facto towards them, irrespective of such an intention (para 63). The mere existence of a website is not enough proof of a direction of one's activity towards a particular State. By their nature, websites, once created, are accessible worldwide and a company need not, as it would have had to do for more traditional forms of advertising, incur extra costs simply for the consumers in other States to be able to access the website (para 66 ff). For the Court, the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile (para 75).

> It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers. (para 76).

> Whether it was minded to conclude a contract with those customers', or, put in different words, what is required are 'clear expressions of the intention to solicit the custom of that State's consumers. (para 80)

The Court subsequently listed a number of criteria which indicates such state of mind (para 81 ff): mention that it is offering its services or its goods in one or more Member States designated by name; the disbursement of expenditure on an internet referencing service to the operator of a search engine in order to facilitate access to the trader's site by

consumers domiciled in various Member States; the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.

With respect to the language or currency used, the Court stated:

> the joint declaration of the Council and the Commission … states that they do not constitute relevant factors for the purpose of determining whether an activity is directed to one or more other Member States. That is indeed true where they correspond to the languages generally used in the Member State from which the trader pursues its activity and to the currency of that Member State. If, on the other hand, the website permits consumers to use a different language or a different currency, the language and/or currency can be taken into consideration and constitute evidence from which it may be concluded that the trader's activity is directed to other Member States. (para 84)

The criteria which the Court therefore withheld in summary, are:

> the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.
>
> On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established. (paras 93–94)

Judgment in *Pammer* and *Alpenhof* handed the national courts what must be a near-complete set of indications which ought to enable them to judge intention to solicit custom from customers in other Member States.

It is noteworthy that the consumer must not show a causal link between the means employed to direct the commercial activity to the Member State of the consumer's domicile, namely the internet site, and the conclusion of the contract with the consumer (*Emrek*).[253]

[253] Case C-218/12 *Lokman Emrek v Vlado Sabranovic* ECLI:EU:C:2013:666. Mr Sabranovic sold second-hand motor vehicles in Spicheren, a town close to the German border. He had an internet site on which French telephone numbers and a German mobile telephone number were mentioned, together with the respective international codes. Mr Emrek, who resided in Saarbrücken (Germany) and who learned through acquaintances (not via the internet) of Mr Sabronovic's business went there and purchased a second-hand motor vehicle. Subsequently, Mr Emrek made claims against Mr Sabronovic under the warranty before the Amtsgericht (District Court) Saarbrücken. Mr Emrek took the view that, under Regulation 44/2001, that court had jurisdiction to hear such an action. It was clear from the set-up of Mr Sabranovic's website that his commercial activity was also directed to

The Court held that requiring such a causal link would raise questions of burden of proof. Difficulties related to proof of the existence of a causal link would tend to dissuade consumers from bringing actions before the courts of their domicile and would therefore weaken the protection of consumers pursued by the Regulation. However, if and when that causal link is in fact established, it would constitute strong evidence which may be taken into consideration by the national court to determine whether the activity of the professional trader is 'directed at' the Member State of the consumer's domicile. The Court's judgment could have certainly swayed differently. There are—among other textual—reasons for arguing pro requiring a causal link between the activities directed at the consumer's place of domicile, and the eventual contract. The CJEU pushes out the consumer protection boat yet a little further.

The *Alpenhof* judgment triggered speculation as to whether Article 17(1)(c) requires a contract between consumer and trader, concluded at a distance. In *Pammer/Alpenhof*, Alpenhof had argued inter alia that that its contract with the consumer was concluded on the spot and not at a distance, as the room keys were handed over and payment was made on the spot, and that accordingly Article 17(1)(c) cannot apply. The Court of Justice had answered this with the very paragraph which then tempted the Oberster Gerichtshof—Austria into the preliminary review in *Mühlleitner*:[254]

> In that regard, the fact that the keys are handed over to the consumer and that payment is made by him in the Member State in which the trader is established does not prevent that provision from applying if the reservation was made and confirmed at a distance, so that the consumer became contractually bound at a distance. (para 87)

This paragraph seemed to suggest 'at a distance' as the trigger for the application of Article 17(1)(c) which in turn led to the preliminary question:

> Does the application of Article 15(1)(c) [] presuppose that the contract between the consumer and the undertaking has been concluded at a distance?

Villalon AG replied making specific reference to the history of (now) Article 17, in particular with reference to the old text, under the Brussels Convention. That old provision seemed to imply that where the consumer's contracting party had encouraged him to leave his Member State of domicile so as to conclude the contract elsewhere, the consumer could not make recourse to the protective regime. Other changes to the relevant title, too, suggested if anything that Council and Commission's intention with the new provisions was definitely not to limit their scope of application: had they intended to do so, the AG suggested, the Institutions would have limited Article 17's scope to contracts concluded at a distance. Court of Justice case-law hints at the same need for a wide approach (in particular, *Ilsinger*,[255] where the Court of Justice held that the scope of Article 17(1)(c) appears 'to be no longer being limited to those situations in which the parties have assumed reciprocal obligations'.)

Germany. However, it was also clear that the contract that had been concluded was not the result of that direction: Mr Emrek had heard from the business by word of mouth, not the internet. Must there be a causal link between the means employed to direct the commercial activity to the Member State of the consumer's domicile, namely the internet site, and the conclusion of the contract with the consumer?

[254] Case C-190/11 *Daniela Mühlleitner v Ahmad Yusufi and Wadat Yusufi* ECLI:EU:C:2012:542.

[255] Case C-180/06 *Renate Ilsinger v Martin Dreschers* [2009] ECR I-3961.

The AG concluded with the suggestion that the reference to 'distance' in paragraph 87 of *Alpenhof* refers to a factual circumstance, rather than a condition for application. The Court of Justice agreed.[256] It stuck to both a literal (no mention of distance contracts in the relevant provision), teleological (protection of consumers) and historical (purpose of the change in the Regulation as compared with the previous text in the Convention) interpretation. The relevant Article now only requires that the trader pursue commercial or professional activities in the Member State of the consumer's ('consumer' is separately defined) domicile or, by any means, directs such activities to that Member State or to several States including that Member State and, secondly, that the contract at issue falls within the scope of such activities.

To many, the conclusion may have seemed obvious, and the issue covered by *acte clair* (meaning the national court could have referred to the arguably obvious meaning of the provision, not to have to refer to the Court of Justice). In particular, the CJEU has repeatedly emphasised the relevance of the consumer title in the Jurisdiction Regulation. On the other hand, however, the same Court has been quite anxious to give national courts detailed and specific instructions on the application of tiny details in the Regulation, making application of the *acte clair* doctrine quite difficult: many things one thought were clear, have been answered by the Court in unexpected ways.

National courts therefore are caught between the proverbial rock and the hard stone. Either they refer profusely, thereby feeding the cycle of micromanagement. Or they make extended use of acte clair, thereby risking unequal application of the Regulation (and potentially European Commission irk). On the issue of Article 17(1)(c) at least, the former would seem to have prevailed: in *Slot*, Case C-98/12 the German Bundesgerichtshof asked essentially the same question—which it later retracted, leading to the case being struck off the register.

#### 2.2.8.2.4 Application to E-tailers, In and Out of the EU

For E-tailers, the application of Article 17 ff has important consequences.

As plaintiffs they can principally only sue in the domicile of the defendant-consumer. If they are being sued, they can find themselves hauled in front of the courts of the consumer's domicile (the consumer may choose to sue in the Member state of the E-tailer's domicile, however they are unlikely to prefer that in lieu of the courts of their own Member State). This has procedural as well as substantive consequences. Evidently procedural issues are determined by the forum (statutes of limitation, legal fees, etc) however this would not seem a dramatic inconvenience to the average E-tailer. The possibility of being sued in other Member States ought not to scare a serious E-tailer.

With respect to substantive law, the consumer protection laws of the forum may well, at the least partially, become applicable, in spite of a standard choice of law clause in the contract (see the analysis of the Rome I Regulation, below in this volume). However this, too, for EU-based E-tailers, need not be an obstacle of a serious kind, particularly in light of the increased ('maximum') harmonisation of consumer law across the EU. In other words, for those E-tailers who are domiciled in the EU (in the extensive sense of Article 17(2) of the Regulation), *Pammer* and *Alpenhof* has opened a clarified if not new possibility that they will be sub judice in a Member State outside their standard corporate domicile.

[256] Note 254 above.

Therefore the impact of the revised Article 17 in the internet context would seem to be more relevant to non-EU-based E-tailers. In the former version, Regulation 44/2001, lest consumer and E-tailer concluded a valid choice of forum agreement in favour of a court in the EU, or lest both parties submitted to the jurisdiction of a court in the EU[257]—neither of these scenarios being very likely in light of the position of the non-EU-based E-tailer—the Regulation simply did not apply to conflicts between EU consumers and non-EU-based E-tailers, even with the extended notion of 'domicile' (see below). An E-tailer without any physical presence in the EU escaped the application of the Regulation.

It is the Commission which initiated the move to change this. As already signalled above, where I review the overall international impact of the Regulation, in its proposal to amend the Regulation,[258] the EC inter alia extended the application of all special jurisdictional rules to defendants without domicile in the EU. The Commission aimed in particular to have the special jurisdictional rule with respect to contracts (Article 7(1) as well as the jurisdictional rules with respect to the protected categories, be brought within the purview of plaintiffs acting against non-EU based defendants. The European Parliament had—in my view justifiably—expressed serious reservations with respect to this proposal, however as I note above, after the lengthy preparation process of the review of the Regulation, both Parliament and Council eventually favoured an extension indeed of the consumer and employment title of the Regulation to defendants not domiciled in the EU.

#### 2.2.8.2.5 'Direction of Activities' as an Overall Trigger for EU Prescriptive and Adjudicative Jurisdiction

In the trade mark context, the reference case is the *L'Oréal/eBay* litigation. The CJEU instructed that where goods located in a third State, which bear a trade mark registered in an EU Member State or a Community trade mark and have not previously been put on the market in the EEA or, in the case of a Community trade mark, in the EU,

(i) are sold by an economic operator on an online marketplace without the consent of the trade mark proprietor to a consumer located in the territory covered by the trade mark; or
(ii) are offered for sale or advertised on such a marketplace targeted at consumers located in that territory

the trade mark proprietor may prevent that sale, offer for sale or advertising by virtue of the rules set out in relevant EU legislation. It is the task of the national courts to assess on a case-by-case basis whether relevant factors exist, on the basis of which it may be concluded that an offer for sale or an advertisement displayed on an online marketplace accessible from the territory covered by the trade mark is 'targeted at' consumers in that territory: when the offer for sale is accompanied by details of the geographic areas to which the seller is willing to dispatch the product, that type of detail is of particular importance in the said assessment.[259] The CJEU itself noted in paragraph 64 of its *L'Oréal* judgment the analogy with the *Pammer and Alpenhof* litigation.[260]

[257] See, however, the analysis of Art 26, above, re submission and non-EU based parties.
[258] COM(2010) 748.
[259] Case C-324/09 *L'Oréal* [2011] ECR I-6011.
[260] L'Oréal and eBay settled their dispute out of court in January 2014. The settlement was undisclosed.

'Intended target of information' as a criterion of applicability was also confirmed as the criterion for application of the Database Directive, Directive 96/9, in *Football Dataco*.[261] Mere accessibility of data does not suffice to grant jurisdiction under the EU Database directive.

In *Google Spain*,[262] however (the infamous 'right to be forgotten' judgment), Jääskinen AG employed the notion 'targeted at' and 'oriented at' to establish jurisdiction in the context of the EU's data protection Directive.[263] He supplemented this with what one could call an economic criterion: namely the business model of the company concerned.

As summarised by the AG, according to Article 4(1) of the Directive, the primary factor that gives rise to the territorial applicability of the national data protection legislation is the processing of personal data carried out in the context of the activities of an establishment of the controller on the territory of the Member State. Further, when a controller is not established on EU territory but uses means or equipment situated on the territory of the Member State for processing of personal data, the legislation of that Member State applies unless such equipment or means is used only for purposes of transit through the territory of the EU. The territorial scope of application of the Directive and the national implementing legislation is triggered therefore either by the location of the establishment of the controller, or the location of the means or equipment being used when the controller is established outside the EEA. Nationality or place of habitual residence of data subjects is not decisive, nor is the physical location of the personal data—at least not in the current versions of the Directive. The AG pointed out that in future legislation, relevant targeting of individuals could be taken into account in relation to controllers not established in the EU. Such an approach, the AG then noted, attaching the territorial applicability of EU legislation to the targeted public, is consistent with the Court's case-law on the applicability of the e-commerce Directive 2000/31, the Brussels I Regulation and Directive 2001/29, to copyright and related rights in the information society to cross-border situations. Again, however, it is not a criterion in the current version of the data protection Directive with respect to providers established outside of the EU.

The AG turned to the business model of a company to assist him in establishing applicability of the Directive for the case at issue, where Google (domiciled in California) does have establishments in the EU (the establishment of the controller therefore being the trigger), as well as at least two known data centres:

> Google Inc is a Californian firm with subsidiaries in various EU Member States. Its European operations are to a certain extent coordinated by its Irish subsidiary. It currently has data centres

[261] Case C-173/11 *Football Dataco* ECLI:EU:C:2012:642: 'Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases must be interpreted as meaning that the sending by one person, by means of a web server located in Member State A, of data previously uploaded by that person from a database protected by the *sui generis* right under that directive to the computer of another person located in Member State B, at that person's request, for the purpose of storage in that computer's memory and display on its screen, constitutes an act of "re-utilisation" of the data by the person sending it. That act takes place, at least, in Member State B, where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in Member State B, which is for the national court to assess.'

[262] Case C-131/12 *Google Spain SL and Google Inc v AEPD and Mario Costeja Gonzalez* ECLI:EU:C:2014:317.

[263] Directive 95/46, [1995] OJ L281/31.

> at least in Belgium and Finland. Information on the exact geographical location of the functions relating to its search engine is not made public. Google claims that no processing of personal data relating to its search engine takes place in Spain. Google Spain acts as commercial representative of Google for its advertising functions. In this capacity is has taken responsibility for the processing of personal data relating to its Spanish advertising customers. Google denies that its search engine performs any operations on the host servers of the source web pages, or that it collects information by means of cookies of non registered users of its search engine.
>
> In my opinion the Court should approach the question of territorial applicability from the perspective of the business model of internet search engine service providers. This, as I have mentioned, normally relies on keyword advertising which is the source of income and, as such, the economic raison d'être for the provision of a free information location tool in the form of a search engine. The entity in charge of keyword advertising (called 'referencing service provider' in the Court's case-law) is linked to the internet search engine. This entity needs presence on national advertising markets. For this reason Google has established subsidiaries in many Member States which clearly constitute establishments within the meaning of Article 4(1)(a) of the Directive. It also provides national web domains such as google.es or google.fi. The activity of the search engine takes this national diversification into account in various ways relating to the display of the search results because the normal financing model of keyword advertising follows the pay-per-click principle. … In conclusion, processing of personal data takes place within the context of a controller's establishment if that establishment acts as the bridge for the referencing service to the advertising market of that Member State, even if the technical data processing operations are situated in other Member States or third countries. …
>
> For this reason, I propose that the Court should answer the first group of preliminary questions in the sense that processing of personal data is carried out in the context of the activities of an 'establishment' of the controller within the meaning of Article 4(1)(a) of the Directive when the undertaking providing the search engine sets up in a Member State for the purpose of promoting and selling advertising space on the search engine, an office or subsidiary which orientates its activity towards the inhabitants of that State. (62, footnotes omitted)

The CJEU broadly stood with the AG's view. The territorial scope of the Directive is the most relevant to the conflicts community. Again, it is noteworthy that in the current version of the data protection Directive, targeting of consumers is not a jurisdictional criterion for providers established outside of the EU. The referring court had stated that Google Search is operated and managed by Google Inc and that it has not been established that Google Spain carries out in Spain any activity directly linked to the indexing or storage of information or data contained on third parties' websites. Nevertheless, according to the referring court, the promotion and sale of advertising space, which Google Spain attends to in respect of Spain, constitutes the bulk of the Google group's commercial activity and may be regarded as closely linked to Google Search.

The CJEU noted that Google Spain was engaging in the effective and real exercise of activity through stable arrangements in Spain. As it moreover had a separate legal personality, it constituted a subsidiary of Google Inc on Spanish territory and, therefore, an 'establishment' within the meaning of Article 4(1)(a) of Directive 95/46. However, is the processing of personal data by the controller 'carried out in the context of the activities' of an establishment of the controller on the territory of a Member State necessary to trigger application of the Directive? Google Spain and Google Inc disputed that this was the case since the processing of personal data at issue in the main proceedings was carried out exclusively by Google Inc, which operated Google Search without any intervention on the part

of Google Spain; the latter's activity was limited to providing support to the Google group's advertising activity, which was separate from its search engine service.

The Court disagreed: Article 4(1)(a) of Directive 95/46 does not require the processing of personal data in question to be carried out 'by' the establishment concerned itself, but only that it be carried out 'in the context of the activities' of the establishment (52): that is the case if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable (55). The very display of personal data on a search results page constitutes processing of such data. Since in the present case that display of results was accompanied, on the same page, by the display of advertising linked to the search terms, it was clear that the processing of personal data in question was being carried out in the context of the commercial and advertising activity of the controller's establishment on the territory of a Member State, in this instance Spanish territory (57).

This view confirms broadly the AG's use of Google's 'business model' as a jurisdictional trigger. *Google Spain* raises all sorts of issues with respect to jurisdiction.[264] In *Weltimmo*,[265] the CJEU took a restrictive view on 'executive' or 'enforcement' jurisdiction. The essence in my view is that the Court insists on internal limitations to enforcement. It discussed the scope of national supervisory authority's power in the context of Directive 95/4, the same directive which was at issue in *Google Spain*. The Court held:

> Where the supervisory authority of a Member State, to which complaints have been submitted in accordance with Article 28(4) of Directive 95/46, reaches the conclusion that the law applicable to the processing of the personal data concerned is not the law of that Member State, but the law of another Member State, Article 28(1), (3) and (6) of that directive must be interpreted as meaning that that supervisory authority will be able to exercise the effective powers of intervention conferred on it in accordance with Article 28(3) of that directive only within the territory of its own Member State. Accordingly, it cannot impose penalties on the basis of the law of that Member State on the controller with respect to the processing of those data who is not established in that territory, but should, in accordance with Article 28(6) of that directive, request the supervisory authority within the Member State whose law is applicable to act.

In other words, the supervisory authority in a Member State can examine the complaints it receives even if the law that applies to the data processing is the law of another Member State. However the scope of its sanctioning power is limited by its national borders.

An important case on the territorial scope of EU/national privacy law and the coinciding jurisdiction was making its way through the UK courts at the time of writing of this second edition. In *Vidal Hall et al v Google Inc*[266] (the so-called 'Safari users' case), the High Court assessed its jurisdiction against Google Inc and found no reason to apply *forum non conveniens*. Google UK was not involved, and the Jurisdiction Regulation did not apply. The claimants alleged that Google had misused their private information, and acted in breach of confidence, and/or in breach of the statutory duties under the Data Protection Act 1998, section 4(4), by tracking and collating, without the claimants' consent or knowledge,

[264] See G van Calster, 'Regulating the Internet. Prescriptive and Jurisdictional Boundaries to the EU's 'Right to Be Forgotten', under peer review at the time of writing and available as work in progress on ssrn, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2686111, accessed 13 November 2015.

[265] C-230/14 *Weltimmo s.r.o. v Nemzeti Adatvédelmi és Információszabadság Hatóság*, ECLI:EU:C:2015:639.

[266] *Judith Vidall-Hall, Robert Hann and Marc Bradshaw* v *Google Inc* [2014] EWHC 13 (QB).

information relating to the claimants' internet usage on the Apple Safari internet browser. Applying the *Spiliada* criteria on *forum non conveniens*, Tugendhat J first of all dismissed the relevance of the location of documents:

> In any event, in the world in which Google Inc operates, the location of documents is likely to be insignificant, since they are likely to be in electronic form, accessible from anywhere in the world … By contrast, the focus of attention is likely to be on the damage that each Claimant claims to have suffered. They are individuals resident here, for whom bringing proceedings in the USA would be likely to be very burdensome (Google Inc has not suggested which state would be the appropriate one). The issues of English law raised by Google Inc are complicated ones, and in a developing area. If an American court had to resolve these issues no doubt it could do so, aided by expert evidence on English law. But that would be costly for all parties, and it would be better for all parties that the issues of English law be resolved by an English court, with the usual right of appeal, which would not be available if the issues were resolved by an American court deciding English law as a question of fact. (132–133)

*Forum non conveniens* was therefore dismissed; the case was able to proceed.

This judgment, in reviewing the prima facie case on the merits, also bolsters the existence of a tort of 'misuse of private information' and surely adds to the growing authority of European-based data protection rules.

The Court of Appeal confirmed the High Court ruling on 27 March 2015,[267] and the Supreme Court granted leave to appeal on 28 July 2015.

#### 2.2.8.2.6 Extended Notion of 'Domicile' for Jurisdiction over Consumer Contracts

Article 17(2) reads:

> Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

The Court of Justice has clarified both 'branch, agency or other establishment' and 'operations' within the context of (now) Article 7(5) (*Somafer*):

> The concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension.[268]

> This concept of operations comprises on the one hand actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there. Further it also comprises those relating to undertakings which have been entered into at the abovementioned place of business in the name of the parent body and which must be performed in the Contracting State where the

[267] [2015] EWCA Civ 311.
[268] Case 33/78 *Somafer SA v Saar-Ferngas AG* [1979] ECR 2183, para 12.

> place of business is established and also actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body.[269]

The objectives of Article 7(5) are of course not those of Article 17(2). The former's aim is to facilitate proceedings.[270] The latter's aim is to protect the consumer, from a public policy point of view. Hence one may indeed have to be careful simply to apply the interpretation of one, to the other.[271]

#### 2.2.8.2.7 Alternative Fora Introduced by Agreement

Article 19 allows for mutually agreed alterations to the rule of Article 18. The conjunctive 'or' has been dropped in all language versions of what is now Article 19 of the Brussels I recast:

> The provisions of this Section may be departed from only by an agreement:
>
> — which is entered into after the dispute has arisen;
> — which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
> — which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

This contrasts with the similar proviso on choice of court in employment contracts, Article 23 of the recast:

> The provisions of this Section may be departed from only by an agreement:
>
> — which is entered into after the dispute has arisen; or
> — which allows the employee to bring proceedings in courts other than those indicated in this Section.

I have suggested, with others, that even though much as I do not understand why the conjunctive has been dropped, its deletion, combined with its being kept in Article 23, means that for consumer contracts, choice of court that pre-dates the dispute is now simply impossible under the Regulation, while being maintained for employment contracts. I was also puzzled as to why such an important change was not discussed at all in the run-up to the recast.

What has happened in reality, the Commission has unofficially suggested, is quite different. Reportedly, the 'juristes-linguistes' took it upon themselves to correct an apparent linguistic mistake in the previous version of the Regulation (indeed one going back to the Brussels Convention): there ought not to be a conjunctive when listing more than one, non-cumulative alternative. That would also explain the difference with Article 23, where there

[269] Ibid, para 13.
[270] Ibid, para 7.
[271] B Anoveros Terradas, 'Restrictions on Jurisdiction Clauses in Consumer Contracts in the European Union' (2003) 1 *Oxford University Comparative Law Forum* 1, at ouclf.iuscomp.org, consulted July 2011, text after n 136.

are only two alternatives. This explanation is in line with other sections of the Regulation (eg Article 25 on choice of court) where 'or' has similarly been dropped.

Other than for the confusing use of conjunctive, the Article would seem fairly straightforward at first sight. There are one or two unclear aspects, however, which have been addressed neither by the initial Brussels Convention, nor by the Regulation (and their respective preparatory works).

Article 19(2) does not stand in the way of agreements which 'allow the consumer to bring proceedings in courts other than those indicated in this Section'. The text of the Regulation does not say so, however given the protective intention of the section, it would seem safe to assume that the forum or fora assigned by such agreement must not be exclusive: ie they must be fora where the consumer can sue over and above those identified by Article 18.[272]

Next, a common assumption is that the conditions of Article 19 are additional to those of Article 25.[273] The CJEU has hinted so much with respect to the similar agreements in the insurance title of the Regulation (*Gerling*).[274] This, however, most certainly does not follow from the text of either Regulation or Convention, neither is there any trace of it in the preparatory works (pre the Schlosser Report). It would be tempting to say that the conditions of Article 25 must apply, for otherwise the seemingly flexible conditions of Article 19 stand-alone, would leave the consumer less protected under Article 19 than he would in a standard application of Article 25. However, would it? Article 19 indeed does not impose any formal conditions, which Article 25 does (see further below). The substantive conditions of Article 19 on the other hand are much stricter. As noted by the Jenard Report, the provisions for the protected categories are a halfway house between the exclusive jurisdictional grounds of Article 24, and the 'complete' freedom of Article 25.[275] In the specific case of consumer contracts, complete freedom to agree on a forum only rules once the dispute has arisen. Lest one assumes that consumers need absolute protection even at a stage when the consumer is likely to have sought legal advice (the Regulation assumes that once the dispute has arisen, both parties are on a more equal footing with respect to deciding where one ought to litigate; moreover, jurisdiction clauses at that stage tend not to be part of 'take it or leave it' general terms and conditions, where disadvantageous clauses can easily be smuggled into), there would seem no need to make such agreement subject to much conditions. Other than the absolute freedom once the dispute has arisen, Article 19 severely limits the possible fora that may be selected, all heavily in favour of the consumer. Consequently I would submit that making such clauses subject to the stricter rules of Article 25, would rather work against the consumer.

[272] Pro: ibid, text after n 173.

[273] See eg Fawcett and Carruthers (n 201) 271. See also the Schlosser Report, para 161: 'Although Article [17] is not expressed to be subject to Article [25] the Working Party was unanimously of the opinion that agreements on jurisdiction must, in so far as they are permitted at all, comply with the formal requirements of Article [25]. Since the form of such agreements is not governed by Section 4, it must be governed by Article [25].'

[274] Case 201/82 *Gerling Konzern Speziale Kreditversicherungs-AG and others v Amministrazione del Tesoro dello Stato* [1983] ECR 2503, para 20: '[W]here in a contract of insurance a clause conferring jurisdiction is inserted for the benefit of the insured who is not a party to the contract but a person distinct from the policy-holder, it must be regarded as valid within the meaning of Article 17 of the Convention provided that, as between the insurer and the policy-holder, the condition as to writing laid down therein has been satisfied and provided that the consent of the insurer in that respect has been clearly and precisely manifested.'

[275] Jenard Report, 29.

It is also noteworthy that Article 25's new rule, in the recast, that the material validity of a choice of court agreement is subject to the *lex fori prorogati*, does not apply to choice of court in the context of the consumer title (or indeed the other protected categories). This lends further support to the argument that such choice of court has to identify additional jurisdictions where the consumer may sue (hence making one *lex fori prorogati* impossible to identify).

Under the former version of the Regulation, it was discussed whether the defendant has to be domiciled in a Member State, for Article 19 (17 as it was then) to apply? It was tempting to say that he does not,[276] in other words that (now) Article 19 on this point follows (now) Article 25; however, in my view the *a contrario* argument was too strong. The Regulation does not include many instances where the domicile of the defendant is irrelevant (see Article 24 and 25, and a departure from that point in my view must not too freely be assumed.[277] The discussion is now redundant, for, as flagged, the consumer title now applies regardless of the domicile of the defendant/business. It is also noteworthy that the consumer does have to be domiciled in the EU. This is clear from the list of jurisdictions included in Article 18, which for the consumer, all refer to his domicile in one of the Member States.

Finally, by virtue of positive harmonisation in the consumer protection law field, any agreements on jurisdiction in the context of contracts caught by Chapter II Section 4 of the Regulation, have to abide by the conditions of the Unfair Contract Terms Directive,[278] although in my view this is more relevant with respect to choice of law (and the relation with the Rome I Regulation: see below), than it is for jurisdiction clauses.[279]

### *2.2.8.3 Contracts for Individual Employment*

**Section 5 Jurisdiction over individual contracts of employment**

Article 20

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 21

1. An employer domiciled in a Member State may be sued:

(a) in the courts of the Member State where he is domiciled; or
(b) in another Member State:
    (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so, or

[276] Eg Fawcett and Carruthers (n 188) 272.
[277] See also ibid.
[278] Directive 93/13, [1993] OJ L95/29, as amended.
[279] See inter alia the analysis by Anoveros Terradas (n 271).

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

Article 22

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 23

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or
2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

The Brussels Convention contained one or two gradually introduced specific provisions on contracts for employment, but no overall title such as for consumer and insurance contracts. Such a title was contemplated at the drafting stage, but eventually abandoned.[280] Firstly the Committee drawing up the Convention, in a somewhat sloppily drafted explanation (where it mixed choice of law rules with positive harmonisation of substantive law)[281] argued that disputes over contracts of employment should as far as possible[282] be brought before the courts of the State whose law governs the contract. With attempts already then under way by the European Commission to harmonise applicable law, the Committee therefore did not think that rules of jurisdiction should be laid down which might not coincide with those which may later be adopted for determining the applicable law.[283] In order to lay down such rules of jurisdiction, the Committee would have had to take into account not only the different ways in which work can be carried out abroad, but also the various categories of worker: wage-earning or salaried workers recruited abroad to work permanently for an undertaking, or those temporarily transferred abroad by an undertaking to work for it there; commercial agents, management, etc. The Committee feared that any attempt by it to draw such distinctions might have provided a further hindrance to the Commission's work. Further, in the view of the Committee, contractual freedom still ruled happily at the time of drafting the Convention (one assumes that this is far less the case now, as labour

[280] Jenard Report, 23 ff.

[281] Which may have been a prospect of some promise at the time of the original Convention, but became of course ever trickier with the accession of new Member States to the EEC and of non-EEC Member States to the Lugano Convention.

[282] The Report does not elaborate but one assumes that the drafters were mindful of the interplay between collective and individual labour law, and of collective labour agreements being a very nationally driven part of the law applicable between employment relations.

[283] But see R Kidner, 'Jurisdiction in European Contracts of Employment' (1998) 27 *Industrial Law Journal*, 103, 104, fn 5. In Case C-125/92 *Mulox v Geels* [1993] ECR I-4075, the Advocate General thought it would be a mistake to exaggerate the importance of the link between jurisdiction and the *lex causae*. I agree.

law has grown exponentially since the 1970s), and the Committee wanted to respect that by making contracts for individual employment generally subject to the standard rules.

The following courts consequently were given jurisdiction: the courts of the State where the defendant is domiciled (Article 4); the special jurisdictional rule for contracts of (now) Article 7(1) of the Regulation, if that place was in a State other than that of the domicile of the defendant—with a specific formula for employment contracts to determine the 'place of performance of the obligation in question';[284] and any court on which the parties have expressly or impliedly agreed (Articles 23[285] and 24 of the amended Brussels Convention). In the case of proceedings based on a tort committed at work, Article 5(3) as it then stood, which provides for the jurisdiction of the courts for the place where the harmful event occurred, could also apply.

The Brussels I Regulation then collected all relevant provisions with respect to employment contracts in one Section. Authoritative source for much of the provisions is the Jenard and Möller Report which accompanied the 1988 Lugano Convention,[286] as well as extensive case-law of the Court of Justice.

Curiously, and unlike 'consumer contracts', the Regulation does not define 'employment'. This is perhaps not all that surprising, given the very different content of 'employment' in the Member States. However, the Court of Justice of course has had to intervene, citing the need for an autonomous interpretation of the principle.

In *Holterman*,[287] the question concerned the pursuit of a defendant both on the basis of his capacity as a director of the company, and for alleged failure properly to have carried out his duties as employee. The applicant Holterman was incorporated in the Netherlands. The defendant was Mr Spies, a German national, domiciled in Germany. He was employed by the applicant between 2001 and 2005/06, first as employee, and subsequently also as director of Holterman's establishments in Germany. The applicant alleges that the defendant caused damage as a result of improper fulfilment of his duties, indeed intentional recklessness, as director.

Application was made at the court at Arnhem, where Spies successfully argued that the court had no jurisdiction on the basis that application has to be made of the protective category of 'individual contracts of employment'. Spies essentially argued that the employment section of the Regulation trumps concurrent jurisdiction on the basis of contract.

'Contract of employment' was addressed in the abstract by the CJEU in Case 266/85 *Shenavai*,[288] where the Court identified a double requirement for it referred to the need

[284] 'In matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated' (this specific proviso was added in 1989).

[285] With specific provision for employment contracts: 'In matters relating to individual contracts of employment an agreement conferring jurisdiction shall have legal force only if it is entered into after the dispute has arisen or if the employee invokes it to seize courts other than those for the defendant's domicile or those specified in Article 5 (1).'

[286] P Jennard and G Möller, Report accompanying the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988, OJ [1990] C189/57.

[287] Case C-47/14 *Holterman Ferho Exploitatie BV and others v Friedrich Leopold Freiherr Speis von Büllesheim* ECLI:EU:C:2015:574.

[288] Case 266/85 *H Shenavai v K Kreischer* [1987] ECR 239.

for a contract to be qualified as a contract of employment: there must be a durable relation between individual and company, a lasting bond, which brings the worker to some extent within the organisational framework of the business; and a link between the contract and the place where the activities are pursued, which determines the application of mandatory rules and collective agreements. However precedent value of *Shenavai* for the Brussels I and recast Regulation is necessarily suboptimal, for at the time employees as a protected category did not yet exist in the Regulation and the Court's findings on contracts of employment took place within the need to identify a 'place of performance' under the Brussels Convention's special jurisdictional rule on contracts.

The Jenard and Möller Report on the 1988 Lugano Convention[289] suggested the relationship of 'subordination' of the employee to the employer,[290] curiously referring for that notion to *Shenavai* and to *Arcado v Haviland*,[291] although neither of these judgments use that term. Cruz Villalòn AG in *Holterman* emphasised that in particular, of course, a contract for employment needs to be distinguished from a contract for the provision of services. He then takes inspiration from the protective intent of the employment contracts heading to specify 'subordination', as meaning a combination of supervision and instruction, as a determining factor for positions of employment. Even higher management can find itself in such position, given that and provided its actions, notwithstanding a wide independent remit, are subject to control and direction of the companies' bodies. Review of a company's by-laws should reveal the existence of such control vis-à-vis higher management, read together with the terms and conditions of the contract of employment at issue (32 of the Opinion). It is only, the AG suggested, per *Asscher*,[292] if management itself through its shareholding exercises control over those bodies that the position of subordination disappears.

In *Holterman*, the Court itself threw into the mix reference to its interpretation of secondary EU law on health and safety at work as well as European labour law, holding that 'the essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he receives remuneration' (41).

Consequently the national courts now have quite a number of criteria which need to apply in practice.[293] It is not for the CJEU to do so in an individual case. These criteria are as follows:

— a durable relation between individual and company, a lasting bond, which brings the worker to some extent within the organisational framework of the business (see *Shenavai*);
— a link between the contract and the place where the activities are pursued, which determines the application of mandatory rules and collective agreements (see *Shenavai*);
— a relationship of 'subordination' of the employee to the employer (see Jenard and Möller Report);

[289] Note 286 above.
[290] [1990] OJ C187/57, 41 (p 73).
[291] Case 9/87 *SPRL Arcado v SA Haviland* [1988] ECR 1539.
[292] Case C-107/94 *PH Asscher v Staatssecretaris van Financien* [1996] ECR I-3089.
[293] See, for instance, just before the finding in *Holterman*, Cooke J in *Petter v EMC* [2015] EWHC 1498 (QB).

— subordination meaning 'supervision and instruction' (see *Holterman*, Cruz Villalón AG);
— services for and under the direction of another in return for which he receives remuneration (see *Holterman*, CJEU).

In *Holterman*, the Court held that once a worker finds himself qualified as an employee, for the purposes of the application of the Jurisdiction Regulation, that qualification will trump any other roles which that individual may play in the organisation ('*the provisions of Chapter II, Section 5 (Articles 18 to 21) of Regulation No 44/2001 must be interpreted as meaning that they preclude the application of Article 5(1) and (3) of that regulation, provided that that person, in his capacity as director and manager, for a certain period of time performed services for and under the direction of that company* in return for which he received remuneration, that being a matter for the referring court to determine', 49), although it then also referred to *Brogsitter*[294] (reported elsewhere in this book; *Brogsitter* concerns the distinction between contracts and torts under Article 7 of the Regulation), stating that it needed to apply *per analogia*: namely whether the action concerned follows from an alleged improper fulfilment of that agreement (as opposed to an improper fulfilment of duties as a director).

For the employment title, the assessment of the various alternative jurisdictions is necessarily factual[295] and not easily caught by generic criteria. At the heart of the analysis, however, are the employee's activities, not the employer's.[296]

It is also worth repeating that the employment contracts section, following the Recast Regulation, now also applies to employers domiciled outside of the EU.

[294] Case C-548/12 *Marc Brogsitter v Fabrication de Montres Normandes EURI* ECLI:EU:C:2014:148.

[295] See, for instance, for a classic example, with a bit of exotic flavouring: the UK Employment Appeal Tribunal in *David Powell v OMV Exploration and Production Limited* [2013] UKEAT 0131_13_2307. The Employment Appeal Tribunal ruled on the (absence of) jurisdiction for UK courts in the case of a UK-domiciled employee, employed originally to work from Yemen but in reality working from Dubai, hired by a Manx incorporated company run from Austria. The employment contract was subject to Manx law and to a choice of court agreement in favour of the courts of the Isle of Man. The Tribunal, however, ruled that the case was within the scope of the Brussels I Regulation—albeit like the Tribunal itself, the Appeal Tribunal does not systematically review the three alternative grounds for domicile of (then) Article 60 of the Jurisdiction Regulation. Domicile was found to be in Austria, for this is the place where the company was effectively managed from. The UK could claim jurisdiction on the basis of (then) Article 19, were the employee found to habitually work in the UK—*quod non*.

[296] Hence, for instance, in my view wrong application by the court at Charleroi (Belgium; air travellers may know it as 'Brussels South'), 4 November 2013, *X* v *Ryanair Ltd*. Ryanair's domicile being in Ireland was not contested and no choice of court was made in the contract between plaintiff and the airline. The plaintiff suggested a list of considerations which in his view led to Charleroi being the place of habitual carrying out of his work, including: journeys as a 'cabin service agent' (steward or stewardess to you and me) always started and ended at Charleroi airport; consequently he had to rent a flat in the Charleroi area; flight times were corresponded to plaintiff via a PC located at the airport; prior to each flight, he had to check in at the Charleroi office; staff issues were dealt with at the airport; equipment was provided from the airport; training and fitness, etc, tests were carried out at Charleroi. The court, however, sided with Ryanair's contention that its organisation at Charleroi was skeleton only, and that in having organised the work schedule from Dublin, there was no team at Charleroi which had the remit to manage the work schedule or anything else independently from Dublin. Per the CJEU's case-law, however, the criterion of the country in which the work is habitually carried out must be given a broad interpretation and must be understood as referring to the place in which or from which the employee actually carries out his working activities. Again: arguably, the employee's activities lie at the heart of that analysis: not the employer's, which is what the court at Charleroi has taken as its main clue.

### *2.2.8.4 Insurance Contracts*

**Section 3 Jurisdiction in matters relating to insurance**

Article 10

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.

Article 11

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled,
(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled,
(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 12

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 13

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 14

1. Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen,
2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section,

3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State,
4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or
5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16.

Article 16

The following are the risks referred to in point 5 of Article 15:

1. any loss of or damage to:
   (a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;
   (b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;
2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:
   (a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;
   (b) for loss or damage caused by goods in transit as described in point 1(b);
3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;
4. any risk or interest connected with any of those referred to in points 1 to 3;
5. notwithstanding points 1 to 4, all "large risks" as defined in Council Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

### 2.2.9 Agreements on Jurisdiction ('Choice of Forum' or 'Prorogation of Jurisdiction'): Article 25

Article 25

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;
(b) in a form which accords with practices which the parties have established between themselves; or
(c) 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.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

#### *2.2.9.1 The Overall Intention of Choice of Court Agreements Under the Brussels Regime*

The provisions on forum clauses are drafted in a way 'not to impede commercial practice, yet at the same time to cancel out the effects of clauses in contracts which might go unread' (Jenard Report),[297] or otherwise 'unnoticed' (*Colzani*).[298] Both the overall deference which the Brussels Convention and Regulation show for choice of court agreements as well as the conditions imposed upon them, are heavily influenced not just by the pre-existing bilateral treaties between quite a number of the initial Convention States, but also the relevant Hague instruments: the Hague Convention of 15 April 1958 on the jurisdiction of the contractual forum in matters relating to the international sale of goods, and the Hague Convention of 25 November 1965 on the choice of court—both since updated (and as far as the latter is concerned: acceded to by the EU—see further below). The drafters also opined that in order to ensure legal certainty, the formal requirements applicable to agreements conferring jurisdiction should be expressly prescribed, but that 'excessive formality which is incompatible with commercial practice' should be avoided.[299] Hence for instance the words 'have agreed' in Article 25 do not require that the court be identified verbatim. It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a court to which they wish to submit any disputes (*Coreck Maritime*).[300]

[297] Jenard Report, 37.

[298] Case 24/76 *Estasis Salotti di Colzani Aimo e Gianmario Colzani snc v Rüwa Polstereimaschinen GmbH* [1976] ECR (1832) 1835—observation by the appellant in the main proceedings.

[299] Jenard Report, 37, with reference to the Hague Conference on Private International Law, documents of the eighth session. FREDERICQ, report on the work of the Second Committee, 303.

[300] Case C-387/98 *Coreck Maritime GmBH* v *Handelsveem BV and others* [2000] ECR I-9337. In the case at issue the choice of court and choice of law clause, read 'Any disputes arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein'—the discussion subsequently focusing inter alia on who exactly the 'carrier' was in the complex contractual arrangement.

Choice of court for contractual disputes do not cover non-contractual obligations between the parties, unless specifically agreed (*CDC*).[301]

Their place in the hierarchy indicates, and Article 25(4) confirms, that choice of court agreements are not an option for subject-matter included in the exclusive jurisdictional grounds of Article 24. Neither must they infringe the jurisdictional rules for the protected categories (see the specific conditions attached to choice of court agreements in the various sections). The 'exclusivity' of choice of court clauses under Article 25 is weaker than that under Article 24: a judgment denying Article 25 and/or its conditions cannot be refused recognition: choice of court is not listed in Article 45 of the Regulation as one of the reasons for refusing recognition.

A choice of court agreement validly made under Article 25 cannot be ignored either by the court which has been assigned by it, or by those who have not. While under the previous version of the Regulation, the court assigned by the agreement could refuse jurisdiction if neither of the parties concerned was domiciled in the EU (see Article 23(3) of the previous version of the Regulation), the current Regulation no longer requires domicile in the EU. Even the previous version of the text granted gentle protection to choice of court made in favour of a court in the EU, by parties neither of whom was domiciled in the EU. Courts of other Member States could not exercise any jurisdiction unless the court to whom jurisdiction was granted refused to accept it (which it would have to do in accordance with its own private international law rules). Moreover if the designated court did to accept its jurisdiction, the resulting judgment enjoyed the recognition and enforcement Title of the Regulation.

Choice of court is made exclusively, unless otherwise indicated. Non-exclusive choice of court is particularly attractive to ensure flexibility vis-à-vis a very movable counterparty, specifically with a view to ensuring that litigation may be started in the jurisdiction where the counterparty at that time has assets available for recognition and enforcement.

#### *2.2.9.2 Choice of Court in Favour of a Court Outside the EU: A Reflexive Effect for Article 25?*

The Jenard Report distinguishes many possible scenarios for choice of court; however, agreements granting jurisdiction to a court outside of the EU is not one of them[302] Whether the courts of an EU Member State on that occasion are entitled to (perhaps indeed obliged to) decline jurisdiction in favour of the non-EU court, is unclear. That they are 'not covered' by the Regulation leads to different interpretations as to how the Member States courts are to react to them.

Case C-281/02 *Owusu*, discussed at length elsewhere, does not answer the question as it was not asked by the High Court. Léger AG does refer to the issue once or twice in his opinion however does not really entertain it—as the question was not sub judice. However under the *Owusu* approach, the CJEU almost certainly would argue that the courts of an EU Member State, where they have jurisdiction under an alternative ground in the

[301] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others* ECLI:EU:C:2015:335.

[302] See also Jenard Report, 38.

Regulation, have to exercise that jurisdiction. The question was not properly answered by the Commission proposal for review.

The CJEU briefly touched upon choice of court in favour of a court outside the EU, in *Coreck Maritime*,[303] merely to observe that

> [then] Article 17 of the Convention does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits. (19, with reference to the Schlosser Report)

This judgment could mean one of many things.

— Either that the Regulation in such an event does not apply at all. This is an unappealing proposition, for it would offer a wide opportunity for circumvention of the Regulation. This interpretation would mean that the very presence of choice of court in favour of a third State would lead to residual jurisdictional rules taking priority. This would hardly be a 'reflexive' application of Article 25 for if and when a national court gives priority to the choice of court, this would be by virtue of the national law, not of European law.
— Or that Article 25 does not apply and that the remainder of the Regulation—in particular, Article 7's special jurisdictional rule for contracts and Article 4's general rule (domicile of the defendant)—does apply. The judgment in *Owusu* is generally seen as confirmation of this suggested reading, although as noted this would not be by virtue of any specific suggestion in *Owusu* that this should be the case, but rather on the basis of the overall flexible attitude of the CJEU in this case, where application of the Regulation was accepted in spite of the overwhelming links the case had with third countries.
— Finally, the Court of Appeal in Owusu suggested a third interpretation: that Article 25 ought to be applied reflexively, by virtue of Article 25 (and the Regulation) itself, not by virtue of national conflicts law. As noted, the CJEU did not entertain this suggestion.

The inclusion or non-inclusion of choice of court agreements in favour of non-EU courts, subsequently resurfaced in the recognition and enforcement title of the Regulation. In *Gothaer*,[304] Krones AG, a German company whose transport insurers are Gothaer and others, had sold a brewing installation to a Mexican undertaking. Krones engaged Samskip GmbH, the German subsidiary of Samskip Holding BV, a transport and logistics undertaking founded in Iceland and established in Rotterdam (the Netherlands), to organise and perform the transport of that equipment from Belgium to Mexico under a bill of lading which contained a term conferring jurisdiction on the courts of Iceland. The consignee and Gothaer and Others brought proceedings against Samskip GmbH in the Belgian courts, alleging that the consignment had been damaged during transport.

The Antwerp Court of Appeal declared, in the operative part of its judgment, that it had 'no authority to hear and decide the case' after finding, in the grounds of the judgment, that the term in the bill of lading conferring jurisdiction on the courts of Iceland was valid

[303] Note 300 above.
[304] Case C-456/11 *Gothaer Allgemeine Versichering et al* ECLI:EU:C:2012:719. See also further below.

and that, while Gothaer and others could sue as successors in title to Krones AG, they were bound by that term. Antwerp did not, incidentally, clarify whether it found the choice of court clause (again: away from the EU) to be covered by the Jurisdiction Regulation or not. The validity of the clause was not sub judice: only the applicability to the insurers was.

Krones AG and Gothaer and others brought a fresh action for compensation before the German courts: on what jurisdictional grounds is not mentioned in the documents before the CJEU. The Landgericht Bremen stayed the proceedings and referred to the European Court of Justice, raising the question of the legal effects of the judgment given in Belgium.

Bremen's questions (reformulated by the AG) essentially were:

— Whether the term 'judgment' within the meaning of Article 32 of Regulation No 44/2001 covers a judgment by which a court of a Member State declines jurisdiction on the ground of an agreement on jurisdiction, even though that judgment is classified as a 'procedural judgment' by the law of the Member State addressed.
— If the answer to the first two questions is in the affirmative, it has to be determined whether Articles 32 and 33 of Regulation No 44/2001 must be interpreted as meaning that the court before which recognition is pleaded of a judgment by which a court of another Member State has declined jurisdiction on the basis of an agreement on jurisdiction is bound by the finding relating to the validity and scope of that agreement which appears in the grounds of the judgment.

The first two questions are reviewed below, under 'Recognition and enforcement'. In the AG's view, a judgment by a court in a Member State, finding that it does not have jurisdiction because of a choice of forum clause pointing away from the EU (in the case at issue: Iceland), is a 'judgment' within the meaning of the Regulation.

The AG then referred to the usual suspects to underline the consequences of that finding: the principle of mutual trust per *Gasser and Turner*; the strict *lis alibi pendens* rule; the high degree of predictability built into the Regulation. Consequently (Opinion, 53) the Regulation in the AG's view includes among judgments that are capable of being recognised judgments by which the court first seized has ruled on its jurisdiction, whether it has declared itself to have jurisdiction or, on the contrary, has declined jurisdiction.

This is clear, the AG suggested, where the court declares that it has jurisdiction. However, Bot AG suggested it also ought to be the case where the court declines jurisdiction. The court asked to recognise and enforce the judgment, in doing so in cases of the first court refusing recognition, in the AG's reasoning regains its freedom to review its own jurisdiction under the Regulation. The AG in this respect referred to the need to help avoid negative conflicts: ie one where no court is happy to entertain the claim. As the AG wrote: 'A conflict of that kind could arise if the court second seized refused to acknowledge the judgment previously given and declined jurisdiction on the ground that the court first seized had jurisdiction' (58).

However in the case at issue, of course, the 'negativity' of the conflict is such only between EU courts: an Icelandic court may be happy to (indeed feel itself obliged to) take the case, on the basis of the choice of court clause. This is where the answer to the third question becomes relevant: is the court asked to recognise, bound by the substantive reasons of the court which issued the judgment, as to the rejection of jurisdiction? The AG acknowledges that choice of court in favour of a non-EU court is not covered by (now) Article 25—however the AG refers to a similar proviso in the Lugano Convention to justify essentially

the extension of the means and motives of the Regulation to the facts at issue. This is where I disagree with the Opinion and indeed to a lesser degree with the eventual judgment: Iceland may be a party to the Lugano Convention—however jurisdiction of an Icelandic court *in casu* was not established by virtue of the Lugano Convention. Both parties to the contract at issue were domiciled in the EU and employed the Regulation's room for court of choice agreements, to agree forum in favour of an Icelandic court.

As noted, the question whether choice of court agreements pointing away from the EU are included in the Regulation, is not properly answered by the Commission proposal for review, neither is it in my view by the AG in *Gothaer*. The Court itself first of all confirmed that the term 'judgment' within the meaning of the Regulation covers a judgment by which a court of a Member State declines jurisdiction on the ground of an agreement on jurisdiction, even though that judgment is classified as a 'procedural judgment' by the law of the Member State addressed.

Moreover, the CJEU held that the court in the Member State in which enforcement is sought is bound by the finding of the first court—made in the grounds of a judgment, which has since become final, declaring the action inadmissible—regarding the validity of that clause. To justify its finding, it refers in principle to the very definition of recognition as highlighted in the Jenard Report: recognition must 'have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given'. Accordingly, a foreign judgment which has been recognised under the Regulation must in principle have the same effects in the State in which recognition is sought as it does in the State of origin. It further emphasised the same arguments as flagged by the AG in coming to its finding.

The Court then conceded that Article 25 does not apply; however, like the AG, it refers to the Lugano Convention. A further argument made by the court in my view is more convincing, namely the 'but for' argument:

> To allow a court of the Member State in which recognition is sought to disregard, as devoid of effect, the jurisdiction clause which a court of the Member State of origin has held to be valid would run counter to that prohibition of a review as to the merits, particularly in circumstances where the latter might well have ruled, but for that clause, that it had jurisdiction. (38)

Indeed typically the action in the court of origin is taken by the recalcitrant party (ie the one acting in spite of a choice of court clause), trying to convince the court of origin that it has jurisdiction on the basis of another Article in the Regulation, when indeed, but for the clause, that court would most likely have exercised jurisdiction. A finding of validity of the clause therefore is likely to have been seriously considered. Allowing a court in another Member State nevertheless to exercise jurisdiction and refusing recognition and enforcement would make the Regulation nugatory. This is in my view no different where as a result (such as here) no court in the EU will be able to hear the case.

Post the Brussels I Recast, the new *lis alibi pendens* rule of Articles 33–34, which I review in the relevant section, is accompanied by a recital which suggests that reflexive effect of 'exclusive' jurisdictional grounds is possible. Given that choice of court, under circumstances, may also lead to exclusive jurisdiction, this arguably also enables reflexive application of Article 25.[305]

[305] Also suggested by S Francq, 'Les clauses d'élection de for dans le nouveau règlement Bruxelles I *bis*' in E Guinchard (ed), *Le nouveau règlement Bruxelles I bis* (Brussel, Bruylant, 2014) 107–46.

Article 25 (in fact its predecessor, Article 23) was found to work reflexively by the High Court in *Plaza v The Law Debenture Trust*,[306] where Proudman J dealt with a UK fallout of longstanding litigation inter alia in Australia, following the insolvency of the Australian Bell group in the 1990s. Curaçao is the COMI (for this notion, see the insolvency chapter in this book). Secondary or ancillary proceedings were opened in Australia. A variety of litigation mostly concerning priority of claims and timely (or not) execution of securities led inter alia to a 2013 Deed of Settlement between parties to the current litigation. The Law Debenture trust (LDTC) was trustee for a number of bonds issued by Bell, some of which were held by Plaza (these bonds contain a non-exclusive choice of court in favour of England). Others were held inter alia by the Insurance Commission of Western Australia (ICWA).

The 2013 Deed contained an exclusive choice of court clause in favour of Western Australia. Plaza, incorporated in Curaçao, sued LDTC, domiciled in the UK, in England, basically questioning its suitability as a trustee for the bonds, citing alleged conflicts of interest (LDTC may or may not have been acting under instruction of ICWA).

Proudman J essentially had to decide whether Article 23 (now Article 25) of the Jurisdiction Regulation in its original version (the recast does not apply) ought to be applied reflexively (protecting choice of court in favour of non-EU courts); alternatively, whether Article 28 of the same Regulation (now Article 30) may be so applied; and what the impact of the CJEU's rejection of *forum non conveniens* is on this all.

*Ferrexpo*, which I review elsewhere, in particular assisted her in holding that reflexive application of Article 23 (now 25) of the Brussels I Regulation is not barred by *Owusu*. The main argument for this approach lies in the judicial economy, which I cite above: the CJEU was asked but did not entertain the question. Moreover Article 23 is a more dominant rule in the Regulation than Article 2's (now 4) rule referring to the domicile of the defendant: a mandatory exception to the rule of Article 2 rather than, in the words of Proudman J, a discretionary exception such as *forum non conveniens*.

Subsidiarily, the High Court also suggested that Article 28's (now 30) rule ought to apply reflexively, although it expressly suggested more discussion of that point is needed and the Article need not be laboured in the case at issue, given its finding on Article 23.

To heap further pressure on the *Owusu* pile, a further potential for undermining the finding in *Owusu* is suggested in the shape of 'case management powers', also suggested in *Jong* and hinted at as potentially introducing *forum non conveniens* through the back door.

With *Plaza v Debenture*, application of *Owusu* by the English courts now is so distinguished that arguably little is left of the CJEU's original intentions. At least, so it is assumed: as I noted above, judicial economy allowed national courts to be creative in their application of the rule. The issue is bound to end up again at the CJEU at some point.

### *2.2.9.3 Conditions with Respect to the Expression of Consent*

Article 25 specifies a number of issues which were left open to interpretation in the original Brussels Convention (some of these issues had already been clarified in earlier amendments of the Convention). In particular, it states specifically that jurisdiction clauses are exclusive lest the parties specifically agree otherwise, and it specifies three possible methods of reaching agreement (see Article 25(1)a–c: the original Brussels Convention only mentioned a).

[306] *Plaza BV v The Law Debenture Trust Corporation PLC* [2015] EWHC 43 (Ch).

The application of each of the possibilities must be guided by one principle only: that the courts satisfy themselves that there was 'true agreement' (Jenard Report)[307] between the parties. This also means that the validity of such clauses must be strictly construed to ensure that the parties have actually consented to the clause and that their consent is clearly and precisely demonstrated (*Saloti*, *Segoura*).[308]

> the validity of clauses conferring jurisdiction must be strictly construed. By making such validity subject to the existence of an 'agreement' between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated. The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established.[309]

The Regulation lists three possible ways in which consent may be expressed (and most importantly, proven).

#### 2.2.9.3.1 In writing or evidenced in writing

There is a considerable amount of CJEU case-law on this issue, in particular on standard terms and conditions in contractual relations. *Colzani* is a standard reference:

> [T]he mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of Article 17, since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction. where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of Article 17 of the Convention is fulfilled only if the contract signed by both parties contains an express reference to those general conditions.[310]

Note that the express reference need not specifically refer to the presence of a choice of court clause in the standard terms and conditions.

In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of 'in writing' is satisfied only if the reference is express and can therefore be checked by a party exercising 'reasonable care' (*Colzani*).[311] It is noteworthy that in both written and oral submissions before the CJEU, quite a number of comments looked at the impact of national law on the validity of the clause, eg with respect to the reference to earlier offers. However the Court did not refer to national law at all,[312]

[307] Jenard Report, 37.

[308] Case 24/76 *Salotti* [1976] ECR 1831; Case 25/76 *Segoura* [1976] ECR 1851; Case 784/79 *Porta-Leasing* [1980] ECR 1517; Case 71/83 *Tilly Russ* [1984] ECR 2417.

[309] *Colzani* (n 298) para 7.

[310] Ibid, paras 9 ff.

[311] Ibid, para 13.

[312] See also Case C-214/89 *Duffryn* [1992] ECR I-1745, paras 13–14, in particular that 'it is important that the concept of "agreement conferring jurisdiction" should not be interpreted simply as referring to the national law of one or other of the States concerned … the concept of "agreement conferring jurisdiction" in Article [25] must be regarded as an independent concept'.

preferring instead to focus solely on the European context of the question (see further below, re validity of the underlying contract).

Application of choice of court in an internet context is a classic 'modern' variety of establishment of consent. An interesting example is *A v P* held by the Brussels Court of Appeal on 25 March 2013. Its judgment is a reminder of the need to take care of the design and formulation of choice of court clauses in standard terms and conditions via the internet. The Court of Appeal first of all correctly held that the alleged non-existence of a contract does not affect its duty to review whether the choice of court agreement which is part of the contract might be valid.

Company P has its registered seat in Poland; company A in Belgium. P had sent A a quote for delivery of a substantial number of solar panels. The judgment did not specify how the offer was sent; however, it was countersigned by A. Subsequent e-mails specified that the panels had to be delivered in Poland. The quote contained a reference to a weblink which contained P's general terms and conditions (GTCs). No further written or verbal reference had been made by the parties to a choice of court agreement. P's standard terms and conditions contained choice of court in favour of the courts at Brussels.

The Court of Appeal referred to *Colzani*, in which the CJEU held that

> in the case of a clause conferring jurisdiction, which is included among the general conditions of sale of one of the parties, printed on the back of the contract, the requirement of a writing … is only fulfilled if the contract signed by the two parties includes an express reference to those general conditions.

The Court of Appeal noted that the standard terms and conditions were not included in the quote; rather, only a reference to a website was made. The Court entertained (but rejected) the possibility of the link being a 'communication by electronic means' within the meaning of Article 25(2) of the jurisdiction Regulation.

I disagree with the guillotine application of *Colzani*'s reference to the inclusion of choice of court in the signed document. Surely *Colzani* can be applied mutatis mutandis to exclusively electronically available GTCs. What is more relevant in my view is the Convention's (and now the Regulation's) emphasis simply on making sure that parties have actually agreed to the clause:

> By making such validity subject to the existence of an 'agreement' between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated. (*Colzani*, para 7)

A simple reference to general terms and conditions in the paper contract signed by the parties offers no more or less certainty that the party who agrees to the other's conditions has actually even read them (indeed as we all know, many never read the small print until it comes to litigation or complaint). What matters more is that it can be reasonably assumed that they had at least the opportunity to do so. That is no less the case in the event of GTCs included on the web.

However, in such case, the party whose GTCs are included on the web needs to ensure that the other party can be reasonably assumed to have consulted them, in the version applicable to the contract at issue. In my view this requires the GTCs to be properly displayed on the website, and, in the event of changes in versions, for them to be numbered accordingly (and for that number or date to have been referred to in the undersigned quote,

or contract, or electronic order). On this, I do agree with the Court of Appeal: the Court pointed out that the weblinked STCs had not been recorded in durable fashion (see Article 25 of the Regulation).

Finally in *El Majdoub v CarsOnTheWeb*,[313] the CJEU itself reviewed choice of court on the internet in the context of so-called 'click-wrap' agreements. Choice of court allegedly had been made in favour of the courts at Leuven, Belgium, in the vicinity of which the seller's parent company had its head office. The buyer, however, sued in Germany, the domicile of the German daughter company (and of the buyer, a car dealer). The buyer claimed that the contract at any rate was with the daughter company, not the mother company, and that choice of court had not been validly made. He submitted that the webpage containing the general terms and conditions of sale of the defendant in the main proceedings did not open automatically upon registration and upon every individual sale. Instead, a box with the indication 'click here to open the conditions of delivery and payment in a new window' must be clicked on (known as 'click wrapping').

In essence, therefore, the question is whether the requirements of Article 25(2) are met only if the window containing those general conditions opens automatically, and upon every sale. That Article, as noted, was added at the adoption of the Brussels I Regulation precisely to address the then newish trend of agreeing to choice of court (and indeed choice of law; but that is not covered by Brussels I) through electronic means.

In line with the requirement not to be excessively formalistic, the CJEU essentially requires that parties be duly diligent when agreeing the choice of court. If click-wrapping makes it possible to print and save the text of those terms and conditions before the conclusion of the contract, then it can be considered a communication by electronic means which provides a durable record of the agreement.

Note that the Court does not hold on whether the agreement is actually reached between the parties; only that click-wrap may provide a durable record of such agreement, where it exists. (One could imagine choice of court having been protested, for instance, or other issues of national law having an impact on the actual existence of the agreement; and one can certainly imagine a continuing discussion on what contract was concluded between what parties in the case at issue.)

#### 2.2.9.3.2 In a Form which Accords with Practices which the Parties have Established Between Themselves

This alternative is directly influenced by the CJEU's decision in *Segoura*[314] where the Court held that the fact that the purchaser does not raise any objections against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions of one of them, and those conditions contain a clause conferring jurisdiction. In such conditions it would be contrary to good faith for the recipient of the confirmation to deny the existence of a jurisdiction conferred by consent, even if he had given no acceptance in writing.

[313] Case C-322/14 *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH* ECLI:EU:C:2015:334.
[314] Case 25/76 *Galeries Segoura SPRL v Société Rahim Bonakdarian* [1976] ECR 1851.

2.2.9.3.3 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

This is of course a factual question which has to be decided by the national courts.[315]

### *2.2.9.4 The Law Applicable to the Formation of Consent*

All the above conditions and in particular the three litterae under Article 25(1) prima facie mention *expression* of consent only.[316] The Court of Justice in its rulings on what was then Article 23 and its Brussels Convention predecessor keeps utterly silent on national conditions relating to the actual formation or existence of consent. Not only does it not entertain the most important common law/English law requirement of 'consideration' (that an agreement needs to have a quid pro quo, however small, before it may be considered a 'contract'); it was silent on much more than that: capacity, mistake, fraud, duress, agency, assignment, etc.[317] All that is said in Article 25 is the requirement of 'agreement' (*parties have* agreed') which, however one looks at it, has to imply a review of substance, rather than formality only.

A good illustration of the limits to what Article 25 regulates is the High Court's finding in *Anchorage*.[318] A bank and a hedge fund were at odds as to whether a handful of instant message communications resulted in a binding contract or contracts and, if so, between which parties and on what terms. The issue for decision at the High Court was whether the disputes should be determined in London (home to the London branch of BNP Paribas and allegedly identified as the exclusive—or not—court of choice in the alleged contracts), New York (home to the hedge fund which, however, also has a separate LLP domiciled in London) or possibly Luxembourg (home to two funds within the Anchorage Group).

For review of the facts, reference is best made to the text of the judgment, for there are many framework agreements, etc, at stake. The High Court's review of the case is, however, most interesting for highlighting the limits to what Article 25 harmonises. The Article aims to ensure a non-formalistic deference to parties' agreement to have their disputes adjudicated in a particular court. As Males J noted (and the CJEU acknowledged), one should not be overly formalistic in applying Article 25.

Article 25, however, does not harmonise the underlying contractual (or not) issues: with whom were contracts made, especially in an agent/principal context; what law applies to the (alleged) choice of court agreement (an issue more or less resolved in the Recast Brussels I Regulation: see below). Males J applied English law to the issue of validity of the clause on the basis, it would seem, of *lex contractus* (which arguably would no longer have been possible after January 2015, as a result of the new Brussels I Regulation—see below): either because of the express determination of such by the parties, or because the *lex contractus*

[315] See eg Case C-106/95 '*MSG*': *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL* [1997] ECR I-911.

[316] See also Heidelberg Report (n 17) paras 324 ff.

[317] See U Magnus, 'Choice of Court Agreements in the Review Proposal for the Brussels I Regulation' in Lein (n 89) (83) 87.

[318] *BNP Paribas v Anchorage Capital Europe et al* [2013] EWHC 3073.

of the agreement of which it forms part is English law by virtue of the Rome I Regulation (reviewed in the relevant chapter). Arguments for the alternative (in particular, application of New York law to the choice of court agreement) are dismissed on the basis that they represent *the kind of semantic approach to such clauses which English law has left firmly behind*.[319]

*Forum non conveniens* (potentially applicable should none of the jurisdictional grounds be valid and given the possibility of New York proceedings) was dismissed; the anti-suit injunction was granted. Here, Males J reviewed the rather grammatical arguments made vis-à-vis the choice of court agreement being used transitively or not; again, the Court took a non-formalistic approach and (respectfully) dismissed the grammatical argument as being elusive.

The strongest indication that the CJEU wishes to keep national law entirely out of the equation when it comes to validity of forum clauses, may be found in *Colzani*,[320] where conditions imposed by national laws were flagged in submissions but ignored by the Court. This problem is even more compounded when one distinguishes between the validity (formal and substantive) of the forum clause, and the validity of the actual underlying agreement. The majority of CJEU authority would seem to favour having the validity of the forum clause to be exclusively determined by the conditions of Article 25. I would however agree[321] that the material validity of the choice of court clause ought to be determined by the *lex contractus*.

The result of the discussion was unsatisfactory, as in practice it left it up to the Member States to decide how to address the substantive validity of choice of court agreements. As a result, 'the law of some Member States refers to the lex fori (since choice-of-forum agreements constitute a procedural contract) whereas others refer to the lex causae' (Heidelberg Report).[322] Consequently choice of court agreements may be considered valid in one Member State and invalid in another. The Heidelberg Report saw scope for remedy under the Draft Common Frame of Reference (DCFR),[323] however I find that suggestion uncharacteristically feeble, as the nature of the DCFR even at the time of compilation of the Heidelberg Report quite evidently did not support this.

When assessing the law which ought to apply to the validity of a forum clause, there are a variety of options:[324]

— *Lex fori prorogati*: the law of the State of the designated forum;
— *Lex fori derogati*: the law of the State which has been derogated from hearing the case (in those instances where the clause has such derogative effect—which is the case in

[319] Even were the validity of the clause not to be upheld, the High Court outlined other jurisdictional grounds: Art 7(1) on the basis of the place of performance of the obligation in question; Art 7(5) on the basis of a contractual dispute closely connected to the operation of a branch; Art 8(1) on the basis of the cases being closely connected (use of London as an anchor defendant against the investment funds).

[320] *Colzani* (n 298).

[321] See also Fawcett and Carruthers (n 188) 287.

[322] Heidelberg Report, para 377.

[323] Ibid, para 378: 'In the long run, it might be helpful in this respect if the planned Common Frame of Reference for European Contract Law will be accepted; in this case a reference to that instrument, which is intended to operate as a toolbox for European legislation and which therefore could also be used for the purposes of Art 23 JR, could be advisable.'

[324] P Kuypers, *Forumkeuze in het Nederlandse Internationaal Privaatrecht* (Antwerpen, Kluwer, 2008) 242.

principle in the Regulation, since it provides that prorogation clauses are in principle exclusive);[325]
— *Lex fori aditi*: the law of the state where the case is actually pending; or
— A combination of any of the above.

Any of the above may of course lead to *lex causae*, typically the *lex contractus*.

This elephant in the room was addressed by the Commission in its proposal for review of the Regulation: the proposal introduced a harmonised conflict of law rule on the substantive validity of choice of court agreements, thus attempting to ensure a similar outcome on this matter whatever the court seized. The Commission proposal at this point firstly did away with the requirement that at least one of the parties be domiciled in the EU, and introduced a harmonised conflict of law rule on the substantive validity of choice of court agreements. The proposal on this point read:

> If the parties have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substance under the law of that Member State.

This proposal lacked a certain degree of precision, as it still did not quite clearly distinguish between formal and material validity of the underlying agreement. Reading the text as it stood, it was not very clear what 'the agreement' in the final part of the sentence referred to. Grammatically it referred to the agreement to confer jurisdiction, in other words the choice of court clause. However, I for one wondered whether the Commission actually meant to refer to the underlying agreement, ie contract.

The Council, in its General Approach document to the review of the Brussels I Regulation[326] did provide for some more clarity. The Council proposed the following with respect to choice of court agreements:

> If the parties, regardless of domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State.

The Commission, as noted, had proposed 'substance' rather than the words 'substantive validity'. The Council also suggested inserting a recital as follows:

> The question as to whether a choice of court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity should be decided in accordance with the law of that Member State. The reference to the law of the Member State of the chosen court should include the conflict of laws rules of that State.

[325] In particular in jurisdictions which do not operate a *forum non conveniens* rule, the difference between exclusive and non-exclusive choice of forum clauses is very relevant. See eg J Fawcett, *Declining Jurisdiction in Private International Law*, Report to the XIVth Congress of the International Academy of Comparative Law (Oxford, Clarendon Press 1995) 51. Under German law, for instance (and outside of the context of the Regulation), in the case of a non-exclusive prorogation, the German court would have to accept jurisdiction, for lack of a *forum non conveniens* safety valve.

[326] Document 10609/12, in particular addendum 1.

It was also the Council that added paragraph 5 to Article 25 as follows:

> 5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
>
> The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Finally, the Council suggested the introduction of a *lis alibi pendens* rule specifically to support choice of court—which I discuss in the next section.

The Council amendment aimed at making the Commission's solution clearer still: the validity of the forum clause, an independent agreement, is determined by the law of the designated forum,[327] including its conflict of laws rules.[328] Of note is that the reference to 'null and void' is not altogether satisfactory, as it leaves unanswered the type of deficiency in consent which does not lead to invalidity of the clause as a whole but rather is 'voidable', ie where there is a deficiency which does away with the deficient part of the clause but otherwise leaves it intact.[329]

The insertion into the Regulation of the *lex fori prorogati* does not always help. In particular, where parties expressly make choice of court non-exclusive (non-exclusive choice of court), or where they designate a plurality of specifically identified courts, the *lex fori prorogati* is not immediately ascertainable. Neither is it in the event of so-called 'unilateral' or 'one-sided' choice of court, which I review below. In my opinion, therefore, at the very least for these cases which are not solved with the new *lex fori prorogati* rule, parties are best advised to continue to (or start to) make separate and express choice of law for unilateral and non-exclusive choice of law.

I would also argue that parties ought to be able to set aside, by express provision, the Regulation's rule on the *lex fori prorogati* determining applicable law for the choice of court agreement, even for exclusive, non-unilateral choice of court. The Regulation's intention is to provide for certainty when it comes to the law applicable to a choice of court agreement. Parties should be allowed to provide such certainty themselves.

#### 2.2.9.4.1 'Unilateral' Jurisdiction Clauses

Also called 'one-sided', 'hybrid' or 'asymmetrical' clauses, these are choice of court agreements where one of the parties, typically the economically stronger one,[330] has a range of jurisdictions to choose from—sometimes expressed in individual terms (eg 'the courts at Amsterdam and the courts at Paris'), more often in abstract terms (eg 'the courts at any State where the Bank has a branch')—while the other party is bound to take the case to a specific court.

[327] See contra, under the current version of the Regulation, the French Cour de Cassation, 26 September 2012 (11-26.022), *La société Banque privée Edmond de Rothschild Europe v X:* when one of the parties to the contract (a bank) can effectively ignore the agreed exclusive forum at will, the clause was held not to be binding under French law, even though the agreed forum was Luxembourg.

[328] See eg as far as residual jurisdiction is concerned, Art 98 of the Belgian Private International Law Act, which in general extends the scope of application of the Rome I Regulation and hence applicability of the *lex contractus* to its excluded areas (which means also, to forum clauses).

[329] See also Magnus (n 317) 93.

[330] This is impossible, of course, where the agreement concerned is subject to one of the protected categories in the Regulation.

Parties would be well advised to insert a specific clause making such a unilateral clause subject to a specifically identified law.

A unilateral choice of court may indeed validly be made in some jurisdictions and not in others. It is inter alia for these clauses that, as noted above, parties would be well advised to identify a specific choice of law that will determine the clause's validity.

In *Rothschild*,[331] the French Cour de Cassation held a unilateral clause to be invalid under French law. It confirmed its view in 2015.[332] In *Credit Suisse*, it extended this view to choice of court in the context of the Lugano Convention.[333] However it later held in *Apple Sales* that a qualified unilateral jurisdiction clause may actually be acceptable as long as options are effectively limited and not open-ended.[334]

In *Jong v HSBC*,[335] the High Court saw no objection in applying such a clause which was valid under Monégasque law (the Brussels I Regulation did not apply), and in among others *Mauritius Commercial Bank* it held similarly for a clause subject to English law.[336,337]

The finding is in contrast with the French Cour de Cassation's stance in *Banque Privee Edmond de Rothschild Europe v X*—which had some calling in the case by virtue of defendants arguing that the jurisdiction agreement ought to be subject to Mauritian law, which is anchored on French civil law. It is noteworthy that claimant was based in Mauritius; the first defendant was a Mauritius-registered company; and the second defendant was the first defendant's parent company and registered in India. Under the 2001 Brussels I Regulation, the clause therefore was not covered by the Regulation. The contract at issue, read:

> Clause 23—Governing Law. This Agreement and any dispute or claim arising out of, or in connection with, it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with English Law.
>
> Clause 24—Enforcement.
>
> 24.1 Jurisdiction
>
> (a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute regarding the existence, validity or termination of this Agreement) (a 'Dispute').
> (b) The Parties agree that the courts of England are the most appropriate and the most convenient courts to settle Disputes and accordingly no Party will agree [sic, obviously a typographical error for argue] to the contrary.

[331] *Rothschild* (n 327).

[332] Cour de Cassation, chambre civile 1, 25 mars 2015, 13-27.264, ECLI:FR:CCASS:2015:C100415.

[333] Cour de Cassation, *Credit Suisse*, 13-27264, 25 March 2015.

[334] Cour de Cassation, *Apple Sales* v *eBizzcuss.com*, 14-16.898, ECLI:FR:CCASS:2015:C101053, 7 October 2015.

[335] *Nancy Jong v HSBC Private Bank (Monaco) SA et al* [2014] EWHC 4165. The plaintiff, Ms Jong, had a contractual dispute with HSBC Monaco SA concerning the proper execution of foreign exchange orders. That the law of Monaco applies was not under dispute. HSBC Monaco's standard terms and conditions, which may or may not apply, contain inter alia a classic unilateral jurisdiction clause: 'Any litigation between the client and the bank shall be submitted to the exclusive jurisdiction of the competent Monaco courts at the offices of the bank location where the account is open. Nevertheless the bank reserves the right to take action at the place of the client's residence or in any other court which would have been competent in the absence of the preceding election of jurisdiction.'

[336] *Mauritius Commercial Bank Limited v Hestia Holdings Limited et al* [2013] EWHC 1328.

[337] In general the common law is quite happy to accept such clauses. See for an example in Hong Kong (which also involves *forum non conveniens* in relation with court proceedings pending in mainland China): *Chinachem Financial Services Ltd v Century Venture Holdings Ltd*, HCA 410/2013.

(c) This Clause 24.1 is for the benefit of the Lender only. As a result the Lender shall not be prevented from taking proceedings related to a Dispute in any other courts in any jurisdiction. To the extent allowed by law the Lender may take concurrent proceedings in any number of jurisdictions.

24.2 Service of Process

(a) The Borrower and the Guarantor shall irrevocably appoint 'Progress Corporate Services Private Limited' presently located at 2, Lansdowne Road, Croydon, Surrey, London CR9 2ER.

The defendants argued that clause 24.1 was invalid under its proper law, whether that of Mauritius or England, and that in the absence of a valid English jurisdiction agreement, the court did not have jurisdiction over Hestia and Sujana. The defendants' challenge to the validity of clause 24.1 rested on two alternative grounds. They alleged that the jurisdiction agreement contained in clause 24.1 remained subject to Mauritian law, notwithstanding clause 23; and that under Mauritian law the jurisdiction agreement was ineffective, as a result of the decision of the French Cour de Cassation in *Rothschild Europe v X*, because it is one sided: it allowed MCB to sue, or insist on being sued, in any jurisdiction in the world, but bound Hestia and Sujana to litigate in England if MCB so choose. Alternatively, it was submitted that if clause 24.1 was governed by English law, it was too one sided to be compatible with fundamental principles regarding equal access to justice and should not be upheld under English law.

The High Court rejected Mauritian law as the applicable law to the clause (although it did entertain the validity under Mauritian law obiter and was not convinced that Rothschild Europe would be applied by Mauritian courts) and saw no problem whatsoever for the validity of the clause under English law. Popplewell J referred to scholarship: 'As Professor Fentiman has observed in a recent article in the Cambridge Law Journal entitled "Universal jurisdiction agreements in Europe" (CLJ (2013) 72 (1) 24–27): "Such unilaterally non-exclusive clauses are ubiquitous in the financial markets. They ensure that creditors can always litigate in a debtor's home court, or where its assets are located. They also contribute to the readiness of banks to provide finance, and reduce the cost of such finance to debtors, by minimising the risk that a debtor's obligations will be unenforceable. Such agreements are valid in English law. … Indeed despite their asymmetric, optional character it is difficult to conceive how their validity could be impugned or what policy might justify doing so …"'.

Arguments based on the ECHR were rejected: 'If, improbably, the true intention of the parties expressed in the clause is that MCB should be entitled to insist on suing or being sued anywhere in the world, that is the contractual bargain to which the court should give effect. The public policy to which that was said to be inimical was "equal access to justice" as reflected in Article 6 of the ECHR. But Article 6 is directed to access to justice within the forum chosen by the parties, not to choice of forum. No forum was identified in which the Defendants' access to justice would be unequal to that of MCB merely because MCB had the option of choosing the forum.' Note Popplewell J's reference to 'improbably'—any chosen forum would have to uphold jurisdiction on the basis of its own conflict of laws rules.

#### 2.2.9.4.2 *Renvoi* and the *Lex Fori Prorogati*

Oddly, the Council has added *renvoi* to the mix (see 'The reference to the law of the Member State of the chosen court should include the conflict of laws rules of that State.'). EU private

international law, for good (mostly practical) reasons typically excludes *renvoi*, as I have noted elsewhere. I am not entirely convinced that adding it here has had any merit,[338] other than of course providing for clarity (although in that case the more logical conclusion, given the aversion against *renvoi* in EU private international law, would have been to exclude *renvoi*). Importantly, it is the private international law of the *chosen court* which will have to be applied: not that of the forum (which may be different). This is relevant in cases where proceedings are not pending before the chosen court (for in such case the new lis alibi pendens rule of Article 31 of the Regulation will oblige all other courts to stay proceedings), and the existence of a forum clause is raised by the defendant.

Whether the *renvoi* that is meant is *renvoi* simple only is not clarified in either text of the Regulation or recital.

It is not clear whether parties may exclude *renvoi*. I would suggest they can (and should). Article 25 as a whole, as I have already mentioned repeatedly, aims at respecting parties' choice as much as possible and without unnecessary formality or complication. Given that exclusion of *renvoi* removes a further layer of complication, I would suggest that parties should be able to do so.

Finally, it is of note that although the new regime under Article 25 on one important issue has aligned the EU with the Hague Convention on choice of court agreements (neither of the parties need to have domicile in the EU), it does differ from that Convention on a number of issues (eg the EU not requiring written agreement).[339] I discuss the EU's accession to the Convention briefly under the relevant heading.

#### *2.2.9.5 Sinking the Torpedo:* Lis Alibi Pendens *for Choice of Court*

The Brussels I Recast has sunk the torpedo which, following the CJEU's finding in *Gasser*, had frustrated so many choice of court agreements. Article 31 now reads:

> 1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.
>
> 2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
>
> 3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.
>
> 4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

#### *2.2.9.6 The EU's Accession to the Hague Convention and the Consequential Priority of the Latter*

The European Commission has been seeking for some time to have the EU accede to the 2005 Hague Choice of Court Convention. The EU finally did so accede at the end of

[338] Contra: Magnus (n 317) 94, who gives four reasons as to why this ought to be welcomed.
[339] Ibid, 91.

2014.[340] The Convention entered into force once the EU had ratified it, and contains three basic rules that give effect to choice of court agreements:

1. The chosen court must in principle hear the case (Article 5);
2. Any court not chosen must in principle decline to hear the case (Article 6); and
3. Any judgment rendered by the chosen court must be recognised and enforced in other Contracting States, except where a ground for refusal applies (Articles 8 and 9).

The EU added a declaration, excluding the application of the Convention to insurance contracts (unlike the recast Brussels I Regulation's provisions re consumers and employees, insurers not domiciled in the EU continue to fall outside the Regulation), in spite of objections. The downside of the complete exclusion of insurance contracts, from the point of view of European insurers, is that choice of court clauses they have negotiated with non-European policyholders would not be recognised and enforced in third States which are Contracting Parties to the Convention. From the perspective of the European policyholders, these have now lost the advantage of having the decisions of EU courts (chosen by the parties) recognised and enforced outside the Union under the Convention. The European Commission, however, was more concerned[341] with the position of the European insureds (as opposed to the insurers). If the Convention were to have been concluded without excluding insurance contracts, there would have been a lack of parallelism with the protective policy established in the Brussels I Regulation which allows the insured party to sue an EU insurer (or a EU branch of third State insurer) in his own place of domicile irrespective of any other jurisdiction available under a choice of court agreement. Not all Member States agreed with the Commission, but it was the latter that won the day.

More generally, the EU's accession naturally put into question the relationship between the Brussels I Recast, the Convention and the Lugano Convention. The European Commission noted that the Brussels I Recast does not 'govern the enforcement in the Union of choice of court agreements in favour of third State courts'. (Ignoring, incidentally, the judgment in *Gothaer*, reviewed elsewhere which achieves the same result in specific circumstances.) This would, in the Commission's view, rather be achieved by the Convention. The Commission suggested that amendments to the Brussels I regulation introduced with the recast of 2012 'have strengthened party autonomy' and now 'ensure that the approach to choice of court agreements for intra-EU situations is consistent with the one that would apply to extra-EU situations under the Convention, once approved by the Union'.

A 'disconnection clause' set out in Article 26(6) of the Hague Convention provides that the Convention shall not affect the application of the Regulation 'where none of the parties is resident in a Contracting State that is not a Member State' of the Union and 'as concerns the recognition or enforcement of judgments as between Member States'.

In its proposal, the Commission suggested that 'the Convention affects the application of the Brussels I regulation if at least one of the parties is resident in a Contracting State to the Convention', and shall 'prevail over the jurisdiction rules of the regulation except

[340] Council Decision 2014/887/EU of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, [2014] OJ L353/5.

[341] COM(2014) 46.

if both parties are EU residents or come from third states, not Contracting Parties to the Convention'.

As regards the recognition and enforcement of judgments, the proposal suggested that the Regulation 'will prevail where the court that made the judgment and the court in which recognition and enforcement is sought are both located in the Union'.

Hence in summary, still according to the proposal, the Convention will 'reduce the scope of application of the Brussels I regulation', but 'this reduction of scope is acceptable in the light of the increase in the respect for party autonomy at international level and increased legal certainty for EU companies engaged in trade with third State parties'.

I am not convinced this was all such a good idea. The above signals a fairly complex regime of scope of application of the Convention/Regulation. The Regulation continues to differ from the Convention (eg in not requiring written agreement for choice of court). Neither does it clearly (in contrast with the recast Regulation) settle applicable law to determine validity of the clause: is it *lex fori prorogati*? In my view it adds a layer of complexity rather than removing some.

### *2.2.9.7 Binding Force of the Choice of Court Agreement on Third Parties*

Ideally, of course, there would be a European rule on whether choice of court is binding upon third parties. However, a third-party effect of contractual arrangements quite clearly is an essential part of national contract law and one that the Member States have so far resisted being harmonised across the EU. Relevant CJEU case-law with respect to bills of lading (*Tilly Russ*[342] and *Coreck Maritime*[343] in particular), insurance contracts for the benefit of a third party, statutes of companies, and trust instruments[344] reveals that in those specific contexts the choice of court agreement does apply to third parties, provided this party succeeds to the first holder of the bill of lading, etc. However, whether such succession actually has taken place is to be determined by the law applicable to that same bill of lading, etc. That deference to the applicable national law, the *lex causae*, makes the CJEU's judgments in this area somewhat nugatory. It would seem a straightforward conclusion that if a party has truly succeeded in another's rights and obligations, then this by default includes that latter's choice of court (and indeed law): for otherwise it would not be true succession.

In *Refcomp*,[345] SNC Doumer ('Doumer') had renovation work carried out on a building complex located in Courbevoie (France), and had taken out insurance with Axa Corporate Solutions Assurance SA ('Axa Corporate'), whose registered office was in Paris. As part of that work, air-conditioning units, each equipped with a number of compressors, were installed; these compressors had been:

— manufactured by Refcomp SpA ('Refcomp'), whose registered office was in Italy;
— purchased from that company and assembled by Climaveneta SpA ('Climaveneta'), whose registered office was also located in Italy;
— supplied to Doumer by Liebert, to whose rights Emerson Network Power ('Emerson'), itself insured with Axa France IARD ('Axa France'), was subrogated, the respective registered offices of which were located in France.

[342] *Tilly Russ* (n 308).
[343] *Coreck Maritime* (n 300).
[344] See review by Magnus in Magnus and Mankowski (n 95) 508 ff and references there.
[345] Case C-543/10 *Refcomp SpA v Axa Corporate Solutions Assurance SA and others* ECLI:EU:C:2013:62.

Irregularities occurred in the air-conditioning system following installation. An expert's report ordered by a court revealed that those failures were caused by a defect in the manufacturing of the compressors. Subrogated to the rights of Doumer, to which it paid compensation as its insured, Axa Corporate summoned the manufacturer Refcomp, the assembler Climaveneta and the supplier Emerson to appear before the Tribunal de grande instance de Paris (Regional Court, Paris), for the purposes of claiming from them *in solidum* compensation in respect of that defect.

The two Italian defendant companies contested the jurisdiction of the Tribunal de grande instance de Paris, relying, in respect of Climaveneta, on an arbitration clause which appearred in the distribution contract between it and Emerson, and, in respect of Refcomp, on a clause conferring jurisdiction on an Italian court which was included in the general terms of the sales contract concluded between itself and Climaveneta.

The Cour d'Appel de Paris held that the objection raised by Climaveneta had to be upheld. It argued it did not have jurisdiction to hear and determine the claim brought against that company on the ground that under French law, in a chain of contracts transferring ownership, an arbitration clause was automatically transferred as an appurtenance to the right of action which is itself an appurtenance to the substantive rights transferred, the homogeneous or heterogeneous nature of the chain being of little importance.

By contrast, the Cour d'Appel de Paris upheld the lower court's rejection of the objection of lack of jurisdiction raised by Refcomp. It justified its decision stating that the rules governing special jurisdiction in matters relating to a contract laid down in (now) Article 7(1) of the Recast Regulation did not apply to a dispute between the sub-buyer of goods and the manufacturer who was not the seller, since such a dispute concerns matters relating to tort or delict, which are governed by the provisions of (now) Article 7(2) of that Regulation, and stated that Article 25 was no longer applicable since the action had no contractual basis.

The case went to the Cour de Cassation, which in turn referred to the CJEU. Jääskinen AG first of all referred to the fact that the Court of appeal's findings are a result of French law on contracts:

> the legal theory according to which, although the principle of privity of contract ordinarily applies, in that contracts are binding only on the parties who have signed them, an exception is nevertheless made to that principle where there is a transfer of ownership, ownership being transferred to all the subsequent purchasers of the goods concerned together with all elements appurtenant to it. It follows that, in French law, the sub-buyer of goods may bring an action for damages against the seller, or against any of the intermediaries who sold the goods or even directly against the manufacturer of those goods. (22)

He then proactively distinguished his Opinion (26–28), in particular that the case at issue only concerns situations where the clause is enforced against the subrogated party, not by it. He would also seem to suggest that his Opinion may only hold where the chain is entirely 'Union' based, ie not where there is a contractual element with parties outside of the EU (however, that might just be me reading too much into the 'Community chain' reference).

Generally, however, the AG firmly played the harmonisation card: choice of court agreements are exempt from the Rome I Regulation; there was therefore no harmonised conflicts rule (I review the current rule in the relevant section, above); leaving it up to national conflict rules creates uncertainty and, as a method, has been abandoned by Regulation 44/2001

(under the old rules on special jurisdiction for contracts, the Court had to find in *Tessili*, reviewed below, that it could not force a European approach to characteristic performance. This has now changed for a number of usual suspects among contract categories).

The issue therefore needs to be given a European interpretation which, the AG suggested on the basis of the exceptional character of Article 25 and the protection of unsuspecting third parties, needs to be that

> a clause conferring jurisdiction agreed between the manufacturer of goods and one of the purchasers of those goods which falls within the scope of the provisions of that article does not produce binding effects against the sub-buyer of those goods who is not party to the contract containing that clause, or against the insurer who is subrogated to the rights of the sub-buyer, unless it is established that that sub-buyer agreed to the clause in accordance with the detailed rules laid down in that article.

While the AG suggested that this is a solution along the lines of the review of the Brussels I Regulation, I disagree: that review has led to a harmonised approach to which conflict of laws rules decide the issue, but not whether privity of contract extends to choice of court agreements. Neither and incidentally, as far as I am aware, does the European Commission proposal for a Common European Sales Law address the issue of subrogation.

The Court effectively confirmed the Opinion, albeit within the boundaries of its customary judicial economy. Like the AG, the Court first of all limited precedent value to a 'chain of contracts under Community law', ie a succession of contracts transferring ownership which have been concluded between economic operators established in different Member States of the European Union. It subsequently reaffirmed the consensual nature of jurisdiction clauses as insisted on by Article 25, and the Brussels Convention before it.

> It follows that the jurisdiction clause incorporated in a contract may, in principle, produce effects only in the relations between the parties who have given their agreement to the conclusion of that contract. In order for a third party to rely on the clause it is, in principle, necessary that the third party has given his consent to that effect.

In a chain of contracts transferring ownership, the relationship of succession between the initial buyer and the sub-buyer is not regarded as the transfer of a single contract or the transfer of all the rights and obligations for which it provides—in contrast with bills of lading for which the Court had previously (Case C-387/98 *Coreck*, referred to above) held that'a jurisdiction clause incorporated in a bill of lading may be relied on against a third party to that contract if that clause has been adjudged valid between the carrier and the shipper and provided that, by virtue of the relevant national law, the third party, on acquiring the bill of lading, succeeded to the shipper's rights and obligations'.

Basically, under French law and French law (almost) alone, the action by Doumer against Refcomp would, exceptionally, be considered contractual. In the other Member States, it would not. To refer, the CJEU held, the assessment as to whether the sub-buyer may rely on a jurisdiction clause incorporated in the initial contract between the manufacturer and the first buyer to national law would give rise to different outcomes among the Member States liable to compromise the aim of unifying the rules of jurisdiction pursued by the Regulation. The concept of 'jurisdiction clause' referred to in that provision therefore must be interpreted as an independent concept, guided by the need to give full effect to the principle of freedom of choice on which Article 25(1) of the Regulation is based.

The CJEU therefore held that:

> Article 23 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that a jurisdiction clause agreed in the contract concluded between the manufacturer of goods and the buyer thereof cannot be relied on against a sub-buyer who, in the course of a succession of contracts transferring ownership concluded between parties established in different Member States, purchased the goods and wishes to bring an action for damages against the manufacturer, unless it is established that that third party has actually consented to that clause under the conditions laid down in that article.

A recent application of the transfer issue is *Goldman Sachs v Novo Banco*[346] where the High Court, having decided that the claim falls under the Regulation, subsequently had to decide whether Novo Banco was subject to the choice of court, in favour of the English court, part of the facilities agreement between the initial parties. As the case concerned a transfer of claims and not a contractual chain, *Refcomp*, reviewed above, does not apply (Hamblen J did not refer to it). The matter needs to be decided by the *lex causae*, here the *lex contractus*: English law. Upon consideration of the various arguments, the High Court held that the choice of court clause had so been transferred together with the original claims.

In *CDC*,[347] the Court was asked to give input on the issue of choice of court, and arbitration clauses, in the agreements between the victims of a cartel, and those guilty of the cartel: do such clauses have any impact on the legal position of CDC, which had acquired the rights to seek damages for the cartel infringement? The AG suggested, in line with most national case-law,[348] that such clauses cannot include follow-up damages for cartel infringement: for the latter is arguably not within the legitimate contractual expectations. This would be different for such clauses concluded after the tort has been committed as Article 25 of the Regulation allows parties to agree on a different forum than those identified in the special jurisdictional rules. The AG found additional support for this argument in the overall objectives of the very recent Directive 2014/104, the damages Directive. He took the opportunity to argue that in the case of arbitration clauses, these may hinder the *effet utile* of Article 101 TFEU, just as choice of court clauses might, unless parties are shown beyond doubt to have consented to the clause, and provided the tribunal or court at issue is under an obligation to apply EU competition law as matter of public policy. (Whether that is the case is subject to national law.)

The Court followed the AG's lead. Such clauses are not generally applicable to liability in tort (the clause would have to refer verbatim to tortious liability). Neither do they in principle bind third parties, lest of course there be subrogation (*Refcomp*). (The referring national court has given very little detail on the clauses at issue and hence the CJEU noted that it could not reply to all questions referred.)

[346] *Goldman Sachs International v Novo Banco SA* [2015] EWHC 2371 (Comm).

[347] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others* ECLI:EU:C:2015:335.

[348] See also van G Calster, 'De Europese IPR regels inzake bevoegdheid en toepasselijk recht bij schadeloosstelling na mededingingbeperkende gedragingen' in D Arts, W Devroe, R Focqué, K Marchand and I Verougstraete (eds), *Mundi et Europae Civis: Liber Amicorum Jacques Steenbergen* (Brussel, Larcier, 2014) 543–54.

### 2.2.10 General Jurisdiction: Defendants Domiciled in a Member State Where a Court is Seized: Article 4

The general jurisdictional rule of the Regulation reflects the maxim *actor sequitur forum rei*: the plaintiff follows the forum of what is under dispute, meaning the plaintiff sues in the jurisdiction where the subject of the lawsuit or the defendant is located, rather than the *forum actoris* rule, which would give preference to the jurisdiction of the plaintiff. The maxim was originally conceived in the law of obligations, making it incumbent on the creditor to go and collect the performance due to him.[349] The drafters of the original Brussels Convention opined that the maxim expresses the fact that the law leans in favour of the defendant. Arguably and without going into the legal philosophy merits of the discussion, while in criminal law indeed this certainly tends to be true, I am less aware of civil law 'in fact' leaning in favour of the defendant. The reflection in the Brussels Convention is relevant, for indeed throughout the Convention there is more than passing deference to the rights and interests of the defendant. While perhaps it may be disputed whether in civil law this necessarily is or ought to be the overall rule, it certainly is a starting point which the Convention had every right to opt for. However as already discussed in the first chapter, the professed bias in the Convention for the position of the defendant, is less evident in the case of the transformation of the Convention into the Regulation.

'Domicile' has already been discussed above. And I have also already emphasised:

— that the 'general' jurisdictional rule of the Regulation is not actually all that 'general', given its many exceptions and its low rank in the actual hierarchy; and
— that despite this low rank, its 'general' nature nevertheless reverberates throughout the Regulation, in that all exceptions to the general rule need to be applied strictly.

The 'domicile' of the defendant determines the Member State of jurisdiction only. A defendant domiciled in a Member State need not necessarily be sued in the court for the place where he is domiciled or has his seat. He may be sued in any court of the State where he is domiciled which has jurisdiction under the law of that State. The internal rules of jurisdiction of that State determine where precisely the defendant needs to be sued.

### 2.2.11 'Special' Jurisdiction: Defendants Domiciled in Another Member State: Articles 7–9

In US jargon this is what is called 'specific' jurisdiction. It applies only where there is an appropriate connection or 'close link'[350] between the cause of action and the state of the forum.

In *Walden v Fiore*, the United States Supreme Court explained the term as follows:

> 'Specific' or 'case-linked' jurisdiction 'depends on an "affiliation between the forum and the underlying controversy"' (ie, an 'activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation'). *Goodyear Dunlop Tires Operations, SA v Brown*, 564 US

[349] In German civil law: *Holschuld*.
[350] Case C-386/05 *Color Drack GmbH* v *Lexx International Vertriebs GmbH* [2007] ECR I-3699.

(2011) (slip op, at 2). This is in contrast to 'general' or 'all purpose' jurisdiction, which permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit (eg, domicile).[351]

Hence 'special jurisdiction' may arguably be regarded as an application of *forum* conveniens—although a forum non conveniens argument can certainly not annihilate jurisdiction on the basis of Articles 7–9. There are many categories of special jurisdiction in Article 7; multipartite litigation is considered in Article 8; and the specific case of liability in maritime cases in Article 9. However, as far as Article 7 is concerned, for a volume such as the current one, Article 7's special jurisdictional rules for contracts and torts would seem the most relevant ones. (Article 7(5) with respect to disputes arising out of the operation of a branch, agency or other establishment, is often applied in a consumer contract context—where it broadens the possibilities for consumers to pick a forum on the basis of practical considerations, as well as in disputes between companies and intermediaries.)[352]

Special jurisdictional rules create a supplementary jurisdiction. In the case of proceedings for which a court is specifically recognised as having jurisdiction under these Articles the plaintiff may, at his option, bring the proceedings either in that court or in the competent courts of the State in which the defendant is domiciled: the general rule of Article 4 of the Regulation is not affected by the rules on special jurisdiction.

It is important to note that the special jurisdictional rules of the Regulation do not just identify a Member State in which can be sued: the provisions identify a specific court in that Member State and hence trump national rules of civil procedure. That is clear from the use of the wording 'in the courts' in each of the subparagraphs, while the remainder of the Regulation uses the term 'courts of the Member State'. National procedural rules that override this are arguably incompatible with the Regulation.[353]

### *2.2.11.1 Article 7(1): Actions Relating to a Contract*—Forum Contractus

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
      — in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
      — in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
   (c) if point (b) does not apply then point (a) applies;

[351] USSC 12-574 *Walden v Fiore et al*, 25 February 2014.

[352] See for more details Fawcett and Carruthers (n 188) 258 ff, and references to four core cases at the CJEU: Cases 14/76 *De Bloos*; 33/78 *Somafer*; 139/80 *Blanckaert*; and 218/86 *Sar Schotte*. This provision concerns only defendants domiciled in a Member State (Art 7(5)), ie companies or firms having their seat in one Member State and having a branch, agency or other establishment in another Member State. Companies or firms which have their seat outside the Union but have a branch, etc, in a Member State are covered by (now) Art 6: see Jenard Report, 26.

[353] Eg 2013 rules of Italian Civil Procedure (Decree of 23 December 2013, n 145). They aim to increase the expertise of specialised courts where foreign companies are involved as either plaintiff or defendant. Court specialisation (such as in the Italian rules, for antitrust cases) would seem to run counter to Arts 7–9, even if well intended.

The original provision in the Convention read: 'in matters related to a contract, a person domiciled in one Member State can, in another Member State, be sued in the courts of the place of performance of the obligation in question'. Article 7(1) was twice amended: once in the Convention to include more specific provisions for employment contracts (now Article 20, see above); and a second time in the Regulation to include specific provision for the sale of goods and for services, the details of which we shall see below.

2.2.11.1.a When Does a Claim Relate to a 'Contract'?

In the overall spirit of the Regulation, the CJEU insists that this be a European concept, not one left to national law (*Martin Peters*):

> Having regard to the objectives and the general scheme of the Convention, that it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned. Therefore … the concept of matters relating to a contract should be regarded as an independent concept which, for the purpose of the application of the Convention, must be interpreted by reference chiefly to the system and objectives of the Convention, in order to ensure that it is fully effective.[354]

However, once jurisdiction settled on the basis of the Regulation, national law regains discretion to requalify the 'contract' as 'tort', or indeed as anything else, for deciding upon applicable law/choice of law, albeit that there is increased harmonisation on this issue, too (see further below, the review of the Rome I and II Regulations).

The Court has not been able to give a truly 'European' positive definition of 'contract'. There is a certain level of abstract clarification in CJEU case-law,[355] however in unclear cases parties have to wait for certainty until the CJEU holds upon judicial review. In *Handte* the Court held:

> the phrase 'matters relating to a contract [] is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.[356]

However this is not quite the same as saying that there has to be an 'obligation freely assumed' for Article 7(1) to apply (note the use of the double negative in the court's judgment), hence *Handte* did not settle all dust. *Engler* clarified things to some degree.

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In *Engler*, Ms Engler received a letter personally addressed to her at her domicile from Janus Versand, which carries on business as a mail order company. That letter contained a 'payment notice', whose form and content led her to believe that she had won a prize of ATS 455 000 in a 'cash prize draw' organised by Janus Versand, and a catalogue of goods marketed by the latter (which apparently also called itself, in its relations with its customers, 'Handelskontor Janus GmbH') with a 'request for a trial without obligation'. In the advertising brochure sent to Ms Engler, Janus

[354] Case 34/82 *Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* [1983] ECR 987, paras 9–10.

[355] Sometimes quite abstract indeed: eg in *Martin Peters*, ibid, para 13, the Court simply referred to 'close links of the same kind as those which are created between the parties to a contract'.

[356] Case C-26/91 *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] ECR I-3967, para 15.

Versand stated that it could also be contacted on the Internet at the following address: www.janus-versand.com. On the 'payment notice' the word 'confirmation' appears in the title together with the winning number printed in bold characters. The name and address of the addressee and beneficiary of the payment notice are those of Ms Engler, and it is accompanied by the words 'personal—not transferable'. The 'payment notice' states, also in bold print, the amount of the prize in figures (ATS 455 000) and the same amount in letters underneath, together with a confirmation signed by a Mr Ulrich Mändercke, certifying that 'the amount of the prize stated is correct and in accordance with the document in our possession', the words 'chambers and office of certified and sworn experts' accompany that signature. Furthermore, Ms Engler was requested to affix to the 'payment notice', in the space provided for that purpose, the 'official stamp of the chambers' accompanying the letter and to return the request for the 'trial without obligation' to Janus Versand. A box for the date and signature, a request to 'fill it in' and a reference in small print to the terms and conditions and the award of the prize supposedly won also feature on the 'payment notice'. Ms Engler had to declare on the 'payment notice' that she had read and accepted those conditions. Finally, it also urged the addressee to return 'today' the document duly completed in order that it could be processed, and an envelope was attached for that purpose. In those circumstances Ms Engler, as Janus Versand had requested, returned the 'payment notice' to it, as she believed that that was sufficient in order to obtain the promised prize. At first Janus Versand did not react, it then refused to pay that sum to Ms Engler. Ms Engler therefore brought an action against Janus Versand before the Austrian courts, based primarily on Paragraph 5j of the Konsumentenschutzgesetz, for an order that Janus Versand pay her the sum of ATS 455 000, plus costs and ancillary amounts. Ms Engler argues that that claim is a contractual claim since Janus Versand, by promising to award a prize, had encouraged her to conclude a contract with that company for sale of goods. However, such a claim is also founded on other grounds, in particular, the breach of pre-contractual obligations. In the alternative, Ms Engler takes the view that her claim is brought in tort, delict or quasi-delict. Janus Versand contested the jurisdiction of the Austrian courts to hear the claim stating, first of all, that the letter on which that claim is founded did not come from it but from Handelskontor Janus GmbH, a company which is a separate legal entity; second, that it had not promised any prize to Ms Engler and, finally, that it did not have any contractual relationship with her. On 2 October 2001 the Landesgericht Feldkirch (Austria) dismissed Ms Engler's action for lack of jurisdiction, since it held that she had not shown the connection between Janus Versand and the sender of the prize notification, namely 'Handelskontor Janus GmbH, Postfach 1670, Abt. 3 Z 4, D-88106 Lindau': domiciled in Germany.

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In *Engler* the CJEU firstly confirmed the subsidiary nature of the jurisdictional rule for tort, and hence the need to review the applicability of the rule for contracts, first.[357] It subsequently clarified the use of the double negative in the *Handte* formula, holding that

> the application of the rule of special jurisdiction provided for matters relating to a contract in Article 5(1) presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based.[358]

The facts in *Engler* and the subsequent finding by the CJEU would seem to suggest that there need not be a mutual element in the relationship for it to fall under the notion of 'contract' in Article 7(1)—which incidentally under Article 17, as noted, is required in the context of consumer 'contracts'. In *Ilsinger* the Court hinted obiter that a situation without mutual legal obligations, 'would at most be liable to be classified as pre-contractual or quasi contractual and might therefore, where appropriate, be covered solely by Article 5(1) of [the] regulation, a provision which must be acknowledged as having, on account of its wording and its position in the scheme of that regulation, a broader scope than that of Article 15 thereof'[359] although to be complete the Court also held in the same judgment

[357] Case C-27/02 *Petra Engler v Janus Versand GmbH* [2005] ECR I-481, para 29.
[358] Ibid, para 51.
[359] *Ilsinger* (n 255) para 57.

> It follows that, although the Court has held that the application of the first paragraph of Article 13 of the Brussels Convention is limited to contracts which give rise to reciprocal and interdependent obligations between the parties, basing itself, moreover, expressly on the wording of that provision referring to a 'contract for the supply of goods or a contract for the supply of services' (see Gabriel, paragraphs 48 to 50, and Engler, paragraphs 34 and 36), the scope of Article 15(1)(c) of Regulation No 44/2001 appears, by contrast, to be no longer being limited to those situations in which the parties have assumed reciprocal obligations.

Frankly, I am confused, perhaps due the German/Austrian specialty of litigation on tombolas/price notifications by direct mail.[360]

It is also noteworthy that jurisdiction to hear disputes concerning the existence of a contractual obligation must be determined in accordance with Article 7(1) of the Regulation and that that provision is therefore applicable even when the existence of the contract on which the claim is based is in dispute between the parties (*Effer*)[361] (which is what is meant by the CJEU's statement that 'Article 5(1) does not require the conclusion of a contract'), albeit that the identification of an obligation is none the less essential for the application of that provision, since the jurisdiction of the national court is determined in matters relating to a contract by the place of performance of the obligation in question (*Tacconi*).[362]

#### 2.2.11.1.b Jurisdictional Consequences

In its original form, as noted, (now) Article 7(1) gave jurisdiction to the courts 'for the place of performance of the obligation in question'; in French: 'devant le tribunal du lieu où l'obligation qui sert de base à la demande a été ou doit être exécutée'; in Dutch 'voor het gerecht van de plaats waar de verbintenis die aan de eis ten grondslag ligt, is uitgevoerd of moet worden uitgevoerd'. The English version in fact is far from the clearest.

'The obligation in question' was left undefined in both the Convention and the preparatory works. Indeed the Jenard Report is very brief on the special jurisdictional clause for contracts. In *De Bloos* the Court specified:

> For the purpose of determining the place of performance within the meaning of Article 5 … the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based.[363]

This really is not a straightforward question whatsoever, as it is by no means easy or even possible for this obligation to be determined. Indeed in complex (or even fairly straightforward ones, such as distribution agreements) contracts there may be quite a variety of such obligations which one has to base one's action on. In such a case (unless of course the plaintiff chooses to consolidate the case by suing in the place of the defendant only), for each specific obligation the court(s) seized would establish 'place of performance' and hence jurisdiction on the basis of its own private international law rules for applicable law. It applied its choice of law rules to determine which law governs the contract, and then uses

[360] See also U Magnus and P Mankowski (eds), *Brussels I Regulation* (Munich, Sellier, 2007).

[361] Case 38/81 *Effer SpA v Hans-Joachim Kantner* [1982] ECR 825, paras 7 and 8.

[362] Case C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)* [2002] ECR I-7357, para 22.

[363] Case 14/76 *A De Bloos, SPRL v Société en commandite par actions Bouyer* [1976] ECR 1497.

that law to specify the place of performance. This ultimately means that the court seized may decide it does, does not, or does have jurisdiction but only over part of the claims.

The Court in *Tessili v Dunlop* held that it was in no position to impose a European definition:

> having regard to the differences between national laws of contract and to the absence at this stage of legal development of any unification in the substantive law applicable, it does not appear possible to give any more substantial guide to the interpretation of [] 'place of performance' of contractual obligations. This is all the more true since the determination of the place of performance of obligations depends on the contractual context to which these obligations belong.[364]

*Tessili* therefore is one of few cases where the CJEU does not insist on an autonomous 'European' interpretation of a harmonised private international law concept. Arguably the *Tessili* deference to national law, also applies to determining whether a particular contract is one for the sale of goods, or for the provision of services. Transport contracts, for instance, may be regarded as either one, depending on the law of the Member State concerned and in the absence of European harmonisation.

The impact of *Tessili* in this context was recently also discussed by the AG and the CJEU in *Corman-Collins*, which I discuss below.[365]

Article 7(1) was amended at the time of adoption of Regulation 44/2001 to harmonise 'the place of performance' at least for two categories of contracts (the most standard contracts): contracts for the sale of goods and the provision of services. For those contracts at least there will therefore be one place of jurisdiction: see the extract from the Regulation above. For these two, the 'place of performance of the obligation in question' is now settled, even if the actual claim is eg for the payment of the price. In other words the connecting factor which the Regulation identifies, is the connecting factor for all claims arising out of that contract: not just those attached to the connecting factor itself (*Color Drack*).[366]

Article 7(1)(b) is the exception. Where the conditions for the two specific categories of contracts in point b (previously called 'subparagraph b') are not fulfilled, the general rule of point 1(a) regains application. In other words, where the conditions of point b are not fulfilled (eg where place of delivery or of provision of services lies outside any Member State, or where there is no sale but rather eg lease), and where parties have 'agreed otherwise', and for all other contracts than those in the subpar.

Where parties 'have agreed otherwise', such a choice must conform to Article (1)(a): ie parties choice has to relate to the genuine place of performance (unless of course parties have agreed a proper choice of court agreement under Article 25, abiding by all whistles and bells of formality (which are less strict in Article 7). See in this respect also *MSG*:[367]

> An oral agreement on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts for a particular place have jurisdiction, is not governed by Article 5(1) of the Convention, but by Article 17, and is valid only if the requirements set out therein are complied with. Whilst the parties are free to agree on a place of performance for contractual obligations which

[364] Case 12/76 *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1473, para 14.
[365] Case C-9/12 *Corman-Collins SA v La Maison du Whisky SA* ECLI:EU:C:2013:860.
[366] See also *Color Drack* (n 350) para 26.
[367] *MSG* (n 315) above.

> differs from that which would be determined under the law applicable to the contract, without having to comply with specific conditions as to form, they are nevertheless not entitled, having regard to the system established by the Convention, to designate, with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract at which the obligations arising under the contract could not be performed in accordance with the terms of the contract.

It is noteworthy that the simple reference to Incoterms (published by the International Chamber of Commerce, these are widely used in international commercial transactions and are shorthand for a number of pre-defined contractual obligations) in the contract is not always solidly accepted by the courts as being an 'agreement' for place of performance within the meaning of Article 7,[368] with the CJEU not denying relevance to Incoterms (such as ex works, in *Electrosteel*),[369] but insisting that even with the use of Incoterms, courts still have to make reference to all relevant terms and conditions in the agreement so as to determine the place of delivery. (See similarly, albeit outside the context of Incoterms, *Car Trim*.)[370] Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place at least for the sale of goods, the CJEU held, is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

For 'place for performance' for all other contracts outside the specific two categories of point (b), the *Tessili* formula referred to above still stands: there is no European definition and national rules take over. (As noted, however, the Rome I Regulation now offers much greater harmonisation in the applicable law exercise for contracts.)

[368] See for instance in Rechtbank Rotterdam in *Roonse Recycling & Service BV v BSS Heavy Machinery GmbH,* ECLI:NL:RBROT:2015:5292, re the use of the Incoterm CPT (carriage paid to). The Court at Rotterdam first of all discussed the factual circumstance of a possible choice of court agreement between parties, in favour of the courts at Eberswalde (Germany). Such choice of court is made in the general terms and conditions of seller, BSS. Whether parties had actually agreed to these, was in dispute. Roonse suggests the reference on the front page of the order form to the general terms and conditions on the backside ('*umseitiger*') was without subject for that back page was blank. The court therefore suggests that agreement depends on whether, as was suggested, the standard terms and conditions were attached (stapled, presumably) to the order form. Whether this was the case is a factual consideration which Rotterdam does not further entertain for even if the choice of court agreement is invalid, the court found it would not have jurisdiction under the only other alternative: Article 7(1) special jurisdictional rule for 'contracts'.

Roonse suggest that the parties had agreed that the contract, a delivery of good, is performed in Rotterdam for that, it argues, is where delivery took place per the Incoterm CPT (carriage paid to).

Rotterdam in casu held the Incoterm CPT Rotterdam as being mostly a reference to costs, not place of delivery. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place at least for the sale of goods, the CJEU held, is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction. In casu, this was found to be in the geographical jurisdiction of the courts at Den Haag. Given that Article 7(1) does not merely identify the courts of *a* Member State but rather a specific court within a Member State, Rotterdam has no jurisdiction.

The incoterm 'ex works' was at issue in *Cimtrode The Electrode Company GmbH v Carbide BV* at Gerechtshof 's-Hertogenbosch, ECLI:NL:GHSHE:2015:3396. The court held inter alia that whether the incoterm was actually part of the agreement between parties, could only be judged in accordance with the lex causae. The agreement was a verbal agreement, and any choice of court which one of the parties claimed had been made, had not been confirmed in writing. Reference to relevant standard terms and conditions on the invoices sent later, following execution of the agreement, could not, the court held, be regarded as confirmation of the choice of court.

[369] Case C-87/10 *Electrosteel Europe SA v Edil Centro SpA* [2011] ECR I-4987.

[370] Case C-381/08 *Car Trim GmbH* v *KeySafety Systems Srl*, [2010] ECR I-1255.

What if the place of the *actual* delivery of the goods or indeed services, differs from what had been agreed? In the Brussels Convention, the French and indeed Dutch versions of the Convention seemed to suggest that actual delivery take priority; in French: 'devant le tribunal du lieu où l'obligation qui sert de base à la demande a été ou doit être exécutée'; in Dutch 'voor het gerecht van de plaats waar de verbintenis die aan de eis ten grondslag ligt, is uitgevoerd of moet worden uitgevoerd'. These versions identified special jurisdiction as lying either with the courts of the State where delivery had actually taken place or, if no delivery at all had taken place, where it should have taken place. Actual delivery took precedence over consented delivery, if such delivery had already taken place. This, however, does lead to the unwarranted result that the party which in spite of consented place of delivery, delivered elsewhere, is able to determine the additional forum. (I am assuming here that defendant objects to jurisdiction, for otherwise parties simply appear voluntarily and the discussion is not relevant.) In my view, if the place of the actual delivery of the goods, or indeed services, differs from what had been agreed, by virtue of Article 7(1)(c), Article 7(1)(a) will regain the upper hand and the place of actual 'performance' (determined as per *Tessili* by the *lex fori* rules for applicable law) will decide special jurisdiction.

In *Corman-Collins*[371] the CJEU was asked to clarify the meaning of 'services'. The questions referred were as follows:

> Should Article 2 of Regulation No 44/2001, where appropriate in conjunction with Article 5(1)(a) and (b), be interpreted as precluding a rule of jurisdiction, such as that set out in Article 4 of the Belgian Law of 27 July 1961, which provides for the jurisdiction of Belgian courts where the exclusive distributor has its registered office in Belgian territory and where the distribution agreement covers all or part of that territory, irrespective of where the grantor of the exclusive distribution rights has its registered office, where the latter is the defendant?
>
> Should Article 5(1)(a) of Regulation No 44/2001 be interpreted as meaning that it applies to an exclusive distribution of goods agreement, pursuant to which one party purchases goods from another party for resale in the territory of another Member State?
>
> If Question 2 is answered in the negative, should Article 5(1)(b) of Regulation No 44/2001 be interpreted as meaning that it refers to an exclusive distribution agreement, such as that at issue between the parties?
>
> If Questions 2 and 3 are answered in the negative, is the contested obligation in the event of the termination of an exclusive distribution agreement the obligation of the seller-grantor or that of the buyer-distributor?

Corman-Collins was registered in Belgium; La Maison du Whisky in France. Jääskinen AG justifiably replied to the first question in succinct fashion: where a defendant is domiciled in a Member State other than the Member State of the forum, the Brussels I Regulation has priority over national jurisdictional rules (such as here: the 1961 Act on 'concession' agreements).

The second and third questions were rephrased by the AG but also re-ordered: (now) Article 7(1)(b) of the Regulation, being the more specific, has priority over Article 7(1)(a). Jääskinen AG then pointed to an important difficulty: 'concession' agreements are not a concept known in EU law (in contrast, for instance, with 'agency'). In view of the need for

[371] Case C-9/12 *Corman-Collins SA v La Maison du Whisky SA* ECLI:EU:C:2013:860.

autonomous interpretation, the qualification or not of a contract as a 'sale of goods' or 'provision of services' must not be left to national law (and ditto courts) to decide. The AG opted for 'services': sale of 'goods' is not the core distinguishing element in a 'concession' agreement, he argued—it is more than that: the holder of the concession rights is explicitly allowed by the other party, to distribute their goods in a given territory, indeed often this right is an exclusive right; holder and grantor often agree common sales techniques (indeed in the case at issue, use by the holder of a domain name indicating the grantor's trading name); the concession agreement usually is a framework agreement, followed by individual sales agreements. Moreover, the holder commits to holding stock; to having an after-sales service; frees the grantor from the requirement to have to establish their own distribution network in the territory; the grantor organises specific training sessions for the holder's staff; etc. The holder therefore effectively provides a 'service', and jurisdiction has to be determined by Article 7(1)(b), second indent.

Proof of whether such elements are present in the contractual relationship between parties needs to be furnished by the party invoking the jurisdictional rule based on 'services'; qualifications in accordance with *lex fori* are not relevant for such determination (European law, in other words, harmonises qualification).

The final question, which the AG only entertained in subsidiary fashion, concerned the issue of what part of the contractual relationship needs to be withheld as 'the obligation in question' of Article 7(1)(a): 'in matters relating to a contract, in the courts for the place of performance of the obligation in question'. The concession holder in the case at issue (*Corman-Collins*) argued that where the grantor's obligation entails delivery of the exclusive right for the holder to exercise an exclusive right of sale in a given territory, the suit for damages needs to be introduced in that territory.

A plaintiff's suit inevitably leans upon a defendant's contractual obligations: it is the latter which determines 'the obligation in question'. Where that place of performance lies, however, as noted, remains subject to national law: the Court in *Tessili* held that it was in no position to impose a European definition. Jääskinen AG did not venture to give one either: outside of the specific categories of Article 7(1)(b), European conflicts law has no grip on the qualification of contracts and their 'place of performance' by national courts.

The Court, like the AG, held in favour of 'services': such is the diverse nature of the various obligations in the contractual relationship. Given its confirmation of the contract falling under Article 7(1)(b), first indent, of the Brussels I Regulation, the Court did not answer the final, subsidiary, question, which questioned the amount of European harmonisation of 'place of performance of the obligation in question' under Article 7(1)(a).

In *Krejci*,[372] storage of goods was held to be a 'service'.

What if there is more than once place to where the goods are to be delivered? Does 7(1)(b) apply or 7(1)(a)? In *Color Drack*, which was the first case under the new Article 7(1), the CJEU first of all notes that its judgment only holds on the situation where there are various points of delivery within one Member State (at para 16): hence not if delivery takes place in two or more Member States, neither if in two States, one of which is not a Member State. The Court subsequently refers to the general idea behind special jurisdiction: a particularly close linking factor between the contract and the court called upon to

[372] Case C-469/12 *Krejci Lager & Umschlagbetriebs GmbH v Olbrich Transport und Logistik GmbH* ECLI:EU:C:2013:788.

hear the litigation, so as to ensure efficient organisation of the proceedings (at para 40). It then decides that consequently if there are several places of delivery, the national court needs to identify that with the closest connecting factor, which is the place of the 'principal delivery' (to be determined on the basis of economic criteria).

If there is no such place of principal delivery: the plaintiff may sue the defendant in the court of the place of delivery of its choice.

It is reasonable to assume but not certain that once sued in one place, that court will become the only court to hear all issues related to the contract: in other words the collective nature of Article 7(1)(b) then revives. It is also reasonable to assume that if there is delivery in more than one Member State, the old case-law presumably still stands: the place of principal delivery has to be determined, and if this is not possible, then there will only be special jurisdiction over a portion of the claim (presumably the court seized will want to avoid that and find a place of principal delivery or indeed of principal obligation in the event of more than one obligations relied on).

In *Wood Floor Solutions*,[373] the CJEU held that the presumption of Article 7 also holds in the case of services provided in several Member States (as opposed to just one), and went on to instruct the national court in detail where the 'place of performance of the obligation' lies in the case of commercial agency contracts.

A perfect illustration of the challenges to, and limitations of, the rule in Article 7(1), is *GDF Suez* at the High Court.[374]

### *2.2.11.2 The Special Jurisdictional Rule for Tort: Article 7(2)*—Forum Delicti Commissi

> Article 7
>
> A person domiciled in a Member State may, in another Member State, be sued: …
>
> 2. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

Road accidents were a particular reason for including a special jurisdictional rule on torts in the Convention.

[373] Case C-19/09 *Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA* [2010] ECR I-2121.

[374] *Canyon Offshore Limited v GDF Suez E&P Nederland BV* [2014] EWHC 3810. Starting with the very discussion of whether there was a contract at all between parties (a prima facie case of which is required to trigger Art 7; put differently: there need not even be solid proof of such contract existing), into the discussion of 'goods' v 'services'; back to the at first sight very, very puzzling fall-back provision of the third indent of the Article ('(c) if subparagraph (b) does not apply then subparagraph (a) applies'); finally, to the determination of 'the place of performance of the obligation in question'.

The claimant, Canyon was a Scottish company with its registered office in Aberdeen. The defendant applicant, GDF, a Dutch company, was a large owner and operator of oil and gas fields. GDF contracted with Cecon NL BV for the transportation and installation of pipelines. Cecon subcontracted to Canyon. Cecon fell behind in payments and GDF committed to paying relevant subcontractors directly. Canyon relied on that alleged contract and on that contract allegedly having its place of performance in the UK.

Mackie J did an absolutely perfect job of taking the case through Art 7's cascade, with impeccable reference to relevant CJEU case-law.

2.2.11.2.1 The Concept of 'Tort'

In *Kalfelis*, the CJEU defined 'tort' as

> all actions which seek to establish liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1).[375]

The concept necessarily has to be an autonomous, European one. Reference to national law to define it is out of the question, as was recently illustrated by the CJEU's findings in *Melzer*.[376] Mr Melzer, who was domiciled in Berlin, was solicited as a client and looked after by telephone by the company Weise Wertpapier Handelsunternehmen (WWH), whose registered office was in Düsseldorf. That company opened an account for Mr Melzer with MF Global UK Ltd, a brokerage house located in London, which traded in stock market futures for Mr Melzer in return for corresponding fees. Mr Melzer brought proceedings before the Landgericht Düsseldorf claiming that MF Global UK should be ordered to pay him damages equivalent to the difference between what he had paid out and what he had received in the context of those transactions, namely €171,075.12, with interest. WWH had not been implicated in the proceedings. In support of his claims, Mr Melzer maintained that he had not been sufficiently informed about the risks involved in futures trading, so far as options contracts were concerned, either by WWH or by MF Global UK.

The court at Dusseldorf rejected its jurisdiction on the basis of *locus damni*, arguing that this had taken place in Berlin (Melzer's domicile), not Düsseldorf. It did, however, argue that it had jurisdiction on the basis of the *locus delicti commissi*, based on a combination of Article 7(2) and the Bürgerliches Gesetzbuch (the German Civil Code). Under paragraph 830 of that Code, entitled 'Joint participants and common purpose':

> (1) Where several persons have caused damage by the commission of an unlawful act undertaken in common, each of them shall be liable for that act. That is also the case even where it is impossible to determine which of the persons involved caused the damage by his act.
>
> (2) Instigators and accomplices shall be treated as joint participants of the act.

The attribution of WWH's actions to MS Global, in the view of the Düsseldorf court, gave it jurisdiction on the basis of Article 7(2). It asked the following of the Court of Justice:

> In the context of jurisdiction in matters relating to tort or delict under Article 5(3) of Regulation [No 44/2001], where there is cross-border participation of several persons in a tort or delict, is reciprocal attribution of the place where the event occurred admissible for determining the place where the harmful event occurred?

There is no trace in the Regulation of any rule on attribution for acts committed in tort. There are, however, many arguments against allowing such attribution from creating extra fora:

— The Regulation's general rule determines jurisdiction in the domicile of the defendant. This principle may be subject to many exceptions, and to many a jurisdictional rule which trumps it, but it remains the principle. As emphasised repeatedly by the CJEU, exceptions to Article 4's general rule must be interpreted strictly, for the exceptions

[375] Case 189/87 *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co and others* [1988] ECR 5565, para 18.

[376] Case C-288/11 *Melzer v MF Global UK Ltd* ECLI:EU:C:2013:305.

would otherwise lead to too many potential jurisdictions. All the more so in the case at issue. Allegations of attributions are easily made, and it is not clear how far the Court can go in reviewing the merits of the argument at the jurisdictional stage.

— A restrictive interpretation also serves the Regulation's purpose, as emphasised by the CJEU, of predictability and reliability. A party may otherwise end up being pursued in courts in which it could not reasonably have foreseen to be sued.

— Furthermore of course, the attributive rule at issue superimposes national law onto Article 7(2) of the Regulation. The Court's emphasis on autonomous interpretation sits uneasily with that.

Alternative jurisdictional rules would have been possible to establish jurisdiction: Article 8's rule on joinders (which would have required the plaintiff in *Melzer* to use WWH as an anchor defendant) comes to mind; as does Article 7(1)'s rule on contracts (although it may not have been easy to establish that the services under contract were or should have been provided in Düsseldorf).

The Court of Justice referred inter alia to *Refcomp*, reviewed above, to emphasise the presumption against letting national law infiltrate the concepts used by the Regulation, and to many of the arguments referred to above, and held:

> Accordingly, the answer to the question referred is that Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that it does not allow the courts of the place where a harmful event occurred which is imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, to take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised.

The scope of Article 7(2) is quite wide and includes actions for defamation, negligent misstatement, negligent and fraudulent misrepresentation, negligence, conversion, infringement of intellectual property rights, passing off, unfair competition, and actionable breaches of EU law.[377] Whether pre-contractual liability is tort or contract, is subject to debate. National and EU authority exists for both sides of the argument however with the Rome II Regulation now assigning choice of law rules for pre-contractual liability to those for tort, authority deciding for Article 7(2) is likely to become stronger.

Jurisdiction is established under Article 7(2) for the court of the place where the harmful event occurred 'or may occur' (the latter was inserted in the Brussels I Regulation and is particularly relevant for intellectual property law suits).

That the *locus delicti commissi* may be difficult to determine does not justify simply excluding the application of Article 7(2). In *CDC*,[378] the referring court enquired about the application of Article 7(2)'s special jurisdictional rule in the event of infringement of competition law, where that infringement concerns a complex horizontal agreement, spread over a long period of time, and with varying impact in various markets. One can probably not establish a *locus delicti commissi* for the tort as a whole, for such behaviour often takes shape in a variety of meetings, electronic correspondence et al. For *locus damni*, too, the picture would be one of a complex patchwork. Predictability and manageability of the

[377] See the list of Fawcett and Carruthers (n 188) 247, with specific references to CJEU case-law for each of them.

[378] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others* ECLI:EU:C:2015:335.

ensuing suits would be impossible to establish in some coherent way, thus endangering some of the very foundations of the Brussels regime. In conclusion, therefore, Jääskinen AG suggested not applying Article 7(2) at all to the scenario in *CDC*, and to stick with application of Article 4, often then in conjunction with Article 8(1) (the use of anchor defendants: reviewed below). Difficult as it may be, the CJEU rejected the AG's suggestion and held that it is not to be excluded that *locus delicti commissi* can be established. One cannot rule out the identification, in the jurisdiction of the court seised of the matter, of a specific event during which either that cartel was definitively concluded or one agreement in particular was made which was the sole causal event giving rise to the loss allegedly inflicted on a buyer. (50)

In the regularly occurring event of liability for defective products (between non-contracting parties evidently: otherwise Article 7(1) is at issue), the CJEU held in *Kainz* that this is the place where the product in question was manufactured.[379]

What Article 7(2) means precisely was not dealt with at great length in the Brussels Convention. The Jenard Report merely reported that '[t]he Committee did not think it should specify whether that place is the place where the event which resulted in damage or injury occurred or whether it is the place where the damage or injury was sustained'.[380] Consequently it fell to the Court to interpret the provision.

#### 2.2.11.2.2 *Bier*: Alternative Jurisdiction

In *Bier* or *Mines de Potasse*,[381] the Court held that the connecting factor can be both the place of the event giving rise to the damage (the *Handlungsort*), and the place where the damage occurred (the *Erfolgsort*). Both of them are component parts of any liability. Hence both of them can be very helpful, the Court held, depending upon the circumstances, from the point of evidence and the conduct of the proceedings (see the *forum conveniens* idea underlying the special jurisdictional rules, above). Moreover, were one to only withhold the place of the event giving rise to the damage, this would almost always coincide with the domicile of the defendant. Hence that interpretation would not offer much of an extra jurisdictional rule compared to Article 4. In the converse case, where the place of the

[379] Case C-45/13 *Andreas Kainz v Pantherwerke AG* ECLI:EU:C:2014:7. Pantherwerke AG was an undertaking established in Germany which manufactured and sold bicycles. Mr Kainz, resident in Salzburg, purchased a bicycle manufactured by Pantherwerke from Funbike GmbH, a company established in Austria. On 3 July 2009, while riding that bicycle in Germany, Mr Kainz suffered a fall and was thereby injured. The place of the event giving rise to the damage was, Mr Kainz claimed, located in Austria as the bicycle was brought into circulation there, in the sense that the product was there made available to the end-user by way of commercial distribution.

Mr Kainz argued specifically that the Courts should take into account not only the interests of the proper administration of justice but also those of the person sustaining the damage, thereby enabling him to bring his action before a court of the Member State in which he is domiciled. The CJEU disagreed: '[A]lthough it is apparent from recital 7 in the preamble to Regulation No 864/2007 that the European Union legislature sought to ensure consistency between Regulation No 44/2001, on the one hand, and the substantive scope and the provisions of Regulation No 864/2007, on the other, that does not mean, however, that the provisions of Regulation No 44/2001 must for that reason be interpreted in the light of the provisions of Regulation No 864/2007. The objective of consistency cannot, in any event, lead to the provisions of Regulation No 44/2001 being interpreted in a manner which is unconnected to the scheme and objectives pursued by that regulation' (20). This is a statement I like a lot and have advocated for some time. In general, I find the link between applicable law and jurisdiction (often leading to *Gleichlauf*-type considerations, such as in Art 24's exclusive jurisdictional rules) not very attractive.

[380] Jenard Report, 26.

[381] Case 21/76 *Handelskwekerij GJ Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735.

damage coincides with the domicile of the defendant, a particularly helpful connecting factor might be excluded for no apparent reason.

The place where the damage occurred is the place where the event which may give rise to liability in tort, etc, resulted in damage. Hence in the case of a defective product, it is not the place of delivery of that product but rather (where this is different), the place where the defective product subsequently caused damage, eg because it is then employed in a production process, and even if that damage results in a purely economic loss (in the case at issue, making the product 'off-spec' or 'off-specification', hence not unusable per se but rather not in line with the technical requirements of the purchaser) (*Zuid Chemie*).[382]

#### 2.2.11.2.3 Immediate Post-*Bier* Management of the Consequences

There is a drawback to the *Mines de Potasse* ruling, namely that, unaltered, it leads to a multitude of fora. The Court has sought to reduce that possibility and encourage plaintiffs to sue in one place only,

— *firstly* by holding in *Dumez France* that *Bier* applies to 'direct damage' only, not to 'indirect damage': Article 7(2) (new) and the subsequent rulings in *Bier* and *Marinari* (see below) cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets.[383] The Court argued along the following lines: in a case such as this, the damage alleged is no more than the indirect consequence of the harm initially suffered by other legal persons who were the direct victims of damage which occurred at a place different from that where the indirect victim subsequently suffered harm. It is necessary to avoid the multiplication of courts of competent jurisdiction which would heighten the risk of irreconcilable decisions. And in the spirit of the Convention and Regulation, recognition of the jurisdiction of the courts of the plaintiff's domicile must be avoided, and would enable a plaintiff to determine the competent court by his choice of domicile.

It is important to note that the CJEU in *Dumez France* does not of course hold that one cannot sue for indirect damage, only that such indirect damage, where direct damage also occurs, does not give rise to an extra jurisdictional opening.

*Marinari* added in the case of one person suffering damage, that damage occurs where damage or loss first materialises, not (if different from the former) where its consequence is subsequently felt.

> The term 'place where the harmful event occurred' in Article 5(3) … does not, on a proper interpretation, cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State. Although that term may cover both the place where the damage occurred and the place of the event giving rise to it, it cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.[384]

[382] Case C-189/08 *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA* [2009] ECR I-6917.
[383] Case C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others* [1990] ECR I-49.
[384] Case C-364/93 *Antonio Marinari* v *Lloyds Bank plc and Zubaidi Trading Company* [1995] ECR I-2719.

However where damage first materialises is not always easy to discern in practice and a large number of problems continued to exist.[385] The CJEU then further massaged the consequence of *Bier*, by holding

— *secondly* if the plaintiff chooses a court purely on the basis of *locus damni*, the court of that Member State may only rule on that part of the damage which has occurred in that Member State (lest of course another rule gives it more all-encompassing jurisdiction—in particular, where that court is also the State of the defendant's domicile.). That was the conclusion of the Court in *Shevill*,[386] which extended the *Bier* rule to immaterial damage.

The ruling in *Shevill* was specifically meant to discourage forum shopping on the basis of extremely weak links to the case (in the particular context of the case: libel also arising in a State where a tiny volume of the article may have been distributed). The Court specified that 'place where the harmful event occurred' in the context of media infringement of personality rights (or using the terms which the Court employs in the judgment, defamation and libel) is the place where the publisher of the defamatory publication is established: that is the place where the harmful event originated and from which the libel was issued and put into circulation.[387] The place where damaged occurred is than determined by the place of distribution, where the victim claims to have suffered injury to his reputation.

It is noteworthy that the CJEU's ruling in *Dumez France* has de facto filtered through into the residual private international law rules of the Member States—but need not: Member States and their courts are evidently free *not* to apply their residual jurisdictional rules in line with the CJEU's findings. A good illustration is *Pike & Doyle*, concerning the litigation in the courts at England, for the harm resulting from the 2008 terror attack in Mumbai.[388] This case is also interesting for its rejection of assimilation between the interpretation of the Brussels I Recast and the Regulations on applicable law (in particular, the Rome II Regulation).

The first claimant suffered continuing pain and loss of amenity and substantial economic losses caused by his injuries. The second claimant sustained loss of earnings in England and Wales and had a continuing loss in the form of the costs of counselling. On that basis both claimants had therefore suffered indirect or secondary damage as a result of the defendants' alleged negligence in Mumbai. The claimants' submission was that this was sufficient to found jurisdiction. The defendants challenged this.

[385] See also eg Case C-51/97 *Réunion européenne SA and Others* v *Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002* [1998] ECR I-6511, where the CJEU incidentally displayed selective *forum conveniens* tendencies: in international maritime transport, the place where the damage is ascertained could certainly qualify as a forum closely linked to the case; however, because this more often than not coincides with the domicile of the plaintiff, the Court chose to rule it out.

[386] Case C-68/93 *Fiona Shevill, Ixora Trading Inc, Chequepoint SARL and Chequepoint International Ltd* v *Presse Alliance SA* [1995] ECR I-415.

[387] Ibid, para 24.

[388] *Pike & Doyle v the Indian Hotels Company Limited* [2013] EWHC 4096 (QB).

In support of their claim, the defendants relied essentially on the impact which EU law *suo arguendo* has on the interpretation of the relevant English rules of procedure. As summarised by Stewart J:

> The Defendants' submission is as follows:
>
> (i) Before 1 January 1987 RSC order 11 rule 1(1)(h) required a plaintiff to establish that the action was 'founded on a Tort committed within the jurisdiction'. The test was 'where in substance did the cause of action arise?' (Distillers Co Ltd v Thompson [reference omitted]).
>
> (ii) On 1 January 1987 the rule changed such that the new RSC order 11 rule 1(1)(f) became 'the claim is founded on a Tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.' The change was made to give effect to Article 5(3) of the Brussels Convention and the decision of the European Court in Handelskwekerij GJ Bier BV v Mines Potasse d'Alsace SA [reference omitted] [references to further precedent omitted]
>
> (iii) The European Rules do not allow indirect secondary damage to found jurisdiction. Dumez France v Hessische Landesbank [reference omitted]. Marinari v Lloyds Bank plc [reference omitted]. [references to further precedent omitted]
>
> (iv) This is all accepted and is in line with the original Bier case where the European Court held that where an act occurred in one Member State and the damage occurred in another, the Claimant could sue the Defendant in the Courts of either state. …
>
> (v) Given the above, the Court should apply normal principles of interpretation to the rule namely: delegated legislation is construed in the same way as an Act, the starting point is to ascertain the legislative intention and the person seeking to understand that intention must do so in the light of the enactment and its purpose. The interpretation must be an informed one [references omitted].
>
> (vi) Therefore since the pre 1987 law would not have allowed indirect secondary damage to found jurisdiction and since the purpose of the change was to align the RSC (subsequently CPR) with the European rules which do not allow such a founding of jurisdiction, the rules should be interpreted consistently with the European cases. (12)

Stewart J disagreed and precedent did before him. Absent the European context—as the defendant was not domiciled in the EU and the Brussels I Regulation did not otherwise apply, there was no reason to assume that the relevant English rules could not be applied taking into account indirect damage as a jurisdictional basis for the English courts: Tugendhat J had already held so with reference to the preparatory works of the relevant change to the Rules of Procedure. He effectively found that Parliament did not fully assimilate the rules relating to non-party states with those relating to states which are a party; it effectively wanted there to be a wedge between the application of the jurisdictional rule for tort in- and outside the Brussels I context.

Neither, Stewart J held, can Rome II come to the defendants' rescue. This was an attempt by the defendants to recycle the limitation to (now) Article 7(2) of the Brussels I Recast Regulation. No reference to this was made in the judgment; however, a prima facie forceful recital in the Rome II Regulation is recital 7:

> The substantive scope and the provisions of this Regulation should be consistent with 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) and the instruments dealing with the law applicable to contractual obligations.

Since Rome II harmonises applicable law for tort even if the national court withholds jurisdiction on the basis of its residuary jurisdictional rules (such as here, given that Brussels I does not apply), this bridge between the various Regulations might resurrect the relevance of the *Dumez France* and *Marinari* limitations to the judgment in *Bier*. Stewart J, however, was not swayed and referred to Sir Robert Nelson in *Stiyianou:*

> Brussels 1 relates to a different subject matter, namely jurisdiction, and has to be construed as a separate regulation, albeit consistently with the other regulations forming part of the compatible set of measures.
>
> Rome II does not abolish the discretion which has to be exercised under the CPR in relation to non-Member States.
>
> Article 2 on its face is wide enough to include any damage direct or indirect which the regulation as a whole covers. Article 4(1) expressly excludes indirect damage which would otherwise be included by virtue of Article 2. There is no reason why 'damage' under the CPR should be interpreted as in a specific Article such as Article 4 which defines the applicable law, rather than interpreted as a general article such as Article 2 which applies to the regulation as a whole (apart from Article 4).
>
> Inconsistencies in the meaning of damage may exist as the tests are different under Brussels 1, Rome II and CPR. The latter includes the exercise of the discretion and hence consideration of forum conveniens to ensure the proper place for the trial is selected, whereas Brussels 1 and Rome II do not.
>
> Rome II does not concern jurisdiction and does not override CPR 9(a). Where Brussels I does not apply, the issue of jurisdiction will be governed by a country's own rules ie in England and Wales the CPR.

Neither Stewart J nor Sir Robert refer to recital 7 of Rome II; however, their arguments in my view are supported post their findings by the CJEU judgment in *Kainz*.[389]

#### 2.2.11.2.4 Problems with *Shevill* in the Internet Age: *eDate Advertising* ('*Kylie Minogue*') and Subsequent Case-Law

*Shevill* more or less satisfactorily addressed the issue of infringement of one's personality rights at a time (1995) when media distribution through the internet was in its infancy. Media distribution by and large was territorially organised or at the very least, its multiple territorial impact could be quantified: by circulation numbers of printed media, or subscriptions in the case of television channels. The internet, including viral marketing, live and recorded video streaming, and internationally broadly available websites of media outlets, has made *Bier* and *Shevill* less apt in the media context. As discussed by Cruz Villalón AG in his Opinion in Joined Cases *eDate Advertising* and *Martinez* (otherwise known as the '*Kylie Minogue*' case),[390] the internet challenges the *Shevill* rule both from the point of view of the victim, and of the publisher. From the victim's point angle, as data (in this case:

[389] *Kainz* (n 379).

[390] Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH v X* and *Olivier Martinez and Robert Martinez v MGN Limited* [2011] ECR I-10269.

alleged defamation) become available swiftly, on a global basis, and in principle forever; from the publisher's angle.

> [T]he global and immediate distribution of news content on the internet makes a publisher subject to numerous local, regional, State and international legal provisions. Moreover, the absence of a global regulatory framework for information activities on the internet, together with the range of provisions of private international law laid down by States, exposes the media to a fragmented, but also potentially contradictory, legal framework, since that which is prohibited in one State may, in turn, be permitted in another. Accordingly, the need to provide the media with legal certainty, by preventing situations which discourage the lawful exercise of freedom of information (the so-called chilling effect), acquires the character of an objective which the Court must also take into consideration.[391]

The Court (Grand Chamber) followed the AG's view. The internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State.[392] (Arguably only) in the context of the internet, therefore, the Court held that the criterion of distribution no longer is fit to apply solely, and held that it must be supplemented with the following:

> a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice.[393]

The Court continued:

> The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.[394]

The Court argues that both for the publisher and for the plaintiff, this forum is reasonably foreseeable. The CJEU however maintains a *Shevill*-like criterion for online access: the criterion of the place where the damage occurred, derived from *Shevill*, continues to confer jurisdiction on courts in each Member State in the territory of which content placed online is or has been accessible. Those courts will continue to have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seized.[395,396]

[391] Cruz Villalón AG, Opinion, *eDate Advertising*, ibid, 46 (footnote omitted).
[392] Judgment of the Court in *eDate Advertising*, ibid, para 46.
[393] Ibid, para 48.
[394] Ibid, para 49.
[395] Ibid, para 51.
[396] Compare with, for instance, the approach of the Ontario courts in *Goldhar v Haaretz.com et al* 2015 ONSC 1128: establishment of jurisdiction on the basis of the tort of libel having been committed in Canada (*locus delicti*

In *Wintersteiger*,[397] the Court confirmed that the connecting factor 'centre of interests' in *eDate Advertising* only holds for infringement of personality rights in an internet context. The applicant here is the proprietor of an Austrian trade mark. The defendant was a competitor established in Germany, who had registered Wintersteiger's name as an AdWord on Google's German search service. Whence users of google.de entering 'Wintersteiger' (looking for that make's ski and snowboarding service tools) receive a link to Wintersteiger's website as first search result, but also as the first AdLink on the right hand side of the screen, an advert for and link to the competitor's website—which Wintersteiger considered an abuse of its trademark.

The judgment of the Court of Justice confirms that the connecting factor 'centre of interests' in *Kylie Minogue and eDate Advertising* only holds for infringement of personality rights in an internet context. Trademark violation is distinguished, on the grounds that *rebus sic stantibus* intellectual property rights are protected on a territorial basis. The Court confines the 'place where the damage occurred' as the Member State in which the trade mark is registered. For the 'place where the event giving rise to the damage', the Court upheld 'place of establishment of the advertiser' as the jurisdictional basis (the Advocate General's 'means necessary for producing, a priori, an actual infringement of a trade mark in another Member State' is a more generic criterion however the Court did not uphold this as such).

Precedent value of the judgment may be limited due to the specific facts of the case and the questions put to the Court. In particular, the conclusion may only hold absolutely where there is only one trade mark held, in only one Member State. The referring court moreover did not flag the many issues surrounding provisional measures and intellectual property rights (see (now) Article 35 of the Regulation and the judgment in *Solvay*, below).[398]

Adding the 'centre of his interests' as an additional forum with complete jurisdiction, is arguably at odds with the natural swing of Article 7(2) since the *Bier/Mines de Potasse* case.

In *Bier*, the court as noted justified the extension of jurisdiction to the place where the damage occurred, both on 'usefulness' grounds vis-à-vis the substance of the case (establishing liability in tort) and in order to ensure a proper extension of the jurisdictional rule: the connecting factor can be both the place of the event giving rise to the damage (the *Handlungsort*), and the place where the damage occurred (the *Erfolgsort*). Both of them are component parts of any liability. Hence both of them can be very helpful, depending upon the circumstances, from the point of evidence and the conduct of the proceedings (see the *forum conveniens* idea underlying the special jurisdictional rules, above). Moreover, were one to only withhold the place of the event giving rise to the damage, this would almost always coincide with the domicile of the defendant. Hence that interpretation would not offer much of an extra jurisdictional rule compared to Article 4. In the converse case, where

*commissi* therefore established as Canada, presumably given publication of the article in question on the English language website of the newspaper, although the facts are not clear on that point); applicable law: *lex loci delecti commissi*, again identified as Canada. Application of *forum non conveniens* rejected. No reference to plaintiff's Canadian interests. Damages held to be limited to the damage to reputation suffered in Canada.

[397] Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* ECLI:EU:C:2012:220.

[398] Case C-616/10 *Solvay SA* v *Honeywell Fluorine Products Europe BV et al,* ECLI:EU:C:2013:445. Further analysis below.

the place of the damage coincides with the domicile of the defendant, a particularly helpful connecting factor might be excluded for no apparent reason.

Following *Bier*, the Court as noted had to massage the consequences of this extension, for it threatened to open up too wide a list of potential for a. In *eDate Advertising* the Court could have actually stayed with *Shevill*. Granted, applying it in an internet context is not straightforward. However the applicant still has an attractive set of potential fora. Domicile of the defendant, per the general rule of Article 4; Member State of the establishment where the publication emanates, if different from the publisher.[399]

In my view, the *eDate Advertising* judgment illustrates the inherent weakness in *Bier* itself. The suitability of a forum for reasons of subsequent comfort in applying the *lex causae*, is not a general modus operandi in the set-up of the Regulation. Safeguarding the defendant's interests is; predictability is, too; mutual trust as well. It is only in Article 24's exclusive jurisdictional grounds that applicable law filters through into forum selection. The approach in *Bier* leaned too much towards accommodating applicable law in deciding jurisdiction.

One question inevitably leads to another. No better illustration than Case C-170/12. In *Pinckney*, on 11 April 2012, the French Cour de Cassation referred the following question for preliminary review with the CJEU:

> Is Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that, in the event of an alleged infringement of copyright committed by means of content placed online on a website,
>
> — the person who considers that his rights have been infringed has the option of bringing an action to establish liability before the courts of each Member State in the territory of which content placed online is or has been accessible, in order to obtain compensation solely in respect of the damage suffered on the territory of the Member State before which the action is brought,
>
> or
>
> — does that content also have to be, or to have been, directed at the public located in the territory of that Member State, or must some other clear connecting factor be present?
>
> Is the answer to Question 1 the same if the alleged infringement of copyright results, not from the placing of dematerialised content online, but, as in the present case, from the online sale of a material carrier medium which reproduces that content?

The Cour de Cassation assumed two CJEU precedents need to be distinguished from *Pinckney*:[400]

— Case C-324/09 *L'Oréal*,[401] which concerns the territorial scope of the EU's trademark laws and revolves around websites 'targeting' consumers as opposed to merely being accessible to them; and
— *eDate Advertising*, above, in which the Court as noted added the connecting factor 'centre of interests' for internet infringements of personality rights. As mentioned

[399] See also A Dickinson, 'By Royal Appointment: No Closer to an EU Private International Law Settlement?', conflictoflaws.net, 24 October 2012 (accessed 18 September 2015).

[400] See also S Vousden, 'Case C-170/12 Pinckney—Where Is the Harm with an Internet Sales Offer?' EU Law Radar, 24 May 2012 (accessed 18 September 2015).

[401] *L'Oréal* (n 259).

above, in *Wintersteiger* the CJEU confirmed that the connecting factor 'centre of interests' in *eDate Advertising* only holds for infringement of personality rights in an internet context. Trademark violation is distinguished, on the grounds that rebus sic stantibus intellectual property rights are protected on a territorial basis. In *Pinckney*, which also concerns intellectual property, the Cour de Cassation moreover points out that the offending item was in fact a material carrier: a vinyl record, illegally compiling songs.

In his Opinion, Jääskinen AG distinguished between two different infringements—both with ample reference to previous case-law. Firstly, for reproduction rights, he suggested the *locus damni* is the same as the *locus delicti commissi* as there was no third party involved. In the case at issue, this led to both the UK (were the songs were copied on a host server) and Austria (where the copies were initially made) as having jurisdiction. Further, for distribution and communication rights, the *locus delicti commissi*, in the AG's view, was the place where the infringers were established: the place of upload of the online content, and the place where the online offer of the CDs was decided. The *locus damni* was identified by the AG with reference to *L'Oréal* for trademarks, and to *Football Dataco*[402] for database rights. The 'targeting' of consumers and the 'focus' of a website are determinant in the view of the AG (in the case of diffuse focus and target, leading to limited jurisdiction per the *Shevill* rule, ie jurisdiction only for the damage that occurred on that territory). Mere accessibility of a site ought not to be withheld in the view of the AG. Neither and importantly, did the AG withold the criterion of 'centre of main interests', withheld by the Court in *eDate Advertising* for the infringement of personality rights, and already rejected by the Court in *Wintersteiger* for the infringement of trade marks: damage stemming from copyright infringement, the AG suggested, is not inherently related to the place of the copyright owner's centre of interests.

The CJEU, however, does not withhold 'focus and target' of the website as a criterion for jurisdiction: '*the possibility of obtaining a reproduction of the work to which the rights relied on by the defendant pertain from an internet site accessible within the jurisdiction of the court seised*' (emphasis added) suffices.[403] However, if *locus damni* is the only jurisdictional

[402] Case C-173/11 *Football Dataco Ltd and others v Sportradar and Sportradar AG* ECLI:EU:C:2012:642 (n 261). Here, with respect to the Database Directive, the CJEU confirmed the 'intended target of information' criterion as a jurisdictional trigger in an internet context. The *Football Dataco* judgment has its most immediate impact in the intellectual property area, but the judgment has generally confirmed the 'intended target' criterion as a trigger for jurisdiction in an internet context. Mere accessibility of data does not suffice to grant jurisdiction.

[403] Similarly, in customs cases, the CJEU has held that that the mere acquisition of a good by a person domiciled in an EU Member State suffices to trigger the application of the EU Customs Regulation's provisions on counterfeit and pirated goods. It is not necessary, in addition, for the goods at issue to have been the subject, prior to the sale, of an offer for sale or advertising targeting consumers of that State. See Case C-98/13 *Martin Blomqvist v Rolex* ECLI:EU:C:2014:55.

See, in the US, in similar developments (although reversed upon appeal), the finding of the US International Trade Commission in *re Align Technology Inc*, 337-TA-833 that digital import suffices for its jurisdiction in patent infringement cases. The companies violating Align Technology's patents were based in Pakistan, without domestic residence of any kind in the United States. The data were then used by US-based dental practices to produce the braces. The foreign residence of the patent infringers fed into arguments made by defendants that a cease and desist order by the ITC would be very difficult to enforce, an argument against upholding jurisdiction in the first place. The ITC was not swayed. I understand Google, among others, argued that digital data do not qualify as 'articles' under relevant US law. The Court of Appeal reversed the ITC's finding.

ground for that Member State, that court, per the *Shevill* rule, only has jurisdiction to adjudicate on the damage caused in that Member State.

In 'G',[404] the Court was asked to provide input in the event of the defendant's domicile being unknown (but with the defendant presumed to be an EU citizen), and the precise location of the server on which the website is stored, also unknown, although most probably in EU territory. The Landgericht Regensburg asked no fewer than 11 questions of some complexity, with a degree of interdependence between them. The Court answered that Article 7(2) may certainly apply in such case, giving preference to legal certainty. However it expects due diligence on behalf of the national courts in making sure that a prima facie case of a link to the EU was established.

The CJEU failed subsequently to entertain the questions on the location of the harmful event given the uncertainty signalled above, for the relevant questions had been dropped by the referring court following the judgment in *eDate Advertising*. In my view, an answer to some of the now dropped questions on location of the harmful event (the *locus delicti commissi*) were certainly not nugatory, even after *eDate Advertising*. There is no Opinion of the Advocate General to assist.

In *Pez Hejduk*,[405] Cruz Villalón AG directly challenged the wisdom of *Bier*; however, his plea fell on deaf ears with the CJEU. *Pez Hejduk* concerned copyright: an intellectual property right for which no formality (such as registration) is required for it validly to exist. The Handelsgericht Wien requested CJEU back-up on the application in the case of Ms Hejduk, a professional photographer, suing EnergieAgentur for unauthorised use on its. de website of photographs which had only been authorised for one-off use during a conference. In view of Pinckney et al, the AG splendidly and concisely distinguished the various strands of case-law and the raison d'être for their consecutive jurisdictional criteria. Encouraged in particular by Portugal and the Commission, the AG then further distinguished the current case. The AG emphasised that not only would it be difficult for the defendant having potentially to face actions in multiple Member States, but also the plaintiff would have limited benefits from seeking limited damages in more jurisdictions, and would find it difficult to prove such damage given the accessibility of the site.

Which is why the AG suggested that further distinguishing is needed for what he called cases involving 'delocalised damages' involving intellectual property, leading to the suggestion that in such cases, only the judges of the Member State in which the causal event occurred should have jurisdiction on the basis of Article 7(2) (general jurisdiction for the domicile of the defendant notwithstanding, obviously: per Article 4). In other words: only the *locus delicti commissi* would be upheld; not the *locus damni*.

No reference is made to the case in the AG's Opinion; however, surely this suggestion amounted to no less than a reversal of *Bier/Mines de Potasse d'Alsace*. Had the CJEU gone along with the AG, and dropped *locus damni*, it would in my view eventually have to concede that in many, if not all, cases it is difficult for the defendant having potentially to face actions in multiple Member States, and for the plaintiff to have to prove and seek limited damages in more jurisdictions. On that basis (that however narrowly distinguished, siding with the AG would mean acknowledging the weakness of the *locus damni* rule), the CJEU did not run with it. It did not at all entertain the AG's concerns with the *locus damni*

[404] Case C-292/10 *G v Cornelius de Visser* ECLI:EU:C:2012:142.
[405] Case C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH* ECLI:EU:C:2015:28.

assessment, and held that in the event of an allegation of infringement of copyright and rights related to copyright guaranteed by the Member State of the court seised, that court has jurisdiction, on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction. That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.

The plaintiff's difficulties were of no concern to the Court. No surprise perhaps given the Brussels I Regulation's near-exclusive concern for the position of the defendant.

#### 2.2.11.2.5 *DFDS Torline*: Determining Location of Damage

*DFDS Torline*[406] concerned the legality of a notice of industrial action given by SEKO against DFDS, with the object of securing a collective agreement for Polish crew of the cargo ship *Tor Caledonia* owned by DFDS, serving the route between Göteberg (Sweden) and Harwich (United Kingdom). The *Tor Caledonia* was registered in the Danish international ship register and is subject to Danish law. At the time of the facts in the main proceedings, the Polish crew were employed on the basis of individual contracts, in accordance with a framework agreement between a number of Danish unions on the one hand, and three Danish associations of shipping companies on the other. Those contracts were governed by Danish law. After DFDS rejected a request by SEKO on behalf of the Polish crew for a collective agreement, on 21 March 2001, SEKO served a notice of industrial action by fax, with effect from 28 March 2001, instructing its Swedish members not to accept employment on the *Tor Caledonia*. The fax also stated that SEKO was calling for sympathy action. Following that request, the Svenska Transportarbetareförbundet (Swedish Transport Workers Union, STAF) gave notice, on 3 April 2001, of sympathy action with effect from 17 April 2001, refusing to engage in any work whatsoever relating to the *Tor Caledonia*, which would prevent the ship from being loaded or unloaded in Swedish ports. DFDS brought an action against SEKO and STAF, seeking an order that the two unions acknowledge that the principal and sympathy actions were unlawful and that they withdraw the notices of industrial action.

The day before the first day of sympathy action called by STAF, DFDS withdrew the *Tor Caledonia* from the Göteborg-Harwich route, which was served from 30 May by another ship leased for that purpose. DFDS brought an action for damages against SEKO before the Sø-og Handelsret (Denmark), claiming that the defendant was liable in tort for giving notice of unlawful industrial action and inciting another Swedish union to give notice of sympathy action, which was also unlawful. The damages sought were for the loss allegedly suffered by DFDS as a result of immobilising the *Tor Caledonia* and leasing a replacement ship. The court decided to stay its decision on the action for damages pending the decision of the Arbejdsret on the legality of the action. The Arbejdsret referred to the CJEU.

The national court asked, essentially, whether Article 7(2) must be interpreted as meaning that the damage resulting from industrial action taken by a trade union in a State to which a vessel registered in another State sails can be regarded as having occurred in the

[406] Case C-18/02 *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation* [2004] ECR I-1417.

flag State, with the result that the ship-owner can bring an action for damages against that trade union in the flag State.

The Court held that the event giving rise to the damage was the notice of industrial action given and publicised by SEKO in Sweden, the State where that union has its head office. Therefore, the place where the fact likely to give rise to tortious liability of the person responsible for the act can only be Sweden, since that is the place where the harmful event originated (at para 41). Furthermore, the damage allegedly caused to DFDS by SEKO consisted in financial loss arising from the withdrawal of the *Tor Caledonia* from its normal route and the hire of another ship to serve the same route. The CJEU instructed the national court to inquire whether such financial loss may be regarded as having arisen at the place where DFDS is established. In the course of that assessment by the national court, the flag State, that is the State in which the ship is registered, must be regarded as only one factor, among others, assisting in the identification of the place where the harmful event took place. The nationality of the ship can play a decisive role only if the national court reaches the conclusion that the damage arose on board the *Tor Caledonia*. In that case, the flag State must necessarily be regarded as the place where the harmful event caused damage.

The outcome of *DFDS Torline* resulted in a rule on industrial action in the Rome II Regulation, which I review in the relevant chapter.

#### 2.2.11.2.6 'Negative' Declarations for Tort

Does Article 7(2) cover an action for declaration as to the non-existence of liability? This was the question in *Folien Fischer* and it was answered by the CJEU in the affirmative. The question was referred for a preliminary ruling by the German Bundesgerichtshof in the course of a dispute between, on the one hand, Folien Fischer AG and Fofitec AG, companies established in Switzerland, and, on the other hand, Ritrama SpA, which has its registered office in Italy. Folien Fischer and Fofitec had been accused of essentially infringement of competition law in their sales practice and in Fofitec's refusal to grant a license to Ritrama for one of its patents. Ritrama had issued a shot across the bows in sending Folien Fischer a letter alleging the incompatibility with competition law of its commercial practices.

Folien Fischer subsequently took the case to court first, in Hamburg, where it was found to be inadmissible for lack of international jurisdiction. Hamburg had taken its cue from that part of German scholarship which argued that negative declarations are not covered by Article 7(2), thus leaving Folien Fischer no choice but to seek that declaration in Italy. Upon appeal the issue came before the CJEU.

Unlike Jääskinen AG, the CJEU itself did not think that the reversal of roles in a negative declaration of liability, merits the non-application of Article 7(2) and the *Bier* formula. Jääskinen AG had in so many words suggested that although the Court does not expressly say so in *Bier*, its holding in that case had a strong whiff about it of protecting the presumed victim, who is generally the claimant in the proceedings.[407] The Court itself put more emphasis on negative and positive declarations of liability essentially relating to the same matters of law and fact.[408]

[407] Jääskinen AG, Opinion in Case C-133/11 *Folien Fischer AG and Fofitec AG v Ritrama SpA* ECLI:EU:C:2012:664, para 48.

[408] Ibid, para 48.

#### 2.2.11.2.7 The Location of the Locus Damni in the Event of Purely Financial Damage/ Economic Loss

The application of Article 7(2) to purely economic loss was put to the Court in *Zuid Chemie*;[409] however, the CJEU did not answer that question for there was also physical damage (with the same victim). The Court recently had a new opportunity to tackle the issue following referral in *Universal*.[410] Universal Music International Holding BV is the parent company of among others a Czech group of companies, who acquired a target company in the Czech Republic. A calculation error by one of the lawyers advising the parties led to Universal having to pay five times what it thought it was going to pay. Arbitration and settlement ensued. This included agreement that the holding company, the plaintiff in the current proceedings, would pay the amount settled for. It duly did, from a Dutch bank account. It now sued the Czech lawyers who had wrongly advised the Czech subsidiary and did so in the Netherlands, as the alleged *Erfolgort* in its tortious relationship with these lawyers, is the Netherlands. The Court considered whether purely economic loss sustained in the *Erfolgort* (and without direct loss, economic or otherwise, elsewhere) leads to jurisdiction for that *Erfolgort*; and if so, how one determines whether the damage is direct or indirect ('follow-up'), and where that economic loss is to be located.

I have above aired my unhappiness with the *Erfolgort*/*Handlungsort* distinction. Extension of Article 7(2) seemed good in principle but led to a continuing need to massage the consequences. The court advisors to the Hoge Raad have sympathy for the view that *Bier's* main justification for accepting jurisdiction for the *Erfolgort* (a close link with the case leading to suitability from the point of view of evidence and conduct of the proceedings) is not present in the case of purely economic loss, particularly where events for the remainder are entirely *Handlungsort* related. The CJEU may well follow this reasoning, although in doing so it might yet again create another layer of distinguishing in the *Bier* rule.

Such further distinguishing has already occurred in *Kolassa*, on the application of Article 7(2) to prospectus liability. Mr Kolassa, as a consumer, through the Austrian bank direktanlage.at AG, invested just under €70,000.00 in X1 Global EUR Index Certificates. The certificates were issued by Barclays Bank, registered in the UK, with a branch in Frankfurt. At the time of the issue of the certificates, Barclays distributed a base prospectus, inter alia in Austria. The portfolio was to be established and administered by X1 Fund Allocation GmbH, to which Barclays Bank had entrusted the investment of the money raised from the issue of the certificates. Most of that money was then lost.

The certificates were sold to institutional investors who sold them on, in particular, to consumers. In the present case, direktanlage.at ordered the certificates to which Mr Kolassa wished to subscribe from its German parent company, DAB Bank AG, with its seat in Munich, which in turn acquired the certificates from Barclays Bank. In each case, the orders were placed and carried out in the name of the respective bank. Direktanlage.at fulfilled Mr Kolassa's order in accordance with its general terms and conditions 'in securities account', meaning that direktanlage.at held the certificates as covering assets in its own name at Munich, on behalf of its clients.

[409] *Zuid Chemie* (n 382).
[410] Case C-12/15 *Universal Music International Holding BV v Michael Tétreault Schilling and Others* (pending).

Mr Kolassa sued Barclays in Vienna, on the basis of contractual, precontractual, tortious or delictual liability. Jurisdiction in Vienna in his view was present on the basis of Article 17 (consumer contracts), 7(1) (contract) or 7(2) (tort). Application of Article 17 was dismissed by the CJEU on the basis of there being no contract whatsoever between Barclayas and Mr Kolassa. (The judgment in *Maletic*[411] was not considered relevant given that the consumer in that case was from the outset contractually linked, inseparably, to two contracting partners.) Application of Article 7(1) is in some ways more flexible because there need not be proof of a contract between the two parties: what is required, though, is proof of a legal obligation freely consented to by one person towards another and on which the claimant's action is based. (For otherwise there is no 'obligation' which constitutes the connecting factor under Article 7.) No such legal obligation 'freely consented' was apparent from the case, hence Article 7(1) was dismissed too.

That left Article 7(2). Per *Kronhofer*[412] (also referred to in the Hoge Raad's referral in *Universal*, above), the mere fact that the applicant has suffered financial consequences does not justify the attribution of jurisdiction to the courts of the applicant's domicile if, per *Kronhofer*, both the events causing loss and the loss itself occurred in the territory of another Member State. On the basis of the facts of the case, the CJEU dismissed Austria as the *locus delicti commissi*: the decisions regarding the arrangements for the investments proposed by Barclays Bank and the contents of the relevant prospectuses were taken in the Member State of Barclays' seat, ie the UK.

The *locus damni*, the place where the loss occurred, is the place where the investor suffered it (54). 'The loss occurred where the investor suffered it' sounds like an abstract definition; however, the CJEU emphasised that this conclusion was fact-related, ie it was the result of, first, the certificates' loss of value being due, not to the vagaries of the market, but to the management of the funds in which the money from the issue of those certificates had been invested. Second, the actions or omissions alleged against Barclays with respect to its legal information obligations took place before the investment made by Mr Kolassa and were, in his view, decisive for that investment (51). If 'the loss occurred where the investor suffered it' is not an abstract but a fact-related criterion, that puzzlingly may mean that there must be an alternative general criterion for purely financial loss if these are due to the 'vagaries of the market'.

The Court further invited the drawing of a distinction by holding that:

> The courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, *in particular* when that loss occurred itself directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts. (55, amphasis added)

Finally, the Court clarified as much at it could the balance between the plaintiff's allegations, and defendant's rebuttal, at the jurisdictional level: what extent of evidence does the seized court need to review with a view to establishing its jurisdiction? The Court held that:

> the national court seised is not, therefore, obliged, if the defendant contests the applicant's allegations, to conduct a comprehensive taking of evidence at the stage of determining jurisdiction, it must be pointed out that both the objective of the sound administration of justice, which underlies

[411] Case C-478/12 *Armin Maletic* v *lastminute.com Gmbh and TUI Österreich Gmbh,* ECLI:EU:C:2013:735.
[412] Case C-168/02 *Rudolf Kronhofer* v *Marianne Maier and others* [2004] ECR I-6009.

> Regulation No 44/2001, and respect for the independence of the national court in the exercise of its functions require the national court seised to be able to examine its international jurisdiction in the light of all the information available to it, including, where appropriate, the defendant's allegations. (64)

That, of course, is a thin line, but I do not see how the CJEU can instruct otherwise.

In my view *Kolassa* invites further specification especially on the exact relevance of banks and bank accounts in cases of purely economic loss: *Universal*, above, provides one such immediate opportunity.

The *locus damni* for purely economic loss was also dealt with in passing by the CJEU in *CDC*,[413] where the Court again has no sympathy for either the mozaic effect of Article 7(2), or indeed the often great difficulties in establishing the *locus damni*, flagged by the AG.

> 'As for loss consisting in additional costs incurred because of artificially high prices, such as the price of the hydrogen peroxide supplied by the cartel at issue in the main proceedings, that place is identifiable only for each alleged victim taken individually and is located, in general, at that victim's registered office. (52)

Taking the registered office as the *locus damni* for purely economic loss had not been as such confirmed by the CJEU before. It is also currently pending in *Universal* (see above). The Court is in my view a bit radical when it comes to justifying the registered office as the *Erfolgfort*:

> That place fully guarantees the efficacious conduct of potential proceedings, given that the assessment of a claim for damages for loss allegedly inflicted upon a specific undertaking as a result of an unlawful cartel, as already found by the Commission in a binding decision, essentially depends on factors specifically relating to the situation of that undertaking. In those circumstances, the courts in whose jurisdiction that undertaking has its registered office are manifestly best suited to adjudicate such a claim. (53)

Incidentally, the location of damage is not easy to establish in other context either. For instance *AMT v Marzillier*[414] concerned special jurisdiction under tort in the event of a loss of contractual right. Here: the loss allegedly due to wrongful inducement by defendant (a law firm) to have a contractual claim heard in England. Contractual claims (alleged precarious investment advice) by a group of individuals had been settled by AMT in Germany. Popplewell J concisely revisited the complete history of Article 7(2), from *Bier* via *Kalfelis* and *Dumez France* to *Marinari* and *Kronhofer*, though leaving out *Shevill*. On the basis of said precedents he held that the courts of England do indeed have jurisdiction: 'The place where the damage occurred as a result of MMGR's allegedly tortious conduct was England, where such conduct deprived AMT of the contractual benefit of the exclusive jurisdiction clause which ought to have been enjoyed in England' (46). Counsel for AMT had also put forward an alternative ground which was that the payments for the settlements and costs came from England, and that England was where management time was wasted and future business lost. Not so, asserted Popplewell J:

> The unquantified heads of loss for wasted management time and loss of business are not the primary heads of claim and do not constitute the main part of the damage said to have occurred as

[413] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others* ECLI:EU:C:2015:335.

[414] *AMT Futures Ltd v Marzillier et al* [2014] EWHC 1085 (Comm).

> a result of the harmful event. They are not the damage. They are not initial, direct or immediate damage, but to the extent quantifiable and recoverable, merely the remoter financial consequences of the harm suffered in Germany. (52)

Per *Shevill*, jurisdiction of the English courts is limited to the extent of damages suffered by the loss of the contractual benefit of the exclusive jurisdiction clause which ought to have been enjoyed in England: how exactly that ought to be quantified (if liability is at all withheld, of course) will not be a straightforward matter.

#### 2.2.11.2.8 'Place Where the Harmful Event Occurred' in Case of Tort by Omission

In *ÖFAB*,[415] contractual claims for payment against a Swedish company (Copperhill) had been assigned to Invest, also domiciled in Sweden. Invest brought an action against a former director and former major shareholder, both domiciled in the Netherlands. Invest sought to have both held liable for the debts of the company, because they had allegedly allowed that company to continue to carry on business even though it was undercapitalised and was forced to go into liquidation.

The underlying debt was a result of work carried out under contract; however, the action was based on the former company director and shareholder allegedly not properly having carried out their monitoring duties. Consequently the Court held in favour of the application of Article 7(2)'s special jurisdictional rule for tort.

That leaves the determination of the *locus delicti commissi*. What was at stake, the Court suggested, was not the financial situation or the carrying-on of the business of that company per se, but rather the conclusion to be drawn as regards a possible failure of monitoring by the member of the board of directors and the shareholder.

Turning to the *locus delicti commissi*, the Court referred to the place where the activities of the company took place:

> It is clear from the documents submitted to the Court that, in the period in which the disputed facts took place, Copperhill's seat was in the municipality of Åre within the jurisdiction of the Östersunds tingsrätt, where, in the same period, it carried on its business and built a hotel. In those circumstances, it appears that the activities carried out and the financial situation related to those activities is connected to that place. In any event, the information on the financial situation and activities of that company necessary to fulfil the management obligations by the member of the board of directors and the shareholder should have been available there. The same is true for the information concerning the alleged failure to comply with those obligations. It is for the referring court to ascertain the accuracy of that information. (54)

In other words, in a tort caused by omission (rather than by positive action by the alleged tortfeasor), the Court turns to the place where the tortfeasor's action ought to have taken place, so as to avoid the very omission that led to the action in tort. For it is that place which answers best the very raison d'être of the special jurisdictional rules of Article 7:

> In matters of tort, delict or quasi-delict, the courts of the place where the harmful event occurred or may occur are usually the most appropriate for deciding the case, in particular on grounds of proximity and ease of taking evidence. (50, with reference *ex multis* to Folien Fischer)

[415] Case C-147/12 *ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV* ECLI:EU:C:2013:490.

2.2.11.2.9 Obligations in Tort between Contracting Parties. The CJEU in *Brogsitter*

In *Brogsitter*, the CJEU considered when a dispute between contracting parties becomes a tort—a case with considerable relevance for the distinction between tort and contract. Mr Brogsitter sold luxury watches. In 2005, he concluded a contract with a master watchmaker, Mr Fräβdorf, then resident in France. Fräβdorf undertook to develop movements for luxury watches, intended for mass marketing, on behalf of Mr Brogsitter. Mr Fräβdorf carried out his activity with Fabrication de Montres Normandes, company of which he was sole shareholder and manager. It appears that Mr Brogsitter paid all costs relating to the development of the two watch movements which were the subject of the contract. Fräβdorf and his company subsequently also developed, in parallel, other watch movements, cases and watch faces, which they exhibited and marketed in their own names and on their own behalf, whilst advertising the products online in French and German. Mr Brogsitter submitted that, by those activities, the defendants breached the terms of their contract. According to Mr Brogsitter, Mr Fräβdorf and Fabrication de Montres Normandes had undertaken to work exclusively for him and, therefore, might neither develop nor make use of, in their own names and on their own behalf, watch movements, whether or not identical to those which were the subject of the contract.

Brogsitter sought an order that the activities in question be terminated and that damages be awarded in tort on the basis, in German law, of the Law against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb) and paragraph 823(2) of the Civil Code (Bürgerliches Gesetzbuch); he submitted that, by their conduct, the defendants had breached business confidentiality, disrupted his business, and committed fraud and breach of trust.

The defendants argued that only French courts have jurisdiction, under Article 7(1), to determine all the applications made by Mr Brogsitter, as both the place of performance of the contract at issue and of the allegedly harmful events were situated in France. The Landgericht Krefeld in first instance had found against its own jurisdiction. This went straight to interim appeal, with the Oberlandesgericht Düsseldorf holding that the first instance court's international jurisdiction derived, with regard to the dispute before it, from Article 7(2) with respect to the hearing and determination of only the civil liability claims made in tort by Mr Brogsitter. The other claims, in contrast, concerned 'matters relating to a contract' within the meaning of Article 7(1), and should be brought before a French court. Krefeld was still unsure and referred the following question to the CJEU:

> Must Article 5(1) of Regulation [No 44/2001] be interpreted as meaning that a claimant who purports to have suffered damage as a result of the conduct amounting to unfair competition of his contractual partner established in another Member State, which is to be regarded in German law as a tortious act, also relies on rights stemming from matters relating to a contract against that person, even if he makes his civil liability claim in tort?

The Court referred to familiar lines: 'contract' and 'tort' need to be interpreted autonomously. (A European definition needs to be given, not a national one.) The concept of 'matters relating to tort, delict or quasi-delict' within the meaning of Article 7(2) covers all actions which seek to establish the liability of a defendant and which do not concern 'matters relating to a contract' within the meaning of Article 7(1)(a) (*Kalfelis*).

However, that one contracting party brings a civil liability claim against an other is not sufficient to consider whether the claim concerns 'matters relating to a contract' within the meaning of Article 7(1)(a) (23). That is the case only where the conduct complained of

may be considered a breach of contract, which may be established by taking into account the purpose of the contract, which will a priori (the German 'grundsätzlich' would have been better translated as 'in principle', or indeed, assuming French was the language of the original draft, 'a priori' should have been dropped for 'en principe') be the case where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter (24–25).

'Where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter.' These cases, in other words, do not lend themselves to a quick fix of jurisdiction review; some skimming of substantive law issues will be necessary.

Incidentally, the link between contracts and torts is also of immediate concern in the area of competition law (where the issue is often whether follow-on claims in damages are impacted by choice of court and choice of law in underlying contracts). Brogsitter is also referred to by Sharpston AG in Joined Cases *Ergo Insurance and AAS Gjensidige Baltic,* which I review in the chapter on the Rome I Regulation.

### 2.2.12 Multipartite Litigation and Consolidated Claims: Articles 8 (and 9)

Article 8 includes four cases which are all inserted because of procedural expediency and because of the need to avoid irreconcilable judgments. However they all do harbour scope for abuse hence the CJEU has interpreted each of them fairly strictly. Procedural efficiency and forum shopping often tempts plaintiffs into identifying an 'anchor defendant' in one jurisdiction, subsequently to employ Article 8 (or similar provisions in national law for subjects outside of the Regulation) to engage other parties in the same jurisdiction. As repeatedly emphasised in this volume, this technique is not wrong per se,[416] indeed rather the opposite: by joining related cases, the resources of the courts are used wisely, and the risk of irreconcilably judgments minimised.

It is also noteworthy that the hierarchical position of the protected categories means that Article 8 cannot be applied to a dispute falling under any of the protected categories (*Glaxosmithkline*).[417]

Moreover, Article 8 can only be used against defendants already domiciled in another Member State.[418] For those outside, national conflicts law decides the possibility of joinder.[419] That is clear from the chapeau of Article 8: '*A person domiciled in a Member State may also be sued*' (emphasis added).

[416] See for an interesting example in the competition law sector, the Court of Appeal in September 2012, *KME Yorkshire et al v Toshiba Carrier UK et al* [2012] EWCA Civ 1190: a connected undertaking that had implemented, but not been party to, an anti-competitive agreement, can nevertheless be in breach of Art 101 TFEU (the foundation Article for EU competition law) and therefore ground jurisdiction against all other defendants who had been originally named in the Commission decision fining the companies concerned.

[417] See Case C-462/06 *Glaxosmithkline and Laboratoires Glaxosmithkline v Jean-Pierre Rouard* [2008] ECR I-3965 with respect to the relationship between Art 6(1) (now: 8(1) and the consumer contracts title—arguably extendable to all provisions of Art 8 and to all protected categories.

[418] See also clearly in *Jong v HSBC*, *Nancy Jong v HSBC Private Bank (Monaco) SA et al* [2014] EWHC 4165.

[419] Applied for instance in Shell: *Friday Alfred Akpan and Vereniging Milieudefensie v Royal Dutch Shell PLC and Shell Petroleum Development Company of Nigeria Ltd*, ECLI:NL:RBDHA:2013:BY9854.

Article 8

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided 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;
2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seized of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;
3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;
4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

### *2.2.12.1 Multiple Defendants: Article 8(1)*

A group of defendants domiciled in two or more of the Member States[420] may all be sued in the courts of the Member State where one of them is domiciled. Jurisdiction derived from the domicile of one of the defendants was adopted by the 1968 Brussels Convention because, using the words of the Jenard Report, it makes it possible to obviate the handing down in the Member States of judgments which are irreconcilable with one another;[421] in other words, it is aimed at avoiding irreconcilable judgments at the recognition and enforcement stage.

That the application of Article 8(1) requires 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' was not included as such in the original Brussels Convention but was added as a condition in *Kalfelis*.[422]

The anchor defendant need not be the principal target of the claim and indeed may even chose not to defend the jurisdiction claim (eg by showing he is not actually domiciled there). Even in such circumstances he still drags all other defendants into the procedural bath with him. This evidently opens some scope of abuse, but it was impossible to include a criterion to offset this (eg requiring the defendant which brings in all the others be the 'principal target' of the suit), as it would lead to great difficulties of interpretation.

The joinder still holds even if the action against the first defendant, domiciled in the forum, is inadmissible from the start, unless per *Reisch Montage* the claim is made against a number of defendants for the sole purpose of removing one of them from the jurisdiction

[420] Art 8(1) cannot be applied to bring an action before the Court of a Member State against a defendant who could only be sued in that Member State by virtue of a joinder with a suit against a party not domiciled in any of the Member States: in *Réunion européenne*, the Court held 'the objective of legal certainty pursued by the Convention would not be attained if the fact that a court in a Contracting State had accepted jurisdiction as regards one of the defendants not domiciled in a Contracting State made it possible to bring another defendant, domiciled in a Contracting State, before that same court in cases other than those envisaged by the Convention, thereby depriving him of the benefit of the protective rules laid down by it': Case C-51/97 *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002*, [1998] ECR I-6511, para 46.

[421] Report Jenard, 27.

[422] *Kalfelis* (n 375) para 12.

of the courts of his Member State of domicile.[423] This is a condition which is expressly provided for in Article 8(2)—see below, but extended by the CJEU to Article 8(1) in particular in *Kalfelis*.[424] However where the close connection using the *Kalfelis* formula mentioned above is established, one need not separately review the absence of sole purpose to remove a defendant from his natural jurisdiction (*Freeport*).[425]

The subjective intention of a plaintiff in employing Article 8(1) was recently at issue in *CDC*.[426] Jääskinen AG suggested in his Opinion that only the time of service of the suit is relevant to assess the criteria of Article 8(1). This suggestion, in my view, finds support in the CJEU's overall approach to Article 8. The subjective intentions of a plaintiff, who often identifies a suitable anchor defendant even if this is not the intended target of their action, do not feature in the application criteria of Article 8. While, as noted, this may lead to abuse of procedural power, establishing malicious intent is all but impossible. All but impossible; but not totally excluded. For that reason the AG suggested that if one can prove that the plaintiff and anchor defendant (in the case at issue: Evonik Degussa) had secretly agreed to settle, prior to the introduction of the suit, such collusion should be punished by non-applicability of Article 8(1), for in that case the conditions of Article 8 arguably are no longer met.

I was not convinced the CJEU should have followed the latter suggestion—particularly not in cases such as the one at issue, where defendants have been found to have acted illegally under EU competition law. (Misdemeanour or indeed criminal act therefore has already been established.) In my view it would be an application of *nemo auditur propriam turpitudinem allegans not* to reward those who infringe EU competition law in the way the AG suggests. (This may be different in the event of as-yet unsubstantiated claims of tort, in which case one may argue the defendant should not routinely have to defend the claims in a court other than the one identified by Article 4.)

The CJEU, however, confirmed the view of the AG. If it is found that, at the time the proceedings were instituted, the applicant and that defendant had colluded to artificially fulfil, or prolong the fulfilment of, Article 8's applicability, the possibility to use that Article will be lost.

The CJEU's findings have already been applied in another case involving CDC, by the court at Amsterdam, this time pursuing inter alia Kemira, a Finnish company, using Akzo Nobel NV, domiciled in the Netherlands, as anchor defendants.[427] The Dutch court referred *in extenso* to *CDC*, noting inter alia that it is not up to CDC to show that the suit was not just introduced to remove Kemira from the Finnish court. That Kemira suggested that introduction of the suit in the Netherlands was not very logical given the absence of factual links to that Member State does not suffice. The court also adopted the CJEU's finding on choice of court and liability in tort. In the absence of a specific proviso about the standard contractual choice of court, liability such as here, for infringement of competition law, cannot be assumed. Finally, at 2.18, the court also referred to an argument made by Kemira that Finish and Swedish law ought to apply to the interpretation (not the validity) of the

[423] Case C-103/05 *Reisch Montage AG v Kiesel Baumaschinen Handels GmbH* [2006] ECR I-6827, para 32.
[424] *Kalfelis* (n 375).
[425] Case C-98/06 *Freeport plc v Olle Arnoldsson* [2007] ECR I-8319, paras 51 ff.
[426] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others* ECLI:EU:C:2015:335.
[427] ECLI:NL:GHAMS:2015:3006.

choice of court agreement. That would have been an interesting discussion. However, in light of the court's earlier judgment on the irrelevance of the court of choice, the court did not entertain that issue.

It is the national court's task to consider whether the proceedings 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.' For decisions to be regarded as contradictory, it is not sufficient that there be a divergence in the outcome of the dispute. That divergence must also arise in the context of the same situation of law and fact (*Roche Nederland*).[428] The legal basis of the action brought before that court may be one indication, but it is certainly not necessary for that legal basis to be identical (*Freeport*).[429]

Whether the likelihood of success of an action against a party before the courts of the State where he is domiciled is relevant in the determination of whether there is a risk of irreconcilable judgments for the purposes of Article 8(1) was raised in *Freeport* but not answered by the CJEU for such answer was eventually not necessary for the preliminary review at issue.

In particular in *intellectual property cases*, the Court's approach to 'same situation of law and fact' has been criticised. In *Roche*,[430] the CJEU controversially held that parallel actions for infringement in different Member States, which, in accordance with Article 64(3) of the Munich Convention,[431] must be examined in the light of the national law in force, are not in the context of the same legal situation and hence any divergences between decisions cannot be treated as contradictory. This left no room for application of Article 8(1) to the benefit of holders of European patents vis-à-vis actions for infringement in different Member States. For intellectual property practice, this made cross-border litigation almost impossible to plan coherently.

In *Solvay*,[432] Solvay SA, a company established in Belgium and holding a European patent,[433] brought an action in the Rechtbank 's-Gravenhage in the Netherlands for

[428] Case C-539/03 *Roche Nederland BV and Others* v *Frederick Primus and Milton Goldenberg* [2006] ECR I-6535, para 26.

[429] *Freeport* (n 425) para 41.

[430] *Roche* (n 428).

[431] The 'patent Convention' or the Convention on the Grant of European Patents, signed at Munich on 5 October 1973. It has 38 Signatory States, including all EU Member States but not the EU itself. The CJEU was critical of the introduction of a unified patent litigation system which piggybacked on the Munich Convention and which would create a European and Community Patents Court to which non-EU Member States would be party but which would issue interpretative judgments on the Community Patent: see Opinion 1/09 of 8 March 2011, [2011] ECR I-1137, para 89: '[T]he envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.' See inter alia M Kant, 'A Specialised Patent Court for Europe? An Analysis of Opinion 1/09 of the Court of Justice of the European Union from 8 March 2011 Concerning the Establishment of a European and Community Patents Court and a Proposal for an Alternative Solution' (2012) *Nederlands Internationaal Privaatrecht* 193–201.

See also elsewhere in this volume where I review the amendments to the Brussels I Recast on this point.

[432] Case C-616/10 *Solvay SA* v *Honeywell Fluorine Products Europe BV and Others* ECLI:EU:C:2012:445.

[433] Such patent is valid in more than one Member State; European patent law is less harmonised than one might hope and even a 'European' patent does not necessarily and automatically cover all Member States.

infringement of several national parts of the patent, in particular against three companies originating from two different Member States, Honeywell Fluorine Products Europe BV, established in the Netherlands, and Honeywell Belgium NV and Honeywell Europe NV, established in Belgium, for marketing a product manufactured by Honeywell International Inc. that was identical to the product under the above patent. In the course of the proceedings, Solvay lodged an interim claim against the defendants in the main proceedings, seeking provisional relief in the form of a cross-border prohibition against infringement for the duration of the main proceedings.

With respect to the application of Article 8(1), Cruz Villalon AG proposed to distinguish, not to overturn, *Roche* on the ground that in the case at issue, the objectionable behaviour concerned more than one undertaking, domiciled in more than one Member State, however accused of the same behaviour in the same Member State. If Article 8(1) were not to be applicable, he suggested, the courts concerned would hence hold on the basis of the same lex loci protectionis (that of the Member State in which the alleged conduct is said to have taken place) and hence the risk of irreconcilable judgments would be great.

The CJEU agreed with its AG that *Roche* still holds: the same situation of law cannot be inferred where infringement proceedings are brought before a number of courts in different Member States in respect of a European patent granted in each of those States and those actions are brought against defendants domiciled in those States in respect of acts allegedly committed in their territory. A European patent continues to be governed, per the Munich Convention, by the national law of each of the Contracting States for which it has been granted. However in the specific circumstances of a case, *Roche* may be distinguished. Whether there is a risk of irreconcilable judgments if those claims were determined separately is for the national court to determine. The CJEU instructs the national court to take into account, inter alia, the dual fact that, first, the defendants in the main proceeding are each separately accused of committing the same infringements with respect to the same products and, secondly, such infringements were committed in the same Member State, so that they adversely affect the same national parts of the European patent at issue.

The CJEU therefore somewhat softens the blow in *Solvay*; however, as noted, it has confirmed its core reasoning in *Roche*. The CJEU's approach would seem overly formalistic, albeit with the advantage of clarity. Even though formally the legal basis for these patents is different, in practice harmonisation between the Member States has gone so far as to make it artificial to speak of different legal basis.[434] This issue is addressed amongst others in the Conflict of Laws in Intellectual Property (CLIP) principles at Max Planck.[435]

There is generally some discussion as to the degree of 'contradiction' or not required for judgments to be 'irreconcilable' within the meaning of Article 8(1). Leger AG opined in *Roche*[436] that there ought to be a more flexible interpretation of 'irreconcilable' within the context of Article 8(1) as opposed to related actions within Article 30, however the Court consistently uses the term 'contradictory', which is the same notion as it has applied in the context of Article 30 (see further on this notion, below).

[434] See M van Eechoud and A Kur, 'Internationaal privaatrecht in intellectuele eigendomszaken—De CLIP principes' (2012) *Nederlands Internationaal Privaatrecht* 252–65.

[435] Principles on Conflict of Laws in Intellectual Property, 31 August 2011, available via www.cl-ip.eu/_www/files/pdf2/Final_Text_1_December_2011.pdf (accessed 18 September 2015).

[436] *Roche* (n 428).

Article 8(1) was also applied in *Sabbagh v Khoury*, as noted.[437] Sana Sabbagh, who lived in New York, claimed that the defendants had variously, since her father's stroke, conspired against both him and her to misappropriate his assets (the 'asset misappropriation claim') and, since her father's death, to work together to deprive her of her entitlement to shares in the group of companies which her father ran (the 'share deprivation claim'). Wael, the first defendant, was the anchor defendant for jurisdictional purposes. He resided, and had at all material times resided, in London. The other defendants lived or were based abroad.

The High Court preceded its application of Article 8(1) with a very thorough review of the merits of each of the cases. (The Court noted (5) that the other defendants live 'abroad', most of them seemingly in Greece. However, the relevant companies at least seem to be domiciled in Lebanon. As noted, Article 8 can only be used against defendants already domiciled in another Member State. For those outside, national conflicts law decides the possibility of joinder.)

Article 8 requires 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' As noted, CJEU case-law (in particular *Roche*) holds that it is not sufficient that there be a divergence in the outcome of the dispute: that divergence must also arise in the context of the same situation of law and fact.

As noted, whether the likelihood of success of an action against a party before the courts of the State where he is domiciled is relevant in the determination of whether there is a risk of irreconcilable judgments for the purposes of Article 8(1) was raised in *Freeport* but not answered by the CJEU for such answer was eventually not necessary for the preliminary review at issue. In *Sabbagh*, with reference to precedent in the English courts, the High Court did carry out a rather thorough merits review, effectively to review whether the claim against Wael might not be abusive, ie invented simply to allow him to be used as anchor defendant. Carr J's extensive merits review hinged on 'to take account of all the necessary factors in the case-file' per *Freeport*. Whether such detailed review might exceed what is required under Article 8(1) is simply not easily ascertained. (The High Court eventually did decide that Article 8(1) applied on account of one of the pursued claims.)

A final note is one to ponder for future reference, rather than it being meant for serious current application. In *CDC*, the CJEU, as noted, ruled out the use of Article 8 if it is found that, at the time the proceedings were instituted, the applicant and that defendant had colluded to fulfil artificially, or prolong the fulfilment of, (now) Article 8's applicability.

What if at the time the proceedings were instituted, an applicant artificially ignores the fulfilment of, (now) Article 8's applicability? The *Aldi*[438] rule of the courts of England and Wales, and its recent application in *Otkritie*,[439] make me ponder whether there is merit in suggesting that the CJEU should interpret Article 8(1) to include an *obligation*, rather than a mere possibility, to join closely connected cases.

In *Aldi*, the Court of Appeal considered application of the *Johnson v Gore Wood*[440] principles on abuse of process of the (then) House of Lords to an attempt to strike out a claim for

[437] *Sana Hassib Sabbagh v Wael Said Khoury et al* [2014] EWHC 3233 (Comm).
[438] *Aldi Stores Limited v WPS Group et al* [2007] EWCA Civ 1260.
[439] *Otkritie Capital International Ltd & Aor v Threadneedle Asset Management Limited & Aor* [2015] EWHC 2329 (Comm).
[440] *Johnson v Gore Wood & Co* [2000] UKHL 65.

abuse of process on the basis that the claim could and should have been brought in previous litigation. *Aldi* concerned complex commercial litigation, as does *Otkritie*. The result of *Aldi* is that plaintiffs need to consult with the court regarding case management, to ensure that related claims are brought in one go. Evidently, the courts need to walk a fine rope for the starting point must be that plaintiffs have wide discretion in deciding where and when to bring a claim: that would seem inherent in Article 6 ECHR's right to a fair trial.

In *Otkritie* (NB: this case does not involve the Brussels Regulation), Knowles J struck the right balance in holding that the *Aldi* requirement of discussing with the court had been breached (and would have cost implications for Otkritie in current proceedings) but that otherwise this breach did not amount to abuse of process.

Now, transporting this to the EU level: to what degree could/should Article 8 include a duty to join closely related proceedings? Should such duty be imposed only on plaintiff or also on the court, *proprio motu*?

#### *2.2.12.2 Warranties, Guarantees and Any Other Third Party Proceedings: Article 8(2)*[441]

An action on a warranty or guarantee is brought against a third party by the defendant in an action for the purpose of being indemnified against the consequences of that action (*Streitverkundung* or *litis denunciatio*). It is in the interests of the proper administration of justice that the jurisdiction over the warranty joins the original jurisdiction (unless the warrantor and the beneficiary of the warranty have agreed choice of court in accordance with Article 25, and the clause covers warranty).

Warranties and guarantees necessarily require involving a third party. The drafters of the Brussels Convention thought it useful to include general third party proceedings in Article 8(2), with reference to the Belgian judicial code which did indeed rather nicely define such proceedings:

> Third party proceedings are those in which a third party is joined as a party to the action. They are intended either to safeguard the interests of the third party or of one of the parties to the action, or to enable judgment to be entered against a party, or to allow an order to be made for the purpose of giving effect to a guarantee or warranty. The third party's intervention is voluntary where he appears in order to defend his interests. It is not voluntary where the third party is sued in the course of the proceedings by one or more of the parties.[442]

Article 8(2) adds specifically that a joinder in this event is not admissible when these proceedings 'were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case'. Moreover, the warranties etc. need to involve exactly the same claim: the defendant in other words may use Article 8(2) to 'forward' the claim to the third party, warrantor, etc, however Article 8(2) must not be used for the defendant to launch an independent claim against any of the parties listed therein.

[441] Please note the unusual territorial exception to Art 8(2) and Art 13 for Germany, Austria and Hungary in Art 65 of the Regulation.

[442] Jenard Report, 28.

#### *2.2.12.3 Counterclaims: Article 8(3)*

In order to establish this jurisdiction the counterclaim must be related to the original claim. Since the concept of related actions was not recognized in all the legal systems at the time, the provision in question, following the draft Belgian Judicial Code of the period, states that the counterclaim must arise from the contract or from the facts on which the original claim was based.[443]

#### *2.2.12.4 Matters Relating to Rights* in Rem *in Immovable Property: Article 8(4)*

See above under the discussion of Article 24.

### 2.2.13 'Residual' Jurisdiction: Defendants not Domiciled in any Member State: Article 6

> Article 6
>
> 1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.
>
> 2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as the nationals of that Member State.

As noted above, Article 4 *expressis verbis* allows the plaintiff to sue defendants not domiciled in the EU, whatever their nationality,[444] on the basis of the national jurisdictional rules of the Member State in which the plaintiff is domiciled. Article 6 does leave the protected categories of employees and consumers, as well as Article 24 and 25 unaffected. Moreover, and importantly, *lis alibi pendens* applies to these suits, as does automatic recognition under Chapter III of the Regulation.

The Jenard Report does not entertain the international sensitivities which we have already referred to. Rather like the European Commission in its follow-up proposals in particular for the original Regulation and the Recast, the Committee that drafted the Regulation was more concerned about bringing the exercise of these 'exorbitant' (a term used by the Jenard Report itself) jurisdictional claims within the purview of the Regulation. The Report justifies Article 6 (4 as it was) on two grounds:

> First, in order to ensure the free movement of judgments, this Article prevents refusal of recognition or enforcement of a judgment given on the basis of rules of internal law relating to jurisdiction. In the absence of such a provision, a judgment debtor would be able to prevent execution being levied on his property simply by transferring it to a Community country other than that in

[443] Ibid.

[444] To make the point ad nauseam perhaps: for the Brussels Convention and the Regulation, the nationality of the parties is irrelevant. Domicile is the relevant criterion. Hence just as non-EU nationals who are domiciled in an EU Member State can avail themselves of the jurisdictional rules of that Member State against non-EU domicileds, EU nationals domiciled outside of the EU will see Art 6 invoked against them.

> which judgment was given. Secondly, this Article may perform a function in the case of lis pendens. Thus, for example, if a French court is seized of an action between a Frenchman and a defendant domiciled in America, and a German court is seized of the same matter on the basis of Article 23 of the Code of Civil Procedure, one of the two courts must in the interests of the proper administration of justice decline jurisdiction in favour of the other. This issue cannot be settled unless the jurisdiction of these courts derives from the Convention.[445]

I have not in this volume reviewed the sometimes complex arrangements made vis-à-vis treaties, pre-existing or otherwise, between EU Member States and third States. The Brussels I Regulation and Recast, as well as the Rome I and II Regulations make (complex) provisions for such.[446]

## 2.2.14 Loss of Jurisdiction: *Lis Alibi Pendens*; and Related Actions: Articles 29–34

**Section 9 *Lis pendens*—related actions**

Article 29

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they 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.

Article 31

1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

[445] Jenard Report, 20–21.

[446] See eg P De Miguel and J-S Bergé, 'The Place of International Agreements and European Law in a European Code of Private International Law' in M Fallon, P Lagarde and S Poillot-Peruzzetto (eds), *Quelle architecture pour un code européen de droit international privé* (Brussels, Peter Lang, 2012) 185–211.

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

Article 32

1. For the purposes of this Section, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or
(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.

2. The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served.

Article 33

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and 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 the third State, the court of the Member State may stay the proceedings if:

(a) 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
(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

2. The court of the Member State may continue the proceedings at any time if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;
(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
(c) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

> Article 34
>
> 1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
> (b) 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
> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.
>
> 2. The court of the Member State may continue the proceedings at any time if:
>
> (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;
> (b) the proceedings in the court of the third State are themselves stayed or discontinued;
> (c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
> (d) the continuation of the proceedings is required for the proper administration of justice.
>
> 3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
>
> 4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

For the whole of section 9, Article 32 specifies what is meant by a court having been 'seized'.

I review Article 31(2)'s protection of choice of court agreements in the section on choice of court, above.

### *2.2.14.1* Lis Alibi Pendens

The general gist of the *lis alibi pendens* rule has already been explored above (where I reviewed the use of anti-suit injunctions in the context of arbitration). The Jenard Report is in fact very brief on this issue. As noted, the *lis alibi pendens* rule applies to concurrent proceedings in the Member States courts, regardless of whether the jurisdiction is established on the basis of the Regulation, provided however the subject-matter is within the scope of application of the Regulation. Per *The Tatry*:

> Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention, a section intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, in so far as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought.[447]

[447] Case C-406/92 *The owners of the cargo lately laden on board the ship 'Tatry' v the owners of the ship 'Maciej Rataj'* [1994] ECR I-5439, para 31.

The rule is (fairly) simple and clear. Where the *same action*, between the *same parties* is brought before the courts of two Member States, Article 29 obliges the court seized second, to at least freeze its jurisdiction.[448] At the most, it can stay proceedings until the first court has decided it has jurisdiction. The rule as it stood before the Recast, made no distinction between jurisdictional rules, despite their hierarchy, exception made for jurisdiction under Article 24. In *Weber v Weber*,[449] the CJEU distinguished *Gasser*, in which it declined freedom for the court second seized to assume priority on the basis of a choice of court agreement. (A particular use of torpedoing which is now addressed to some degree by the Brussels I Recast Regulation: see below.) It referred in particular to the positive obligation included in (now) Article 45(1)(e)(ii) of the Jurisdiction Regulation for courts *not* to recognise earlier judgments which were held in contravention of Article 24's exclusive jurisdictional rules. (Article 24's choice of court agreements, by contrast, did *not* feature in Article 35 of the former regulation, neither do they in the current Article 45.)

The Court's reference to Article 45 (35 as it stood) in my view means that its reasoning should extend to all jurisdictional rules included in that Article, including the protected categories of consumers and insureds (not, strangely, employees—though this has changed following the Brussels I recast). There is lingering doubt, however, over the impact of the judgment on the application of Article 24(4)'s rule on intellectual property. In *Weber*, the Court held that:

> In those circumstances, the court second seised is no longer entitled to stay its proceedings or to decline jurisdiction, and it must give a ruling on the substance of the action before it in order to comply with the rule on exclusive jurisdiction. (56)

In the application of Article 24(4), this continues to raise the question whether 'the substance of the action before it' only concerns the validity of the intellectual property, or also the underlying issue of infringement of such property.

The court seized second has no authority to investigate the jurisdiction of the first court.

No positive action is required by the court first seized to trigger *lis alibi pendens*. In *Cartier v Ziegler*,[450] the Court of Justice held that the application of Article 29's *lis albi pendens* rule does not require a formal decision by the national court first seized (or exhaustion of national remedies against such acceptance of jurisdiction). In a multi-party case involving insurance companies, forwarders and transporters (sub-sub-contracted) of a shipment of Cartier goods, the UK High Court was undeniably first seized vis-à-vis at least some of the parties involved in the litigation in France; however, the question was how Article 29's *lis alibi pendens* rule needed to be applied. The French Cour de Cassation asked essentially whether Article 29(2) must be interpreted as meaning that it is sufficient, for the jurisdiction of the court first seized to be established within the meaning of that provision, that no party has contested its jurisdiction or whether it is necessary that that court has impliedly or expressly assumed jurisdiction by a judgment which has become final. The referring court referred to scholarship suggesting that the jurisdiction of the court first seized may

[448] Instead of declining jurisdiction, the court which is subsequently seized of a matter may, however, stay its proceedings if the jurisdiction of the court first seized is contested. This rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seized of the matter were to decline jurisdiction. The risk of unnecessary disclaimers of jurisdiction is thereby avoided: see Jenard Report, 41.

[449] *Weber* (n 182).

[450] Case C-1/13 *Cartier parfums—lunettes SAS and AXA Corporate Solutions Assurances SA v Ziegler France SA and others* ECLI:EU:C:2014:109.

be established only by a judgment from that court explicitly rejecting its lack of jurisdiction or by the exhaustion of the remedies that are available against its decision to assume jurisdiction.

The CJEU held that:

> Article 27(2) of Council Regulation (EC) No 44/2001 … must be interpreted as meaning that, except in the situation where the court second seised has exclusive jurisdiction by virtue of that regulation, the jurisdiction of the court first seised must be regarded as being established, within the meaning of that provision, if that court has not declined jurisdiction of its own motion and none of the parties has contested its jurisdiction prior to or up to the time at which a position is adopted which is regarded in national procedural law as being the first defence on the substance submitted before that court.

The Court's finding does of course require the court seized later (or the lawyers appearing before it) to be au fait with the procedural law of the alternative court (such as in France, the possibility to raise objection against jurisdiction verbally only). The CJEU's overall consideration here lies with obliging but also enabling the court seized second, not to linger indefinitely with the application of Article 29.

The conditions for Article 29 to apply are that the case involves the same action, between the same parties. The CJEU has clarified in *Gubish Machinenfabrik*[451] and in *The Tatry*[452] what was already clearer in other language versions (including Dutch),[453] namely that Article 29 requires three identities: identify of parties; identify of object or 'subject-matter'; and identity of cause. The English version and the German version mention 'same parties' and 'same cause of action' only: they do not expressly distinguish between the concepts of 'object' and 'cause' of action.

*The Tatry* was recently applied in *Aertssen*.[454] The CJEU held among others that the question whether the parties are the same cannot depend on the position of one or other of the parties in the two proceedings.

### *2.2.14.2 Identity of Parties*

> [W]here some of the parties are the same as the parties to an action which has already been started, Article [27] requires the second court seized to decline jurisdiction only to the extent to which the parties to the proceedings pending before it are also parties to the action previously started before the court of another Contracting State; it does not prevent the proceedings from continuing between the other parties.[455]

> [T]hat interpretation of Article [27] involves fragmenting the proceedings. However, Article [28] mitigates that disadvantage. That article allows the second court seized to stay proceedings or to decline jurisdiction on the ground that the actions are related, if the conditions there set out are satisfied.[456]

[451] Case 144/86 *Gubisch Maschinenfabrik KG v Giulio Palumbo* [1987] ECR 4861.

[452] *The Tatry* (n 447).

[453] 'Wanneer voor gerechten van verschillende verdragsluitende Staten tussen dezelfde partijen vorderingen aanhangig zijn, welke hetzelfde onderwerp betreffen en op dezelfde oorzaak berusten'; see also the French 'Lorsque des demandes ayant le même objet et la même cause sont formées entre les mêmes parties.'

[454] Case C-523/14 *Aannemingsbedrijf Aertssen en Aertssen Terrassements v VSB Machineverhuur BV et al*, ECLI:EU:C:2015:722.

[455] *The Tatry* (n 447) para 33.

[456] Ibid, para 34.

### *2.2.14.3 Identity of Object or 'Subject-Matter'*

'The "object of the action" for the purposes of (now) Article 29 means the end the action has in view' (*The Tatry*).[457] This cannot be restricted so as to mean two claims which are entirely identical (*Gubisch Maschinenfabrik*).[458] Rather, they will more often than not be the flip sides of the same coin: an action seeking declaration that a contract is invalid; and a competing action seeking enforcement of that very contract; or an action seeking liability of a party; and a competing action seeking a declaration that that party is not liable. Basically, and with a view to the enforcement issue, if the orders sought could contradict each other were they both granted, their object will be the same.

### *2.2.14.4 Identity of Cause of Action*

[T]he 'cause of action' comprises the facts and the rule of law relied on as the basis of the action (Gubbisch).[459]

In this respect account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant (*Gantner Electronic*).[460]

### *2.2.14.5* Lis Alibi Pendens *and the* Forum Non Conveniens *Doctrine*

#### 2.2.14.5.1 Under the Brussels I Regulation

The Regulation's rules on *lis pendens* are the ultimate expression of the Regulation's search for clarity and especially predictability—therefore also inflexibility. The result of that is nowhere clearer than in *Owusu v Jackson*.[461]

According to the doctrine of *forum non conveniens*, as understood in English law, a national court may decline to exercise jurisdiction on the ground that a court in another State, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.[462] An English court which decides to decline jurisdiction under the doctrine of *forum non conveniens* stays proceedings so that the proceedings which are thus provisionally suspended can be resumed should it prove, in particular, that the foreign forum has no jurisdiction to hear the case or that the claimant has no access to effective justice in that forum.

Mr Owusu was a UK national who had rented a holiday home in Jamaica from one of the defendants, Mr Jackson, a Jamaican national but domiciled in the UK, and who suffered severe physical injuries in a diving accident as a result, allegedly, of a badly maintained and not properly signposted private beach that came with the holiday home. Mr Owusu also sued a number of Jamaican based companies with links to the case.

[457] *The Tatry* (n 447) para 40.
[458] *Gubisch Maschinenfabrik* (n 451) 17.
[459] Ibid, para 38.
[460] Case C-111/01 *Gantner Electronic GmbH v Basch Exploitatie Maatschappij BV* [2003] ECR I-4207, para 31.
[461] Case C-281/02 *Andrew Owusu v NB Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others* [2005] ECR I-553.
[462] The House of Lords, in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, particularly para 476.

It was obvious from the start that the only procedural link to the UK under the Regulation was (now) Article 4 for one of the defendants. It was also clear that had the claim been brought outside of the context of the Regulation, the English courts most likely would have applied forum non conveniens to dismiss the case. The House of Lords pointed out that, were it forced to accept jurisdiction and hence issue a judgment on the merits of the case, this judgment would be very difficult to enforce in Jamaica. The specific questions of the case are worth repeating in full:

> 1. Is it inconsistent with the Brussels Convention, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:
>
> (a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;
> (b) if the proceedings have no connecting factors to any other Contracting State?
>
> 2. If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?

The Court held—rather concisely (the reader may wish to consult Léger AG's Opinion):

> That for the jurisdiction rules of the Brussels Convention to apply at all, the existence of an international element is required.
>
> That the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of Article 2 of the Brussels Convention, from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States.
>
> That moreover, the rules of the Brussels Convention on exclusive jurisdiction or express prorogation of jurisdiction are also likely to be applicable to legal relationships involving only one Contracting State and one or more non-Contracting States.
>
> That the uniform rules of jurisdiction contained in the Brussels Convention are not intended to apply only to situations in which there is a real and sufficient link with the working of the internal market, by definition involving a number of Member States: it is not disputed that the mother instrument, ie the Brussels Convention, helps to ensure the smooth working of the internal market.
>
> With respect to the compatibility with the BC of the FNC doctrine, the Court observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention
>
> That respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention (see, inter alia, Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-'[*sic*]6307, paragraph 23, and Case C-256/00 *Besix* [2002] ECR I-'1699, paragraph 24), would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the *forum non conveniens* doctrine.
>
> That Application of the *forum non conveniens* doctrine, which allows the court seized a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.

> That the legal protection of persons established in the Community would also be undermined. In particular, a defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued.
>
> That moreover, allowing *forum non conveniens* in the context of the Brussels Convention would be likely to affect the uniform application of the rules of jurisdiction contained therein in so far as that doctrine is recognised only in a limited number of Contracting States, whereas the objective of the Brussels Convention is precisely to lay down common rules to the exclusion of derogating national rules.

The Court's ruling left many issues unanswered, including with respect to court of choice agreements [what if there is an express choice of court agreement for a third State];[463] or what the impact of the ruling is, if any, if there is already a proceeding pending in a third State;[464] or what if that third State, had it been a Member State, would have had exclusive jurisdiction under Article 24. However, the Court's general gist is clear: it emphasises the predictability and legal certainty as core issues of the Brussels Convention and the Regulation; and it sees the application of *forum non conveniens* in spite of its criteria as developed by the House of Lords (now Supreme Court) in *Spiliada*, as unpredictable and as relying too much on the individual 'discretion' of the national judge (perhaps a more suited word would have been 'judgment': 'discretion' would indeed seem to suggest a completely free range for the English judge, which considering *Spiliada* is certainly not the case).

The English courts most certainly have not given up on *forum non conveniens* altogether. They happily continue to apply *forum non conveniens* outside of the Regulation's context, not just where no European harmonisation at all is involved,[465] but also outside of the Regulation context but within EU law, for instance with respect to the Brussels IIa Regulation.[466]

Moreover, recent developments in the courts of England and Wales suggest a *forum non conveniens*-type solution by the use of 'case management' considerations. In *Jong v HSBC*, for instance,[467] Purle J considered (at 26) whether the case against the English defendants may potentially be stayed in favour of having them joined to proceedings in Monaco. (In precedent, it was suggested that the clear rejection of *forum non conveniens* in *Owusu*, may not stand in the way of a stay on 'sensible case management' grounds, rather than *forum non conveniens* grounds.) Purle J justifiably hesitated ('the court must be careful not to evade the impact of Owusu v Jackson through the back door'), before dismissing the suggestion given that no case was as yet pending in Monaco. It is noteworthy that the latter would, incidentally, be a condition for the (strictly choreographed) *lis alibi pendens* rule of the Brussels I Recast to apply (Article 33; reviewed below). I would certainly argue that Owusu and the CJEU's reasoning behind it, excludes recourse to a de facto *forum non conveniens* rule.

[463] Pro application of FNC: see eg *Konkola Copper Mines plc v Coromin* [2005] EWHC 898 (Comm): a provision of the contract conferred exclusive jurisdiction on a non-Member State.

[464] Contra application of FNC: Barling J in *Catalyst v Lewinsohn* [2009] EWHC 1964 (Ch).

[465] See eg *Cherney v Deripaska* [2008] EWHC 1530 (Comm).

[466] *KN v JCN* [2010] EWHC 843, in which the English Court retained its power to grant a stay on grounds of *forum non conveniens*: High Court, Family Division, 19 April 2010.

[467] *Nancy Jong v HSBC Private Bank (Monaco) SA et al* [2014] EWHC 4165.

2.2.14.5.2 The Cautious Introduction of *Forum Non Conveniens* in the Brussels I Recast.

Interestingly, the European Parliament Rapporteur for the review of the Brussels I Regulation had early on in the proceedings suggested a *forum non conveniens* mechanism for the Regulation, along the lines of the Brussels II Regulation:[468]

> Suggests, in order to avoid the type of problem which came to the fore in Owusu v. Jackson, a solution on the lines of Article 15 of Regulation No 2201/2003 so as to allow the courts of a Member State having jurisdiction as to the substance to stay proceedings if they consider that a court of another Member State or of a third country would be better placed to hear the case, or a specific part thereof, thus enabling the parties to bring an application before that court or to enable the court seised (sic) to transfer the case to that court with the agreement of the parties; welcomes the corresponding suggestion in the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession.[469]

The relevant provision in that Regulation reads:

> Article 15
>
> Transfer to a court better placed to hear the case
>
> 1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:
>
> (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or
> (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.
>
> 2. Paragraph 1 shall apply:
>
> (a) upon application from a party; or
> (b) of the court's own motion; or
> (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.
>
> A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.
>
> 3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:
>
> (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised (sic); or
> (b) is the former habitual residence of the child; or
> (c) is the place of the child's nationality; or
> (d) is the habitual residence of a holder of parental responsibility; or

[468] Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters, [2003] OJ L338/1.

[469] Report by Tadeusz Zwiefka MEP of 29 June 2010 on the implementation of the Brussels I Regulation, PE 439.997v02-00, 14.

(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised (sic) in accordance with paragraph 1.

If the courts are not seised (sic) by that time, the court which has been seised (sic) shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised (sic) shall decline jurisdiction. Otherwise, the court first seised (sic) shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53.

This *forum non conveniens* provision clearly leaves a lot less room for manoeuvre for the courts seized, or at the least it aims to impose substantial conditions upon that room for manoeuvre.

Likewise, in the new succession Regulation,[470] Article 6 provides:

Article 6

Declining of jurisdiction in the event of a choice of law

Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the court seised (sic) pursuant to Article 4 or Article 10:

(a) may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets; or
(b) shall decline jurisdiction if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law.

In conclusion, even if the Parliament Rapporteur eventually dropped his idea for an overall *forum non conveniens* rule, clearly the new generation European private international law instruments are not as hostile to *forum non conveniens* as the CJEU had perceived the previous generation to be. This then led to the cautious introduction of *forum non conveniens* in the Brussels I Recast in what are now Articles 33–34 of the Regulation (see the text of that provision, above).

As I review above, under the 'International Impact of the Regulation', the European Commission wanted to introduce a considerable expansion of the international reach of the Regulation, an attempt which succeeded only very partially. It was, however, precisely with a view to managing the expected dramatic increase of *lis alibi pendens* occurring with

[470] Regulation 650/2012 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, [2012] OJ L201/107. The United Kingdom is as yet not covered by this Regulation. See relevant chapter of this handbook.

courts of third States, that the proposal for review introduced the new rule on application of *lis alibi pendens* and 'related actions' with third States.

In fact, the Regulation is so insistent upon those parts (in particular consumer contracts and contracts of employment) of its jurisdictional rules which apply irrespective of the domicile of the defendant that the rules of Articles 33 and 34 do *not* apply to them: a court in a Member State seized of an action other than those based on Articles 4, 7, 8 or 9 *cannot* refuse jurisdiction. Other than for the listed Articles, the CJEU's findings in *Owusu* continue to apply.

The inclusion of Article 4 in particular is remarkable, precisely given that it was the only jurisdictional ground which in *Owusu* granted jurisdiction to the Courts of England.

It is clear that Article 33 (for *lis alibi pendens*) and Article 34 (for 'related actions') impose a more restricted and choreographed room for manoeuvre for courts in the EU to refuse to hear a case where a related case is already pending ex-EU than would be the case in a *forum non conveniens* scenario. Of note is also recital 24, which specifies the condition of 'proper administration of justice':

> When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.
>
> That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.

It will be interesting to see how the courts will apply Articles 33–34.

### *2.2.14.6 Related Actions*

Article 30 applies for actions which do not conform to the Article 29 conditions, eg for actions between different parties, however where the actions are so related that separate proceedings would risk irreconcilable judgments. The purpose of that provision is to avoid the risk of conflicting judgments and thus to facilitate the proper administration of justice in the Union (*Gubisch Maschinenfabrik)*.[471] To achieve proper administration of justice, the interpretation of 'related actions' must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive (*Gubisch Maschinenfabrik)*.[472] 'Irreconcilable' is at least in the English version, used in Article 45, too (refusal of recognition of judgment: see below), other language versions (German, Italian) use different terms. Moreover the goals of Article 30 and Article 45 are radically different. Article 45 enables a court, by way of derogation from the principles and objectives of the Regulation, to refuse to recognise a foreign judgment. Consequently the term "irreconcilable … judgment" there referred to must be interpreted by reference to that objective. The objective of the third paragraph of Article 30,

[471] *Gubisch Maschinenfabrik* (n 451) para 51, with reference to the Jenard Report.
[472] Ibid, para 52.

however, is to improve coordination of the exercise of judicial functions within the Union and to avoid conflicting and contradictory decisions, even where the separate enforcement of each of them is not precluded (*Gubisch Maschinenfabrik)*.[473] Thus the risk of conflicting decisions is enough to trigger Article 30, without necessarily involving the risk of giving rise to mutually exclusive legal consequences (*Gubisch Maschinenfabrik*).[474]

Article 30 gives the court much more leeway than Article 29: it can stay its proceedings; reject its jurisdiction in favour of the other court; or simply go ahead.

The High Court held in *Nomura v Banco Monte dei Paschi di Siena* (BMPS)[475] against a grant of a stay of the English proceedings in favour of proceedings in Italy. The stay would have been granted on the basis of Article 30(1): 'where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings'.

A 'mandate' agreement exists between parties, which includes a non-exclusive jurisdiction clause in favour of the English courts. The ISDA Master agreement (this is different from the mandate agreement) is subject to English law and as such (see paragraph 16 of the judgment) contains an exclusive choice of court clause. BMPS fired the first shot in litigation, in Italy. The Italian claims are a mixture of contractual liability, liability in tort and liability ensuing from a criminal offence. BMPS essentially claimed that its former senior management colluded with Nomura in covering up losses incurred on financial operations with Nomura. Nomura started proceedings in England with a view to establishing that the agreements at issue were valid and binding. The parties agreed that the Italian court was first seized.

As already explained, Article 30 gives the court much more leeway than Article 29's *lis alibi pendens* rules. The High Court made full use of this flexibility, inter alia in finding that in reviewing whether actions are 'related' within the meaning of Article 30 account must be taken not just of the claims of the plaintiff but also the defence raised by the defendant. This is in contrast with the CJEU's position on Article 29 in *Gantner Electronic*, referred to above: in deciding identity of action under Article 29, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant.

Eder J held that the two proceedings were not likely to lead to irreconcilable judgments. Nomura's claims in England were contractual. BMPS's claims were based mostly on tort (paragraph 26). It should not be excluded that the findings in one court will influence the other. Proximity or convenience did not plead in favour of Italy. Finally and importantly, the High Court found that

> the case against the grant of a stay is strongly fortified because of the existence of the exclusive jurisdiction clause in the [] Master Agreement. [] the Court should, so far as possible, give effect to the parties' bargain and be very slow indeed to exercise a discretion in a manner the effect of which would be to destroy such bargain'.

The High Court justifiably did not entertain the parties' arguments on the basis of the new Jurisdiction Regulation, which had not yet entered into force and which includes a new

[473] Ibid, para 54.
[474] Ibid, para 57.
[475] *Nomura International PLC v Banca Monte dei Paschi di Siena SpA* [2013] EWHC 3187.

rule, reviewed elsewhere, granting better protection to choice of court agreements (priority for the court assigned to have first go at establishing its jurisdiction).

In the case of the *Alexandros T*, the distinction between Articles 29 and 30 was put into context sharply by the UK Supreme Court. It had to consider the impact on UK proceedings, opened in response to proceedings in Greece, in a dispute in which the insurers of the ship were under the impression that things had been settled following earlier proceedings in England. On 3 May 2006 the vessel *Alexandros T* sank and became a total loss 300 miles south of Port Elizabeth, with considerable loss of life. Her owners were Starlight Shipping Company ('Starlight'). Starlight made a claim against its insurers, who denied liability on the basis that the vessel was unseaworthy with the privity of the assured, namely Starlight. The insurers also said that Starlight had failed properly to report and repair damage to the vessel. Suits and countersuits followed, in England, on the basis of an exclusive jurisdictional clause in the insurance agreements. On 13 December 2007, the 2006 proceedings had been settled between Starlight and The Lloyd's Market (LMI) (as well as various underwriters) for 100 per cent of the claim, but without interest and costs, in full and final satisfaction of the claim.

In April 2011, nine sets of Greek proceedings, in materially identical form, were issued by Starlight and by a range of other interested parties, against LMI and the underwriters. The claims were for compensation for loss of hire and loss of opportunity by Starlight, and for pecuniary compensation due to moral damage. All the claims rely upon breaches of the Greek Civil and Criminal Code, not, as before, on the contractual arrangements. Subsequent to the issue of the Greek proceedings, the insurers took further steps and brought further proceedings in England. The insurers sought to enforce the settlement agreements. Starlight et al subsequently sought a stay of the English proceedings under Articles 29 or 30 of the Regulation. The High Court refused.[476] The Court of Appeal granted.[477] The Supreme Court had to untie the knot.[478]

In the case of the *Alexandros T*, the application of these two Articles led to extensive toing and froing by counsel, with Lord Clarke stating that the principles of Article 29

> require a comparison of the claims made in each jurisdiction and, in particular, consideration of whether the different claims have le même objet et la même cause without regard to the defences being advanced. … As I see it, Article 27 involves a comparison between the causes of action in the different sets of proceedings, not (as in Article 28) the proceedings themselves. … [T]he analysis cannot involve a broad comparison between what each party ultimately hopes to achieve. The analysis simply involves a comparison between the claims in order to see whether they have the same cause and the same object. (51 ff)

He then suggested that Article 29 has no impact on the proceedings at issue—the English proceedings should not be stayed and in Lord Clarke's view the matter was *acte clair*: no reference to the CJEU was needed. Lord Mance disagreed with this approach, essentially suggesting that both actions seek a declaration of non-liability and are therefore, at least for some of them, the same action within the meaning of Article 79.

[476] *Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG et al* [2011] EWHC 3381 (Comm).
[477] *Starlight Shipping Company v Allianz Marine & Aviation Versicherungs AG et al* [2012] EWCA Civ 1714.
[478] [2013] UKSC 70.

As for the application of Article 30, Lord Clarke suggested that the English Court should not exercise the possibility of a stay, inter alia in light of the exclusive choice of court clause previously agreed between the parties:

> I can see no reason why, in exercising that discretion under Article 28, the court second seised should not take into account the fact that the parties had previously agreed (or arguably agreed) an exclusive jurisdiction clause in favour of that court. On the contrary, depending upon the circumstances of the particular case, that seems to me to be likely to be a powerful factor in support of refusal of a stay. (95)

On this, Lord Mance did not disagree, neither did he suggest referral to the CJEU.

The relevant claims were, however, eventually dropped and therefore the need for referral to the CJEU disappeared.

Article 32 clarifies what is meant by court 'seized':

> Article 32
>
> For the purposes of this Section, a court shall be deemed to be seised (sic):
>
> 1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
> 2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

## 2.2.15 Applications for Provisional or Protective Measures: Article 35

> **Section 10 Provisional, including protective, measures**
>
> Article 35
>
> Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.

A court which has jurisdiction under any of the provisions of the Regulation will be able to order any provisional or protective measures it deems necessary, even if it has stayed its jurisdiction by application of the *lis alibi pendens* rule.[479] This was confirmed in *Van Uden*:

> a court having jurisdiction as to the substance of a case in accordance with Articles 2 and 5 to 18 of the Convention also has jurisdiction to order any provisional or protective measures which may prove necessary.[480]

[479] See eg *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm) 70–73; see Fawcett and Carruthers (n 188) 315, fn 956.

[480] Case C-391/95 *Van Uden* [1998] ECR I-7122, para 19.

This is not in itself surprising[481] and it is not what is meant by Article 35. Article 35 basically amounts to the Regulation (and the Brussels Convention before it) specifying its field of application: it does not regulate 'provisional, including protective, measures' and hence in each State, application may therefore be made to the competent courts for provisional or protective measures to be imposed or suspended, or for rulings on the validity of such measures, without regard to the rules of jurisdiction laid down in the Regulation (Jenard Report).[482] Article 35 is therefore an additional, subsidiary rule of jurisdiction with reference to national law.

As regards the measures which may be taken reference should largely be made to the internal law of the country concerned (Jenard Report).[483] However, EU law does impose two core requirements.

— Firstly, the core issue of whether the measure is 'provisional' is determined by European law: it is not the *lex fori* which decides whether the measure is provisional, but rather the Regulation. The measures must be provisional measures only: not measures taken in expedient procedures (*Reichert v Dresdner Bank*):

> [T]he expression 'provisional, including protective, measures' within the meaning of Article [31] must therefore be understood as referring to measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter.[484]

  This is interpreted strictly: in the case at issue, the *actio pauliana* was held as not preserving a legal situation but rather seeking to vary it, by ordering the revocation as against the creditor of the disposition effected by the debtor in fraud of the creditor's rights.[485]

— Moreover, the granting of provisional or protective measures on the basis of Article 35 is conditional on the existence of 'a real connecting link' between the subject-matter of the measures sought and the territorial jurisdiction of the Member State of the court before which those measures are sought (*Van Uden*). A typical link evidently is the presence of assets in the Member State concerned.)[486] A measure ordering interim payment of a contractual consideration does not constitute a provisional measure within the meaning of that article unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant

[481] Although as noted above, neither is it free of difficulty: in particular, for interim measures in intellectual property disputes, the application of the exclusive jurisdictional ground of Art 24(4) sits uneasily with other courts' jurisdiction for provisionary measures. The CJEU answered some of the issues concerning the delineation with Art 35 in *Solvay* (n 432 above and further analysis there) but did not entertain the relationship between Art 24(4) and provisional measures based on the core jurisdictional rules of the Regulation, rather than on Art 35.

[482] Jenard Report, 42.

[483] Ibid. *Lex fori* therefore applies to the types of available measures and conditions imposed upon them. See also M Bogdan, 'The Proposed Recast of Rules on Provisional Measures under the Brussels I Regulation' in Lein (n 89) 125, 130.

[484] Case C-261/*90 Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG* [1992] ECR 2149, para 34.

[485] Ibid, para 35.

[486] Bogdan (n 483).

> located or to be located within the confines of the territorial jurisdiction of the court to which application is made (*Van Uden*).[487]

The *Denilauler* criteria (see more on this below) for a ruling to be considered a 'judgment' within the context of the Regulation are a particular challenge within the context of provisional measures. In *Denilauler* the CJEU clarified that for a ruling to be a 'judgment' it has to follow an 'inquiry in adversarial proceedings'.[488] Quite a few provisional measures however (indeed often the most efficient ones) are/have to be taken ex parte and hence arguably fall outside the Regulation. The main consequence of them not being covered is of course not that the measure concerned is in any way illegal: that is not for the Regulation to consider. Rather, those measures that fall outside the Regulation will not enjoy its recognition and enforcement title, which especially in the case of provisional measures may be rather crucial (particularly in cases where assets need to be recovered from abroad or evidence preserved).

The Commission proposal on the review of the Regulation, and indeed the Council and Parliament discussion of the same, intended largely simply to clarify the article on provisional measures. There are one or two issues of note, however.

— Firstly, the new regime is more restrictive, in that it now excludes all provisional measures taken by the court of a Member State which does not have jurisdiction over the matter by virtue of the Regulation, from its enforcement title. Only provisional measures ordered by the court with substantive jurisdiction under the Regulation continue to be principally enforced across the EU by virtue of the Regulation.[489] It is of course not excluded that they might be enforced following subsidiary national law, which on the whole however will be much more cumbersome.

This important restriction is not clear from Article 35 itself. Rather, Article 2's definition of 'judgment' includes the new rule: see Article 2(a), second paragraph:

> For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement.

While one may sympathise with the Commission view expressed in its Green Paper preceding the review, namely that the scope of provisional measures is so wide and diverse across the EU that mutual recognition is particularly difficult,[490] such mutual recognition is also particularly useful. It fits entirely with the Internal Market credentials of the Regulation however as we have noted once or twice already, those are no longer the driving force behind the Regulation.

— On another point the new regime has overruled *Denilauler* and brings ex parte measures within the remit of the Regulation, though not in an altogether satisfactory manner. This new rule is included in recital 33 which reads:

> Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation.

[487] Case C-391/95 *Van Uden* [1998] ECR I-7091.
[488] Case 125/79 *Bernard Denilauler v SNC Couchet Frère* [1980] ECR 1553.
[489] See P Kiesselbach, 'The Brussels I Review Proposal—An Overview' in Lein (n 89) 1, 16.
[490] See also ibid.

> However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State. Having to serve the judgment prior to enforcement of course largely takes away the ex parte effect. While one cannot rule out abuse, nevertheless I cannot see why ex post review of potential reasons for refusing enforceability, could not have sufficiently served the rule of law trick whilst better serving procedural expediency and the Internal Market.

### 2.2.16 Recognition and Enforcement

To recognise foreign judgments is to admit for the territory of the recognising State the authority which they enjoy in the State where they were handed down.[491]

Chapter III of the Regulation was of course the true starting point of the whole Brussels Convention and Regulation system, indeed it was the very raison d'être for what has become a very extensive body of secondary EU law (see more on this in the introductory chapter). As a result of the safeguards granted to the defendant in the original proceedings, Title III of the Regulation is very liberal on the question of recognition and enforcement. As already stated, it seeks to facilitate as far as possible the free movement of judgments, and should be interpreted in this spirit. This liberal approach is evidenced in Title III first by a reduction in the number of grounds which can operate to prevent the recognition and enforcement of judgments and secondly, by the simplification of the enforcement procedure which is common to all Member States.[492]

To some degree Chapter III of the Regulation, in conjunction with other EU law instruments including the European Small Claims Procedure Regulation,[493] has become near-automatic. It is, as noted before, precisely the near-automatic recognition and enforcement procedures which first triggered the wish of the drafters of the Brussels Convention to include provisions on jurisdiction and which subsequently encouraged the CJEU to emphasise the need for mutual trust and legal certainty in the application of the Regulation.

Chapter III on recognition and enforcement has three sections: one on recognition; one on 'enforcement'; and finally one with common provisions. The 'enforcement' section has a misleading title,[494] for it does not actually lead to enforcement of the judgments at issue, rather to paving the way to such enforcement in the relevant Member State. Enforcement itself is left to national law—what is meant therefore is '*exequatur*'.

The section on recognition firstly ensures the automatic recognition of judgments without any special procedure being needed; a cross-reference to the swift procedure foreseen

[491] Virgos–Schmit Report on the Insolvency Regulation, para 143, 92: the report has not been officially published for reasons explained elsewhere in this volume. It may downloaded from the Archives of European Integration, eg via http://aei.pitt.edu/952/. See further below.

[492] Jenard Report, 42.

[493] Regulation 861/2007, [2007] OJ L199/1.

[494] H Storme, 'Het Europese Recht van het erkennen en uitvoerbaar verklaren van beslissingen en akten' in J Erauw (ed), *Internationaal Privaatrecht* (Mechelen, Kluwer, 2009) 237, 250.

for *exequatur*, should one for a particular reason require express recognition of a foreign judgment; and finally a limited number of grounds which may lead to a court refusing recognition. The latter are in turn cross-referred to in the section on *exequatur*: in other words recognition and *exequatur* may be refused only on the basis of the same grounds.

Finally, Section 3 'common provisions' concerns formalities, in particular the documentation required to be submitted upon application for either recognition or enforcement.

Formally, Article 39 of the Recast Regulation has abolished *exequatur*; however, that does not mean that no formalities are needed. The new procedure effectively means that the party requesting enforcement applies to the court of origin to issue the judgment with what effectively is a passport, in accordance with the standard forms included in annex. Therefore *exequatur* no longer exists (for this necessarily originates with the State of enforcement); it has been replaced with what I would like to call *identicatur*. Not all formalities (and the associated costs) have therefore disappeared. Rather, because they are now incurred in the country of origin, the parties concerned can feel more comfortable with the procedure.

> Article 36
>
> 1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
>
> 2. Any interested party may, in accordance with the procedure provided for in Subsection 2 of Section 3, apply for a decision that there are no grounds for refusal of recognition as referred to in Article 45.
>
> 3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of refusal of recognition, that court shall have jurisdiction over that question.

Article 36 includes three rules on recognition:[495]

— Judgments have to be recognised automatically. Member States must not make recognition per se subject to a special procedure and any party wishing to invoke a judgment against another party, typically as a defence in a proceeding initiated by that other party, can do so without having to make recourse to any prior special procedure. There is a presumption in favour or recognition, and it takes a special procedure to rebut that presumption.
— In the event of a dispute, if recognition is itself the principal issue, the simplified procedure for enforcement provided for in the Regulation may be applied (as opposed to the situation prior to the Convention, where complicated national procedures had to be followed).
— If the outcome of proceedings depends on the determination of an incidental question of recognition, the court entertaining those proceedings has jurisdiction on the question of recognition.

Two conditions which are frequently inserted in enforcement treaties are not included in the Regulation: it is not necessary that the foreign judgment should have become res judicata,

[495] Meaning conferring judgments the authority and effectiveness accorded to them in the State in which they were given: Jenard Report, 43.

and the jurisdiction of the court which gave the original judgment does not ordinarily have to be verified by the court of the State in which the recognition is sought.[496]

### *2.2.16.1 Recognition*

The conditions for recognition are included in Article 36 ff, and partially in the definitional Articles of the Regulation:[497] the judgment [a] must be an adjudication from a court in a Member State; [b] must be given in a civil or commercial matter; [c] must not be impeachable for jurisdictional error; [d] must not be impeachable for procedural or substantive reasons; and [e] must not be excluded from recognition by a relevant other Treaty.

#### 2.2.16.1.1 Must Be an Adjudication from a Court in a Member State

> Article 2(a)
>
> 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

The definition of Article 2 clearly excludes judgments from non-Member States, even if they have been held enforceable by a judge in another Member State (recognition of whose judgment is subsequently sought). Article 58 extends recognition to authentic acts, such as from notary publics.

Chapter III applies regardless of whether the judgment was issued on the basis of a jurisdictional rule of the Regulation or not—see also below: national public policy must certainly not be invoked to refuse recognition of judgments issued in the basis of exorbitant national rules of jurisdiction vis-à-vis non-EU-domiciled defendants.

The very wording of Article 2 shows that the definition of 'judgment' given in that provision refers, for the purposes of the application of the various provisions of the Regulation in which the term is used, solely to judicial decisions actually given by a court or tribunal of a Member State. In order to be a 'judgment' for the purposes of the Regulation the decision must emanate from a judicial body of a Member State deciding on its own authority on the issues between the parties. That condition is not fulfilled in the case of a settlement, even if it was reached in a court of a Member State and brings legal proceedings to an end. Settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention.[498] The CJEU in *Solo Kleinmotoren* reached this decision with reference to the discussion in the Jenard Report on the German *Kostenfestsetzungsbeschlug des Urkundsbeamten*, a decision on costs which would seem fairly administrative but of which the Expert Committee justified its inclusion because of the potential for the full court to intervene where parties disagree as to the initial decision by the court clerk.

More generally, the Court has (within the context of the Brussels Convention however transferable to the Regulation), made the rights of the defence infiltrate into the very definition of a 'judgment' under the Regulation. All the provisions of the Regulation, both those contained in the Title on jurisdiction and those contained in the Title on recognition and

[496] Jenard Report, 44.
[497] The format for listing these conditions is taken from Briggs (n 19) 121 ff.
[498] Case C-414/92 *Solo Kleinmotoren GmbH* v *Emilio Boch* [1994] ECR I-237.

enforcement, express the intention to ensure that, within the scope of the objectives of the Regulation, proceedings leading to the delivery of judicial decisions take place in such a way that the rights of the defence are observed. For such decisions to fall within the scope of the Regulation, it is sufficient (but also required) if they are judicial decisions which, before their recognition and enforcement are sought in a State other than the State of origin, have been, or have been capable of being, the subject in that State of origin and under various procedures, of an inquiry in adversarial proceedings (*Denilauler*, *Gambazzi*).[499]

How this applies to court recognition or adoption, or any other equivalent terminology used, of *arbitral awards* is unclear. I do not think court decisions recognising arbitral awards are excluded from the recognition title merely because they validate a decision made by someone who is not a court within the meaning of the Regulation. Depending both on the extent of review by the court of a Member State, in accordance with that State's national civil procedure rules, and on the actual review carried out by that court, court rulings which validate a ruling by a non-court, may in my view qualify, on an ad hoc basis, as an 'inquiry in adversarial proceedings' per the *Denilauler* and *Gambazzi* formula.[500]

In *Gothaer*,[501] Bot AG summarised the Court's case law on what a 'judgment' entails into three criteria: organic, procedural (closely related to organic) and substantive.

> The first criterion is organic. The judgment must emanate from a court or tribunal, that is to say, a body which acted independently of the other institutions of the State and impartially. … The second criterion, which cannot be separated from the first, is procedural. It requires that the rights of the defence were observed in the procedure which led up to the adoption of the judgment. … The third criterion is substantive. The judgment is characterised by the exercise of a power of assessment by the judicial body from which it emanates. That criterion means that a distinction must be drawn depending on whether the authority has a decision-making role or restricts itself to a more passive function, consisting for example in receiving the intentions of the parties to the proceedings. (36 ff)

Consequently, in the AG's view, a judgment by a court in a Member State, finding that it does not have jurisdiction because of a choice of forum clause pointing away from the EU (in the case at issue: Iceland), is a 'judgment' within the meaning of Article 2 of the Regulation.

#### 2.2.16.1.2 Must be Given in a Civil or Commercial Matter

The matter at issue does have to come within the scope of application of the Regulation as it otherwise simply falls outside the scope of the Regulation per se.[502] It follows that Title III cannot be invoked for the recognition and enforcement of judgments given on matters excluded from the scope of the Regulation (for those exclusions, see above).[503]

[499] *Denilauler* (n 488) para 13; Case C-394/07 *Marco Gambazzi v DaimlerChrysler Canada Inc and CIBC Mellon Trust Company* [2009] ECR I-2563, para 23.

[500] Ibid.

[501] Case C-456/*11 Gothaer Allgemeine Versicherung AG, ERGO Versicherung AG, Versicherungskammer Bayern-Versicherungsanstalt des öffentlichen Rechts, Nürnberger Allgemeine Versicherungs AG, Krones AG v Samskip GmbH* ECLI:EU:C:2012:719.

[502] Jenard Report, para 43.

[503] Ibid.

May the recognising court second-guess the decision by the adjudicating court on whether the issue falls within the scope of application of the Regulation? Scholarship is divided on the issue. It has been argued that especially in those cases where the issue had not really been raised before the court whose judgment needs to be recognised, the court in the latter Member State must consider the issue, while in those cases where the issue has been raised and the adjudicating court has held that the matter is within the scope of the Regulation, discretion by the recognising court is required.[504] Others have argued quite in passing that the scope of the Regulation is and needs to be looked at both at the adjudication stage and at the recognition and enforcement stage, and point to the fact that quite a few of the CJEU judgments on the scope of application resulted from preliminary review after the review of jurisdiction by a national court.[505] In *German Graphics*, the CJEU would seem to side with the latter suggestion, stating that:

> the court responsible for the enforcement must, before declaring that a judgment should be recognised which is not within the scope of application of Regulation No 1346/2000, in accordance with Regulation No 44/2001, determine whether the judgment at issue is within the material scope of the latter regulation.

Granted, the CJEU did not specify whether this is also the case where the very issue of scope of application and exclusions has already been subject to debate in the original court.[506]

#### 2.2.16.1.3 Must Not be Impeachable for Jurisdictional Error

> Article 45 (1)(e) (the recognition of a judgment shall be refused)
>
> if the judgment conflicts with
>
> (i) Sections 3, 4 or 5 of Chapter II, where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or
> (ii) Section 6 of Chapter II.
>
> 2. In its examination of the grounds of jurisdiction referred to in point (e) of paragraph 1, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction.
>
> 3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.

Article 45(1)(e) used to be included in a separate Article, Article 35. It has now been integrated in the list of potential reasons for refusal of recognition of Article 45. As far as the protected categories are concerned, the Brussels I Regulation awkwardly only protected the consumers and the insureds, not the employees. (Probably because the protection of employees was only inserted after the Brussels Convention.)

Evidently the starting point of Article 45 is to limit the scope for the courts in the State where recognition is sought, to refuse that recognition. There is a presumption in favour of recognition (which is the exact opposite of all Conventions, bi- and multilateral, prior to

[504] Briggs (n 19) 123.
[505] Fawcett and Carruthers (n 188) 601.
[506] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee*, [2009] ECR I-8421, 19.

the Brussels Convention) and the limited grounds which may justify a refusal of recognition are listed exhaustively in the Regulation.

'Jurisdictional error'[507] is included in Article 45(1)(e), which discusses the room for the courts in the Member State of recognition to review the application of the Regulation by the courts in the Member State of adjudication. The principle is that *no* second-guessing must take place of the jurisdictional rules once it is clear that the matter is within the scope of the Regulation (see above re 'civil or commercial matters' and whether the view on this by the adjudicating court can be second-guessed), and any alleged wrong application of jurisdiction (other than those listed in Article 45(1)(e)) cannot be categorised as infringing public policy in the Member State of recognition (Article 45(3)).

As noted once or twice already, the exercise by the national courts of their national rules of jurisdiction per Article 6 of the Regulation is covered by the Regulation's Chapter III on recognition and enforcement. Consequently there is in principle no room for the courts of other Member States to question the application of these rules by their counterparts in other Member States.

The only exceptions are, as noted, the jurisdictional rules for insurance contracts, consumer contracts (and employment contracts) and exclusive jurisdiction on the basis of Article 24.[508] *Not* infringement of exclusive jurisdiction clauses validly made under Article 25. As a result of the aforementioned Hague Choice of Court Agreements Convention, to which the EU is now a Party, an amendment of the Regulation on this point is quite likely but has as yet not materialised.

#### 2.2.16.1.4 Must Not be Impeachable for Procedural or Substantive Reasons

Article 35

1. On the application of any interested party, the recognition of a judgment shall be refused:

(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;
(b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;
(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or
(e) if the judgment conflicts with:
    (i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or
    (ii) Section 6 of Chapter II.

[507] The courts in the State of recognition certainly must not review a foreign judgment as to its substance in law or in fact: see Art 36 of the Regulation: 'Under no circumstances may a foreign judgment be reviewed as to its substance.'

[508] See the ultimately failed attempt in *fly LAL* (n 53).

> 2. In its examination of the grounds of jurisdiction referred to in point (e) of paragraph 1, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction.
>
> 3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.
>
> 4. The application for refusal of recognition shall be made in accordance with the procedures provided for in Subsection 2 and, where appropriate, Section 4.

Here, too, the Regulation is of course very limited: there are only five such reasons and they are exclusively listed in Article 45 (Article 45(1)(e) has been reviewed above):

### Public Policy

The notion of 'public policy' in Article 45 is that of *ordre public international*.[509] The notion may be confusing for continental lawyers, as civil law tends to employ the same notion (loosely translated as 'public order') for quite a variety of contexts:

— those of contract law, limiting the contractual freedom of parties in the event of interests which serve the public interest as a whole, as opposed to 'mandatory' law which protects the interest of specific categories of individuals only;
— of European law, particularly in the context of the four freedoms and the degree to which a Member State may create obstacles to such freedoms; and
— of private international law, in the context of recognition and enforcement (leading to a refusal of such steps in the event doing so would be contrary to core principles of the legal order where recognition is sought); and finally in the context of applicable law/choice of law: leading to the forum ignoring provisions of the applicable law).

The recognition itself must be 'manifestly' contrary to (national) public policy.

> This means firstly that the court in the State of recognition must not review whether the judgment itself is contrary to its national public policy, but rather, its enforcement. (Jenard Report)[510]

### National Concept Under the Control of the CJEU

'Public policy in the Member State in which recognition is sought' is by its very nature a matter for the courts of that Member State to define; however, the CJEU has held that the nature of the Regulation necessarily implies that the CJEU has to exercise a degree of control. It has held that the clause on public policy may be relied on only in exceptional cases (*Hoffmann*, *Hendrikman*).[511] While the Member States remain free in principle to

[509] See also the Hess and Pfeiffer study for the European Parliament, *L'interprétation de l'exception d'ordre public telle que prévue par les instruments du droit international privé et du droit procédural de l'Union européenne* (2011), available at www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453189/IPOL-JURI_ET%282011%29453189_FR.pdf, accessed 18 September 2015.

[510] Jenard Report, 44.

[511] Case 145/86 *Hoffmann* [1988] ECR 645, para 21, and Case C-78/95 *Hendrikman* [1996] ECR I-4943, para 23.

determine according to their own conception what public policy requires, the limits of that concept are a matter of interpretation of the Regulation (*Krombach*).[512]

Recourse to the clause on public policy can be envisaged only where recognition or enforcement of the judgment delivered in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (*Krombach*).[513]

### Infringement of EU Law

The possibility that the court of the State of origin erred in applying certain rules of EU law, including free movement of goods and competition law, does not qualify automatically as an infringement of public policy. That these rules concern Union[514] as opposed to national law does not as such have an impact on the application of Article 45 (*Renault*).[515] The means to correct errors in applying European competition law are national appeals procedures, judicial review with the CJEU, and, one imagines, direct appeal to the European Commission that in having its courts wrongly apply European competition law, is an infringement of that Member State's duties under the Treaty.

In *Diageo*,[516] the CJEU applied the exception vis-à-vis EU trade mark law. Taking a similarly restrictive line as in *Renault*, the Court formulated the test as follows where the breach concerns infringement of EU law:

> the public-policy clause would apply only where that error of law means that the recognition of the judgment concerned in the State in which recognition is sought would result in the manifest breach of an essential rule of law in the EU legal order and therefore in the legal order of that Member State. (50)

The relevant breach of EU trade mark law is simply not in that league (51). The Court in *Diageo* does seem to suggest (54)—although one has to infer that a contrario—that if one were to show that Member State courts deliberately infringe EU law, even if that EU law is not in the 'essential' category, such pattern of national precedent (imposed by the higher courts) could lead to refusal of recognition. However, this was not the suggestion made in the case at issue.

[512] Case C-7/98 *Krombach* [2000] ECR I-1935, para 22.

[513] Ibid, para 37.

[514] Specifically in the case of competition law, EU law is of a very high standing: see Case C-126/07 *Eco Swiss* [1999] ECR I-3055. Where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Art 85 of the Treaty (now Art 101 TFEU). That provision constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. Also, Community law requires that questions concerning the interpretation of the prohibition laid down in Art 85 should be open to examination by national courts when they are asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.

[515] Case C-38/98 *Renault*, [2000] ECR I-2973, para 31 ff.

[516] Case C-681/13 *Diageo Brands BV v Simiramida-04 EOOD* ECLI:EU:C:2015:471.

### Purely Economic Interests

The concept of 'public policy' within the meaning of Article 45(1) seeks to protect legal interests which are expressed through a rule of law, and not purely economic interests. The mere invocation of serious economic consequences does not constitute an infringement of the public policy of the Member State in which recognition is sought (*fly LAL*).[517]

### Infringement of the Right to Fair Trial

Disregard for rights under the ECHR, in particular, the right to a fair trial, has famously been upheld as within reach of a national court's option to apply Article 45 of the Regulation in *Krombach v Bamberski*.[518] However, in reviewing this possibility, the court to which the application to enforce is submitted has to make an ad hoc assessment of potential infringement of the right to fair trial.

In *Trade Agency*, proceedings were underway between Trade Agency Ltd ('Trade Agency') and Seramico Investments Ltd ('Seramico') concerning the recognition and enforcement in Latvia of a judgment in default delivered by the High Court of England and Wales. Seramico had filed suit against Trade Agency for payment of a sum of just under £300,000. Trade Agency entered no defence and the sum was awarded. Seramico then sought enforcement in Latvia. The Latvian court wondered whether Brussels I's Article 34(1)'s public policy exception (now Article 45(1)) allowed it to deny 'enforcement' (what it meant is really '*exequatur*') given that under the English system, an uncontested claim is summarily granted, without the judgment reviewing and confirming the legal merits of the case.

The UK had pointed out in the hearing at the Court of Justice that a judgment given in default of appearance, such as that given by the High Court in the main proceedings, cannot be obtained until, first, the applicant serves the claim form and the particulars of claim, containing a detailed description of the pleas in law and the material facts, to which the judgment itself impliedly refers; and, second, the defendant, although he has been informed of the legal proceedings instituted against him, does not appear or does not express his intention to submit a defence within the period prescribed.

The CJEU[519] refused to disallow all scope for the Member State in which enforcement is sought, to refuse such enforcement in light of what seem to be serious procedural requirements under English law. However, the court in which *exequatur* is sought may only refuse after review of the individual merits of the case: it has to, in other words, review whether in the case at issue the defendant knew of the applicant's statement of claim and decided not to defend himself against it. It may not decide that the English system as such is contrary to public policy in the state of enforcement.

The observance of the right to a fair trial requires that all judgments be reasoned in order to enable the defendant to understand why judgment has been pronounced against him and to bring an appropriate and effective appeal against such a judgment (*fly LAL*,[520] also *Trade Agency*).

[517] *fly LAL* (n 53) 58.
[518] *Krombach v Bamberski* (n 512).
[519] Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* ECLI:EU:C:2012:531.
[520] *fly LAL* (n 53) 51 ff. In the case at issue recourse failed: the referring court had suggested that the court of origin had failed properly to justify its decision on the merits and that this infringed a right to a fair trial. The

The rights of the defence were also invoked by the Irish High Court to refuse recognition of a Danish judgment in *Celtic Salmon*.[521] Hogan J summarised the issue as follows:

> Where a defendant in foreign proceedings governed by the Brussels Regulation (Council Regulation No 44/2001 EC) fails to advance and maintain a counter-claim for damages for [sic] in those proceedings, is that party then barred by the doctrine of res judicata or by the provisions of the Brussels Regulation itself from re-litigating that counterclaim for damages for breach of contract and negligence in existing proceedings in this jurisdiction where it sues as plaintiff?

Celtic Salmon used Aller Ireland, an Irish subsidiary of the parent company, as anchor defendant. The parent company, Aller Denmark, was duly joined to the proceedings. Vets, commissioned by Celtic Atlantic, had established a deficiency in the feed supplied by Aller Denmark. The dispute between the parties then started with a letter sent by Celtic Atlantic in July, 2008 claiming damages for the (allegedly) defective fish feed. Aller Denmark responded by denying liability, but also claimed for unpaid invoices in respect of the fish feed. In November 2008, Aller Denmark fired the first shot in litigation, suing in Denmark. There were two separate claims. First, Aller Denmark claimed in respect of certain unpaid invoices for the fish feed ('claim 1'). (It also reserved its position to make further claims in this regard. The claim taken forward only related to a fraction of the feed actually supplied.) Second, it sought an order that 'Celtic be ordered to admit that the delivered feed on which Aller Acqua's claim is based is in conformity with the contract' ('claim 2').

Celtic's Irish solicitors, according to the judgment, advised that it would be unwise to bring a counter-claim in the Danish proceedings, because to do so 'would preclude us from bringing proceedings in Ireland for damages for breach of contract'. In May 2009, Irish proceedings were brought by Celtic. These amounted to a claim for damages for negligence and breach of contract by reason of the allegedly defective nature of the fish feed.

The Danish courts accepted jurisdiction on the basis of (now) Article 7 based upon (whether this had been agreed was disputed between parties) delivery (incoterm) ex works/ex factory. This is the point where procedural difficulties started (hence the relevance of *lex fori*). The reports commissioned earlier by Celtic turned out not to be admissible (or at the very least would be regarded with suspicion) by the Danish courts given that under Danish civil procedure the court appoints its own experts. However, at the time this would have been carried forward, both fish and fish feed had been consumed. Celtic Atlantic elected not to pursue the counterclaim in respect of the defective feed, and reserved the right to do so at a later date (without specific reference to Danish or Irish courts).

The Danish court eventually sided with Aller in respect of two claims: claim 1 for debt in respect of the two unpaid invoices in the sum €58,655 plus interest; and claim 2 that 'Celtic [Atlantic] be ordered to admit that the delivered feed on which Aller [Denmark]'s claim is based is in conformity with the contract'. There was subsequently discussion among Danish experts in the Irish courts, whether the Danish judgment was in default of appearance, given the absence of defence against at least part of it.

CJEU found there was no lack of reasoning, since it was possible to follow the line of reasoning which led to the determination of the amount of the sums at issue. The parties concerned moreover had the opportunity to bring an action against such a decision and they exercised that option. Therefore, the basic principles of a fair trial were respected and, accordingly, there are no grounds to consider that there has been a breach of public policy.

[521] *Celtic Salmon v Aller Acqua* [2014] IEHC 421.

The question sub judice in the Irish High court was the fate of the Irish proceedings, Hogan J justifiably concluded that Article 29 JR (the *lis alibi pendens* rule) no longer had any relevance, given that the Danish proceedings had come to an end. Rather, whether Celtic's claims in the Irish courts were the same as those entertained in Denmark (and hence continuing them in Ireland, per se abusive, inter alia given comity) and/or whether Aller could waive the Danish judgment in defence of the Irish claims. The latter would imply recognition of the Danish judgment.

Hogan J emphasised procedural rights per *Krombach*, and the Charter, and concluded that by reason of the manner in which the Danish Administration of Justice Act operated in this case, the effective procedural rights of Celtic Atlantic were violated so far as claim 2 was concerned. He insisted that (only) on 'the special and particular facts of this case, the existence and operation of the Danish law operated … as an "insuperable" procedural obstacle which barred the effective prosecution of its claim' (124).

### Ordre Public and Residual National Jurisdictional Rules

Public policy is certainly not to be invoked as a ground for refusing to recognise a judgment given by a court of a Member State which has based its jurisdiction over a defendant domiciled outside the Union on a provision of its internal law, such as the provisions listed in Annex to the Regulation (the exorbitant national jurisdictional grounds) (Jenard Report).[522]

### Judgments in Default of Appearance

This is the necessary corollary of Article 25, and a matter of factual appreciation. It is typically difficult to apply in the event of pro forma service, eg to the local consul, the last known address, the public prosecutor's office, etc.[523] Whether the document which instituted the proceedings was duly served or not, has to be judged in accordance with the internal law of the Member State where the judgment was issued (Jenard Report),[524] however the second leg of that exception ('in a way as to enable him to arrange his defence') indicates that the courts in the State of recognition have room to judge the timeliness in particular with respect to the ECHR. The Jenard Report itself indicated that this provision does leave a crucial role for the courts in the State of recognition and hence must not be too restrictively applied.[525]

The observance of the rights of defence of a defendant in default of appearance is effectively ensured by a double review, one each by the Court of origin and the Court which is asked to recognise the judgment (*ASML*).[526] In the original proceedings in the State in which the judgment was given, the combined application of the Recast Regulation and Article 19(1) of Regulation 1393/2007,[527] mean that the court hearing the case must stay

[522] Jenard Report, 79.
[523] Briggs (n 19) 128.
[524] Jenard Report, 44.
[525] Ibid, 44 and 45.
[526] Case C-283/05 *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* [2006] ECR I-12041, para 29.
[527] On service of documents in civil or commercial matters, [2007] OJ L324/79. It replaced Regulation 1348/2000.

the proceedings so long as it is not shown that the defendant has been able to receive the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end. If, during recognition and enforcement proceedings in the State in which enforcement is sought, the defendant commences proceedings against a declaration of enforceability issued in the State in which the judgment was given, the court hearing the action must also examine the proper observance of the rights of the defence.

Irreconcilability with Other Judgments of the Member State of Forum

This exception applies whether these other judgments are issued sooner or later, however the application of *lis alibi pendens* and related actions ought greatly to reduce the number of irreconcilable judgments. Article 45(1)c requires the same parties only, not the same cause of action.

Irreconcilability with Other Judgment of Other Member States (than the Adjudicating Member State) or of a Third State

This exception does require the same parties and the same cause of action. Recognition may be refused if the proceedings which gave rise to the judgment whose recognition is sought have already resulted in a judgment which was given in a third State or another Member State and which would be entitled to recognition and enforcement under the law of the State in which recognition is sought.

What if there are irreconcilable judgments of the same State of origin? *Salzgitter Mannesmann*[528] concerned proceedings between Salzgitter Mannesmann Handel GmbH ('Salzgitter') and SC Laminorul SA ('Laminorul') concerning an application for a declaration of enforceability in Germany of a judgment given by a Romanian court by which Salzgitter was ordered to pay €188,330 to Laminorul. That judgment was at odds with an earlier judgment of that very same court, declaring the action as inadmissible. Salzgitter had not been properly represented in the second proceedings (there was discussion about the legality of representation). Appeals failed, and the courts at Düsseldorf found themselves being asked to enforce a judgment that was incompatible with another judgment by that same State. Does Article 45 of the Regulation apply? The CJEU held against the application of Article 45 on the familiar grounds of predictability and mutual trust. Courts in the Member States in which recognition and enforcement is sought have very limited grounds for refusal. One of the core limitations is to ensure that the Member State of recognition does not perform a de novo review of the case. The CJEU essentially argued that, were Article 45(1)(d) to apply to judgments of the same Member State of origin, the recognition and enforcement procedure would essentially amount to a further appeal in the underlying case. Salzgitter, having exhausted all internal procedures to seek to have the judgment overturned, now has to face the music in Germany.

There is course one further option: the German court could find the Romanian proceedings manifestly contrary to German public order. Per *Trade Agency* this is a measure of last resort and of strict application—not one firmly contemplated by the court at Düsseldorf, so it would seem.

[528] Case C-157/12 *Salzgitter Mannesmann Handel GmbH v SC Laminorul SA* ECLI:EU:C:2013:597.

2.2.16.1.5 Must Not be Excluded from Recognition by a Relevant Other Treaty

See Article 72, which has limited application.

### *2.2.16.2 Enforcement*

With respect to enforcement, the Recast Brussels I Regulation has further simplified procedures. The enforcement procedure of the Regulation constitutes an autonomous and complete system, independent of the legal systems of the Contracting States, including the matter of appeals (*Deutsche Genossenschaftsbank*, *Draka*).[529]

Unlike recognition, enforcement does always require a procedure, albeit a simplified one.

The procedure has two stages: the first one effectively introduces the judgment, enforcement of which will be subsequently sought, into the legal order of the Member State in which enforcement is sought. This stage of the procedure (to be introduced with a court identified in Annex) is formal only. The applicant produces the documents and certificates referred to in Article 53 ff JR, following which the court merely ensures that those formalities are complete. The authorities listed in Annex, at this stage of the procedure may not indeed must not carry out any other assessment (in particular, they may not review the conditions for refusal of *exequatur*, listed in the Regulation (*Prism Investments*).[530] The result of this formal exercise is a declaration of enforceability, which in accordance with Article 42 is served upon the party against whom enforcement is sought.

Once served, the decision may then be appealed, following which the relevant court (again identified in Annex) reviews the grounds for refusal, which are the same as those listed for the refusal of recognition.

The Court of Justice in *Trade Agency* emphasised the relevance of the potential for review of the grounds for objection, and in particular the rights of defence, and public policy arguments. The certificate produced, which is issued by the Member State of origin and which confirms the enforceability of the judgment in the Member State of origin, does not amount to an irrefutable presumption of the judgment being issued in accordance with the rights of the defence. The court in the Member State of enforcement therefore, in this second stage of the enforcement procedure, has full authority to review whether in fact the proceedings in the Member State of origin meet with the requirements of the rights of the defence, in particular whether the timing of service of the document initiating the proceedings (the date of which is confirmed by the certificate produced) allowed the defendant in default of appearance enough time to raise their defence.

In *Trade Agency* the Court of Justice also held that the same court moreover, has the right not to grant, under the public policy exception, enforcement of a judgment following national proceedings in which an uncontested claim leads to the claim being granted, without the judgment listing legal grounds assessing and confirming the merits of the case. However the court in which *exequatur* is sought, may only refuse after review of the individual merits of the case: it has to in other words review whether in the case at issue, the defendant knew of the applicant's statement of claim and decided not to defend himself

[529] Case 148/84 *Deutsche Genossenschaftsbank v SA Brasserie du Pêcheur* [1985] ECR 1981; and, for the Regulation, Case C-167/08 *Draka NK Cables Ltd, AB Sandvik international, VO Sembodja BV and Parc Healthcare International Limited v Omnipol Ltd* [2009] ECR I-3477.

[530] Case C-139/10 *Prism Investments BV v Jaap Anne van der Meer* [2011] ECR I-9511, paras 28 ff.

against it.[531] It may not decide that the foreign system as such as contrary to public policy in the state of enforcement.

The *exequatur* procedure of the Brussels I Regulation has been overhauled in the current review. However, it is exactly on issues of the rights of the defence, such as those raised in *Trade Agency*, that a number of Member States continue to insist that *exequatur* can never be entirely automatic, even among EU Member States.

[531] Case C-619/10 *Trade Agency Ltd v Seramico Investments* ECLI:EU:C:2012:531. The case at issue confirmed England and Wales' procedure for uncontested claims, in which the court merely grants the claim without *expressis verbis* summarising the merits of the claim. However, the UK had pointed out in the proceedings before the Court of Justice that a judgment given in default of appearance, such as that given by the High Court in the main proceedings, cannot be obtained until, first, the applicant serves the claim form and the particulars of claim, containing a detailed description of the pleas in law and the material facts, to which the judgment itself impliedly refers, and, second, the defendant, although he has been informed of the legal proceedings instituted against him, does not appear or does not express his intention to submit a defence within the period prescribed.

# 3

# The Core of European Private International Law: Applicable Law—Contracts

## 3.1 Summary

Applicable law or 'choice of law' for contracts is currently regulated by the so-called 'Rome I' Regulation: Regulation 593/2008.[1] The predecessor of the Regulation was the 1980 Rome Convention.[2] It is noteworthy that as with the Brussels Convention, for the Rome Convention there is a supplementary means of interpretation with a 'Report', in this case the Giuliano–Lagarde Report.[3]

Unlike the Brussels Convention on jurisdiction (see previous chapter), common law countries joined in with the European harmonisation of choice of law rules from the start. This arguably helped better integrate common law elements into this leg of the exercise than in jurisdiction issues.

Just like the Rome II Regulation (see Chapter 4), Rome I applies in all situations within its scope of application, involving a conflict of laws.[4] In civil and commercial matters, therefore, and as far as the subject-matter has not been excluded from the Regulation by virtue of Article 1, Rome I applies to all civil and commercial contractual matters, whether the court of the Member State has jurisdiction to hear the case on the basis of the Brussels I (Recast) Regulation, or on the basis of its national private international law. The Regulation (and the Convention before it)[5] is a uniform measure of private international law which replaces national private international law.

[1] [2008] OJ L177/6. See generally R Plender and M Wilderspin, *The European Private International Law of Obligations*, 4th edn (London, Sweet & Maxwell, 2015).

[2] 1980 Rome Convention on the law applicable to contractual obligations, consolidated version in [1998] OJ C27/34. As with the Brussels Convention, for the Rome Convention there is a supplementary means of interpretation in the form of a 'Report', the Guiliano–Lagarde Report, [1980] OJ C282/1.

[3] Giuliano–Lagarde Report, ibid.

[4] Readers will remember from the introduction to this volume that the second step of private international law, ie where the court which has jurisdiction to rule on the matter, is typically called 'conflict of laws', *stricto sensu*, in common law.

[5] Guiliano-Lagarde Report, 13, and Art 2.

### 3.1.1 Principles

The Rome I Regulation runs along three basic principles: the freedom of the parties to choose applicable law; a high degree of predictability, so as to assist with the Internal Market; and at the same time room for manoeuvre for the forum to correct the default choice in favour of the country with which the contract is 'most closely connected'.

### 3.1.2 Scope of Application

Rome I applies to contracts concluded after 17 December 2009 (Article 28),[6] leaving the Rome Convention in operation for contracts concluded before that date. It applies more specifically to *contractual obligations in civil and commercial matters* (Article 1(1)) hence *not* to torts or other non-contractual obligations, such as unjust enrichment (for which we now have the Rome II Regulation: see the relevant chapter), nor to contracts in non-civil or non-commercial matters (such as public law, tax and customs). Article 1(2) provides for a list of largely self-explanatory exclusions.

The Regulation has a universal scope (see Article 2), meaning that any law specified by the Regulation shall be applied, whether or not it is the law of a Member State.

### 3.1.3 Basic Principle: Freedom of Choice

In accordance with Article 3(1), the main principle of the Regulation is the free choice of the parties: *a contract shall be governed by the law chosen by the parties*. The choice—as long as it has been made validly, of course—is absolutely free: the law chosen need not have any connection with the parties or the contract.[7] The choice can be expressly made, or implied, however it at any rate has to be clear:

> The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. (Article 3(1)

'Implied choice' is inter alia influenced by any exclusive choice of court clauses which may have been agreed to. Recital 12 of the Regulation mentions these as 'one of the factors' to be taken into account however it is clear in practice that the impact of such choice of court clauses is very strong, in the absence of express choice of law clauses. 'Implied' certainly requires that somehow the parties need to have considered the issue consciously: again choice of court clauses may testify to this, as may the use of clauses which are specific to the laws of a given State.

As is not uncommon in European private international law, the Regulation includes a number of provisions protecting parties perceived to be in a weaker position: consumers, insurance contracts, and individual employment contracts.

[6] The temporal application of the Regulation has raised a number of issues in practice, which are reviewed below.

[7] The only exceptions being Art 5(2) in the case of carriage of passengers, and Art 7(3) for small insured risks. These allow free choice but among a closed list of options only.

### 3.1.4 Applicable Law in the Absence of Choice

The Rome Convention applied the 'closest connection' test in the absence of choice of law by the parties; it included a number of presumptions on the basis of the characteristic performance doctrine (see below) and further employed an escape clause, correcting characteristic performance if in reality the contract was more closely connected to another country than that of the characteristic performance. Especially in continental Europe, the characteristic performance test had become the norm, pushing the more factual 'closest connection' test to the background. The Regulation therefore wanted to correct the uneasy relationship between these two concepts, and kill the two birds of predictability (civil law) with factual appropriateness (common law). The Regulation now requires the court to *characterise* the contract and

[1] assess whether it fits within any of the contracts described in Article 4(1);
[2] in the negative, or if the contract falls within more than one of these categories, the court applies the *characteristic performance* test: Article 4(2);
[3] both [1] and [2] may be corrected if there is a *manifestly closer connection* with another State: that is the escape clause: Article 4(3);

If neither [1] nor [2] can be applied, the law of the State with the closest connection shall apply: Article 4(4).

The whistles and bells associated with each of these are reviewed below.

## 3.2 Detailed Review of the Regulation

### 3.2.1 Scope of Application

Article 1

Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
(b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
(c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(e) arbitration agreements and agreements on the choice of court;
(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;
(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
(i) obligations arising out of dealings prior to the conclusion of a contract;
(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [14] the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.
4. In this Regulation, the term "Member State" shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

The Regulation does not apply to Denmark (the Rome Convention does), but it does to Ireland (from the start) and to the United Kingdom (after some hesitation).

The Regulation first of all only applies 'in situations involving a conflict of laws'; these are, according to the Giuliano–Lagarde Report,

> [s]ituations which involve one or more elements foreign to the internal social system of a country (for example, the fact that one or all of the parties to the contract are foreign nationals or persons habitually resident abroad, the fact that the contract was made abroad the fact that one or more of the obligations of the parties are to be performed in a foreign country, etc thereby giving the legal systems of several countries claims to apply.[8]

Where a State consists of several territorial units each with its own substantive law of contractual obligations, the Regulation also applies to conflicts of laws between those territorial units so as to ensure foreseeability and certainty on the law and the uniform application of European rules to all conflict situations.[9]

The three basic principles of the Regulation are: freedom of the parties to choose applicable law; a high degree of predictability, so as to assist the internal market; and at the same time room for manoeuvre for the court to correct choice in favour of country with which the contract is 'most closely connected'.

Rome I applies to contracts concluded after 17 December 2009 (see Article 28). For contracts concluded before that date, the Rome Convention continues to apply (see below for major differences). This evidently means that the Rome Convention will be of relevance for some time still.

[8] Giuliano–Lagarde Report, 10.
[9] Commission proposal, 9. This was also the case under the Convention: see the Giuliano–Lagarde Report.

### *3.2.1.1 'Contractual Obligations'*

The difference between 'contract' and tort' in European private international law is of course crucial, readers are aware at this point in this volume. Crucial, yet the concept is left undefined in the Brussels I (and Recast) Regulation (which has a different special jurisdictional rule for both), the Rome I Regulation on applicable law for contracts, and the Rome II Regulation on applicable law for torts. Undefined, for these foundational elements of private law are outside the reach of legal and political compromise in the legislative process. Yet courts of course do have to apply the rules and in doing so, have to distinguish between both.

The CJEU pushes an 'autonomous' EU definition of both concepts which in the past has led to the seminal findings in Jakob Handte (Case C-26/91) and Kalfelis (Case 189/87). In *Handte* the Court held: the phrase 'matters relating to a contract is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.' (the double negative exercised scholarship for some time, as noted in the Chapter on the Brussels I Recast)). In *Kalfelis* the Court had earlier defined 'tort' as 'all actions which seek to establish liability of a defendant and which are not related to a "contract" within the meaning of Article 5(1).' (5(1) has become 7(1) in the Recast).

The Rome I Regulation applies to 'contractual obligations', but does not define these. In light of the need to apply the Regulation consistently with the Brussels I Recast Regulation,[10] it is generally said that a 'contractual obligation' must be understood to mean an 'obligation freely assumed' (*Handte*),[11] however as noted above (when discussing Article 7(1) of the Brussels I Recast Regulation), one must be cautious with this assumption.

In Joined Cases C-359/14 and C-475/14 *Ergo Insurance* and *AAS Gjensidige Baltic*, pending at the CJEU at the time of writing, the question is whether the relationship between two insurers, having covered liability for a towing vehicle, respectively a trailer, each subrogated in their insured's rights and obligations, one of them currently exercising a claim against the other in partial recovery of the compensation due to the victim, is non-contractual. Per Kalfelis, tort as a category is residual. Sharpston AG's starting point therefore is to examine whether the recourse action is essentially contractual in nature. In the negative, the action is non-contractual. The case is evidently made more complex by the underlying relationships between insurer and insured, and the presence of subrogration. In question is not therefore the relationship between the insurer and the victim: this is clearly non-contractual. The question is rather whether the action of one insurer against the other is contractual in nature, given the contractual relationship between insurer and insured, respectively the non-contractual relationship between the insured and the victim.

Sharpston AG first gets two issues out of the way. Lithuania (both referred cases are pending in Lithuanian courts) is a signatory State to the Hague Convention on the law applicable to traffic accidents, which is left unaffected by Rome II by virtue of Article 28. However the Convention itself holds that it does not apply to recourse action and subrogation involving insurance companies. Further, a suggestion that Directive 2009/103 (relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability) includes a conflict of laws (applicable law)

[10] See recital 7: 'The substantive scope of the provisions of this Regulation should be consistent with [the Brussels I Recast Regulation] and [Rome II].'

[11] Case C-26/91 *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] ECR I-3967.

rule which is *lex specialis* vis-a-vis the Rome Regulation, was quickly dismissed. Indeed the Directive's provisions do not indicate whatsoever that they can be stretched.

Then comes the core of the issue: the nature of the relationship underlying the claim. This, the AG suggests, is contractual. Relevant precedent referred to includes *Brogsitter* (Case C-548/12, discussed in the chapter on Jurisdiction) and *OFAB* (Case C-147/12, also reviewed in the Jurisdiction chapter and in the Chapter on the Insolvency Regulation). Essentially the AG puts forward an ancestry test: what is the ancestry of the action, without which the parties concerned would not be finding themselves pleading in a court of law? She uses 'centre of gravity' ('the centre of gravity of the obligation to indemnify is in the contractual obligation'); 'rooted in' ('the recourse action by one insurer against the other … is rooted in the contracts of insurance'); and 'intimately bound up' ('[the action] is intimately bound up with the two insurers' contractual obligation').[12]

Incidentally, in paragraph 20 of her Opinion the AG refers, in giving context, to the difference between Lithuanian and German law (the accidents both occurred in Germany) as regards the limitation periods for bringing a recourse action. In Rome II, limitation periods are included in Article 15 as being covered by the *lex causae*; also in Article 12 of Rome I. This pre-empts discussion on the matter for whether limitation periods are covered by *lex fori* (as a procedural issue) or the *lex causae* is otherwise not necessarily the same in all Member States.

If the CJEU confirms, preferably using the terminology of its AG, the tort/contract discussion in my view will have been helpfully clarified.

### 3.2.2 Exclusions

*Culpa in contrahendo* is specifically excluded (it is covered by the Rome II Regulation). (Article 1(2)(i): 'The following shall be excluded from this Regulation … (i) obligations arising out of dealings prior to the conclusion of a contract.')

Among the other exclusions, quite a few are aligned with the exemptions from the Brussels I Recast, although the joint exclusion from both the Brussels I Recast Regulation and Rome I (and indeed previously from the Brussels Convention and the Rome Convention: the nature of the exclusions is not dramatically different between the 'old' and the 'new' generation of European private international law instruments) should not be done intuitively: there might be good reason for harmonising jurisdiction in certain areas, but not applicable law, or indeed conversely.

Alignment in exclusions from the Brussels I Recast Regulation and Rome I exists for the specific exemption of revenue, customs and administrative matters; arbitration agreements; matrimonial property regimes (where following a Green Paper,[13] the Commission took a separate initiative which would have led to two twin Regulations on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in respectively matters of matrimonial property regimes[14] and registered partnerships)[15] however which

[12] Joined Cases C-359/14 and C-475/14 *Ergo Insurance and AAS Gjensidige Baltic* [62].

[13] Commission Green Paper of 17 July 2006 on conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition, COM(2006) 400.

[14] COM(2011) 126/2.

[15] COM(2011) 127/2.

stranded late 2015 on the requirement of unanimity in Council and which may now be recycled as an instrument of enhanced co-operation; wills and succession (where the Commission has taken a separate initiative which led to a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession)[16] ; and 'questions involving the status or legal capacity of natural persons, without prejudice to Article 13'. Article 13 as we shall see below, deals with incapacity.

'Obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations' are, as far as maintenance is concerned, now covered for all Member States by Regulation 4/2009,[17] and as far as divorce and legal separation are concerned, by Regulation 1259/2010 ('Rome III'),[18] but only for the 14 Member States which are a party to this very first application of the 'Enhanced Co-operation' mechanism. Choice of court agreements are excluded in one breath with arbitration agreements. Issues with respect to their validity are being dealt to some degree with in the review of the Brussels I Recast Regulation (see in relevant chapter).

Whether to exclude choice of court agreements from Rome I was subject to lively debate. Choice of court agreements arguably are agreements or 'contracts' just like any other. This is indeed the case in many jurisdictions, and ordinary choice of law rules are applied to discover the law applicable to such contract. However, as the review of the Brussels I Recast Regulation showed, choice of court agreements, even if they are 'contracts', are considered by a number of Member States to be of a peculiar nature, seeing as the adjudication of jurisdiction is considered an exercise of State authority and public policy.[19] The Brussels I Recast Regulation, the Brussels Convention and national laws alike therefore limit contractual freedom for choice of court. Those in favour of excluding choice of court agreements from the Convention also pointed to the provisions of the Brussels Convention, now Regulation, with respect to choice of court agreements, which, they argued, effectively harmonise at least insofar as Union courts are concerned, the conditions for validity of the clause and form, hence suggesting that the outstanding points, notably those relating to consent, 'do not arise in practice'.[20] With reference to the review above of the not altogether undisputed application of the relevant provisions of the Regulation, that statement seemed a bit optimistic. As a result of the exclusion, choice of law for choice of court agreements is subject to the residual private international law of the Member States, exception made of course for the new provisions in the Recast Brussels I Regulation (see Chapter 2).

Also excluded are questions governed by the law of companies, etc. The Giuliano–Lagarde Report goes into a bit more detail as to what is and is not excluded:

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Confirming this exclusion, the Group stated that it affects all the complex acts (contractual administrative, registration) which are necessary to the creation of a company or firm and to the regulation of its internal organization

[16] COM(2009) 154. Regulation 650/2012, [2012] OJ L201/107. Note that this Regulation deals with succession only, not with matrimonial property regimes.

[17] Regulation 4/2009 on jurisdiction, applicable law, recognition and decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L7/1.

[18] Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L343/10.

[19] See also Giuliano–Lagarde Report, 11 (para 5).

[20] Ibid.

and winding up, ie acts which fall within the scope of company law. On the other hand, acts or preliminary contracts whose sole purpose is to create obligations between interested parties (promoters) with a view to forming a company or firm are not covered by the exclusion.

The subject may be a body with or without legal personality, profit-making or non-profit-making. Having regard to the differences which exist, it may be that certain relationships will be regarded as within the scope of company law or might be treated as being governed by that law (for example, societé de droit civil nicht-rechtsfahiger Verein, partnership, Vennootschap onder firma, etc) in some countries but not in others. The rule has been made flexible in order to take account of the diversity of national laws.

Examples of 'internal organization' are: the calling of meetings, the right to vote, the necessary quorum, the appointment of officers of the company or firm, etc. 'Winding-up' would cover either the termination of the company or firm as provided by its constitution or by operation of law, or its disappearance by merger or other similar process.

At the request of the German delegation the Group extended the subparagraph (e) exclusion to the personal liability of members and organs, and also to the legal capacity of companies or firms. On the other hand the Group did not adopt the proposal that mergers and groupings should also be expressly mentioned, most of the delegations being of the opinion that mergers and groupings were already covered by the present wording.

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The 'corporate exception' is currently before the CJEU in *KA Finanz*.[21] The two main questions ask whether the 'company law' excepted area includes (a) reorganisations such as mergers and divisions, and (b) in connection with reorganisations, the creditor protection provision in Article 15 of Directive 78/855 concerning mergers of public limited liability companies, and of its successor, Directive 2011/35. KA Finanz is what is generally referred to as a 'bad bank'.

The referring court, Austria's Oberster Gerichtshof, would seem to be hedging its bets on whether the Rome Convention or the Regulation applies to the contract, and ditto for the 1978 Directive or the aforementioned 2011 Directive.

The Giuliano–Lagarde explanation does not clarify all. For instance, the Report would seem to suggest that 'mergers and groupings', at issue in *KA Finanz*, are covered by the exception. Presumably, given the nature of the remainder of the exception, this is limited to the actual final agreement creating the joint venture or merged company, and not to the complex set of agreements leading up to such creation, such as memoranda of understanding, or non-disclosure agreements. Along those lines, I would suggest creditor protection is not covered by the exception.

The Gerichtshof also sought clarification on whether there are

> any requirements concerning the treatment of mergers in relation to conflict of laws to be inferred from European primary law such as the freedom of establishment under Article 49 TFEU, the freedom to provide services under Article 56 TFEU and the free movement of capital and payments under Article 63 TFEU, in particular as to whether the national law of the State of the outwardly merging company or the national law of the target company is to be applied?

This question to me seems far too academic to prompt the CJEU into entertaining it.

Advocate-General Bot's Opinion (which was issued on the day of near-finalisation of this edition of the Handbook), has considerably slimmed down the list of questions eligible for

[21] Case C-483/13 *KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group*.

answer, due to the (non-) application ratione temporis of secondary EU law at issue: this includes the Rome I Regulation. However he also, more puzzlingly, skates around the question concerning the application of the corporate exception of the 1980 Rome Convention, despite the judgment which is being appealed with the referring court, having made that exception the corner piece of its conflicts analysis. In particular, it considered that the consequences of a merger are part of the corporate status of the company concerned and that the transfer of assets within the context of a merger consequently need to be assessed viz-a-viz the company's *lex societatis*: Austrian law, and not, as suggested by claimants, German law as the *lex contractus* relevant to the assets concerned (bonds issued by the corporate predecessor of the new corporation).

The AG focuses his analysis entirely on the specific qualification of the contract at issue (conclusion: *sui generis*), and on Directive 2005/56. In paras 47–48, he suggests that contractual obligations of the bank's predecessor, per Directive 2005/56, are transferred to the corporate successor, including the lex contractus of those agreements. One can build an assumption around those paras, that the AG suggests a narrow interpretation of the corporate exception to the Rome Convention, etc. However it is quite unusual for one to have to second-guess an AG's Opinion. Judicial economy is usually the signature of the CJEU itself, not its Advocate Generals.

Finally, the exclusion for arbitration agreements, just as in the Brussels I Recast Regulation, is a result of the deference to pre-existing international conventions (in particular, the New York Convention), and to the feeling that the matter was very complex and settling it one way or another might even have endangered ratification of the Rome Convention. The parties to the Rome Convention aired the expectation that the issue would be addressed by international law.[22] The New York Convention famously leaves the entire validity question of arbitration clauses to the forum, rendering the statement of the Commission in its proposal for the Rome I Regulation, that arbitration clauses were 'already covered by satisfactory international regulations',[23] a bit puzzling.

Where the arbitration clause forms an integral part of a contract, the exclusion relates only to the clause itself and not to the contract as a whole.[24]

As a result of arbitration agreements being excluded, choice of law in arbitration is subject to national law. Typically,[25] arbitration agreements are treated distinct from the substantive agreement in which they are included, for the purpose of assessment of their validity, existence and effectiveness. This leads one to have to ascertain *lex arbitri* (the law of the arbitration agreement, per the preceding sentence); the curial law (the procedural law which will guide the arbitration proceedings; despite the Latin *curia* not commonly referred to as *lex curia*); and the 'proper law', the law that governs the actual contract (*lex contractus*). *Lex arbitri* in England implies identifying the law with which the arbitration agreement has its 'closest and most real connection'.[26]

[22] Giuliano–Lagarde Report, 12.

[23] COM(2005) 650, 3.

[24] Giuliano–Lagarde Report, 12 (para 5 *in fine*).

[25] For English law, see the Court of Appeal in *Fiona Trust & Holding Corporation & ors v Yuri Privalov & ors* [2007] EWCA Civ 20.

[26] See application in *Sulamerica*: the claimant insurers sought the continuation of an interim anti-suit injunction against the defendant insureds. The parties were at loggerheads over the validity of an arbitration agreement between them, which may be found in the policy. Express choice of law for the policy had been made for Brazil.

### 3.2.3 Universal Application

> Article 2 Universal application
>
> Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

The Regulation has *universal scope*: the application of its rules may well lead to the application of the laws of Ruritania, a non-Member-State. This led to the predictable criticism that the Internal Market credentials of the Regulation are quite questionable. However, in view of the Commission's insistence that the main obstacle to the Internal Market in this respect is uncertainty, rather than unfamiliarity, and given the blessing which the EU Member States had already for some time given to a European private international law (see the relevant part of the introductory chapter), this criticism had little impact.[27]

Importantly, the universal application rule applies not just for contracts where the parties have freely chosen the applicable law, but also where the court has to apply the close connection rules in the absence of choice.

In accordance with Article 22(2), the Regulation does *not* apply to intra-Member State conflicts (these are not 'international'); however, a Member State may opt to do so.[28] Do note the difference with Article 22(1) which holds that:

> Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

### 3.2.4 Freedom of Choice

> Article 3
>
> Freedom of choice
>
> 1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
>
> 2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion

Express and exclusive choice of court had also been made for Brasil. The parties were all Brazilian (incidentally, the re-insurers were not). The subject matter of the insurance was located in Brazil (Jirau, one of the world's largest hydroelectric facilities). However, the arbitration agreement in the contract concluded with appointing London as the seat of the arbitration. Arbitration was agreed to be held under ARIAS rules. The law with which the arbitration agreement had its 'closest and most real connection' was found to be England, given that London had been assigned as the seat of arbitration: *Sulamerica CIA et al v ENESA Engenharia SA et al* [2012] EWHC 42 (Comm). The Court of Appeal confirmed: *Sulamerica CIA et al v ENESA Engenharia SA et al* [2012] EWCA Civ 638. In *Abuja International Hotels*, Hamblen J came to the same conclusion with respect to an underlying agreement that was governed by Nigerian law: *Abuja International Hotels Limited v Meridien SAS* [2012] EWHC 87 (Comm).

[27] Other than in the United Kingdom, Ireland and Denmark where, as noted, the respective governments have to decide on opting in (or in the case of Denmark on the conclusion of a specific Protocol) for each individual instrument.

[28] Eg in the United Kingdom, but also in Canada, Australia, the United States, etc: all these countries are within the radar of the Rome I Regulation by virtue of its universal character.

> of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
>
> 3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
>
> 4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.
>
> 5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

As noted, the choice (referred to in common law as 'the proper law of the contract': the law which the parties intended to govern the contract) is absolutely free: the law chosen need not have any connection with the parties or the contract. There are two exceptions to this rule: Article 5 limits the choice to one of five countries in the case of contracts of carriage; and Article 7 has a similar rule for small insured risks.

The choice can be verbatim, or tacit, but at any rate it has to be *clearly demonstrated*:[29] the parties somehow need to have considered the issue consciously. Article 3 requires the courts to ascertain the true tacit will of the parties rather than a purely hypothetical will.[30] 'Clearly demonstrated' and 'tacit' are probably better terminology therefore than 'implicit' or 'inferred', although both often used in practice. A 'clearly demonstrated' choice is inter alia influenced by any choice of court clauses in the contract (see recital 12 of the Regulation)[31] ; however, this can only be one element to consider (albeit a strong one). The Commission proposal had included a presumption in favour of a choice of law when parties had a choice of court agreement.[32] This presumption was not withheld in the final text.

Including a number of clauses specific to the law of a particular State, is another indication of choice of law (Giuliano–Lagarde Report),[33] as is the previous track record between the parties under contracts containing an express choice of law, where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties (Giuliano–Lagarde Report).[34] The identification of only limited clauses specific to the law of a particular State which parties agree do not apply between them

[29] The Rome Convention language read 'demonstrated with reasonable certainty'; however, this change was introduced not with a view to changing the standard of proof, or level of intensity, but rather to coordinate the various language versions of the text (in particular, to have all language versions coordinate with the French version). See H Heiss, 'Party Autonomy' in F Ferrari and S Leible (eds), *Rome I Regulation—The Law Applicable to Contractual Obligations in Europe* (Munich, Sellier, 2009) 1, 1.

[30] See the Commission proposal, COM(2005) 650, 5.

[31] 'An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.'

[32] 'If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State.'

[33] Giuliano–Lagarde Report, 17, para 3.

[34] Ibid.

may, in the absence of verbatim choice of law, indicate that parties have otherwise chosen for that law to be generally applicable.

Can parties opt to make the law of a non-State, eg terms and conditions drafted by a non-State body and never adopted by any State, the applicable law to their contract? The understanding in the Rome Convention was that this was not allowed, inter alia given that the Convention referred in Article 1(1) to 'The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.' Choosing non-State law, however, was discussed in the run-up to the Regulation, and the Commission proposal was very favourable at this point, having included a specific paragraph in Article 3 to that effect.[35] The form of words used would have authorised the choice of the UNIDROIT principles, the *Principles of European Contract Law* or a possible future optional Union instrument, while excluding the *lex mercatoria*, which was seen as not precise enough, or private codifications not adequately recognised by the international community.[36] Parliament suggested dropping the reference to the Draft Common Frame of Reference (DCFR). The Council, however, in the end had the reference to non-State law dropped altogether.[37] According to recital 13, parties are free to 'incorporating by reference into their contract a non-State body of law or an international convention'. It is not exactly clear what is meant 'by reference', and linguistic comparison does not help much.[38] While 'by reference' in ordinary language arguably could mean to include a simple reference to the non-State system, the preparatory works, with their obvious scepticism[39] towards such non-State law, suggest that at the very least one would have to include specific clauses of the non-State system in the contract. Especially in a business context, one ought to be safe rather than sorry and hence I would certainly recommend including as much as possible by full integration of terms into the contract.

The use of the word 'any *law*' in Article 3 Rome I is generally understood to underline the conclusion that the choice must be for the laws of a State. However linguistic reference to a number of language versions in my view does not back up that overall conclusion, and even in English surely 'law' can mean law *sensu latu*, not just 'State law'. Consequently the strongest authority against the choice of law for a non-country is recital 13 combined with the *travaux préparatoires*.

Recital 14—'Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules'—is a clear reference to the possibility of a future optional instrument of European contract law, most likely linked to

[35] 'The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.' Note that the reference to 'or in the Community' in the first sentence, was a reference to the then 'draft' Draft Common Frame of Reference—which Parliament opined was a bit odd, given that neither the nature nor the text of that draft was at all agreed: 'it is unclear what shape that body of contract terms will take and on what legal basis it will be adopted', Draft Report by Committee, August 2006, PE374.427.

[36] Explanatory Memorandum to the Commission Proposal.

[37] Compromise package by the Presidency, April 2007, JUSTCIV 73.

[38] English, French, German and Dutch all include 'referring'/'reference'.

[39] See also S Symeonides, 'Party Autonomy in Rome I and II from a Comparative Perspective' in K Boele-Woelki, T Einhorn, D Girsberger and S Symeonides (eds), *Convergence and Divergence in Private International Law—Liber Amicorum Kurt Siehr* (Munchen, Schulthess, 2010) 513, 540.

the DCFR.[40] One such instrument was proposed by the European Commission in October 2011, for sales.[41] However, the exact relationship between this proposal and Rome I was far from clear, especially in relation to mandatory rules of Union law.

Neither the contract nor the parties need to have any link to the chosen law, in contrast with US conflict of laws. Limitations to the freedom of choice as a result of mandatory law and similar provisions are reviewed below.

The Regulation allows for *dépeçage* or 'severance': parties are free to have different laws regulate different parts of the contract,[42,43] albeit that the choice must be logically consistent, ie it must relate to elements in the contract which can be governed by different laws without giving rise to contradictions (Giuliano–Lagarde Report).[44] For instance, repudiation of the contract for non-performance cannot be subjected to two different laws, one for the vendor and one for the purchaser. If the chosen laws cannot be logically reconciled, applicable law will have to be decided in accordance with Article 4.

Choice of law (and a change thereof) can be made at the start of the contract or throughout the duration of the contract, and is subject to the same rules as the initial choice (Giuliano–Lagarde Report),[45] though any such change must not adversely affect the position of third parties. Consequently choice post-initiation of the contract, or a change in the choice of law can also be made tacitly, as long as it is clearly demonstrated. If the choice of law is made or changed in the course of the proceedings, the limits within which the choice or change can be effective falls within the ambit of national law of procedure (Giuliano–Lagarde Report).[46]

### 3.2.5 Protected Categories

Articles 5–8 of Rome I provide for specific provisions for contracts of carriage (goods and passengers), consumers, insurance, and employment contracts—I refer by and large to the provisions of the Regulation for they speak mostly for themselves.

In the case of consumers, the definition employed is the generic definition of the Brussels I Recast Regulation, focusing on direction of activities. Note that there are important exceptions (see Article 6(4)). For both consumers and employees, the provisions of the Regulation more or less reiterate the regime of the Rome Convention. For both categories, the specific conflicts rules have a double aim: protecting the weaker category, as well as ensuring predictability.[47] For both categories, party autonomy is the starting point, albeit that for

[40] See also F Zoll, 'The Draft Common Frame of Reference as an Instrument of the Autonomous Qualification in the Context of the Rome I Regulation' in Ferrari and Leible (n 29) 17.

[41] COM(2011) 635 on a Common European Sales Law, withdrawn in 2015.

[42] See Art 3(1) *in fine*: By their choice the parties can select the law applicable to the whole or to part only of the contract.

[43] This is not as odd as it may seem at first sight, as different laws of the Member States have different attractions to the parties. Especially in complex transactions and complex areas of the law, intellectual property rights, say, or securitisation, one would ideally also have the court with the perceived know-how rule on the case; however, *dépeçage* for choice of court is certainly not possible.

[44] Giuliano–Lagarde Report, 17, para 4.

[45] Ibid, 18, para 6.

[46] Ibid.

[47] See Case C-384/10 *Jan Voogsgeerd Navimer SA* [2011] ECR I-13275, and before that Case C-29/10 *Heiko Koelzsch v Etat du Grand Duchy de Luxembourg* [2011] ECR I-1595. These judgments apply the Rome Convention but the provisions have not materially changed.

neither, the parties' choice of law is absolute. The parties' choice of law cannot set aside the protection offered by the provisions of mandatory law of the law that would have been applicable, had the parties not consented to a choice of law. For consumers, this is the law of the country where the consumer has his habitual residence (Article 6(1)). For employees, the law of the country in which or, failing that, from which, the employee habitually carries out his work in performance of the contract (Article 8(2)). For both categories, an escape clause offers courts flexibility (in the absence of express choice of law made by the parties), making the law most closely connected to the contract the applicable law.

The 'closer connections' test was applied by the CJEU in *Schlecker*.[48] (Formally the judgment applies the similar provision in the Rome Convention; however, the relevant provisions have not materially changed.) In the case at issue, Schlecker was a company governed by German law that was active in the retailing of beauty and health products. Although Schlecker was established in Germany, it had many branches in several Member States of the European Union. Under an initial employment contract, Mrs Boedeker—a German national and resident—was employed by Schlecker and performed her duties in Germany from 1 December 1979 to 1 January 1994. Under a further contract, concluded on 30 November 1994, Mrs Boedeker was appointed by Schlecker, with effect from 1 March 1995 until the summer of 2006, as distribution manager ('Geschäftsführerin/Vertrieb') for the entire territory of the Netherlands. In that capacity, Mrs Boedeker in fact performed her duties in the Netherlands. By letter of 19 June 2006, Schlecker informed Mrs Boedeker that her position as manager for the Netherlands would be abolished with effect from 30 June 2006 and invited her to take up, under the same contractual conditions, the post of head of accounts ('Bereichsleiterin Revision') in Dortmund (Germany), with effect from 1 July 2006. Although Mrs Boedeker lodged an objection on 4 July 2006 against that notice of amendment ('Änderungskündigung'), she took up her post as regional manager in Dortmund. On 5 July 2006, Mrs Boedeker declared herself unfit for work on medical grounds. As from 16 August 2006, she received benefits from a German health insurance fund ('Krankenkasse'). Subsequently, various actions were brought both by Mrs Boedeker and by Schlecker before the courts.

These two judgments are likely to be very relevant to employment law practice for some time to come. The judgment in *Koelzsch* ruled: 'Article 6(2)(a) of the Convention on the law applicable to contractual obligations [] must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer.'

In *Voogsgeerd*, the ECJ held: '1. Article 6(2) of the Rome Convention on the law applicable to contractual obligations [] must be interpreted as meaning that the national court seised of the case must first establish whether the employee, in the performance of his contract, habitually carries out his work in the same country, which is the country in which or from which, in the light of all the factors which characterise that activity, the employee performs the main part of his obligations towards his employer. 2. In the case where the national court takes the view that it cannot rule on the dispute before it under Article 6(2)(a) of that convention, Article 6(2)(b) of the Rome Convention must be interpreted as follows: —the concept of 'the place of business through which the employee was engaged' must be understood as referring exclusively to the place of business which engaged the employee and not to that with which the employee is connected by his actual employment; —the possession of legal personality does not constitute a requirement which must be fulfilled by the place of business of the employer within the meaning of that provision; —the place of business of an undertaking other than that which is formally referred to as the employer, with which that undertaking has connections, may be classified as a 'place of business' if there are objective factors enabling an actual situation to be established which differs from that which appears from the terms of the contract, and even though the authority of the employer has not been formally transferred to that other undertaking.'

[48] Case C-64/12 *Schlecker v Melitta Josefa Boedeker* ECLI:EU:C:2013:551.

In the absence of explicit choice of law by the parties to the contract, the connecting factors under Article 8(a) and (b) need to be looked at consecutively, ie with the 'habitual' workplace having priority. Wahl AG firstly set out the overall logic of the choice of law process under Article 6 (now Article 8 in the Regulation), with an important insight (and the helpful use of moot examples) into the issue of *favor laboratoris*. Article 6(1) obliges a national court to test any express choice against the laws which would apply in the absence of choice, and to have the strictest of these (ie the most favourable towards the employee)—albeit only for those stricter provisions—trump even express choice of law. In the absence of choice, however, this comparison need no longer be made: whichever law is identified by Article 6(2) applies in full, even if it is not the most protective towards the employee.

The AG subsequently advised in favour of giving the escape clause the widest possible remit, trumping the presumptions of (now) Article 8(1)(a) and (b), also in the particular situation in which an employee has performed an employment contract habitually, for a lengthy period and without interruption, in a single country. In determining what the AG called the 'centre of gravity of the employment relationship', it was suggested that inter alia the following criteria are relevant: place of habitual performance; the fact that the employee pays taxes and contributions in a particular country, relating to the income from his activity and the fact that he is covered by the social security scheme there and the various pension, sickness insurance and invalidity schemes. In each of these, the AG suggested, the court has to review in fact whether these particular choices were not imposed on the employee, but rather chosen consensually.

The Court concurred with the AG that the closer connection test must apply as suggested by its formulation: even if there is a habitual place of performance, this may be trumped by other circumstances. However, the Court also held that the sheer amount of 'other criteria' in and of itself does not suffice to rebut the presumption:

> the court called upon to rule in a particular case cannot automatically conclude that the rule laid down in Article 6(2)(a) of the Rome Convention must be disregarded solely because, by dint of their number, the other relevant circumstances—apart from the actual place of work—would result in the selection of another country. (40)

In other words: the actual place of work has considerable gravity. Nevertheless, among the other criteria, there are two, the Court suggested (though without reference to specific support in preparatory works or otherwise), which are particularly relevant:

> among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions. (41)

For insurance contracts, the relevant articles have been lifted from the various Directives on insurance law. Article 7 in combination with Article 23 oddly mean that while for insurance law, the Regulation effectively codifies the various insurance law Directives, for all other categories (including those with specific regimes in the Regulation, such as consumer law), the Regulation is *lex generalis* and any more specific sectoral Directives trump the Regulation.

Article 23

Relationship with other provisions of Community law

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

The Directive on consumer rights[49] provides specifically that it does not in principle interfere with the applicable law rules laid down by the Rome I Regulation.[50] However it does explicitly qualify as mandatory EU law,[51] as I review below.

### 3.2.6 Applicable Law in the Absence of Choice

Because the regime in the Rome Regulation attempts *in globo* to remedy the shortcomings of the previous regime of the Rome Convention, it is worthwhile recalling both regimes in full:

| Rome Convention | Rome Regulation |
|---|---|
| Article 4 | Article 4 |
| Applicable law in the absence of choice | Applicable law in the absence of choice |
| 1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.<br>2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. | 1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:<br>(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;<br>(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;<br>(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;<br>(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country; |

[49] Directive 2011/83, [2011] OJ L304/64.

[50] Recital 10: This Directive should be without prejudice 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).

[51] Article 25—Imperative nature of the Directive. If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive. Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer.

| | |
|---|---|
| 3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.<br>4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.<br>5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. | (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;<br>(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;<br>(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;<br>(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.<br>2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.<br>3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.<br>4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected. |

Both the Convention and now the Regulation attempt to define applicable law in the absence of choice in as precisely a way as possible. This, the drafters of the Convention argued, allows parties proper weighing and balancing of the need to make an express choice.

The Rome Convention applied the closest connection test; it then included a number of presumptions on the basis of the characteristic performance doctrine (see below); and it then had an escape clause, correcting characteristic performance if in reality the contract was clearly more closely connected to another country than that of the characteristic performance.[52] Interestingly, the Convention text specifically mentioned the possibility of *dépeçage*, also in the absence of choice of law (in such case therefore judge-made rather than expressly intended by the parties). There are strong arguments to hold that the Rome Regulation no longer allows for *dépeçage* in the absence of choice.[53]

[52] See also Case C-133/08 *Intercontainer* [2009] ECR I-9687 (re the Rome Convention).

[53] Pro this conclusion (hence against *dépeçage*: U Magnus, 'Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice' in Ferrari and Leible (n 29) 27, 31.

The Regulation wanted to correct the uneasy relationship between close connection/characteristic performance (the latter had become the norm, especially in continental Europe), and marry predictability (typically more the concern of continental Europe, and of course the staple diet of European private international law, rooted within the internal market) with appropriateness (common law). It now requires the court to characterise the contract and

[1] check whether it fits within any of the contracts described in Article 4(1)
[2] in the negative, or if the contract falls within more than one of these categories, the court applies the *characteristic performance* test: Article 4(2)
[3] both [1] and [2] may be corrected if there is a manifestly closer connection with another State: that is the escape clause: Article 4(3)

If neither [1] nor [2] can be applied: the law of the State with the 'closest connection' will be the applicable law: Article 4(4).

Some more detail on each of these.

### *3.2.6.1 Characterisation of the Contract*

The court must characterise the contract: Article 18 of the Rome Convention provided that:

> In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.

The Regulation no longer includes such provision, which is not surprising: the Convention lay outside the E(E)(C)(U) framework, the Regulation evidently lies squarely within it. Moreover, the CJEU for a long time had no jurisdiction over the Convention—now evidently it does over the Regulation. Consequently the Court of Justice can be expected to push for an 'autonomous' interpretation of the various concepts—a tall order for some of the terminology used in them.

After the court has characterised the contract, it must:

1. check as to whether it fits within any of the contracts described in Article 4(1).[54] Four of the subdivisions in Article 4(1) are an expression of the *characteristic performance* test: a, b, e, and f. Several of the rules of Article 4(1) apply the connecting factor 'habitual residence' (which is defined in Article 19). Article 19 specifies that for the purposes of determining the habitual residence, the relevant point in time is the time of the conclusion of the contract. This prevents *conflits mobiles* (possibility of changes in the connecting factor).

### *3.2.6.2 Habitual Residence*

Article 19 defines 'habitual residence' as:

> 1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
>
> The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

[54] For detail on each of them, see inter alia ibid, 34 ff.

> 2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
>
> 3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.'

Note that under the Convention, for companies the 'principal place of business' was the place of habitual residence.

The habitual residence for a natural person is only defined when it comes to his acting in the course of his business activity. 'Habitual residence' is a concept which is not used in Brussels I, however it is used in the Brussels II bis Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matter of parental responsibility,[55] where it is left undefined, and in the Rome III Regulation (an instrument of enhanced cooperation and hence not applicable in all Member States) implementing enhanced cooperation in the area of applicable law to divorce and legal separation,[56] where, too, somewhat oddly given its date of adoption (after Rome I and II) it is left undefined.

The Court of Justice has defined 'habitual residence' in *Swaddling* within the context of social security law (entitlement of benefits subject to a residence requirement) as the place

> where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances.[57]

Undoubtedly the context of the adjudication needs to be taken into account,[58] such as in *Swaddling*, a social security case, in which the seeking of holding of employment is likely to have a much greater relevance for determining habitual residence than in the context of, say, maintenance or parental responsibility (where, for instance, the interest and 'anchorage' of the child is likely to be much more relevant). Moreover, the Court itself has warned that its case-law on habitual residence in one area, cannot be directly transposed in the context of any other.[59] It is obvious however that the 'centre of interest' test which in one way or another finds its way into habitual residence in all relevant EU law, includes a subjective or 'qualitative'[60] element.

Of interest is the difference between the notion of 'habitual residence' as compared to 'domicile' for companies in the Rome I (and Rome II, see below) Regulations and the Brussels I Regulation. As noted in the relevant chapter, 'domicile' under the Regulation is defined using a triple alternative—leading to potential positive jurisdiction conflicts (ie more than one court claiming jurisdiction, with all the ensuing *lis alibi pendens* and related complications as a result). By contrast, in Rome I and Rome II the definition of 'habitual residence' ought to lead to just one location (and hence just one applicable law). The EU's

[55] [2003] OJ L338/1.
[56] [2010] OJ L343/10.
[57] Case C-90/97 *Swaddling v Adjudication Officer* [1999] ECR I-1075, para 29.
[58] See also House of Lords *M v M* [2007] EWHC 2047 (Fam).
[59] See Case C-523/07 *A* [2009] ECR I-2805, para 36. In the case at issue, even for application of the notion to two different parts of the same Regulation, Brussels II bis.
[60] C Clarkson, and J Hill, *The Conflict of Laws*, 4th edn (Oxford, OUP, 2011) 338.

autonomous concept of habitual leads to a singular 'habitual residence' which is not necessarily the case, for instance, in English law.

Finally, Article 19(2) fixes the habitual residence of a business to a specific branch, etc, to such branch, etc, where the contract is concluded in the course of the operations of a branch, or where said contract is to be performed by such branch, etc.

#### *3.2.6.3 The Characteristic Performance Test*

[2] If the contract does not fit within any of the listed categories, or if it falls within more than one of them, the court applies the *characteristic performance* test: Article 4(2). This in other words is a direct application of the characteristic performance doctrine: Article 4(1) merely contains a number of applications of the doctrine. Note that the doctrine (which has Swiss origin) refers *not* to the law of the State where the characteristic performance needs to be carried out, but rather to the law of the State where the party which has to carry out the characteristic performance, has its habitual residence.

Recital 19 emphasises that for contracts with rights and obligations which belong to a variety of the categories listed in Article 4(1) (and for which hence Article 4(2) prescribes that the characteristic performance needs to be identified), the characteristic performance is determined on the basis of that element of the contract where the gravity of the contract lies. If that is impossible (eg if there is no such gravity in the contract), Article 4(4) needs to be applied. It is noteworthy that where, in line with recital 19, there *is* gravity with one particular part of the contract, the court needs to continue the characteristic performance test of Article 4(2), and *not* determine applicable law on the basis of Article 4(1) (in that case singlehandedly applied to the element of gravity).

It is clear that outside the categories of Article 4(1), the likelihood of different courts in the Member States coming to a different conclusion increases. Such is the inevitable result of the limited harmonisation of contract law in the Member States.

#### *3.2.6.4 Manifestly Closer Connection*

[3] Both [1] and [2] may be corrected (Article 4(3)) if there is a manifestly closer connection with another State: ie the escape clause/the appropriateness idea, which underlies relevant common law on the matter.

The Rome Convention had a similar escape clause but without the denoter 'manifestly'. Evidently this will have to be applied restrictively.

#### *3.2.6.5 The Ultimate Option: Closest Connection*

[4] If neither [1] nor [2] can be applied, then the court will apply the law of the State with the 'closest connection': Article 4(4). Note there the absence of 'manifestly'.

### 3.2.7 Formal Validity, Consent and Capacity

Article 10

Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 11

Formal validity

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

(a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and
(b) those requirements cannot be derogated from by agreement.

Article 13

Incapacity

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.

Consent and material validity, included in Article 10, are textbook examples of what in the introduction to this volume is referred to as the *Vorfrage*. How does one determine the contractual obligations of parties, if the very validity of this contract, and/or the existence of consent of one of the parties to the contract, is disputed? In conflict of laws terms: what law determines the existence of consent and the (in)validity of a contract?

The Giuliano–Lagarde Report explains it in terms of circularity: 'the circular argument that where there is a choice of the applicable law no law can be said to be applicable until the contract is found to be valid'.[61]

[61] Giuliano–Lagarde Report, 28.

The Convention and now the Brussels I Recast Regulation solve the riddle by use of the putative applicable law:[62] the existence and the validity of a contract or any terms of it, is determined by the law which would govern it under the Regulation, if the contract or term were valid. 'In other words, the parties are able to pull themselves up by their own bootstraps' (a reference to von Munchausen):[63] awkward clauses or awkward contracts can be ensured of validity by choosing an applicable law of which one is certain that it approves. Evidently, there are general safeguards to protect against choice of law becoming a simple means to circumvent mandatory law of the forum, which we review below.

Article 10 itself however also limits the possibility of the 'bootstrap', by protecting bona fide parties: a party may rely upon the law of the country in which he has his habitual residence, to establish that he did not consent, if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the putative applicable law. 'The circumstances' include the parties' previous practices among themselves, their business relationship, and whether the transaction is a conventional one.[64] The burden of proof evidently lies with the party wanting to establish that it did not consent.

### *3.2.7.1 Incapacity*

As noted above, in the scope of application of Rome I, the legal capacity of natural persons or of bodies corporate or unincorporate is in principle excluded from the scope of the Convention. This exclusion means that each Member State continues to apply its own system of private international law to contractual capacity. However, in the case of natural persons,[65] the question of capacity is not entirely excluded. Article 13 (and Article 11 of the Rome convention before it) is intended to protect a party who in good faith believed himself to be contracting with a person of full capacity and who, after the contract has been entered into, is confronted by the incapacity of the other contracting party. There is in other words a concern to protect a party in good faith against the risk of a contract being held voidable or void on the ground of the other party's incapacity on account of the application of a law other than that of the place where the contract was concluded.[66]

Article 13 subjects the protection of the other party to the contract to very stringent conditions.[67] First, the contract must be concluded between persons who are in the same country. The provision does not wish to prejudice the protection of a party under a disability where the contract is concluded at a distance, between persons who are in different countries, even if, under the law governing the contract, the latter is deemed to have been concluded in the country where the party with full capacity is. Secondly, Article 13 is only to be applied where there is a conflict of laws. The law which, according to the private

[62] JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett's Private International Law*, 14th edn (Oxford, OUP, 2008) 744.

[63] Ibid, 745.

[64] Ibid, and references to case-law.

[65] In the discussions leading to the Regulation, an extension of this provision to legal persons was pondered, but in the end abandoned, mainly due to the differences associated with applying 'incapacity' to legal persons: see F Alférez Garcimartín, 'The Rome I Regulation: Much Ado About Nothing?' (2008) 2 *European Legal Forum (E)* 61, 63.

[66] Giuliano–Lagarde Report, 30.

[67] Ibid. The wording of Art 13 of the Rome I Regulation is identical (only one comma was added) to Art 11 of the Rome Convention.

international law of the court hearing the case, governs the capacity of the person claiming to be under a disability must be different from the law of the country where the contract was concluded. Thirdly, the person claiming to be under a disability must be deemed to have full capacity by the law of the country where the contract was concluded. This is because it is only in this case that the other party may rely on apparent capacity.

In principle these three conditions are sufficient to prevent the incapacitated person from pleading his incapacity against the other contracting party. This will not however be so 'if the other party to the contract was aware of his incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence'. This wording implies that the burden of proof lies on the incapacitated party. It is he who must establish that the other party knew of his incapacity or should have known of it. Article 13 is known as the *Lizardi* rule, after the relevant French case.[68]

Article 13 therefore does not have an Article 10(2)-like provision. This is a result of the focus of the two articles being different: Article 10 wishes to protect bona fide parties against mala fide parties who trick them into consent. Article 13 on the other hand aims to protect bona fide parties who rely on the validity of the contract, against mala fide parties who, post factum, claim incapacity.

#### *3.2.7.2 Formal Validity*

Formal validity is determined by the *lex contractus*. Article 11 contains general rules; a rule for unilateral acts intended to have legal effect; and special rules for consumer contracts and contracts in respect of immovable property.[69] The Giuliano–Lagarde Report discusses Article 11 (which does not differ dramatically from the provision in the Convention, other than for one more specific alternative connection factor introduced for contracts concluded at a distance) at length. It suggests that it would be unwise to determine too specifically what is meant to be covered by the 'form' of the contract, but does venture that:

> It is nevertheless permissible to consider 'form', for the purposes of Article [11], as including every external manifestation required on the part of a person expressing the will to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective. This definition does not include the special requirements which have to be fulfilled where there are persons under a disability to be protected, such as the need in French law for the consent of a family council to an act for the benefit of a minor, or where an act is to be valid against third parties, for example the need in English law for a notice of a statutory assignment of a chose in action.

### 3.2.8 Mandatory Law, and Public Order

There are effectively three cases of application: two for 'mandatory law' (Articles 3(3) and (4); and Article 9), one for 'public order' (Article 21).

**Mandatory law: Articles 3(3) and (4)**

Article 3

…

[68] Cour de Cassation, Req 16 January 1861, *Lizardi v Chaize et autres* (Dalloz, 1861) 1.193.
[69] Fawcett and Carruthers (n 61) 746.

> 3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
>
> 4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

Article 3 of the Regulation defines 'mandatory law' as 'provisions of law which cannot be derogated from by agreement'. There is obviously no *ius commune* on this: other than for EU law (where the CJEU is the final and sole judge), whether national law is mandatory or not is determined by the State which issues the law—often requiring analysis of case-law. The forum is bound to apply this provision in accordance with the law of the State whose 'mandatory' (or not) law is under consideration.

Both for Article 3(3) and for Article 3(4), *all other elements* relevant to the 'situation'[70] need to be located in a country other than the one whose law has been chosen. Therefore the issue needs to be exclusively linked to that country: a partial link with any other country (other than the choice of law) will break the chain of mandatory law.

### *3.2.8.1 Purely Domestic Contracts: Article 3(3)*

Some Member States (already at the time of the Convention) wanted to ban parties from making a choice of law for another Member State where all elements pointed to one Member State: they were, in other words, against allowing parties to employ choice of law to 'internationalise' an otherwise purely domestic situation.[71] Some, notably the United Kingdom, were however against such restriction, as it would deny the very essence of freedom of choice, given that many parties bona fide make such choice. Financial services were once again the main sector that was thought of in the formulation of the Article. Article 3(3) is a compromise. The Regulation does not clarify what 'all relevant elements' (other than choice of law) means. That is hence left to national law to determine, albeit that recital 15 clarifies that choice of court is no factor in this assessment. In other words, 'all other elements' can still be located in a country other than that of the choice of law, even if a choice of court agreement points away from it.

### *3.2.8.2 Mandatory EU Law: Article 3(4)*

This is a completely new provision, which was absent in the text of the Convention. It had, however, been applied by the CJEU, in particular in *Ingmar GB*.[72]

[70] 'Situation' (already used in the Rome Convention) is used in (inter alia) the English, French and German version of the Regulation, not eg the Dutch version. Why none of them use 'contract' is not clear; see also J Harris, 'Mandatory Rules and Public Policy under the Rome I Regulation' in Ferrari and Leible (n 29) fn 215.

[71] See also T Kruger, 'Wanneer is een zaak "internationaal" voor het Europese IPR?' (2006) *Tijdschrift voor Belgisch Handelsrecht* (941) 946.

[72] Case C-381/98 *Ingmar GB* [2000] ECR I-9305, para 25: 'It must therefore be held that it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely

Examples include the Commercial Agents Directive, Directive 86/653, per *Ingmar GB*, however arguably also quite a few provisions in secondary law with respect to various kinds of distribution, and consumer law. With respect to the latter, the consumer rights Directive,[73] provides that:

> If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive. Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer.

In other words, this Directive unequivocally declares itself to be of a mandatory EU nature. Moreover, the Directive reaffirms the provisions of the consumer contracts title of Article 6 of Rome I, with specific reference for contracts with choice of law in favour of a third country.[74] Recital 58 of the consumer rights Directive provides:

> Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 should apply, in order to determine whether the consumer retains the protection granted by this Directive.

Consumer law in the Member States becoming ever more harmonised, choice of law for one Member State or another in consumer contracts will not make much difference. Together with the (see in relevant chapter, above) extension of some of the special jurisdictional rules of the Brussels I Recast Regulation, including the protected categories, to defendants not domiciled in the EU, the consumer rights Directive establishes a wide territorial reach of the EU's consumer laws. However, in the event of choice of law for a third country, this often means that the professional party involved has its domicile in that third country. In such instances, the specific instruction of Article 3(4) (as in Article 3(3)), that 'all other elements … are located in one or more Member States', would seem to rule out its application: for the domicile of one of the parties firmly puts at least one such element outside of the EU. This is strikingly different from the *Ingmar* case itself, where the CJEU held that the place of residence of the principal (in the case at issue: California) in the commercial agents relationship was irrelevant. In other words, by virtue of the formulation of Article 3(3) (and 3(4)), *Ingmar* decided today would arguably[75] have a very different outcome.

Insofar as (or indeed as long as)[76] these EU rules require national implementation, the insertion of 'where appropriate as implemented in the Member State of the forum' means

connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.' (In the case at issue, a choice of law clause had been inserted which made the contract applicable to the laws of California.)

[73] Directive 2011/83 on consumer rights, [2011] OJ L304/64.

[74] In particular, Art 6(2): 'Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.'

[75] Pro: Harris (n 70) 341.

[76] EU consumer law is an area of law where positive harmonisation at the EU level is increasingly taking the form of 'maximum' harmonisation, leaving ever fewer—if any—room for manoeuvre for the Member States to implement legislation offering increased protection for consumers. See Art 4 of the Consumer Rights Directive: 'Article 4, Level of harmonisation. Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.'

that the qualification of 'EU mandatory law' in that instance arguably extends to any more further-going ('gold plated') national implementation measures[77] (only) in the forum. Interestingly, Article 1(4)[78] extends the meaning of 'Member State' to Denmark, for the specific purpose of Article 3(4) and Article 7 (insurance contracts). Failure to have done so in the Rome II Regulation enables choice of law in torts for a third country, in the event the only EU connection is a Danish one, hereby arguably depriving Danish citizens from the protection of a set of mandatory EU rules.[79]

In *Fern v Intergraph*,[80] the High Court took a narrow view of mandatory requirements on choice of law in the context of the Commercial Agents Directive.[81] Mann J was asked whether a clear Texas governing law and Texas jurisdiction clause should be set aside, jurisdiction upheld by the English courts and applicable law to be held to be English law, on the basis of an alleged infringement of the UK implementation of the Commercial Agents Directive. (The procedural context was one of permission to 'serve out of the jurisdiction'.)

Fern was the agent of Intergraph in the EU. Fern claimed compensation for breach of the Commercial Agents Regulations 1993 (UK), which implement the Commercial Agents Directive. Some core EU law considerations have passed before the High Court, including *Marleasing*, *Faccini Dori*, *von Colson* and *Inter-Environnement*. The High Court's main preoccupation would seem to have been with the rescue of choice of court and of governing law as much as possible, even within the constraints of the CJEU's decision in *Ingmar*. In that judgment (which was confined to choice of law; the jurisdiction of the English courts was not sub judice), the CJEU as noted stated that:

> It must therefore be held that it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause. The purpose served by the provisions in question requires that they be applied where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State, irrespective of the law by which the parties intended the contract to be governed.

(In the case at issue, a choice of law clause had been inserted which made the contract applicable to the laws of California.)

However, the operative part of the CJEU's decision in *Ingmar* focused on the compensation element only:

> Articles 17 and 18 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country.

[77] Pro: Heiss (n 29) 5.

[78] 'In this Regulation, the term "Member State" shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.'

[79] Heiss (n 29) 6. I disagree that the clear provisions of Rome II (where they define 'Member State') should really read 'including Denmark' for the purpose of Art 14(3) Rome II. *In claris*, I would argue, *not fit interpretatio*.

[80] *Fern Computer Consultancy Ltd* v *Intergraph Cadworx & analysis Solutions Inc*, [2014] EWHC 2908 (Ch).

[81] Directive 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents, [1986] OJ L382/17.

In the case at issue, the High Court seems to have leapt at the more narrow operative part in *Ingmar* (and its non-consideration of choice of court) in an effort to uphold the choice of court and governing law agreement: the right to compensation derives from statutory law, not from contractual obligations, asnd hence does not affect the aforementioned clauses. In reaching that conclusion, however, Mann J effectively refused to consider the *effet utile* of the Commercial Agents Directive when interpreting English rules of civil procedure for serving out of jurisdiction. *Effet utile* does resurface, however, for parties have been given time to submit their views on whether the right to compensation as a statutory right, infringement of which would amount to a tort, would fall outside the scope of the relevant contractual clauses and would lead to jurisdiction in the English courts.

Even if this will be the eventual decision of the High Court after re-submission of arguments, it is likely that the confines of that jurisdiction in England will be narrowly defined (ie the right to compensation only). This is a striking difference with eg the German courts: the Bundesgerichtshof for instance employs a much swifter and absolute rejection of choice of court and governing law ex-EU in the context of the Commercial Agents Directive.[82] The Bundesgerichtshof denied a choice of court agreement in favour of the courts in Virginia. The agreement was part of a contract between a German agent and a principal from the US and coincided with a choice of law clause, also in favour of the laws of Virginia. Under Virginian law, the agent would not have a right to indemnity, contrary to the Commercial Agents Directive, which was held in *Ingmar* to be part of EU mandatory law: that was enough for the German courts to refuse to accept the validity of the choice of court clause, and to accept jurisdiction for German courts on the basis effectively of a minimum presence rule (general jurisdiction over a defendant anywhere it maintains a registered branch or office). Choice of court clauses in favour of non-EU courts are not covered by the Brussels I Regulation. Yet when national courts refuse to acknowledge such choices and assume jurisdiction, the Rome I Regulation on applicable law for contracts does come into play. In effect, the German court here refused to acknowledge the clause on the basis of applicable law considerations.

### *3.2.8.3 'Overriding' Mandatory Law: Article 9*

Article 9

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

[82] Bundesgerichtshof, 5 September 2012, VII ZR 25/12.

'Overriding mandatory provisions' is what French private international law refers to as *lois de police*,[83] also known as *lois d'application immédiate* or *lois d'application nécessaire*.[84] *Lois de police* is the term used in the French version of the Regulation. '*Lois de police*' effectively are a specific form of application of *ordre public*, namely functioning in an assertive sense,[85] akin to US-style government interest analysis: the close contact between the forum (or indeed other States), the contract and the parties in this analysis justifies the application of a set of provisions of the law of that forum or the other State, over and above the law which would otherwise be applicable.[86]

The definition of 'overriding mandatory provisions' is inspired by the CJEU's *Arblade* decision, which concerned free movement of services and the application of *lois de police* in Belgian legal practice, also known as *lois d'application immédiate*. The CJEU described 'public order legislation' as

> national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.[87]

After the definition (evidently a restricted sub-set of 'mandatory law'), Article 9 draws a sharp distinction between overriding mandatory law of the forum, and mandatory law of the country of performance (which more often than not is *not* the country whose law governs the contract). Article 9(2) imposes no restrictions on the application of overriding mandatory law of the forum. However 'foreign' mandatory law may only be brought into play by the forum if it is the overriding mandatory law of the country where the obligations arising out of the contract have to be or have been performed.[88] The forum *may* apply these, but only if that law makes the acts to be performed in that country unlawful, thus creating protection against the effects of unlawfulness in the country of performance.

This is quite a departure from the Rome Convention, where the forum could apply the mandatory provisions (without the qualifier 'overriding') of each country with a close connection to the contract. Article 7 of the Convention reads:

> Article 7—Mandatory rules
>
> 1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
>
> 2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

[83] See for detailed analysis A Bonomi, 'Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts' (2008) 10 *Yearbook of Private International Law* 285–300.

[84] See also F Rigaux and M Fallon, *Droit international privé*, 2nd edn (Brussels, Larcier, 1993) para 1342.

[85] M Forde, 'The "*Ordre Public*" Exception and Adjudicative Jurisdiction Conventions' (1980) *International & Comparative Law Quarterly* 259, 260.

[86] See ibid for a pre-Regulation example in the Paris Court of Appeal: *Club Mediterranée v Caisse des congés spectacles* (1976) 54 RCDIP 485.

[87] Joined Cases C-369/96 and C-376/96 *Arblade* and *Leloup* [1999] ECR I-8453.

[88] Creating an additional layer of complexity in cases where the contract has been performed but not in the place where it was supposed to have been performed.

This large room for manoeuvre was not acceptable to many of the Member States, and some of them had opted out of Article 7(1):[89] including Germany and the United Kingdom. Under the Convention, this was perfectly acceptable as this was a classic instrument of international law. Under the Rome I Regulation, however, such opt-out of course is impossible and hence the provision needed tightening up.

The 'overriding' mandatory law provision is one of those 'just in case' provisions of the Regulation. Even in those Member States which had not made the reservation against the application of the Rome Convention equivalent of this provision, there had been no reported cases of courts applying the mandatory rules of a foreign country.[90,91] Nevertheless, in the discussions on the Rome I proposal, it was suggested that the very inclusion of a foreign mandatory law rule in the Regulation, regardless of the unlikeliness of its application, might be enough to deter commercial transactions.[92] The discussions on the proposal somewhat stumbled in the dark, as the Member States which were most concerned with the rule, especially because of the potential impact on their financial services sector (UK, Germany, Luxembourg), had expressed a reservation against the Rome Convention's provisions at this point. Contractual certainty was the goal of the relevant Member States vis-à-vis this provision. The United Kingdom's initial position in the negotiations was to seek deletion of the provision altogether—an unfeasible position as the majority of Member States already applied the similar provision of the Convention without, as noted above, any great upheaval.[93] The current provision is therefore a compromise:

> Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

The compromise moreover already had authority under English law.[94] Denning LJ held in *Foster v Driscoll*[95]

> If two persons agree together on a transaction which to their knowledge is intended to be carried out by means of one or other of them breaking the laws of a friendly country, or procuring

[89] Not of Art 7(2). For an application of that provision in the employment law context, see *Simpson v Intralinks*, Employment Appeal Tribunal (EAT), UKEAT/0593/11/RN.

[90] O Lando and P Nielson, 'The Rome I Proposal' (2007) 3 Journal of Private International Law 29, 46.

[91] Indeed an often-quoted example is a 2000 judgment by the Commercial Court in Mons, Belgium (Tribunal de Commerce de Mons, 2 November 2000, Rev dr Com Belge, 2001, 617). The Belgian court decided not to apply Tunisian mandatory law, *in casu* competition law, under which exclusive distribution agreements are unlawful. The court seemed to hesitate to apply Tunisian law in particular because it felt that the prohibition of these agreements, so to speak, was exclusive to Tunisia. I would concur (see also Harris (n 74) 327) that under the current Regulation, this view would fit uneasily with the Regulation, for the agreement would indeed render performance in the state unlawful (the forum of course is not obliged to apply the rule, but the case would seem to represent a textbook example of circumstances in which application of Art 9 would be suitable).

[92] See inter alia Harris (n 70) 282 ff. Harris also points out (288 ff) the inconsistency of the UK's approach to the flexibility of courts in the negotiations leading to the Regulation: for applicable law in the absence of choice, it was the UK's insistence which led to the escape clause on the closer connection test; for mandatory law, the same UK insistence led to great suspicion of judges' discretion.

[93] United Kingdom Ministry of Justice, 'Rome I—Should the UK Opt In?', Consultation Paper CP05/08, 2 April 2008, 79.

[94] Reported ibid.

[95] *Foster v Driscoll* [1929] 1 KB 470.

> or assisting another person in the breach of such laws, then the courts of this country [Author: meaning England] will not lend their aid to the enforcement of the transaction.

*Foster v Driscoll*[96] prevents enforcement of such contract on the basis that to do so would be contrary to English public policy on grounds of comity of nations.[97] Linking its authority directly to the overriding mandatory law provision, of course begs the question whether there is in substance any difference between this provision, and the section on public policy (below). Indeed prior to the Rome Convention, English law did not distinguish between 'mandatory law' and 'public policy': both went under the denoter 'public policy'.

There is nothing to suggest that 'overriding mandatory law' may not also include provisions of EU law. However, given the difference between Article 3(4) (provisions which cannot be derogated from by agreement) and Article 9 (overriding mandatory provisions), I would argue that there must be a difference between both, including where they are applied to Union law. In other words to safeguard the *effet utile* of Article 9 as applied to Union law, in Union law, too, there must be a difference between EU law provisions of different stature: those of EU law which cannot be derogated from by agreement, versus those which have to be considered overriding mandatory provisions. In my view,[98] therefore, Article 9 cannot be used simply to resurrect provisions of EU law which have fallen by the Article 3(4) wayside (in particular because the 'all other elements test' has not been met, as reported above).

The exact relationship between mandatory and overriding mandatory provisions of EU and national law to some degree has been clarified by the Court of Justice in *Unamar*.[99] Belgium's stronger protection of the agent, long held by Belgian law to be of 'special' (in the Rome Convention jargon) mandatory rules calibre, gold plates the regime of the Commercial Agents Directive, Directive 86/653. In *Unamar*, parties had agreed on Bulgarian law being applicable law (as well as incidentally on the case having to go to arbitration in Bulgaria first, circumventing Belgian law which proscribes the use of arbitration for disputes such as those at issue). The question therefore arose whether Belgian law, the *lex fori*, can justifiably trump Bulgarian law of which no suggestion is being made that it does not meet the minimum standard of the pre-cited Directive. In 2005, Unamar, as commercial agent, and NMB, as principal, concluded a commercial agency agreement for the operation of NMB's container liner shipping service. The agreement was for a one-year term and was renewed annually until 31 December 2008. It provided that it was to be governed by Bulgarian law and that any dispute relating to the agreement was to be determined

[96] The rule was confirmed by the Court of Appeal in inter alia *Regazzoni v KC Sethia (1944) Ltd* [1956] 3 WLR 79, and see case note RY Jennings, 'Conflict of Laws. Contract Illegal by Foreign Law. Whether Enforceable in England' (1956) 14(2) *Cambridge Law Journal* 141–43.

[97] Consultation Paper (n 92) 79.

[98] Contra: Harris (n 70) 341.

[99] Case C-184/12 *Unamar v Navigation Maritime Bulgare* ECLI:EU:C:2013:663. The question referred to read 'having regard, not least, to the classification under Belgian law of the provisions at issue in this case (Articles 18, 20 and 21 of the Belgian Law of 13 April 1995 relating to commercial agency contracts) as special mandatory rules of law within the terms of Article 7(2) of the Rome Convention, must Articles 3 and 7(2) of the Rome Convention, 2 read, as appropriate, in conjunction with Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, be interpreted as meaning that special mandatory rules of law of the forum that offer wider protection than the minimum laid down by Directive 86/653/EEC may be applied to the contract, even if it appears that the law applicable to the contract is the law of another Member State of the European Union in which the minimum protection provided by Directive 86/653/EEC has also been implemented?'

by arbitration in Bulgaria. On 19 December 2008, NMB informed its agents that it was obliged, for financial reasons, to terminate their contractual relationship. The agency contract concluded with Unamar was extended only until 31 March 2009. Unamar brought an action on 25 February 2009 before the Antwerp Commercial Court for an order that NMB pay various forms of compensation provided for under the law on commercial agency contracts. NMB in turn brought an action against Unamar for payment of outstanding freight. In the proceedings brought by Unamar, NMB raised a plea of inadmissibility alleging that the Belgian court did not have jurisdiction to hear the dispute before it because there was an arbitration clause in the commercial agency contract. By judgment of 12 May 2009, after joining the cases referred to it by each of the parties, the court ruled that NMB's plea of lack of jurisdiction was unfounded. As regards the applicable law in the two disputes brought before it, that court ruled, inter alia, that Article 27 of the Belgian law on commercial agency contracts was a unilateral conflict of law rule which was directly applicable as a 'mandatory rule' and which thus rendered the choice of foreign law ineffective.

Appeal brought the case in judicial review before the CJEU. The Court did *not* rule on the issue of jurisdiction, given that the Hof van Cassatie had not raised this in its request. This means that the debate on whether Belgian's trumping of foreign arbitration in cases such as these continues to be unresolved. According to NMB, the application of the law on commercial agency contracts to the dispute in the main proceedings cannot be considered to be 'mandatory' within the meaning of Article 7(2) of the Rome Convention, given that the dispute concerns a matter covered by Directive 86/653 and the law chosen by the parties is precisely the law of another Member State which has also transposed that Directive into its national law. Thus, according to NMB, the principles of the freedom of contract of the parties and legal certainty preclude the rejection of Bulgarian law in favour of Belgian law.

The Court emphasised the harmonising purpose of the commercial agency contracts Directive. It also highlighted that the wording of Article 7(2) of the Rome Convention does not expressly lay down any particular condition for the application of the mandatory rules of the law of the forum. However, the CJEU then insisted (46) that the possibility of pleading the existence of mandatory rules under Article 7(2) of the Rome Convention does not affect the obligation of the Member States to ensure the conformity of those rules with EU law. The considerations underlying such national legislation can be taken into account by EU law only in terms of the exceptions to EU freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest (reference is made to *Arblade*: see above).[100] The classification of national provisions by a Member State as public order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.

The plea relating to the existence of a 'mandatory rule' within the meaning of the legislation of the Member State concerned, as referred to in Article 7(2) of the Rome Convention, must therefore be interpreted strictly: for otherwise it risks upsetting the core rule of that Convention, which is parties' freedom to choose applicable law.

[100] *Arblade* (n 87).

The Court finally held that it is for the Belgian court,

> in the course of its assessment of whether the national law which it proposes to substitute for that expressly chosen by the parties to the contract is a 'mandatory rule', to take account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned. As the Commission pointed out, such a case might be one where the transposition in the Member State of the forum, by extending the scope of a directive or by choosing to make wider use of the discretion afforded by that directive, offers greater protection to commercial agents by virtue of the particular interest which the Member State pays to that category of nationals. (50)

The Court then distinguished *Ingmar*,[101] in which the law which was rejected was the law of a third country, while in *Unamar*, the law which was to be rejected in favour of the law of the forum was that of another Member State which, according to all those intervening and in the opinion of the referring court, had correctly transposed Directive 86/653.

The Court concluded:

> Articles 3 and 7(2) of the Rome Convention must be interpreted as meaning that the law of a Member State of the European Union which meets the minimum protection requirements laid down by Directive 86/653 and which has been chosen by the parties to a commercial agency contract may be rejected by the court of another Member State before which the case has been brought in favour of the law of the forum, owing to the mandatory nature, in the legal order of that Member State, of the rules governing the situation of self-employed commercial agents only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that transposition, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by the directive, taking account in that regard of the nature and of the objective of such mandatory provisions.

The Court's instructions were therefore clear: there is a strong presumption against mandatory law, in light of the correct implementation by Bulgaria; and the national court has to conduct a proper review of the preparatory works of the relevant Belgian Act which transposed the Directive. Discussions in Belgian scholarship reveal that there is no clear view on the exact nature of the 'mandatory' character of the gold-plated provisions.

The CJEU also referred in passing to the Rome Regulation. This Regulation, as noted, introduces two types of mandatory provisions: simple 'mandatory' ones, with reference to national as well as to EU law and with specific reference to gold-plating for the latter; and 'overriding mandatory' ones, with reference to the *Arblade* criteria but no reference to gold-plating.

It is not therefore entirely certain what the precedent value is of *Unamar* in terms of the future application of the Regulation. The Hof van Cassatie, to which the case was referred back, did not research at all the *travaux préparatoires* of the 1995 Act. It simply annulled the judgment of the Court of Appeal (which now has to be revisited by another Court of Appeal) for 'lack of justification'. In doing so, it (only) referred to the CJEU's dictum, in full, followed by the conclusion that the Court of Appeal has not duly justified its decision. Now, Belgian Supreme Court judgments are not necessarily easy to read: often lengthy and verbatim reference is made in particular to applicants' legal argument, followed by much more succinct conclusion by the court itself. Interpretation therefore hinges on being able

[101] *Ingmar* (n 72).

to identify those specific arguments which may have swayed the court. There is no hint of these in the finding in *Unamar*.

In my view, the CJEU's judgment clearly implies a presumption against the mandatory nature of gold-plated provisions:

> only if the court before which the case has been brought finds, on the basis of a *detailed assessment*, that, *in the course of that transposition*, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by the directive, taking account in that regard of the nature and of the objective of such mandatory provisions. (emphasis added)

The Court of Appeal at Antwerp had focused its analysis on the correct transposition of the minimum requirements of the Commercial Agents Directive into Bulgarian law. It had referred to discussion in the Belgian parliament, suggesting the altogether limited mandatory character of the Belgian rules from the moment a conflict of laws context is present.

In other words, paraphrasing the CJEU, there was no '*detailed assessment*, that, *in the course of that transposition*, [Belgium] held it to be crucial, in [its] legal order, to grant the commercial agent protection going beyond that provided for by the Directive'. Neither, though, did applicants' arguments, at least as referred to in the Supreme Court's judgment, include such detailed assessment. Had there been so in applicants' submission, I would have assumed the Court would have referred to it.

There is in my view *no* active requirement for the courts to scout for indications of mandatory character. The default position is against such character. In the absence of indications of *detailed* assessment (not just one or two references to passing discussion in parliament) by applicants themselves, I believe the Antwerp Court of Appeal has been wrongly rebuked for not having duly entertained such assessment.

The case now has gone back to appeal (this time at the Brussels Court of Appeal). The ball must be squarely in the court of the applicants. They are seeking to establish the mandatory character: they ought to provide the 'detailed assessment' that the CJEU requires, which the Brussels Court of Appeal in its turn may or may not be convinced by.

Were the case to have been decided under the Rome I Regulation, I would argue in view of the *effet utile* argument made above, that in the absence of a reference to gold plating in Article 9, and its presence in Article 3, that the allowance for national rules of overriding mandatory nature, does not cover gold plating.

The CJEU has a further opportunity to review Article 9's provisions on overriding mandatory provisions in *Nikiforidis*.[102] The claimant is a Greek national, employed by the Greek State at a Greek primary school in Nuremberg (Germany). His salary was reduced in accordance with relevant Greek Saving Laws. The claimant asked for payment of the sums withheld. Is the German court bound to apply the Greek Saving Laws? The case first of all seeks clarification on the temporal scope of Rome I. Article 28 Rome I provides that it applies to contracts concluded 'as from 17 December 2009' (this is the corrected format; initially Article 28 read 'after'). When exactly a contract is 'concluded' needs to be determined in accordance with the *lex causae* as identified by the Regulation (an extension of Article 10(1), suggested by most, if not all, relevant scholarship). There has hitherto been much less noise about the application of Article 28 to 'continuing' contracts', ie those

[102] Case C-135/15 *Hellenic Republic v Grigorios Nikiforidis*. Pending at the time of writing.

concluded before the temporal scope of the Regulation, continuing after, however renewed, renegotiated, amended, etc: do these continue to be covered by the Rome convention ad infinitum, or is there a cut-off point at which these continuing contracts become newly concluded? Any suggestion along these latter lines presumably requires determination of a threshold. For instance, adaptation of price in line with inflation presumably is not sufficient to speak of a 'new' contract. But would contractually foreseen price renegotiation to take account of economic cycle, lead to such a new contract?

One's intuitive assumption may be to prefer autonomous interpretation of the concept 'concluded'; however, in the current state of (lack of) harmonisation of contractual law, it is more likely that the Court will prefer an Article 10(1) type solution.

Next up is the application of Article 9's provision on overriding mandatory provisions. The Regulation as noted quite deliberately limited the room for manoeuvre for the court seized to apply overriding mandatory law other than that of the forum: only such laws of the country where the obligations arising out of the contract 'have to be performed' can come into calling. That place is likely to be Germany in the case at issue (the Regulation does not define 'place of performance' under Article 9(3)).

#### *3.2.8.4 Public Policy: Article 21*

> Article 21
>
> Public policy of the forum
>
> The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

The *ordre public* at issue can only have an impact on the case if the *application* of the applicable law is *manifestly* incompatible with the *ordre public* of the forum (and of the forum alone).

It is useful to consider the difference with Articles 3 and 9: these concern a provision of mandatory law which *positively* comes in lieu of the offending provision. By contrast, the application of Article 21 blanks out the offending provision and the alternative appears by default, eg a clause giving right to damages in case of non-payment of a dowry (or eg non-supply of slaves or offending images; non-supply of counterfeit goods; use of illegal funds to purchase goods; etc): public order will apply and the clause or more likely the contract as a whole will simply vanish. One could also conceivably have a situation where the overriding mandatory law of the forum conflicts with that of the applicable law: in such case, the forum could arguably call upon *ordre public* to justify setting aside the latter.[103]

There remains considerable uncertainty as to the precise distinction between Article 9(3), and Article 21, which has inter alia led the Commission to order a study to map national case-law in this area.

### 3.2.9 The Relationship with Other Conventions

By virtue of Article 25, the regulation does not prejudice the application of international Conventions to which one or more Member States are parties at the time when

[103] Similarly: Fawcett and Carruthers (n 62) 742.

the Regulation was adopted and which lay down conflict rules relating to contractual obligations. The Member States were under a duty to notify these.[104]

Of final note is that the Hague process has led to the adoption of the Hague principles on choice of law in international commercial contracts.[105] The principles (and accompanying commentary) have not taken the form of a classic Hague convention; rather, it is hoped that they inspire practice. Bottom-up harmonisation, in other words. For the EU, the Rome I Regulation evidently already harmonises choice of law, hence the principles must not be followed where Rome I applies. However, in particular given the principles' ambition to be applied by arbitral tribunals, they may have some effect in the EU too.

Without wishing to be complete, a quick scan of the Hague principles reveals the following (= refers to similarities with Rome I; ≠ to differences):

— ≠ The Hague principles concern choice of law principles only. Rome I covers applicable law in the wider sense (it also determines applicable law if no choice of law has been made).
— ≠ The Principles apply to courts and arbitral tribunals. The general consensus is that arbitral panels subject to the laws of an EU Member State as the *lex curia* are not bound by Rome I.
— ≠ The Hague principles only apply to B2B and not to B2C transactions. They deal with international 'commercial' contracts only. Famously Rome I includes and indeed pampers B2C contracts.
— Purely domestic contracts are covered by Rome I, with choice of law being corrected to a considerable degree. ≠ Hague principles: these do not cover purely domestic contracts because they are not 'international';
— = Party autonomy and *dépeçage* are supported in both.
— = Universal character—parties may choose any law, they or the contract need not have any material link with that law.
— ≠ Rules of law—Rome I probably allows choice of State law only (its recitals are inconclusive, as is its legislative history). Hague principles: allow parties to opt for non-State law.
— Tacit choice of law is effectively dealt with the same in both.
— Scope of the chosen law: while more or less similar, one obvious difference is that the Hague Principles cover *culpa in contrahendo*. In the EU, this is subject to the Rome II Regulation.
— Article 11 of the Hague principles allows for a wider remit for courts and tribunals to apply overriding mandatory law that is not that of the forum.
— Article 9(2)—formal validity of the contract may be established by many a law that might have a bearing on it. *Favor negoti*, in other words: as in Rome I.

[104] See Art 26, and the Commission notice, Notifications under Article 26(1) of Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), [2010] OJ C343/3.

[105] Principles on Choice of Law in International Commercial Contracts, 19 March 2015.

# 4

# The Core of European Private International Law: Applicable Law—Tort

## 4.1 Introduction

Regulation 864/2007,[1] the 'Rome II'[2] Regulation, was the first instrument of European private international law to have been created using the co-decision procedure. One had attempted to include torts in the Rome Convention, however that was later abandoned. It took a very long time to agree what has now become the Rome II Regulation.[3,4]

[1] [2007] OJ L199/40.

[2] The Rome II Regulation was adopted a year earlier than Rome I; its later numbering is a sign of deference to the ancestor of the Rome I Regulation, the 1980 Rome Convention.

[3] A Dickinson, *The Rome II Regulation* (Oxford, OUP, 2008) 4 ff and 23 ff.

[4] Commission Proposal, COM (2003) 427, 3: 'The Commission convened two meetings of experts in 1969, at which it was agreed to focus initially on questions having the greatest impact on the operation of the common market the law applicable to tangible and intangible property, contractual and non-contractual obligations and the form of legal documents. On 23 June 1972, the experts presented a first preliminary draft convention on the law applicable to contractual and non-contractual obligations. Following the accession of the United Kingdom, Ireland and Denmark, the group was expanded in 1973, and that slowed progress. In March 1978, the decision was taken to confine attention to contractual obligations so that negotiations could be completed within a reasonable time and to commence negotiations later for a second convention on non-contractual obligations. In June 1980 the Convention on the law applicable to contractual obligations (the "Rome Convention") was opened for signature, and it entered into force on 1 April 1991. As there was no proper legal basis in the EC Treaty at the time of its signing, the convention takes the traditional form of an international treaty. But as it was seen as the indispensable adjunct to the Brussels Convention, the complementarity being referred to expressly in the Preamble, it is treated in the same way as the instruments adopted on the basis of Article 293 (ex-220) and is an integral part of the Community acquis. … Article K.1(6) of the Union Treaty in the Maastricht version classified judicial cooperation in civil matters in the areas of common interest to the Member States of the European Union. In its Resolution of 14 October 1996 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 July 1996 to 30 June 1998, the Council stated that, in pursuing the objectives set by the European Council, it intended to concentrate during the above period on certain priority areas, which included the "launching of discussions on the necessity and possibility of drawing up … a convention on the law applicable to extra-contractual obligations". In February 1998 the Commission sent the Member States a questionnaire on a draft convention on the law applicable to non-contractual obligations. The Austrian Presidency held four working meetings to examine the replies to the questionnaire. It was established that all the Member States supported the principle of an instrument on the law applicable to non-contractual obligations. At the same time the Commission financed a GROTIUS project presented by the European Private International Law Group (GEDIP) to examine the feasibility of a European Convention on the law applicable to non-contractual obligations, which culminated in a draft text. The Council's ad hoc "Rome II" Working Party continued to meet throughout 1999 under the German and Finnish Presidencies, examining the draft texts presented by the Austrian Presidency and by Gedip. An initial consensus emerged on a number of conflict rules, which this proposal for a Regulation duly reflects. The Amsterdam

This evidently is not just the result of the level of complexity of the subject-matter concerned. There are far more complicated areas of EU law, in financial services, say, or in tax or corporate law, international trade, environmental protection, energy, etc, where the development of regulation may have been cumbersome but never quite this long in the making.

The particular complexity in the case of conflict rules for tort lies in the intensity with which the proposal and the eventual Regulation have been linked to the efforts to create a European *ius commune*. In particular one recital of the Regulation is quite telling in this respect. Recital 6 notes:

> The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

'Improving the predictability of the outcome of litigation' is the higher goal which this recital identifies with specific reference to what was then the core legal basis for European private international law (Internal Market) and presumably, which it therefore sees as the ultimate goal of European private international law full stop. The European Commission formulated it as follows in its proposal:

> The mere fact that there are rules governing the jurisdiction of the courts does not generate reasonable foreseeability as to the outcome of a case being heard on the merits. The Brussels Convention and the 'Brussels I' Regulation that superseded it on 1 March 2002 contain a number of options enabling claimants to prefer this or that court. The risk is that parties will opt for the courts of one Member State rather than another simply because the law applicable in the courts of this state would be more favourable to them. That is why work began on codifying the rules on conflicts of laws in the Community in 1967.[5]

One need not overdramatise, however, the seemingly fairly casual reference in the recitals, and in one of the very opening statements of the Commission proposal, to predictability in outcome of litigation (as opposed to 'simply' predictability in competent court and applicable law) arguably is best served by unity in substantive law itself. If this is indeed the eventual goal of the Institutions, then both the Rome I and II Regulations may well prove to be only a transitional phase. To be superseded in the not too distant feature by some kind of harmonisation of substantive private law in the Member States.[6]

Treaty, which entered into force on 1 May 1999, having moved cooperation in civil matters into the Community context, the Justice and Home Affairs Council on 3 December 1998 adopted the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. It recalls that principles such as certainty in the law and equal access to justice require among other things "clear designation of the applicable law" and states in paragraph 40 that "The following measures should be taken within two years after the entry into force of the Treaty: … b) drawing up a legal instrument on the law applicable to non-contractual obligations (Rome II)". On 3 May 2002, the Commission launched consultations with interested circles on an initial preliminary draft proposal for a "Rome II" Regulation prepared by the Directorate-General for Justice and Home Affairs. The consultations prompted a very wide response, and the Commission received 80 or so written contributions from the Member States, academics, representatives of industry and consumers' associations. The written consultation procedure was followed by a public hearing in Brussels on 7 January 2003. This proposal duly reflects the comments received' (footnotes omitted).

[5] Ibid.

[6] With the Draft Common Frame of Reference (DCFR) as the most obvious vehicle.

The legal basis of the Regulation as it then stood certainly required necessity within the meaning of then Article 65 EC: 'in so far as necessary for the proper functioning of the internal market'. I concur with the view that the justification of the Regulation under Article 65 EC was fanciful at best, indeed in my own experience no client has ever hesitated to venture into a Member State market, citing uncertainty as to the applicable law should it ever come to a case of tort. In the view of Sir Peter North,

> [N]o clear and convincing need for this proposed Regulation had been identified by the Commission in terms of the operation of the internal market. It looks rather like harmonisation on the basis of tidiness.[7]

Consequently, the Regulation was quite clearly *ultra vires*. There is now less urgency in this consideration,[8] as the legal basis for Union action in this field has widened as per the TFEU (and reported elsewhere in this volume). However, the fact that the European Institutions overruled the *vires* arguments (and that notwithstanding muttering, Member States in the end went along with the Regulation), is a telling sign of the tenacity and speed of the development of European private international law.

## 4.2 General Principles

The Regulation follows a familiar pattern in EU private international law: it defines material and temporal scope; it includes a general rule with one general exception and one escape clause; it has specific choice of law rules for specific kinds of torts; it respects parties' freedom to choose applicable law; it excludes *renvoi*; and it has a number of provisions on mandatory law and public order.

Rome II applies to events giving rise to damage which occur (the events, not the damage) after 11 January 2009 (Article 31 combined with 32). The discussion on the temporal scope of the Regulation was the result of, frankly, a bit of a muddle in the wording of the more traditional end formulas of secondary EU law, which typically deal with 'entry into force' and 'application'. In *Homawoo*,[9] the Court held that:

> It is open to the legislature to separate the date for the entry into force from that of the application of the act that it adopts, by delaying the second in relation to the first. Such a procedure may in particular, once the act has entered into force and is therefore part of the legal order of the European Union, enable the Member States or European Union institutions to perform, on the basis of that act, the prior obligations which are necessary for its subsequent full application to all persons concerned. (24)

In a few language versions of the Rome II Regulation, Article 32 carries the title 'entry into force' (in the equivalent language—English was not one of them) but in substance effectively deals with application. In the light of the content of the provision which is the same

[7] House of Lords Report on the Proposed Rome II Regulation, Evidence, cited by Dickinson (n 3) 44.

[8] Indeed it would have been very difficult to convince the ECJ of *ultra vires* arguments, in the face of the adoption of the Regulation after prolonged discussion.

[9] Case C-412/10 *Homawoo v GMF Assurances*, [2011] ECR I-11603.

in all of the language versions, the Court held that Article 32 of the Regulation does not set the date for its entry into force but sets the date of its application.

> It follows that, as there is no specific provision that sets the date for the entry into force of the Regulation, that date must be determined in accordance with the general rule laid down in the third subparagraph of Article 297(1) TFEU. As the Regulation was published in the Official Journal of the European Union on 31 July 2007, it entered into force on 20 August 2007, that is to say the 20th day following that of its publication.[10]

Article 3 confirms the universal character: the Regulation applies regardless of whether it leads to the law of a non-Member State being applicable. That was contested in the run-up to the Regulation (inter alia because it undermines the Internal Market credentials of the Regulation: Chinese law, say, may apply and that would hardly seem to support the Internal Market); however, in the end it was upheld because of the fear of fragmentation in an area which could do with more clarity and less sophistication.

## 4.3 Scope of Application

> Article 1(1)
>
> Scope
>
> This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, 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).

### 4.3.1 'Situations Involving a Conflict of Laws'

The phrase *situations involving a conflict of laws*/*comportant un conflit de lois* basically refers to the trigger required of any private international law situations. There has to be some kind of factual foreign connection to the case which makes that the forum has to contemplate at least the possibility of laws other than its own applying. I do not support unnecessary complication of this requirement, and indeed agree with the view[11] that the Commission overcomplicates (but now also confuses) things by stating in its proposal that

> The proposed Regulation would apply to all situations involving a conflict of laws, ie situations in which there are one or more elements that are alien to the domestic social life of a country that entail applying several systems of law.[12]

The Commission's attitude in this respect would seem to have been inspired by the Giuliano–Lagarde Report.[13]

[10] Para 30 of the judgment.
[11] Dickinson (n 3) 157.
[12] Commission Proposal, COM(2003) 427, 8.
[13] Para 10.

### 4.3.2 Only Courts and Tribunals? Application to Arbitration Tribunals

It has been argued that the Regulation applies only to situations where courts and tribunals exercising judicial functions of a Member State, hear the case at issue.[14] On this view, arbitration tribunals sitting in a Member State would be free not to apply the Regulation and determine applicable law in line with the arbitration law of the seat of arbitration, and with the arbitration agreement. This argument is made with particular reference to the need to apply Rome II in conjunction with Brussels I (and Rome I). See in this respect also recital 7:

> The substantive scope and the provisions of this Regulation should be consistent with 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) and the instruments dealing with the law applicable to contractual obligations.

In my view, while arbitration agreements could certainly take great advantage of the freedom of choice included in Article 14 (see further below), a simple exclusion of the applicability of the Regulation to arbitration tribunals, cannot necessarily be derived from the text of the Regulation. Unlike the Rome I Regulation, which excludes arbitration agreements from its scope of application, Rome II does not mention arbitration. It does mention 'courts', and indeed 'courts' only, including in recital 6:

> The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

'The country of *the court* in which an action is brought': that would indeed seem to point specifically to the 'courts and tribunals', most probably to be understood in the meaning of the Brussels I (Recast) Regulation, only. Notwithstanding the absence of textual reference, however, one can scarcely fathom how the Regulation would apply to such tribunals, given that parties often either identify their own choice of law provisions, or refer to arbitration rules which do (UNCITRAL, ICC, NCIA all do).[15] Unlimited application of the Regulation would utterly ignore these. Of course, the room for circumvention of the Regulation might argue for its applicability to arbitration, which however in turn would undoubtedly make the EU less attractive to locate arbitration tribunals. The proverbial jury is out on this point, the arguments pro and contra quite extensive,[16] and a judgment by the European Court of Justice likely at some point (it would require a court reviewing some or other aspect of an arbitration ruling, to refer to Luxembourg).

Generally, I believe it is crucial not to read recital 7 (I fully take advantage of it being a recital only) as a general instruction to assimilate the application of the Regulations on jurisdiction and applicable law. Member States and their courts are evidently free *not* to apply their residual jurisdictional rules in line with the CJEU's findings. A good illustration is *Pike & Doyle*, concerning litigation in the courts at England for the harm resulting from

[14] Dickinson (n 3) 159 (at para 3.79 and before).

[15] See also C Buys, 'The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration' (2005) 79 *St John's Law Review* 59–96.

[16] See in particular Dickinson (n 3) 158 ff.

the 2008 terror attack in Mumbai.[17] I have reviewed the case in the chapter on the Brussels I Recast, too; I repeat the analysis here for there are important implications for applicable law analysis.

The first claimant suffered continuing pain and loss of amenity and substantial economic losses caused by his injuries. The second claimant sustained loss of earnings in England and Wales and continuing loss in the form of having to pay for counselling. On that basis both claimants have therefore suffered indirect or secondary damage as a result of the defendants' alleged negligence in Mumbai. The claimants' submission was that this is sufficient to found jurisdiction. The defendants challenged this.

In support of their claim, the defendants relied essentially on the impact which EU law *suo arguendo* has on the interpretation of the relevant English rules of procedure. As summarised by Stewart J:

> The Defendants' submission is as follows:
>
> (i) Before 1 January 1987 RSC order 11 rule 1(1)(h) required a plaintiff to establish that the action was 'founded on a Tort committed within the jurisdiction'. The test was 'where in substance did the cause of action arise?' (Distillers Co Ltd v Thompson [reference omitted]).
>
> (ii) On 1 January 1987 the rule changed such that the new RSC order 11 rule 1(1)(f) became 'the claim is founded on a Tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.' The change was made to give effect to Article 5(3) of the Brussels Convention and the decision of the European Court in Handelskwekerij GJ Bier BV v Mines Potasse d'Alsace SA [reference omitted]. [references to further precedent omitted].
>
> (iii) The European Rules do not allow indirect secondary damage to found jurisdiction. Dumez France v Hessische Landesbank [reference omitted]). Marinari v Lloyds Bank plc [reference omitted]). [references to further precedent omitted].
>
> (iv) This is all accepted and is in line with the original Bier case where the European Court held that where an act occurred in one Member State and the damage occurred in another, the Claimant could sue the Defendant in the Courts of either state. …
>
> (v) Given the above, the Court should apply normal principles of interpretation to the rule namely: delegated legislation is construed in the same way as an Act, the starting point is to ascertain the legislative intention and the person seeking to understand that intention must do so in the light of the enactment and its purpose. The interpretation must be an informed one [references omitted].
>
> (vi) Therefore since the pre 1987 law would not have allowed indirect secondary damage to found jurisdiction and since the purpose of the change was to align the RSC (subsequently CPR) with the European rules which do not allow such a founding of jurisdiction, the rules should be interpreted consistently with the European cases. (12)

Stewart J disagreed and precedent did before him. Absent the European context—for defendant is not domiciled in the EU and the Brussels I Regulation does not otherwise apply—there is no reason to assume that the relevant English rules cannot be applied taking into account indirect damage as a jurisdictional basis for the English courts: Tugendhat J had already held so with reference to the preparatory works of the relevant change to the Rules of Procedure. He effectively found that Parliament did not fully assimilate the rules

[17] *Pike & Doyle v the Indian Hotels Company Limited* [2013] EWHC 4096 (QB).

relating to non-party states with those relating to states which are a party; it effectively wanted there to be a wedge between the application of the jurisdictional rule for tort in and outside the Brussels I context.

Neither, Stewart J held, can Rome II come to the defendants' rescue. This was an attempt by defendants to recycle the limitation to (now) Article 7(2) of the Brussels I Recast Regulation. No reference to this was made in the judgment however a prima facie forceful recital in the Rome II Regulation is recital 7:

> The substantive scope and the provisions of this Regulation should be consistent with 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) and the instruments dealing with the law applicable to contractual obligations.

Since Rome II harmonises applicable law for tort even if the national court withholds jurisdiction on the basis of its residuary jurisdictional rules (such as here, given that Brussels I does not apply), this bridge between the various Regulations might resurrect the relevance of the *Dumez France* and *Marinari* limitations to the judgment in *Bier*. Stewart J, however, was not swayed and referred to Sir Robert Nelson in *Stilyanou*:

- Brussels 1 relates to a different subject matter, namely jurisdiction, and has to be construed as a separate regulation, albeit consistently with the other regulations forming part of the compatible set of measures.
- Rome II does not abolish the discretion which has to be exercised under the CPR in relation to non-Member States.
- Article 2 on its face is wide enough to include any damage direct or indirect which the regulation as a whole covers. Article 4(1) expressly excludes indirect damage which would otherwise be included by virtue of Article 2. There is no reason why 'damage' under the CPR should be interpreted as in a specific Article such as Article 4 which defines the applicable law, rather than interpreted as a general article such as Article 2 which applies to the regulation as a whole (apart from Article 4).
- Inconsistencies in the meaning of damage may exist as the tests are different under Brussels 1, Rome II and CPR. The latter includes the exercise of the discretion and hence consideration of forum conveniens to ensure the proper place for the trial is selected, whereas Brussels 1 and Rome II do not.
- Rome II does not concern jurisdiction and does not override CPR 9(a). Where Brussels I does not apply, the issue of jurisdiction will be governed by a country's own rules ie in England and Wales the CPR.[18]

Neither Stewart J nor Sir Robert refer to recital 7 Rome II; however, their arguments in my view are supported post their findings by the CJEU judgment in *Kainz*.[19]

[18] *Pike & Doyle* (n 17 above) at 19.

[19] Case C-45/13 *Andreas Kainz v Pantherwerke AG*, ECLI:EU:C:2014:7, 20: '[A]lthough it is apparent from recital 7 in the preamble to Regulation No 864/2007 that the European Union legislature sought to ensure consistency between Regulation No 44/2001, on the one hand, and the substantive scope and the provisions of Regulation No 864/2007, on the other, that does not mean, however, that the provisions of Regulation No 44/2001 must for that reason be interpreted in the light of the provisions of Regulation No 864/2007. The objective of consistency cannot, in any event, lead to the provisions of Regulation No 44/2001 being interpreted in a manner which is unconnected to the scheme and objectives pursued by that regulation.'

This is a statement I like a lot and have advocated for some time. In general, I find the link between applicable law and jurisdiction (often leading to *Gleichlauf*-type considerations; such as in Brussels I Recast Art 24's exclusive jurisdictional rules) not very attractive.

### 4.3.3 'Non-Contractual Obligations'

The scope of the Regulation covers all non-contractual obligations except those in matters listed in paragraph 2 of Article 2. Neither the Regulation nor its recitals refer to any kind of 'positive' definition of non-contractual obligations.

> The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. (recital 11)

An abstract definition of 'non-contractual obligations' was not even attempted in the run-up to the Regulation, as Member States legal traditions simply vary too widely on the concept.[20]

Following the ruling in *Kalfelis*, where the CJEU defined 'tort' as *all actions which seek to establish liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)*,[21] and the subsequent judgment in *Handte*[22] and *Engler*,[23] the Commission posits tort, and the Rome II Regulation, as 'residual'[24] in relation to contract cases which it argues, with reference to the pre-cited CJEU case-law, must be defined in strict terms.

However, while this is fairly clear for tort (or 'delict'), it was clear that this would be less obvious for what in some jurisdictions is termed 'quasi-delict' or 'quasi-contract', including in particular unjust enrichment and agency without authority (*negotiorum gestio*), which is comparable with a quasi-contract in common law. Moreover, the texts of both the Brussels Convention (upon which the pre-cited case-law is based) and its Regulation successor do not speak of 'non-contractual obligations', but rather of 'tort, delict or quasi-delict'. As far as contracts are concerned, they do not employ the term 'contractual obligations' as Rome I does, but rather 'matters relating to a contract'. Consequently and notwithstanding the link made between the three Regulations, one must not simply lift concepts from either Rome I, II or Brussels I, and mutually apply them without hesitation.

The Regulation tries to pre-empt some of the likely disputes by listing the obligations which are covered by it. Article 2(1) lists as non-contractual obligations:

> For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.

There are considerable possibilities for confusion, including the existence in a number of Member States of concurrent contractual and non-contractual liability arising from one

[20] A complication also experienced by the product liability Directive: Directive 85/374 on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products OJ [1985] L210/29, as amended.

[21] Case 189/87 *Kalfelis* [1988] ECR 5565, para 18, see also above, in the jurisdiction chapter (Ch 2).

[22] Case C-26/91 *Jakob Handte* [1992] ECR I-3967, para 15. See also above, the review of the special jurisdictional rule for 'contract' under the Brussels I Regulation.

[23] Case C-27/02 *Engler* [2005] ECR I-481. See also above, the review of the special jurisdictional rule for 'tort' under the Brussels I Regulation.

[24] Commission Proposal, COM(2003) 427, 8.

and the same factual situation.[25] The EC alludes to the difficulty in discussing the escape-clause (see below) of manifest closer connection:

> The text states that the pre-existing relationship may consist of a contract that is closely connected with the non-contractual obligations in question. This solution is particularly interesting for Member States whose legal system allows both contractual and non-contractual obligations between the same parties. But the text is flexible enough to allow the court to take account of a contractual relationship that is still only contemplated, as in the case of the breakdown of negotiations or of annulment of a contract, or of a family relationship. By having the same law apply to all their relationships, this solution respects the parties' legitimate expectations and meets the need for sound administration of justice. On a more technical level, it means that the consequences of the fact that one and the same relationship may be covered by the law of contract in one Member State and the law of tort/delict in another can be mitigated, until such time as the Court of Justice comes up with its own autonomous response to the situation.[26]

### 4.3.4 Excluded Matters

Most of the exclusions[27] listed in Article 1(2) are the usual suspects. The excluded matters to a large degree mirror those of the Rome I Regulation and, with the necessary caution, one may apply the reasons for exclusion there, to the Rome II Regulation, too (including the explanations given in the Giuliano–Lagarde Report).

> 1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, 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).
>
> 2. The following shall be excluded from the scope of this Regulation:
>
> (a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;
> (b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
> (c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
> (d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

[25] See inter alia Dickinson (n 3) 185 ff and the references to scholarship there.
[26] Commission Proposal, COM(2003) 427, 12–13.
[27] Obviously national private international law applies to the excluded sectors.

(e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;
(f) non-contractual obligations arising out of nuclear damage;
(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

#### *4.3.4.1 Non-Contractual Obligations Arising out of Family or Similar Relationships*

The Commission justified exclusion of such obligations as follows:

> [F]amily obligations do not in general arise from a tort or delict. But such obligations can occasionally appear in the family context, as is the case of an action for compensation for damage caused by late payment of a maintenance obligation. Some commentators have suggested including these obligations within the scope of the Regulation on the grounds that they are governed by the exception clause in Article 3(3), which expressly refers to the mechanism of the 'secondary connection' that places them under the same law as the underlying family relationship. Since there are so far no harmonised conflict-of-laws rules in the Community as regards family law, it has been found preferable to exclude non-contractual obligations arising out of such relationships from the scope of the proposed Regulation.[28]

Recital 10 defines 'family relationships' as follows:

> Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

In the meantime of course the argument that 'there are so far no harmonised conflict-of-laws rules in the Community as regards family law' has been overtaken by legislative developments. Regulation 4/2009 on jurisdiction, applicable law, recognition and decisions and cooperation in matters relating to maintenance obligations,[29] and for the relevant Member States by the Rome III Regulation re applicable law in divorce and legal separation, Regulation 1259/2010.[30] The justification for non-inclusion may be nugatory, however the impact on Rome II of these recent pieces of secondary law is the same: the disputes at issue are not covered by it.

The non-contractual relationship has to 'arise out of' the family relationship. The simple fact that there is a non-contractual relationship between family members clearly is not enough for it to be excluded from the Regulation, in cases where 'simple' tort happens to arise between family members.

[28] Commission Proposal, COM(2003) 427, 8.
[29] Regulation 4/2009 on jurisdiction, applicable law, recognition and decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1.
[30] Regulation 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10.

#### *4.3.4.2 Non-Contractual Obligations Arising out of Matrimonial Property Regimes, Property Regimes of Relationships Deemed by the law Applicable to such Relationships to have Comparable Effects to Marriage, and Wills and Succession*

This exclusion follows a similar pattern as the one for family relationships, namely principal exclusion for the same reason, gradual harmonisation via other routes: in particular, for wills and succession, Regulation 650/2012,[31] and for matrimonial property regimes, a 2011 twin proposal on matrimonial property regimes[32] and registered partnerships, in the future probably to be replaced with enhanced co-operation.[33]

#### *4.3.4.3 Non-Contractual Obligations Arising Under Bills of Exchange, Cheques and Promissory Notes and Other Negotiable Instruments to the Extent that the Obligations Under such Other Negotiable Instruments arise out of their Negotiable Character*

This exception is a bit of a mouthful and also somewhat of an anachronism. It mirrors the exclusion under the Rome I Regulation, where the Commission referred to the Giuliano Lagarde Report justification for the exclusion under the Rome Convention:

> In retaining this exclusion, for which provision had already been made in the original preliminary draft, the Group took the view that the provisions of the Convention were not suited to the regulation of obligations of this kind. Their inclusion would have involved rather complicated special rules. Moreover the Geneva Conventions to which several Member States of the Community are parties govern most of these areas. Also, certain Member States of the Community regard these obligations as non-contractual.[34]

The latter element of the Giuliano–Lagarde justification, could have conceivably re-opened the debate in the negotiation of the Rome II Regulation, however, many of the others arguments for not including these opaque instruments still stood and, perhaps most importantly, it would have seemed a disproportionate investment of time to regulate the conflict of laws aspects of these instruments which inevitably are of ever smaller importance in commercial markets dominated by electronic money transfer.[35]

#### *4.3.4.4 The lex Societatis Exception*

Non-Contractual Obligations Arising out of the Law of Companies and Other Bodies Corporate or Unincorporated Regarding Matters such as the Creation, by Registration or Otherwise, Legal Capacity, Internal Organisation or Winding-up of Companies and Other Bodies Corporate or Unincorporated, the Personal Liability of Officers and Members as such for the Obligations of the Company or Body and the Personal Liability of Auditors to a Company or to its Members in the Statutory Audits of Accounting Documents.

[31] Regulation 650/2012 [2012] OJ L201/107.
[32] COM(2011) 126/2.
[33] COM(2011) 127/2.
[34] Guiliano–Lagarde Report, [1980] OJ C282/1, 11.
[35] Dickinson (n 3) 203.

Such non-contractual liability cannot be separated from the law governing companies or firms or other bodies corporate or unincorporate that is applicable to the company or firm or other body corporate or unincorporate in connection with whose management the question of liability arises.[36] The Rome Convention had excluded these matters for the same reason,[37] given the work on positive harmonisation of company law, which was in full swing at the time (and to some degree continues to be).

As also noted above for the 'family relationships' exception, current exception only applies to those non-contractual obligations 'arising out of' the excluded matter. A simple connection with it does not suffice. The Giuliano Lagarde Report goes into a bit more detail as to what is and is not excluded, as discussed above, under the Rome I Regulation.[38] As with all other exceptions, they need to be interpreted strictly.[39]

#### *4.3.4.5 Violations of Privacy and Rights Relating to Personality, Including Defamation*

These were not included in the scope simply because no agreement could eventually be reached on the connecting factor. The Commission had proposed not to exclude violations of privacy and rights relating to the personality, instead opting to propose a specific conflicts rule:

> 1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.
>
> 2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

(Note: Article 3 was the general rule in the initial Commission Proposal.)

The Commission's justification for this heading referred in particular to the difficulties in deciding on a suitable conflicts rule in particular given the impact of the mass media, and referred to the problems in the application of the *Shevill* rule[40] in the information society. It then noted:

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A study of the conflict rules in the Member States shows that there is not only a degree of diversity in the solutions adopted but also considerable uncertainty as to the law. In the absence of codification, court decisions laying down general rules are still lacking in many Member States. The connecting factors in the other Member States vary widely: the publisher's headquarters or the place where the product was published (Germany and Italy, at the victim's option); the place where the product was distributed and brought to the knowledge of third parties

[36] Commission Proposal, COM(2003) 427, 9.

[37] Guiliano–Lagarde Report, 12.

[38] Above, Sub the Rome I Regulation, Scope of application.

[39] As noted before, there is no general principle in EU law to apply exceptions restrictively; rather, exceptions need to be applied in accordance with the context and aim of the EU law concerned. In the case at issue, the need for restrictive application arises out of the express indications in the *travaux préparatoires*: see in particular the Commission Proposal, 9.

[40] Case C-68/93 *Shevill v Presse Alliance* [1995] ECR I-415. Reviewed in the chapter on the Brussels I Recast.

(Belgium, France, Luxembourg); the place where the victim enjoys a reputation, presumed to be his habitual residence (Austria). Other Member States follow the principle of favouring the victim, by giving the victim the option (Germany, Italy), or applying the law of the place where the damage is sustained where the *lex loci delicti* does not provide for compensation (Portugal). The UK solution is very different from the solutions applied in other Member States, for it differentiates depending whether the publication is distributed in the UK or elsewhere: in the former case the only law applicable is the law of the place of distribution; in the latter case the court applies both the law of the place of distribution and the *lex fori* ("double actionability rule"). This rule protects the national press, as the English courts cannot give judgment against it if there is no provision for this in English law.

Given the diversity and the uncertainties of the current situation, harmonising the conflict rule in the Community will increase certainty in the law.

The content of the uniform rule must reflect the rules of international jurisdiction in the "Brussels I" Regulation. The effect of the *Mines de Potasse d'Alsace* and *Fiona Shevill* judgments is that the victim may sue for damages either in the courts of the State where the publisher of the defamatory material is established, which have full jurisdiction to compensate for all damage sustained, or in the courts of each State in which the publication was distributed and the victim claims to have suffered a loss of reputation, with jurisdiction to award damages only for damage sustained in their own State. Consequently, if the victim decides to bring the action in a court in a State where the publication is distributed, that court will apply its own law to the damage sustained in that State. But if the victim brings the action in the court for the place where the publisher is headquartered, that court will have jurisdiction to rule on the entire claim for damages: the *lex fori* will then govern the damage sustained in that country and the court will apply the laws involved on a distributive basis if the victim also claims compensation for damage sustained in other States.

In view of the practical difficulties in the distributive application of several laws to a given situation, the Commission proposed, in its draft proposal for a Council Regulation of May 2002 that the law of the victim's habitual residence be applied. But there was extensive criticism of this during the consultations, one of the grounds being that it is not always easy to ascertain the habitual residence of a celebrity and another being that the combination of rules of jurisdiction and conflict rules could produce a situation in which the courts of the State of the publisher's establishment would have to give judgment against the publisher under the law of the victim's habitual residence even though the product was perfectly in conformity with the rules of the publisher's State of establishment and no single copy of the product was distributed in the victim's State of residence. The Commission has taken these criticisms on board and reviewed its proposal.

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The EC's view however did not convince and led to a quite extraordinarily wide discussion, one assumes partly because of the very nature of the profession of those most affected (the media), as well as given the close interaction with freedom of expression and privacy issues.

The discussion resulted in the current exclusion altogether. It has been noted first of all that the exclusion itself leads to qualification issues, as there is no EU definition of 'privacy' or 'defamation'.[41] The issue has nevertheless not been dropped. A 'positive sunset clause' or 'review clause' was inserted in the Regulation: the EC was instructed in Article 30(2)[42]

[41] A Dickinson, 'By Royal Appointment: No Closer to an EU Private International Law Settlement?', conflictoflaws.net, 24 October 2014 (accessed 24 October 2014).

[42] 'Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.'

to present a study by 31 December 2008. Following the study,[43] all has turned quiet from the part of the Commission. The European Parliament produced a report in June 2010 to follow-up on the study.[44] Parliament's interest is not surprising: it was the EP which made the most effort in trying to broker a compromise in the negotiations which led to the Regulation. Parliament argues in particular that inclusion of personality rights in the Regulation, would counter the threat of the 'chilling effect' on the press of so-called 'libel tourism',

> a type of forum shopping in which a claimant elects to bring an action for defamation in the jurisdiction which is considered most likely to produce a favourable result—generally that of England and Wales, which is 'regarded as the most claimant-friendly in the world' … the high costs of litigating in that jurisdiction and the potentially high level of damages that may be awarded there allegedly have a chilling effect on freedom of expression; … where legal costs are high, publishers may be forced to settle even where they consider that they have a good defence.[45]

The 2010 EP Report arguably has not entirely advanced things. Rather than focusing on concrete proposals, the Report provides for a complete round-up of various views and possibilities. Complete as it may be, it does nothing to advance the choice for a specific conflicts rule. Following the *eDate Advertising* judgment,[46] which added an additional jurisdictional rule on the basis of centre of interests,[47] Ms Wallis MEP issued a new Report,[48] which this time round does include specific proposals and calls upon the Commission to issue a proposal for amendment to the Rome II Regulation. On the conflicts rule, Ms Wallis proposed the following specific new rule:

> Article 5a—Privacy and rights relating to personality
>
> (1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by the first sentence.

[43] The MainStrat Report of February 2009, Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. JLS/2007/C4/028. Final Report available via http://ec.europa.eu/justice/doc_centre/civil/studies/doc/study_privacy_en.pdf.

[44] Working document of 23 June 2010 on the amendment of the Rome II Regulation, Rapporteur Diana Wallis MEP, PE 443.025, available via http://conflictoflaws.net/News/2010/07/Working-document-Rome-II.doc.

[45] EP Committee on Legal Affairs Draft Report of 2 December 2012 (Diana Wallis MEP), with recommendations to the Commission on the amendment of Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II), 2009/2170 INI, recital C and D.

[46] Joined Cases C-509/09 and C-161/10, *eDate Advertising GmbH v X* and *Olivier Martinez and Robert Martinez v MGN Limited* [2011] ECR I-10269.

[47] '[A] person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests.' See the discussion of the *eDate Advertising* case, chapter 2 above, under the Brussels I Regulation.

[48] See n 45 above.

(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.

(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.

This proposal therefore suggests 'direct and substantial impact'[49] as the criterion for determining applicable law. The inspiration which this report therefore takes from the *eDate Advertising* case, does not lie directly in any kind of recycling of the 'centre of interest' criterion of the CJEU but rather in the Court's view on predictability. This is especially apparent in the correction to the main rule, namely that the law applicable be the law of the country in which the person claimed to be liable is habitually resident if he could not reasonably have foreseen substantial consequences of his act occurring in the country designated by the 'direct and substantial impact' test.

The EC is not obliged to propose any kind of amendment. It is not likely to be tempted soon.

#### *4.3.4.6 Other Exclusions*

The exclusion for *voluntary* trusts is without a doubt crucial for UK (and Irish) legal practice, but is outside the scope of the current volume. *Nuclear damage* is excluded given the extensive body of international law on the issue.

### 4.3.5 Civil and Commercial Matters

In accordance with Article 1, the Regulation applies to 'non contractual obligations in civil and commercial matters' which evidently ties into the relevant discussion under the Jurisdiction Regulation (see above in this volume).[50] Both the Brussels I Recast Regulation and Rome II specifically exclude 'revenue, customs and administrative matters'. Other than in the Brussels I Recast Regulation, however, Rome II also specifically excludes 'the liability of the State for acts and omissions in the exercise of State authority' (*acta iure imperii*). Recital 7 stipulates that the latter element needs to be applied in symmetry with the Brussels I Regulation.

## 4.4 Applicable Law—General Rule: *Lex Loci Damni*

Article 4(1) includes the general rule for choice of law and instructs to apply the law of the country where the damage occurs (*lex loci damni*). This is a departure from the previously

[49] For want of a noun for 'affected'.

[50] In particular also the review of Case C-292/05 *Lechouritou* [2007] ECR I-1519, chapter 2 above.

EU-wide held principle of *lex loci delicti commissi*, and was 'simply' intended to lead to less discussion in most cases:

> The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable. (recital 15)

Indeed the geography of the (physical) damage is generally easier to identify than the 'place of the tort'. Similarly, in the Recast Brussels I Regulation, Article 7(2) has a specific jurisdiction rule for torts: the place where the damage *occurs* as distinct from the place where it is suffered, or ramifies.

Article 4(1) of Rome II specifically instructs to ignore the *lex loci delicti commissi*, as well as the law of the countries where the indirect consequences of the *delict* are felt (a similar rule applies for jurisdiction in Brussels I, inter alia following the *Marinari*[51] ruling).[52]

*Lex loci damni* most often will lead to the application of the law of the victim, and is indeed seen as not favouring the tortfeasor. This choice is not without its consequences from a tort policy point of view. Combined with the specific rules for product liability and environmental damage (see below), the overall angle of the Regulation approaches tort from the perspective of the sufferer. This

> favours the philosophy that tort law, in particular, should take as its primary objective the distribution of loss among members of society, rather than the regulation of conduct.[53]

And indeed the Regulation would seem to view this as the 'modern' way forward:

> Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability. (recital 16)

In reality, of course, it could very well be that in cross-border torts, the state of conduct prescribed higher standards of conduct for the tortfeasor than the State of injury, in which case (and subject to the specific categories below), the *lex loci* damni rule does not in fact protect the victim.[54]

The connecting factor also means that different laws will apply in the case of different places of damages (the so-called 'mosaic' principle, even if, eg by virtue of Article 4 of the Recast Brussels I Regulation (domicile of the defendant), the case is pending in one court only). This of course may be remedied in certain cases by virtue of the exception and escape clause in 4(2) and (3) (see below); moreover, in accordance with Article 17, some rules of

[51] Case C-364/93 *Antonio Marinari v Lloyds Bank et al*, [1995] ECR I-2719.

[52] See also S Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 *American Journal of Comparative Law* 9–16, 173–222: 'translated into simpler English, Article 4(1) provides that the applicable law is the law of the country in which the *injury* occurs, and more precisely the harmful physical *impact*'.

[53] Dickinson (n 3) 7.

[54] See Symeonides (n 52) above.

the *lex loci delicti commissi* must in any even be 'taken into account' (which arguably is not the same as 'applied'),[55] such as general health and safety and highway code provisions.

'Damage' is defined by Article 2(1) by reference to various types of non-contractual obligations, by listing torts, plus 3 other categories (a clarification included in the 2006 amended proposal, so as to ensure no doubt remains): tort/delict, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. It also clarifies that within the scope are both obligations which have arisen *and* those which are likely to arise—that is the same under the Brussels I Regulation.

## 4.5 One General Exception to the General Rule and One Escape Clause

### 4.5.1 General Exception: Parties Habitually Resident in the Same Country

Article 4(2) provides that where both parties are habitually resident in the same country when the damage occurs, the law of that country shall apply. This is a 'consequences' based connecting factor.

Note that both the specific provision on product liability and that on collective action (see further below) leave Article 4(2) in place—hence for those two specific categories, Article 4(2) in practice will be the most determinant connection factor.

As is the case in Rome I, Article 23 gives a specific definition of 'habitual residence'; and as is also the case in Rome I, no specific definition is given of the 'normal' habitual residence of a natural person (as opposed to when in the exercise of his professional activities). The remarks on habitual residence made in the course of the analysis of Rome I, apply here, too.

> Article 23
>
> Habitual residence
>
> 1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
>
> Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
>
> 2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

[55] See also the Commission proposal, COM(2003) 427, 25: 'The rule in Article [17] is based on the fact that the perpetrator must abide by the rules of safety and conduct in force in the country in which he operates, irrespective of the law applicable to the civil consequences of his action, and that these rules must also be taken into consideration when ascertaining liability. Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages.'

'Habitual residence' was considered by the High Court in *Winrow v Hemphill*.[56] This involved a road traffic accident that occurred in Germany. The claimant was a rear-seat passenger in a vehicle driven by Mrs Hemphill (the 'first defendant'), which collided head on with a German vehicle. The defendant admitted fault for the collision. As a result of the collision, the claimant sustained personal injury, for which she received some treatment in Germany and further ongoing treatment in England. She and her husband returned to live in England in June 2011, earlier than planned. The 'second defendant' was the German insurer of the first defendant.

The following was agreed between the parties:

(i) Since the claimant's husband was due to leave the army in February 2014 after 22 years' service he would have returned to England 1½–2 years before that date to undertake resettlement training. It was always their intention to return to live in England.
(ii) At the time of the accident the claimant was living in Germany, having moved there in January 2001 with her husband who was a member of Her Majesty's Armed Services. Germany was not the preferred posting of the claimant's husband; it was his second choice. He had four separate three year postings in Germany.
(iii) The claimant was a UK national.
(iv) Whilst in Germany, the claimant and her family lived on a British Army base where schools provided an English education.
(v) While in Germany, the claimant was employed on a full-time basis as an Early Years Practitioner by Service Children's Education (a UK government agency).
(vi) The claimant claimed continuing loss and damage including care and assistance and loss of earnings. She asserted that the majority of her loss has been and will be incurred in England. The claimant alleged continuing pain, suffering and loss of amenity.
(vii) The first defendant was a UK national and an army wife, with her husband serving with the Army in Germany. She had been in Germany for between 18 months and 2 years before the accident. She returned to England soon afterwards.

The High Court was asked (1) what law applies per Article 4, and (2) whether under the circumstances, Article 4(3) Rome II might have any relevance (for this latter issue, see below under the relevant heading).

On the *habitual residence* issue, Rome II as noted corrects the overall *lex loci damni* rule in cases of joint habitual residence between tortfeasor and victim (which was argued to be the case here). Habitual residence was also argued to play a role in the 'closer connection' test (see below).

'Habitual residence' is a concept which is not used in the Brussels I Recast Regulation; however, it is used in the Brussels II bis Regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matter of parental responsibility, where it is left undefined, and in the Rome III Regulation (an instrument of enhanced cooperation and hence not applicable in all Member States) implementing enhanced cooperation in the area of applicable law to divorce and legal separation, where, too, somewhat oddly given its date of adoption (after Rome I and II), it is left undefined.

[56] *Gaynor Winrow v Mrs J Hemphill and AGEAS Insurance Limited* [2014] EWHC 3164 (QB).

The Court of Justice has defined 'habitual residence' in *Swaddling*,[57] within the context of social security law (entitlement of benefits subject to a residence requirement) as the place

> where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances.

Undoubtedly the context of the adjudication needs to be taken into account, such as in *Swaddling*, a social security case, in which the seeking of holding of employment is likely to have a much greater relevance for determining habitual residence than in the context of, say, maintenance or parental responsibility (where, for instance, the interest and 'anchorage' of the child is likely to be much more relevant).[58] Moreover, the Court of Justice itself has warned that its case-law on habitual residence in one area cannot be directly transposed in the context of any other.[59]

It is obvious, however, that the 'centre of interest' test, which in one way or another finds its way into habitual residence in all relevant EU law, includes a subjective element: the intention of a person to be anchored in a particular place. This was argued to be relevant in the case at issue, because both victim and tortfeasor were resident in Germany on account of their husbands' military postings there.

Slade J, in my view justifiably, held that having regard to the length of stay in the country, its purpose and the establishing of a life there, habitual residence of the claimant at the time of her accident was Germany. Having followed her husband, who was posted to Germany on Army business, this did not make her stay there involuntary.

### 4.5.2 Escape Clause: Case Manifestly More Closely Connected with Other Country

Article 4(3) more generally includes an escape clause: when it is clear from the circumstances of the case that it is '*manifestly*' more closely connected with a country other than the one indicated by 4(1) or 4 (2), the law of that country shall apply instead. '*The*' tort has to have that manifestly closer relationship: one of its elements (eg where only one of the elements is sub judice, typically the quantum of the damages following admitted liability by one of the parties) is not enough.[60] Evidently contractual relations between parties prior to the occurrence of the tort may indicate such manifest closer connection—this avoids fabrication of a tort to avoid applicable law under Rome I. The reference to a contract in Article 4(3) is by way of example only. The text is flexible enough to allow the court to take account of a contractual relationship that is still only contemplated, as in the case of the breakdown of negotiations or of annulment of a contract, or of a family relationship.[61] The escape clause also is at least partially an answer to the not too uncommonly occurring coincidence of contractual and non-contractual liability between parties to a contract.

[57] Case C-90/97 *Robin Swaddling v Adjudication Officer* [1999] ECR I-1075.
[58] See also House of Lords *M v M* [2007] EWHC 2047 (Fam), a case referred to in *Winrow*.
[59] Case C-523/07 *A* [2009] ECR I-2805.
[60] *Dépeçage* therefore, despite the EP's wish, is not accepted. Cf the Rome I Regulation's Art 3(1) *in fine*.
[61] Commission Proposal, COM(2003) 427, 13.

A rare consideration of Article 4(3) may be found in *Winrow v Hemphill*.[62] This involved a road traffic accident that occurred in Germany ('discussed above with respect to the issue of 'habitual residence'). The High Court first of all confirmed the exceptional character of the escape clause, but emphasised, and I have great sympathy for this view, that in reviewing that exceptional possibility, there should be no limitation in principle of factors that can be taken into account: Article 4(3) clearly is an exception to the EU's mantra of predictability in EU private international law, but one that even the European Commission foresaw and which is inherent to the very nature of the exception. Hence the High Court considered inter alia the joint nationality of the victims (with an interesting discussion on whether *United Kingdom* nationality may be relevant for the consideration of *English* law being applicable—there is no such thing as 'English' nationality); habitual residence at the time of the accident and subsequently; location of subsequent consequences (the victim now suffering those in England; loss of earnings occurring in England), etc. Even what a particular court in a particular Member State may consider to be relevant for the application of 4(3) may be very unpredictable, and indeed may also be disparate across the EU.

However, on balance Slade J held that the balance was in favour of *not* applying the escape clause, particularly in view of the period of time of habitual residence in Germany, and subsequent continuing residence in that country (inter alia for follow-up treatment). The final holding therefore was:

> Factors weighing against displacement of German law as the applicable law of the tort by reason of Article 4(1) are that the road traffic accident caused by the negligence of the First Defendant took place in Germany. The Claimant sustained her injury in Germany. At the time of the accident both the Claimant and the First Defendant were habitually resident there. The Claimant had lived in Germany for about eight and a half years and remained living there for eighteen months after the accident.Under Article 4(3) the court must be satisfied that the tort is manifestly more closely connected with English law than German law. Article 4(3) places a high hurdle in the path of a party seeking to displace the law indicated by Article 4(1) or 4(2). Taking into account all the circumstances, the relevant factors do not indicate a manifestly closer connection of the tort with England than with Germany. The law indicated by Article 4(1) is not displaced by Article 4(3). The law applicable to the claim in tort is therefore German law.[63]

This judgment to my knowledge is one of few discussing Article 4(3)'s escape clause in such detail. A judgment which does justice to both the exceptional nature of the provision, and the need to consider all relevant factors.

## 4.6 Specific Choice of Law Rules for Specific Torts—No Specific Rules for 'Protected Categories'

The Regulation includes specific rules for specific torts, however it does not have specific provisions for specific categories of victims. Some of the specific torts arguably lead to

[62] *Gaynor Winrow v Mrs J Hemphill and AGEAS Insurance Limmited* [2014] EWHC 3164 (QB).
[63] *Winrow v Hemphill* (n 62 above) at 62–63.

protection of what may be seen as the weaker victim of the tort, however this is not the case for all of them. The Commission wrote in its proposal

> where the pre-existing relationship consists of a consumer or employment contract and the contract contains a choice-of-law clause in favour of a law other than the law of the consumer's habitual place of residence, the place where the employment contract is habitually performed or, exceptionally, the place where the employee was hired, the secondary connection mechanism cannot have the effect of depriving the weaker party of the protection of the law otherwise applicable. The proposed Regulation does not contain an express rule to this effect since the Commission considers that the solution is already implicit in the protective rules of the Rome Convention: Articles 5 and 6 would be deflected from their objective if the secondary connection validated the choice of the parties as regards non-contractual obligations but their choice was at least partly invalid as regards their contract.[64]

(Note: references now of course having to be made to the Rome I Regulation instead of the Convention.)

This may well be implicit in the Rome Regulation—however, in my view if this is the course the European Commission (and Council/European Parliament) wanted to ensure, they really ought to have included it in the text of the Regulation.[65]

Product liability, unfair competition, environmental damage, infringement of intellectual property, and industrial action, each have a specific choice of law rule in the Regulation. These all aim at identifying one or more specific connection factors for specific situations, to ensure that the most closely related laws will be applied. Recital 19 justifies the existence of specific rules:

> Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

Evidently the danger is (and a sticky point during the negotiations was) how far one goes in describing such specific categories.

### 4.6.1 Product Liability

Article 5

Product liability

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
(c) the law of the country in which the damage occurred, if the product was marketed in that country.

[64] Ibid.
[65] See also Dickinson (n 3) 345–46.

> However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).
>
> 2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

Recital 20 of the Regulation clarifies:

> The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.

It is noteworthy that by virtue of Article 28[66] (which employs the same mechanism as Article 25 of Rome I), the Hague Products Liability Convention[67] continues to apply between the EU Member States that are also Party to the Hague Convention (similarly for the Hague Convention on Traffic accidents).[68]

The Commission's original proposal on product liability (in its proposal: Article 4), was much more straightforward:

> Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.

[66] 'Article 28: Relationship with existing international conventions: 1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations. 2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.' See Commission Notice, Notifications under Article 29(1) of Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), [2010] OJ C343/7. Notably, Belgium did not notify any such Conventions at all, which arguably has no impact in law, however, is somewhat unfortunate.

[67] Convention on the Law Applicable to Products Liability, (1972) 11 ILM 1283.

[68] See also T Graziano, 'The Rome II Regulation and the Hague Conventions on Traffic Accidents and Product Liability—Interaction, Conflicts and Future Perspectives' (2008) *Nederlands Internationaal Privaatrecht* 425–29, and X Kramer, 'The Rome II Regulation on the Law Applicable to Non-contractual Obligations: The European Private International Law Tradition Continued' (2008) *Nederlands Internationaal Privaatrecht* 414–24.

It is worthwhile recalling the Commission's justification for the specific rule, for the product liability scenario is likely to arise quite frequently (always bearing in mind the potential existence of international Conventions per Article 28):

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'The proposed Regulation acknowledges the specific constraints inherent in the subject-matter in issue but nevertheless proceeds from the need for a rule to avoid being unnecessarily complex.

Under Article 4, the applicable law is basically the law of the place of where the person sustaining damage has his habitual residence. But this solution is conditional on the product having been marketed in that country with the consent of the person claimed to be liable. In the absence of consent, the applicable law is the law of the country in which the person claimed to be liable has his habitual residence. Article 3(2) (common habitual residence) and (3) (general exception clause) also apply.

The fact that this is a simple and predictable rule means that it is particularly suitable in an area where the number of out-of-court settlements is very high, partly because insurers are so often involved. Article 4 strikes a reasonable balance between the interests in issue. Given the requirement that the product be marketed in the country of the victim's habitual residence for his law to be applicable, the solution is foreseeable for the producer, who has control over his sales network. It also reflects the legitimate interests of the person sustaining damage, who will generally have acquired a product that is lawfully marketed in his country of residence. Where the victim acquires the product in a country other than that of his habitual residence, perhaps while travelling, two hypotheses need to be distinguished: the first is where the victim acquired abroad a product also marketed in their country of residence, for instance in order to enjoy a special offer. In this case the producer had already foreseen that his activity might be evaluated by the yardstick of the rules in force in that country, and Article 4 designates the law of that country, since both parties could foresee that it would be applicable.

In the second hypothesis, by contrast, where the victim acquired abroad a product that is not lawfully marketed in their country of habitual residence, none of the parties would have expected that law to be applied. A subsidiary rule is consequently needed. The two connecting factors discussed during the Commission's consultations were the place where the damage is sustained and the habitual residence of the person claimed to be liable. Since the large-scale mobility of consumer goods means that the connection to the place where the damage is sustained no longer meets the need for certainty in the law or for protection of the victim, the Commission has opted for the second solution.

The rule in Article 4 corresponds not only to the parties' expectations but also to the European Union's more general objectives of a high level of protection of consumers' health and the preservation of fair competition on a given market. By ensuring that all competitors on a given market are subject to the same safety standards, producers established in a low protection country could no longer export their low standards to other countries, which will be a general incentive to innovation and scientific and technical development.

The expression "*person claimed to be liable*" does not necessarily mean the manufacturer of a finished product; it might also be the producer of a component or commodity, or even an intermediary or a retailer. Anybody who imports a product into the Community is considered in certain conditions to be responsible for the safety of the products in the same way as the producer.' (footnotes omitted)

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The rule subsequently became almost mind-bogglingly complex. The Commission in particular was not happy with the cascade system and noted in its position vis-a-vis the Council Common Position

> **Article 5** on product liability departs in its drafting approach considerably from the Commission's proposal (Article 6 of the amended proposal), albeit not in its intention. The common position reflects the need for a specific rule on products liability which strikes an appropriate balance between the interests of the victim and the person liable.

> The Commission continues to regret the approach in the common position which provides for a rather complex system of cascade application of connecting factors. It remains persuaded that its original solution offered an equally balanced solution for the interests at stake, while expressed in much simpler drafting.[69] (use of bold in the original)

I am not entirely convinced that the 'foreseeability' rule is 'unduly generous' to the defendant,[70] since certainty as to the law applicable is a general objective of the Regulation, as emphasised by the recitals. However 'foreseeability' obviously is a factual consideration which inevitably leads to discussion in the courtroom—comparative reference (albeit at the level of jurisdiction) may be made to the US 'minimum contacts' rule as applied in product liability cases, in particular in *McIntyre* (United States Supreme Court, June 2011).[71]

For the definition of product and defective product, the Commission had wanted Articles 2 and 6 of Directive 85/374[72] to apply. However even in the Commission proposal, this was not as such included in the text. In the eventual Regulation, there is no trace whatsoever of any reference to the product liability Directive, not even in the recitals. It is quite extraordinary that notwithstanding the space devoted in negotiation, to the product liability provisions, many core questions remain unanswered. For instance, the text of Article 5 very clearly relates to damage caused *by* a product, not *to* a product (and likewise in other language versions of the Regulation). Just as, incidentally, the product liability Directive itself does not apply to warranty issues of faulty goods, I do not see how the provision of Article 5 can be read in any other way than to mean that it does not apply to damage to the product itself,[73] although it does of course apply to damage caused to other products and to life and property of those other than the purchaser of the product.

'Damage' is not defined either, nor is 'marketed'. The Commission proposal includes some hints as to what 'marketing' might mean (including a reference to a controlled sales network), however given the fog of discussions leading to the final text, and the considerable differences between final text and original proposal, it is not entirely safe to assume that the Court will be using the Commission's suggestions as a yardstick. The element of foreseeability for the producer harbours a strong indication that there needs to have been a degree of activity of the producer vis-à-vis the territory in which the product ended up causing damage,[74] which is reminiscent of the jurisdictional rules of the Brussels I Recast on consumer contracts (and indeed the specific provisions for consumer contracts in the Rome I Regulation), however one cannot of course draw too much a parallel with those.

The concept at any rate differs from what is understood as 'marketed' or 'placed on the market' in the most general of relevant EU laws, the 'Blue Book'. According to the Guide

[69] COM(2006) 66, 3.

[70] Symeonides (n 52) 206.

[71] *J McIntyre Mach, Ltd v Nicastro*, 131 SCt 2780 (2011). See also AB Morrison, 'The Impacts of *McIntyre* on Minimum Contacts', *Arguendo*, September 2011. See a recent application by the Court of Appeals for the 8th Circuit, in *Creative Calling Solutions*, No 14-3054: sending over to a State, per the provisions of the contract, of large amounts of samples, is enough to satisfy the minimum contacts rule in that State.

[72] Directive 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, [1985] OJ L210/29, as amended.

[73] Pro: G Légier, 'Le règlement 'Rome II' sur la loi Applicable aux Obligations Non Contractuelles' (2007) I-207 *La Semaine Juridique*, 21 November, 15–17. Contra: Dickinson (n 3) 367.

[74] Although this would seem less apt to apply in the context of manufacturers of components, who (see the Commission Proposal) arguably are also included in this specific provision. Other than for the purposes of dual-use regulation, component manufacturers tend to have no direct interest or control of the product chain downstream.

to the implementation of directives based on the New Approach and the Global Approach (Blue Book),

> A product is placed on the Community market when it is made available for the first time. This is considered to take place when a product is transferred from the stage of manufacture with the intention of distribution or use on the Community market. Moreover, the concept of placing on the market refers to each individual product, not to a type of product, and whether it was manufactured as an individual unit or in series. The transfer of the product takes place either from the manufacturer, or the manufacturer's authorised representative in the Community, to the importer established in the Community or to the person responsible for distributing the product on the Community market. The transfer may also take place directly from the manufacturer, or authorised representative in the Community, to the final consumer or user.
>
> The product is considered to be transferred either when the physical hand-over or the transfer of ownership has taken place. This transfer can be for payment or free of charge, and it can be based on any type of legal instrument. Thus, a transfer of a product is considered to have taken place, for instance, in the circumstances of sale, loan, hire, leasing and gift. (footnotes omitted)[75]

## 4.6.2 Unfair Competition and Acts Restricting Free Competition

Article 6

Unfair competition and acts restricting free competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.
   (b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

[75] Section 2.3 in the most recent edition, which is the 2000 version. Sectorial Directives tend to employ a more general concept, and then often refer to the Blue Book in implementing measures. See eg Art 2(4) of Directive 2005/32 on ecodesign requirements for energy-using products, [2005] OJ L191/29: '"Placing on the market" means making an EuP available for the first time on the Community market with a view to its distribution or use within the Community whether for reward or free of charge and irrespective of the selling technique.'

Quite aside from the difficulty for a number of Member States in recognising the very concept of 'unfair competition',[76] the rules of Article 6 are even more arcane than those of Article 5.

In its justification for an autonomous connection for damage arising out of an act of unfair competition, the Commission refers to the 'three dimensional function' of competition law:

> The purpose of the rules against unfair competition is to protect fair competition by obliging all participants to play the game by the same rules. Among other things they outlaw acts calculated to influence demand (misleading advertising, forced sales, etc), acts that impede competing supplies (disruption of deliveries by competitors, enticing away a competitor's staff, boycotts), and acts that exploit a competitor's value (passing off and the like). The modern competition law seeks to protect not only competitors (horizontal dimension) but also consumers and the public in general (vertical relations). This three-dimensional function of competition law must be reflected in a modern conflict-of-laws instrument.[77]

Its initial proposal was succinct (it was listed as Article 5 in the proposal):

> 1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected.
>
> 2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 3(2) and (3) shall apply.

The brevity of its proposal however contrasts sharply with the discussion which ensued. The use of 'unfair competition' only in the proposed article (which for those Member States which employ national legislation of similar ilk, puts it firmly within general consumer protection law) as opposed to the inclusion of competition law in the explanatory memorandum, led to discussions as to whether competition law ought to be included at all. The Commission clarified that it had not wanted to include competition law,[78] however the horse by then had bolted and despite attempts by Austria and Germany, as well as the European Parliament, to drop competition law from the Regulation altogether, and by the UK to draft a separate rule for damage caused by Article 101–102 TFEU infringements, competition law infringements came to exist alongside unfair competition, and the 'affected market' criterion introduced.

The rules are complex, as the Article shows, the concepts employed vague and not exactly leading to much predictability, the link with Commission policy documents on competition policy (eg re 'relevant' markets, etc) unclear, and the article as a whole hanging in the balance in view of the Commission initiatives on private enforcement of competition law[79]

[76] One can detect a whiff of, if not intended than at the least real, self-fulfilling harmonisation prophecy here. Just as the core concepts of the products liability rule have not been defined, the vagueness of concepts for Art 6, the very absence in a number of Member States of the category whose conflicts rule is being harmonised, and the confusing nature of the eventual rules included in Art 6, undoubtedly will lead to a lot of confusion in practice, need for preliminary review, etc. This in turn may strengthen the hand of advocates of harmonisation of national private law.

[77] Commission proposal, COM(2003) 427, 15.

[78] Outcome of proceedings, Council Committee on Civil Law matters, document 5430/04, 27 January 2004, 2.

[79] White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165.

and on collective proceedings in the same. As for the latter, the EU has developed a growing interest in the Europeanisation of the system of class actions. The Commission is pondering policy options for European collective redress in consumer law[80] and tort law,[81] and has flagged whether specific jurisdiction rules are necessary for collective actions.[82]

The Rome II provisions on this topic therefore may very well (hopefully) run out of steam before they have managed to create too much confusion in practice.[83]

### 4.6.3 Environmental Damage

> Article 7
>
> Environmental damage
>
> The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

The Commission proposal had not initially specifically distinguished between 'environmental damage'[84] and 'damage sustained by persons or property', although the Commission had clarified that ecological damage was included in what it simply called 'a violation of the environment'. Without specifically mentioning it, the Commission's reference to recent developments which recognise 'ecological damage' as being included, undoubtedly relates to the Environmental Liability Directive (ELD).[85] The ELD mentions specifically in Article 3(2) that

> This Directive shall apply without prejudice to more stringent Community legislation regulating the operation of any of the activities falling within the scope of this Directive and without prejudice to Community legislation containing rules on conflicts of jurisdiction.

The ELD's recitals refer in this respect even more specifically to the Jurisdiction Regulation, not to Rome I or II. The specific reference to 'Community legislation containing rules on conflicts of jurisdiction' in my view therefore has to mean[86] that an impact of the ELD on the issue of applicable law, must not be excluded, however in view of the altogether limited scope of the Directive,[87] it must not be exaggerated either.

[80] Ibid.

[81] Green Paper, COM(2008) 794.

[82] Green Paper on the review of the Brussels I Regulation, COM(2009) 175.

[83] One particularly interesting question is the degree to which EU competition law may bear relevance in actions for damages sustained in the EU, caused by behaviour to which EU competition law is in principle not applicable (this is quite distinct from the question of the territorial reach of EU competition law).

[84] Note that the damage has to be 'environmental' (or damage sustained by persons or property as a result of such damage), not the event leading to the damage.

[85] Directive 2004/35, [2004] OJ L143/56.

[86] Pro albeit in the more sophisticated aspect of public authorities' actions to ensure compliance with environmental law: G Betlem and C Bernasconi, 'European Private International Law, the Environment, and Obstacles for Public Authorities' (2006) 122 *Law Quarterly Review* 124 ff. Contra: Dickinson (n 3) 431 ff.

[87] See in particular its recital 14: 'This Directive does not apply to cases of personal injury, to damage to private property or to any economic loss and does not affect any right regarding these types of damages.' The original Commission ambition was much more extensive than that.

The Commission had noted that in most countries, the conflicts rule applied the *lex loci damni*. However, it argued that the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union's more general objectives in environmental matters, the Commission argued that the point of the connection rule must be not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive 'to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country's laxer rules', a somewhat clumsy reference by the Commission to the so-called pollution haven theory. This solution, the Commission argued, would be contrary to the underlying philosophy of the European substantive law of the environment and the 'polluter pays' principle.[88]

The Commission also argued that sustaining as a starting point the general *loci damni* rule is in conformity with developments in environmental protection policy 'which tends to support strict liability'. This surely is only true for those Member States which do indeed operate strict liability—which despite the ELD is not the case overall and even in those Member States where it is, it is not the case across the board.

Much like with the unfair competition rule, there were plenty of proposals, including from the European Parliament, to delete the specific rule altogether. After discussion to and fro, current text was reached (and Parliament overruled). Recital 24 now specifies

> 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

Recital 25 refers to the full plethora of environmental principles of the Treaty to justify what it calls 'discriminating in favour of the person sustaining the damage'. The question of when the person seeking compensation can make the choice of the law applicable has to be determined in accordance with the law of the Member State in which the court is seised (see recital 25).

The 'conduct and safety rules' provision of Article 17, bears specific relevance in the context of environmental damage,[89] although it is unclear whether this covers the 'permit defence' rule which Member States may (but are not obliged to) adopt under the ELD. Under Article 8(4)(a) of the Directive,

> The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by: (a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws

[88] Commission Proposal, COM(2003) 427, 18–19.

[89] The Commission gives the example of 'the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B, where it is not authorised (and where the emissions exceed the tolerated level). Under Article [17], the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business.'

> and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event.

I would argue that an environmental permit, as a much more extensive instrument than merely containing 'rules of safety and conduct',[90] is not captured by Article 17, meaning that permits of the *lex loci delicti commissi*[91] will not have any impact if the applicable law is the *lex loci damni*.

Finally, an interesting suggestion has been made[92] that because of the ELD's wide definition of 'operator' responsible for environmental damage, the link with Rome II Regulation opens the possibility of a decision taken at a corporation's headquarters, being considered the 'event giving rise to the damage'. Article 6 and 8 of the Directive establish liability with the 'operator', as defined in Article 2(6):

> 'operator' means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, *to whom decisive economic power over the technical functioning of such an activity has been delegated*, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity. (emphasis added)

### 4.6.4 Damage Caused by Infringement of Intellectual Property Rights

> Article 8
>
> Infringement of intellectual property rights
>
> 1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.
>
> 2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.
>
> 3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Recital 26 clarifies what must be understood by 'intellectual property rights', albeit in a non-exhaustive manner: 'For the purposes of this Regulation, the term 'intellectual property rights' should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights.'

The treatment of intellectual property was one of the questions that was debated intensely during the Commission's consultations. Many of the contributions to the consultation referred to the universally recognised principle of *lex loci protectionis*, meaning the law of

[90] In the context of an environmental permit, rules of conduct and safety may potentially be included in the occupational health and safety rules; however, not all Member States include these in environmental legislation and the corresponding permits.

[91] EU environmental law may be harmonised to quite a degree; however, there is plenty of space for national, regional and even local distinction, hence the exclusion of these permits does matter.

[92] C Otero Garcia-Castrillon, 'International Litigation Trends in Environmental Liability: A European Union–United States Comparative Perspective' (2011) 7 *Journal of Private International Law* 551, 571.

the country in which protection is claimed. This principle underpins eg the Berne Convention for the Protection of Literary and Artistic Works of 1886 and the Paris Convention for the Protection of Industrial Property of 1883. This rule, also known as the 'territorial principle', enables each country to apply its own law to an infringement of an intellectual property right which is in force in its territory. Counterfeiting an industrial property right is governed by the law of the country in which the patent was issued or the trade mark or model was registered; in copyright cases the courts apply the law of the country where the violation was committed. This solution confirms that the rights held in each country are independent.[93]

The general *lex loci damni* rule does not reflect the overall solution favoured by the international agreements. Consequently two options were open: either to lift infringement of intellectual property rights from the Regulation altogether, or to include a special rule for them in the Regulation. The latter won the day.

The *lex loci protectionis* rule, however, does not work when the infringement concerns unitary 'Community' (now Union) marks: here, the protection is extended to the Union as a whole—whence the specific rule for them.

### 4.6.5 Damage Caused by Industrial Action

> Article 9
>
> Industrial action
>
> Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

Article 9 is a direct outcome of the *DFDS Torline* case.[94] The ECJ left open the possibility of (financial, which was the only and the direct) damage having occurred on board the ship withdrawn from service following industrial action, which would make the flag State (Denmark) a potential forum, and, consequently, applicable law Danish law. The Swedish delegation noted[95]

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In case C-18/02 *DFDS Torline*, 5.2.2004, somewhat simplified, a Swedish trade union brought an industrial action in order to achieve an agreement for the crew of a ship trafficking the route Harwich-Gothenburg. In order to avoid the industrial action, which consisted in a noticed blockade against loading and unloading of cargo and against anchoring in the port of Gothenburg, the Danish shipping company decided to replace the ship with another one rented for this purpose. The Danish shipping company then brought an action against the Swedish trade union in a Danish court and claimed damages for costs incurred.

In a preliminary ruling on the meaning of "place where the damage occurred" in Article 5(3) of the Brussels Convention, the European Court of Justice stated that it is a task for the national court to judge where the damage occurred and that the flag State only is one circumstance among others to take account of in this assessment.

[93] Commission Proposal, COM(2003) 427, 20.
[94] Case C-18/02 *DFDS Torline* [2004] ECR I-1417, discussed in chapter 2 above.
[95] Document 9009/04 ADD 8 of 18 May 2004, JUSTCIV 71 CODEC 645, 12.

*Since the wording of Article 3 of the proposed Rome II Regulation is very similar, the consequence of this case is that the legality of an industrial action, carried out in order to secure that the working conditions in the state in which the work is to be performed, could be governed by another law.*

This runs contrary to the spirit of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services …. Article 3(1) of the Directive lists the matters to which the terms and conditions of employment of the host state must be applied irrespective of the law applicable to the employment contract. The terms and conditions include such matters as the minimum rates of pay, minimum paid annual holidays and health and safety at work. The terms and conditions can be laid down by law, regulation or administrative provisions. Moreover, they can be based on collective agreements or arbitration awards that have been declared universally applicable.

The unique problem for Sweden is that there are no minimum rates of pay laid down by law and also no system of declaring a collective agreement universally applicable. It is left to the trade unions to bring about the same result, if necessary through industrial action. The Swedish method for bringing about compliance with local employment conditions falls within the scope of both the Brussels I Regulation and the proposed Rome II Regulation whereas other methods used by other countries such as minimum legislation or a system of declaring collective agreements universally applicable do not.

The Swedish delegation had thought that it would not be necessary but after the ruling in *DFDS Torline* Sweden must ask for a particular rule on the law applicable to industrial action. We are quite certain that other delegations will understand this and recognize that the question is of paramount importance to Sweden. (original emphasis omitted, current emphasis added)

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Sweden therefore suggested the insertion of the clause

> Article 8a—Industrial action
>
> The law applicable to a non-contractual obligation arising out of a noticed or executed industrial action shall be the law of the country where the action has been taken.

The proposal met with only lukewarm support, however it did in the end win the day, albeit in its current, reworded fashion. The Commission[96] continued not to be enthused, but did note with satisfaction that 'its scope is now defined more precisely and is, in particular, limited to the issue of liability of employers, workers and/or trade unions in the context of an industrial action. The text is, however, still unclear that it should not extend to relationships vis-à-vis third parties and the Commission regrets this lack of clarity.'

Recitals 27 and 28 of the Regulation do not do much to calm the ensuing nervousness:

> (27) The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.
>
> (28) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

Latvia and Estonia voted against the Common Position specifically because of Article 9. They feared in particular that the Article would serve as a restriction to the free movement

[96] COM(2006) 566, 4.

of services. The *Viking*[97] and *Lavalle*[98] cases on the free movement of services did not exactly help to quieten their dismay.

## 4.7 Freedom to Choose Applicable Law

Article 14

Freedom of choice

1. The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred; or
(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

Recital 31 clarifies

To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

In the Jurisdiction Regulation, there continues to be confusion as to the role, if any, of national law on the question of the very existence of consent in the agreement which underlies the forum clause.[99] The Recast Regulation has settled the issue in favour of the law of the State assigned by the forum clause. It is most attractive to follow the same course for prorogation of jurisdiction under the Rome II Regulation, and let the validity of the applicable law clause be decided by the law of the State whose laws are assigned by the applicable law clause. However as Dickinson rightly points out,[100] unlike forum clauses, which are

[97] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.
[98] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.
[99] See above chapter 2.
[100] Dickinson (n 3) 550.

excluded from the Rome I Regulation, agreements on the law applicable to non-contractual obligations, are within the scope of Rome I. That gives a strong hand in favour of making the law applicable to the choice of law clause, the law which under the Rome I Regulation is applicable to the agreement.

Article 14 confirms that parties may agree to submit non-contractual obligations to the law of their choice. Conditions do apply:

— for non-commercial activities only after the dispute has arisen; this protects the weaker party.
— *not* for unfair competition and intellectual property rights: for the former, because of the collective interests involved, and for the latter, because it relies largely still on the principle of territoriality, and it involves public interest.[101]
— *not* for purely domestic cases: to as to avoid circumvention of mandatory law; and finally
— Article 14(3) provides for a similar condition for mandatory Union law (whether or not to be implemented by the Member States) where all the elements relevant to the tort are located in one or more Member State(s).[102]

## 4.8 Scope of the Law Applicable

Article 15 clarifies that the scope of the law applicable is very wide.

Article 15

Scope of the law applicable

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
(b) the grounds for exemption from liability, any limitation of liability and any division of liability;
(c) the existence, the nature and the assessment of damage or the remedy claimed;
(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
(f) persons entitled to compensation for damage sustained personally;
(g) liability for the acts of another person;
(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

[101] These stated reasons are not entirely convincing: eg environmental issues also involve public interest yet are not excluded.
[102] Rome I includes similar provisions for contracts.

The provision is important, because jurisdictions may differ quite substantially as to which parts of the dispute they consider to relate to the substantive matter of 'tort', as opposed to procedural law. Procedural matters are governed by the l*ex fori*[103] and continue to be so under the Rome II Regulation: Article 1(3) provides specifically

> This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

Article 15 clearly has a limiting effect on Article 1(3), given that it qualifies a number of issues as being substantive law, even though national law may have considered these to be procedural.

The European Commission explained that (what became) Article 15, broadly takes over Article 10 of the Rome convention, although in reality the sources which inspired Article 15 would seem to have been more extensive than that. In its proposal,[104] the Commission outlines quite a few of the provisions of Article 15 in more detail (note the one or two instances where the Commission proposal does differ from the final text):

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(a) "The conditions and extent of liability, including the determination of persons who are liable for acts performed by them"; the expression "conditions … of liability" refers to intrinsic factors of liability. The following questions are particularly concerned: nature of liability (strict or fault-based); the definition of fault, including the question whether an omission can constitute a fault; the causal link between the event giving rise to the damage and the damage; the persons potentially liable; etc.

"Extent of liability" refers to the limitations laid down by law on liability, including the maximum extent of that liability and the contribution to be made by each of the persons liable for the damage which is to be compensated for. The expression also includes division of liability between joint perpetrators.

(b) "The grounds for exemption from liability, any limitation of liability and any division of liability": these are extrinsic factors of liability. The grounds for release from liability include force majeure; necessity; third-party fault and fault by the victim. The concept also includes the inadmissibility of actions between spouses and the exclusion of the perpetrator's liability in relation to certain categories of persons.

(c) "The existence and kinds of damage for which compensation may be due": this is to determine the damage for which compensation may be due, such as personal injury, damage to property, moral damage and environmental damage, and financial loss or loss of an opportunity.

(d) "the measures which a court has power to take under its procedural law to prevent or terminate damage or to ensure the provision of compensation": this refers to forms of compensation, such as the question whether the damage can be repaired by payment of damages, and ways of preventing or halting the damage, such as an interlocutory injunction, though without actually obliging the court to order measures that are unknown in the procedural law of the forum.

(e) "the measure of damages in so far as prescribed by law": if the applicable law provides for rules on the measure of damages, the court must apply them.

(f) "the question whether a right to compensation may be assigned or inherited": this is self-explanatory. In succession cases, the designated law governs the question whether an action can be brought by a victim's heir to obtain compensation for damage sustained by the victim. In assignment cases, the designated law governs the question whether a claim is assignable and the relationship between assignor and debtor.

[103] For instance so far as concerns the assessment of damages, case-law, in particular the decision of the House of Lords in *Harding v Wealands* [2007] 2 AC 1, had established that the assessment of damages is a procedural matter, governed by English law as the *lex fori*—clearly overruled now for those cases covered by the Rome II Regulation.

[104] COM(2003) 427, 24.

(g) The law that is designated will also determine the "persons entitled to compensation for damage sustained personally": this concept particularly refers to the question whether a person other than the "direct victim" can obtain compensation for damage sustained on a "knock-on" basis, following damage sustained by the victim. Such damage might be non-material, as in the pain and suffering caused by a bereavement, or financial, as in the loss sustained by the children or spouse of a deceased person.

(h) "liability for the acts of another person": this concept concerns provisions in the law designated for vicarious liability. It covers the liability of parents for their children and of principals for their agents.

(i) "the manners in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation and the interruption and suspension of the period"; the law designated governs the loss of a right following failure to exercise it, on the conditions set by the law.

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'Persons' under littera a) arguably needs to be applied both with a view to legal persons and to natural persons. Consequently whether legal persons can be held liable for tort, which is most likely to have been committed ultra vires, is subject to the *lex causae*, even if the *lex incorporationis* were to rule out such corporate liability. Recital 12 has been inserted to underline this, at the instigation of the European Parliament: '(12) The law applicable should also govern the question of the capacity to incur liability in tort/delict.'[105]

Despite the clarification in the Regulation, combined with the EC proposal and with the recitals, difficulties do of course remain. However in particular 'assessment of damage' under Article 15(c) has a very wide scope indeed. For instance the scope of the applicable law arguably includes the determination of whether damages need to be determined 'net', taking into account subsequent history which impacts upon the dependency of the party that is being compensated, or rather 'gross', at the moment of death.[106] Nevertheless the exact meaning of 'assessment of damage' is unclear, even after review of the various language versions.

Article 15 clearly has a limiting effect on Article 1(3), given that it qualifies a number of issues as being substantive law, even though national law may have considered these to be procedural.

Despite the clarification in the Regulation, combined with the Commission proposal and with the recitals, difficulties do of course remain. However, in particular 'assessment of damage' under Article 15(c) has a very wide scope indeed. For instance, the scope of the applicable law arguably includes the determination of whether damages need to be

[105] See also Dickinson (n 3) 570. Cf the Rome I Regulation, where legal capacity of natural persons is largely excluded.

[106] In that respect *Cox v Ergo Versicherung*, which was not decided under the Regulation, would not have to be decided differently post the Regulation. In this case, the deceased was a British Army officer killed in a traffic accident in Germany (not related to his active duty). His widow sued Ergo, the insurer of the German driver who was held to be entirely at fault. Mrs Cox sued in the UK, hoping that English law would apply to the net/gross issue (English law being more favourable on this issue). Both the High Court ([2011] EWHC 2806 (QB)] and the Court of Appeal ([2012] EWCA Civ 1001) agreed that the net/gross issue was not procedural but rather substantive and hence ruled by the *lex causae*, which was German law. It was effectively held that the 'heads of damages' allowed or indeed not taken into account in the claim (future earnings, new partner, etc) are substantive law, not covered by 'quantification' of the damage which under the pre-Rome II Regulation English regime were held to be procedural law. Hence in view of the Court of Appeal, heads of damages, including net v gross, are not part of what the regulation now calls 'evidence and procedure' which by virtue of Article 1(3) Rome II continue to be ruled by *lex fori*.

determined 'net', taking into account subsequent history which impacts upon the dependency of the party that is being compensated, or rather 'gross', at the moment of death.[107]

In *Wall v Mutuelle De Poitiers Assurances*,[108] following a severe road accident, the plaintiff sued the insurance company in the UK—jurisdictional issues were not under discussion. The Court of Appeal had to review the extent to which French law, the *lex causae*, had to be applied by the English Courts: utterly and totally, with all its practical implications? Or with due regard for the distinction which the Regulation continues to make between procedure and substance? Tugendhat J unsurprisingly opted for the latter: an English court must not strive to reach the same result as a French court would, let alone insist that evidence given to the English court be in the form of a French-style expert report (no more indeed than a French court would in the reverse hypothesis). As Tugendhat J summarises at 16, in fine: 'Rules' as to the assessment of damages are therefore to be 'imported'; if there is a rule as to what kind of loss is recoverable, that rule is to be imported. But mere methods of proving recoverable loss are not to be imported.

With reference to Dworkin, no less, on soft law, the Court did hold that applicable law should be understood to include 'judicial conventions and practices', eg 'particular tariffs, guidelines or formulae' used by judges in the calculation of damages under the applicable law: in France, these are the so-called Dintilhac headings.

## 4.9 Contract-Related Tort Claims

Unjust enrichment, *negotiorum gestio* and *culpa in contrahendo* each have a specific article assigned to them. Article 10(1), 11(1) and 12(1) of Rome II each increase the scope for choice of law for each of the three categories. As noted, the general choice of law rule for Rome II is rather restricted; in particular, for pre-tort scenarios, choice of law is only possible between parties who both pursue a commercial activity. In the three contract-related scenarios, however, the tort piggy-backs on the choice of law under contracts (Rome I).[109]

## 4.10 'Overriding' Mandatory Law and Public Order

> Article 16
>
> Overriding mandatory provisions
>
> Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

[107] See *Katerina Cox v Ergo Versicherung AG* [2011] EWHC 2806 (QB), [2012] EWCA Civ 1001.

[108] *Steven Wall v Mutuelle de Poitiers Assurances* [2013] EWHC 53 (QB).

[109] See also H Heiss, 'Party Autonomy' in F Ferrari and S Leible (eds), *Rome I Regulation—The Law Applicable to Contractual Obligations in Europe* (Munich, Sellier, 2009) 1, 8.

> Article 26
>
> Public policy of the forum
>
> The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Recital 32 specifies that these Articles apply in particular where the designated law were to allow for non-compensatory exemplary or punitive damages of an excessive nature:

> (32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum.

# 5

# The Insolvency Regulation

## 5.1 The Overall Nature of and Core Approaches to Insolvency and Private International Law

This whole volume and many others with it arguably are testimony to private international law's overall intricate nature. Insolvency proceedings however involve additional challenges. The subject of insolvency proceedings by its nature almost always involves a multitude of stakeholders, and the subject-matter of the multitude of claims is much more varied than in the average private international law scenario.[1]

There are two core approaches to insolvency and private international law. '*Universality*' argues that against one particular insolvent person (whether he be a private individual or an undertaking), only one insolvency procedure ought to be opened. This one procedure would then (have to) include all debts and assets, and decisions reached in its course ought to be recognised by all other jurisdictions. In its purest form, universality combines universality of effects, with unity of proceedings. The often used term '*lex concursus*' is more or less uniquely[2] attached to the universality doctrine. It refers to the law of the place where insolvency proceedings have been opened ('*concursus*', as a variety of claims 'concur'), and hints at the standard *Gleichlauf*[3] between forum and applicable law in insolvency proceedings.

The *territorial approach* to insolvency proceedings focuses on the location of the assets: an insolvency proceeding may/must be opened in each State where the insolvent has assets, and, in its purest form any consequences of such proceeding are limited to the territory concerned: territoriality of effects and plurality of proceedings.

One does not really 'support' one theory or the other. Rather, universality is what one aspires to; territoriality is the interim (potentially ultimate) reality. The universal approach can only work when other States accept the exclusivity of the proceedings in a different State, and are happy to attach consequences to the findings of those proceedings. This requires bi- or multilateral agreements and eventually a global approach to insolvency proceedings.

[1] For a good illustration, see the UK Supreme Court in *Rubin v Eurofinance SA* [2012] UKSC 46 (not within the scope of the Insolvency Regulation as none of the debtors had their centre of main interests in the EU).

[2] Grammatically, of course, there is no reason why *lex concursus* could not also apply to the territoriality doctrine; however, standard terminology is such as to reserve it for the universality doctrine.

[3] See the three processes of private international law, and standard 'connecting factors', in the introductory chapter.

## 5.2 Genesis of the Insolvency Regulation

As noted above in the review of the Brussels I Recast, insolvency was exempt from the 1968 Brussels Convention. This was evidently not because it was not deemed to have any relevance to business. Rather it was seen to be of such high relevance to cross-border business, that it required a specific, tailor-made regime. Unlike the majority of issues dealt with in the Brussels Convention (and the subsequent Regulation), the subject of insolvency proceedings by its nature almost always involves a multitude of stakeholders, and the subject-matter of the multitude of claims is much more varied than in the average Rome I or Rome II situation.

There have been plenty of attempts to come to a Convention in the insolvency field.[4] In May 1996 one was very nearly there. The entry into force of the 23 November 1995 Convention on insolvency proceedings[5] was made subject to ratification by all 15 Member States at the time,[6] within a period of 6 months. This period lapsed on 24 May 1996 without the United Kingdom having ratified (due to strategic quarrels over the institutional position of Gibraltar, and the lingering animosity between the UK and the other Member States over the fall-out of the BSE crisis). Having nearly succeeded, it would of course have been foolish not to somehow recycle the 1995 text. In the meantime, the legal basis for the initiative had changed. Article 65 EC, in combination with 67(1) EC, post Amsterdam, no longer kept the issue outside of the EC's legal framework:

> Article 65: 'Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include: …
>
> Article 67: 1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

The Member States taking the 'initiative' where Germany and Finland under their respective 1999 presidencies of the Union. The 'Insolvency Regulation', Regulation 1346/2000,[7] which is reviewed in this heading, by default has become a global focal point for attempts to reach a multilateral approach to jurisdiction and applicable law in insolvency proceedings. There is no global or truly multilateral equivalent of the Regulation. Especially given the use of some of the core concepts of the Regulation (first and foremost the 'Centre of Main Interest—COMI, as the main jurisdictional driver) in other jurisdictions, too, their interpretation by courts of the Member States under the guidance of the European Court of Justice, has become of global interest.[8]

Interestingly, given the collapse of the 1995 Convention at the last moment only, it already had all the trimmings of EC private international law Conventions, including the

[4] See the overview in G Moss, IF Fletcher and S Isaacs (eds), *The EC Regulation on Insolvency Proceedings*, 2nd edn (Oxford, OUP, 2009) 2 ff.

[5] It can be downloaded from the Archives of European Integration, eg via http://aei.pitt.edu/2840/.

[6] Art 49(3): 'This Convention shall not enter into force until it has been ratified, accepted or approved by all the Member States of the European Union as constituted on the date on which this Convention is closed for signature.'

[7] Regulation 1346/2000, [2000] OJ L160/1.

[8] See eg A Ragan, 'COMI Strikes a Discordant Note' (2010) 27 *Emory Bankruptcy Developments Journal* 117–68.

accompanying 'Report', in this case the Virgos–Schmit Report.[9] The Report never having been formally adopted, it nevertheless has considerable influence in the application of the Insolvency Regulation. The institutional awkwardness is made more poignant by the aforementioned legal basis of the Regulation. In the five-year interim period post Amsterdam, the Commission did not have sole right of initiative. In this case, given the history of the Regulation, Germany and Finland revived the Convention text more or less as it stood, leading to a lack of Commission proposal (and explanatory Memorandum) and, given the streamlined decision-making procedure, neither any extensive Parliament involvement. The Regulation's *travaux préparatoires* in other words are thin on the ground, making the Virgos–Schmit Report an important (if unofficial and never formally adopted) reference. The eventual Regulation tries to pre-empt some of the perhaps expected controversy by making full albeit not unusual use of recitals.

The Regulation does not apply to Denmark, which has created one or two peculiar difficulties, for instance that English courts can justifiably consider the use of anti-suit injunctions against Danish proceedings (see a recent application (injunction not granted) in *Swiss Marine*.[10,11]) This is probably not possible in the context of the insolvency Regulation (see further, *Kemsley*).[12]

[9] It can be downloaded from the Archives of European Integration, eg via http://aei.pitt.edu/952/.

[10] *SwissMarine Corporation Limited v OW Supply & trading A/S (in bankruptcy)* [2015] EWHC 1571. SwissMarine Corporation Limited ('SwissMarine') applied for an anti-suit injunction against OW Supply & Trading A/S ('OW Supply'), a Danish company that had filed for bankruptcy in the Bankruptcy Court of Aalborg, Denmark on 7 November 2014. SwissMarine sought an order restraining OW Supply (i) from proceeding with an action that it had brought in the District Court in Lyngby, Denmark (the 'Lyngby action') and (ii) from commencing any other or further proceedings in Denmark or elsewhere against SwissMarine directed to obtaining a 'disputed' sum claimed under an ISDA Master Agreement (the 'ISDA Agreement') or any transaction thereunder.

The Brussels I Recast did not apply for the dispute arguably fell under that Regulation's insolvency exception. The Insolvency Regulation as noted does not apply for Denmark has opted out of it. The High Court held essentially that the Lygnby action is not covered by the jurisdiction agreement because it was not a suit, action or proceedings relating to a dispute arising out of or in connection with the ISDA Agreement or any non-contractual obligations arising out of or in relation to it. The Court followed the defendant's argument that OW Supply was not seeking to have determined any dispute under the ISDA Agreement or about the parties' rights and obligations under it, and there was no dispute about their contractual rights and obligations. The question for the Lyngby court was how the Danish insolvency regime applied to the parties. In the words of Smith J: 'The wording [of the choice of court clause in the ISDA Agreement] does not bear on the question whether OW Supply can invoke the protection of Danish insolvency rules, or whether the jurisdiction agreement was intended to prevent this. I cannot accept that the parties evinced an intention in the schedule that OW Supply (or SwissMarine) should abandon the protection of its national insolvency regime' (26). In conclusion, SwissMarine have not shown a sufficient case that the jurisdiction agreement applies to the Lyngby action to justify its submission that it should be granted an anti-suit injunction on the grounds that in bringing and pursuing the action OW Supply is acting in breach of it (29).

Smith J also discussed at length the impact of the Brussels I and Brussels I Recast Regulation on the reference, in the choice of court provision of the ISDA Agreement, to 'Convention' (ie 1968 Brussels Convention) parties. Although this discussion had no bearing on the eventual outcome, the Court's (disputable) conclusion that reference to Convention States should be read as such (and not include 'Regulation' States), in my view would merit adaptation, by parties ad hoc or generally, of the relevant choice of court clause.

[11] See for an application by the Courts of the Isle of Man in favour of US proceedings (to which the Regulation equally does not apply) *Interdevelco Limited v Waste2Energy Group Holdings Plc* CHP 2012/56. The Isle of Man High Court declined to accept jurisdiction in insolvency proceedings against a company incorporated in the Isle of Man. Waste2Energy may be incorporated in the Isle of Man but it has considerable commercial connections in the US, where other companies within the group are located, and is subject to insolvency proceedings there. The Manx court had jurisdiction in principle, on the basis of the incorporation there. However, Manx rules on civil procedure include a general *forum non conveniens* rule, and its insolvency laws express clear preference for universality. The combination of both with comity led the High Court to relinquish jurisdiction in favour of the US.

[12] See n 75 below and accompanying text.

In the meantime, the Regulation was considerably amended in 2015. It will be replaced by Regulation 2015/848,[13] which will apply to insolvency proceedings opened after 26 June 2017. I use 'EIR 2015' for the new Regulation and 'former EIR' when I refer to Regulation 1346/2000. A first observation when comparing the old and new version of the EIR is that the Regulation, and its recitals,[14] have almost doubled in size. That is in some measure due to the introduction of an entirely new chapter for group insolvency.

## 5.3 General Context of the 2015 Amendments

The EIR 2015 is the result of an entire 'insolvency package', which was adopted by the European Commission in December 2012.[15] The whole package comprises the proposal to revise Regulation 1346/2000,[16] the Hess–Oberhammer–Pfeiffer–Pieckenbrock–Seagon Report on the application of that Regulation,[17] the Commission Report on same,[18] an Impact Assessment[19] and a Communication on a new European approach on business failure and insolvency.[20] That latter Communication was later supplemented with a Recommendation,[21] in which the Commission again observed the lack of harmonisation at the applicable and substantive law level. The Recommendation includes among others guidelines on the facilitation of negotiations for business restructuring.

A report on the functioning of the former Regulation was scheduled for June 2012, with the Commission having tendered a study in late 2011, collecting information on the practice in the Member States. In its call for tender, the Commission identified a number or changes in the insolvency environment since the adoption of the Regulation:[22] the number of Member States has increased twice since (in 2004 and 2007), meaning 12 new Member States have entered the arena, some of which have rather specific insolvency procedures. Generally, some Member States adopted new legal schemes for restructuring and treatment of insolvency, based on the UNCITRAL Model Law. Finally, the organisation of business itself has changed: companies are incorporated in international groups (parent company and subsidiaries), they apply corporate governance rules, and have access to capital in the

[13] Regulation 2015/848, [2015] OJ L141/19.

[14] I am grateful to Prof Wessels for providing, on his blog (http://bobwessels.nl/2015/08/2015-08-doc1-eu-insolvency-regulation-v-recast-recitals-compared/, accessed 22 September 2015) a table of equivalence of the old and new Regulation's recitals.

[15] 'Giving Honest Businesses a Second Chance: Commission Proposes Modern Insolvency Rules', IP/12/1354, 12 December 2015, available via http://europa.eu/rapid/press-release_IP-12-1354_en.htm or ow.ly/Q1x1H, accessed 24 July 2015.

[16] COM(2012) 744.

[17] B Hess, P Oberhammer, T Pfeiffer, A Pieckenbrock and C Seagon, *External Evaluation of Regulation 1346/2000 on Insolvency Proceedings* (December 2012), available at http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf or ow.ly/Q1ymC, accessed 24 July 2015.

[18] COM(2012) 743.

[19] SWD(2012) 416, available via http://ec.europa.eu/justice/civil/files/insolvency-ia_en.pdf or ow.ly/Q1zUT, accessed 24 July 2015.

[20] COM(2012) 742.

[21] Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, COM(2014) 1500.

[22] Open invitation to tender JUST/2011/JCIV/PR/0049/A4.

financial markets. Faced with new risks (global economy, relocation of business, unemployment, the 2008 financial crisis), European companies have had to adapt continuously to a changing environment.

In most Member States bankruptcy law has been modernised to fit with the new economic context: beside traditional collective insolvency proceedings decided by the court on the basis of the debtor's insolvency, new schemes applicable to a group of main creditors (eg banks, public bodies) at a pre-insolvency stage are regarded as being more efficient for the purposes of business continuation and preservation of jobs. At the same time, new procedures for the treatment of over-indebtedness of natural persons have been put in place in many countries (eg 'civil bankruptcy') with a view to guaranteeing a decent life to the poorest debtors (as a principle of social justice).

As a consequence, the Commission flagged in particular the following difficulties in application which, it suggested, may have required an amendment to the Regulation:[23]

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1. Scope of the Regulation

   — the limitation of the scope of the Regulation to insolvency and winding-up proceedings as defined in Articles 1 and 2 and listed in Annexes A and B thereof and a possible extension to hybrid proceedings (ie pre-insolvency compulsory arrangements to prevent the formal insolvency proceedings, for example in the UK; "*pre-pack*", French "*sauvegarde*");
   — the exclusion from the scope of the institutions referred to in Article 1 (2). The re-organisation of financial undertakings and payment systems and from the Directives should be examined as a possible extension of the scope of the Regulation;
   — the limitation of the territorial scope and its effect on insolvency procedures involving debtors with a COMI or assets in Denmark and/or non-EU States; in particular, the effect of Danish decisions in relation to insolvency proceedings opened in other Member States;
   — the delineation of the scope with other Union instruments in the area of civil justice, notably the JR.

2. The system of main and secondary proceedings:

   — jurisdiction for opening proceedings: the concept of COMI;
   — the issue of transfer of seat/shift of COMI to another Member State (Case C-1/04 Staubitz-Schreiber, Case C-396/09 Interedil) and the relationship with the principle of freedom of establishment and corporate mobility (Article 49 TFEU, Case C-210/06 Cartesio, conclusions of the Experts' Group on European Company Law 2011) and Directive on the approximation of the laws of the Member States and the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses;
   — the division of powers between main and secondary proceedings;
   — pending parallel insolvency proceedings;
   — recognition and enforcement of decision opening insolvency proceedings in another Member State;
   — the public policy exception;
   — recognition and enforcement of other decisions under the Regulation.

3. The insolvency of groups of companies, the application of the Regulation taken by national courts in such situations.
4. Debt adjustment of private individuals ("consumer bankruptcy").
5. Insolvency proceedings and arbitration/ADR: effect of insolvency on arbitration/ADR clauses, effect of arbitration/ADR proceedings in context of Article 15.
6. Applicable law rules: *lex fori* vs *lex situs*, rules on protection of rights *in rem*, set-off, reservation of title.
7. Claims handling and distribution, priority of security.
8. Detrimental acts, avoidance actions.

[23] Ibid, footnotes omitted.

9. Jurisdiction over actions related to insolvency proceedings, in particular for civil claims to set a transaction aside (*actio pauliana)*.
10. Registration and publication of proceedings.
11. Cooperation and communication between liquidators, judicial cooperation between courts, electronic forms in all languages, interconnection of insolvency registers beyond the scope of the project currently carried out in the framework of the European e-Justice Portal.
12. Coherence, synergies and coordination between the Regulation, particularly Articles 3, 10 and Annex A, and the Directive on the protection of employees in case of insolvency of the employer—(including case law where co-operation between the various national guarantee institutions is needed and analysed).

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The report issued on the basis of the points of interest, originally due for the summer of 2012, was made public in December 2012.[24] In October 2012, the Insolvency Regulation did feature in the European Commission's second round (list of intended) of proposals to shake up the Single Market, 'Single Market Act II' (SIMA II).[25]

As noted above, there is one very important limit to the Insolvency Regulation in its current form: it does *not* harmonise insolvency law. There are substantial differences in the general approach to insolvency proceedings: what level of protection is given to 'weaker' creditors, such as employees; whether and how there is State intervention in the proceedings; whether courts play a central role or leave creditors (or certain categories of creditors) in the driving seat; etc. These are not at all addressed by the Regulation.

The Commission eventually tabled a proposal with two angles:[26] firstly, what one could call a procedural angle (firmly within the conflicts area, especially in terms of recognition and enforcement), which would continue the current focus of not harmonising insolvency law (although the last element of these comes close). On this angle SIMA II[27] declared that:

> We thus need to establish conditions for the EU wide recognition of national insolvency and debt-discharge schemes, which enable financially distressed enterprises to become again competitive participants in the economy. We need to ensure simple and efficient insolvency proceedings, whenever there are assets or debts in several Member States. Rules are needed for the insolvency of groups of companies that maximise their chances of survival. To this end, the Commission will table a legislative proposal modernising the European Insolvency Regulation.

Secondly, a more substantial angle which would actually aim to create a (step-up to a) European insolvency law. As SIMA II put it:

> However, we need to go further. At present, there is in many Member States little tolerance for failure and current rules do not allow honest innovators to fail 'quickly and cheaply'. We need to set up the route towards measures and incentives for Member States to take away the stigma of failure associated with insolvency and to reduce overly long debt discharge periods. We also need to consider how the efficiency of national insolvency laws can be further improved with a view to creating a level playing field for companies, entrepreneurs and private persons within the internal market. To this end, the Commission will table a Communication together with the revision of the European Insolvency Regulation.

[24] COM(2012) 743.
[25] COM(2012) 573: Communication on the 'Single Market Act II—Together for New Growth'.
[26] COM(2012) 744.
[27] See n 25 above.

The Commission effectively already threw in the towel on trying to convince Member States that some kind of harmonised insolvency laws (especially with a view to installing a 'right to fail') ought to be agreed: the second leg of the exercise, as the above extract indicates, eventually merely consisted of a Communication.

The Commission's own summary of its proposal to amend the insolvency Regulation read as follows:

> The elements of the proposed reform of the Insolvency Regulation can be summarised as follows:
>
> — Scope: The proposal extends the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons which currently do not fit the definition;
> — Jurisdiction: The proposal clarifies the jurisdiction rules and improves the procedural framework for determining jurisdiction;
> — Secondary proceedings: the proposal provides for a more efficient administration of insolvency proceedings by enabling the court to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors, by abolishing the requirement that secondary proceedings must be winding-up proceedings and by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved;
> — Publicity of proceedings and lodging of claims: The proposal requires Member States to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers. It also introduces standard forms for the lodging of claims;
> — Groups of companies: The proposal provides for a coordination of the insolvency proceedings concerning different members of the same group of companies by obliging the liquidators and courts involved in the different main proceedings to cooperate and communicate with each other; in addition, it gives the liquidators involved in such proceedings the procedural tools to request a stay of the respective other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.

At a practical level, of particular note are the provisions in the EIR 2015 dealing with the interconnection of insolvency registers (Article 25). The need for this has repeatedly been highlighted.[28] The Commission is to adopt the necessary implementing regulation to enable this interconnection, which will be operated inter alia via the EU's E-Justice portal. Data protection is one of the concerns that will need to be addressed in the roll-out of the register.

Finally, the EIR 2015 will apply to insolvency proceedings opened after 26 June 2017 (Articles 84 and 92). 'Opened' requires formal opening by a Member State's judicial authorities, within the meaning of Article 2(7) EIR 2015. It does not refer to the date of a request to open those proceedings.[29]

[28] For instance, in the circumstances of Case C-251/12 *van Buggenhout/van de Mierop ECLI*:EU:C:2013:566, and G van Calster, 'van Buggenhout/van de Mierop: ECJ Disagrees with its AG re Protection of Debtors', www.gavclaw.com, 20 September 2013, accessed 28 July 2015.

[29] Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-701 (re Art 43 of the former EIR).

The former EIR has been repealed from 25 June 2015 (see Article 92 with respect to entry into force), though in accordance with Article 84(2) it will continue to apply to insolvency proceedings which have been opened before 26 June 2017 (and provided of course these proceedings are within the scope of the former, not the new, EIR).

Article 84(1), second sentence (which existed as Article 43, second sentence), solves the *conflit mobile*[30] which might arise as a result of the interim period between acts committed by a debtor (classic example: contracts entered into), and that debtor subsequently being the subject of an insolvency proceeding. If that proceeding is opened after 26 June 2017, the acts committed by a debtor before that date shall continue to be governed by the law which was applicable to them at the time they were committed. The EIR 2015 then covers all other procedural aspects of the insolvency. The rather quick succession of two insolvency regimes (2000 and 2014) means in practice that quite a few insolvencies which procedurally might be subject to the EIR 2015 involve 'acts committed by a debtor' stretching back to before the entry into force of the former EIR. Article 84's (and before it Article 43's) intention may be simple, namely to prevent retroactive application of the applicable conflict of law rules.[31] However, in practice the split between applicable law and applicable procedure in my view may[32] create more practical complications than it solves.

## 5.4 Scope of Application, Dovetailing with the Brussels I Recast and Overall Aim

### 5.4.1 The So-called 'Bankruptcy' Exception Under the Jurisdiction Regulation

Article 1(2)(b) of the Brussels I Recast provides that it does not apply to

> Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceeding

The first sentence of the sixth recital in the preamble to Regulation No 1346/2000 (the 6th recital of the 2015 Regulation contains a similar provision) clarifies that the Regulation should, in accordance with the principle of proportionality,

> be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.

Consequently, the scope of application of the Insolvency Regulation, old and new should not be broadly interpreted (*German Graphics*).[33] Per *Gourdain*, in the context of the

[30] A *conflit mobile* in the narrow sense occurs when the factual matrix included in the connecting factor changes. A classic example would be a change in nationality (a relevant connecting factor in much of family law) or a change in contractual terms (eg parties amend the agreed place of delivery). In the context of the current Article I propose to apply it to a change in the conflict of laws rule.

[31] See M Virgos and F Garcimartin, *The European Insolvency Regulation: Law and Practice* (The Hague, Kluwer, 2004) 157–58, 31–32.

[32] Discussion in scholarship is vague to non-existent, and in case-law the issue would not seem to have featured abundantly.

[33] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECR I-8421, para 25.

Brussels I (and Recast), an action is related to bankruptcy only if it derives directly from the bankruptcy and is closely linked to proceedings for realising the assets or judicial supervision.[34] It is the closeness of the link, in the sense of the case-law resulting from *Gourdain*, between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of the Brussels I Recast Regulation applies.[35] The mere fact that the liquidator is a party to the proceedings is not sufficient to classify the proceedings as deriving directly from the insolvency and being closely linked to proceedings for realising assets (*Gourdain*).[36] Relevant case-law is aptly summarised by the UK Supreme Court in *Rubin v Eurofinance*.[37]

I review the 'bankruptcy exception' also in the relevant chapter on the Brussels I Recast Regulation. Recent case-law which tries to focus the analysis from the point of view of the Insolvency Regulation includes *Nickel & Goeldner*[38] (which also deals with Article 71's rule on the relation between Brussels I and the Convention for the International Carriage of Goods by Road (CMR)). In *Nickel & Goeldner*, the insolvency administrator of Kintra applied to the relevant Lithuanian courts for an order that Nickel & Goeldner Spedition, which had its registered office in Germany, pay its debt in respect of services comprising the international carriage of goods provided by Kintra for Nickel & Goeldner Spedition, inter alia in France and in Germany. According to the insolvency administrator of Kintra, the jurisdiction of the Lithuanian courts was based on Article 14(3) of the Lithuanian law on the insolvency of undertakings. Nickel & Goeldner Spedition disputed that jurisdiction, claiming that the dispute fell within the scope of Article 31 of the CMR and of the Brussels I Regulation.

[34] Case 133/78 *Henri Gourdain v Franz Nadler* [1979] ECR 733, para 4: case-law under the Brussels I Regulation is not irrelevant in this respect, as the Regulation, like the Brussels Convention, excludes 'bankruptcy' from its scope of application.

[35] For instance *not* an action seeking to ensure the reservation of a title clause over goods in possession of the debtor: the answer to that question of law is independent of the opening of insolvency proceedings. See *German Graphics* (note 33) para 31. The judgment also clarifies that Art 7 of the Regulation, on reservation of title (see further analysis below), only constitutes a substantive rule intended to protect the seller with respect to assets which are situated outside the Member State of opening of insolvency proceedings: it is not concerned with the delineation between the Brussels I Recast and the Insolvency Regulation. By contrast, per *SCT Industri*, the exception does apply (and hence the Insolvency Regulation is applicable) to a judgment of a court of Member State A, regarding registration of ownership of shares in a company having its registered office in Member State A, according to which the transfer of those shares was to be regarded as invalid on the ground that the court of Member State A did not recognise the powers of a liquidator from a Member State B in the context of insolvency proceedings conducted and closed in Member State B. The action which gave rise to such a decision derives directly from insolvency proceedings and is closely linked to them. First, the link between the court action and the insolvency proceedings is particularly close since the dispute concerns solely the ownership of the shares which were transferred in insolvency proceedings by a liquidator on the basis of provisions, such as those enacted under the legislation of Member State B on insolvency proceedings, which derogate from the general rules of private law and, in particular, from property law. Thus, the transfer of the shares and the action for restitution of title to which it gave rise are the direct and indissociable consequence of the exercise by the liquidator—an individual who intervenes only after the insolvency proceedings have been opened—of a power which he derives specifically from the provisions of national law governing insolvency proceedings. Second, the content and the scope of the decision declaring the transfer to be invalid are intimately linked to the conduct of the insolvency proceedings since the ground on which the transfer was held invalid relates, specifically and exclusively, to the extent of the powers of that liquidator in insolvency proceedings: Case C-111/08 *SCT Industri v Alpenblume* [2009] ECR I-5655.

[36] Case 133/78 *Henri Gourdain* v *Franz Nadler* [1979] ECR 733.

[37] *Rubin v Eurofinance SA* [2012] UKSC 46.

[38] Case C-157/13 *Nickel & Goeldner Spedition GmbH* v *'Kintra' UAB* ECLI:EU:C:2014:2145.

The Courts instructed how its earlier case-law (*Gourdain*, *Seagon*, *German Graphics*, *F-Tex*) needs to be applied:

> It is apparent from that case-law that it is true that, in its assessment, the Court has taken into account the fact that the various types of actions which it heard were brought in connection with insolvency proceedings. However, it has mainly concerned itself with determining on each occasion whether the action at issue derived from insolvency law or from other rules.
>
> It follows that the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings. (26–27)

The action at issue was an action for the payment of a debt arising out of the provision of services in implementation of a contract for carriage. That action could have been brought by the creditor itself before its divestment by the opening of insolvency proceedings relating to it and, in that situation, the action would have been governed by the rules concerning jurisdiction applicable in civil and commercial matters. The fact that, after the opening of insolvency proceedings against a service provider, the action for payment was taken by the insolvency administrator appointed in the course of those proceedings and that the latter acts in the interest of the creditors does not substantially amend the nature of the debt relied on which continues to be subject, in terms of the substance of the matter, to the rules of law which remain unchanged.

Hence, there was no direct link with the insolvency proceedings and the Brussels I Regulation continued to apply.

It is not the procedural context (in particular, whether the liquidator takes the action) but rather the legal basis of the action that determines the insolvency exception. This is a useful alternative formulation of the *Gourdain* et al case-law

In *Nortel*,[39] the CJEU confirmed *Nickel & Goeldner*, and also extended its findings in *Seagon* (see below) to secondary proceedings. Nortel Networks SA ('NNSA') was established in Yvelines (France). The Nortel group was a provider of technical solutions for telecommunications networks. Nortel Networks Limited ('NNL'), established in Mississauga (Canada), held the majority of the Nortel group's worldwide subsidiaries, including NNSA. In 2008 insolvency proceedings were initiated simultaneously in Canada, the US and the EU. In January 2009, the High Court opened main insolvency proceedings under English law in respect of all the companies in the Nortel group established in the EU, including NNSA.

Following a joint application lodged by NNSA and the joint administrators, by judgment of May 2009 the court at Versailles opened secondary proceedings in respect of NNSA. In July 2009, industrial action at NNSA was brought to an end by a memorandum of agreement settling the action. It provided for the making of a severance payment, of which one

[39] Case C-649/13, *Comité d'entreprise de Nortel Networks SA and others v Cosme Rogeau et al* ECLI:EU:C:2015:384, On the application of Art 71, the Court held that, in a situation where a dispute falls within the scope of both the Regulation and the CMR, a Member State may, in accordance with Art 71(1) of the Regulation, apply the rules concerning jurisdiction laid down in Art 31(1) CMR.

part was payable immediately and another part, known as the 'deferred severance payment', was to be paid, once operations had ceased, out of the available funds arising from the sale of assets. That memorandum was approved by the court at Versailles. NNSA's positive balance was, however, subsequently caught up in the global settlement for Nortel, including transfers of funds to escrow accounts in the US, to be distributed following global settlement, and new debt following the continuation of Nortel's activities as well as costs related to the global winding-up of the company. The deferred severance payment therefore could no longer be paid.

The works council of NNSA and former NNSA employees brought an action before the court at Versailles seeking, first, a declaration that the secondary proceedings gave them an exclusive and direct right over the share of the overall proceeds from the sale of the Nortel group's assets that falls to NNSA and, second, an order requiring the liquidator to make immediate disbursement, in particular, of the deferred severance payment, to the extent of the funds available to NNSA. The French liquidator then summoned the joint administrators as third parties before the referring court. However, these then suggested the court at Versailles decline international jurisdiction, in favour of the High Court at London, and in the alternative, to decline jurisdiction to rule on the assets and rights which were not situated in France for the purposes of Article 2(g) of the Insolvency Regulation when the judgment opening the secondary proceedings was delivered. That Article reads:

> (g) 'the Member State in which assets are situated' shall mean, in the case of:
> — tangible property, the Member State within the territory of which the property is situated,
> — property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,
> — claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

There are essentially two parts to the referring court's questions: (i) the allocation of international jurisdiction between the court hearing the main proceedings and the court hearing the secondary proceedings; and (ii) identification of the law applicable to determine the debtor's assets that fall within the scope of the effects of the secondary proceedings.

On the first question, the Court first reviewed whether the Insolvency Regulation applied at all—an issue seemingly that did not feature in the national proceedings or in the written procedure before the CJEU, but which came up at the hearing. The issue being that what the Works Council was after was that an agreement to pay a debt be honoured: one that looks just like a fairly standard agreement were it not to arise out of insolvency. Per *Nickel & Goeldner* the Court reviewed 'whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings'. Here, the basis of the action, as was pointed out by Mengozzi AG, was relevant French insolvency law (for the determination of the order of creditors' rights) and the Insolvency Regulation (for the determination of the hierarchy between main and secondary insolvency proceedings). The Insolvency Regulation therefore applies. The AG's review in fact was clearer than the Court's summary. More generally, the CJEU does seem to go out of its way to re-emphasise the *Nickel & Goeldner* formula, even if the separation of the Brussels I and the Insolvency Regulation was not particularly controversial in the case at issue.

## 5.4.2 The Definition of Insolvency Proceedings

Regulation 1346/2000:

> Article 1
>
> **Scope**
>
> 1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.
> 2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.
>
> Article 2
>
> **Definitions**
>
> For the purposes of this Regulation:
>
> (a) 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;
> (b) 'liquidator' shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;
> (c) 'winding-up proceedings' shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;

Core to Article 1(1) of the former EIR as noted was the following provision:

> This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

It then defined most of these concepts in turn in Article 2. The combined application of these Articles with the associated Annexes meant that the Member States furnished the scope of application of the Regulation by virtue of their including, or not, relevant procedures in an Annex. It was not sufficient that national proceedings met the conditions of Article 1 in a generic way for them to be included in the scope of application of the Regulation. The Virgos–Schmit Report was clear on this point.[40] In *Bank Handlowy*,[41] the CJEU moreover confirmed that when a procedure is included in the Annex, upon proposal by the Member State, the EU or indeed the courts in other Member States are not to second-guess whether these are 'true' insolvency proceedings. 'Insolvency' may be a substantial condition for the Regulation to apply, but it is not defined by it and continues to be left undefined.

Under the former EIR, Member States in practice could reorganise, etc, outside the pure insolvency context subject to the EIR by virtue of including the relevant procedure in an Annex. The EIR 2015 formalises the wider approach, in line with the Commissions's objectives as highlighted above (namely to no longer limit the scope to liquidation proceedings).

[40] Virgos–Schmit Report, para 48, 32.

[41] Case C-116/11 *Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp z oo*, ECLI:EU:C:2012:739.

The core definition of insolvency proceeding, previously spread over Articles 1 and 2, has now been somewhat better integrated, though is still spread over Articles 1 and 2. It now reads:

> This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
>
> — a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
> — the assets and affairs of a debtor are subject to control or supervision by a court; or
> — temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).
>
> Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.
>
> The proceedings referred to in this paragraph are listed in Annex A.

Some, but certainly not all, Member States have included a variety of restructuring mechanisms in their relevant Annexes. Recital 9 (of the 2015 EIR) is very clear as to the fate of procedures included or excluded from the Annexes:

> This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation.

The EIR 2015 emphasises its wider calling (not just liquidation but also reorganisation) by dropping the term 'liquidator' in favour of 'insolvency practitioner'.

'Insolvency' as noted continues to be undefined by the Regulation. Article 1(1) clarifies that the Regulation at any rate only applies to

— *collective* proceedings, which are
— based on *insolvency*,
— which entail the *partial or total divestment* of a debtor, and
— the appointment of a '*liquidator*', now called an 'insolvency practitioner', further defined in Article 2(5) (new).

The combined application of these Articles with the associated Annexes means that the Member States furnish the scope of application of the Regulation by virtue of their including, or not, relevant procedures in Annex.[42] There is a simplified amendment of the Annexes, in particular, allowing the Member States to propose an amendment, rather than leaving

[42] The 1990 Council of Europe's 'Istanbul Convention', the European Convention on Certain International Aspects of Bankruptcy, employs the same method and to that effect inspired the Regulation.

the initiative with the EC, and granting the Council the right subsequently to amend the Annexes without having to go via Parliament.

Needless to say, a number of what might seem to be insolvency proceedings existing in the Member States, have not been included in the Annexes, hence the Regulation does not apply to them. This evidently may influence the choice of procedure by creditors in insolvency-relevant national procedures. Where the business involved has cross-border dimensions, the recognition and enforcement leg of the Regulation in particular may well push the creditor into choosing a procedure which is covered by the Regulation.

National insolvency proceedings which meet the requirements of Article 1(1) however which have not been included by the Member State concerned in Annex A, are not covered by the Regulation.[43] It is not sufficient that national proceedings meet the conditions of Article 1 in a generic way (Virgos–Schmit Report).[44] Arguably, proceedings which have been included in that Annex but which do not meet with those same conditions are not covered by the Regulation either: otherwise the conditions of said Article would be nugatory.

Ad nauseam, the Annex is the trigger and it is the Member States that pull it. In my view that renders nugatory many of the discussions which one could conceivably have vis-à-vis the terminology of the EIR. For instance, in the absence of European harmonisation of substantive insolvency law, what laws are '*laws relating to insolvency*' must be left to the Member States. Any autonomous interpretation of the concept by the CJEU would, in my view, run counter to the clear deference to national law expressed in the Annex system.

One of the elephants in the room are the English Schemes of Arrangement. These have gained considerable popularity for use by companies not registered in the UK, the most obvious attraction being the possibility to 'cram down' under the relevant English law (Part 26 of the Companies Act 2006 (England and Wales)). A Scheme of Arrangement allows a (qualified) majority of creditors to accept restructuring of the company's debt in spite of opposition by a minority, *and* to have that restructuring have binding effect on those unwilling creditors. Relevant case-law[45] leaves the Schemes firmly outside of the EIR and within the scope of application of the Brussels I Regulation.[46] That Regulation facilitates jurisdiction of the English courts, in contrast with the EIR where jurisdiction is based on objective elements. Schemes of Arrangement have had an important impact on the attraction of London as a basis for restructuring practice, arguably also leading continental European States to amend their insolvency laws in relevant part. The Annex approach of the Regulation would, in my view, have sufficed to emphasise the exclusion of Schemes of Arrangement from the EIR. So as to leave no doubt, however, the UK succeeded in having a specific recital (recital 16 of the 2015 EIR) inserted to emphasise the point:

> This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency.

[43] Moss G et al (n 4) 42.

[44] Virgos–Schmit Report, para 48, 32.

[45] See in particular *Apcoa* [2014] EWHC 3849 and *Van Gansewinkel* [2015] EWHC 2151.

[46] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1, and the Recast regulation 1215/2012, [2012] OJ L351/1. Reviewed in the relevant chapter.

By virtue of Article 1(2), the Regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings. The regulatory environment for these undertakings was considered too specific, and, to some extent, the national supervisory (prudential) authorities have extremely wide-ranging powers of intervention.[47] In the meantime, the EU has put in place tailored insolvency regimes for some[48] of these categories,[49] urged on by the drafters of the Convention (the then 15 Member States). For while they recognised the need for a specific regime for these specific undertakings, they did not want the exclusion to gain a more than temporary character.

### 5.4.3 Four Cumulative Conditions

The Regulation only applies to *collective* proceedings, which are based on *insolvency*, which entail the *partial or total divestment* of a debtor, and the appointment of a '*liquidator*' (now called 'insolvency practitioner').

The debtor need not have a particular status: the Regulation applies equally to all proceedings, whether these involve a natural person or a legal person, a trader or an individual.[50]

The Regulation is not limited to winding-up proceedings (which used to have their own definition in Article 2(c) (old)),[51] contrary to earlier mooted versions of the Convention. This would have included a fifth condition, that the proceedings may lead to the realisation of the debtor's assets. Such limitation would have had the advantage of simplifying the resulting rules, as the spread of national proceedings involved would have been a lot thinner.[52] However it would also have ruled out application of the Regulation to a considerable amount of 'reorganisation'[53] procedures in the Member States, now more generally referred to as 'restructuring'. A compromise was found in the 2000 text to extend the system of the Regulation to insolvency proceedings, the main aim of which was not winding-up but reorganisation. However as part of the compromise, negotiated under the draft Convention, local proceedings opened after the main proceedings could only be winding-up proceedings (see further below). The often unfortunate consequence of this compromise was that when main proceedings have been initiated with a view to restructuring a company with assets in a variety of Member States, the step or threat by some of the creditors of opening up (a) secondary proceeding(s) in another Member State(s)—which, as just noted, have to be winding-up proceedings—may derail the very chances of success of the restructuring.[54] As I further explain below, this substantial difference between 'secondary' and 'territorial' proceedings has now been removed from the Regulation.

[47] Recital 9 of the Regulation (old and new).

[48] However, not for collective investment undertakings, which leaves a considerable gap.

[49] For insurance undertakings: Directive 2001/17, [2001] OJ L110/28; for 'credit institutions': Directive 2001/24, [2001] OJ L125/15.

[50] Virgos–Schmit Report, para 53, 39, and recital 9 of the Regulation (old and new).

[51] Art 2(c) (old), '"winding-up proceedings" shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B.'

[52] Virgos–Schmit Report, para 51, 35.

[53] Ibid, 36.

[54] See also Moss et al (n 4) 51.

The formal definition of 'insolvency proceedings' has been amended, but in substance does not differ from the previous version. I will therefore continue to use the four main tenets of the concept, as employed in the 2000 version.

#### *5.4.3.1 Collective Proceedings*

Individual action by one creditor only is precluded from cover by the Regulation (Virgos–Schmit Report)[55] lest arguably circumstances are such that there is only one individual creditor, who consequently equals collectivity (in which case at any rate one of the collective proceedings included in Annex A has to be followed).

#### *5.4.3.2 Based on the Debtor's Insolvency*

Procedures based on any other ground are not covered by the Regulation. 'Insolvency' is not defined by the Regulation.

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'The [Regulation] is based on the idea of financial crisis, but does not provide its own definition of insolvency. It takes this from the national law of the country in which proceedings are opened. There is no test of insolvency other than that demanded by the national legislation of the State in which proceedings are opened. Thus, if a national law is based on the occurrence of an act of bankruptcy listed in the bankruptcy law or on the evidence that the debtor has ceased to pay his debts, it is sufficient for one of these facts to be established in order that insolvency proceedings be opened and the [Regulation] applied.' (Virgos–Schmit Report)[56]

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#### *5.4.3.3 Which Entail the Partial or Total Divestment of a Debtor*

The requirement of 'divestment' (French: *dessaisissement*; German: *Vermögensbeschlag*), means that the debtor must lose control, partially or totally, of his estate and business:

> that is to say the transfer to another person, the liquidator, of the powers of administration and of disposal over all or part of his assets, or the limitation of these powers through the intervention and control of his actions (Virgos–Schmit Report).[57]

#### *5.4.3.4 Which Entail the Appointment of a 'Liquidator', Now Called an 'Insolvency Practitioner'*

This requirement is directly linked to the previous condition: it is the insolvency practitioner who gains control over administration and disposal of the debtor's assets. 'Practitioner' is defined in (now) Article 2(5) which again employs the Annex approach joined to an abstract definition in the Article itself. Specific legal positions in the Member States are qualified (or not) as 'liquidator' per Annex B (in the previous Regulation, Annex B contained the list of winding-up proceedings, but this is no longer a qualification that is relevant for the purposes of the Regulation). The definition of Article 2(5) re-emphasises

[55] Virgos–Schmit Report, para 49, 32.
[56] Ibid, 32–33.
[57] Ibid, 34.

the aforementioned condition of divestment. The liquidator has to be in control of at least part of the debtor's affairs. Courts may be themselves be 'liquidator' in the sense of Article 2(5), however this needs to be indicated in so many words in (now) Annex B.

### 5.4.4 Opening by a 'Court' or Judicial Authority?

For insolvency proceedings to be within the scope of the Regulation, they need not be opened by a judicial authority (a great many, though not all, of the procedures included in Annex A are of this variety). This was done

— mostly[58] for the same reason as the inclusion of proceedings which may not lead to a winding-up of the debtor (see above). Ordinary non-judicial collective proceedings in particular in the UK and Ireland (especially creditor's voluntary winding-up) represent an important percentage of all corporate insolvency cases. Excluding them would have excluded a sizeable portion of insolvency practice particularly in those countries.
— Further, these proceedings are not of the 'cloak and dagger' variety. They offer sufficient guarantees (including access to the courts, for the legality of the proceedings to be supervised and for any questions which may arise to be settled) in order that they be brought under the Regulation.[59]
— Finally, one of the crucial aims of the Regulation is to safeguard the position of creditors in other Member States, for which it has enough mechanisms to defend the positions of the creditors (the possibility of secondary proceedings, public order exceptions, safeguard of acquired rights, etc.) to enable these proceedings to benefit from the Regulation system.

As I also review below, the fact that insolvency proceedings not opened by a judicial authority, are covered by the Regulation to the degree they are included in Annex A and meet with the conditions of Articles 1 and 2, does not mean that they receive all the benefits of the Regulation. In particular, decisions adopted in the course of these proceedings do not enjoy automatic recognition and enforcement (Virgos–Schmit Report).[60] They do, however, benefit from two core consequences of inclusion in the Regulation (Virgos–Schmit Report):[61]

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1. these proceedings have to be recognized as collective insolvency proceedings pursuant to Article 1. Once proceedings have been opened in a [Member] State in accordance with Article 3, the creditors must seek payment of their debts through these collective proceedings, even if they are not conducted by the courts. Any question relating to the conduct of the proceedings or the decisions taken in the course of those proceedings, should be referred to the courts of that State;
2. the appointment of the liquidator and the powers conferred on him by the law of the State where proceedings were opened must be recognized in other [Member] States. However if the liquidator wishes to exercise his powers in another [Member] State, it is necessary for the [Member] States having proceedings of this

[58] Ibid, para 52, 37.
[59] In particular, the automatic recognition of the judgment under the Regulation requires one to be sure that the proceedings included in it are sound from the point of view of the rule of law.
[60] Virgos–Schmit Report, para 52, 37.
[61] Ibid, 38.

> type (the United Kingdom and Ireland) to introduce into their national legislation a system of confirmation by the courts of the nature of the proceedings and the appointment of the liquidator. This condition is shown in the list in Annex A which contains the proceedings designated by each country. In both cases these are termed proceedings "with confirmation of or by a court".

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### 5.4.5 Relation with the Judgments Regulation (Brussels I Recast): Dovetail or Not?

Recital 7 of the 2015 EIR addresses the relation between the Brussels I Recast Regulation 1215/2012[62] and the Insolvency Regulation.

> Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council. Those proceedings should be covered by this Regulation. The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.

Insolvency, as noted above, was excluded from the Brussels I Regulation (and from the 1968 Brussels Convention[63] before it) because it was envisaged to be included in what eventually became the Insolvency Regulation. Consequently the scope of application of the Brussels I (and Recast) Regulation and the Insolvency Regulation evidently is determined by each other's existence.

However, whether they clearly 'dovetail' (ie slot into one another leaving no spare space; rather like the joint from which the expression takes its name) when it comes to their respective scope of application, is less clear.[64]

*Nickel & Goeldner* at paragraph 21[65] and *Nortel Networks* at paragraph 26[66] are often quoted in support of the dovetail. However, Recital 7 of the 2015 EIR usefully reminds us not to treat *exclusion* of Annex A EIR as automatically leading to *inclusion* in Brussels I Recast. I do not in fact think the Jenard Report[67] suggests that the Brussels Convention

[62] [2012] OJ L351/1.

[63] See n 6 above.

[64] At any rate any dovetailing does not extend to matters of choice of law. That is because neither Lugano nor the Judgments Regulation consider choice of law: they are limited to jurisdiction. See Snowden J in *Van Gansewinkel* (n 45).

[65] Case C-157/13 *Nickel & Goeldner Spedition GmbH v Kintra UAB* ECLI:EU:C:2014:2145, para 21: 'In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the [Brussels Convention], which was replaced by Regulation No 44/2001, the Court has held that that regulation and Regulation No1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" fall within the scope of Regulation No 1346/2000. Following the same reasoning, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in F-Tex, C-213/10, EU:C:2012:215, paragraphs 21, 29 and 48).'

[66] Case C-649/13 *Comité d'entreprise de Nortel Networks SA and others v Cosme Rogeau et al* ECLI:EU:C:2015:384, 26, quoting quasi verbatim from *Nickel & Goeldner*, ibid.

[67] Report by P Jenard on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1979] OJ C59/1 (the Jenard Report).

intended a pure parallel.[68] That Report merely mentions the (never completed) Insolvency Convention being prepared and the need to pace the inclusion of bankruptcy, etc, in European private international law. Rather it is the Schlosser Report which first in so many words suggests the need for dovetailing:[69]

> leaving aside special bankruptcy rules for very special types of business undertakings, the two Conventions were intended to dovetail almost completely with each other. Consequently, the preliminary draft Convention on bankruptcy, which was first drawn up in 1970, submitted in an amended form in 1975, deliberately adopted the principal terms 'bankruptcy compositions' and 'analogous proceedings in the provisions concerning its scope in the same way as they were used in the 1968 Convention. To avoid, as far as possible leaving lacunae between the scope of the two Conventions efforts are being made in the discussions on the proposed Convention on bankruptcy to enumerate in detail all the principal and secondary proceedings involved and so to eliminate any problems of interpretation. As long as the proposed Convention on bankruptcy has not yet come into force, the application of Article 1, second paragraph, point (2) of the 1968 Convention remains difficult. The problems, including the matters arising from the accession of the new Member States, are of two kinds. First, it necessary to define what proceedings are meant by bankruptcy, compositions or analogous proceedings as well as their constituent parts. Secondly, the legal position in the United Kingdom poses a special problem as the bankruptcy of 'incorporated companies' is not a recognized concept in that country.(footnotes omitted)

In *German Graphics*, however, the CJEU itself noted that 'it is conceivable that, among those judgments, there are some judgments which will come within the scope of application neither of Regulation No 1346/2000 nor of Regulation No 44/2001.[70]

Whatever the intention of the Brussels Convention, the way in which the EIR (old and new) has defined its scope of application has arguably upset any dovetailing that might have been intended. The eventual text of the former and 2015 EIR, and additionally the relevance of inclusion in the Annex, clearly show that the absolute parallel cannot be maintained in practice. Starting with the definition, the Jenard Report employs a definition that certainly does not entirely overlap with the definition in either former or new EIR:

> Article 1 (2) excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons judicial arrangements compositions and analogous proceedings, ie those proceedings which depending on the system of law involved, are based on the suspension of payments, the Insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purpose either compulsory and collective liquidation of the assets or simply of supervision.[71]

Further and as noted, neither the Jenard Report, the Schlosser Report nor the Brussels Convention itself would have envisaged the Member States being in the definitional driver's seat, as a result of the Annex approach as reviewed above.

[68] As suggested by A Layton, and H Mercer (general eds), with H Mercer, L Wyles, C Dougherty and P de Verneuil Smith (assist eds), and S O'Malley (consultant ed), *European Civil Practice*, 2nd edn, vol 1 (London, Sweet & Maxwell, 2004) 356–57, referring to the Jenard Report.

[69] Report by P Schlosser on the convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom 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, [1979] OJ C59(71) 90.

[70] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECR I-8421, 17.

[71] Jenard Report, 11 *in fine* 12.

### 5.4.6 Core Aim of the Regulation

High on the list of aims of the Regulation, is the avoidance of forum shopping: 'It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)' (recital 4; now recital 5).

Paradoxically, akin to the impact of the Owusu ruling on the popularity of forum non conveniens in Member States outside of the UK, one of the results of the insolvency Regulation may well have been precisely to kindle interest in forum shopping in insolvency proceedings—and rightly so. The Regulation all too readily dismisses forum shopping as unwarranted in all its forms.[72] Forum shopping, especially in UK courts, is alive and well outside the scope of the Insolvency Regulation.[73]

An interesting thought is whether, given the Regulation's aversion to forum shopping, *forum non conveniens* ought to be acceptable. In *Buccament Bay*,[74] Strauss QC (DJ) dealt with the preliminary jurisdictional issue of whether the court should exercise its jurisdiction

[72] See generally W-G Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 *European Business Organization Law Review* 579–620.

[73] See eg application in *JSC Bank of Moscow & Aor v Kekhman: Vladimir Abramovich Kekhman* [2015] EWHC 396 (Ch). The High Court refused to reverse an earlier decision establishing jurisdiction for personal bankruptcy. The COMI was not in the EU and the Insolvency Regulation therefore did not apply. Jurisdiction was upheld even though the applicant had only been personally been in the UK for one or two days. The applicant argued pro jurisdiction mainly on the basis of (a) the absence of a personal bankruptcy regime in the Russian Federation; (b) the availability of assets in the jurisdiction (£200,000 which was to be made available to the official receiver); (c) connection to the jurisdiction in the form of contractual English law/jurisdiction provisions; (c) the opinion of a Russian lawyer that the courts of the Russian Federation would recognise the bankruptcy; (d) the fact that an English bankruptcy would allow for the investigation of Mr Kekhman's affairs and an orderly realisation of Mr Kekhman's assets for the benefit of his creditors as opposed to realisation on a first come, first served basis; (e) the promise that Mr Kekhman would cooperate with the official receiver and any trustee appointed; and (f) the prospect of Mr Kekhman's financial rehabilitation.

Personal presence has long been withheld as sufficient ground for jurisdiction in England. Section 265 Insolvency Act 1986 now provides 'Conditions to be satisfied in respect of debtor. (1) A bankruptcy petition shall not be presented to the court … unless the debtor (a) is domiciled in England and Wales, (b) is personally present in England and Wales on the day on which the petition is presented, or (c) at any time in the period of 3 years ending with that day (i) has been ordinarily resident, or has had a place of residence, in England and Wales; or (ii) has carried on business in England and Wales.'

Once jurisdiction has so been established, the Court has discretion to confirm or refuse jurisdiction in the case at issue, on the basis of relevant authority in case-law (and further instruction in the Act).

Baister CR reviewed precedent at length (including recent case-law on schemes of arrangement in the English courts) and held pro jurisdiction. Where his arguments are mostly likely to catch attention is his review of forum shopping, good and bad: 'The authorities, and in particular the corporate ones, demonstrate that the courts here are prepared to countenance what is in reality forum shopping, albeit of a positive, by which I mean a legitimate, kind' (104). 'There is no suggestion in this case that the bankruptcy order was sought for an improper purpose … beyond, the Applicants would say, Mr Kekhman's seeking to avoid the harsh consequences of Russian law (much as it might be said the companies in the two scheme cases [ie schemes of arrangement] mentioned above sought to avoid the potential consequences for them of the lack of a scheme jurisdiction in their respective countries)' (110). 'Rather, it seems to me that Mr Kekhman has come to this jurisdiction to fill a lacuna in the laws of the country where he is domiciled and resides. Many of the cases we have looked at, though primarily, I accept, in the corporate realm, indicate that the courts here have often been content to assist in such circumstances' (111).

Russian assets can still be gone after by the banks in Russia, using Russian law. English will be credited to them by the English courts using English law.

This case is a refreshing defence of forum shopping which in my view unfairly has been utterly blacklisted in the Insolvency Regulation.

[74] *Buccament Bay Ltd v Harlequin Property (SVG)* Ltd [2014] EWHC 3130 (Ch).

to hear winding-up petitions, based on largely undisputed debts, when neither of the companies concerned is incorporated in England (they are incorporated in Saint Vincent and the Grenadines (SVG)).

The judgment does not start with what logically it ought to have done, namely determining the COMI per the EU's Insolvency Regulation. Instead, Strauss DJ first considered the application of section 221(1) the UK Insolvency Act 1986, which inter alia gives the court jurisdiction to wind-up foreign companies as 'unregistered' companies, provided, subject to relevant case-law, that there is sufficient connection with England. He decided there was not (in particular because the condition, required under relevant precedent, that the petitioners derive benefit from the winding up was not satisfied here). It is only after having rejected application of Article 221(1) that the court summarily returned to the COMI under the Insolvency Regulation. Arguments pro and contra led, justifiably I believe, to a finding of the COMI being outside the EU.

This is then where the High Court came to the most interesting part of the judgment, even if it was obiter (25). Namely that even had the COMI been in the UK, the English court could still exercise constraints/room for manoeuvre, applying section 221(1), including recourse to *forum non conveniens*. In the words of Strauss DJ,

> the only effect of Article 3(1) [of the Insolvency Regulation] is to give the court jurisdiction, which it has anyhow under English domestic law, to open insolvency proceedings. Where a company's COMI is in this country, it is highly likely that, by definition, the court will be satisfied that there is a substantial connection with this country, but otherwise the discretionary factors will be the same. In this case, even if I had been satisfied that the respondents' COMI was here, it would still have made no sense to make winding up orders in a case which is obviously much more suitable for the SVG courts.

Respectfully, I disagree. Article 3(1) simply supersedes Section 221(1) in cases where the COMI is in the UK. It generally supersedes national jurisdictional rules, again, provided the COMI is in the EU. As Article 221(1) is a jurisdictional rule and not one of substantive UK insolvency law (which applies as lex concursus), it cannot be called upon had the COMI been in England.

That leaves the overall question of whether the Insolvency Regulation accommodates *forum non conveniens* (it certainly does not have a formal rule on it, in contrast to the Brussels I recast). Although there is no CJEU case-law on this, it is quite likely that neither Regulation nor most definitely the CJEU have sympathy for *forum non conveniens*.

A similarly interesting prospect is the use of anti-suit injunctions in the context of the Insolvency Regulation. Reflection on this issue was made in *Kemsley*.[75] At least until late 2008, Mr Kemsley was a very wealthy individual. On 25 June 2008, Barclays granted him a personal loan of £5 million on an unsecured basis. The loan was repayable after a year but the loan period was subsequently extended. In 2009, Mr Kemsley's business in England collapsed when his group of companies went into administration. Mr Kemsley was unable to keep up repayment to Barclays of instalments under the extended loan, and failed to stick to a repayment schedule for debts with another company. Mr Kemsley is a British citizen and had lived until 2009 in England. Following the collapse of his business here, he moved in June 2009 with his wife and family to Florida. They moved to New York City in

[75] *Paul Zeital Kemsley v Barclays Bank Plc et al* [2013] EWHC 1274 (Ch).

about May 2010 but subsequently Mr and Mrs Kemsley became estranged and Mrs Kemsley moved back with their children to England in about June 2012. Mr Kemsley remained in the United States.

On 13 January 2012, Mr Kemsley presented his bankruptcy petition to the High Court. His petition was based on his physical presence in England on the date of presentation, within the terms of the Insolvency Act 1986, and on his having had a place of residence in England within three years of presentation. On 26 March 2012, he was declared bankrupt on the basis of the EU's Insolvency Regulation. On 1 March 2012, shortly before Mr Kemsley became bankrupt, Barclays commenced proceedings against him under the loan agreement in the Supreme Court of the State of New York. On 21 August 2012, he applied in the US Bankruptcy Court for the Southern District of New York under Chapter 15 of the US Bankruptcy Code for recognition of the English bankruptcy as a foreign main proceeding.

In the English case, Mr Kemsley sought to restrain Barclays from pursuing proceedings in the United States: an anti-suit injunction. The anti-suit injunction was dismissed.[76] The High Court sided in favour of a restrictive approach to anti-suit injunctions in the case of bankruptcy, per precedent. It found that the US court was best placed to decide on the COMI in the US. The US bankruptcy court refused to recognise Mr Kemsley's UK bankruptcy as a foreign main or non-main proceeding under Chapter 15.[77] The court held that Mr Kemsley's COMI needed to be adjudged as at the time of his English bankruptcy filing, not the time of the Chapter 15 filing. Rejecting Mr Kemsley's statement at the time of his UK bankruptcy filing, the court found that his COMI was in the US at that time, focusing on Mr Kemsley's habitual place of residence and that of his family.

It is surprising that the High Court even considered an anti-suit injunction, given the EU's aversion to these in the area of conflict of laws, post *Gasser* and *Turner*. However, the High Court evidently must have considered the English court's duties under and loyalties to the Insolvency Regulation fully met with the previous finding of insolvency. The subsequent proceedings arguably on that basis fall outside that remit. Moreover, the aversion to anti-suit injunctions arguably only holds vis-à-vis fellow EU courts.

As will be highlighted in the analysis below, the insolvency Regulation does *not* harmonise insolvency law. There are substantial differences in the general approach to insolvency proceedings: what level of protection is given to 'weaker' creditors, such as employees; whether and how there is State intervention in the proceedings; whether courts play a central role or leave creditors (or certain categories of creditors) in the driving seat; etc. These are not at all addressed by the Regulation.

## 5.5 The International Impact of the Regulation

The Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Union,[78] even if the debtor's registered office or place of incorporation or

[76] Ibid.
[77] USBC New York, Case No 12-13570, in *re: Paul Zeital Kemsley*.
[78] Recital 14 (old; now 25) of the Regulation; Virgos–Schmit Report, para 11, 12.

any other concept used by other States to determine corporate 'domicile', is located outside of the EU.[79]

The Regulation does not however regulate the effect of the proceedings vis-à-vis third States. In relation to third States, the Regulation does not impair the freedom of the Member States to adopt the appropriate rules (Virgos–Schmit Report):[80] conflict rules for impact on third States are determined by the private international law of each Member State. They are free to choose whether to copy the Regulation's model for the residual jurisdictional and applicable law rules. Consequently in insolvency proceedings, much more so than under the rules of the Jurisdiction Regulation for standard civil and commercial issues, there is a much wider scope for interaction between conflicting EU and national rules.

When the centre of the debtor's main interests is outside the EU, the Regulation does not apply. In such a case, it is up to the private international law of Member States to decide whether insolvency proceedings may be opened against the debtor and on the rules and conditions to be applied. This holds true regardless of whether the debtor has assets or creditors in other Member States and whether the question of the effects of such proceedings in other Member States is raised (Virgos–Schmit Report).[81]

## 5.6 The Jurisdictional Model: Universal Jurisdiction Based on COMI, Alongside Limited Territorial Procedures

Draft Convention and Regulation came to the same conclusion: universal jurisdiction and the coinciding lex concursus as the law of the State of opening of the proceedings, may well be tempting from an organisation point of view, however neither practically achievable nor always warranted. Recital 11 (old; now 22) notes in this respect:

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> This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (eg rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

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[79] See eg *Brac rent-a-car international Inc* [2003] EWHC 128 (Ch), in which there had been a petition for an administration order against the company, which had been incorporated in Delaware but had conducted all its operations in the UK. A creditor had been awarded an arbitration award in Italy and had had this award registered as a judgment in the UK. This creditor opposed the opening of insolvency proceedings in the UK.

[80] Virgos–Schmit Report, para 11, 12.

[81] Ibid, para 44, 29.

The result is a combined model of the existing principles of regulation of international bankruptcies (universality or territoriality of effects and unity or plurality of proceedings), a combined model which permits local proceedings to coexist with the main universal proceedings. Insolvency proceedings may be opened in the Member State where the debtor has the 'centre of his main interests'. Insolvency proceedings opened in that State will be main proceedings of universal character:

— 'main', because if local proceedings are opened, they will be subject to mandatory rules of coordination and subordination to it, and
— 'universal', because, unless local proceedings are opened, all assets of the debtor will be encompassed therein, wherever located.

Single main proceedings are always possible within the Union. However the Regulation does not exclude the opening of local proceedings, controlled and governed by the national law concerned, to protect those local interests. Local proceedings have only territorial scope, limited to the assets located in the State concerned. To open such local proceedings it is necessary that the debtor possess an establishment in the territory of the State of the opening of proceedings. In relation to the main proceedings, local insolvency proceedings can only be 'secondary proceedings', since the latter are to be coordinated with and subordinated to the main proceedings (Virgos–Schmit Report).[82]

## 5.6.1 Main Insolvency Proceeding: Centre of Main Interest (COMI)

### *5.6.1.1 'COMI' as (Un)Defined by the Regulation*

COMI was not defined in the 2000 version of the Regulation. As the core connecting factor of the Regulation, this was of course unfortunate, but perhaps not all that surprising. It gave the courts and tribunals flexibility in tackling scenarios which arise in practice and which any form of abstract definition or criteria simply cannot catch. There was, however, one important clarification in the Recitals of the Regulation, which identified the angle from which COMI needs to be approached. Recital 13 (old) read:[83]

> The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

Recital 13 has now been integrated in the Regulation proper.

COMI is therefore linked to foreseeability by the (potential) creditors, all the more so because of the principal *Gleichlauf* between forum and applicable law. Those doing business with the undertaking or private individual or thus in a position to calculate the legal risks in the event of an insolvency. The Virgos–Schmit Report adds the following clarifications:[84]

— By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (eg consumers).

[82] Ibid, paras 13 ff, 13–14.
[83] In a direct copy from ibid, para 75.
[84] Ibid, 51 ff.

— The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres.
— In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. Where companies and legal persons are concerned, the Regulation in Article 3(1) presumes, unless proved to the contrary, that the debtor's centre of main interests is the 'place of the registered office'. The Virgos–Schmit Report adds that this place normally corresponds to the debtor's 'head office', however this is a concept which in itself is open to a great many interpretations. In practice, national courts have been quite happy to set aside the presumption (as Article 3(1) specifically allows them to), given the presumption arguably a lot less weight than perhaps had been assumed by the drafters of the Regulation.[85] The CJEU itself had singled out mailbox companies as not being in a position simply to claim the protection of the State in which they are incorporated (*Eurofood*):

> in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated.[86]

A finding of COMI by the courts of one Member State must not be second-guessed by the (courts of) other Member States (*Bank Handlowy*,[87] *Burgo Group*).[88] Even if the courts of one Member State erred in accepting primary jurisdiction, the courts in other Member States have to stick by that judgment. Any challenge to it must be brought in the national courts of the Member States were main proceedings were opened.

The Regulation nevertheless of course has inserted the possibility of secondary proceedings precisely to protect local interests in other Member States. Correction of COMI was not as such thought of when the architecture of secondary proceedings was conceived, in practice such proceedings do serve to offset some of the consequences of an (allegedly) incorrect assessment of the COMI.

### *5.6.1.2 European and National Case-Law on COMI*

#### 5.6.1.2.1 Need for Autonomous Interpretation

> It follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question

[85] P Wautelet, 'Some Considerations on the Center of Main Interests as Jurisdictional Test under the European Insolvency Regulation' in G Affaki (ed), *Cross-Border Insolvency and Conflicts of Jurisdictions: A US–EU Experience* (Brussels, Bruylant, 2007) 73, 86 ff.

[86] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813, paras 34–35.

[87] Case C-116/11 *Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp z oo*, ECLI:EU:C:2012:739.

[88] Case C-327/13 *Burgo Group SpA v Illochroma SA and Jérôme Theetten* ECLI:EU:C:2014:2158.

This is a bit of a mouthful but is established case-law of the European Court of Justice and gains extra gloss within the context of the application by the Court of European private international law. As highlighted repeatedly throughout this volume, the Court insist on the need for predictability of the application of European private international law Regulations, and the need for autonomous interpretation of core concepts of those regulations.

The concept 'the centre of a debtor's main interests' is peculiar to the Regulation, thus having an autonomous meaning, and must therefore be interpreted in a uniform way, independently of national legislation (*Eurofood*, *Interedil*).[89] The reference in (old) recital 13 in the preamble to the Regulation to the place where the debtor conducts the administration of his interests reflects the European Union legislature's intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction. As noted, the recital's definition has now been moved into the Regulation proper.

In the assessment of COMI, neither domicile of the creditors nor agreement between creditors and debtor that the COMI is in a particular Member State can be of any relevance;[90] however, many other criteria can feed in particular into the assessment, by the national courts, of ascertainability by third parties.[91]

#### 5.6.1.2.2 Objective and Ascertainable by Third Parties: Eurofood, Rastelli, Interedil

With reference to (former) recital 13, the Court has held that the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings (*Eurofood*, *Interedil*).[92]

The relevance of foreseeability by the potential creditors was emphasised in *Rastelli*, too.[93] The centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty

[89] *Eurofood* (n 86) para 31; and Case C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] ECR I-9915, para 43.

[90] Contra and wrong: *Propertize BV v [Beheer] Beheer BV* ECLI:NL:GHSE:2014:1311. the court at 's-Hertogenbosch (Netherlands) held that *Propertise BV* has its COMI in the Netherlands (and the presumption in favour of the COMI being the place of corporate domicile was therefore not dismissed), paying particular attention to the fact that (1) during argument at court both parties in the meantime had agreed that the COMI was in the Netherlands, and (2) that the main creditors were based in the Netherlands.

[91] See eg the court at the Hague in *De vennootschap naar buitenlands recht New Europe Property (BVI) Ltd v Central Eastern European Real Estate Shareholdings BV* ECLI:NL:RBDHA:2014:13625. Central Eastern European Real Estate Shareholdings BV ('CEE') was incorporated in the Netherlands. The Netherlands is therefore presumed to be the COMI of the company. CEE itself suggested Romania was the COMI. The court at The Hague correctly emphasised both elements of (former) recital 13, paying particular attention to third party ascertainability. Consultation of the commercial register, the Court noted, revealed clearly to third parties that the company was being managed from the Netherlands, by Dutch directors. It is here that the Court added the reference to the commercial register revealing the 'typically Dutch names' of the directors. That is amusing and was bound to attract attention—although to be fair it is not the core reasoning of the court. Of some relevance was the fact that the directors apparently, as was revealed at the hearing, regularly consulted, in the Netherlands, with Netherlands-based consultants. It is of course difficult to read the entire mind of the court just from the succinctly written judgment; however, what seemed to be crucial was the lack of convincing elements, provided by the company, that to third parties Romania clearly was the place of administration of the company's interests. Indeed the judgment reveals no such factors at all. The aforementioned elements therefore acted in support of the presumption.

[92] *Eurofood* (n 86) para 33, and *Interedil* (n 89) para 49.

[93] Case C-191/10 *Rastelli Davide e C Snc v Jean-Charles Hidoux* (qq liquidator) [2011] ECR I-13209, paras 33 ff.

and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings. In the case at issue, the property of two companies was intermixed, which led to French courts, under national procedural rules, being able to join the property to the insolvency proceeding. However to characterise such a situation, the French court uses two alternative criteria drawn, respectively, from the existence of intermingled accounts and from abnormal financial relations between the companies, such as the deliberate organisation of transfers of assets without consideration. Neither of these circumstances are easy to ascertain by third parties, rather, they are the subject of accounting hocus pocus which typically is not visible to third parties and hence cannot influence their view on the COMI of the parties concerned. Even if these circumstances were quite transparent, they need not necessarily lead to a singular COMI: such intermixing may be organised from two management and supervision centres situated in two different Member States.

Where the bodies responsible for its management and supervision are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of Article 3(1) of the Regulation is wholly applicable (*Interedil*, paragraph 50). That presumption may be rebutted where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. In that event, the simple presumption laid down by the EU legislature in favour of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect (*Eurofood IFSC*, paragraph 34, *Interedil*, paragraph 51).

#### 5.6.1.2.3 Eurofood: Individuality of the COMI

The Regulation itself contains no specific rules on determining the COMI for groups of companies. The rules on groups of companies in the 2015 EIR, which I review below, have not changed the essence of this rule. The 'Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes') (Virgos–Schmit Report).[94] Each debtor constituting a distinct legal entity is subject to its own COMI determination.[95] The mere fact that a daughter company's economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by Article 3(1) of the Regulation (*Eurofood)*.

A good recent application was made in *Northsea Base Investment*.[96] Insolvency administrators were appointed out of court, but sought a High Court declaration finding the COMI for the eight insolvent companies to be England. Such finding assists with the ease of international travel of the administrators' decisions. With ships sailing all over Europe and further afield, any decisions by the administrators are likely to have to be enforced outside of England. The sole shareholder of the holding company was incorporated in Nevis (the St Kitts and Nevis Federation) and in turn was held by three family trusts also based in Nevis. Marine Cross was a shipping agent incorporated in the UK with its registered offices

[94] Virgos–Schmit Report, para 76, 52.

[95] See the opposite view, prior to the *Eurofood* judgment, *In re Collins & Aikman Corp Group* [2005] EWHC 1754 (Ch), in which the High Court addressed COMI vis-à-vis a Michigan-based company with 24 corporations registered in the EU. The group was treated as a single unit.

[96] *Northsea Base Investment et al* [2015] EWHC 121 (Ch).

in London. The companies were the only client of Marine Cross. All eight of the applicant companies were incorporated in Cyprus, share the same company registered office in Cyprus and had essentially the same form of Cypriot corporate documents.

Birss J held, using the well-established criteria in particular of *Eurofood* (in a group of companies, the COMI has to be decided for each of them with individual legal personality) and *Interedil* (emphasis on third party ascertainability in the case of attempts to rebuke Article 3(1)'s presumption in favour of the registered office being COMI) and settled on Marine Cross being the most relevant factor in determining the COMI vis-à-vis the shipping companies: the COMI being England. For the relevant holding companies (their Nevis-based shareholders were out of the equation), the High Court observed that these do not have operational functions. It held that their relations with London-based banks under financial agreements, all subject to English law and English jurisdiction, determined the COMI as being in England too. The case is a good reminder that even intricate special-purpose vehicle structures should not detract from COMI finding on well-established principles.

#### 5.6.1.2.4 'Actual Centre of Management and Supervision and of the Management of its Interests'

In *Interedil*, the Court emphasised transparency and publicity: the requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them (paragraph 49). The factors to be taken into account to rebut the presumption of Article 3(1), second sentence, include, in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties (*Interedil*, paragraph 52).

All relevant considerations tempted the Court into what may be regarded as a definition of 'COMI': in the case of a company at least, the company's actual centre of management and supervision and of the management of its interests, is its COMI. However, one must not be tempted to treat this extract as a stand-alone definition of COMI (and one which arguably closely resembles the 'Head Office' approach): throughout the *Interedil* judgment, the Court emphasised the element of transparency and publicity.

By way of illustration, a textbook application of COMI was made by the Irish High Court in *Harley Medical Group*.[97] Harley Medical Group (Ireland) Ltd had its registered office in the British Virgin Islands. It had registered in the Companies Registration Office (CRO) in Ireland as an external company with a branch established in the State pursuant to the European Communities (Branch Disclosure) Regulations 1993. The sole shareholder sought winding up in Ireland. Liabilities arose from claims against Harley by 158 former patients in respect of cosmetic treatment they had received. Many of those claims arise from breast implant operations using breast implants from PIP, a French registered company. Harley was informed by its insurers that its insurance cover did not extend to product liability claims for products sourced from a third party.

[97] *In the matter of the Harley Medical Group (Ireland) Limited* [2013] IEHC 219.

The patients opposed jurisdiction, and sought to have the case heard in the UK instead: the *lex concursus* would then have been English law, which allegedly would have been more favourable on account of the Third Parties (Rights against Insurers) Act 2010; this would allegedly give the claimants better rights against the insurer. As the High Court correctly held, however:

> The perceived advantage to the Opposing Creditors of this Court declining jurisdiction to wind up the Company is articulated as follows in []'s second affidavit, where it is averred that—
>
> … the creditors believe their rights under UK legislation with regard to any relevant policies of insurance indemnifying or intended to indemnify the Company against claims such as those of the creditors will be stronger than under Irish law.
>
> The Court was referred to a UK statute entitled Third Parties (Rights against Insurers) Act 2010. That contention is immaterial to the Court's function on this application and it would be inappropriate for the Court to express any view on it. (37)

The High Court swiftly rejected the notion that the Regulation does not apply because of the non-EU incorporation of the company: from the moment the company's COMI is in the EU, the Regulation does apply. Neither does it matter that the company is part of a group of undertakings, and that a company within the group with which it was associated had been placed in administration in the UK: the COMI, per *Eurofood* (notably, upon reference by the Irish Supreme Court), needs to be individually determined per corporation.

The Court subsequently reviewed the rebuttable presumption of the COMI as being the place of incorporation (here: the British Virgin Islands). Per *Interedil*, this requires the court seized to review whether the company's actual centre of management and supervision and of the management of its interests is located in its territory, in a manner that is ascertainable by third parties. Both conditions were fulfilled: On the condition of 'actual centre of management and supervision and of the management of its interests' the High Court accepted the following indices:

— The company has never traded in any jurisdiction other than Ireland.
— All surgical treatments had been carried out in Ireland, the operations having been performed by surgeons registered with the Irish Medical Council.
— The company was registered as a branch in Ireland and subsequently filed all of the statutory returns as was required by law.
— All employees of the company are located in Ireland.
— The company's only place of business is at Dublin.
— The company's address for correspondence has at all times been located in Ireland.
— The company is registered with the Irish Revenue Commissioners for VAT, and relevant national insurance payments.
— The company is not tax resident in any other jurisdiction.
— The company does not operate any bank account in any other jurisdiction other than Ireland.
— The company board meetings typically took place in Guernsey. However, in the last 14 months, they have taken place either in London or in Dublin.

On the matter of ascertainability by third parties, all of the company's activities had been conducted in Ireland since 1999 and the administration of its interests had been continuously conducted in Ireland, had been readily ascertainable by third parties by conducting a

search in the CRO and an inspection of the documents filed by the company in the CRO in accordance with the law of Ireland.

#### 5.6.1.2.5 Additional Jurisdiction for Member State of COMI for Actions 'Closely Connected' with the Insolvency Proceedings

In *Seagon*, the Court of Justice employed recital 6 of the 2000 Regulation[98] to hold that Article 3(1) must be interpreted as meaning that it also confers international jurisdiction on the courts of the Member State within the territory of which insolvency proceedings were opened to hear an action which derives directly from the initial insolvency proceedings and which is 'closely connected' with them, within the meaning of recital 6 in the preamble to the Regulation.[99] In that judgment the Court of Justice linked its findings directly to the Regulation's aim of discouraging forum shopping. Actions to set a transaction aside by virtue of insolvency, are closely connected to the opening of the proceedings, given that assets transfers in the run-up to insolvency proceedings are probably the oldest trick of the trade to frustrate one's creditors.

A 'close connection' is not present, per *Rastelli*,[100] where a national court seeks to join to the main proceeding, a proceeding concerning a different debtor with its COMI in another Member State and no establishment in the former, simply because the debtor concerned possesses property which is intermixed with the debtor in the main proceeding. Joining to the initial proceedings an additional debtor, legally distinct from the debtor concerned by those proceedings, produces with regard to that additional debtor the same effects as the decision to open insolvency proceedings. The latter cannot be done simply on the basis of a procedural mechanism such as a joinder, but rather requires the national court at issue to carry out a de novo assessment of the conditions of the Regulation: either a main proceeding on the basis of COMI, or a territorial procedure on the basis of locally present assets and 'establishment'.

In *Seagon*, the CJEU ruled that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside (*actio pauliana*) that is brought against a person whose registered office is in another Member State.

*Nortel* extended this finding to secondary proceedings.[101] In *Seagon*, the Court held that Article 3(1) must be interpreted as meaning that it also confers international jurisdiction on the courts of the Member State within the territory of which insolvency proceedings were opened to hear an action which derives directly from the initial insolvency proceedings and which is 'closely connected' with them, within the meaning of recital 6 in the preamble to the Regulation. In *Nortel*, the Court held that Article 3(2) of that regulation must

[98] Which, paradoxically, speaks of the principle of proportionality which in principle functions as a limiting factor on EU competence: '(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.'

[99] Case C-339/07 *Christopher Seagon* v *Deko Marty Belgium NV* [2009] ECR I-767, paras 19–21.

[100] *Rastelli* (n 93).

[101] *Nortel* (n 39).

be interpreted analogously. Here, the related action seeks a declaration that specified assets fall within secondary insolvency proceedings. It is designed specifically to protect the local interests which justify the very establishment of jurisdiction for the secondary proceedings.

However, such action quite obviously has a direct effect on the interests administered in the main insolvency proceedings. The jurisdiction for the court of the secondary proceedings therefore cannot be exclusive. It is jurisdiction concurrently with the Member State of the COMI. Unobjectionable as the Court's view may be, in practice it may create serious coordination headaches (one for which I do not think even the provisions for coordination in the new Insolvency Regulation provide sufficient answer).

Does *Seagon* also apply where insolvency proceedings have been opened in a Member State, but the place of residence or registered office of the person against whom the action to have a transaction set aside is brought is not in a Member State, but in a third country? The court held that it does in *Schmid v Hertel*,[102] and confirmed these principles in *H v HK*.[103]

Schmid was the German liquidator of the debtor's assets, appointed in the insolvency proceedings opened in her regard in Germany on 4 May 2007. The defendant, Ms Hertel, resided in Switzerland. Mr Schmid brought an action against Ms Hertel before the German courts to have a transaction set aside, seeking to recover €8,015.08 plus interest as part of the debtor's estate. The Brussels I Regulation as noted displays bias in favour of the defendant: *actor sequitur forum rei*. The overall jurisdictional angle of the Insolvency Regulation is different: avoiding forum shopping to the detriment of creditors is its main aim, and its insistence on verifiable and predictable criteria to determine the COMI (which in turns determines jurisdiction) needs to be seen in that light. That non-EU domiciled defendants get caught up in EU proceedings on the basis of COMI is not generally seen as problematic within the context of the Regulation.

The CJEU is rather realistic with respect to the potential recognition and enforcement problems associated with judgments under the Regulation held against non-domicileds. In the absence of assets in the EU held by the non-dom (if there were, enforcement would be straightforward), classic bilateral treaties may come to the rescue and, if there is no such treaty, so be it: in the view of the Court, the Regulation's jurisdictional rules should not be held up by potential problems at the enforcement stage.

#### 5.6.1.2.6 The Relevant Date for the Purpose of Locating the Centre of the Debtor's Main Interests, and Transfer after Lodging of Request to Open a Proceeding

The Regulation does not contain any express provisions concerning the specific case involving the transfer of a debtor's centre of interests. Per *Interedil*, in the light of the general terms in which Article 3(1) of the Regulation is worded, the last place in which that centre was located must therefore be regarded as the relevant place for the purpose of determining the court having jurisdiction to open the main insolvency proceedings.[104] This is also indicated by the use of the present tense: jurisdiction is granted to the courts of the Member State within the territory of which the centre of a debtor's main interest *is* situated.[105]

[102] Case C-328/12 *Ralph Schmid v Lilly Hertel* ECLI:EU:C:2014:6.
[103] Case C-295/13 *H* v *HK*, ECLI:EU:2014:2410.
[104] *Interedil* (n 89) para 54.
[105] See also Moss et al (n 4) 47.

Where the centre of a debtor's main interests is transferred after the lodging of a request to open insolvency proceedings, but before the proceedings are opened, the courts of the Member State within the territory of which the centre of main interests was situated at the time when the request was lodged retain jurisdiction to rule on those proceedings.[106] However where the COMI has been transferred before a request to open insolvency proceedings is lodged, the centre of the debtor's main interests is therefore presumed, in accordance with the second sentence of Article 3(1) of the Regulation, to be located at the place of the new registered office and, accordingly, it is the courts of the Member State within the territory of which the new registered office is located which, in principle, have jurisdiction to open the main insolvency proceedings, unless the presumption in Article 3(1) of the Regulation is rebutted by evidence that the centre of main interests has not followed the change of registered office.[107]

The Court's case-law on the timing of determination of COMI is made all the more relevant given the case-law on the freedom of establishment (see elsewhere in this volume), which has given rise to an increase in corporate mobility in the EU.[108] The resulting room for forum shopping (both in the case of a group of companies, and in the event of a single company seeking to take advantage of advantageous insolvency proceedings) prima facie sits uneasily of course with the Regulation's declared intent of combatting forum shopping, however, as the cases above illustrate, the result of the Court's case-law on COMI is that any change in COMI most certainly cannot be carried out on a whim.[109]

#### 5.6.1.2.7 The Provisions of the EIR 2015: Determination of COMI and 'Look Back' Periods

The COMI, as noted, is now defined in the EIR proper:

> The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. (Article 3(1))

The EIR 2015 has expanded and clarified the presumptions of COMI and has also provided a qualified look-back period for change of COMI. Both corporations and individuals can and do of course legitimately move their COMI. However, one of the main drivers of the Regulation is to avoid abusive forum shopping, whereby debtors move COMI simply to shop for a regime which will be attractive to them but not to their creditors.

[106] Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701, para 29, with specific reference to the need to avoid forum shopping.

[107] *Interedil* (n 89) para 56.

[108] Whether the increase reflects a permanent rise and recurring phenomenon, is more difficult to ascertain: see also W Brattonn, J McCahery and E Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis', Law Working Paper No 91 (European Corporate Governance Institute, 2008). To be sure, in the immediate aftermath of the *Centros* and related case-law (reviewed below), there was quite a bit of corporate mobility, especially into the United Kingdom. However arguably a lot of that potential has now been 'mopped up', especially in view of the regulatory competition that followed, leading to more inviting corporate requirements in those Member States which saw a lot of corporations disappear. See also L Enriques and M Gelter, 'How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law', European Corporate Governance Institute (ECGI), Law Research Paper Series, No 63/2006.

[109] Incidentally I disagree with the suggestion (Ringe, n 72) that the 'fuzziness' of COMI (a phrase said to be first used by H Eidenmüller in 'Free Choice in International Company Insolvency Law in Europe' (2005) 6 *European Business Organization Law Review* 423 428) contributes to its alleged incompatibility with the Treaty's freedom of establishment.

To assist genuine change in the COMI, recital 28 of the 2015 EIR emphasises, in line with the main principles recalled above, the relevance of ascertainability by third parties also in the event of a shift in COMI. It adds a number of practical precautions which the debtor could take to ensure that an intended shift in COMI actually will be recognised as such:

> This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

More generally, the EIR 2015 has expanded COMI presumptions as follows:

> The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
>
> In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.
>
> In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.
>
> In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings. (Article 3(1))

Rather than just the one presumption in the former EIR for companies or legal persons, the EIR 2015 introduces presumptions of COMI for all three categories of insolvable persons. For neither of the three categories does the Regulation introduce a negation of move of COMI within a prescribed period. Rather, it introduces look-back periods (three months for corporations and individuals exercising an independent business or professional activity; six months for individuals not carrying out such activity) in which the presumption will no longer hold. Change of COMI in that period immediately preceding a filing for insolvency can still be substantiated, however, by simply following the COMI criteria of Article 3(1), recalled above.

#### 5.6.1.2.8 The Insolvency of Groups of Companies and 'Group Coordination Proceedings'

##### The Entity-by-Entity Approach is Maintained

In *Eurofood*,[110] as noted, the Court of Justice insisted on determination of the COMI for each separate undertaking. The CJEU therefore defers to the corporate veil and in my view

[110] *Eurofood* (n 86).

is right to do so. Of note is of course that the finding in *Eurofood* does not exclude that the COMI for highly a integrated groups of companies may be found to be in one and the same place. Ad hoc rebuttal of the registered office presumption in favour of the registered office of the holding company is most definitely a possibility.

The European Commission did not in principle question the what it calls 'entity-by-entity' approach for determining COMI. Instead, it proposed better coordination between the insolvency proceedings, using in particular procedural safeguards to enable liquidators of the various companies of the group to have a say in each other's procedure. The European Parliament strengthened the coordination element by inserting 'group coordination proceedings', which I further review below.

The Regulation (Article 2(13)) defines a 'group of companies' as:

> a parent undertaking and all its subsidiary undertakings.

A 'parent undertaking' in turn is defined as:

> an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to be a parent undertaking.

The rather detailed rules for groups of companies, most of them speaking for themselves, take the form of a whole new Chapter in the Regulation, dealing with what the Regulation calls on the one hand 'cooperation and communication', and on the other hand 'coordination'. Each of these apply to both courts and insolvency practitioners.

Of note is also that the EIR 2015 strengthens cooperation and communication between insolvency practitioners and courts in the event of one single company (in that case coordination between main and secondary proceedings being the obvious aim).

### Cooperation and Communication for Groups of Companies

As far as cooperation and communication is concerned, the proof of the Group of Companies Chapter will lie in both the goodwill and the procedural limits to which courts and practitioners in the Member States are subject. The Chapter in relevant part talks of the standing of the insolvency practitioners in each other's proceedings, of exchange of information, of the option to conclude agreements to all these effects, etc. However, each of these possibilities (with the exception of group coordination proceedings: see below) is qualified by reference to both national procedural law, to conflict of interest and to the sound administration of justice. In other words there are likely to be plenty of remaining options for recalcitrant jurisdictions to refuse to cooperate. In fairness, in many such group proceedings practitioners and courts currently already explore cooperation. The clear instructions to that effect in the Regulation undoubtedly will assist in stretching current procedural options in the Member States to assist further cooperation.

### Group Coordination Proceedings

The one innovation backed up by hard law provisions in the Regulation is the introduction of 'group coordination proceedings'.

As noted, it was the European Parliament which suggested these proceedings. Parliament had also suggested assigning group coordination to the jurisdiction of the COMI

of the member of the group which performs 'crucial functions'. Parliament's proposed amendment on this issue read:

> Opening of group coordination proceedings
>
> Group coordination proceedings may be brought by an insolvency representative in any court having jurisdiction over the insolvency proceedings of a member of the group, provided that:
>
> — insolvency proceedings with respect to that member of the group are pending; and
> — the members of the group having their centre of main interests in the Member State of the court seised to open the group coordination proceedings perform crucial functions within the group.
>
> Where more than one court is seised to open group coordination proceedings, the group coordination proceedings shall be opened in the Member State where the most crucial functions within the group are performed. To that extent the courts seised shall communicate and cooperate with each other in accordance with Article 42b. Where the most crucial functions cannot be determined, the first court seised may open group coordination proceedings provided that the conditions for opening such proceedings are satisfied.
>
> Where group coordination proceedings have been opened, the right of insolvency representatives to request a stay of the proceedings in accordance with point (b) of Article 42d(1) shall be subject to the approval of the coordinator. Existing stays shall remain in force and effect, subject to the coordinator's power to request the cessation of any such stay.[111]

'Crucial functions within the group' in turn were defined as

> the ability, prior to the opening of insolvency proceedings with respect to any member of the group, to take and enforce decisions of strategic relevance for the group or parts of it; or
>
> the economic significance within the group, which shall be presumed if the group member or members contribute at least 10 per cent to the consolidated balance-sheet total and consolidated turnover.

It is clear that the 'crucial functions' criterion was likely to drag this innovation of the Parliament's into practical controversy. Consequently Council (and Commission) supported the idea of group coordination proceedings, bar the 'crucial functions' jurisdictional trigger. In the absence of choice of court, Article 62 now instead has a strict *lis alibi pendens rule*:

> Without prejudice to Article 66, where the opening of group coordination proceedings is requested before courts of different Member States, any court other than the court first seised shall decline jurisdiction in favour of that court.

Combined with Article 61's rule that such proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group, inevitably Article 62 will trigger race to court for the establishment of the group coordination proceedings. However this was seen as preferable to the difficult determination of 'crucial functions'.

Article 63 obliges the court seized to check the request to open group coordination proceedings against the following criteria:

— the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members;

[111] EP legislative resolution of 5 February 2014, P7_TA(2014) 0093.

— no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and
— the proposed coordinator fulfils the requirements laid down in Article 71.

Article 71 in turn insists inter alia that the coordinator cannot be chosen from among the midst of the insolvency practitioners involved in each of the members of the group's insolvency.

Among these criteria, the proviso that 'no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings' is likely to be the toughest to apply. It presumably requires an overall assessment of the net return after insolvency, rather than just an assessment in absolute terms. However, how exactly 'competing' insolvency regimes (for jurisdiction to a large degree also leads to applicable law) are to be compared in this assessment is not at all clear.

It is only after being satisfied that Article 63's criteria are met that the court seized gives notice of the request to all other insolvency practitioners of the group. The court seized has to give all insolvency practitioners involved the opportunity to be heard. Article 63 does not state so in so many words; however, presumably after having heard the practitioners concerned, the Court has to revisit its assessment of Article 63's criteria.

The reference in Article 62 to Article 66 is to that Article's choice of court provisions:

1. Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate court for the opening of group coordination proceedings, that court shall have exclusive jurisdiction.
2. The choice of court shall be made by joint agreement in writing or evidenced in writing. It may be made until such time as group coordination proceedings have been opened in accordance with Article 68.

Any court other than the court seised under paragraph 1 shall decline jurisdiction in favour of that court.

The request for the opening of group coordination proceedings shall be submitted to the court agreed in accordance with Article 61.

Article 66's two-thirds majority rule applies therefore even if one of the objecting insolvency practitioners has won the race to court. It avoids the proceedings being hijacked by a minority. This effectively amounts to cram-down of choice of court for group coordination proceedings.

Interestingly, Article 66 does not mention the need for the choice of court to have to abide by the aforementioned criteria of Article 63. This gives the two-thirds majority of insolvency practitioners a much wider remit to select the exclusive jurisdiction.

Finally, it is worth mentioning that the exclusive jurisdiction provision in this title applies to group coordination proceedings only. The underlying jurisdiction for main or secondary proceedings is not affected.

If and when a group coordinator is assigned, the EIR assigns him or her overall coordination and planning tasks (Article 72) as well as a wide remit to request information, to be heard and to provide input into all national proceedings.

### *5.6.1.3 Universality of the Proceedings Opened in the COMI Member State*

The main proceedings are always universal. This has a number of important legal consequences:

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(a) Assets located outside the State of opening are also included in the proceedings and sequestrated as from the opening of proceedings on a world-wide basis;
(b) All creditors are encompassed;
(c) Proceedings opened in one [Member State] will produce effects throughout the whole territory of the [Member States] (ie the [Union]). The recognition of the effects of the proceedings in other [Member States] is automatic, by force of law, without the need for an exequatur, and is independent of publication; However, enforcement of judgments will require prior limited control by the national courts, through an exequatur. If the conditions set out by the [Regulation] are satisfied, the national Courts are obliged to grant it.
(d) The liquidator appointed in the main proceedings has authority to act in all the other [Member States], without the need for an exequatur. He may remove assets from the State in which they are located. In exercising these powers (granted by the State of opening), the liquidator must comply with the laws of the State concerned. This is particularly the case if coercion is necessary to gain control of the assets (he must then request the assistance of the local authorities);
(e) Individual execution is not possible against the assets of a debtor located in any [Member State];
(f) There is a legal duty to surrender to the insolvency proceedings the proceeds recovered by individual execution or obtained from the debtor's voluntary payment out of assets located abroad.[112]

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The impact of the main proceedings and the corresponding powers of the liquidator, within the constraints of (old) Article 18 ff, are at their highest for as long as no secondary proceedings have been opened. 'Only the opening of secondary insolvency proceedings is capable of restricting the universal effect of the main insolvency proceedings' (*MG Probud*)[113]

The impact of this priority, must not be underestimated, especially given the link (detailed below) with applicable law. Because of the universal effect which all main insolvency proceedings must be accorded, main insolvency proceedings encompass all of the debtor's EU assets. The law of the State of opening of the main proceedings determines not only the opening of insolvency proceedings, but also their course and closure. On that basis, that law is required to govern the treatment of assets situated in all Member States and the effects of the insolvency proceedings on the measures to which those assets are liable to be subject—inevitably of course leading to a race to court just as under the Brussels I Regulation by virtue of that latter Regulation's *lis alibi pendens* rule. The insolvency Regulation however does not have a 'guillotine-like'[114] *lis alibi pendens* rule. (old) Article 16's (now Article 19) priority rule, reviewed below, has required flanking measures (in particular the limited scope for refusal of recognition) and the firm hand of European Court of Justice case-law (in particular the emphasis on the principle of mutual trust, see the para just below) to render it relevant in practice.

[112] Virgos–Schmit Report, para 19, 15 ff.
[113] Case C-444/07 *MG Probud Gdynia sp z oo* [2010] ECR I-417, para 24.
[114] Wautelet (n 85) 77.

Given the impact of the opening of the main proceedings: may the jurisdiction assumed by a court of a Member State to open main insolvency proceedings be reviewed by a court of another Member State in which recognition has been applied for? The rule of priority laid down in Article 16(1) (old) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust. This element of mutual trust is of exactly the same nature as the corresponding provisions and case-law under the Jurisdiction Regulation (per *Gasser*, *Turner*, etc: reviewed elsewhere in this volume). It is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction, ie examine whether the centre of the debtor's main interests is situated in that Member State. In return, as the (old) 22nd recital of the Regulation emphasises, the principle of mutual trust requires that the courts of the other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction: any challenge of that view has to be brought in the courts of the Member State which has detected a COMI and has upheld jurisdiction (*Eurofood*).[115]

#### *5.6.1.4 When is an Insolvency Procedure 'Opened' within the Meaning of the Regulation?*

In particular, given the drastic impact of the opening of (main) proceedings, is there some kind of active review required by the relevant court whether the substantive conditions for insolvency have been met, or can a near-automatic trigger of the proceedings suffice, in particular following initiative by one of the creditors?

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The conditions and formalities required for opening insolvency proceedings are a matter for national law, and vary considerably from one Member State to another. In some Member States, the proceedings are opened very shortly after the submission of the application, the necessary verifications being carried out later. In other Member States, certain essential findings, which may be quite time-consuming, must be made before proceedings are opened. Under the national law of certain Member States, the proceedings may be opened 'provisionally' for several months. it is necessary, in order to ensure the effectiveness of the system established by the Regulation, that the recognition principle laid down in the first subparagraph of Article 16(1) of the Regulation, be capable of being applied as soon as possible in the course of the proceedings. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the Regulation applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period. In those circumstances, a 'decision to open insolvency proceedings' for the purposes of the Regulation must be regarded as including not only a decision which is formally described as an opening decision by the legislation of the Member State of the court that handed it down, but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment involves the debtor losing the powers of management which he has over his assets. In such a

[115] *Eurofood* (n 86) paras 38 ff.

> case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to in Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1(1) of the Regulation, are present.[116]

## 5.6.2 Secondary and Territorial Insolvency Proceedings

Secondary and territorial proceedings may only be opened if the debtor possesses an establishment within the territory of that other Member State, and only vis-à-vis the debtor's assets in that State. Article 2(h) of the 2000 Regulation defined 'establishment' as

> any place of operations where the debtor carries out a non-transitory economic activity with human means and goods

which the Court of Justice specified in less philosophical terms as (*Interedil*)[117]

> a structure with a minimum level of organisation and a degree of stability for the purpose of pursuing an economic activity.

basically this is a combination of pursuit of an economic activity and the presence of human resources. This has to be determined in the same way as the location of the centre of main interests, namely on the basis of objective factors which are ascertainable by third parties.[118]

In *Burgo Group*,[119] the CJEU held that, per *Interedil*, the fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an 'establishment'. On the other hand, the definition does not refer to the place of the registered office of a debtor company or to the legal status of the place in which the operations in question are carried out.[120] The Member State where the company has its registered office clearly is not excluded from the definition: otherwise local interests would be denied the opportunity of seeking protection, which would exist in other Member States where an establishment is present.

A good illustration is *Olympic Airways*,[121] in which the Court of Appeal for England and Wales combined *Interedil* and further CJEU guidance with respect to COMI, as well as

[116] Ibid, paras 51 ff.
[117] *Interedil* (n 89) para 62.
[118] Ibid, para 63.
[119] *Burgo Group* (n 88).
[120] On 21 April 2008, the Commercial Court, Roubaix-Tourcoing (France) placed all the companies in the Illochroma group—including Illochroma, established in Brussels (Belgium)—into receivership and appointed Maître Theetten as agent. On 25 November 2008, it placed Illochroma in liquidation and appointed Maître Theetten as liquidator. Burgo Group, established in Altavilla-Vicentina-Vicenza (Italy), is owed money by Illochroma for the supply of goods. On 4 November 2008, Burgo Group presented Maître Theetten with a statement of liability in the amount of €359,778.48. Maître Theetten informed Burgo Group that the statement of liability could not be taken into account because it was out of time.

Burgo Group then requested the opening of secondary proceedings in respect of Illochroma. The referring court (the Brussels Court of Appeal) observed that the Insolvency Regulation defines 'establishment' as any place where the debtor carries out a non-transitory economic activity with human means and goods, which is the situation in the present case. Illochroma is a company with two establishments in Belgium, where it is the owner of a building, buys and sells goods, and employs staff. Illochrama and the liquidator contend that, since Illochroma has its registered office in Belgium, it cannot be regarded as an establishment within the meaning of Regulation 1346/2000. They argued that secondary proceedings are restricted to establishments without legal personality.
[121] *Olympic Airways* [2013] EWCA Civ 643.

extensive reference to the Virgos–Schmit Report, the CA held that for there to be an establishment, the mere presence of the company in the territory of the Member State is not enough: there has to be genuine 'external economic activity. In the words of Sir Bernard Rix:

> The definition is clearly intended to lay down a rule that the mere presence of an office or branch, a 'place' at which the debtor is located, is not sufficient. It has to be a place 'of operations': human and physical resources have to be involved in those operations; and there has to be 'economic activity' involving those resources. (33)

He also emphasised that this economic activity needs to be 'external', ie market oriented. Of note is also the temporal element: per *Office Metro*[122] the possibility to open up secondary proceedings requires there to be such establishment at the time of the request for opening of such proceeding. The UK Supreme Court later confirmed this judgment.[123]

The EIR 2015 now defines 'establishment' as 'any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets'. 'Assets' replaces 'goods', which is quite helpful especially in a services economy. Moreover the three-month period is another way in which the Regulation discourages forum shopping.

The opening of secondary or territorial proceedings is subject to different conditions according to whether or not main proceedings have already been opened. In the first situation (main proceedings have already been opened), the proceedings are described as 'secondary proceedings' and are governed by the provisions of Chapter III of the Regulation (mainly designed to ensure proper coordination with and in effect subordination to, the main proceedings: for as noted below, the Regulation does encourage collectivity of the proceedings). In the second situation (no main proceeding has been opened), the proceedings are described as 'territorial insolvency proceedings' and the circumstances in which proceedings can be opened are determined by Article 3(4) of the Regulation. If and when the main proceedings have been opened, the 'territorial' procedure becomes 'secondary'.

#### *5.6.2.1 Territorial Insolvency Proceedings*

Article 3(2) ff concerns two situations: first, where it is impossible to open main proceedings because of the conditions laid down by the law of the Member State where the debtor has the centre of its main interests and, secondly, where the opening of territorial proceedings in the Member State within the territory of which the debtor has an establishment is requested by certain creditors having a particular connection with that territory.

Recital 17 (old; now 37) to the Regulation hints at restrictive interpretation: 'cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary.' This is compounded by the need for coordination which is also emphasised in recital 12 (old; now 23 and 24), in fine: 'Mandatory rules of coordination with the main proceedings satisfy the need for unity in the [Union].' Such coordination cannot be ensured if main proceedings have not been opened, and hence the Court held in *Zaza Retail* that cases where under Article 3(4)(a) the opening of territorial insolvency proceedings can be requested before that of the main insolvency

[122] *Office Metro* [2012] EWHC 1191 (Ch).

[123] *The Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airways SA* [2015] UKSC 27.

proceedings are limited to what is absolutely necessary.[124] In particular, the requirement of 'conditions' present in that Article, cannot be extended to conditions excluding particular persons (such as the public prosecutor) from the category of persons empowered to request the opening of such proceedings. Hence they are limited to substantive conditions of insolvency, such as whether one needs to be a trader to be declared insolvent etc. In the case at issue, the Belgian public prosecutor, empowered under Belgian law to request insolvency in the general interest, had wanted to open territorial proceedings in Belgium prior to opening of the main proceedings in the Netherlands, were Zaza had its COMI.

In the same restrictive vain, a party has to have a claim of its own to lodge against the debtor's estate, for it to be a 'creditor' within the meaning of Article 3(4)(b). A claim in the general interest is not enough.[125]

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> Local insolvency proceedings opened in accordance with the [Regulation] limit the universal cope of the main proceedings. Assets located in the [Member State] where a court opens local insolvency proceedings are subject only to the local proceedings. However, the universal character of the main proceedings reveals itself through the mandatory rules of coordination of the local proceedings with the main proceedings, which include some specific powers of intervention given by the [Regulation] to the liquidator of the main proceedings … and the transfer of any surplus in the local proceedings to the main proceedings.[126]

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### *5.6.2.2 Secondary Insolvency Proceedings*

Here, locus standi is more flexible: see Article 29 of the Regulation.

It is only in relation to territorial proceedings that the right to request the opening of proceedings is limited by the Regulation to creditors who have their domicile, habitual residence or registered office within the Member State in which the relevant establishment is situated, or whose claims arise from the operation of that establishment. Any other conclusion would amount to indirect discrimination on the grounds of nationality, since non-residents are in the majority of cases foreigners (*Burgo Group*).[127]

The Regulation grants broad discretion, with regard to the opening of secondary proceedings, to the court before which an action seeking the opening of secondary proceedings has been bought. Article 28 (old; now Article 35) of the Regulation determines in principle as the law applicable to secondary proceedings that of the Member State within the territory of which those secondary proceedings are opened. Whether opening of the proceedings is 'appropriate' has to be determined by that applicable law. EU law does have an impact on that assessment though: in deciding appropriateness, Member States must not discriminate on the basis of place of residence or registered office; the Regulation's motifs for allowing secondary proceedings must be respected (in the main: protection of local interests, given that universal proceedings may be preferred even though these often lead to practical difficulties);

[124] Case C-112/10 *Zaza Retail*, [2011] ECR I-11525.

[125] Ibid, para 31. Note the contrast with secondary proceedings, where Art 29 allows for a much wider category of persons to request the opening of such.

[126] Virgos–Schmit Report, para 20, 17.

[127] *Burgo Group* (n 88).

and finally the principle of sincere cooperation implies that the court assessing the secondary proceedings must have regard to the objectives of the main proceedings (*Burgo Group*).[128]

Local insolvency proceedings following the activities of a debtor in that locality, but with its COMI elsewhere, continue to be treated with caution in the EIR. Their inclusion at all in the Regulation upsets the universality of the proceedings in the Member State of the COMI. On the other hand they clearly can be of use in assisting with the main proceedings, especially in the realisation of local assets (this would be more challenging to organise entirely from the Member State of the COMI). Moreover they protect creditors in Member States other than that of the COMI in the event the laws of that Member State do not (yet) allow for opening of the proceedings.

In an attempt to limit the impact on universality, the former EIR attached different conditions to local proceedings depending on whether proceedings in the Member State of the COMI had already been opened. If that is not the case, then the local proceedings, aimed at the assets located in that territory, are referred to as 'territorial' insolvency proceedings. From the moment proceedings are opened in the Member State of the COMI, any 'territorial' proceedings are renamed 'secondary proceedings'. Precisely because they are also required in the event the laws of the Member State of the COMI do not allow for opening of proceedings, local creditors deserve the protection of local insolvency proceedings: these territorial proceedings therefore can be both winding-up and restructuring proceedings. The former EIR, however, prescribed that secondary proceedings, by contrast, always had to be winding-up proceedings: see in this respect very clearly Article 3(3) in fine: 'These latter proceedings must be winding-up proceedings.'

I found the philosophy behind this never quite satisfactorily explained, in spite of the valiant efforts of scholarship.[129] The net result, it is suggested, is that a restructuring effort in the Member State of the COMI may quite effectively be undermined. At the very least the negotiation position of relevant parties is seriously strengthened, by the creditors' insistence, indeed threat, that they will open secondary proceedings. Such move effectively lifts the assets in that Member State from the restructuring effort. (Although the courts in the secondary State may be able to apply local conditions for winding-up in a way which does not jeopardise such coordination.)

It is this negative impact on the proper restructuring effort in the Member State of the COMI that has now led to the EIR 2015 dropping the condition that secondary proceedings must be winding-up proceedings. The aforementioned sentence no longer features in the EIR 2015.

## 5.7 Applicable Law

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".

[128] Ibid.
[129] See Moss et al (n 4) 51; and Virgos and Garcimartin (n 30) 157–58.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:
   (a) against which debtors insolvency proceedings may be brought on account of their capacity;
   (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
   (c) the respective powers of the debtor and the liquidator;
   (d) the conditions under which set-offs may be invoked;
   (e) the effects of insolvency proceedings on current contracts to which the debtor is party;
   (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
   (g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
   (h) the rules governing the lodging, verification and admission of claims;
   (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;
   (j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
   (k) creditors' rights after the closure of insolvency proceedings;
   (l) who is to bear the costs and expenses incurred in the insolvency proceedings;
   (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 28

Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 4 of the Regulation is the general rule: unless otherwise stated by the Regulation, the law of the State of the opening of proceedings is applicable. *Renvoi* is not specifically excluded by the Regulation however it is safe to assume that it is.[130] To avoid doubt, Article 28 reiterates the same conflict rule for secondary proceedings. The Regulation has omitted doing the same for territorial proceedings however the *lex concursus* rule may be viewed as the general conflicts rule of the Regulation and is hence arguably also valid for territorial proceedings[131] (validly opened).

The list of issues part of the applicable law, included in Article 4, is non-exhaustive. Many of the issues listed are more specifically dealt with or at least additionally referred to in other parts of the Regulation.

### 5.7.1 Exceptions

The general rule of Article 4 inevitably had to be softened for quite a number of instances. As noted in the introduction, insolvency proceedings involve a wide array of interests.

[130] See also Virgos–Schmit Report, para 87, 63.
[131] Ibid, para 89, 64.

The expediency, efficiency and effectiveness craved inter alia by recital 2 (old; now 3) of the Regulation, has led in particular to the automatic extension of all the effects of the application of the *lex concursus* by the courts in the State of opening of the proceedings. That could not be done without there being exceptions to the general rule:[132]

1. In certain cases, the Regulation excludes some rights over assets located abroad from the effects of the insolvency proceedings (as in Articles 5, 6 and 7).
2. In other cases, it ensures that certain effects of the insolvency proceedings are governed not by the law of the State of the opening, but by the law of another State, defined in the abstract by Articles 8, 9, 10, 11, 14 and 15. In such cases, the effects to be given to the proceedings opened in other States are the same effects attributed to a domestic proceedings of equivalent nature (liquidation, composition, or reorganization proceedings) by the law of the State concerned. Of particular note are Article 5 on third parties' rights in rem, Article 10 on employment contracts, and Article 13 on 'detrimental acts'.

The latter is a good example of the European harmonisation of the *Vorfrage*, alluded to elsewhere in this volume. Within the context of the insolvency Regulation, the *Vorfrage* takes on a specific form in Article 13 on 'detrimental' acts, in conjunction with its Article 4(2)(m) on 'the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors' (Virgos–Schmit Report).[133]

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The basic rule of the Regulation is that the law of the State of the opening governs, under Article 4, any possible voidness, voidability or unenforceability of acts which may be detrimental to all the creditors' interests. This same law determines the conditions to be met, the manner in which the nullity and voidability function (automatically, by allocating retrospective effects to the proceedings or pursuant to an action taken by the liquidator, etc) and the legal consequences of nullity and voidability.

Article 13 represents a defence against the application of the law of the State of the opening, which must be pursued by the interested party, who must claim it. It acts as a "veto" against the invalidity of the act decreed by the law of the State of the opening. Article 13 provides that the rules of the law of the State of the opening shall not apply when the person who has benefited from the contested act provides proof that:

1. the act in question (eg a contract) is subject to the law of a Contracting State other than the State of the opening of the proceedings; and

2. the law of that other State does not allow for this act to be challenged by any means.

By 'any means it is understood that the act must not be capable of being challenged using either rules on insolvency or general rules of the national law applicable to the act (eg to the contract referred to in paragraph (1)). "In the relevant case" means that the act should not be capable of being challenged in fact ie after taking into account all the concrete circumstances of the case. It is not sufficient to determine whether it can be challenged in the abstract.

The aim of Article 13 is to uphold legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law, against interference from a different "lex concursus". From the perspective of the protection of legitimate expectations, the operation of Article 13 is justified with regard to acts carried out prior to the opening of the insolvency proceedings, and threatened by either the retroactive nature of the insolvency proceedings opened in another country or actions to set aside previous

[132] Ibid, para 92, 68 ff. The Virgos–Schmit Report contains details of each of the exceptions.
[133] Ibid, paras 135 ff, 87 ff.

> acts of the debtor brought by the liquidator in those proceedings. After the proceedings have been opened in a Member State, the creditor's reliance on the validity of the transaction under the national law applicable in non-insolvency situations is no longer justified. Thenceforth, all unauthorised disposals by the debtor are in principle ineffective by virtue of the divestment of his powers to dispose of the assets and such effect is recognised in all Member States. Article 13 does not protect against such an effect of the insolvency proceedings and it is not applicable to disposals occurring after the opening of the insolvency proceedings.

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It is noteworthy that Articles 8–15 do not affect the international workings of the Regulation: as noted, in relation to third States, the Regulation does not impair the freedom of the Member States to adopt the appropriate rules. Consequently, where the relevant applicable law as determined by Articles 8–15 is not that of a Member State, the law of the State of the opening of proceedings does not slot in by default: 'The need to protect legitimate expectations and the certainty of transactions is equally valid in relations with non-[Member] States' (Virgos–Schmit Report).[134] The Regulation is restricted to the intra-EU effect of insolvency proceedings and Member States are therefore free to decide which rules they deem most appropriate in other cases.

An important application of Article 13 (now Article 1) was made by the CJEU in *Lutz*.[135] This case illustrates the increasing relevance of the *actio pauliana* in protecting creditors from their debtor's insolvency. The core underlying issue for *Lutz* is that, in the absence of considerable capital in companies (arguably a direct result indeed of the regulatory competition in Member States' corporate law following the CJEU's case-law on freedom of establishment: see the relevant chapter), civil law mechanisms have become more relevant than classic recourse to companies' liability.

If one relies on more classic modes of securitisation, one may want to have more predictability in what law will apply to those securitised agreements. That is where the Insolvency Regulation comes in, in providing for a mechanism which allows parties to indeed give parties the freedom to choose applicable law for the relevant agreements. Article 4(2)m of the Insolvency Regulation (in the new Regulation this is Article 7(m)—unchanged) as noted makes the *lex concursus* applicable in principle: the *lex concursus* applies to '(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.'

However, Article 13 (16 new—unchanged) insulates a set of agreements from the *actio pauliana*:

> Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:
>
> — the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
> — that law does not allow any means of challenging that act in the relevant case.

[134] Ibid, para 93, 69.

[135] Case C-557/13 *Hermann Lutz v Elke Bäuerle, acting as liquidator of ECZ Autohandel GmbH* ECLI: EU:C:2015:227.

The crucial consideration in *Lutz* was whether the absence of means of challenge in the *lex causae*, relates to substantive law only, or also to procedural law. The time-line and relevant distinction in German and Austrian law was as follows:[136]

> 17 Mar 2008—Austrian court issues an enforceable payment order in favour of Mr Lutz against the debtor company
> 18 April 2008—debtor files application for German insolvency proceedings
> 20 May 2008—attachment of three Austrian bank accounts of the company
> 4 August 2008—German insolvency proceedings opened (as main proceedings) in respect of the company
> 17 Mar 2009—Austrian bank pays monies to Mr Lutz
>
> Under German law, any enforcement of security over the debtor's assets during the month preceding the lodging of the application to open proceedings is legally invalid once proceedings are opened. Under Austrian law, an action to set aside a transaction must be brought within one year after the opening of proceedings, failing which it becomes time-barred. By contrast, the limitation period under German law is three years. Although the attachment order was granted before the application to open main proceedings was filed, the actual attachment itself took place after that filing and the subsequent payment of monies by the bank took place after main proceedings were opened in Germany. Mr Lutz argued that art 13 applied and that the payment could no longer be challenged by the German liquidator under Austrian law as the one-year limitation period had expired.

Essentially, the Court expressed sympathy for the cover of procedural limits to fighting detrimental acts to be determined by the *lex causae*. (It dismissed any relevance of Article 12(1)d of the Rome I Regulation, which provides that prescription and limitation of actions are governed by 'the law applicable to a contract': the Insolvency Regulation is most definitely *lex specialis*).

However, leaving the matter up to the *lex causae* would cause differentiated application of the Insolvency Regulation across the Member States. Consequently the CJEU opts for autonomous interpretation, ruling that

> Article 13 of Regulation No 1346/2000 must be interpreted as meaning that the defence which it establishes also applies to limitation periods or other time-bars relating to actions to set aside transactions under the lex causae. (49)

The judgment essentially confirmed the EFTA Court's views on the similar proviso in Directive 2001/24 on the winding-up of credit institutions (*LBI hf v Merrill Lynch*).[137]

Following *Lutz*, application of the rule for *lex causae* in the context of detrimental acts/*actio pauliana* was also made in *Nike*, Case C-310/14.[138] Nike (incorporated in The Netherlands) had a franchise agreement with Sportland Oy, a Finnish company. This agreement is governed by Dutch law (through choice of law). Sportland paid for a number of Nike deliveries. Payments went ahead a few months before and after the opening of the insolvency proceedings. Sportland's liquidator attempts to have the payments annulled, and to have Nike reimburse them.

[136] K Stones, 'CJEU Guidance on Detrimental Acts', 22 April 2015, http://blogs.lexisnexis.co.uk/randi/cjeu-guidance-on-detrimental-acts/, accessed 22 September 2015.
[137] Case E-28/13 *LBI hf v Merrill Lynch International Ltd*, [2014] EFTA Ct Rep 970.
[138] C-310/14 *Nike European Operations Netherlands v Sportland Oy*, ECLI:EU:C:2015:690.

Under *Finnish law,* paragraph 10 of the Law on Recovery of Assets provides that the payment of a debt within three months of the prescribed date may be challenged if it is paid with an unusual means of payment, is paid prematurely, or in an amount which, in view of the amount of the debtor's estate, may be regarded as significant. Under *Netherlands law*, according to Article 47 of the Law on Insolvency (Faillissementswet), the payment of an outstanding debt may be challenged only if it is proven that when the recipient received the payment he was aware that the application for insolvency proceedings had already been lodged or that the payment was agreed between the creditor and the debtor in order to give priority to that creditor to the detriment of the other creditors.

Nike first of all argued, unsuccessfully in the Finnish courts, that the payment was not 'unusual'. The Finnish courts essentially held that under relevant Finnish law, the payment was unusual among others because the amount paid was quite high in relation to the overall assets of the company. Nike argued in subsidiary order that Dutch law, the *lex causae* of the franchise agreement, should be applied. Attention then focussed (and the CJEU held on) the burden of proof under Article 13, as well as the exact meaning of 'that law does not allow any means of challenging that act in the relevant case.'

Firstly, the Finnish version of the Regulation seemingly does not include wording identical or similar to 'in the relevant case' (Article 13 *in fine*). Insisting on a restrictive interpretation of Article 13, which it had also held in *Lutz*, the CJEU held that all the circumstances of the cases need to be taken into account. The person profiting from the action cannot solely rely 'in a purely abstract manner, on the unchallengeable character of the act at issue on the basis of a provision of the lex causae'.[139]

Related to this issue the referring court had actually quoted the Virgos Schmit report, which reads in relevant part (at 137): 'By "any means" it is understood that the act must not be capable of being challenged using either rules on insolvency or general rules of the national law applicable to the act'. This interpretation evidently reduces the comfort zone for the party who benefitted from the act. It widens the search area, so to speak. It was suggested, for instance, that Dutch law in general includes a prohibition of abuse of rights, which is wider than the limited circumstances of the Faillissementswet, referred to above.

The CJEU surprisingly does not quote the report however it does come to a similar conclusion: at 36: 'the expression "does not allow any means of challenging that act …" applies, in addition to the insolvency rules of the lex causae, to the general provisions and principles of that law, taken as a whole.'

Attention then shifted to the burden of proof: which party is required to plead that the circumstances for application of a provision of the *lex causae* leading to voidness, voidability or unenforceability of the act, do not exist? The CJEU held on the basis of Article 13's wording and overall objectives that it is for the defendant in an action relating to the voidness, voidability or unenforceability of an act to provide proof, on the basis of the *lex causae*, that the act cannot be challenged. The defendant has to prove both the facts from which the conclusion can be drawn that the act is unchallengeable and the absence of any evidence that would militate against that conclusion (at 25).

However, (at 27) 'although Article 13 of the regulation expressly governs where the burden of proof lies, it does not contain any provisions on more specific procedural aspects. For instance, that article does not set out, inter alia, the ways in which evidence is to be elicited,

[139] See above (n 9) at 21.

what evidence is to be admissible before the appropriate national court, or the principles governing that court's assessment of the probative value of the evidence adduced before it'.

'(T)he issue of determining the criteria for ascertaining whether the applicant has in fact proven that the act can be challenged falls within the procedural autonomy of the relevant Member State, regard being had to the principles of effectiveness and equivalence.' (at 44)

The Court therefore once again bumps into the limits of autonomous interpretation. How concrete (as opposed to 'in the abstract': see the CJEU's words, above) the defendant has to be in providing proof (and foreign expert testimony with it), may differ greatly in the various Member States.

The applicable law identified by the Regulation is a national law (as signalled above, typically albeit not always of one of the Member States). The Regulation harmonises jurisdiction and choice of laws rules on insolvency *proceedings*. It does not harmonise insolvency law. One important common principle of insolvency law is however promoted by the Regulation, namely the principle of collective satisfaction. A creditor who, after the opening of proceedings, obtains total or partial satisfaction of his claim individually breaches the principle of collective satisfaction on which the insolvency proceedings are based. Hence, the obligation to return 'what has been obtained'. The liquidator may demand either the return of the assets received or the equivalent in money, as provided for in Article 20:

> Article 20
>
> Return and imputation
>
> 1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.
> 2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

## 5.8 Recognition and Enforcement of Insolvency Proceedings

> To recognize foreign judgments is to admit for the territory of the recognising State the authority which they enjoy in the State where they were handed down. (Virgos–Schmit Report)[140]

The Regulation accords immediate recognition of judgments concerning the opening, course and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings.[141] Within the system of the Regulation, therefore, recognition is automatic. It requires no preliminary decision by a court of the requested State. The automatic recognition however only applies to 'judgments'. Non-judicial proceedings which, as noted above, may be covered by the Regulation, are not subject to its provisions on recognition and enforcement.

[140] Virgos–Schmit Report, para 143, 92.
[141] Ibid.

### 5.8.1 Judgments Concerning the Opening of Insolvency Proceedings

With respect to the *opening* of the proceedings, the rule is laid down in Article 16 (Article 19 of the 2015 EIR, however, in substance unaltered), and the effects of the recognition is regulated in Articles 17–24 (Articles 22 ff of the 2015 EIR).

> Article 16
>
> Principle
>
> 1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.
> This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.
> 2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

The automatic recognition of the judgments opening insolvency proceedings has practical impact mostly in that it means an 'occupation of the field', and fixation of applicable law.

The law of the State of the opening of proceedings provides for the relevant trigger: the automatic recognition requires that the judgment opening insolvency proceedings become 'effective' in the State of opening. It is not necessary for it to be 'final': even if it is a provisional opening, eg subject to appeal in the State of opening, the judgment still enjoys recognition under Article 16. That insolvency proceedings cannot be brought in the State of recognition on account of the debtor's capacity (one imagines in particular: those Member States which do not have in insolvency procedure for natural persons who are not acting in a professional ('trader') capacity), is specifically ruled out as relevant by the second para of Article 16(1). Article 26 adds moreover specifically that the State requested can in such instance not invoke public policy in its territory to oppose recognition on those grounds.

Article 17 distinguishes between the recognition of main compared to territorial proceedings:

> Article 17
>
> Effects of recognition
>
> 1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.
> 2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 17 is now Article 20 of the 2015 EIR, however, in substance the regime is unaltered. The Regulation uses what is known as the 'extension' model: proceedings in another Member State will not, as regard their effects, be simply equated with national proceedings of the State where recognition is sought. Rather, they will be recognised in those States with the same effects attributed to them by the law of the State of opening, and subject to the

limitations outlined above under applicable law: insolvency proceedings have both procedural as well as substantive effects and the latter operate within the limits of applicable law (see Articles 5 ff of the Regulation—now Article 8 ff).

The main proceeding cannot produce its effects in respect of the assets and legal situations which come within the jurisdiction of territorial proceedings opened: that is the result of Article 17(2) and it is of course logical given the very existence of those proceedings. These proceedings may generate effects in other Member States, in particular, they may lead to other Member States having to enforce the return of assets which were abroad without authorisation, after the opening of the territorial proceedings. In that respect, the territorial proceedings limit the reach of the main proceedings.

The main proceedings are not however without any relevance at all for the assets included in any territorial proceedings. In particular, the former Regulation includes a number of coordination and supervision requirements in Articles 31–37 which, as noted, have been significantly strengthened in the 2015 EIR.

### 5.8.2 Other Judgments in the Course of Insolvency Proceedings

Article 25 of the Insolvency Regulation (Article 32 in the 2015 EIR) concerns, in particular, the recognition and enforceability of judgments other than those directly concerning the *opening* of insolvency proceedings.

1. The first subparagraph of Article 25(1) (Article 32(1) in the 2015 EIR), applies to judgments which concern the 'course and closure' of such proceedings.
2. The second subparagraph of Article 25(1) (Article 32(1) in the 2015 EIR) applies to 'judgments deriving directly from insolvency proceedings and which are closely linked to them', and
3. The third subparagraph applies to judgments relating to preservation measures taken after the request for the opening of the proceedings. Finally
4. Article 25(2) (Article 32(2) in the 2015 EIR) applies to judgments other than all the above, however presumably with some kind of more or less remote link to the insolvency proceeding.

The latter may or may not be covered by the Jurisdiction Regulation. Where they are, the court concerned evidently has to apply the relevant rules of the Brussels I Recast Regulation.[142]

Article 25(3) provides that Member States are not obliged to recognise or enforce a judgment covered by Article 25(1) which might result in a limitation of personal freedom or postal secrecy. This has been deleted in the 2015 EIR.

### 5.8.3 Defences Against Recognition and Enforcement

As reviewed above in the analysis of COMI, the Regulation is based on the principle of Union trust and consequently on the general assumption that a foreign judgment is valid.

[142] Case C-292/08 *German Graphics* [2009] ECR I-8421.

Article 26's provision on public policy therefore is formulated in a restrictive sense—the identical provision is Article 33 in the 2015 EIR:[143]

> Article 26
>
> Public policy
>
> Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

The only ground for opposing recognition is that the foreign judgment is contrary to the public policy of the requested State. Consequently (Virgos–Schmit Report):[144]

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1. The foreign judgment cannot be the subject of review as regards its substance (*révision au fond*). All questions regarding the substance must be discussed before the courts of the State of the opening of proceedings. In the State where recognition or enforcement is requested, the court may only decide whether the foreign judgment will have effects contrary to its public policy.
2. The [Regulation] contains no provisions as to the verification of the international jurisdiction of the court of the State of origin (the court in the State of the opening of proceedings which has jurisdiction under Article 3 of the [Regulation]). The courts of the requested States may not review the jurisdiction of the court of the State of origin, but only verify that the judgment emanates from a court of a [Member] State which claims jurisdiction under Article 3 of the [Regulation].

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## 5.9 Powers of the Liquidator/Insolvency Practitioner

Article 18 (old; now 21), too, uses the extension model: the liquidator's powers, their nature and their scope are determined by the law of the State of the opening of the proceedings in respect of which he was appointed. That law also establishes the liquidator's obligations (the exercise of which moreover is influenced by the limitations to the applicable law under Articles 7 ff). Articles 31–37 (now 41–51) confer powers on the liquidator of the main proceedings to coordinate those proceedings and any secondary proceedings (which, by virtue of Article 37 (new), he may himself request in the Member State(s) concerned.

Frustration is aired by many commentators that the supervision, cooperation and coordination provisions of the Regulation apply to and between liquidators only, not, at least not formally, to and between courts. While such requirement of cooperation may be assumed to be implied in the Regulation, it would nevertheless have been useful to have had specific instructions to that effect: that is now addressed by a whole set of provisions in the Regulation which aim at encouraging cooperation.

[143] Portugal issued a Declaration to this Article, see [2000] OJ C183/1.
[144] Virgos-Schmit Report, para 202, 126.

# 6

# The European Succession Regulation

Regulation 650/2012[1] 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' is for understandable reasons commonly referred to as 'the Succession Regulation'. Understandable, as otherwise the Regulation's title is a bit of a tongue-twister. However, this easily makes one forget the ambitious intention of the Regulation. The Regulation:

— First of all, determines jurisdiction, applicable law, and recognition and enforcement. It thereby follows the recent trend to harmonise the three steps of private international law[2] into a single motion. (Until recently applicable law was usually inserted in a separate Regulation.)
— Further, the title already indicates that the Regulation does more than solely harmonising jurisdiction, etc, of *courts*. The title refers to 'decisions' (the text explicitly intends notaries), as well as to the mutual recognition of authentic instruments (including wills) in the field of succession.
— Finally, the Regulation introduces a completely new instrument: the European Certificate of Succession.

## 6.1 Introduction

I have discussed the expansionism of the European Commission in the development of European private international law in the introductory chapters to this book.[3] Specifically with respect to matters of succession, it is of some importance to note the quite unexpected/surprising legal basis. The European Commission justified its original proposal on the ground that the free movement of persons was being impeded by

> the diversity of both the rules under substantive law and the rules of international jurisdiction or of applicable law, the multitude of authorities to which international succession matters can be referred and the fragmentation of successions which can result from these divergent rules.[4]

[1] Regulation 650/2012, [2012] OJ L201/107. See also the Commission implementing Regulation 1329/2014 establishing relevant forms, [2014] OJ L359/30.

[2] Jurisdiction; applicable law; recognition and enforcement.

[3] See also G van Calster, 'To Unity and Beyond? The Boundaries of European Private International Law and the European Ius Commune' in A Verbeke et al (eds), *Liber Amicorum Walter Pintens* (Cambridge, Intersentia, 2012) 1459–85.

[4] COM(2009) 154.

The legal basis of the Regulation is Article 81(2) TFEU,[5] which is remarkable. In particular, Article 81(3) provides for a divergent decision-making procedure with regard to 'family law' aspects: these need to be approved by unanimity, instead of qualified majority. According to the Commission proposal, the law of succession is not covered by this part of the Article as instead, so the Commission suggest, it is considered to be property law, and is more subject to party autonomy than family law. I disagree, mainly because the most important obstacles to the creation of the Regulation were those parts of succession law where party autonomy is restricted precisely *for reasons of family law*: in particular the so-called 'reserved portion' of an estate, and the limited number (*numerus clausus*) of rights *in rem*. It is clear that the Commission preferred not having to make use of unanimity.

Also noteworthy is the obligatory reference to the effects on the Internal Market (in this case, the free movement of persons). This reference is no longer (a) correct, neither is it (b) necessary.

(a) Not correct. Indeed, arguably only individuals with a large estate are possibly led by reasons of estate planning when exercising, or not, their freedom of movement. They subsequently rely on sophisticated legal advice, inter alia in the form of trusts and trust-like figures, which provides them with the certainty they are looking for. (Sophisticated forms of estate planning which in fact have been excluded from the scope of application of the Regulation.)
(b) Not necessary. With the changed legal basis, an Internal Market impact of disparate national legislation in the private international law area is no longer required to justify European law in this area: a cross-border element suffices.

[5] Pro memoria:
Article 81 TFEU:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
   (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
   (b) the cross-border service of judicial and extrajudicial documents;
   (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
   (d) cooperation in the taking of evidence;
   (e) effective access to justice;
   (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
   (g) the development of alternative methods of dispute settlement;
   (h) support for the training of the judiciary and judicial staff.
3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.
The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

## 6.2 The Regulation Broadly Introduced

### 6.2.1 The Notion of 'Courts' and the Position of the Office of Notary

Particularly with regard to succession law, notaries in the Member States carry out tasks which can be considered 'judicial'. In some jurisdictions (especially in the Anglo-Saxon world) a court is involved in transferring the estate from the deceased to those inheriting. This is not the case in most Member States with a so-called 'Latin' office of notary. A private international law regulation concerning inheritance can therefore not solely be aimed at courts in the traditional sense of the word. In particular, notaries and registry offices, but also testamentary executors entrusted with judicial authority, need to be integrated.

The rules with regard to jurisdiction and applicable law included in the Regulation have to be complied with by all above-mentioned legal professions,[6] though only to the extent that they *exercise judicial functions.* The Regulation therefore adopts, in Article 3(2), a functional approach of a 'court':

> For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate:
>
> (a) may be made the subject of an appeal to or review by a judicial authority; and
> (b) have a similar force and effect as a decision of a judicial authority on the same matter.
>
> The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 79.

In particular with respect to notaries, this means that acts they draft in such judicial capacity should be able to circulate freely.

However, outside of the exercise of judicial functions, notaries are not bound by the rules on jurisdiction, and the authentic instruments they issue circulate in accordance with the provisions on authentic instruments.[7]

In accordance with Article 79 of the Regulation, the Commission (on the basis of notifications by the Member States) will establish a list of the authorities and legal professions which need to be considered as 'courts' in accordance with this functional determination. This list will also be particularly interesting for internal national use. At the time of writing, this list had not yet been adopted (even after proper entry into force of the Regulation).

[6] See recital 20.
[7] Recital 22.

## 6.2.2 Scope of Application

### *6.2.2.1 Ratione Materiae*

The Regulation is not applicable to (fasten your seatbelts!):

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— revenue, customs or administrative matters

— the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects;

— the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26;

— questions relating to the disappearance, absence or presumed death of a natural person;

— questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage;

— maintenance obligations other than those arising by reason of death;

— the formal validity of dispositions of property upon death made orally;

— property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);

— questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members;

— the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;

— the creation, administration and dissolution of trusts;

— the nature of rights in rem; and

— any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

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That is a mouthful. It concerns a mixture of, on the one hand, matters which although they are raised as a result of the inheritance are not part of it, to, on the other hand, matters which certainly are part of it, but for which not even a beginning of consensus could be found on the private international law rules. For some of those, such as the matrimonial property regimes,[8] the Commission has taken separate initiatives which should lead to a more complete private international law treatment concerning the matrimonial property consequences of death.

[8] Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126. Discussed by the European Parliament in first reading in September 2013. Technical review by the Commission in December 2014, however political consensus failed to be reached in Council in December 2015, and the proposal is now likely to be revived in some form via enhanced cooperation.

Once the obstacle of exclusions has been overcome/taken, the Regulation does use a broad definition of the concept of 'succession': Article 3(1)(a) defines 'succession' in the following terms:

> 'succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.

### *6.2.2.2 Ratione Loci*

The Regulation *ratione loci* is not applicable to Denmark, the United Kingdom and Ireland ('the group of three'). As repeatedly pointed out in this volume, these three Member States all have a type of opt-out or opt-in with respect to European private international law and none of them has made use of the possibility to join the Regulation.

It is important to note that even though the Regulation is not applicable to these Member States, this does not mean that these rules are completely irrelevant for them.

First of all, there is a possibility that the national private international law rules of the group of three leads to the succession law of one of the other Member States. In that case, the courts of the group of three will, insofar as the private international law of the Member State concerned does not provide for *renvoi* in the case of succession law,[9] apply the Regulation as the applicable private international law rules on succession law of the state concerned.

Furthermore, the nationals of the group of three form part of European migration. If those nationals have their habitual residence in another Member State, the Regulation will be applicable to their estate.

Finally, due to the (limited, see hereinafter) freedom of choice the Regulation increases the possibility that successions of non-residents of the group of three will nevertheless be subject to the succession law of one of them. Contrary to the Rome I and Rome II Regulations[10] (for both Regulations in Article 1(4)) the Succession Regulation does not define 'Member States' restrictively as solely being the Member States to which the Regulation is applicable. Nationals of the group of three living in another Member State that is bound by the Succession Regulation, can legitimately therefore opt to make their estate subject to the laws of a member of the group of three, and courts outside of this group will apply that law so chosen.

### *6.2.2.3 Ratione Tempore*

*Ratione tempore*, the bulk of the Regulation was applicable from 17 August 2015 onwards.[11] However, this does not mean that practice had to wait until 17 August 2015 to make use of the possibilities offered by the Regulation. Indeed, most wills are drafted with a view to application as far into the future as possible. A will drafted before 17 August 2015 could

[9] If this is not the case, the private international law of the group of three will indeed refer to the substantive law of succession of the Member State concerned, excluding the private international law rules of the state.

[10] Which harmonise the private international law rules concerning applicable law with respect to respectively contractual and non-contractual obligations.

[11] Exceptions are Arts 77 and 78 (duty of the Member States to provide information to the Commission) which entered into force on 16 January 2014 and Art 79–81 which already entered into force in July 2012 in particular with a view to ensuring the mandate of the European Commission to take a number of preparatory measures.

perfectly validly make use of the choice of law options offered by the Regulation, or *expressis verbis* determine the habitual residence of the testator (which might become subject to a factual correction, see below).

Article 83 also explicitly provides that if a disposition of property upon death has been made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.

## 6.2.3 Harmonisation of the Rules on Jurisdiction and Applicable Law

### *6.2.3.1 Complete Harmonisation—No Residual Private International Law Concerning Succession Law?*

First of all, the Regulation *completely* harmonises the private international law rules of succession law of the Member States to which it is applicable. There is therefore no room for residual private international law rules concerning succession law (to the extent of course that the matter concerned is covered by the scope of the Regulation).[12] Where the habitual residence of the deceased at the time of death is not located in a Member State, Article 10 lists in an exclusive and hierarchical way the grounds upon which the courts of a Member State can rule with regard to the succession.[13] Article 11 adds a *forum necessitatis*, which in accordance with recital 31 needs to be applied restrictively.

Article 10 will most definitely lead to positive conflicts of jurisdiction (meaning more than one Member State claiming jurisdiction) for which the *lis alibi pendens* rule of Articles 17 and 18 offer a solution.

If the deceased did not have his habitual residence in the EU at the time of his death, and neither Article 10 nor Article 11 grant jurisdiction to any of the authorities of the Member States to which the Regulation applies, *no* residual private international law can be invoked to claim jurisdiction within the scope of application of the Regulation. It is noteworthy that in accordance with the rules on applicable law (Chapter III of the Regulation), if a Member State invokes the provisions of Articles 10 or 11, the applicable law remains the law of the habitual residence (ex-EU) at the moment of death, unless the escape clause of Article 21(2) (a manifestly closer connection) applies.

### *6.2.3.2 Jurisdiction*

#### 6.2.3.2.1 General Rule

If the deceased did have his habitual residence in a Member State at the time of death, the courts of that Member State will have jurisdiction to rule on the succession as a whole (Article 4), and the laws of that Member State will also be applicable to the succession as a whole.

[12] *Prima facie* therefore entire Articles or chapters of residual national private international law (such as, for instance, Chapter VII of the Belgian Private International Law Act) have become redundant. However, again: the scope of application of the Regulation is subject to many exceptions. What is 'succession' therefore in residual national private international law, is not necessarily so in EU law.

[13] Connecting factors for the subsidiary jurisdiction are the nationality at the moment of death or previous habitual residence within a minimum period of time. Each of those gives the Member State concerned *full* jurisdiction, for the whole estate. If none of both conditions is fulfilled, Art 10(2) determines the jurisdiction on the basis of the *assets rule*, ie jurisdiction only with respect to the assets of the estate which are located in that Member State.

The basic rule therefore is:

*general* jurisdiction of the Member State where the deceased had his *habitual residence* at the time of death and the applicability of the law of this State

to the succession as a whole, ie both the succession and the estate administration. Ad nauseam: the habitual residence at the moment of death is relevant.

#### 6.2.3.2.2 Choice of Court

The Regulation restricts choice of court[14] to the parties concerned, meaning the parties which bring the succession (in broad terms, defined by the Regulation in Article 1(a)) sub judice. Choice of court is not as such available to the deceased, and the limited choice of court available to the 'parties' applies a very tight straitjacket. *Only* where the deceased has legitimately made a choice of law in favour of the law of a Member State[15] can the parties concerned agree that a court or 'the' courts of that Member State are to have exclusive jurisdiction to rule on any succession matter.

Choice of court has to be expressed in writing—de facto choice of court agreements through submission are excluded (except in the case of Article 7(c), in combination with Article 9, see below: express 'acceptance' without written choice of court agreement for the jurisdiction of the courts of the country of the choice of law).

Not all possible parties need to have endorsed the choice made. If a concerned party who voluntarily enters the proceedings later on (Article 9: the only possibility of jurisdiction by appearance) is missing, the choice of court agreement keeps on applying. However, if this party contests jurisdiction, the choice of court agreement expires and the court concerned will have to decline its jurisdiction. General jurisdiction rules take over, meaning: Article 4: last habitual residence; Article 10: subsidiary jurisdiction for non-EU residents.

The Regulation employs, in Article 6, a rather roundabout way to show its respect for choice of court agreements. This Article introduces the obligation respectively possibility for the court seized to decline its jurisdiction, where that court is seized on the basis of the general jurisdictional rule (last habitual residence of the deceased) or on the basis of the subsidiary jurisdiction of Article 10 (in the event of the deceased having had his last habitual residence outside of the EU).[16]

Article 6(b) therefore protects choice of court made by all the parties to the proceedings.

Article 6(a) manages the situation where the deceased made a choice of law, yet where at least one party concerned does not proceed before the courts of the Member State of the choice of law, but rather before the courts designated by Articles 4 and 10. In that case, the rule of Article 6(a) amounts to a *forum non conveniens* application. Although the court seized has general jurisdiction, it may decide that the courts of the Member State of the

[14] See among others also M Alvarez Torne, 'Key Points on the Determination of International Jurisdiction in the New EU Regulation on Succession and Wills' (2013) XIV *Yearbook of Private International Law* 409–23.

[15] In accordance with Art 5(1), a valid choice of law in favour of a third state probably has *no* effect on the jurisdiction of the European courts.

[16] Those consulting the Dutch version of the text should note a rather important language mistake. According to the Dutch version the court seized has the *possibility* ('kan') of declining jurisdiction in both situations. This in contrast to other language versions, such as the French one (peut … decline), the German one (es kann sich erklären … es erklärt sich für unzuständig) and the English one (may … shall …). It is obvious that the Dutch version should be set aside.

chosen law 'are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets'.

Note that the *forum non conveniens* exception cannot be applied by the court *proprio motu*, but only where one of the parties to the proceedings requests it.

Also note that at least according to the wording of the Regulation, the court by application of *forum non conveniens declines* jurisdiction, and does not suspend/freeze it. It would have been better had the Regulation explicitly provided that the courts seized only definitely decline their jurisdiction once the court of the Member State of the choice of law confirms jurisdiction. It is perfectly possible, for instance, that the latter court decides that based on the *lex causae* applicable to the choice of law, this choice has not been validly made. Where this to happen, parties would have nowhere to go and would have to start the proceedings all over again in the original court.

Article 7(a) and (b) are in effect redundant. They are simply the flip-side of the coin of Article 6(a) and (b), this time seen from the perspective of the courts of the country in favour of which the deceased made a choice of law.

Article 7(c), on the other hand, is quite puzzling: the courts of the country whose law has been chosen have jurisdiction 'if the parties to the proceedings have expressly accepted the jurisdiction of the court seized'—ie an 'express' acceptance, which is not a choice of court agreement (which is already covered by Article 7(a)), but for which it is not quite clear what it should consist of. In any case the hypothesis distinguishes itself from Article 9. That provision deals with the situations where not all parties to the proceedings were parties to the choice of court agreement. In that case the designated court can still continue the proceedings if the parties to the proceedings who were not party to the agreement enter an appearance. Article 7(c) instead concerns a formal choice of court agreement which is adopted after the court concerned has been seized in another way than as a consequence of such a clause.[17]

A real *professio fori* by the deceased is not possible. It is true that to a significant extent the deceased can help determine the jurisdiction through the factual choice of habitual residence, yet this does not offer complete certainty (see also below). The deceased also can influence the issue of jurisdiction by making an explicit choice of law.

#### 6.2.3.2.3 The Indivisibility of Jurisdiction and Applicable Law

Of particular note is that in respect of jurisdiction and succession, the Regulation does away with division of jurisdiction and/or applicable law between immovable and movable succession, a rule which used to exist in a considerable number of Member States. (Some of which applied a *renvoi* correction with regard to applicable law.)

Jurisdiction is one and indivisible. A limited exception to this may be found in Article 10(2), but only in the event the deceased at the time of death did not have his habitual residence in any Member State, and no subsidiary jurisdiction can be determined for

[17] See also A Bonomi, P Wauthelet, I Pretelli and A Öztürk, *Le droit européen des successions. Commentaire du Règlement n° 650/2012 du 4 juillet 2012* (Brussels, Bruylant, 2013) 202 ff.

the succession as a whole based on Article 10(1).[18] In such a situation, shared jurisdiction applies for all the Member States where assets of the estate are located (and only with regard to these assets).

A practical correction can furthermore be found in Article 13. If the *lex successionis* provides for the possibility of an express acceptance or refusal of the estate, of a legacy or of a reserved share (eg a declaration designed to limit the liability of the person concerned vis-à-vis the debts of the estate), the courts of the habitual residence of the beneficiary shall have jurisdiction to receive such declarations. The Regulation does not provide for a system of exchange of information, or the creation of a European database. Exactly how the administrator of the estate takes note of such declarations is thus not completely clear.

#### 6.2.3.2.4 Provisional and Protective Measures

Finally, Article 19 also provides for general jurisdiction with regard to provisional or protective measures. This undoubtedly will lead to sclerosis in the settlement of quite a number of successions. The provision reads

> Article 19—Provisional, including protective, measures
>
> Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

Neither Regulation nor recitals give any guidance with regard to the concept. Importantly, in contrast to the new regime on provisional measures in the Brussels I Recast (reviewed in the relevant chapter),[19] recognition and enforcement of provisional measures in the Succession Regulation is not restricted to measures taken by the courts which have jurisdiction over the substantive dispute. The limitation in the Brussels I Recast was justified by the Commission with reference to the very diverse nature and scope of the provisional measures in civil and commercial matters in the civil procedure of Member States. In matters of succession, provisionary measures are very diverse in nature and scope, yet this seemingly was not sufficient to lead to a similar restriction in the EU Regulation.

### *6.2.3.3 Applicable Law*

#### 6.2.3.3.1 General: Gleichlauf and Indivisibility

The general rule with regard to applicable law is *Gleichlauf* with jurisdiction: as noted, one and only one law applies to the succession as a whole. A classic escape clause is available for exceptional circumstances;[20] however, when triggered the clause applies to the estate as a whole.

[18] This is in the event of a deceased with the nationality of a Member State or previous habitual residence in a Member State, provided that, at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed.

[19] See recital 33 of Regulation 1215/2012.

[20] Article 21(2): 'Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.' Recital 25 further determines the following: 'With regard to the determination of the law applicable to the succession the

In rejecting in particular the notion of different connecting factors for the immovable and movable assets of the estate, European private international law questions—in my opinion correctly—the formerly untouchable aura of the *locus* and *lex rei sitae*.

#### 6.2.3.3.2 Choice of Law

In contrast with the absence of straight choice of forum by the deceased (see above), the Regulation does provide for the possibility for the deceased to exercise choice of law, albeit limited to a few options only.[21]

Choice of law is possible, however, only in favour of the State whose nationality the deceased holds at the time of such choice, or at the time of death.

It is noteworthy that this does not have to be the nationality of a Member State. Article 22 of the Regulation refers to the law of the 'State whose nationality he possesses at the time of making the choice or at the time of death' and Article 20 confirms the universal application of the Regulation: 'Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.' Choice of law in favour of a non-Member State whose nationality one possesses is therefore possible. As a result of Article 5(1) on jurisdiction this will not have the consequence that the courts of the Member States can no longer exercise their jurisdiction: if the last habitual residence of the deceased was in the European Union, European courts keep their jurisdiction.

The Regulation strengthens the possibility of choice of law by not requiring the deceased to have this nationality at the time of death. That is a particularly useful addition for the Member States or other States which link the voluntary or otherwise acquisition of another nationality (eg the spouse's nationality) to the loss of the original nationality. However in such case, choice of law in matters of succession needs to have been made prior to the change in nationality.

Choice of law has an importance influence on jurisdiction, as explained above, and is definitely possible, even if the chosen law does not actually allow for choice of law with regard to succession. That law does determine the material/substantive validity of the choice of law, but only with regard to the question whether choice can be considered to have been made and/or modified or revoked knowingly.[22]

#### 6.2.3.3.3 Renvoi

In the initial proposal of the Commission *renvoi* was completely excluded, in line with the traditional rejection by the other European private international law instruments towards

authority dealing with the succession may in exceptional cases—where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State—arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected. That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.'

[21] I am not au fait whether choice of forum by the deceased can be found/is recognised in pre-existing national private international law rules, or whether in the Member States where agreements as to succession are possible choice of court is commonly included in the agreements.

[22] Recital 40.

*renvoi*. Scholarship, however, correctly[23] pointed out that *renvoi* is particularly useful with regard to non-EU States.[24] However, in accordance with Article 34 *renvoi* only applies where the law of a third State refers back to a EU Member State (but not necessarily the law of the State whose courts have jurisdiction), or to the law of another third State which would apply its own law. Although the Regulation does not explicitly say so, it can be assumed that in case of remission to an EU Member State, this only consists of remission to the substantive law of the State: thus excluding its private international law.

The Regulation protects the deceased who omits to exclude *renvoi* when making a choice of law: *renvoi* does not apply in case of choice of law.

#### 6.2.3.3.4 Scope of the Applicable Law

In line with the broad notion of 'succession' in the Regulation, Article 23 gives a very broad list of what is covered by the applicable law.

#### 6.2.3.3.5 Public Policy

The Regulation includes a classic clause on public policy, primarily in Article 35:

> Public policy (ordre public). The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Public policy is also considered in Article 40 (grounds of non-recognition) and Article 59, paragraph 1, in fine (grounds for non-acceptance of authentic acts).

*Ordre public* is aimed at a number of usual suspects, including foreign legal systems (ex-EU) which grant a broader right to succession to boys than to girls, or which exclude rights of succession in cases of same-sex couples (this does not form part of the *ordre public* of all Member States), or which do not have an exclusion of the right to succession where the heir murdered or seriously neglected the deceased, etc. It is clear, however, that the million-dollar question with regard to public policy concerns the reserved share. Can a foreign legal system be set aside, in whole or partially, for absence of, or variety in the reserved share? The original proposal of the Commission triggered the discussion:

> 2. In particular, the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum.[25]

Scholarship would seem to be in consensus that the discussion within the Council and the Parliament, and the subsequent withdrawal of the proposed Article 27(2), does not mean that *ordre public* can be invoked completely to deny choice of law made for a country where a reserved share does not exist.

The public order exception in any case without a doubt has to be carried out ad hoc. It only leads to the non-application of the foreign law where and to the extent that

[23] By reference to what is called governmental interest analysis in the common law countries: why would a European court apply the laws of a third state if that third state itself would not apply its own laws?

[24] Note that the Dutch text of the proposal accidently uses 'slechts' in Art 27(2): obviously 'niet' (not) is being meant (see also the other language versions).

[25] Proposed Art 27(2), COM(2009) 154. See also the discussion of Arte 35 by Bonomi in n 17.

application were to lead to manifestly unacceptable consequences vis-à-vis the core legal norms of the forum. It is definitely out of the question for one to invoke *ordre public* to set aside the application of the law of a State where the reserved share does exist but takes a different form. The same goes for situations where the applicable law does not provide for a reserved share, but has different mechanisms which protect the surviving spouse and/or the children. This arguably obliges the forum to apply similar mechanisms to the estate over which it has jurisdiction.

#### *6.2.3.4 The Concept of 'Habitual Residence'*

It is not unusual for European private international law *not* to define the concepts that are at the core of its rules. In the case of succession the absence of a definition for 'habitual residence' is not a bad decision. The concept is anchored in ad hoc facts to such a degree that it is difficult to conceive how one could express it in abstract criteria. Once again the recitals provide for guidance:

> (23) In view of the increasing mobility of citizens and in order to ensure the proper administration of justice within the Union and to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, this Regulation should provide that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.
>
> (24) In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

By way of reference, the Belgian Act on private international law[26] does define the concept of 'habitual residence' (Article 4, second paragraph).

In Dutch:

> § 2. Voor de toepassing van deze wet wordt onder gewone verblijfplaats verstaan:
>
> 1° de plaats waar een natuurlijke persoon zich hoofdzakelijk heeft gevestigd, zelfs bij afwezigheid van registratie en onafhankelijk van een verblijfs- of vestigingsvergunning; om deze plaats

[26] For further analysis, see G van Calster and S Berte 'Keuze van woonplaats naar internationaal recht' in G Ballon, H De Decker, V Sagaert, E Terryn, B Tilleman and A Verbeke (eds), *Gemeenrechtelijke clausules* (Antwerp and Cambridge, Intersentia, 2013) 1787–99.

te bepalen, wordt met name rekening gehouden met omstandigheden van persoonlijke of professionele aard die duurzame banden met die plaats aantonen of wijzen op de wil om die banden te scheppen;

2° de plaats waar een rechtspersoon zijn voornaamste vestiging heeft.

In French:

§ 2. Pour l'application de la présente loi, la résidence habituelle se comprend comme:

1° le lieu où une personne physique s'est établie à titre principal, même en l'absence de tout enregistrement et indépendamment d'une autorisation de séjourner ou de s'établir; pour déterminer ce lieu, il est tenu compte, en particulier, de circonstances de nature personnelle ou professionnelle qui révèlent des liens durables avec ce lieu ou la volonté de nouer de tels liens;

2° le lieu où une personne morale a son établissement principal.

In German:

§ 2—Für die Anwendung des vorliegenden Gesetzes versteht man unter gewöhnlichem Wohnort:

1. den Ort, wo eine natürliche Person sich hauptsächlich niedergelassen hat, auch wenn sie nicht eingetragen ist und unabhängig davon, ob sie eine Aufenthalts- oder Niederlassungserlaubnis hat; um diesen Ort zu bestimmen, werden insbesondere Umstände persönlicher oder beruflicher Art berücksichtigt, die auf dauerhafte Verbindungen mit diesem Ort oder auf den Willen, solche Verbindungen zu knüpfen, schließen lassen,
2. den Ort, wo eine juristische Person ihre Hauptniederlassung hat.

In the context of the Belgian act, the residence of a natural person is presumed to be his 'habitual' residence, if this is where his interests are concentrated and where, in normal circumstances, he can be found on a regular basis and with a certain sustainability and stability. Consequently, a person does not necessarily establish his habitual residence in a place where he is only present on a temporal basis, eg on holidays, on a study or business trip, as a diplomatic agent, etc. On the other hand, one does not lose one's habitual residence following a temporary absence. Furthermore, a proven or elapsed time period is not necessarily relevant or important. Consequently, a person who recently moved to a foreign country with the intention of settling there can, from the moment of settling down, have his habitual residence there.[27] Still in the context of the Belgian act, the registration at a specific register, eg the register of births, deaths and marriages or a similar register in a foreign country, is not crucial for the qualification of habitual residence. It does, however, create a rebuttable presumption of habitual residence for natural persons. The lack of registration cannot, on the other hand, lead to a presumption of absence of habitual residence. The person concerned might have neglected to register, in the same way as he might have forgotten to let his name be deleted from the register.[28]

European private international law of course famously underlines the importance of autonomy. Unless there are specific indications to the contrary, European concepts need

[27] Memorie van Toelichting, *Parl St* Senaat BZ 2003, nr 3-27/1, 29–30; J Erauw, 'Artikel 4' in J Erauw et al (eds), *Het wetboek internationaal privaatrecht becommentarieerd* (Brussels, Bruylant, 2006) 23.

[28] Memorie van Toelichting, ibid; Erauw, ibid.

to be interpreted autonomously; they need to be given a European interpretation. Even a concept used in two different instruments of European private international law need not necessarily be interpreted in the same way in both of them.

The recitals to the Succession Regulation, however, give a rather byzantine *negative* indication in recital 25:

> With regard to the determination of the law applicable to the succession the authority dealing with the succession may in exceptional cases—where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State—arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected. *That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.* (emphasis added)

It is clear that the concept 'habitual residence' can lead to positive conflicts of jurisdiction (with more than one State considering itself to be the last habitual residence of the deceased). This emphasises the importance of the *lis alibi pendens* rule. It is important to note, however, that the *lis alibi pendens* rule only has an impact on proceedings between the same parties. Where parties are not the same, the actions may be merely 'related' within the meaning of Article 18 (which has less binding consequences).

### 6.2.4 The European Certificate of Succession

The challenge is well known in practice.[29] Those having inherited need proof of status, and third parties who enter into transactions on the basis of this proof need to be protected. Member States have developed a great variety of tools to meet both needs. This variety of course leads to complexity. Cases of mutual recognition of the certificates concerned are limited if not non-existent. Heirs are therefore compelled to apply for a certificate in every State where they need to prove their rights, and this in accordance with the applicable laws of every State. The Succession Regulation offers two solutions.

First of all, national certificates can make use of the acceptance of authentic instruments provided for in Article 59. They (only) enjoy the same 'evidentiary effect' in the other Member State as they have in the Member State of origin.

Another possibility is the introduction by the Regulation of a true European authentic instrument: the European Certificate of Succession provided for in Articles 62 ff. This certificate exists over and above the national systems. It does not substitute those systems—unless the Member State concerned decides to, whether or not gradually, abolish its own certificate.

[29] See also J Kleinschmidt, 'Optionales Erbrecht: Das Europäische Nachlasszeugnis als Herausforderung an das Kollisionsrecht' (2013) 77 *RabelsZ* 723–85.

### 6.2.5 Dispositions of Property upon Death

The formal validity of dispositions of property upon death made orally is excluded from the scope of the Regulation (see Article 1(2)(f)). However, for the remainder, the Regulation uses a system which ensures that both substantive and especially the formal validity of the will of the deceased is respected as far as possible.

With regard to substantive validity, it would seem self-evident practice for those drawing up a will to be advised to make explicit choice of law in favour of the law which will also apply to the estate. Standard models of wills ought to be so designed.

With regard to formal validity, Article 27 uses five alternative connecting factors—with the caveat that States which are party to the Hague Treaty of 1961 apply this Treaty with respect to the formal validity.

### 6.2.6 The Administrator of the Estate

An (elaborate) Article 29 provides for rules with regard to the appointment and powers of the 'administrator' of the estate. In contrast with (of course) the European Certificate of Succession, which is a true European instrument, the Regulation does not create a 'European' figure of administrator. The proposal of the Commission regulated both sides of the coin: both the hypothesis in which the succession law of the forum provides that the ownership is being transferred to the heirs through an administrator whereas the applicable law does not provide for this; and the hypothesis that the applicable law foresees this but not the forum.

Article 29 only caters to the first hypothesis. It has rightly been questioned whether in the current context this Article will have any application at all, since it is in particular the United Kingdom and Ireland that have a pure system of administrators. It is also not inconceivable that the lack of a mirror image provision[30] in the current text acts as an additional obstacle to a possible accession to the Regulation by these countries.

### 6.2.7 Bottlenecks/Obstacles/Problems

The analysis above already identifies a number of problems with the application of the Regulation. Over and above these, the following need to mentioned:

— The customary habit of European private international law to fill the recitals with substantive provisions. This leads to legal uncertainty. As noted elsewhere in this volume, the status of the recitals is far from clear. In *Pammer/Alpenhof*, the Court of Justice

[30] The proposal of the Commission provided in Art 21 that the Member States which have such an administrator according to their private international law rules could appoint one with regard to the assets which are on their territory: 'The law applicable to the succession shall be no obstacle to the application of the law of the Member State in which the property is located where it: (a) subjects the administration and liquidation of the succession to the appointment of an administrator or executor of the will via an authority located in this Member State. The law applicable to the succession shall govern the determination of the persons, such as the heirs, legatees, executors or administrators of the will, who are likely to be appointed to administer and liquidate the succession.'

ignored the explicit instructions in the recitals of the Brussels I Regulation.[31] Recently the Court also—and rightly—ignored the instructions for mirroring application of the Rome I and Brussel I Regulations in *Kainz*.[32]

— The non-applicability of the Regulation to three Member States leads to permanent complications. Some of this complication, as suggested, could have been avoided by a restrictive interpretation of the concept of 'Member State'. British migration in the EU (in particular to countries such as Spain, France, Cyprus and Italy) is quite extensive. The bulk of this migration involves 'ordinary' people. For them the Regulation risks causing more problems than it solves.

— The Regulation more or less[33] for the first time recognises the role of notaries in private international law. In the Roman tradition especially, notaries play a significant primary and often also final role in settling the estate. Therefore a Regulation in the field of successions cannot suffice by directing itself at courts in the traditional sense of the word. Notaries and registry offices, but also testamentary executors entrusted with judicial authority, had to be integrated in the Regulation's set-up.

  However, the Regulation recognises that notaries are not bound by its rules of jurisdiction (recital 36) since the office of notary is a non-judicial authority. The call to the parties 'to agree among themselves how to proceed' in the case of related actions before a notary is weak.

— In the case of a deceased with the nationality of a third State, choice of law in favour of that State is possible. Yet, the Regulation seems to suggest that this does not influence the core jurisdiction of the European courts. However, if in such a case the deceased also made a choice of court agreement in favour of that third country, I believe the possibility cannot be ruled out that the courts of a number of Member States will explore whether they can decline their competence.[34]

— A deceased may *expressis verbis* include in a will or otherwise that his habitual residence lies in a given Member State. Is this factual determination subject to correction or does it have to be seen as an explicit choice of law at the moment of a subsequent relocation to that Member State? The Regulation does not give any indications.

— The status of 'agreements as to succession'. The Regulation discusses in Article 25 the issues of their material validity, etc, yet does not cover the full platter of (private international law) complications, such as the effect of possible choice of court agreements included in such agreements.

  As mentioned, the Regulation does not explicitly include the possibility for the deceased to make a choice of court. His choice of law does influence, however, international jurisdiction. Whether agreements as to succession are excluded from the Rome I Regulation is not entirely clear. The Succession Regulation is only partly *lex specialis*—in particular it is not *lex specialis* with regard to choice of court clauses. The Rome I

[31] Joined Cases C-585/08 and C-144/09 [2010] ECR I-12527.
[32] Case C-45/13 *Andreas Kainz* v *Pantherwerke AG* [2014] ECR I-7.
[33] See Art 57 of the Brussels I Regulation.
[34] See by analogy the judgment in *Gothaer*, discussed in the chapter on jurisdiction in civil and commercial matters.

Regulation excludes from its scope 'obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations' (Article 1(2(b)). Although succession frequently follows from family relationships, this is not the case for every form of succession. Agreements as to succession can exactly be aimed at disinheriting family members or at distinguishing inheritance between family members and/or others.

— *Renvoi*. The grounds for this in the Regulation are attractive. However, application always causes problems.

— 'Trusts' are to a large degree excluded from the Regulation. They are also routinely employed in estate planning. The reception of the legal consequences of trust and trust-like concepts in the legal order of the EU Member States with a civil law tradition, is far from straightforward. It is quite understandable that a coordinated approach to trusts and estate planning was beyond the reach of the Regulation. That does not of course mean that the challenge has gone away.

— The concrete effects of the Regulation will further be determined by the final content of the European regime on matrimonial property. The now abandoned Commission proposal provides for choice of law in favour of the habitual residence and nationality. This is likely to be included in a future enhanced cooperation instrument. The parallel with the Succession Regulation is clear/evident.

— Finally, the EU has recently adopted the Regulation concerning the attachment of bank accounts,[35] which, eventually and in contrast with what the Commission had proposed, is applicable to neither matrimonial property regimes nor succession law.[36]

[35] Regulation 655/2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, [2014] OJ L189/59.

[36] When drafting the proposal the European Commission explicitly declared that the proposed Regulation would be applicable to matters of matrimonial property regimes, of the consequences of registered partnerships and of successions as soon as the legal instruments proposed by the Commission in these two areas have been adopted and entered into application: COM(2011) 445, 6.

# 7

# Free Movement of Establishment, *Lex Societatis* and Private International Law

In family law, the status and capacity of a natural person is largely determined by a person's nationality, which generally stays with it for life,[1] or, particularly in common law countries, by a person's domicile, which is less fixed but nevertheless assumes strong links with a particular State.[2,3] The corporate equivalent of nationality and domicile is the *lex societatis*. It is the 'personal law' or corporate identity of companies.[4] It often determines 'whether the company had been validly created; what its constitution is; what the powers are of its organs, officers and shareholders; whether it has been merged with another company; and whether it has been dissolved'.[5] These in others words are the corporate equivalents of life and death, capacity, marriage, divorce, adoption, etc. However one must not assume too much consensus on what is covered by the *lex societatis*. For instance there is no consensus on corporate governance regulations being part of the *lex societatis*, or shareholder agreements either before or after the creation of the company.

What State determines the *lex societatis*, in other words what State may assign (or deprive) corporate identity to a company, in practice is largely confined to two competing models. Just as in family law nationality does not always sit easily with domicile, so, too, in company law, the 'real seat' theory does not see eye to eye with the 'incorporation' theory. Both theories represent different views on corporate identity; and because corporate identity, as noted, determines a whole range of issues, obtaining and losing one's corporate identity has an immediate private international law impact. In the EU, the extent to which national law links consequences to the (loss of) attachment with a Member State's territory is closely tied in with the application by the Court of Justice of the Treaty's Articles on the free movement of establishment: it is to these cases that current chapter turns its attention.[6]

[1] Lest, of course, the person changes nationality, or loses one through the particulars of the nationality laws of the State concerned.

[2] See also J Meeusen, M Pertegas, G Straetmans and F Swennen (eds), *International Family Law for the European Union* (Oxford, Intersentia, 2007).

[3] The notion of 'habitual residence' is something of an attempt at reconciling both.

[4] TC Hartley, *International Commercial Litigation* (Cambridge, CUP, 2009) 506.

[5] Ibid.

[6] See generally and extensively, J Borg-Barthet, *The Governing Law of Companies in EU Law* (Oxford, Hart Publishing, 2012).

The real seat theory determines that the *lex societatis* is that of the State where the company has its 'real seat', or effective seat. This will be the case if or from the moment the company concerned carries out a certain level of activity within that Member State. Such activity can be quite diverse and States using the real seat theory operate different types of thresholds to that effect: turnover, presence of staff, presence of head office and/or senior management.[7] The incorporation theory, by contrast, holds that the *lex societatis* is that of the State where the company was incorporated. The factual development of the activities of that company, in this view, has no impact on the determination of the *lex societatis*.[8]

Contrary to intuition, it is the incorporation theory which is generally seen as being favoured by countries with a liberal outlook on economic policy. Proponents of the incorporation theory argue that the country of incorporation not only determines applicable law[9] (for the issues that are covered by the *lex societatis* see the discussion above), but also that other countries need to recognise the corporate nationality of the undertaking thus established. Countries that favour the real seat theory (which at first sight would seem more hospitable to unrestricted freedom of manoeuvre), argue that a State's laws (including tax laws, labour laws, minority shareholder rights, etc.) ought to apply to all companies who exceed a certain threshold of activity on their territory. Moreover, some of the real seat countries (indeed arguably the purest form of the theory) insist that such threshold having been met, a company ought to formalise its factual relationship with that country by re-incorporating as a company of that State. Germany's Bundesgerichtshof argues that where the connecting factor is taken to be the place of incorporation, the company's founding members are placed at an advantage, since they are able, when choosing the place of incorporation, to choose the legal system which suits them best. Therein, according to the Bundesgerichtshof, lies the fundamental weakness of the incorporation principle, which fails to take account of the fact that a company's incorporation and activities also affect the interests of third parties and of the State in which the company has its actual centre of administration, where that is located in a State other than the one in which the company was incorporated. By contrast, where the connecting factor is taken to be the actual centre of administration, that prevents the provisions of company law in the State in which the actual centre of administration is situated, which are intended to protect certain vital interests, notably those of the company's creditors, from being circumvented by incorporating the company abroad.[10]

The latter element of course is where the EU's freedom of establishment comes in: back and forth re-incorporation evidently is not conducive to the Internal Market.[11] Exercising

[7] I appreciate the comparison does not hold; however, the fact that the connecting factor for the *lex societatis* is therefore changeable in accordance with factual circumstances of firm character makes this theory akin to the domicile approach for natural persons.

[8] Therefore this approach is more akin to the nationality approach for natural persons.

[9] Although even the most staunch supporters of the incorporation theory will apply a certain form of border regulatory adjustment, applying national law to incoming corporations, to protect a number of interests (eg legitimate expectations of third parties).

[10] See the reference to the view of the Bundesgerichtshof in Case C-208/00 *Überseering* [2002] ECR I-9919, paras 15–16.

[11] Indeed the serious consequences attached to the lack of re-incorporation in the country of destination, may even be regarded as a breach of proprietary rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

the right of establishment can take two forms: on the one hand, subsidiaries, branches or agencies may be set up. That is known as secondary establishment. Establishment may also take the form of the setting-up of a new company or the transfer of the central management and control of the company, often regarded as its real head office. That is called primary establishment.[12]

> Article 49
>
> (ex Article 43 TEC)
>
> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 50 TFEU foresees harmonisation to accompany the principal freedom:

> Article 50
>
> (ex Article 44 TEC)
>
> 1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.
>
> 2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:
>
> (a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;
> (b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;
> (c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;
> (d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;
> (e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);
> (f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries

[12] Darmon AG in Case 81/87 *Daily Mail* [1988] ECR 5483, 4.

in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;

(g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;

(h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

However, it is fair to say that the harmonisation envisaged by this Article is very incomplete (the Societas Europaea Directive[13] and the Cross-border Merger Directive[14] being the limited successes so far).

Article 293 EC (formerly Article 220 EEC, repealed after Lisbon) provided that:

> Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: …
>
> the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries,

This Article, however, did not constitute a reserve of legislative competence vested in the Member States. Although Article 293 EC gave Member States the opportunity to enter into negotiations with a view, inter alia, to facilitating the resolution of problems arising from the discrepancies between the various laws relating to the mutual recognition of companies and the retention of legal personality in the event of the transfer of their seat from one country to another, it does so solely 'so far as is necessary', that is to say if the provisions of the Treaty do not enable its objectives to be attained.[15]

The provisions of the Treaty concerning freedom of establishment apply to measures of the Member State of origin which affect the establishment in another Member State of one of its nationals or of a company incorporated under its legislation,[16] and to measures of the Member State of destination which affect the establishment in that Member State of a nationals or of a company incorporated under the legislation of another Member State.[17]

[13] Regulation 2157/2001 on the Statute for a European company (SE), [2001] OJ L294/1, and Directive 2001/86 supplementing the Statute for a European company with regard to the involvement of employees, [2001] OJ L294/22.

[14] Directive 2005/56 on cross-border mergers of limited liability companies, [2005] OJ L310/1.

[15] *Überseering* (n 10) para 54.

[16] See *ex multis* Case C-9/02 *deLasteyrie du Saillant* [2004] ECR I-2409, para 42; Case C-418/07 *Papillon* [2008] ECR I-8947, para 16; Case C-247/08 *Gaz de France–Berliner Investissement* [2009] ECR I-9225, para 55; and Case C-311/08 *SGI* [2010] ECR I-487, para 39.

[17] Case C-212/97 *Centros* [1999] ECR I-1459.

## 7.1 *Daily Mail*

In *Daily Mail*,[18] in the words of Darmon AG, company law met tax law. In the United Kingdom, the connecting factors governing the application to a legal person of those branches of law are not necessarily the same. The concept of incorporation, as it is understood in English law, makes it possible to dissociate a company's domicile, expressed through its registered office, and its nationality, on the one hand, from its residence, which largely determines the tax rules applicable to it, on the other. The proceedings pending before the national court arose from the possibility of such a separation. Daily Mail wanted to transfer its central management and control—but continue its incorporation under UK law—purely for tax reasons: it wished to escape capital gains tax after the sale of a significant part of its non-permanent assets, to use the proceeds of that sale to buy its own shares.[19] Under UK company legislation a company such as the defendant, incorporated under that legislation and having its registered office in the UK, may establish its central management and control outside the UK without losing legal personality or ceasing to be a company incorporated in the UK. According to the relevant tax legislation, only companies which are resident for tax purposes in the UK are as a rule liable to UK corporation tax. A company is resident for tax purposes in the place in which its central management and control is located. The Income and Corporation Taxes Act 1970 prohibited companies resident for tax purposes in the UK from ceasing to be so resident without the consent of the Treasury. The Treasury agreed but only on condition of sales of a number of assets: in other words, the Treasury wanted to claw back at least part of the tax this lost. Does this infringe Daily Mail's free movement of establishment?

The CJEU held that freedom of establishment works both ways: it protects both companies entering a Member State and those leaving a Member State. However, in the then state of Community law, there was no harmonisation of the laws of incorporation (even now this is embryonic); corporations exist by virtue of the law, and at that moment, this was national law (and it continues to be so):

> [I]t should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning. (*Daily Mail*, para 19)

Any harmonisation which had taken place had not dealt with any of the differences in national law which were at issue in the *Daily Mail* proceedings, hence the Court held that the scope for a Member State to attach consequences to a corporation leaving its territory, in the absence moreover of Community law imposing a specific connecting factor (real seat or incorporation), is necessarily wide.

[18] Case 81/87 *Daily Mail and General Trust* ('*Daily Mail*') [1988] ECR 5483.

[19] After establishing its central management and control in the Netherlands the applicant would be subject to Netherlands corporation tax, but the transactions envisaged would be taxed only on the basis of any capital gains which accrued after the transfer of its residence for tax purposes.

> It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether—and if so how—the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions. Under those circumstances, Articles 52 and 58 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State. (*Daily Mail*, paras 23–24)

The Court therefore did not question the principal right, under the freedom of establishment, for a company to move its registered or real head office, but gave the State or origin a wide margin of manoeuvre in attaching consequences to such move. Incidentally, Darmon AG did opine as to what minimum kind of (economic) presence would be required for a company to be able to be enjoy the freedom of establishment: he emphasised that the freedom of establishment requires a genuine economic link, that EU law should provide criteria for national authorities to decide whether such exercise was genuine, and, with reference to *Leclerc*,[20] that Community law offers no assistance where 'objective factors' show that a particular activity was carried out 'in order to circumvent' national legislation:

> In order to determine whether the transfer of the central management and control of a company constitutes establishment within the meaning of the Treaty it is therefore necessary to take into consideration a range of factors. The place at which the management of the company meets is undoubtedly one of the foremost of those factors, as is the place, normally the same, at which general policy decisions are made. However, in certain circumstances those factors may be neither exclusive nor even decisive. It might be necessary to take account of the residence of the principal managers, the place at which general meetings are held, the place at which administrative and accounting documents are kept and the place at which the company's principal financial activities are carried on, in particular, the place at which it operates a bank account. That list cannot be regarded as exhaustive. Moreover, those factors may have to be given different weight according to whether, for example, the company is engaged in production or investment. In the latter case, it may be perfectly legitimate to take account of the market on which the company's commercial or stock exchange transactions are mainly carried out and the scale of those transactions.[21]

Finally, it is worth emphasising that *Daily Mail* only concerns the treatment by the State of origin in the case of identity-preserving outbound corporate immigration.[22]

## 7.2 *Centros*

In *Centros*,[23] a private (ie non-listed) limited liability company which had never traded in England, its State of incorporation, wishes to establish a branch (not: relocate its seat to) in

[20] Case 229/83 *Edouard Leclerc* [1985] ECR 1.
[21] *Daily Mail* (n 18) 8.
[22] See also C Panayi, 'Corporate Mobility in Private International Law and European Community Law: Debunking Some Myths' (2009) 28 *Oxford Yearbook of European Law* 124–30.
[23] Case C-212/97 *Centros* [1999] ECR I-1459.

Denmark; however, Denmark refuses: it suggested the absence of trading in the UK effectively meant that Centros wanted really to establish its principal establishment in Denmark, rather than a branch. Allowing this, so Denmark suggested, effectively would give Centros an opportunity to circumvent Danish corporate requirements, including minimum capital requirements. In other words: Denmark argued that one had to have a minimum economic activity in the State of origin for one to enjoy the free movement of establishment to another Member State.

The CJEU disagreed: a company formed in accordance with the laws of the home Member State, enjoys free movement of establishment even if that initial incorporation was purely meant subsequently to use the free movement of establishment to move to another Member State. This does not prevent a receiving Member State from taking measures to prevent fraud, however such measures need to be case-specific. Not generic and certainly not aimed at cases such as this:[24] the Treaty Articles on the free movement of establishment were designed to enable exactly the kind of corporate movement as attempted by Centros.[25]

> Exercising the right of establishment in the Member State that offered it the most favourable conditions in respect of the paid-up capital requirement, a procedure which is exactly one of the objectives freedom of establishment is designed to achieve. The ability to take advantage of the opportunities offered by different types of company in other countries and differences in the regulations of Member States does not in itself constitute unlawful circumvention of national rules.[26]

The fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States was not, in itself, an abuse of the right of establishment. In *Kefalas*, the Court defined 'abuse' as follows: a person abuses the right conferred on him if he exercises it unreasonably to derive, to the detriment of others, an improper advantage, manifestly contrary to the objective' pursued by the legislator in conferring that particular right on the individual.[27]

In other words, in *Centros* the Court employed an extensive interpretation of the concept of freedom of establishment and a narrow interpretation of the concept of abuse. La Pergola AG, incidentally, rejected the attempts at identifying a 'minimum' economic activity which would be required and also suffice to trigger protection under the Treaty. Such minimum economic link is only specifically provided for third countries,[28] while for intra-Union companies, there is no need to inquire into the nature and content of the activities the company is pursuing or intends to pursue: Article 49 very clearly has no provisions whatsoever to that effect.[29]

[24] '[A]lthough, in such circumstances, the national courts may, case by case, take account—on the basis of objective evidence—of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions': *Centros*, para 25.

[25] It did not help that the Danish authorities conceded that, had the company concerned had conducted even a tiny bit of business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk: see *Centros*, para 35.

[26] This is the Commission's view as summarised by La Pergola AG in *Centros* [1999] ECR I-1461, 10.

[27] Case C-367/96 *Kefalas* [1998] ECR I-2843, para 28.

[28] The need for 'an effective and continuous link' with the economy of a Member State, solely in a case in which the company has nothing but its registered office within the Union, is required by the General Programme for the abolition of restrictions on freedom to provide services, [1962] OJ 2/32.

[29] La Pergola AG in *Centros* (n 26) 1473–74.

*Daily Mail* can be distinguished from *Centros*: the former deals with identity-preserving outbound corporate immigration: what is the scope of manoeuvre for the home State? *Centros* deals with inbound corporate immigration: what freedom does the receiving Member State have to restrict this?

## 7.3 *Überseering*

In *Überseering*,[30] a Dutch company, with two sites in Germany which it was having refurbished, had a disagreement over the works with its contractors and wished to sue in Germany. In the meantime, two German nationals had acquired all the shares in the company. The German court dismissed the action: it held, in line with established German case-law, that since the claims had been initiated, the company had transferred its actual seat of administration and hence should have re-incorporated under German law; its failure to do so meant that it could not sue in Germany. According to the settled case-law of the Bundesgerichtshof, a company's legal capacity is determined by reference to the law applicable in the place where its actual centre of administration is established (*Sitztheorie* or company seat principle), as opposed to the *Gründungstheorie* or incorporation principle, by virtue of which legal capacity is determined in accordance with the law of the State in which the company was incorporated. That rule also applies where a company has been validly incorporated in another State and has subsequently transferred its actual centre of administration to Germany. This case in other words presented the Court with the distinction between the real seat theory and the incorporation theory in its purest form.

The Court took great care to distinguish *Daily Mail*: in *Daily Mail* the company purposely wished to transfer its actual centre of administration from the Member State where it had incorporated, and to retain its legal incorporation there—*Überseering* by contrast concerns the *recognition* by one Member State of a company incorporated under the laws of another Member State. *Überseering* never gave any indication that it intended to transfer its seat to Germany. Its legal existence was never called into question under the law of the State where it was incorporated as a result of all its shares being transferred to persons resident in Germany. In particular, the company was not subject to any winding-up measures under Netherlands law. Under Netherlands law, it did not cease to be validly incorporated. The Court added that even if arguendo the dispute before the national court is seen as concerning a transfer of the actual centre of administration from one country to another, the interpretation of *Daily Mail* put forward by inter alia Germany, was incorrect. The Court did not rule on the question whether where, as here, a company incorporated under the law of a Member State ('A') is found, under the law of another Member State ('B'), to have moved its actual centre of administration to Member State B, that State is entitled to refuse to recognise the legal personality which the company enjoys under the law of its State of incorporation ('A'). The Court did not intend to recognise a Member State as having the power, vis-*à*-vis companies validly incorporated in other Member States and found by it to

[30] *Überseering* (n 10).

have transferred their seat to its territory, to subject those companies' effective exercise in its territory of the freedom of establishment to compliance with its domestic company law.[31]

The refusal to give standing or to recognise the legal capacity of a company validly incorporated in another Member State was a restriction to the freedom of establishment which could not be justified. The requirement of reincorporation of the same company in Germany was tantamount to outright negation of freedom of establishment. Germany argued that the German rules of private international company law enhance legal certainty and creditor protection. It played specifically on the absence of harmonisation and hence the absence of any kind of pre-emption: There is no harmonisation at Union level of the rules for protecting the share capital of limited liability companies and such companies are subject in Member States other than Germany to requirements which are in some respects much less strict. The company seat principle as applied by German law ensures that a company whose principal place of business is in Germany has a fixed minimum share capital, something which is instrumental in protecting parties with whom it enters into contracts and its creditors. That also prevents distortions of competition since all companies whose principal place of business is in Germany are subject to the same legal requirements.[32] Germany also referred to employee protection and tax administration. The Court, however, dealt with these arguments briefly. It is not inconceivable that overriding requirements relating to the general interest, such as the protection of the interests of creditors, minority shareholders, employees and even the taxation authorities, may, in certain circumstances and subject to certain conditions, justify restrictions on freedom of establishment The sudden death implications of the German rule, are tantamount to an outright negation of the freedom of establishment conferred on companies, for which there can be no justification.[33]

In *Überseering*, the Court was at pains to judge on the specific issue of the change in shareholder structure leading to the company not having any standing at all in Germany.

## 7.4 *Inspire Art*

The facts in *Inspire Art*[34] were similar to *Centros*. Inspire Art Ltd was formed under the law of the United Kingdom, and the dispute concerns principally whether the entry relating to its Netherlands branch in the Netherlands commercial register must be supplemented by the words 'formally foreign company'. The Dutch Wet op de formeel buitenlandse vennootschappen (law on formally foreign companies) provides that these supplementary words must appear in the commercial register and must be used in the course of business. There were also other, connected legal obligations which may also restrict freedom of establishment, such as minimum capital requirements, personal joint and several liability of directors and other formal requirements.

[31] Ibid, para 72.
[32] Ibid, para 87.
[33] Ibid, paras 92–93.
[34] Case C-167//01 *Inspire Art* [2003] ECR I-10155.

All of Inspire Art's activities were carried out in the Netherlands and there was no firm intention to carry out any activity in the UK. The only reason for incorporation in the UK were the rules on minimum share capital.

The Court firstly took its references to absent harmonisation, in *Daily Mail* and *Centros*, to their logical conclusion: to the degree that provisions of the Dutch law on formally foreign companies concerned disclosure regulations which had been harmonised by the company Directives, and were compatible with those provisions, they cannot be regarded as constituting any impediment to freedom of establishment. On the other hand, there were a number of disclosure obligations under the Dutch law which were not included in the harmonisation directives. The relevant Directive having been found by the Court to be exhaustive, the CJEU held that within the scope of application of the Directive, any additional disclosure requirements were illegal.

The assessment vis-*à*-vis the freedom of establishment was therefore eventually limited to those obligations which were not disclosure obligations, in particular, the rules relating to the minimum capital required, both at the time of registration and for so long as a formally foreign company exists, and those relating to the penalty attaching to non-compliance with the obligations laid down by the Dutch law, namely the joint and several liability of the directors with the company. The Court again was unimpressed by the reference by the Dutch government to the fact that more and more companies employed the favourable regime in other Member States, to incorporate there, and carry out their activities mainly or even exclusively in the Netherlands ('brass-plate companies', ie those with no real connection with the State of formation). The reasons for which a company chooses to be formed in a particular Member State are, save in the case of fraud, irrelevant with regard to application of the rules on freedom of establishment.[35]

The CJEU again held that the blank application[36] by the Dutch authorities of their domestic rules was incompatible with the free movement of establishment. It failed to indicate where the boundaries of national room for manoeuvre would lie, were the Member State to apply such restriction ad hoc, case-specific, rather than across the board in an absolute manner. In other words: exactly which laws of the State of incorporation travel with it and which the receiving State can impose, remained unclear, as did whether those requirements would then come on top of the rules of the state of incorporation, or would replace them.

## 7.5 *Cartesio*—and its Mirror Image: *Vale*

In *Cartesio*,[37] a company incorporated in Hungary wanted to change its operational headquarters to Italy but keep Hungarian incorporation. Hungarian corporate law does not allow for this: a company can keep its Hungarian incorporation but only if it moves headquarters within Hungary. Otherwise it has to dissolve in Hungary and incorporate elsewhere. Pursuant to Hungarian company law, the seat of a company constituted under

[35] Ibid, para 95.

[36] With a complication for those arguments relating to public interest whose use had been pre-empted by the relevant Directive.

[37] Case C-210/06 *Cartesio* [2008] ECR I-9641.

Hungarian law is the place where its operational headquarters are situated. In other words, the place where a company has its operational headquarters is supposed to coincide with its place of incorporation. A transfer of the operational headquarters of a company constituted under Hungarian law will normally be entered into the commercial register if the transfer takes place within Hungary. Cartesio sought to transfer its operational headquarters to Italy. However, instead of reconstituting itself as an Italian company, Cartesio wished to remain incorporated in Hungary and thus subject to Hungarian company law. The *Cartesio* scenario in other words was the first opportunity for the Court to revisit the very scenario which led to *Daily Mail*: outbound corporate migration, with a question mark on the room for manoeuvre for the home State.

Maduro AG suggested overruling *Daily Mail* on the grounds that case-law has evolved since. In particular: in case-law on the room for manoeuvre for the receiving State, the Court has held, see above, that absolute refusals such as these are *non sequitur*: one may have specific ad hoc reasons. The Advocate General argued that the efforts by the CJEU at distinguishing *Daily Mail* were unconvincing and confusing. With reference to a crucial consideration in *Daily Mail*, Maduro AG opined that

> it is impossible, in my view, to argue on the basis of the current state of Community law that Member States enjoy an absolute freedom to determine the 'life and death' of companies constituted under their domestic law, irrespective of the consequences for the freedom of establishment.[38]

In applying the *Centros* et al case-law, the AG suggested that the blank Hungarian refusal fell foul of the freedom of establishment:

> The rules currently under consideration completely deny the possibility for a company constituted under Hungarian law to transfer its operational headquarters to another Member State. Hungarian law, as applied by the commercial court, does not merely set conditions for such a transfer, but instead requires that the company be dissolved. Especially since the Hungarian Government has not put forward any grounds of justification, it is difficult to see how such 'an outright negation of the freedom of establishment' could be necessary for reasons of public interest.[39]

The CJEU disagreed, however, and found the Hungarian rules to be acceptable, citing the crucial considerations of the *Daily Mail* case. The Court insisted that the state of harmonisation of company law was not such as to take away the differences between the Member States in the core issues which are at issue in the facts of the case.[40] The one distinction which the Court made, related to the 'sudden death' sanction in case *Cartesio* were to have sought re-incorporation under Italian law: *Cartesio* itself sought to transfer its seat without re-incorporation; that can be stopped by Hungarian law. However this would be different, were Cartesio to have sought re-incorporation under Italian law (assuming Italian law would be happy to let such re-incorporation go ahead): that would also have been denied by Hungarian law, which requires liquidation in Hungary first. That would be unacceptable in the view of the Court.[41]

[38] Opinion of Maduro AG in *Cartesio*, ibid, 31.
[39] Ibid, 34 (footnotes omitted).
[40] Ibid, para 114.
[41] Ibid, paras 112–13.

In *Cartesio*, therefore, the Court stuck to its perceived dichotomy between in- and outbound migration, despite a plea by Maduro AG to approximate the two. The court then added an obiter in paragraph 112:

> In fact, in that latter case, the power referred to in paragraph 110 above, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so.

(The English version of the text in fact is not the clearest.)

That obiter got many excited, and confused: do the final words of paragraph 112 imply that the host Member State can choose whether to accept such re-incorporation, or rather, does Article 49 TFEU imply that the host Member State has no choice but to accept such re-incorporation?

In *Cartesio*, a company incorporated in Hungary wanted to change its operational headquarters to Italy but keep Hungarian incorporation. Hungarian corporate law does not allow for this: a company can keep its Hungarian incorporation but only if it moves headquarters within Hungary. Otherwise it has to dissolve in Hungary and incorporate elsewhere.

Case C-378/10 *Vale*,[42] is a mirror image:[43] an Italian company wanted to dissolve in Italy and re-incorporate in Hungary, and it wished its Italian predecessor to be recognised as its legal predecessor, meaning all the rights and obligations of the old company would transfer to the new. A procedure which is perfectly possible for Hungarian companies, within Hungary: in particular, by changing company form. Vale's application for registration was rejected. The obiter in *Cartesio* led to speculation whether the host Member State is under a duty to cooperate with such conversion (as opposed to *Cartesio*, which sought to establish the limits to obstruction by the home Member State).

The Court in my view/in my reading of the judgment took a perfectly logical approach to the obiter: 'to the extent that it is permitted under that law to do so' refers to the existence of a national conversion procedure. If nationally incorporated companies may convert and transfer all rights and obligations to the new company, any restrictions on foreign companies employing this mechanism come within the reach of Article 49 TFEU.

There may be reasons for the host Member State to restrict this possibility in specific instances (for reasons of eg protection of the interests of creditors, minority shareholders and employees, the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions: see paragraph 39 of *Vale*), but none of these apply here: Hungarian law precludes, in a general manner, cross-border conversions, with the result that it prevents such operations from being carried out even if the interests mentioned in paragraph 39 above are not threatened in any event (paragraph 40).

The host Member State must therefore open the possibility of conversion to foreign registered companies, (only) if it has such conversion possibility in its own corporate laws. Any

[42] ECLI:EU:C:2012:440.

[43] See also S Rammeloo, 'Companies Migrating in Europe', Workshop Corporate Law Ius Commune Research School, Utrecht, November 2011, slides on file with the author.

conditions imposed by national law (documentation, proof of actual economic continuity of operations, etc) may also be imposed on these foreign companies, provided this is done in a transparent, non-discriminatory fashion, and in a way which does not jeopardise the actual freedom of establishment.

It is interesting to note that the Court recycled (as it did in *Cartesio*), the very core *Daily Mail* quote which explains its hesitation effectively to harmonise corporate law itself, through too drastic an interpretation of Article 49 TFEU:

> [C]ompanies are creatures of national law and exist only by virtue of the national legislation which determines their incorporation and functioning. (*Vale*, para 27)

No doubt many corporate law implications escape me,[44] and will lead to further cases at the Court.

## 7.6 *Grid Indus*

In *Grid Indus*[45] the lead actor was a limited liability company incorporated under Netherlands law. Until 15 December 2000 its place of effective management was in the Netherlands. The company has since 10 June 1996 had a considerable claim, in Sterling, against National Grid Company plc, a company established in the UK. Following the rise in value of the pound sterling against the Dutch guilder, an unrealised exchange rate gain was generated on that claim. On 15 December 2000 National Grid Indus transferred its place of effective management to the UK. National Grid Indus in principle remained liable to tax indefinitely in the Netherlands, because it was incorporated under Netherlands law. However, by virtue of Article 4(3) of the double taxation Convention between the UK and the Netherlands, National Grid Indus was deemed to be resident in the UK after the transfer of its place of effective management. Since after that transfer it no longer had a permanent establishment within the meaning of the Convention in the Netherlands, only the UK was entitled to tax its profits and capital gains after the transfer, in accordance with the Convention. There had to be a final settlement of the unrealised capital gains at the time of the transfer of the company's place of management. The tax authorities ruled that National Grid Indus should be taxed immediately, inter alia on the exchange rate gain mentioned above.

Can a company incorporated under the law of a Member State which transfers its place of effective management to another Member State and is taxed by the former Member State on the occasion of that transfer rely on Article 49 TFEU against that Member State? The UK and The Netherlands referred to *Daily Mail* to argue that Article 49 TFEU leaves untouched the Member States' power to enact legislation, including fiscal rules relating to transfers between Member States of the places of management of undertakings. The Court's

[44] See T Biermeyer and T Holtrichter, 'The Missing Puzzle in Judge-made European Law on Corporate Migration?' (2011) 18 *Columbia Journal of European Law*, www.cjel.net/online/18_1-biermeyer/ (accessed 25 October 2012).

[45] Case C-371/10 *National Grid Indus BV*, [2011] ECR I-12273.

interpretation of that Article in *Daily Mail and General Trust* and *Cartesio*, they suggested, does not concern solely the conditions of the incorporation and functioning of companies under national company law. They submitted that, if a Member State has power to require a company leaving its territory to be wound up and liquidated, it must also be regarded as having power to impose fiscal requirements if it applies the system—more advantageous from the point of view of the single market—of transferring the place of management while retaining legal personality.

The Court held firstly that neither the judgments in *Daily Mail* and *Cartesio* nor the Treaty itself, negate the possibility for companies such as in the case at issue, to call upon the freedom of establishment to challenge the lawfulness of a tax imposed on it by the former Member State on the occasion of the transfer of the place of effective management.[46] Further, the Court held that a company incorporated under Netherlands law wishing to transfer its place of effective management outside Netherlands territory, in the exercise of its right guaranteed by Article 49 TFEU, is placed at a disadvantage in terms of cash flow compared to a similar company retaining its place of effective management in the Netherlands: the later are not taxed until the gains are actually realised and to the extent that they are realised. That difference of treatment relating to the taxation of capital gains is liable to deter a company incorporated under Netherlands law from transferring its place of management to another Member State.

Can the difference be justified? The Court recognised of course the importance of preserving the allocation of powers of taxation between the Member States. The transfer of the place of effective management of a company of one Member State to another Member State cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer. Establishing *the amount of tax* at the time of the transfer of a company's place of effective management complies with the principle of proportionality. It is proportionate for that Member State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the tax due on the unrealised capital gains that have arisen in its territory at the time when its power of taxation in respect of the company in question ceases to exist, in the present case the time of the transfer of the company's place of effective management to another Member State.[47]

However, while determination of the tax at that time may be proportionate, *immediate recovery* at the same time, may not. Recovery of the tax debt at the time of the actual realisation in the host Member State of the asset in respect of which a capital gain was established by the authorities of the Member State of origin on the occasion of the transfer of a company's place of effective management to the host Member State may avoid the cash-flow problems which could be produced by the immediate recovery of the tax due on unrealised capital gains. Whether or not the Member State of origin's duty to set in motion an administrative follow-up of the company's assets, so as to allow it to trace when the asset is being realised, in itself may impose on the company a burden of such nature as to also restrict the freedom of establishment, depends on the complexity or not of the company's asset movements. The State of origin may for instance also make recourse to bank guarantees to cover the recovery risk.

[46] Ibid, para 33.
[47] Ibid, para 52.

Deferred payment of tax does not represent, for the tax authorities of the Member States, an excessive burden in connection with tracing all the assets of a company in respect of which a capital gain had been ascertained at the time of the transfer of the company's place of effective management.[48] The Court held that the existing machinery for mutual assistance between the authorities of the Member States is sufficient to enable the Member State of origin to check the truthfulness of the returns made by companies which have opted for deferred payment of the tax.

*Grid Indus* does not overrule *Daily Mail* or *Cartesio*, and its ramifications are foremost relevant for the tax administration between the Member States (immediate recovery of the tax at the time the company transfers its place of management is not an option; deferred payment of tax has to be an option given the high opportunities for Member States to cooperate).[49] The Court does emphasise that contrary to the some of the Member States' wildest dreams perhaps, Daily Mail does not imply that the freedom of establishment cannot be invoked in the case of outgoing corporate mobility.

[48] Ibid, para 75.

[49] It is noteworthy that the freedom of establishment (and the relevant CJEU case-law) applies to EFTA States too. Hence Norway, for instance, has already (had to) adapt its relevant legislation. It has been pointed out ('Norway Modifies Exit Tax Rules to Comply with ECJ Ruling', DLA Piper International Tax Briefing, 26 June 2012, www.dlapiper.com/norway-modifies-exit-tax-rules-to-comply-with-ecj-ruling/ (accessed 24 October 2012)) that in the absence of either an EU-wide or set of national definitions of when an unrealised capital gain is actually realised, 'tax planning opportunities' (indefinite forum shopping, effectively) arise so as to defer exit taxation nearly indefinitely.

# 8

# Private International Law, Corporate Social Responsibility and Extraterritoriality

## 8.1 The Role of Private International Law in Operationalising Corporate Social Responsibility

Environmental protection and human rights are core elements of the so-called 'Corporate Social Responsibility' (CSR) agenda. The European Commission has previously defined CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.[1] It has in the meantime changed this to 'the responsibility of enterprises for their impacts on society'[2] in order to re-align the EU approach to CSR with international developments, in particular the Ruggie Report.[3]

The law is one instrument which can be employed to further the CSR agenda and the implementation of its priorities. The United Nations has perhaps somewhat optimistically referred to the extraterritorial application of national law as a key element in operationalising human rights, labour rights and environmental protection. This proposition suggests 'developed' countries with strong regulatory law (environment, human rights, labour, even tax) ought to design their laws and their courts' application of same in a manner that catches corporate behaviour outside their territory. In this way, as long as there is some, even strenuous, link to the developed State in question (through corporate headquarters; shareholder structure; board meetings; marketing of goods and services into those countries; etc), the laws of that State would be used as a jack for regulatory performance abroad. The United States have been keen in recent years to pursue this route for a select number of statutes, particularly in the area of corruption and export controls. In the EU, the debate has

[1] COM(2001) 366.
[2] COM(2011) 681.
[3] Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework', 2011, available at www.ohchr.org/Documents/Publications/GuidingPrinciples BusinessHR_EN.pdf (accessed 28 March 2014).

more generically focused on how conflict of laws could be employed to increase application of EU law to companies abroad.

These developments join an older cousin in the use of highly regulated countries (and their courts) in attempting to up the regulatory stakes in the developing (or less regulatory caring) world: US case-law on the Alien Torts Statute is often cited as the textbook example of employing national and international law, applied by national courts, to further the international community. This case-law, however, was reversed by the same circuit which launched its application, and was subsequently drastically curtailed by the US Supreme Court.

This chapter firstly reviews developments in the EU and in the US on the topic under consideration. I am of course keenly aware of the core differences between both approaches. The eye-catching developments in the US concern the application of *public* rather than private international law. It is, however, the commonality of object (the regulatory jack identified above) of both developments I am interested in, rather than the distinction in mode of delivery (public compared to private international law).

I will conclude with reference to some related themes, in particular on the piercing of the corporate veil.

Reviewing the suitability of employing private international law as a way forward for what are essentially disputes with a high potential for upsetting inter-State relations, is particularly relevant in light of recent developments in case-law involving the Alien Tort Statute (ATS). In *Kiobel v Royal Dutch Petroleum*, the US Court of Appeals for the Second Circuit held that corporations cannot be sued under the Alien Tort State for violations of customary international law because 'the concept of corporate liability … has not achieved universal recognition or acceptance of a norm in the relations of States with each other'.[4] In denying re-hearing, Chief Judge Jacobs argued in February 2011 that

> All the cases of the class affected by this case involve transnational corporations, many of them foreign. Such foreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors—and paying taxes. I cannot think that there is some consensus among nations that American courts and lawyers have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them—and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees. Such proceedings have the natural tendency to provoke international rivalry, divisive interests, competition, and grievance—the very opposite of the universal consensus that sustains customary international law.

Judge Jacobs' frank assessment of the respective roles of public and private international law are particularly interesting when one considers, *comitas gentium*, the root of modern private international law.

[4] 17 September 2010, 49. See further references below.

## 8.2 The United States: Litigation Based on the Alien Tort Statute[5]

### 8.2.1 The Discovery of ATS by the CSR Community

The ATS, a product of the United States' first congress, creates a domestic forum for violations of international law. It is litigation based on the ATS which forms the centerpiece of how the law in the United States might further the international CSR agenda.

It is noteworthy that over and above the ATS controversy which I review below, more classic problems involving in particular recognition and enforcement have an impact on the CSR debate too. There is no better illustration than what is informally known as *Ecuador v Chevron*, which goes back to Chevron's acquisition of Texaco, and the pollution caused by Texaco's operations in the area affected, in the 1980s and 1990s. The case throws light on the difficulties which arise in enforcing a judgment of a third country in a jurisdiction such as the United States. Chevron essentially argued that rule of law principles had been violated in the Ecuadorian rulings on the liability, consequently barring enforcement in the US. (It is interesting to note in this respect that rule of law considerations, in particular rights of the defence, are one of the very few grounds which may lead an EU court to reject enforcement of a judgment of another EU court, under the Brussels I Regulation.[6] The hesitation by US courts to enforce the Ecuadorian judgments therefore do not ring entirely alien to EU ears.)

Turning to the subject of current heading, the relevant text of the ATS reads:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[7]

Although there has been some debate over the original intention of Congress in creating the statute, the accepted use of ATS litigation, in its broadest terms, has become one in which aliens may bring suit against other foreign nationals or US citizens for breach of commonly accepted international norms. The statute remained unused in the courts for roughly 200 years after its creation until *Filartiga v Pena-Irala* (1980).[8] The US Second Circuit Court of Appeals, the court that serves Connecticut, New York and Vermont, upheld the claims of the defendants, Paraguayan nationals, that the rights of their family member, as defined by international law, were violated when another Paraguayan tortured and killed him. Following the success of the trial, ATS litigation has had an increased presence in US courts, though the vast majority of claims do not find the success that *Filartiga* did. The original trial also set a precedent for the use of ATS in cases regarding human rights. A few notable cases have arisen in the last few decades and have helped to define further the goal of ATS litigation, though not to an extent that has made the statute any less controversial.

[5] This section in a previous version was co-authored with Charlotte Luks at Hampshire College. Thanks are due to the EuroScholars programme for their assistance in enabling the research which led to this section.

[6] See analysis in the relevant chapter.

[7] Alien Tort Statute, 28 USC §1350(2000).

[8] *Filartiga v Pena-Irala*, 630 F2d 876, 878 (2d Cir 1980).

The ATS case most commonly cited in scholarly attempts to define the statute and its acceptable uses is *Sosa v Alvarez-Machain* (2004).[9] In *Sosa*, a Mexican national claimed violation of his right to be free from arbitrary detention when he was abducted and detained overnight by other Mexican nationals. Although the court determined that one night of detention followed by being turned over to lawful authorities and a prompt arraignment was not a major violation of international norms, the results of the case significantly narrowed the scope of jurisdiction in ATS cases. The court held that in order to qualify for ATS, a plaintiff must provide significant evidence for the violation of well-defined and universally accepted norms of common international law. The *Sosa* court made clear the argument that the Statute was not intended to be read broadly and as such, future courts should be conservative in terms of recognising new violations of international law. The Court wrote: 'The judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.'[10,11]

Post *Sosa*, plaintiffs are burdened with the task of not only proving that a defendant has violated international law, but that the international law in question is amply defined as well as a universally accepted and documented international norm. In the original text of the 1789 statute, there were three requirements: the plaintiff had to be an alien, allege a tort, and offer evidence towards the defendant's guilt in violation of 'the law of nations'. The specific 'law of nations' was not further defined in the original text of the document but with the 200-year gap in cases using ATS, the language did not become controversial until recent years. Since *Sosa*, plaintiffs have had to provide evidence for a law's validity by 'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law'.[12] The plaintiff has also had to demonstrate a level of consensus among nations as well as international treaties and statutes to demonstrate the validity of an international norm, though the *Sosa* decision drastically narrowed the scope of documents that may be used to claim common international law.[13] For 200 years the ATS was an ill-defined, unused piece of legislation. Until recently more commonly used, each case brought before US courts employing ATS litigation further restricted the acceptable use of the Statute.

### 8.2.2 Corporate Liability Under ATS and the Setback Under *Kiobel*

Whether corporations may be held liable for violations of international human rights law has long been a topic of debate in the legal community. At the Nuremberg trials, various German industrialists were convicted of war crimes including the use of slave labour.[14]

[9] *Sosa v Alvarez-Machain*, 124 S Ct 2739, 2769 (2004).

[10] See ibid.

[11] DD Caron and RM Buxbaum, 'The Alien Tort Statute: An Overview of Current Issues' (2010) 28(2) *Berkeley Journal of International Law* 514.

[12] SM Morris, 'The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims after *Sarei* and *Sosa*' (2010) 41 *Columbia Human Rights Law Review* 281.

[13] Ibid, 283.

[14] D Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts' (2008) 6(2) *Northwestern Journal of International Human Rights* 306.

However, while the Nuremberg courts were allowed to find organisations guilty of war crimes, they could do so only through the trial of an individual. Essentially, a corporation could be found criminal but could not be tried separately, only through an individual who facilitated the corporation's criminal enterprises.[15]

The Nuremberg trials are relevant to US ATS litigation in that their precedents are often consulted by judges in ATS cases. Notably, in *Kiobel v Royal Dutch Petroleum* (2010),[16] the Second Circuit's verdict relied heavily on precedents set by international tribunals, including the Nuremberg trials, in relation to corporate liability for violation of international law.[17]

In recent years, the debate has become more focused to the question of corporate culpability for violations of human rights rather than simply corporate liability. Plaintiffs often find corporations a desirable opponent as they do not have sovereign immunity and if the trial is successful, corporations' resources can more readily be used to compensate plaintiffs.

*Kiobel* found that, due to what it perceived as a lack of precedent in international law, corporations cannot be held liable for violations of customary international law in US courts under ATS litigation.[18] However, this decision only added to a growing list of corporate ATS cases with incongruent results. In *Doe I v Unocal Corporation* (2002),[19] the Ninth Circuit Court unanimously decided that corporations can be sued for aiding and abetting foreign human rights violators. Similarly, in *Khulamani v Barclay National Bank Limited* (2007),[20] the court agreed that corporations can be held liable for aiding and abetting in violations of international law.[21]

This lack of congruency among ATS cases involving corporations was largely due to the fact that most of the cases are presented before the circuit courts rather than the Supreme Court.

### 8.2.3 The 'Touch and Concern' Test of the US Supreme Court in *Kiobel*

The US Supreme Court's eventual finding in *Kiobel*[22] was eagerly awaited. The central question in the Court's finding on *Kiobel* turned out to be this: whether and under what circumstances US courts may recognise a cause of action under the ATS, for violations of the law of nations, occurring within the territory of a sovereign other than the United States. In focusing on this question (and replying in the negative), the Supreme Court did not entertain the question which actually led to *certiorari*, namely whether the law of nations recognises corporate liability.

[15] Ibid, 315.

[16] *Kiobel v Royal Dutch Petroleum Co*, 621 F 3d 111 (2d Cir, Sept 17, 2010).

[17] JR Crook, 'Contemporary Practices of the United States Relating to International Law: International Human Rights: Second Circuit Panel Finds Alien Tort Statute Does Not Apply To Corporations' (2011) 105 *American Journal of International Law* 139.

[18] Ibid.

[19] *Doe I v Unocal Corp*, 395 F 3d 932 (9th Cir 2002), rehearing en banc granted, 395 F 3d 978 (9th Cir 2003), and vacated and appeal dismissed following settlement, 403 F 3d 708 (9th Cir 2005).

[20] *Khulumani v Barclay Nat'l Bank Ltd*, 504 F 3d 254 (2d Cir 2007).

[21] Cassel (n 14) 319.

[22] USSC No 10-1491 decided 17 April 2013.

*Certiorari* at the Supreme Court was keenly awaited by the CSR community, for, as noted, ATS litigation by default had become the flag-bearer for pursuing alleged violations of international law (whether in human rights or environment) by multinational corporations.

Before *Kiobel*, extraterritorial application of US law had been under consideration in *Morrison v National Australia Bank*,[23] in the area of securities. In *Kiobel*, the Supreme Court relied on its extensive review of extraterritoriality in *Morrison*. It did so even if in *Morrison* (and other cases before it) the question of extraterritoriality was one of merits (also known as 'jurisdiction to prescribe'), ie whether an Act of Congress regulating conduct applies abroad. By contrast, in *Kiobel*, the question concerned jurisdiction *pur sang* (also known as jurisdiction to adjudicate). For the Supreme Court, this did not dent the precedent value of *Morrison*:

> [W]e think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.

In *Morrison*, the Supreme Court held that when a statute gives no clear indication of an extraterritorial application, it has none. In *Kiobel*, the Court did not find convincing argument in either text, history or purpose of the ATS that could rebut the presumption against extraterritoriality. The closest such rebuttal arguably lay in the historic (and more current) examples of employing ATS against piracy. As the SC noted:

> [P]iracy normally occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country, [however] applying US law to pirates does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences.

The latter, of course, is where the core of the argument lies, and where public, and private international law principles of comity come into play: the degree to which in upholding jurisdiction, the courts in ordinary might be obstructing US foreign policy. This in my view is particularly interesting when one considers the *communis utilitatis* roots of modern conflict of laws. The conviction in Dutch conflict of laws in the 17th century (later exported via Scotland to the US) that foreign laws needed to be applied if and when they so wanted, on the basis of reciprocity, and in line with *communis utilitatis*, has now been turned on its head: comity is now being used as a presumption *against* such application of foreign laws or, here, public international law.

The Supreme Court concluded as follows:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See Morrison, 561 US ___ (slip op at 17–24). Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

An interesting line of case-law related to the challenges of *Morrison* lies in the application of the US Foreign Trade Antitrust Improvements Act (FTAIA). Whether the FTAIA is jurisdictional or rather establishes a substantial condition on the merits under the US Sherman Act (the main source of US anti-trust or 'competition' law) has been extensively

[23] No 561 US 247 (2010) decided 24 June 2010.

debated and arguments for or against now also rely on the seminal *Morrison* litigation (emphasising the need to draw a careful line between true jurisdictional limitations and other types of rules).

The FTAIA provides in short that the Sherman Act shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless: (1) such conduct has a direct, substantia, and reasonably foreseeable effect—(a) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (a) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the Sherman Act.

In *Lotes v Foxconn*,[24] Scheindlin USDJ for the US District Court of New York rejected jurisdiction and found the FTAIA to be of a jurisdictional nature. Plaintiff and defendant were Chinese corporations, competing in the USB connector market. Neither of them sold or manufactured the connector in the United States; however, Lotes, the plaintiff, argued that the defendant's management of its patents was effectively foreclosing Lotes from gaining a foothold in inter alia the US market. Judge Scheindlin found there to be a disconnect between the relevant foreign market (in competition terms) in which the defendant is alleged to create a monopoly (the Chinese market in USB 3.0 connectors), and the US market supposedly affected by the attempted monopolisation.

At the level of competition authorities, the issue of jurisdiction is sometimes managed using comity considerations in inter-State agreements.[25] These agreements employ some form of an effects and comity doctrine. Of course, where enforcement of competition law is sought through private action, these agreements do not apply, leaving courts to have to apply their standard jurisdictional (or are they? See above) rules. This is no different in the EU, albeit that jurisdiction there is much more easily determined, typically on the basis of corporate domicile. What (competition) law applies is regulated through an EU equivalent, in the Rome II Regulation, of the US 'minimum contacts' rule (see the chapter on the Rome II Regulation).

In summary, the US Supreme Court answers *Kiobel*-type cases (a foreign plaintiff suing a foreign defendant for acts or omissions occurring wholly *outside* of the United States that allegedly violate the law of nations), but did leave open many questions that fall outside the factual *Kiobel* box.

Does the reference to 'claim' and 'territory' of the US refer to the tortious *action* (thus requiring that to take place in the US) or would a US defendant suffice (in all likelihood: no)? What 'link' would be enough for the action to take place in the US: in particular, how does the test apply to lack of corporate oversight over foreign subsidiaries?

### 8.2.4 Post-*Kiobel* Case-Law

Further distinguishing of the US Supreme Court test in *Kiobel* was/is required and indeed very soon ended up at the Supreme Court again: on 14 January 2014 the Supreme Court

[24] USDC, Southern District of New York, *Lotes Co Ltd v Hon Hai Precision Industry Co Ltd; Foxconn International Holdings Ltd Et al*, 12 Civ 7465 (SAS).

[25] Eg between the EU and the US: see [1995] OJ L95/47 and [1998] OJ L173/28.

rejected US jurisdiction in *Daimler v Bauman*.[26] Chief Justice Roberts' and concurring opinions in *Kiobel*, as noted above, leave room for further distinguishing. *Daimler* does less so. The Court in the end did not focus too much on the issue of agency and attributability of a subsidiary's actions to the mother company. (Daimler was a German corporation that was sued in California by Argentinian plaintiffs for human rights violations in Argentina. The Californian link was a subsidiary which distributes cars there but which is not incorporated there; its corporate home is Delaware.) Per *International Shoe*,[27] general jurisdiction other than in the State of incorporation applies only (in the case of foreign companies) when a foreign company's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities'.

Daimler therefore establishes firmly that if you want to sue a company on the basis of its having its 'home' in the forum, then that home better be exactly that. Not, as here, merely a condo in the US when its true home lies in Germany.

Interestingly, Judge Ginsburg (writing for the majority, see 23) noted the difference between the Court of Appeal's approach and the EU approach when it comes to overall personal jurisdiction over corporations (she referred to the recast Brussels I Regulation, 1215/2012, which had yet to apply but which in substance on this issue does not differ from the previous version). However, in reality the EU takes quite a different direction (compared to *Daimler*) vis-à-vis foreign corporations, in the particular context of B2B consumer contracts as well as employment contracts (an entirely different subject-matter, I appreciate).

In *In re South African Apartheid Litigation* (*Lungisile Ntsebeza et al v Ford, General Motors and IBM*), the Southern District of New York picked up the issue where the Supreme Court had left it: can corporations be held liable under the ATS for violations of 'the law of nations'? Scheindlin USDJ held a preliminary hearing on 17 April 2014.[28] She held firstly that it is federal common law that ought to decide whether this is so—not international law itself (ATS being a federal US Statute). Next she argued that the fact in particular (withheld by Jacobs J in *Kiobel*) that few corporations were ever held to account in a court of law for violations of public international law was not instrumental in finding against such liability.

Counsel were then been instructed to brief on the 'touch and concern' test put forward by the Supreme Court in *Kiobel*, with the warning that they must show in particular that the companies concerned acted 'not only with the knowledge but with the purpose to aid and abet the South African regime's tortious conduct as alleged in these complaints'. The case was eventually dismissed at the end of August 2014,[29] when in the meantime the Fourth Circuit of Appeal had held in *al Shimari v CACI* that the facts in that case did touch and concern the US with sufficient force to displace the presumption against extraterritorial application of the ATS.[30]

Due to a shortage of trained military interrogators, the US had hired civilian contractors to interrogate detainees at Abu Ghraib, Iraq (the context will be known to readers). During the period relevant to the civil action, those private interrogators were provided

[26] USSC No 11-965.
[27] *International Shoe v State of Washington* 326 US 310 (1945).
[28] See http://opiniojuris.org/wp-content/uploads/17-Apr-SDNY-Opinion.pdf, accessed 26 June 2014.
[29] *In Re South African Apartheid Litigation*, 02 MDL 1499 (SAS).
[30] *Suhail Najim Abdullah Al Shimari et al v CACI Premier Technology, Inc et al*, USCA 4th Cir, No 13-1937.

exclusively by CACI Premier Technology, Inc ('CACI'), a corporation domiciled in the US. The plaintiffs in the case were foreign nationals who alleged that they were tortured and otherwise mistreated by US civilian and military personnel while detained at Abu Ghraib. The plaintiffs alleges that CACI employees 'instigated, directed, participated in, encouraged, and aided and abetted conduct towards detainees that clearly violated the Geneva Conventions, the Army Field Manual, and the laws of the United States'.

The Court of Appeal noted among many things that the Supreme Court in *Kiobel* broadly stated that the 'claims', rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force, suggesting in the view of the Court of Appeal that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action. It found that the claims do concern US territory, pointing to the fact that:

> [T]he plaintiffs' claims allege acts of torture committed by United States citizens who were employed by an American corporation, CACI, which has corporate headquarters located in Fairfax County, Virginia. The alleged torture occurred at a military facility operated by United States government personnel.
>
> In addition, the employees who allegedly participated in the acts of torture were hired by CACI in the United States to fulfill the terms of a contract that CACI executed with the United States Department of the Interior. The contract between CACI and the Department of the Interior was issued by a government office in Arizona, and CACI was authorized to collect payments by mailing invoices to government accounting offices in Colorado. Under the terms of the contract, CACI interrogators were required to obtain security clearances from the United States Department of Defense. Finally, the allegations are not confined to the assertion that CACI's employees participated directly in acts of torture committed at the Abu Ghraib prison. The plaintiffs also allege that CACI's managers located in the United States were aware of reports of misconduct abroad, attempted to 'cover up' the misconduct, and 'implicitly, if not expressly, encouraged' it.

Whether the claims present non-justiciable political questions at the time of writing still needed to be determined by the District Court.

In her finding on *Apartheid*,[31] Scheindlin USDJ distinguished *al Shimari* for the alleged violation of international law was inflicted by the South African subsidiaries of the US defendant corporations, over whom defendants may have exercised control, but control alone, it transpires, is not enough to create a sufficient link with the US to meet the *Kiobel* test.

The applicants had previously already argued that critical policy level decisions were made in the US, and that the provision of expertise, management, technology and equipment essential to the alleged abuses came from the US. This has now, so it would seem, been further backed up by detailed facts, but even these facts did not graduate, so to speak, the US companies' involvement from management and effective control to 'aiding and abetting' as Scheindlin USDJ had instructed counsel to show.

By contrast, in *Doe v Nestle*[32] a much more flexible approach was taken than in either *Apartheid* or *Doe v Nestle* and *Tiffany v China Merchants Bank et al.*[33] In this latter case, the

[31] *Apartheid* (n 29).
[32] *John Doe I, II and II v Nestle USA Inc et al*, USCA 9th Cir, No 10-56739 (4 September 2014).
[33] 12-2317-cv (L) (2d Cir 2014).

US Second Circuit Court of Appeals took the application of *Kiobel* in *Daimler* as cue for a refusal of the recognition of asset restraints and discovery orders against a bank with merely branch offices in New York. The bank's sites of incorporation and principal places of business were all outside of the US. With reference to *Daimler*, the Court held that there was no basis on which to conclude that the bank's contacts in New York were so 'continuous and systematic' judged against their national and global activities, that they were 'essentially at home' in the State.

By contrast, in *Doe v Nestle*, the Ninth Circuit Court of Appeals reversed the lower court's decision to dismiss ATS claims and arguably indeed adopted an extensive view of 'aiding and abetting' within the context of ATS:

> Driven by the goal to reduce costs in any way possible, the defendants allegedly supported the use of child slavery, the cheapest form of labor available. These allegations explain how the use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast, and therefore, the allegations support the inference that the defendants acted with the purpose to facilitate child slavery.

These allegations were considered even to meet the supposedly stricter 'purpose' test. The defendant's market power and control over operations abroad seemed to have played an important role.

Most of these cases are subject to all types of appeal, hence the waters on ATS are not yet calm and settled.

### 8.2.5 Summary on the US

With *Kiobel* and *Daimler*, it is clear that the scope for ATS litigation has been severely diminished. It remains to be seen whether the issue of corporate culpability will reach the US Supreme Court too.

Attention may now be reignited in what has been brewing in the EU for some time: using national courts to apply national law for conduct abroad—in other words, classic private international law/conflict of laws coming to the limelight once again.

## 8.3 The European Union

In European private international law, as with the ATS, the two main concerns that arise when addressing matters of corporate violation of rights are whether or not EU Member State courts have jurisdiction and, if so, what laws, national or international, apply.[34]

[34] D Augenstein, 'Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union' (2010), available at http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf, 16. See also V Van Den Eeckhout, 'Promoting Human Rights within the Union: The Role of European Private International Law' (2008) 14 *European Law Journal* 105 127.

## 8.3.1 Jurisdiction

### *8.3.1.1 General Jurisdictional Rule: Article 4 of the Brussels I Recast Regulation*

In accordance with the Brussels I Recast Regulation, it is enough for a court in an EU Member State to establish jurisdiction if the defendant is domiciled in an EU Member State. For corporations, this place is their corporate or registered seat. Consequently truly multinational corporations may in theory at least be quite easily pursued in the courts of an EU Member State, even for actions committed outside of the EU: the principal jurisdictional ground of the defendant's domicile, included in Article 4 of the Regulation, operates independently of the activities to which the action relates.

A good example of the ease in bringing a case against European holding companies, in the EU, is *Milieudefensie et al v Shell*.[35] Shell's parent company was hauled before a Dutch court by a Dutch environmental NGO (Milieudefensie), seeking (with a number of Nigerian farmers) to have the parent company being held liable for environmental pollution caused in Nigeria.

The media were somewhat wrong-footed in reporting on the issue. Establishing jurisdiction in an EU court vis-à-vis a company with a seat in the EU is not exactly string theory. It is a simple application of the Brussels I Regulation. The CJEU, as readers will know, has gone as far as to bar national courts from even pondering rejection of such jurisdiction (Case C-281/02 *Owusu*; see analysis in the relevant chapter).

What is interesting is the fact that Milieudefensie and the individual applicants also pursued the Nigerian daughter company in the Netherlands. In an interim ruling going back to 2009,[36] the court held that the case against the Nigerian daughter could prima facie at least be joined with the case against the mother holding. (The judgment on the merits, which I refer to in more detail below, confirmed this interim finding, as does the judgment in appeal.)

Pursuing a holding company with a domicile in the EU is therefore easy from the jurisdiction point of view. However, subjecting that company to EU law (or the national implementation thereof) is more challenging with respect to applicable law (see below). Staying with the jurisdictional level: being able to sue the mother company does not give one an easy day in court vis-à-vis any daughter companies. Corporate reality dictates that even though the firms concerned may operate under one global brand, in practice they are organised into separate corporate entities. As a result, one will find that International Business Inc is actually made up of most probably as many separate corporate entities as the countries in which it operates. This reality of singular corporate domicile for each daughter company rules out jurisdiction under the Brussels I Regulation vis-à-vis those daughters with a corporate seat outside of the EU.

For those companies lacking a domicile in the EU, national conflicts law (in EU conflicts jargon, 'residual jurisdiction') takes over. Some EU Member States more readily accept

[35] See for analysis also L Enneking, 'The Future of Foreign Direct Liability? Exploring the International Relevance of the Dutch Shell Nigeria case' (2014) 10 *Utrecht Law Review* 44–54; and C van der Heijden, 'De Shell Nigeria Zaak: de eerste Nederlandse foreign direct liability zaak voor de civiele rechter' (2013) 3 *Tijdschrift voor Ondernemingsbestuur* 71–85.

[36] BK8616, Rechtbank 's-Gravenhage, HA ZA 330891 09-579, *Vereniging Milieudefensie et al v Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd*. The jurisdiction issue, in particular the validity of using the mother company as an anchor under Dutch private international law, was confirmed upon appeal in December 2015: ECLI:NL:GHDHA:2015:3586.

jurisdiction against non-EU domiciled companies than others. Some, for instance (notably, France), are fairly flexible, allowing plaintiffs with the nationality of the forum to bring cases to be brought against anyone incorporated or domiciled anywhere. Others operate some form of a *forum necessitatis* rule, allowing anyone with a minimum contact with the jurisdiction to sue in exceptional circumstances, typically in some fashion linked to the rule of law.

#### *8.3.1.2 Special Jurisdictional Rule: Article 7(5) Brussels I Recast Regulation—Operations Arising out of a Branch*

In the case of corporations, Article 7(5) of the Brussels I Regulation extends to branches of international companies:

> A person domiciled in a Member State may, in another Member State, be sued: …
>
> 5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.

The use of the words 'arising out of', however, indicates the limited potential for this rule in the case of international litigation in a CSR context.

> This concept of operations … also comprises … actions concerning non-contractual obligations arising from the activities in which the branch, agency or other establishment within the above defined meaning, has engaged at the place in which it is established on behalf of the parent body.[37]

It can hardly be said that the non-contractual obligations of International Business Ruritania Ltd can automatically be allocated to International Business [EU Member State]. They do not 'arise out of' the operation of the EU Member State. Moreover, Article 7(5) requires International Business Ruritania Ltd to be domiciled in another EU Member State: it concerns only defendants already domiciled in a Member State, ie companies or firms having their seat in one Member State and having a branch, agency or other establishment in another Member State. Companies or firms which have their seat outside the Union but have a branch, etc, in a Member State are covered instead by Article 6 of the Jurisdiction Regulation. (This defers to national or 'residual) (see above) rules of jurisdiction in the case of non-EU based defendants.)

#### *8.3.1.3 Special Jurisdictional Rule: Article 7(2) Brussels I Recast—Tort*

The special jurisdictional rule for tort may seem appealing at first sight. Per *Bier*,[38] the CJEU held that (now) Article 7(2) allows litigation in both the *locus delicti commissi* (the place where the harmful event leading to, or potentially leading to, the harm occurred) and the *locus damni* (the place where the damage occurred). In cases where a plaintiff is able to show that International Business with a registered seat in an EU Member State is behind the actions which led to the tort, this grants a jurisdictional trigger. However, as already noted, this is not in itself a big help for pursuing EU-based multinational corporations. They can already be pursued on the basis of Article 4. The bigger issue, as dealt with below, is how one can pursue that EU mother company on the basis of EU law.

[37] Case 33/78 *Somafer* [1979] ECR 2183, para 13.
[38] Case 21/76 *Mines de Potasse d'Alsace* [1976] ECR 1735.

#### *8.3.1.4 Special Jurisdictional Rule: Article 7(4) Jurisdiction Regulation*

Courts which have jurisdiction in a criminal procedure, also have jurisdiction for the civil leg of the prosecution.

#### *8.3.1.5 Review of the Jurisdiction Regulation—The 'International Dimension' of the Regulation*

The review of the Brussels I Regulation proposed both an assets-based jurisdictional rule and a *forum necessitatis* option, which would have had an impact on the issue discussed here. However, neither of these proposals were withheld in the eventual Brussels I Recast Regulation, as discussed in the relevant chapter.

### 8.3.2 Applicable Law

Establishing jurisdiction leaves open the question of what law to apply to the facts at issue—as also illustrated by the challenges hitting the application of the ATS. The EU does not operate an ATS-like system, which employs *international* law to advance the case of plaintiffs seeking 'justice' in environmental or human rights cases. The CSR-proactive route which must be followed in the EU is one of *Gleichlauf* between having a court in the EU hear the case, and having that court apply the human rights/environmental law of that same forum.[39]

The most likely route to pursue a corporation in a court in the EU is via an action in tort. This generally entails the application of the *lex loci damni*—the core rule of the EU's 'Rome II' Regulation (see the relevant chapter): applicable law is the law of the place where the damage first occurred, not where the action leading to that damage occurred or where subsequent indirect damage is felt. Given that plaintiffs generally do not pursue the case with a view to having the law of a non-EU Member State apply (they aim to have EU law being applicable), this general rule of the Rome II Regulation in all likelihood is not the goal of the plaintiffs.

Might any of the exceptions in the Rome II Regulation apply?

If both parties are habitually resident in the same country when the damage occurs, the law of that country applies (Article 4(2) Rome II). This may be relevant in exceptional cases, but the more standard CSR scenario is for victims resident in the *locus damni*, outside of the EU, to sue in the EU. Even if the victims of the tort subsequently move to the same EU Member State as the State of incorporation of defendant, this would not assist: Article 4(2) looks at the time of occurrence of the damage.

Article 4(3) more generally includes an escape clause: when it is clear from the circumstances of the case that it is 'manifestly' more closely connected with a country other than the one indicated by 4(1) or 4(2), the law of that country shall apply instead. The tort in

[39] Given the high degree of harmonisation of environmental law, as well as (to a slightly lesser degree) of occupational health and safety laws, and of course the impact of the European Convention on Human Rights as well as the EU's Charter of Fundamental Rights, the relevant laws of EU Member State do display a certain amount of harmony.

question has to have that manifestly closer relationship: in particular in the CSR context, this is problematic given the occurrence of the damage abroad.

Finally, Article 7 Rome II contains a special rule for environmental damage:

> Article 7
>
> Environmental damage
>
> The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

This Article ties in with one of the options for establishing jurisdiction for an EU court, as highlighted above. One would have to convince a court in an EU Member State that either direct instructions or negligent lack of oversight by International Business [EU Member State] led to the damage at issue and hence constitutes 'the event giving rise to the damage'. This is not an easy burden of proof. (And one reminiscent of the US judge's instruction to counsel in *Apartheid*: see above).

Finally, I would argue that the additional rule on 'rules of safety and conduct' of Article 17 arguably have less of a calling for environmental litigation than may be prima facie assumed.[40]

In summary, therefore, while it is relatively straightforward in the case of acts committed abroad to sue a corporation in the EU, in the case of that corporation having a corporate bridgehead in the EU, applicable law almost certainly will *not* be European law.[41] There does not at this moment seem much of a constituency in the EU institutions to have this changed.

In the above-mentioned case involving Shell, the Court at The Hague held on 30 January 2013 *not* on the basis of the Rome II Regulation, but rather on the basis of Dutch conflicts law, for Rome II did not apply *ratione tempore*. Therefore it did not entertain any of the options outlined above in that Regulation which may have led to Dutch law: the events which gave rise to the damage occurred before the entry into force of that Regulation.

Generally the judgment is quite comforting for Shell (and other holding companies in similar situations). The Hague Court stuck to its decision to join the cases (a finding confirmed upon appeal in December 2015), hence allowing Shell Nigeria to be pursued in the Dutch courts, together with the holding company (against which as noted jurisdiction was easily established under the Brussels I Regulation). The Court applied *lex loci damni*. (If I am not mistaken, prior to Rome II, the Netherlands applied a more or less complex conflicts rule, not necessarily leading to *lex loci damni*, neither to *lex loci delicti commissi*, which was the rule in most EU Member States prior to the entry into force of the Rome II Regulation.)

Nigerian law applied and any route to apply Dutch law was rejected. Incompatibility with Dutch *ordre public*, for instance, was not withheld. As Nigerian law runs along common

[40] Contra: V Van Den Eeckhout, 'Corporate Human Rights Violations and Private International Law' (2012) No 2 *Contemporary Readings in Law and Social Justice*.

[41] Similarly, see C Van Dam, 'Tort Law and Human Rights: Brothers in Arms. On the Role of Tort Law in the Area of Business and Human Rights' (2011) *Journal of European Tort Law* 221, 231–32.

law lines, the Court ran through negligence in tort, applied to environmental cases, leading amongst others to the inevitable English case of *Rylands v Fletcher*. The Court found that the damage occurred because of sabotage, which under Nigerian law in principle exonerated Shell Nigeria. Only for two specific instances of damage was liability withheld, for Shell Nigeria had failed to take basic precautions. The conditions of the Court of Appeal in *Chandler v Cape*[42] to establish liability for the holding company were not found to be met in the case at issue. The Court did not establish a specific duty of care under Nigerian law (with the loop to the English common law) for Royal Dutch Shell, the mother company. A general CSR commitment was not found not to alter that.

## 8.4 Piercing of the Corporate Veil and Compliance Strategies

As the *Shell* case shows, some form of piercing of the corporate veil is generally required to lead to successful pursuit of international holding companies on the basis of activities of their subsidiaries carried out in less CSR-active jurisdictions. Even in the EU, there is no general EU rule on the piercing of the corporate veil. Neither company law nor tort law is sufficiently (or in the case of tort law even embryonically) harmonised to be able to speak of much EU influence here.

### 8.4.1 Inspiration from Competition Law?

In EU competition law, the principle is more or less established and may, one suspects, inspire in other areas, too. In *ENI*,[43] for instance, the CJEU confirmed the strong presumption of attribution in the case of shareholder control.

It is established case-law under EU competition law that the conduct of a subsidiary may be imputed, for the purposes of the application of Article 101 TFEU (the core Article disciplining cartel behaviour), to the parent company particularly where, although having separate legal personality, that subsidiary does not autonomously determine its conduct on the market but mostly applies the instructions given to it by the parent company. The CJEU (and national courts taking its lead) will have regard in particular to the economic, organisational and legal links which unite those two legal entities. In such a situation, since the parent company and its subsidiary form part of a single economic unit and thus form a single undertaking for the purpose of Article 101 TFEU, the Court of Justice has repeatedly held that the Commission may address a decision imposing fines to the parent company without being required to establish its individual involvement in the infringement.

In the particular case in which a parent company holds all or almost all of the capital in a subsidiary which has committed an infringement of the EU competition rules, there is a rebuttable presumption that that parent company exercises an actual decisive influence

[42] *Chandler v Cape* [2012] EWCA Civ 525.

[43] Case T-39/07 *ENI SpA v European Commission* [2011] ECR II-4457, and appeal: Case C-508/11 P, ECLI:EU:C:2013:289.

over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption is fulfilled.

In addition, in the specific case where a holding company holds 100 per cent of the capital of an interposed company, which, in turn, holds the entire capital of a subsidiary of its group which has committed an infringement of EU competition law, there is also a rebuttable presumption that that holding company exercises a decisive influence over the conduct of the interposed company and also indirectly, via that company, over the conduct of that subsidiary.

In *ENI*, for the entire duration of the infringement in question, Eni held, directly or indirectly, at least 99.97% of the capital in the companies which were directly active within its group in the sectors in which there had been a violation of competition law. The CJEU held that in particular the absence of management overlap between Eni and the daughter companies was not enough to rebut the presumption of the companies being a single economic unit.

### 8.4.2 Outside of Competition Law

In competition law, therefore, the corporate veil may be quite easily pierced in a holding context, at the very least for transfer of fines. This is undoubtedly *not* the approach which many Member States take outside of the competition law area. The waters on the piercing of the corporate veil other than in the area of competition law, remain quite deep. This has an impact on the conflicts area, in particular in the application of the Rome II Regulation (as noted, the core rule for conflict of laws in torts) and the debate on CSR. This point was also made by eg the UK Supreme Court on 12 June 2013 in *Petrodel v Prest*[44] (a matrimonial assets case which was decided on the basis of trust), where Lord Neuberger stated obiter:

> if piercing the corporate veil has any role to play, it is in connection with evasion.

Lord Sumption's take was:

> there is a limited principle of English law which applies when a person is under an existing legal obligation…which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.

He added:

> The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil.

Lord Clarke, agreeing with Lord Mance and others, stated:

> the situations in which piercing the corporate veil may be available as a fall-back are likely to be very rare.

[44] *Petrodel v Prest* [2013] UKSC 34.

Piercing issues were also sub judice in *VTB*[45]—without much holding on the merits. VTB's case was that it was induced in London to enter into a facility agreement, and an accompanying interest rate swap agreement, by misrepresentations made by one of the defendants, for which it claimed the other respondents were jointly and severally liable. The parties were of suitably diverse domicile (the appellant incorporated in England but controlled by a State-owned bank in Moscow; the defendants two British Virgin Island-based companies owned and controlled by a Moscow-based Russian businessman). As the defendants were not EU-based, the Brussels I Regulation did not apply.

The issues involved were essentially the following:

1. *Jurisdiction*. Lord Neuberger made the point that settling the presence (or not) of jurisdiction is an early procedural incident in a trial and ought not to lead to protracted legal argument, costs and time, lest the discussions centre around whether the potential other jurisdiction can guarantee a fair trial or not. In contrast with other in recent high-profile cases before the UK courts, the alternative, Russian forum, would by common agreement have also offered a fair trial. Lord Neuberger also emphasised, with reference to Lord Bingham in *Lubbe v Cape*, that in *forum non conveniens* considerations, appeal judges should defer in principle to the trial judge, and that this should be no different in proceedings concerning service out of jurisdiction. The majority therefore opted to defer to Arnold J (at the High Court) and the Court of Appeal in their finding of jurisdiction, in the absence of any error which ought to have made the former change their conclusion.
2. *Applicable law for tortious misrepresentation.* This the law of the jurisdiction in which the misleading representations are ultimately received and relied upon (the *forum connogati* if you like). In the case at issue, this was held to be England.
3. *Applicable law for piercing the corporate veil.* The Court emphasised the foundation of individual personality of a company established in *Salomon and A Salomon and Co Ltd* (1897). The presumption must be against piercing. The Supreme Court did not, however, set out a definitive test for it was not necessary for its resolving of the case; neither did it decide what law should apply to the issue. In theory, Lord Neuberger suggested,

> the proper law governing the piercing of the corporate veil (may be) the lex incorporationis, the lex fori, or some other law (for example, the lex contractus, where the issue concerns who is considered to be party to a contract entered into by the company in question).

However common ground among parties in the case thus far had been to apply English law and the issue of choice of law for piercing the corporate veil was not further reviewed.

That would seem to be the general line held by case-law across the EU: if the relevance for deciding applicable law to the piercing issue is at all identified, parties and courts generally happily continue with the application of *lex causae* rather than conducting the analysis using traditional conflict of laws methodology.

[45] *VTB* [2013] UKSC 5.

## 8.5 Conclusion

It may be the cynic's view that in the absence of internationally followed principles, in particular on piercing the corporate veil, companies will continue to organise their corporate structure with a view to forum and applicable law shopping. However, paraphrasing Judge Jacobs in *Kiobel*, immoral behaviour is not generally the business plan of companies. This does not mean that one need not address the current uncertainty with respect to the possibility to pursue business in EU or other courts on the basis of arguably stricter tort, health and safety, environmental, etc, laws in those States. For if nothing else, the current disparate approach does not exactly assist in creating the level playing field necessary for international business integration.

# Annexes

# ANNEX 1—REGULATION 1215/2012, THE BRUSSELS I RECAST REGULATION

I

*(Legislative acts)*

## REGULATIONS

**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)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 67(4) and points (a), (c) and (e) of Article 81(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) On 21 April 2009, the Commission adopted a report on the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [3]. The report concluded that, in general, the operation of that Regulation is satisfactory, but that it is desirable to improve the application of certain of its provisions, to further facilitate the free circulation of judgments and to further enhance access to justice. Since a number of amendments are to be made to that Regulation it should, in the interests of clarity, be recast.

(2) At its meeting in Brussels on 10 and 11 December 2009, the European Council adopted a new multiannual programme entitled 'The Stockholm Programme – an open and secure Europe serving and protecting citizens' [4]. In the Stockholm Programme the European Council considered that the process of abolishing all intermediate measures (the exequatur) should be continued during the period covered by that Programme. At the same time the abolition of the exequatur should also be accompanied by a series of safeguards.

(3) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.

(4) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters, and to ensure rapid and simple recognition and enforcement of judgments given in a Member State, are essential.

(5) Such provisions fall within the area of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty on the Functioning of the European Union (TFEU).

[1] OJ C 218, 23.7.2011, p. 78.
[2] Position of the European Parliament of 20 November 2012 (not yet published in the Official Journal) and decision of the Council of 6 December 2012.
[3] OJ L 12, 16.1.2001, p. 1.
[4] OJ C 115, 4.5.2010, p. 1.

(6) In order to attain the objective of free circulation of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a legal instrument of the Union which is binding and directly applicable.

(7) On 27 September 1968, the then Member States of the European Communities, acting under Article 220, fourth indent, of the Treaty establishing the European Economic Community, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, subsequently amended by conventions on the accession to that Convention of new Member States ([1]) ('the 1968 Brussels Convention'). On 16 September 1988, the then Member States of the European Communities and certain EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters ([2]) ('the 1988 Lugano Convention'), which is a parallel convention to the 1968 Brussels Convention. The 1988 Lugano Convention became applicable to Poland on 1 February 2000.

(8) On 22 December 2000, the Council adopted Regulation (EC) No 44/2001, which replaces the 1968 Brussels Convention with regard to the territories of the Member States covered by the TFEU, as between the Member States except Denmark. By Council Decision 2006/325/EC ([3]), the Community concluded an agreement with Denmark ensuring the application of the provisions of Regulation (EC) No 44/2001 in Denmark. The 1988 Lugano Convention was revised by the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ([4]), signed at Lugano on 30 October 2007 by the Community, Denmark, Iceland, Norway and Switzerland ('the 2007 Lugano Convention').

(9) The 1968 Brussels Convention continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.

(10) The scope of this Regulation should cover all the main civil and commercial matters apart from certain well-defined matters, in particular maintenance obligations, which should be excluded from the scope of this Regulation following the adoption of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ([5]).

(11) For the purposes of this Regulation, courts or tribunals of the Member States should include courts or tribunals common to several Member States, such as the Benelux Court of Justice when it exercises jurisdiction on matters falling within the scope of this Regulation. Therefore, judgments given by such courts should be recognised and enforced in accordance with this Regulation.

(12) This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

([1]) OJ L 299, 31.12.1972, p. 32, OJ L 304, 30.10.1978, p. 1, OJ L 388, 31.12.1982, p. 1, OJ L 285, 3.10.1989, p. 1, OJ C 15, 15.1.1997, p. 1. For a consolidated text, see OJ C 27, 26.1.1998, p. 1.
([2]) OJ L 319, 25.11.1988, p. 9.
([3]) OJ L 120, 5.5.2006, p. 22.
([4]) OJ L 147, 10.6.2009, p. 5.
([5]) OJ L 7, 10.1.2009, p. 1.

(13) There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.

(14) A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.

However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

(17) The owner of a cultural object as defined in Article 1(1) of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State [1] should be able under this Regulation to initiate proceedings as regards a civil claim for the recovery, based on ownership, of such a cultural object in the courts for the place where the cultural object is situated at the time the court is seised. Such proceedings should be without prejudice to proceedings initiated under Directive 93/7/EEC.

[1] OJ L 74, 27.3.1993, p. 74.

(18) In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.

(19) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

(20) Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State.

(21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.

(22) However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general *lis pendens* rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.

This exception should not cover situations where the parties have entered into conflicting exclusive choice-of-court agreements or where a court designated in an exclusive choice-of-court agreement has been seised first. In such cases, the general *lis pendens* rule of this Regulation should apply.

(23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.

(24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.

That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.

(25) The notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [1]. It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to the application of 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 [2].

(26) Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.

(27) For the purposes of the free circulation of judgments, a judgment given in a Member State should be recognised and enforced in another Member State even if it is given against a person not domiciled in a Member State.

(28) Where a judgment contains a measure or order which is not known in the law of the Member State addressed, that measure or order, including any right indicated therein, should, to the extent possible, be adapted to one which, under the law of that Member State, has equivalent effects attached to it and pursues similar aims. How, and by whom, the adaptation is to be carried out should be determined by each Member State.

(29) The direct enforcement in the Member State addressed of a judgment given in another Member State without a declaration of enforceability should not jeopardise respect for the rights of the defence. Therefore, the person against whom enforcement is sought should be able to apply for refusal of the recognition or enforcement of a judgment if he considers one of the grounds for refusal of recognition to be present. This should include the ground that he had not had the opportunity to arrange for his defence where the judgment was given in default of appearance in a civil action linked to criminal proceedings. It should also include the grounds which could be invoked on the basis of an agreement between the Member State addressed and a third State concluded pursuant to Article 59 of the 1968 Brussels Convention.

(30) A party challenging the enforcement of a judgment given in another Member State should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to invoke, in the same procedure, in addition to the grounds for refusal provided for in this Regulation, the grounds for refusal available under national law and within the time-limits laid down in that law.

The recognition of a judgment should, however, be refused only if one or more of the grounds for refusal provided for in this Regulation are present.

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[1] OJ L 157, 30.4.2004, p. 45.
[2] OJ L 174, 27.6.2001, p. 1.

(31) Pending a challenge to the enforcement of a judgment, it should be possible for the courts in the Member State addressed, during the entire proceedings relating to such a challenge, including any appeal, to allow the enforcement to proceed subject to a limitation of the enforcement or to the provision of security.

(32) In order to inform the person against whom enforcement is sought of the enforcement of a judgment given in another Member State, the certificate established under this Regulation, if necessary accompanied by the judgment, should be served on that person in reasonable time before the first enforcement measure. In this context, the first enforcement measure should mean the first enforcement measure after such service.

(33) Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State.

(34) Continuity between the 1968 Brussels Convention, Regulation (EC) No 44/2001 and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation by the Court of Justice of the European Union of the 1968 Brussels Convention and of the Regulations replacing it.

(35) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

(36) Without prejudice to the obligations of the Member States under the Treaties, this Regulation should not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation.

(37) In order to ensure that the certificates to be used in connection with the recognition or enforcement of judgments, authentic instruments and court settlements under this Regulation are kept up-to-date, the power to adopt acts in accordance with Article 290 of the TFEU should be delegated to the Commission in respect of amendments to Annexes I and II to this Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(38) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial guaranteed in Article 47 of the Charter.

(39) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(40) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the TEU and to the then Treaty establishing the European Community, took part in the adoption and application of Regulation (EC) No 44/2001. In accordance with Article 3 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 TEU and to the TFEU, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Regulation.

(41) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application, without prejudice to the possibility for Denmark of applying the amendments to Regulation (EC) No 44/2001 pursuant to Article 3 of the Agreement of 19 October 2005 between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [1],

[1] OJ L 299, 16.11.2005, p. 62.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

**SCOPE AND DEFINITIONS**

*Article 1*

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall 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*).

2. This Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

(c) social security;

(d) arbitration;

(e) maintenance obligations arising from a family relationship, parentage, marriage or affinity;

(f) wills and succession, including maintenance obligations arising by reason of death.

*Article 2*

For the purposes of this Regulation:

(a) 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;

(b) 'court settlement' means a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings;

(c) 'authentic instrument' means a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:

(i) relates to the signature and the content of the instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose;

(d) 'Member State of origin' means the Member State in which, as the case may be, the judgment has been given, the court settlement has been approved or concluded, or the authentic instrument has been formally drawn up or registered;

(e) 'Member State addressed' means the Member State in which the recognition of the judgment is invoked or in which the enforcement of the judgment, the court settlement or the authentic instrument is sought;

(f) 'court of origin' means the court which has given the judgment the recognition of which is invoked or the enforcement of which is sought.

*Article 3*

For the purposes of this Regulation, 'court' includes the following authorities to the extent that they have jurisdiction in matters falling within the scope of this Regulation:

(a) in Hungary, in summary proceedings concerning orders to pay (fizetési meghagyásos eljárás), the notary (közjegyző);

(b) in Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the Enforcement Authority (Kronofogdemyndigheten).

CHAPTER II

**JURISDICTION**

*SECTION 1*

***General provisions***

*Article 4*

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

*Article 5*

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.

2. In particular, the rules of national jurisdiction of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1) shall not be applicable as against the persons referred to in paragraph 1.

*Article 6*

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.

*SECTION 2*

***Special jurisdiction***

*Article 7*

A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies;

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

(3) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

(4) as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised;

(5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated;

(6) as regards a dispute brought against a settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

(7) as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment; or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

*Article 8*

A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided 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;

(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

(3) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

(4) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated.

*Article 9*

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

*SECTION 3*

***Jurisdiction in matters relating to insurance***

*Article 10*

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.

*Article 11*

1. An insurer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled;

(b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled; or

(c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

*Article 12*

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

*Article 13*

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

*Article 14*

1. Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

*Article 15*

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section;

(3) which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that Member State;

(4) which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State; or

(5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16.

*Article 16*

The following are the risks referred to in point 5 of Article 15:

(1) any loss of or damage to:

(a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

(2) any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

(b) for loss or damage caused by goods in transit as described in point 1(b);

(3) any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

(4) any risk or interest connected with any of those referred to in points 1 to 3;

(5) notwithstanding points 1 to 4, all 'large risks' as defined in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [1].

[1] OJ L 335, 17.12.2009, p. 1.

*SECTION 4*

***Jurisdiction over consumer contracts***

*Article 17*

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

(a) it is a contract for the sale of goods on instalment credit terms;

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

*Article 18*

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

*Article 19*

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or

(3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

*SECTION 5*

***Jurisdiction over individual contracts of employment***

*Article 20*

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

*Article 21*

1. An employer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

*Article 22*

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

*Article 23*

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen; or

(2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

*SECTION 6*

***Exclusive jurisdiction***

*Article 24*

The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

(1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

(2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

(3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

(4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State;

(5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

*SECTION 7*

***Prorogation of jurisdiction***

*Article 25*

1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves; or

(c) 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.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

*Article 26*

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.

*SECTION 8*

***Examination as to jurisdiction and admissibility***

*Article 27*

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, it shall declare of its own motion that it has no jurisdiction.

*Article 28*

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

3. Article 19 of 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 or commercial matters (service of documents) ([1]) shall apply instead of paragraph 2 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

4. Where Regulation (EC) No 1393/2007 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

*SECTION 9*

***Lis pendens — related actions***

*Article 29*

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

*Article 30*

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they 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.

*Article 31*

1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

*Article 32*

1. For the purposes of this Section, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.

([1]) OJ L 324, 10.12.2007, p. 79.

2. The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served.

*Article 33*

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and 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 the third State, the court of the Member State may stay the proceedings if:

(a) 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

(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

2. The court of the Member State may continue the proceedings at any time if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;

(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or

(c) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

*Article 34*

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:

(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(b) 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

(c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

2. The court of the Member State may continue the proceedings at any time if:

(a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;

(b) the proceedings in the court of the third State are themselves stayed or discontinued;

(c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or

(d) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

*SECTION 10*

***Provisional, including protective, measures***

*Article 35*

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

**RECOGNITION AND ENFORCEMENT**

*SECTION 1*

***Recognition***

*Article 36*

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party may, in accordance with the procedure provided for in Subsection 2 of Section 3, apply for a decision that there are no grounds for refusal of recognition as referred to in Article 45.

3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of refusal of recognition, that court shall have jurisdiction over that question.

*Article 37*

1. A party who wishes to invoke in a Member State a judgment given in another Member State shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53.

2. The court or authority before which a judgment given in another Member State is invoked may, where necessary, require the party invoking it to provide, in accordance with Article 57, a translation or a transliteration of the contents of the certificate referred to in point (b) of paragraph 1. The court or authority may require the party to provide a translation of the judgment instead of a translation of the contents of the certificate if it is unable to proceed without such a translation.

*Article 38*

The court or authority before which a judgment given in another Member State is invoked may suspend the proceedings, in whole or in part, if:

(a) the judgment is challenged in the Member State of origin; or

(b) an application has been submitted for a decision that there are no grounds for refusal of recognition as referred to in Article 45 or for a decision that the recognition is to be refused on the basis of one of those grounds.

*SECTION 2*

***Enforcement***

*Article 39*

A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required.

*Article 40*

An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed.

*Article 41*

1. Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.

2. Notwithstanding paragraph 1, the grounds for refusal or of suspension of enforcement under the law of the Member State addressed shall apply in so far as they are not incompatible with the grounds referred to in Article 45.

3. The party seeking the enforcement of a judgment given in another Member State shall not be required to have a postal address in the Member State addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.

*Article 42*

1. For the purposes of enforcement in a Member State of a judgment given in another Member State, the applicant shall provide the competent enforcement authority with:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

2. For the purposes of enforcement in a Member State of a judgment given in another Member State ordering a provisional, including a protective, measure, the applicant shall provide the competent enforcement authority with:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;

(b) the certificate issued pursuant to Article 53, containing a description of the measure and certifying that:

(i) the court has jurisdiction as to the substance of the matter;

(ii) the judgment is enforceable in the Member State of origin; and

(c) where the measure was ordered without the defendant being summoned to appear, proof of service of the judgment.

3. The competent enforcement authority may, where necessary, require the applicant to provide, in accordance with Article 57, a translation or a transliteration of the contents of the certificate.

4. The competent enforcement authority may require the applicant to provide a translation of the judgment only if it is unable to proceed without such a translation.

*Article 43*

1. Where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. The certificate shall be accompanied by the judgment, if not already served on that person.

2. Where the person against whom enforcement is sought is domiciled in a Member State other than the Member State of origin, he may request a translation of the judgment in order to contest the enforcement if the judgment is not written in or accompanied by a translation into either of the following languages:

(a) a language which he understands; or

(b) the official language of the Member State in which he is domiciled or, where there are several official languages in that Member State, the official language or one of the official languages of the place where he is domiciled.

Where a translation of the judgment is requested under the first subparagraph, no measures of enforcement may be taken other than protective measures until that translation has been provided to the person against whom enforcement is sought. This paragraph shall not apply if the judgment has already been served on the person against whom enforcement is sought in one of the languages referred to in the first subparagraph or is accompanied by a translation into one of those languages.

3. This Article shall not apply to the enforcement of a protective measure in a judgment or where the person seeking enforcement proceeds to protective measures in accordance with Article 40.

*Article 44*

1. In the event of an application for refusal of enforcement of a judgment pursuant to Subsection 2 of Section 3, the court in the Member State addressed may, on the application of the person against whom enforcement is sought:

(a) limit the enforcement proceedings to protective measures;

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) suspend, either wholly or in part, the enforcement proceedings.

2. The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the judgment is suspended in the Member State of origin.

*SECTION 3*

***Refusal of recognition and enforcement***

Subsection 1

**Refusal of recognition**

*Article 45*

1. On the application of any interested party, the recognition of a judgment shall be refused:

(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed;

(b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or

(e) if the judgment conflicts with:

(i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or

(ii) Section 6 of Chapter II.

2. In its examination of the grounds of jurisdiction referred to in point (e) of paragraph 1, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction.

3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.

4. The application for refusal of recognition shall be made in accordance with the procedures provided for in Subsection 2 and, where appropriate, Section 4.

Subsection 2

**Refusal of enforcement**

*Article 46*

On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist.

*Article 47*

1. The application for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted.

2. The procedure for refusal of enforcement shall, in so far as it is not covered by this Regulation, be governed by the law of the Member State addressed.

3. The applicant shall provide the court with a copy of the judgment and, where necessary, a translation or transliteration of it.

The court may dispense with the production of the documents referred to in the first subparagraph if it already possesses them or if it considers it unreasonable to require the applicant to provide them. In the latter case, the court may require the other party to provide those documents.

4. The party seeking the refusal of enforcement of a judgment given in another Member State shall not be required to have a postal address in the Member State addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.

*Article 48*

The court shall decide on the application for refusal of enforcement without delay.

*Article 49*

1. The decision on the application for refusal of enforcement may be appealed against by either party.

2. The appeal is to be lodged with the court which the Member State concerned has communicated to the Commission pursuant to point (b) of Article 75 as the court with which such an appeal is to be lodged.

*Article 50*

The decision given on the appeal may only be contested by an appeal where the courts with which any further appeal is to be lodged have been communicated by the Member State concerned to the Commission pursuant to point (c) of Article 75.

*Article 51*

1. The court to which an application for refusal of enforcement is submitted or the court which hears an appeal lodged under Article 49 or Article 50 may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired. In the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland, Cyprus or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

SECTION 4

***Common provisions***

*Article 52*

Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed.

*Article 53*

The court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I.

*Article 54*

1. If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests.

Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

2. Any party may challenge the adaptation of the measure or order before a court.

3. If necessary, the party invoking the judgment or seeking its enforcement may be required to provide a translation or a transliteration of the judgment.

*Article 55*

A judgment given in a Member State which orders a payment by way of a penalty shall be enforceable in the Member State addressed only if the amount of the payment has been finally determined by the court of origin.

*Article 56*

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for the enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State addressed.

*Article 57*

1. When a translation or a transliteration is required under this Regulation, such translation or transliteration shall be into the official language of the Member State concerned or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where a judgment given in another Member State is invoked or an application is made, in accordance with the law of that Member State.

2. For the purposes of the forms referred to in Articles 53 and 60, translations or transliterations may also be into any other official language or languages of the institutions of the Union that the Member State concerned has indicated it can accept.

3. Any translation made under this Regulation shall be done by a person qualified to do translations in one of the Member States.

CHAPTER IV

**AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS**

*Article 58*

1. An authentic instrument which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required. Enforcement of the authentic instrument may be refused only if such enforcement is manifestly contrary to public policy (ordre public) in the Member State addressed.

The provisions of Section 2, Subsection 2 of Section 3, and Section 4 of Chapter III shall apply as appropriate to authentic instruments.

2. The authentic instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

*Article 59*

A court settlement which is enforceable in the Member State of origin shall be enforced in the other Member States under the same conditions as authentic instruments.

*Article 60*

The competent authority or court of the Member State of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex II containing a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement.

CHAPTER V

**GENERAL PROVISIONS**

*Article 61*

No legalisation or other similar formality shall be required for documents issued in a Member State in the context of this Regulation.

*Article 62*

1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

*Article 63*

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat;

(b) central administration; or

(c) principal place of business.

2. For the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

*Article 64*

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Member State who are being prosecuted in the criminal courts of another Member State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Member States.

*Article 65*

1. The jurisdiction specified in point 2 of Article 8 and Article 13 in actions on a warranty or guarantee or in any other third-party proceedings may be resorted to in the Member States included in the list established by the Commission pursuant to point (b) of Article 76(1) and Article 76(2) only in so far as permitted under national law. A person domiciled in another Member State may be invited to join the proceedings before the courts of those Member States pursuant to the rules on third-party notice referred to in that list.

2. Judgments given in a Member State by virtue of point 2 of Article 8 or Article 13 shall be recognised and enforced in accordance with Chapter III in any other Member State. Any effects which judgments given in the Member States included in the list referred to in paragraph 1 may have, in accordance with the law of those Member States, on third parties by application of paragraph 1 shall be recognised in all Member States.

3. The Member States included in the list referred to in paragraph 1 shall, within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC [1] ('the European Judicial Network') provide information on how to determine, in accordance with their national law, the effects of the judgments referred to in the second sentence of paragraph 2.

CHAPTER VI

**TRANSITIONAL PROVISIONS**

*Article 66*

1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.

2. Notwithstanding Article 80, Regulation (EC) No 44/2001 shall 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 10 January 2015 which fall within the scope of that Regulation.

CHAPTER VII

**RELATIONSHIP WITH OTHER INSTRUMENTS**

*Article 67*

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments.

[1] OJ L 174, 27.6.2001, p. 25.

*Article 68*

1. This Regulation shall, as between the Member States, supersede the 1968 Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.

2. In so far as this Regulation replaces the provisions of the 1968 Brussels Convention between the Member States, any reference to that Convention shall be understood as a reference to this Regulation.

*Article 69*

Subject to Articles 70 and 71, this Regulation shall, as between the Member States, supersede the conventions that cover the same matters as those to which this Regulation applies. In particular, the conventions included in the list established by the Commission pursuant to point (c) of Article 76(1) and Article 76(2) shall be superseded.

*Article 70*

1. The conventions referred to in Article 69 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given, authentic instruments formally drawn up or registered and court settlements approved or concluded before the date of entry into force of Regulation (EC) No 44/2001.

*Article 71*

1. This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

(a) this Regulation shall not prevent a court of a Member State which is party to a convention on a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not party to that convention. The court hearing the action shall, in any event, apply Article 28 of this Regulation;

(b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation on recognition and enforcement of judgments may be applied.

*Article 72*

This Regulation shall not affect agreements by which Member States, prior to the entry into force of Regulation (EC) No 44/2001, undertook pursuant to Article 59 of the 1968 Brussels Convention not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third State where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

*Article 73*

1. This Regulation shall not affect the application of the 2007 Lugano Convention.

2. This Regulation shall not affect the application of the 1958 New York Convention.

3. This Regulation shall not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation.

CHAPTER VIII

**FINAL PROVISIONS**

*Article 74*

The Member States shall provide, within the framework of the European Judicial Network and with a view to making the information available to the public, a description of national rules and procedures concerning enforcement, including authorities competent for enforcement, and information on any limitations on enforcement, in particular debtor protection rules and limitation or prescription periods.

The Member States shall keep this information permanently updated.

*Article 75*

By 10 January 2014, the Member States shall communicate to the Commission:

(a) the courts to which the application for refusal of enforcement is to be submitted pursuant to Article 47(1);

(b) the courts with which an appeal against the decision on the application for refusal of enforcement is to be lodged pursuant to Article 49(2);

(c) the courts with which any further appeal is to be lodged pursuant to Article 50; and

(d) the languages accepted for translations of the forms as referred to in Article 57(2).

The Commission shall make the information publicly available through any appropriate means, in particular through the European Judicial Network.

*Article 76*

1. The Member States shall notify the Commission of:

(a) the rules of jurisdiction referred to in Articles 5(2) and 6(2);

(b) the rules on third-party notice referred to in Article 65; and

(c) the conventions referred to in Article 69.

2. The Commission shall, on the basis of the notifications by the Member States referred to in paragraph 1, establish the corresponding lists.

3. The Member States shall notify the Commission of any subsequent amendments required to be made to those lists. The Commission shall amend those lists accordingly.

4. The Commission shall publish the lists and any subsequent amendments made to them in the *Official Journal of the European Union*.

5. The Commission shall make all information notified pursuant to paragraphs 1 and 3 publicly available through any other appropriate means, in particular through the European Judicial Network.

*Article 77*

The Commission shall be empowered to adopt delegated acts in accordance with Article 78 concerning the amendment of Annexes I and II.

*Article 78*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 77 shall be conferred on the Commission for an indeterminate period of time from 9 January 2013.

3. The delegation of power referred to in Article 77 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 77 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

*Article 79*

By 11 January 2022 the Commission shall present a report to the European Parliament, to the Council and to the European Economic and Social Committee on the application of this Regulation. That report shall include an evaluation of the possible need for a further extension of the rules on jurisdiction to defendants not domiciled in a Member State, taking into account the operation of this Regulation and possible developments at international level. Where appropriate, the report shall be accompanied by a proposal for amendment of this Regulation.

*Article 80*

This Regulation shall repeal Regulation (EC) No 44/2001. References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table set out in Annex III.

*Article 81*

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 10 January 2015, with the exception of Articles 75 and 76, which shall apply from 10 January 2014.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 12 December 2012.

| | |
|---|---|
| *For the European Parliament* | *For the Council* |
| *The President* | *The President* |
| M. SCHULZ | A. D. MAVROYIANNIS |

*ANNEX I*

**CERTIFICATE CONCERNING A JUDGMENT IN CIVIL AND COMMERCIAL MATTERS**

**Article 53 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**

1. COURT OF ORIGIN

1.1. Name:

1.2. Address:

1.2.1. Street and number/PO box:

1.2.2. Place and postal code:

1.2.3. Member State:

AT ☐ BE ☐ BG ☐ CY ☐ CZ ☐ DE ☐ EE ☐ EL ☐ ES ☐ FI ☐ FR ☐ HU ☐ IE ☐ IT ☐ LT ☐LU ☐ LV ☐ MT ☐ NL ☐ PL ☐ PT ☐ RO ☐ SE ☐ SI ☐ SK ☐ UK ☐

1.3. Telephone:

1.4. Fax

1.5. E-mail (if available):

2. CLAIMANT(S) ([1])

2.1. Surname and given name(s)/name of company or organisation:

2.2. Identification number (if applicable and if available):

2.3. Date (dd/mm/yyyy) and place of birth or, if legal person, of incorporation/formation/registration (if relevant and if available):

2.4. Address:

2.4.1. Street and number/PO box:

2.4.2. Place and postal code:

2.4.3. Country:

AT ☐ BE ☐ BG ☐ CY ☐ CZ ☐ DE ☐ EE ☐ EL ☐ ES ☐ FI ☐ FR ☐ HU ☐ IE ☐ IT ☐ LT ☐ LU ☐ LV ☐ MT ☐ NL ☐ PL ☐ PT ☐ RO ☐ SE ☐ SI ☐ SK ☐ UK ☐ Other (please specify (ISO-code)) ☐

2.5. E-mail (if available):

3. DEFENDANT(S) ([2])

3.1. Surname and given name(s)/name of company or organisation:

3.2. Identification number (if applicable and if available):

3.3. Date (dd/mm/yyyy) and place of birth or, if legal person, of incorporation/formation/registration (if relevant and if available):

3.4. Address:

3.4.1. Street and number/PO box:

3.4.2. Place and postal code:

3.4.3. Country:

AT ☐ BE ☐ BG ☐ CY ☐ CZ ☐ DE ☐ EE ☐ EL ☐ ES ☐ FI ☐ FR ☐ HU ☐ IE ☐ IT ☐ LT ☐ LU ☐ LV ☐ MT ☐ NL ☐ PL ☐ PT ☐ RO ☐ SE ☐ SI ☐ SK ☐ UK ☐ Other (please specify (ISO-code)) ☐

3.5. E-mail (if available):

4. THE JUDGMENT

4.1. Date (dd/mm/yyyy) of the judgment:

4.2. Reference number of the judgment:

4.3. The judgment was given in default of appearance:

4.3.1. ☐ No

4.3.2. ☐ Yes (please indicate the date (dd/mm/yyyy) on which the document instituting the proceedings or an equivalent document was served on the defendant):

4.4. The judgment is enforceable in the Member State of origin without any further conditions having to be met:

4.4.1. ☐ Yes (please indicate the date (dd/mm/yyyy) on which the judgment was declared enforceable, if applicable):

4.4.2. ☐ Yes, but only against the following person(s) (please specify):

4.4.3. ☐ Yes, but limited to part(s) of the judgment (please specify):

4.4.4. ☐ The judgment does not contain an enforceable obligation

4.5. As of the date of issue of the certificate, the judgment has been served on the defendant(s):

4.5.1. ☐ Yes (please indicate the date of service (dd/mm/yyyy) if known):

4.5.1.1. The judgment was served in the following language(s):

BG ☐ ES ☐ CS ☐ DE ☐ ET ☐ EL ☐ EN ☐ FR ☐ GA ☐ IT ☐ LV ☐ LT ☐ HU ☐ MT ☐ NL ☐ PL ☐ PT ☐ RO ☐ SK ☐ SL ☐ FI ☐ SV ☐ Other (please specify (ISO-code)) ☐

4.5.2. ☐ Not to the knowledge of the court

4.6. Terms of the judgment and interest:

4.6.1. Judgment on a monetary claim ([3])

4.6.1.1. Short description of the subject-matter of the case:

4.6.1.2. The court has ordered

..... (surname and given name(s)/name of company or organisation) ([4])

to make a payment to:

..... (surname and given name(s)/name of company or organisation)

4.6.1.2.1. If more than one person has been held liable for one and the same claim, the whole amount may be collected from any one of them:

4.6.1.2.1.1. ☐ Yes

4.6.1.2.1.2. ☐ No

4.6.1.3. Currency:

☐ euro (EUR) ☐ Bulgarian lev (BGN) ☐ Czech koruna (CZK) ☐ Hungarian forint (HUF) ☐ Lithuanian litas (LTL) ☐ Latvian lats (LVL) ☐ Polish zloty (PLN) ☐ Pound Sterling (GBP) ☐ Romanian leu (RON) ☐ Swedish krona (SEK) ☐ Other (please specify (ISO code)):

4.6.1.4. Principal amount:

4.6.1.4.1. ☐ Amount to be paid in one sum

4.6.1.4.2. ☐ Amount to be paid in instalments ([5])

| Due date (dd/mm/yyyy) | Amount |
|---|---|
| | |
| | |

4.6.1.4.3. ☐ Amount to be paid regularly

4.6.1.4.3.1. ☐ per day

4.6.1.4.3.2. ☐ per week

4.6.1.4.3.3. ☐ other (state frequency):

4.6.1.4.3.4. From date (dd/mm/yyyy) or event:

4.6.1.4.3.5. If applicable, until (date (dd/mm/yyyy) or event):

4.6.1.5. Interest, if applicable:

4.6.1.5.1. Interest:

4.6.1.5.1.1. ☐ Not specified in the judgment

4.6.1.5.1.2. ☐ Yes, specified in the judgment as follows:

4.6.1.5.1.2.1. Amount:

or:

4.6.1.5.1.2.2. Rate … %

4.6.1.5.1.2.3. Interest due from ..... (date (dd/mm/yyyy) or event) to ..... (date (dd/mm/yyyy) or event) ([6])

4.6.1.5.2. ☐ Statutory interest (if applicable) to be calculated in accordance with (please specify relevant statute):

4.6.1.5.2.1. Interest due from ..... (date (dd/mm/yyyy) or event) to ..... (date (dd/mm/yyyy) or event) ([6])

4.6.1.5.3. ☐ Capitalisation of interest (if applicable, please specify):

4.6.2. Judgment ordering a provisional, including a protective, measure:

4.6.2.1. Short description of the subject-matter of the case and the measure ordered:

4.6.2.2. The measure was ordered by a court having jurisdiction as to the substance of the matter

4.6.2.2.1. ☐ Yes

4.6.3. Other type of judgment:

4.6.3.1. Short description of the subject-matter of the case and the ruling by the court:

4.7. Costs ([7]):

4.7.1. Currency:

☐ euro (EUR) ☐ Bulgarian lev (BGN) ☐ Czech koruna (CZK) ☐ Hungarian forint (HUF) ☐ Lithuanian litas (LTL) ☐ Latvian lats (LVL) ☐ Polish zloty (PLN) ☐ Pound Sterling (GBP) ☐ Romanian leu (RON) ☐ Swedish krona (SEK) ☐ Other (please specify (ISO code)):

4.7.2. The following person(s) against whom enforcement is sought has/have been ordered to bear the costs:

4.7.2.1. Surname and given name(s)/name of company or organisation: ([8])

4.7.2.2. If more than one person has been ordered to bear the costs, the whole amount may be collected from any one of them:

4.7.2.2.1. ☐ Yes

4.7.2.2.2. ☐ No

4.7.3. The costs of which recovery is sought are as follows: ([9])

4.7.3.1. ☐ The costs have been fixed in the judgment by way of a total amount (please specify amount):

4.7.3.2. ☐ The costs have been fixed in the judgment by way of a percentage of total costs (please specify percentage of total):

4.7.3.3. ☐ Liability for the costs has been determined in the judgment and the exact amounts are as follows:

4.7.3.3.1. ☐ Court fees:

4.7.3.3.2. ☐ Lawyers' fees:

4.7.3.3.3. ☐ Cost of service of documents:

4.7.3.3.4. ☐ Other:

4.7.3.4. ☐ Other (please specify):

4.7.4. Interest on costs:

4.7.4.1. ☐ Not applicable

4.7.4.2. ☐ Interest specified in the judgment

4.7.4.2.1. ☐ Amount:

or

4.7.4.2.2. ☐ Rate … %

4.7.4.2.2.1. Interest due from ..... (date (dd/mm/yyyy) or event) to ..... (date (dd/mm/yyyy) or event) ([6])

4.7.4.3. ☐ Statutory interest (if applicable) to be calculated in accordance with (please specify relevant statute):

4.7.4.3.1. Interest due from ..... (date (dd/mm/yyyy) or event) to ..... (date (dd/mm/yyyy) or event) ([6])

4.7.4.4. ☐ Capitalisation of interest (if applicable, please specify):

Done at: …

Signature and/or stamp of the court of origin:

([1]) Insert information for all claimants if the judgment concerns more than one.
([2]) Insert information for all defendants if the judgment concerns more than one.
([3]) If the judgment only concerns costs relating to a claim which has been decided in an earlier judgment, leave point 4.6.1 blank and go to point 4.7.
([4]) If more than one person has been ordered to make a payment, insert information for all persons.
([5]) Insert information for each instalment.
([6]) Insert information for all periods if more than one.
([7]) This point also covers situations where the costs are awarded in a separate judgment.
([8]) Insert information for all persons if more than one.
([9]) In the event that the costs may be recovered from several persons, insert the breakdown for each person separately.

*ANNEX II*

**CERTIFICATE CONCERNING AN AUTHENTIC INSTRUMENT/COURT SETTLEMENT (1) IN CIVIL AND COMMERCIAL MATTERS**

**Article 60 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**

1. COURT OR COMPETENT AUTHORITY ISSUING THE CERTIFICATE

1.1. Name:

1.2. Address:

1.2.1. Street and number/PO box:

1.2.2. Place and postal code:

1.2.3. Member State:

AT ☐ BE ☐ BG ☐ CY ☐ CZ ☐ DE ☐ EE ☐ EL ☐ ES ☐ FI ☐ FR ☐ HU ☐ IE ☐ IT ☐ LT ☐ LU ☐ LV ☐ MT ☐ NL ☐ PL ☐ PT ☐ RO ☐ SE ☐ SI ☐ SK ☐ UK ☐

1.3. Telephone:

1.4. Fax

1.5. E-mail (if available):

2. AUTHENTIC INSTRUMENT

2.1. Authority which has drawn up the authentic instrument (if different from the authority issuing the certificate)

2.1.1. Name and designation of authority:

2.1.2. Address:

2.2. Date (dd/mm/yyyy) on which the authentic instrument was drawn up by the authority referred to in point 2.1:

2.3. Reference number of the authentic instrument (if applicable):

2.4. Date (dd/mm/yyyy) on which the authentic instrument was registered in the Member State of origin (to be filled in only if the date of registration determines the legal effect of the instrument and this date is different from the date indicated in point 2.2):

2.4.1. Reference number in the register (if applicable):

3. COURT SETTLEMENT

3.1. Court which approved the court settlement or before which the court settlement was concluded (if different from the court issuing the certificate)

3.1.1. Name of court:

3.1.2. Address:

3.2. Date (dd/mm/yyyy) of the court settlement:

3.3. Reference number of the court settlement:

4. PARTIES TO THE AUTHENTIC INSTRUMENT/COURT SETTLEMENT:

4.1. Name(s) of creditor(s) (surname and given name(s)/name of company or organisation) (2):

4.1.1. Identification number (if applicable and if available):

4.1.2. Date (dd/mm/yyyy) and place of birth or, if legal person, of incorporation/formation/registration (if relevant and if available):

4.2. Name(s) of debtor(s) (surname and given name(s)/name of company or organisation) (3):

4.2.1. Identification number (if applicable and if available):

4.2.2. Date (dd/mm/yyyy) and place of birth or, if legal person, of incorporation/formation/registration (if relevant and if available):

4.3. Name of other parties, if any (surname and given name(s)/name of company or organisation) (4)

4.3.1. Identification number (if applicable and if available):

4.3.2. Date (dd/mm/yyyy) and place of birth or, if legal person, of incorporation/formation/registration (if relevant and if available):

5. ENFORCEABILITY OF THE AUTHENTIC INSTRUMENT/COURT SETTLEMENT IN THE MEMBER STATE OF ORIGIN

5.1. The authentic instrument/court settlement is enforceable in the Member State of origin

5.1.1. ☐ Yes

5.2. Terms of the authentic instrument/court settlement and interest

5.2.1 Authentic instrument/court settlement relating to a monetary claim

5.2.1.1. Short description of the subject matter:

5.2.1.2. Under the authentic instrument/court settlement

..... (surname and given name(s)/name of company or organisation) ([5])

has to make a payment to:

..... (surname and given name(s)/name of company or organisation)

5.2.1.2.1. If more than one person has been held liable for one and the same claim, the whole amount may be collected from any one of them:

5.2.1.2.1.1. ☐ Yes

5.2.1.2.1.2. ☐ No

5.2.1.3. Currency:

☐ euro (EUR) ☐ Bulgarian lev (BGN) ☐ Czech koruna (CZK) ☐ Hungarian forint (HUF) ☐ Lithuanian litas (LTL) ☐ Latvian lats (LVL) ☐ Polish zloty (PLN) ☐ Pound Sterling (GBP) ☐ Romanian leu (RON) ☐ Swedish krona (SEK) ☐ Other (please specify (ISO code)):

5.2.1.4. Principal amount:

5.2.1.4.1. ☐ Amount to be paid in one sum

5.2.1.4.2. ☐ Amount to be paid in instalments ([6])

| Due date (dd/mm/yyyy) | Amount |
|---|---|
| | |
| | |

5.2.1.4.3. ☐ Amount to be paid regularly

5.2.1.4.3.1. ☐ per day

5.2.1.4.3.2. ☐ per week

5.2.1.4.3.3. ☐ other (state frequency):

5.2.1.4.3.4. From date (dd/mm/yyyy) or event:

5.2.1.4.3.5. If applicable, until ..... (date (dd/mm/yyyy) or event)

5.2.1.5. Interest, if applicable

5.2.1.5.1. Interest:

5.2.1.5.1.1. ☐ Not specified in the authentic instrument/court settlement

5.2.1.5.1.2. ☐ Yes, specified in the authentic instrument/court settlement as follows:

5.2.1.5.1.2.1. Amount:

or

5.2.1.5.1.2.2. Rate … %

5.2.1.5.1.2.3. Interest due from ..... (date (dd/mm/yyyy) or event) to ..... (date (dd/mm/yyyy) or event) ([7])

5.2.1.5.2. ☐ Statutory interest (if applicable) to be calculated in accordance with (please specify relevant statute):

5.2.1.5.2.1. Interest due from ..... (date (dd/mm/yyyy) or event) to ..... (date (dd/mm/yyyy) or event) ([7])

5.2.1.5.3. ☐ Capitalisation of interest (if applicable, please specify):

5.2.2. Authentic instrument/court settlement relating to a non-monetary enforceable obligation:

5.2.2.1. Short description of the enforceable obligation

5.2.2.2. The obligation referred to in point 5.2.2.1 is enforceable against the following person(s) ([8]) (surname and given name(s)/name of company or organisation):

Done at: …

Signature and/or stamp of the court or competent authority issuing the certificate:

---

([1]) Delete as appropriate throughout the certificate.
([2]) Insert information for all creditors if more than one.
([3]) Insert information for all debtors if more than one.
([4]) Insert information for other parties (if any).
([5]) If more than one person has been ordered to make a payment, insert information for all persons.
([6]) Insert information for each instalment.
([7]) Insert information for all periods if more than one.
([8]) Insert information for all persons if more than one.

*ANNEX III*

**CORRELATION TABLE**

| Regulation (EC) No 44/2001 | This Regulation |
|---|---|
| Article 1(1) | Article 1(1) |
| Article 1(2), introductory words | Article 1(2), introductory words |
| Article 1(2) point (a) | Article 1(2), points (a) and (f) |
| Article 1(2), points (b) to (d) | Article 1(2), points (b) to (d) |
| — | Article 1(2), point (e) |
| Article 1(3) | — |
| — | Article 2 |
| Article 2 | Article 4 |
| Article 3 | Article 5 |
| Article 4 | Article 6 |
| Article 5, introductory words | Article 7, introductory words |
| Article 5, point (1) | Article 7, point (1) |
| Article 5, point (2) | — |
| Article 5, points (3) and (4) | Article 7, points (2) and (3) |
| — | Article 7, point (4) |
| Article 5, points (5) to (7) | Article 7, points (5) to (7) |
| Article 6 | Article 8 |
| Article 7 | Article 9 |
| Article 8 | Article 10 |
| Article 9 | Article 11 |
| Article 10 | Article 12 |
| Article 11 | Article 13 |
| Article 12 | Article 14 |
| Article 13 | Article 15 |
| Article 14 | Article 16 |
| Article 15 | Article 17 |
| Article 16 | Article 18 |
| Article 17 | Article 19 |
| Article 18 | Article 20 |
| Article 19, points (1) and (2) | Article 21(1) |
| — | Article 21(2) |
| Article 20 | Article 22 |
| Article 21 | Article 23 |
| Article 22 | Article 24 |
| Article 23(1) and (2) | Article 25(1) and (2) |

| Regulation (EC) No 44/2001 | This Regulation |
|---|---|
| Article 23(3) | — |
| Article 23(4) and (5) | Article 25(3) and (4) |
| — | Article 25(5) |
| Article 24 | Article 26(1) |
| — | Article 26(2) |
| Article 25 | Article 27 |
| Article 26 | Article 28 |
| Article 27(1) | Article 29(1) |
| — | Article 29(2) |
| Article 27(2) | Article 29(3) |
| Article 28 | Article 30 |
| Article 29 | Article 31(1) |
| — | Article 31(2) |
| — | Article 31(3) |
| — | Article 31(4) |
| Article 30 | Article 32(1), points (a) and (b) |
| — | Article 32(1), second subparagraph |
| — | Article 32(2) |
| — | Article 33 |
| — | Article 34 |
| Article 31 | Article 35 |
| Article 32 | Article 2, point (a) |
| Article 33 | Article 36 |
| — | Article 37 |
| — | Article 39 |
| — | Article 40 |
| — | Article 41 |
| — | Article 42 |
| — | Article 43 |
| — | Article 44 |
| Article 34 | Article 45(1), points (a) to (d) |
| Article 35(1) | Article 45(1), point (e) |
| Article 35(2) | Article 45(2) |
| Article 35(3) | Article 45(3) |
| — | Article 45(4) |
| Article 36 | Article 52 |
| Article 37(1) | Article 38, point (a) |
| Article 38 | — |

| Regulation (EC) No 44/2001 | This Regulation |
|---|---|
| Article 39 | — |
| Article 40 | — |
| Article 41 | — |
| Article 42 | — |
| Article 43 | — |
| Article 44 | — |
| Article 45 | — |
| Article 46 | — |
| Article 47 | — |
| Article 48 | — |
| — | Article 46 |
| — | Article 47 |
| — | Article 48 |
| — | Article 49 |
| — | Article 50 |
| — | Article 51 |
| — | Article 54 |
| Article 49 | Article 55 |
| Article 50 | — |
| Article 51 | Article 56 |
| Article 52 | — |
| Article 53 | — |
| Article 54 | Article 53 |
| Article 55(1) | — |
| Article 55(2) | Article 37(2), Article 47(3) and Article 57 |
| Article 56 | Article 61 |
| Article 57(1) | Article 58(1) |
| Article 57(2) | — |
| Article 57(3) | Article 58(2) |
| Article 57(4) | Article 60 |
| Article 58 | Article 59 and Article 60 |
| Article 59 | Article 62 |
| Article 60 | Article 63 |
| Article 61 | Article 64 |
| Article 62 | Article 3 |
| Article 63 | — |
| Article 64 | — |
| Article 65 | Article 65(1) and (2) |

| Regulation (EC) No 44/2001 | This Regulation |
|---|---|
| — | Article 65(3) |
| Article 66 | Article 66 |
| Article 67 | Article 67 |
| Article 68 | Article 68 |
| Article 69 | Article 69 |
| Article 70 | Article 70 |
| Article 71 | Article 71 |
| Article 72 | Article 72 |
| — | Article 73 |
| Article 73 | Article 79 |
| Article 74(1) | Article 75, first paragraph, points (a), (b) and (c), and Article 76(1), point (a) |
| Article 74(2) | Article 77 |
| — | Article 78 |
| — | Article 80 |
| Article 75 | — |
| Article 76 | Article 81 |
| Annex I | Article 76(1), point (a) |
| Annex II | Article 75, point (a) |
| Annex III | Article 75, point (b) |
| Annex IV | Article 75, point (c) |
| Annex V | Annex I and Annex II |
| Annex VI | Annex II |
| — | Annex III |

# ANNEX 2—ROME I

**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)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([2]),

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters ([3]). The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme ([4]), adopted by the European Council on 5 November 2004, called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations (Rome I).

([1]) OJ C 318, 23.12.2006, p. 56.

([2]) Opinion of the European Parliament of 29 November 2007 (not yet published in the Official Journal) and Council Decision of 5 June 2008.

([3]) OJ C 12, 15.1.2001, p. 1.

([4]) OJ C 53, 3.3.2005, p. 1.

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([5]) (Brussels I) and 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) ([6]).

(8) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(9) Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character.

(10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.

(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.

([5]) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

([6]) OJ L 199, 31.7.2007, p. 40.

(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.

(15) Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations [1] (the Rome Convention), the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007.

(16) To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.

(17) As far as the applicable law in the absence of choice is concerned, the concept of 'provision of services' and 'sale of goods' should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.

(18) As far as the applicable law in the absence of choice is concerned, multilateral systems should be those in which trading is conducted, such as regulated markets and multilateral trading facilities as referred to in Article 4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments [2], regardless of whether or not they rely on a central counterparty.

(19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

(20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(21) In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(22) As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term 'consignor' should refer to any person who enters into a contract of carriage with the carrier and the term 'the carrier' should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.

(24) With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities'. The declaration also states that 'the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by

[1] OJ C 334, 30.12.2005, p. 1.

[2] OJ L 145, 30.4.2004, p. 1. Directive as last amended by Directive 2008/10/EC (OJ L 76, 19.3.2008, p. 33).

whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.'.

(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

(26) For the purposes of this Regulation, financial services such as investment services and activities and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) ([1]), should be subject to Article 6 of this Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services.

(27) Various exceptions should be made to the general conflict-of-law rule for consumer contracts. Under one such exception the general rule should not apply to contracts relating to rights *in rem* in immovable property or tenancies of such property unless the contract relates to the right to use immovable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis ([2]).

(28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Likewise, whenever such instruments are issued or offered, the contractual relationship established between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the country of habitual residence of the consumer, as there is a need to ensure uniformity in the terms and conditions of an issuance or an offer. The same rationale should apply with regard to the multilateral systems covered by Article 4(1)(h), in respect of which it should be ensured that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within those systems or with the operator of such systems.

(29) For the purposes of this Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscription and redemption of units in collective investment undertakings should include the terms governing, *inter alia*, the allocation of securities or units, rights in the event of over-subscription, withdrawal rights and similar matters in the context of the offer as well as those matters referred to in Articles 10, 11, 12 and 13, thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law.

(30) For the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.

(31) Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems ([3]).

(32) Owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders. Therefore, Article 6 should not apply in the context of those particular contracts.

(33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States.

(34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services ([4]).

([1]) OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2008/18/EC of the European Parliament and of the Council (OJ L 76, 19.3.2008, p. 42).

([2]) OJ L 280, 29.10.1994, p. 83.

([3]) OJ L 166, 11.6.1998, p. 45.

([4]) OJ L 18, 21.1.1997, p. 1.

(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.

(36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

(37) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.

(38) In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term 'relationship' should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.

(39) For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation.

(40) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) ([1]).

(41) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(42) The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations.

(43) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain its objective.

(44) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified its wish to take part in the adoption and application of the present Regulation.

(45) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(46) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

([1]) OJ L 178, 17.7.2000, p. 1.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

**SCOPE**

*Article 1*

**Material scope**

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;

(b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;

(c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(e) arbitration agreements and agreements on the choice of court;

(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;

(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;

(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(i) obligations arising out of dealings prior to the conclusion of a contract;

(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [1] the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.

4. In this Regulation, the term 'Member State' shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

*Article 2*

**Universal application**

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II

**UNIFORM RULES**

*Article 3*

**Freedom of choice**

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the

[1] OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2008/19/EC (OJ L 76, 19.3.2008, p. 44).

parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

*Article 4*

**Applicable law in the absence of choice**

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

(c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

*Article 5*

**Contracts of carriage**

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

(a) the passenger has his habitual residence; or

(b) the carrier has his habitual residence; or

(c) the carrier has his place of central administration; or

(d) the place of departure is situated; or

(e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

*Article 6*

**Consumer contracts**

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another

person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

(b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1];

(c) a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

(d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;

(e) a contract concluded within the type of system falling within the scope of Article 4(1)(h).

[1] OJ L 158, 23.6.1990, p. 59.

*Article 7*

**Insurance contracts**

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [2] shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

[2] OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/68/EC of the European Parliament and of the Council (OJ L 323, 9.12.2005, p. 1).

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;

(b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services ([1]) and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

*Article 8*

**Individual employment contracts**

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

*Article 9*

**Overriding mandatory provisions**

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

*Article 10*

**Consent and material validity**

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.

2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

*Article 11*

**Formal validity**

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is

([1]) OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2005/14/EC of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 14).

formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

(a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and

(b) those requirements cannot be derogated from by agreement.

*Article 12*

**Scope of the law applicable**

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

*Article 13*

**Incapacity**

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.

*Article 14*

**Voluntary assignment and contractual subrogation**

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

*Article 15*

**Legal subrogation**

Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

*Article 16*

**Multiple liability**

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to

claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

*Article 17*

**Set-off**

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

*Article 18*

**Burden of proof**

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER III

**OTHER PROVISIONS**

*Article 19*

**Habitual residence**

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

*Article 20*

**Exclusion of *renvoi***

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

*Article 21*

**Public policy of the forum**

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

*Article 22*

**States with more than one legal system**

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

*Article 23*

**Relationship with other provisions of Community law**

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

*Article 24*

**Relationship with the Rome Convention**

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

*Article 25*

**Relationship with existing international conventions**

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

*Article 26*

**List of Conventions**

1. By 17 June 2009, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the *Official Journal of the European Union*:

(a) a list of the conventions referred to in paragraph 1;

(b) the denunciations referred to in paragraph 1.

*Article 27*

**Review clause**

1. By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:

(a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and

(b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.

2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

*Article 28*

**Application in time**

This Regulation shall apply to contracts concluded after 17 December 2009.

CHAPTER IV

**FINAL PROVISIONS**

*Article 29*

**Entry into force and application**

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 17 June 2008.

| *For the European Parliament* | *For the Council* |
|---|---|
| *The President* | *The President* |
| H.-G. PÖTTERING | J. LENARČIČ |

# ANNEX 3—ROME II

## 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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 25 June 2007 [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.

(4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [3]. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme [4], adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [5] (Brussels I) and the instruments dealing with the law applicable to contractual obligations.

(8) This Regulation should apply irrespective of the nature of the court or tribunal seised.

(9) Claims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.

(10) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.

(12) The law applicable should also govern the question of the capacity to incur liability in tort/delict.

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[1] OJ C 241, 28.9.2004, p. 1.

[2] Opinion of the European Parliament of 6 July 2005 (OJ C 157 E, 6.7.2006, p. 371), Council Common Position of 25 September 2006 (OJ C 289 E, 28.11.2006, p. 68) and Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal). European Parliament Legislative Resolution of 10 July 2007 and Council Decision of 28 June 2007.

[3] OJ C 12, 15.1.2001, p. 1.

[4] OJ C 53, 3.3.2005, p. 1.

[5] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

(13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.

(14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions, for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.

(15) The principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.

(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18) The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

(19) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(20) The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.

(21) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.

(22) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is, or is likely to be, affected. In cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.

(23) For the purposes of this Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.

(24) 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

(25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.

(26) Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of this Regulation, the term 'intellectual property rights' should be interpreted as meaning, for instance, copyright, related rights, the *sui generis* right for the protection of databases and industrial property rights.

(27) The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

(28) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

(29) Provision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.

(30) *Culpa in contrahendo* for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

(32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

(33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

(34) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.

(35) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to non-contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [1].

[1] OJ L 178, 17.7.2000, p. 1.

(36) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(37) The Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

(38) Since the objective of this Regulation cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary to attain that objective.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

**SCOPE**

*Article 1*

**Scope**

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, 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*).

2. The following shall be excluded from the scope of this Regulation:

(a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;

(b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;

(e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;

(f) non-contractual obligations arising out of nuclear damage;

(g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

4. For the purposes of this Regulation, 'Member State' shall mean any Member State other than Denmark.

*Article 2*

**Non-contractual obligations**

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.

2. This Regulation shall apply also to non-contractual obligations that are likely to arise.

3. Any reference in this Regulation to:

(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and

(b) damage shall include damage that is likely to occur.

*Article 3*

**Universal application**

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II

**TORTS/DELICTS**

*Article 4*

**General rule**

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be 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 of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

*Article 5*

**Product liability**

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

(a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,

(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,

(c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

*Article 6*

**Unfair competition and acts restricting free competition**

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

*Article 7*

**Environmental damage**

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

*Article 8*

**Infringement of intellectual property rights**

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.

2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.

3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

*Article 9*

**Industrial action**

Without prejudice to Article 4(2), the law applicable to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

CHAPTER III

**UNJUST ENRICHMENT, *NEGOTIORUM GESTIO* AND *CULPA IN CONTRAHENDO***

*Article 10*

**Unjust enrichment**

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

*Article 11*

***Negotiorum gestio***

1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

*Article 12*

***Culpa in contrahendo***

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) 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 of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

*Article 13*

**Applicability of Article 8**

For the purposes of this Chapter, Article 8 shall apply to non-contractual obligations arising from an infringement of an intellectual property right.

CHAPTER IV

**FREEDOM OF CHOICE**

*Article 14*

**Freedom of choice**

1. The parties may agree to submit non-contractual obligations to the law of their choice:

(a) by an agreement entered into after the event giving rise to the damage occurred;

or

(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

CHAPTER V

**COMMON RULES**

*Article 15*

**Scope of the law applicable**

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence, the nature and the assessment of damage or the remedy claimed;

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

(f) persons entitled to compensation for damage sustained personally;

(g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

*Article 16*

**Overriding mandatory provisions**

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

*Article 17*

**Rules of safety and conduct**

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

*Article 18*

**Direct action against the insurer of the person liable**

The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

*Article 19*

**Subrogation**

Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

*Article 20*

**Multiple liability**

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

*Article 21*

**Formal validity**

A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed.

*Article 22*

**Burden of proof**

1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

CHAPTER VI

**OTHER PROVISIONS**

*Article 23*

**Habitual residence**

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

*Article 24*

**Exclusion of renvoi**

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

*Article 25*

**States with more than one legal system**

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

*Article 26*

**Public policy of the forum**

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

*Article 27*

**Relationship with other provisions of Community law**

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

*Article 28*

**Relationship with existing international conventions**

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

CHAPTER VII

**FINAL PROVISIONS**

*Article 29*

**List of conventions**

1. By 11 July 2008, Member States shall notify the Commission of the conventions referred to in Article 28(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish in the *Official Journal of the European Union* within six months of receipt:

(i) a list of the conventions referred to in paragraph 1;

(ii) the denunciations referred to in paragraph 1.

*Article 30*

**Review clause**

1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:

(i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation;

(ii) a study on the effects of Article 28 of this Regulation with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

2. Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1].

*Article 31*

**Application in time**

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

*Article 32*

**Date of application**

This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 11 July 2007.

*For the European Parliament*
*The President*
H.-G. PÖTTERING

*For the Council*
*The President*
M. LOBO ANTUNES

[1] OJ L 281, 23.11.1995, p. 31.

**Commission Statement on the review clause (Article 30)**

The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.

**Commission Statement on road accidents**

The Commission, being aware of the different practices followed in the Member States as regards the level of compensation awarded to victims of road traffic accidents, is prepared to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence. To that end the Commission will make available to the European Parliament and to the Council, before the end of 2008, a study on all options, including insurance aspects, for improving the position of cross-border victims, which would pave the way for a Green Paper.

**Commission Statement on the treatment of foreign law**

The Commission, being aware of the different practices followed in the Member States as regards the treatment of foreign law, will publish at the latest four years after the entry into force of the 'Rome II' Regulation and in any event as soon as it is available a horizontal study on the application of foreign law in civil and commercial matters by the courts of the Member States, having regard to the aims of the Hague Programme. It is also prepared to take appropriate measures if necessary.

# ANNEX 4—REGULATION 2015/848, THE INSOLVENCY RECAST REGULATION

**REGULATION (EU) 2015/848 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 20 May 2015**

**on insolvency proceedings**

**(recast)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Acting in accordance with the ordinary legislative procedure ([2]),

Whereas:

(1) On 12 December 2012, the Commission adopted a report on the application of Council Regulation (EC) No 1346/2000 ([3]). The report concluded that the Regulation is functioning well in general but that it would be desirable to improve the application of certain of its provisions in order to enhance the effective administration of cross-border insolvency proceedings. Since that Regulation has been amended several times and further amendments are to be made, it should be recast in the interest of clarity.

(2) The Union has set the objective of establishing an area of freedom, security and justice.

(3) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty.

(4) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Union law. The insolvency of such undertakings also affects the proper functioning of the internal market, and there is a need for a Union act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.

(5) It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping).

(6) This Regulation should include provisions governing jurisdiction for opening insolvency proceedings and actions which are directly derived from insolvency proceedings and are closely linked with them. This Regulation should also contain provisions regarding the recognition and enforcement of judgments issued in such proceedings, and provisions regarding the law applicable to insolvency proceedings. In addition, this Regulation should lay down rules on the coordination of insolvency proceedings which relate to the same debtor or to several members of the same group of companies.

(7) Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council ([4]). Those proceedings should be covered by this Regulation. The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.

([1]) OJ C 271, 19.9.2013, p. 55.
([2]) Position of the European Parliament of 5 February 2014 (not yet published in the Official Journal) and position of the Council at first reading of 12 March 2015 (not yet published in the Official Journal). Position of the European Parliament of 20 May 2015 (not yet published in the Official Journal).
([3]) Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1).
([4]) 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 (OJ L 351, 20.12.2012, p. 1).

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Union measure which is binding and directly applicable in Member States.

(9) This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation.

(10) The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. It should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor. Since such proceedings do not necessarily entail the appointment of an insolvency practitioner, they should be covered by this Regulation if they take place under the control or supervision of a court. In this context, the term 'control' should include situations where the court only intervenes on appeal by a creditor or other interested parties.

(11) This Regulation should also apply to procedures which grant a temporary stay on enforcement actions brought by individual creditors where such actions could adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business. Such procedures should not be detrimental to the general body of creditors and, if no agreement on a restructuring plan can be reached, should be preliminary to other procedures covered by this Regulation.

(12) This Regulation should apply to proceedings the opening of which is subject to publicity in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings.

(13) Accordingly, insolvency proceedings which are confidential should be excluded from the scope of this Regulation. While such proceedings may play an important role in some Member States, their confidential nature makes it impossible for a creditor or a court located in another Member State to know that such proceedings have been opened, thereby making it difficult to provide for the recognition of their effects throughout the Union.

(14) The collective proceedings which are covered by this Regulation should include all or a significant part of the creditors to whom a debtor owes all or a substantial proportion of the debtor's outstanding debts provided that the claims of those creditors who are not involved in such proceedings remain unaffected. Proceedings which involve only the financial creditors of a debtor should also be covered. Proceedings which do not include all the creditors of a debtor should be proceedings aimed at rescuing the debtor. Proceedings that lead to a definitive cessation of the debtor's activities or the liquidation of the debtor's assets should include all the debtor's creditors. Moreover, the fact that some insolvency proceedings for natural persons exclude specific categories of claims, such as maintenance claims, from the possibility of a debt-discharge should not mean that such proceedings are not collective.

(15) This Regulation should also apply to proceedings that, under the law of some Member States, are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis. Although labelled as 'interim', such proceedings should meet all other requirements of this Regulation.

(16) This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency. Similarly, the purpose of adjustment of debt should not include specific proceedings in which debts of a natural person of very low income and very low asset value are written off, provided that this type of proceedings never makes provision for payment to creditors.

(17) This Regulation's scope should extend to proceedings which are triggered by situations in which the debtor faces non-financial difficulties, provided that such difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due. The time frame relevant for the determination of such threat may extend to a period of several months or even longer in order to account for cases in which the debtor is faced with non-financial difficulties threatening the status of its business as a going concern and, in the medium term, its liquidity. This may be the case, for example, where the debtor has lost a contract which is of key importance to it.

(18) This Regulation should be without prejudice to the rules on the recovery of State aid from insolvent companies as interpreted by the case-law of the Court of Justice of the European Union.

(19) Insolvency proceedings concerning insurance undertakings, credit institutions, investment firms and other firms, institutions or undertakings covered by Directive 2001/24/EC of the European Parliament and of the Council [1] and collective investment undertakings should be excluded from the scope of this Regulation, as they are all subject to special arrangements and the national supervisory authorities have wide-ranging powers of intervention.

(20) Insolvency proceedings do not necessarily involve the intervention of a judicial authority. Therefore, the term 'court' in this Regulation should, in certain provisions, be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the insolvency proceedings are opened.

(21) Insolvency practitioners are defined in this Regulation and listed in Annex B. Insolvency practitioners who are appointed without the involvement of a judicial body should, under national law, be appropriately regulated and authorised to act in insolvency proceedings. The national regulatory framework should provide for proper arrangements to deal with potential conflicts of interest.

(22) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different. At the next review of this Regulation, it will be necessary to identify further measures in order to improve the preferential rights of employees at European level. This Regulation should take account of such differing national laws in two different ways. On the one hand, provision should be made for special rules on the applicable law in the case of particularly significant rights and legal relationships (e.g. rights *in rem* and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of the opening of proceedings should also be allowed alongside main insolvency proceedings with universal scope.

(23) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests. Those proceedings have universal scope and are aimed at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary insolvency proceedings to be opened to run in parallel with the main insolvency proceedings. Secondary insolvency proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary insolvency proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union.

(24) Where main insolvency proceedings concerning a legal person or company have been opened in a Member State other than that of its registered office, it should be possible to open secondary insolvency proceedings in the Member State of the registered office, provided that the debtor is carrying out an economic activity with human means and assets in that State, in accordance with the case-law of the Court of Justice of the European Union.

(25) This Regulation applies only to proceedings in respect of a debtor whose centre of main interests is located in the Union.

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[1] Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions (OJ L 125, 5.5.2001, p. 15).

(26) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State should be established by the national law of the Member State concerned.

(27) Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction.

(28) When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

(29) This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.

(30) Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation.

(31) With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's principal place of business or at the individual's habitual residence should not apply where, respectively, in the case of a company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings, or, in the case of an individual not exercising an independent business or professional activity, the debtor has relocated his habitual residence to another Member State within the 6-month period prior to the request for opening insolvency proceedings.

(32) In all cases, where the circumstances of the matter give rise to doubts about the court's jurisdiction, the court should require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, give the debtor's creditors the opportunity to present their views on the question of jurisdiction.

(33) In the event that the court seised of the request to open insolvency proceedings finds that the centre of main interests is not located on its territory, it should not open main insolvency proceedings.

(34) In addition, any creditor of the debtor should have an effective remedy against the decision to open insolvency proceedings. The consequences of any challenge to the decision to open insolvency proceedings should be governed by national law.

(35) The courts of the Member State within the territory of which insolvency proceedings have been opened should also have jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them. Such actions should include avoidance actions against defendants in other Member States and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings. In contrast, actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings do not derive directly from the proceedings. Where such an action is related to another action based on general civil and commercial law, the insolvency practitioner should be able to

bring both actions in the courts of the defendant's domicile if he considers it more efficient to bring the action in that forum. This could, for example, be the case where the insolvency practitioner wishes to combine an action for director's liability on the basis of insolvency law with an action based on company law or general tort law.

(36) The court having jurisdiction to open the main insolvency proceedings should be able to order provisional and protective measures as from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are important to guarantee the effectiveness of the insolvency proceedings. In that connection, this Regulation should provide for various possibilities. On the one hand, the court competent for the main insolvency proceedings should also be able to order provisional and protective measures covering assets situated in the territory of other Member States. On the other hand, an insolvency practitioner temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those Member States.

(37) Prior to the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and public authorities, or to cases in which main insolvency proceedings cannot be opened under the law of the Member State where the debtor has the centre of its main interests. The reason for this restriction is that cases in which territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary.

(38) Following the opening of the main insolvency proceedings, this Regulation does not restrict the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment. The insolvency practitioner in the main insolvency proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings.

(39) This Regulation should provide for rules to determine the location of the debtor's assets, which should apply when determining which assets belong to the main or secondary insolvency proceedings, or to situations involving third parties' rights *in rem*. In particular, this Regulation should provide that European patents with unitary effect, a Community trade mark or any other similar rights, such as Community plant variety rights or Community designs, should only be included in the main insolvency proceedings.

(40) Secondary insolvency proceedings can serve different purposes, besides the protection of local interests. Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings to the other Member States where the assets are located. For that reason, the insolvency practitioner in the main insolvency proceedings may request the opening of secondary insolvency proceedings where the efficient administration of the insolvency estate so requires.

(41) Secondary insolvency proceedings may also hamper the efficient administration of the insolvency estate. Therefore, this Regulation sets out two specific situations in which the court seised of a request to open secondary insolvency proceedings should be able, at the request of the insolvency practitioner in the main insolvency proceedings, to postpone or refuse the opening of such proceedings.

(42) First, this Regulation confers on the insolvency practitioner in main insolvency proceedings the possibility of giving an undertaking to local creditors that they will be treated as if secondary insolvency proceedings had been opened. That undertaking has to meet a number of conditions set out in this Regulation, in particular that it be approved by a qualified majority of local creditors. Where such an undertaking has been given, the court seised of a request to open secondary insolvency proceedings should be able to refuse that request if it is satisfied that the undertaking adequately protects the general interests of local creditors. When assessing those interests, the court should take into account the fact that the undertaking has been approved by a qualified majority of local creditors.

(43) For the purposes of giving an undertaking to local creditors, the assets and rights located in the Member State where the debtor has an establishment should form a sub-category of the insolvency estate, and, when distributing them or the proceeds resulting from their realisation, the insolvency practitioner in the main insolvency proceedings should respect the priority rights that creditors would have had if secondary insolvency proceedings had been opened in that Member State.

(44) National law should be applicable, as appropriate, in relation to the approval of an undertaking. In particular, where under national law the voting rules for adopting a restructuring plan require the prior approval of creditors' claims, those claims should be deemed to be approved for the purpose of voting on the undertaking. Where there are different procedures for the adoption of restructuring plans under national law, Member States should designate the specific procedure which should be relevant in this context.

(45) Second, this Regulation should provide for the possibility that the court temporarily stays the opening of secondary insolvency proceedings, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings, in order to preserve the efficiency of the stay granted in the main insolvency proceedings. The court should be able to grant the temporary stay if it is satisfied that suitable measures are in place to protect the general interest of local creditors. In such a case, all creditors that could be affected by the outcome of the negotiations on a restructuring plan should be informed of the negotiations and be allowed to participate in them.

(46) In order to ensure effective protection of local interests, the insolvency practitioner in the main insolvency proceedings should not be able to realise or re-locate, in an abusive manner, assets situated in the Member State where an establishment is located, in particular, with the purpose of frustrating the possibility that such interests can be effectively satisfied if secondary insolvency proceedings are opened subsequently.

(47) This Regulation should not prevent the courts of a Member State in which secondary insolvency proceedings have been opened from sanctioning a debtor's directors for violation of their duties, provided that those courts have jurisdiction to address such disputes under their national law.

(48) Main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the actors involved in all the concurrent proceedings. Proper cooperation implies the various insolvency practitioners and the courts involved cooperating closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the insolvency practitioner in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. In particular, the insolvency practitioner should be able to propose a restructuring plan or composition or apply for a suspension of the realisation of the assets in the secondary insolvency proceedings. When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral).

(49) In light of such cooperation, insolvency practitioners and courts should be able to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings. Such agreements and protocols may vary in form, in that they may be written or oral, and in scope, in that they may range from generic to specific, and may be entered into by different parties. Simple generic agreements may emphasise the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements may establish a framework of principles to govern multiple insolvency proceedings and may be approved by the courts involved, where the national law so requires. They may reflect an agreement between the parties to take, or to refrain from taking, certain steps or actions.

(50) Similarly, the courts of different Member States may cooperate by coordinating the appointment of insolvency practitioners. In that context, they may appoint a single insolvency practitioner for several insolvency proceedings concerning the same debtor or for different members of a group of companies, provided that this is compatible with the rules applicable to each of the proceedings, in particular with any requirements concerning the qualification and licensing of the insolvency practitioner.

(51) This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies.

(52) Where insolvency proceedings have been opened for several companies of the same group, there should be proper cooperation between the actors involved in those proceedings. The various insolvency practitioners and the courts involved should therefore be under a similar obligation to cooperate and communicate with each other as those involved in main and secondary insolvency proceedings relating to the same debtor. Cooperation between the insolvency practitioners should not run counter to the interests of the creditors in each of the proceedings, and such cooperation should be aimed at finding a solution that would leverage synergies across the group.

(53) The introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State. In such cases, the court should also be able to appoint, if appropriate, the same insolvency practitioner in all proceedings concerned, provided that this is not incompatible with the rules applicable to them.

(54) With a view to further improving the coordination of the insolvency proceedings of members of a group of companies, and to allow for a coordinated restructuring of the group, this Regulation should introduce procedural rules on the coordination of the insolvency proceedings of members of a group of companies. Such coordination should strive to ensure the efficiency of the coordination, whilst at the same time respecting each group member's separate legal personality.

(55) An insolvency practitioner appointed in insolvency proceedings opened in relation to a member of a group of companies should be able to request the opening of group coordination proceedings. However, where the law applicable to the insolvency so requires, that insolvency practitioner should obtain the necessary authorisation before making such a request. The request should specify the essential elements of the coordination, in particular an outline of the coordination plan, a proposal as to whom should be appointed as coordinator and an outline of the estimated costs of the coordination.

(56) In order to ensure the voluntary nature of group coordination proceedings, the insolvency practitioners involved should be able to object to their participation in the proceedings within a specified time period. In order to allow the insolvency practitioners involved to take an informed decision on participation in the group coordination proceedings, they should be informed at an early stage of the essential elements of the coordination. However, any insolvency practitioner who initially objects to inclusion in the group coordination proceedings should be able to subsequently request to participate in them. In such a case, the coordinator should take a decision on the admissibility of the request. All insolvency practitioners, including the requesting insolvency practitioner, should be informed of the coordinator's decision and should have the opportunity of challenging that decision before the court which has opened the group coordination proceedings.

(57) Group coordination proceedings should always strive to facilitate the effective administration of the insolvency proceedings of the group members, and to have a generally positive impact for the creditors. This Regulation should therefore ensure that the court with which a request for group coordination proceedings has been filed makes an assessment of those criteria prior to opening group coordination proceedings.

(58) The advantages of group coordination proceedings should not be outweighed by the costs of those proceedings. Therefore, it is necessary to ensure that the costs of the coordination, and the share of those costs that each group member will bear, are adequate, proportionate and reasonable, and are determined in accordance with the national law of the Member State in which group coordination proceedings have been opened. The insolvency practitioners involved should also have the possibility of controlling those costs from an early stage of the proceedings. Where the national law so requires, controlling costs from an early stage of proceedings could involve the insolvency practitioner seeking the approval of a court or creditors' committee.

(59) Where the coordinator considers that the fulfilment of his or her tasks requires a significant increase in costs compared to the initially estimated costs and, in any case, where the costs exceed 10 % of the estimated costs, the coordinator should be authorised by the court which has opened the group coordination proceedings to exceed such costs. Before taking its decision, the court which has opened the group coordination proceedings should give the possibility to the participating insolvency practitioners to be heard before it in order to allow them to communicate their observations on the appropriateness of the coordinator's request.

(60) For members of a group of companies which are not participating in group coordination proceedings, this Regulation should also provide for an alternative mechanism to achieve a coordinated restructuring of the group. An insolvency practitioner appointed in proceedings relating to a member of a group of companies should have standing to request a stay of any measure related to the realisation of the assets in the proceedings opened with respect to other members of the group which are not subject to group coordination proceedings. It should only be possible to request such a stay if a restructuring plan is presented for the members of the group concerned, if the plan is to the benefit of the creditors in the proceedings in respect of which the stay is requested, and if the stay is necessary to ensure that the plan can be properly implemented.

(61) This Regulation should not prevent Member States from establishing national rules which would supplement the rules on cooperation, communication and coordination with regard to the insolvency of members of groups of companies set out in this Regulation, provided that the scope of application of those national rules is limited to the national jurisdiction and that their application would not impair the efficiency of the rules laid down by this Regulation.

(62) The rules on cooperation, communication and coordination in the framework of the insolvency of members of a group of companies provided for in this Regulation should only apply to the extent that proceedings relating to different members of the same group of companies have been opened in more than one Member State.

(63) Any creditor which has its habitual residence, domicile or registered office in the Union should have the right to lodge its claims in each of the insolvency proceedings pending in the Union relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. This Regulation should not prevent the insolvency practitioner from lodging claims on behalf of certain groups of creditors, for example employees, where the national law so provides. However, in order to ensure the equal treatment of creditors, the distribution of proceeds should be coordinated. Every creditor should be able to keep what it has received in the course of insolvency proceedings, but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.

(64) It is essential that creditors which have their habitual residence, domicile or registered office in the Union be informed about the opening of insolvency proceedings relating to their debtor's assets. In order to ensure a swift transmission of information to creditors, Regulation (EC) No 1393/2007 of the European Parliament and of the Council [1] should not apply where this Regulation refers to the obligation to inform creditors. The use of standard forms available in all official languages of the institutions of the Union should facilitate the task of creditors when lodging claims in proceedings opened in another Member State. The consequences of the incomplete filing of the standard forms should be a matter for national law.

(65) This Regulation should provide for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which fall within its scope, and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. The recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise that court's decision.

(66) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main insolvency proceedings and for local proceedings. The *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(67) Automatic recognition of insolvency proceedings to which the law of the State of the opening of proceedings normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provision should be made for a number of exceptions to the general rule.

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[1] 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, p. 79).

(68) There is a particular need for a special reference diverging from the law of the opening State in the case of rights *in rem*, since such rights are of considerable importance for the granting of credit. The basis, validity and extent of rights *in rem* should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of a right *in rem* should therefore be able to continue to assert its right to segregation or separate settlement of the collateral security. Where assets are subject to rights *in rem* under the *lex situs* in one Member State but the main insolvency proceedings are being carried out in another Member State, the insolvency practitioner in the main insolvency proceedings should be able to request the opening of secondary insolvency proceedings in the jurisdiction where the rights *in rem* arise if the debtor has an establishment there. If secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights *in rem* should be paid to the insolvency practitioner in the main insolvency proceedings.

(69) This Regulation lays down several provisions for a court to order a stay of opening proceedings or a stay of enforcement proceedings. Any such stay should not affect the rights *in rem* of creditors or third parties.

(70) If a set-off of claims is not permitted under the law of the State of the opening of proceedings, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off would acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

(71) There is also a need for special protection in the case of payment systems and financial markets, for example in relation to the position-closing agreements and netting agreements to be found in such systems, as well as the sale of securities and the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council [1]. For such transactions, the only law which is relevant should be that applicable to the system or market concerned. That law is intended to prevent the possibility of mechanisms for the payment and settlement of transactions, and provided for in payment and set-off systems or on the regulated financial markets of the Member States, being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules laid down in this Regulation.

(72) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment should be determined by the law applicable to the relevant employment agreement, in accordance with the general rules on conflict of laws. Moreover, in cases where the termination of employment contracts requires approval by a court or administrative authority, the Member State in which an establishment of the debtor is located should retain jurisdiction to grant such approval even if no insolvency proceedings have been opened in that Member State. Any other questions relating to the law of insolvency, such as whether the employees' claims are protected by preferential rights and the status such preferential rights may have, should be determined by the law of the Member State in which the insolvency proceedings (main or secondary) have been opened, except in cases where an undertaking to avoid secondary insolvency proceedings has been given in accordance with this Regulation.

(73) The law applicable to the effects of insolvency proceedings on any pending lawsuit or pending arbitral proceedings concerning an asset or right which forms part of the debtor's insolvency estate should be the law of the Member State where the lawsuit is pending or where the arbitration has its seat. However, this rule should not affect national rules on recognition and enforcement of arbitral awards.

(74) In order to take account of the specific procedural rules of court systems in certain Member States flexibility should be provided with regard to certain rules of this Regulation. Accordingly, references in this Regulation to notice being given by a judicial body of a Member State should include, where a Member State's procedural rules so require, an order by that judicial body directing that notice be given.

(75) For business considerations, the main content of the decision opening the proceedings should be published, at the request of the insolvency practitioner, in a Member State other than that of the court which delivered that decision. If there is an establishment in the Member State concerned, such publication should be mandatory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

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[1] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45).

(76) In order to improve the provision of information to relevant creditors and courts and to prevent the opening of parallel insolvency proceedings, Member States should be required to publish relevant information in cross-border insolvency cases in a publicly accessible electronic register. In order to facilitate access to that information for creditors and courts domiciled or located in other Member States, this Regulation should provide for the interconnection of such insolvency registers via the European e-Justice Portal. Member States should be free to publish relevant information in several registers and it should be possible to interconnect more than one register per Member State.

(77) This Regulation should determine the minimum amount of information to be published in the insolvency registers. Member States should not be precluded from including additional information. Where the debtor is an individual, the insolvency registers should only have to indicate a registration number if the debtor is exercising an independent business or professional activity. That registration number should be understood to be the unique registration number of the debtor's independent business or professional activity published in the trade register, if any.

(78) Information on certain aspects of insolvency proceedings is essential for creditors, such as time limits for lodging claims or for challenging decisions. This Regulation should, however, not require Member States to calculate those time-limits on a case-by-case basis. Member States should be able to fulfil their obligations by adding hyperlinks to the European e-Justice Portal, where self-explanatory information on the criteria for calculating those time-limits is to be provided.

(79) In order to grant sufficient protection to information relating to individuals not exercising an independent business or professional activity, Member States should be able to make access to that information subject to supplementary search criteria such as the debtor's personal identification number, address, date of birth or the district of the competent court, or to make access conditional upon a request to a competent authority or upon the verification of a legitimate interest.

(80) Member States should also be able not to include in their insolvency registers information on individuals not exercising an independent business or professional activity. In such cases, Member States should ensure that the relevant information is given to the creditors by individual notice, and that claims of creditors who have not received the information are not affected by the proceedings.

(81) It may be the case that some of the persons concerned are not aware that insolvency proceedings have been opened, and act in good faith in a way that conflicts with the new circumstances. In order to protect such persons who, unaware that foreign proceedings have been opened, make a payment to the debtor instead of to the foreign insolvency practitioner, provision should be made for such a payment to have a debt-discharging effect.

(82) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council [1].

(83) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. In particular, this Regulation seeks to promote the application of Articles 8, 17 and 47 concerning, respectively, the protection of personal data, the right to property and the right to an effective remedy and to a fair trial.

(84) Directive 95/46/EC of the European Parliament and of the Council [2] and Regulation (EC) No 45/2001 of the European Parliament and of the Council [3] apply to the processing of personal data within the framework of this Regulation.

(85) This Regulation is without prejudice to Regulation (EEC, Euratom) No 1182/71 of the Council [4].

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[1] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

[3] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1).

[4] Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, p. 1).

(86) Since the objective of this Regulation cannot be sufficiently achieved by the Member States but can rather, by reason of the creation of a legal framework for the proper administration of cross-border insolvency proceedings, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

(87) In accordance with Article 3 and Article 4a(1) 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 the Treaty on the Functioning of the European Union, the United Kingdom and Ireland have notified their wish to take part in the adoption and application of this Regulation.

(88) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(89) The European Data Protection Supervisor was consulted and delivered an opinion on 27 March 2013 [1],

HAVE ADOPTED THIS REGULATION:

CHAPTER I

**GENERAL PROVISIONS**

*Article 1*

**Scope**

1. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

(a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;

(b) the assets and affairs of a debtor are subject to control or supervision by a court; or

(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).

Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

The proceedings referred to in this paragraph are listed in Annex A.

2. This Regulation shall not apply to proceedings referred to in paragraph 1 that concern:

(a) insurance undertakings;

(b) credit institutions;

(c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or

(d) collective investment undertakings.

*Article 2*

**Definitions**

For the purposes of this Regulation:

(1) 'collective proceedings' means proceedings which include all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them;

[1] OJ C 358, 7.12.2013, p. 15.

(2) 'collective investment undertakings' means undertakings for collective investment in transferable securities (UCITS) as defined in Directive 2009/65/EC of the European Parliament and of the Council [1] and alternative investment funds (AIFs) as defined in Directive 2011/61/EU of the European Parliament and of the Council [2];

(3) 'debtor in possession' means a debtor in respect of which insolvency proceedings have been opened which do not necessarily involve the appointment of an insolvency practitioner or the complete transfer of the rights and duties to administer the debtor's assets to an insolvency practitioner and where, therefore, the debtor remains totally or at least partially in control of its assets and affairs;

(4) 'insolvency proceedings' means the proceedings listed in Annex A;

(5) 'insolvency practitioner' means any person or body whose function, including on an interim basis, is to:

(i) verify and admit claims submitted in insolvency proceedings;

(ii) represent the collective interest of the creditors;

(iii) administer, either in full or in part, assets of which the debtor has been divested;

(iv) liquidate the assets referred to in point (iii); or

(v) supervise the administration of the debtor's affairs.

The persons and bodies referred to in the first subparagraph are listed in Annex B;

(6) 'court' means:

(i) in points (b) and (c) of Article 1(1), Article 4(2), Articles 5 and 6, Article 21(3), point (j) of Article 24(2), Articles 36 and 39, and Articles 61 to 77, the judicial body of a Member State;

(ii) in all other articles, the judicial body or any other competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings;

(7) 'judgment opening insolvency proceedings' includes:

(i) the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and

(ii) the decision of a court to appoint an insolvency practitioner;

(8) 'the time of the opening of proceedings' means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not;

(9) 'the Member State in which assets are situated' means, in the case of:

(i) registered shares in companies other than those referred to in point (ii), the Member State within the territory of which the company having issued the shares has its registered office;

(ii) financial instruments, the title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary ('book entry securities'), the Member State in which the register or account in which the entries are made is maintained;

(iii) cash held in accounts with a credit institution, the Member State indicated in the account's IBAN, or, for cash held in accounts with a credit institution which does not have an IBAN, the Member State in which the credit institution holding the account has its central administration or, where the account is held with a branch, agency or other establishment, the Member State in which the branch, agency or other establishment is located;

(iv) property and rights, ownership of or entitlement to which is entered in a public register other than those referred to in point (i), the Member State under the authority of which the register is kept;

(v) European patents, the Member State for which the European patent is granted;

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[1] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

[2] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

(vi) copyright and related rights, the Member State within the territory of which the owner of such rights has its habitual residence or registered office;

(vii) tangible property, other than that referred to in points (i) to (iv), the Member State within the territory of which the property is situated;

(viii) claims against third parties, other than those relating to assets referred to in point (iii), the Member State within the territory of which the third party required to meet the claims has the centre of its main interests, as determined in accordance with Article 3(1);

(10) 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets;

(11) 'local creditor' means a creditor whose claims against a debtor arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the centre of the debtor's main interests is located;

(12) 'foreign creditor' means a creditor which has its habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States;

(13) 'group of companies' means a parent undertaking and all its subsidiary undertakings;

(14) 'parent undertaking' means an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council [1] shall be deemed to be a parent undertaking.

*Article 3*

**International jurisdiction**

1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings.

2. Where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened in accordance with paragraph 1, any proceedings opened subsequently in accordance with paragraph 2 shall be secondary insolvency proceedings.

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[1] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertaking, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

4. The territorial insolvency proceedings referred to in paragraph 2 may only be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 where

(a) insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b) the opening of territorial insolvency proceedings is requested by:

(i) a creditor whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested; or

(ii) a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings.

When main insolvency proceedings are opened, the territorial insolvency proceedings shall become secondary insolvency proceedings.

*Article 4*

**Examination as to jurisdiction**

1. A court seised of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Article 3. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) or (2).

2. Notwithstanding paragraph 1, where insolvency proceedings are opened in accordance with national law without a decision by a court, Member States may entrust the insolvency practitioner appointed in such proceedings to examine whether the Member State in which a request for the opening of proceedings is pending has jurisdiction pursuant to Article 3. Where this is the case, the insolvency practitioner shall specify in the decision opening the proceedings the grounds on which jurisdiction is based and, in particular, whether jurisdiction is based on Article 3(1) or (2).

*Article 5*

**Judicial review of the decision to open main insolvency proceedings**

1. The debtor or any creditor may challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction.

2. The decision opening main insolvency proceedings may be challenged by parties other than those referred to in paragraph 1 or on grounds other than a lack of international jurisdiction where national law so provides.

*Article 6*

**Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them**

1. The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.

2. Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012.

The first subparagraph shall apply to the debtor in possession, provided that national law allows the debtor in possession to bring actions on behalf of the insolvency estate.

3. For the purpose of paragraph 2, actions are deemed to be related where they 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.

*Article 7*

**Applicable law**

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the 'State of the opening of proceedings').

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following:

(a) the debtors against which insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the insolvency practitioner;

(d) the conditions under which set-offs may be invoked;

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits;

(g) the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) the rules governing the lodging, verification and admission of claims;

(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off;

(j) the conditions for, and the effects of closure of, insolvency proceedings, in particular by composition;

(k) creditors' rights after the closure of insolvency proceedings;

(l) who is to bear the costs and expenses incurred in the insolvency proceedings;

(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

*Article 8*

**Third parties' rights *in rem***

1. The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall, in particular, mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right *in rem* to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, based on which a right *in rem* within the meaning of paragraph 1 may be obtained shall be considered to be a right *in rem*.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2).

*Article 9*

**Set-off**

1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2).

*Article 10*

**Reservation of title**

1. The opening of insolvency proceedings against the purchaser of an asset shall not affect sellers' rights that are based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of the opening of proceedings.

2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2).

*Article 11*

**Contracts relating to immoveable property**

1. The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

2. The court which opened main insolvency proceedings shall have jurisdiction to approve the termination or modification of the contracts referred to in this Article where:

(a) the law of the Member State applicable to those contracts requires that such a contract may only be terminated or modified with the approval of the court opening insolvency proceedings; and

(b) no insolvency proceedings have been opened in that Member State.

*Article 12*

**Payment systems and financial markets**

1. Without prejudice to Article 8, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

*Article 13*

**Contracts of employment**

1. The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

2. The courts of the Member State in which secondary insolvency proceedings may be opened shall retain jurisdiction to approve the termination or modification of the contracts referred to in this Article even if no insolvency proceedings have been opened in that Member State.

The first subparagraph shall also apply to an authority competent under national law to approve the termination or modification of the contracts referred to in this Article.

*Article 14*

**Effects on rights subject to registration**

The effects of insolvency proceedings on the rights of a debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

*Article 15*

**European patents with unitary effect and Community trade marks**

For the purposes of this Regulation, a European patent with unitary effect, a Community trade mark or any other similar right established by Union law may be included only in the proceedings referred to in Article 3(1).

*Article 16*

**Detrimental acts**

Point (m) of Article 7(2) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

(a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and

(b) the law of that Member State does not allow any means of challenging that act in the relevant case.

*Article 17*

**Protection of third-party purchasers**

Where, by an act concluded after the opening of insolvency proceedings, a debtor disposes, for consideration, of:

(a) an immoveable asset;

(b) a ship or an aircraft subject to registration in a public register; or

(c) securities the existence of which requires registration in a register laid down by law;

the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.

*Article 18*

**Effects of insolvency proceedings on pending lawsuits or arbitral proceedings**

The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.

CHAPTER II

**RECOGNITION OF INSOLVENCY PROCEEDINGS**

*Article 19*

**Principle**

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings.

The rule laid down in the first subparagraph shall also apply where, on account of a debtor's capacity, insolvency proceedings cannot be brought against that debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

*Article 20*

**Effects of recognition**

1. The judgment opening insolvency proceedings as referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

*Article 21*

**Powers of the insolvency practitioner**

1. The insolvency practitioner appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on it, by the law of the State of the opening of proceedings, in another Member State, as long as no other insolvency proceedings have been opened there and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. Subject to Articles 8 and 10, the insolvency practitioner may, in particular, remove the debtor's assets from the territory of the Member State in which they are situated.

2. The insolvency practitioner appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. The insolvency practitioner may also bring any action to set aside which is in the interests of the creditors.

3. In exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures, unless ordered by a court of that Member State, or the right to rule on legal proceedings or disputes.

*Article 22*

**Proof of the insolvency practitioner's appointment**

The insolvency practitioner's appointment shall be evidenced by a certified copy of the original decision appointing it or by any other certificate issued by the court which has jurisdiction.

A translation into the official language or one of the official languages of the Member State within the territory of which it intends to act may be required. No legalisation or other similar formality shall be required.

*Article 23*

**Return and imputation**

1. A creditor which, after the opening of the proceedings referred to in Article 3(1), obtains by any means, in particular through enforcement, total or partial satisfaction of its claim on the assets belonging to a debtor situated within the territory of another Member State, shall return what it has obtained to the insolvency practitioner, subject to Articles 8 and 10.

2. In order to ensure the equal treatment of creditors, a creditor which has, in the course of insolvency proceedings, obtained a dividend on its claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

*Article 24*

**Establishment of insolvency registers**

1. Member States shall establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published ('insolvency registers'). That information shall be published as soon as possible after the opening of such proceedings.

2. The information referred to in paragraph 1 shall be made publicly available, subject to the conditions laid down in Article 27, and shall include the following ('mandatory information'):

(a) the date of the opening of insolvency proceedings;

(b) the court opening insolvency proceedings and the case reference number, if any;

(c) the type of insolvency proceedings referred to in Annex A that were opened and, where applicable, any relevant subtype of such proceedings opened in accordance with national law;

(d) whether jurisdiction for opening proceedings is based on Article 3(1), 3(2) or 3(4);

(e) if the debtor is a company or a legal person, the debtor's name, registration number, registered office or, if different, postal address;

(f) if the debtor is an individual whether or not exercising an independent business or professional activity, the debtor's name, registration number, if any, and postal address or, where the address is protected, the debtor's place and date of birth;

(g) the name, postal address or e-mail address of the insolvency practitioner, if any, appointed in the proceedings;

(h) the time limit for lodging claims, if any, or a reference to the criteria for calculating that time limit;

(i) the date of closing main insolvency proceedings, if any;

(j) the court before which and, where applicable, the time limit within which a challenge of the decision opening insolvency proceedings is to be lodged in accordance with Article 5, or a reference to the criteria for calculating that time limit.

3. Paragraph 2 shall not preclude Member States from including documents or additional information in their national insolvency registers, such as directors' disqualifications related to insolvency.

4. Member States shall not be obliged to include in the insolvency registers the information referred to in paragraph 1 of this Article in relation to individuals not exercising an independent business or professional activity, or to make such information publicly available through the system of interconnection of those registers, provided that known foreign creditors are informed, pursuant to Article 54, of the elements referred to under point (j) of paragraph 2 of this Article.

Where a Member State makes use of the possibility referred to in the first subparagraph, the insolvency proceedings shall not affect the claims of foreign creditors who have not received the information referred to in the first subparagraph.

5. The publication of information in the registers under this Regulation shall not have any legal effects other than those set out in national law and in Article 55(6).

*Article 25*

**Interconnection of insolvency registers**

1. The Commission shall establish a decentralised system for the interconnection of insolvency registers by means of implementing acts. That system shall be composed of the insolvency registers and the European e-Justice Portal, which shall serve as a central public electronic access point to information in the system. The system shall provide a search service in all the official languages of the institutions of the Union in order to make available the mandatory information and any other documents or information included in the insolvency registers which the Member States choose to make available through the European e-Justice Portal.

2. By means of implementing acts in accordance with the procedure referred to in Article 87, the Commission shall adopt the following by 26 June 2019:

(a) the technical specification defining the methods of communication and information exchange by electronic means on the basis of the established interface specification for the system of interconnection of insolvency registers;

(b) the technical measures ensuring the minimum information technology security standards for communication and distribution of information within the system of interconnection of insolvency registers;

(c) minimum criteria for the search service provided by the European e-Justice Portal based on the information set out in Article 24;

(d) minimum criteria for the presentation of the results of such searches based on the information set out in Article 24;

(e) the means and the technical conditions of availability of services provided by the system of interconnection; and

(f) a glossary containing a basic explanation of the national insolvency proceedings listed in Annex A.

*Article 26*

**Costs of establishing and interconnecting insolvency registers**

1. The establishment, maintenance and future development of the system of interconnection of insolvency registers shall be financed from the general budget of the Union.

2. Each Member State shall bear the costs of establishing and adjusting its national insolvency registers to make them interoperable with the European e-Justice Portal, as well as the costs of administering, operating and maintaining those registers. This shall be without prejudice to the possibility to apply for grants to support such activities under the Union's financial programmes.

*Article 27*

**Conditions of access to information via the system of interconnection**

1. Member States shall ensure that the mandatory information referred to in points (a) to (j) of Article 24(2) is available free of charge via the system of interconnection of insolvency registers.

2. This Regulation shall not preclude Member States from charging a reasonable fee for access to the documents or additional information referred to in Article 24(3) via the system of interconnection of insolvency registers.

3. Member States may make access to mandatory information concerning individuals who are not exercising an independent business or professional activity, and concerning individuals exercising an independent business or professional activity when the insolvency proceedings are not related to that activity, subject to supplementary search criteria relating to the debtor in addition to the minimum criteria referred to in point (c) of Article 25(2).

4. Member States may require that access to the information referred to in paragraph 3 be made conditional upon a request to the competent authority. Member States may make access conditional upon the verification of the existence of a legitimate interest for accessing such information. The requesting person shall be able to submit the request for information electronically by means of a standard form via the European e-Justice Portal. Where a legitimate interest is required, it shall be permissible for the requesting person to justify his request by electronic copies of relevant documents. The requesting person shall be provided with an answer by the competent authority within 3 working days.

The requesting person shall not be obliged to provide translations of the documents justifying his request, or to bear any costs of translation which the competent authority may incur.

*Article 28*

**Publication in another Member State**

1. The insolvency practitioner or the debtor in possession shall request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing the insolvency practitioner be published in any other Member State where an establishment of the debtor is located in accordance with the publication procedures provided for in that Member State. Such publication shall specify, where appropriate, the insolvency practitioner appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or (2).

2. The insolvency practitioner or the debtor in possession may request that the information referred to in paragraph 1 be published in any other Member State where the insolvency practitioner or the debtor in possession deems it necessary in accordance with the publication procedures provided for in that Member State.

*Article 29*

**Registration in public registers of another Member State**

1. Where the law of a Member State in which an establishment of the debtor is located and this establishment has been entered into a public register of that Member State, or the law of a Member State in which immovable property belonging to the debtor is located, requires information on the opening of insolvency proceedings referred to in Article 28 to be published in the land register, company register or any other public register, the insolvency practitioner or the debtor in possession shall take all the necessary measures to ensure such a registration.

2. The insolvency practitioner or the debtor in possession may request such registration in any other Member State, provided that the law of the Member State where the register is kept allows such registration.

*Article 30*

**Costs**

The costs of the publication and registration provided for in Articles 28 and 29 shall be regarded as costs and expenses incurred in the proceedings.

*Article 31*

**Honouring of an obligation to a debtor**

1. Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the insolvency practitioner in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of the proceedings.

2. Where such an obligation is honoured before the publication provided for in Article 28 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings. Where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings.

*Article 32*

**Recognition and enforceability of other judgments**

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 19 and which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 39 to 44 and 47 to 57 of Regulation (EU) No 1215/2012.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 of this Article shall be governed by Regulation (EU) No 1215/2012 provided that that Regulation is applicable.

*Article 33*

**Public policy**

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

CHAPTER III

**SECONDARY INSOLVENCY PROCEEDINGS**

*Article 34*

**Opening of proceedings**

Where main insolvency proceedings have been opened by a court of a Member State and recognised in another Member State, a court of that other Member State which has jurisdiction pursuant to Article 3(2) may open secondary insolvency proceedings in accordance with the provisions set out in this Chapter. Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened. The effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of the Member State in which those proceedings have been opened.

*Article 35*

**Applicable law**

Save as otherwise provided for in this Regulation, the law applicable to secondary insolvency proceedings shall be that of the Member State within the territory of which the secondary insolvency proceedings are opened.

*Article 36*

**Right to give an undertaking in order to avoid secondary insolvency proceedings**

1. In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the 'undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets.

2. Where an undertaking has been given in accordance with this Article, the law applicable to the distribution of proceeds from the realisation of assets referred to in paragraph 1, to the ranking of creditors' claims, and to the rights of creditors in relation to the assets referred to in paragraph 1 shall be the law of the Member State in which secondary insolvency proceedings could have been opened. The relevant point in time for determining the assets referred to in paragraph 1 shall be the moment at which the undertaking is given.

3. The undertaking shall be made in the official language or one of the official languages of the Member State where secondary insolvency proceedings could have been opened, or, where there are several official languages in that Member State, the official language or one of the official languages of the place in which secondary insolvency proceedings could have been opened.

4. The undertaking shall be made in writing. It shall be subject to any other requirements relating to form and approval requirements as to distributions, if any, of the State of the opening of the main insolvency proceedings.

5. The undertaking shall be approved by the known local creditors. The rules on qualified majority and voting that apply to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened shall also apply to the approval of the undertaking. Creditors shall be able to participate in the vote by distance means of communication, where national law so permits. The insolvency practitioner shall inform the known local creditors of the undertaking, of the rules and procedures for its approval, and of the approval or rejection of the undertaking.

6. An undertaking given and approved in accordance with this Article shall be binding on the estate. If secondary insolvency proceedings are opened in accordance with Articles 37 and 38, the insolvency practitioner in the main insolvency proceedings shall transfer any assets which it removed from the territory of that Member State after the undertaking was given or, where those assets have already been realised, their proceeds, to the insolvency practitioner in the secondary insolvency proceedings.

7. Where the insolvency practitioner has given an undertaking, it shall inform local creditors about the intended distributions prior to distributing the assets and proceeds referred to in paragraph 1. If that information does not comply with the terms of the undertaking or the applicable law, any local creditor may challenge such distribution before the courts of the Member State in which main insolvency proceedings have been opened in order to obtain a distribution in accordance with the terms of the undertaking and the applicable law. In such cases, no distribution shall take place until the court has taken a decision on the challenge.

8. Local creditors may apply to the courts of the Member State in which main insolvency proceedings have been opened, in order to require the insolvency practitioner in the main insolvency proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the State of the opening of main insolvency proceedings.

9. Local creditors may also apply to the courts of the Member State in which secondary insolvency proceedings could have been opened in order to require the court to take provisional or protective measures to ensure compliance by the insolvency practitioner with the terms of the undertaking.

10. The insolvency practitioner shall be liable for any damage caused to local creditors as a result of its non-compliance with the obligations and requirements set out in this Article.

11. For the purpose of this Article, an authority which is established in the Member State where secondary insolvency proceedings could have been opened and which is obliged under Directive 2008/94/EC of the European Parliament and of the Council ([1]) to guarantee the payment of employees' outstanding claims resulting from contracts of employment or employment relationships shall be considered to be a local creditor, where the national law so provides.

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([1]) Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ L 283, 28.10.2008, p. 36).

*Article 37*

**Right to request the opening of secondary insolvency proceedings**

1. The opening of secondary insolvency proceedings may be requested by:

(a) the insolvency practitioner in the main insolvency proceedings;

(b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary insolvency proceedings is requested.

2. Where an undertaking has become binding in accordance with Article 36, the request for opening secondary insolvency proceedings shall be lodged within 30 days of having received notice of the approval of the undertaking.

*Article 38*

**Decision to open secondary insolvency proceedings**

1. A court seised of a request to open secondary insolvency proceedings shall immediately give notice to the insolvency practitioner or the debtor in possession in the main insolvency proceedings and give it an opportunity to be heard on the request.

2. Where the insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with Article 36, the court referred to in paragraph 1 of this Article shall, at the request of the insolvency practitioner, not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.

3. Where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may stay the opening of secondary insolvency proceedings for a period not exceeding 3 months, provided that suitable measures are in place to protect the interests of local creditors.

The court referred to in paragraph 1 may order protective measures to protect the interests of local creditors by requiring the insolvency practitioner or the debtor in possession not to remove or dispose of any assets which are located in the Member State where its establishment is located unless this is done in the ordinary course of business. The court may also order other measures to protect the interest of local creditors during a stay, unless this is incompatible with the national rules on civil procedure.

The stay of the opening of secondary insolvency proceedings shall be lifted by the court of its own motion or at the request of any creditor if, during the stay, an agreement in the negotiations referred to in the first subparagraph has been concluded.

The stay may be lifted by the court of its own motion or at the request of any creditor if the continuation of the stay is detrimental to the creditor's rights, in particular if the negotiations have been disrupted or it has become evident that they are unlikely to be concluded, or if the insolvency practitioner or the debtor in possession has infringed the prohibition on disposal of its assets or on removal of them from the territory of the Member State where the establishment is located.

4. At the request of the insolvency practitioner in the main insolvency proceedings, the court referred to in paragraph 1 may open a type of insolvency proceedings as listed in Annex A other than the type initially requested, provided that the conditions for opening that type of proceedings under national law are fulfilled and that that type of proceedings is the most appropriate as regards the interests of the local creditors and coherence between the main and secondary insolvency proceedings. The second sentence of Article 34 shall apply.

*Article 39*

**Judicial review of the decision to open secondary insolvency proceedings**

The insolvency practitioner in the main insolvency proceedings may challenge the decision to open secondary insolvency proceedings before the courts of the Member State in which secondary insolvency proceedings have been opened on the ground that the court did not comply with the conditions and requirements of Article 38.

*Article 40*

**Advance payment of costs and expenses**

Where the law of the Member State in which the opening of secondary insolvency proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security.

*Article 41*

**Cooperation and communication between insolvency practitioners**

1. The insolvency practitioner in the main insolvency proceedings and the insolvency practitioner or practitioners in secondary insolvency proceedings concerning the same debtor shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings. Such cooperation may take any form, including the conclusion of agreements or protocols.

2. In implementing the cooperation set out in paragraph 1, the insolvency practitioners shall:

(a) as soon as possible communicate to each other any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or at terminating the proceedings, provided appropriate arrangements are made to protect confidential information;

(b) explore the possibility of restructuring the debtor and, where such a possibility exists, coordinate the elaboration and implementation of a restructuring plan;

(c) coordinate the administration of the realisation or use of the debtor's assets and affairs; the insolvency practitioner in the secondary insolvency proceedings shall give the insolvency practitioner in the main insolvency proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary insolvency proceedings.

3. Paragraphs 1 and 2 shall apply mutatis mutandis to situations where, in the main or in the secondary insolvency proceedings or in any territorial insolvency proceedings concerning the same debtor and open at the same time, the debtor remains in possession of its assets.

*Article 42*

**Cooperation and communication between courts**

1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate with any other court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, to the extent that such cooperation is not incompatible with the rules applicable to each of the proceedings. For that purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that it is not incompatible with the rules applicable to them.

2. In implementing the cooperation set out in paragraph 1, the courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with, or request information or assistance directly from, each other provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3. The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern:

(a) coordination in the appointment of the insolvency practitioners;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the debtor's assets and affairs;

(d) coordination of the conduct of hearings;

(e) coordination in the approval of protocols, where necessary.

*Article 43*

**Cooperation and communication between insolvency practitioners and courts**

1. In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened in respect of the same debtor:

(a) an insolvency practitioner in main insolvency proceedings shall cooperate and communicate with any court before which a request to open secondary insolvency proceedings is pending or which has opened such proceedings;

(b) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open main insolvency proceedings is pending or which has opened such proceedings; and

(c) an insolvency practitioner in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open other territorial or secondary insolvency proceedings is pending or which has opened such proceedings;

to the extent that such cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interest.

2. The cooperation referred to in paragraph 1 may be implemented by any appropriate means, such as those set out in Article 42(3).

*Article 44*

**Costs of cooperation and communication**

The requirements laid down in Articles 42 and 43 shall not result in courts charging costs to each other for cooperation and communication.

*Article 45*

**Exercise of creditors' rights**

1. Any creditor may lodge its claim in the main insolvency proceedings and in any secondary insolvency proceedings.

2. The insolvency practitioners in the main and any secondary insolvency proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served by doing so, subject to the right of creditors to oppose such lodgement or to withdraw the lodgement of their claims where the law applicable so provides.

3. The insolvency practitioner in the main or secondary insolvency proceedings shall be entitled to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.

*Article 46*

**Stay of the process of realisation of assets**

1. The court which opened the secondary insolvency proceedings shall stay the process of realisation of assets in whole or in part on receipt of a request from the insolvency practitioner in the main insolvency proceedings. In such a case, it may require the insolvency practitioner in the main insolvency proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary insolvency proceedings and of individual classes of creditors. Such a request from the insolvency practitioner may be rejected only if it is manifestly of no interest to the creditors in the main insolvency proceedings. Such a stay of the process of realisation of assets may be ordered for up to 3 months. It may be continued or renewed for similar periods.

2. The court referred to in paragraph 1 shall terminate the stay of the process of realisation of assets:

(a) at the request of the insolvency practitioner in the main insolvency proceedings;

(b) of its own motion, at the request of a creditor or at the request of the insolvency practitioner in the secondary insolvency proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main insolvency proceedings or in the secondary insolvency proceedings.

*Article 47*

**Power of the insolvency practitioner to propose restructuring plans**

1. Where the law of the Member State where secondary insolvency proceedings have been opened allows for such proceedings to be closed without liquidation by a restructuring plan, a composition or a comparable measure, the insolvency practitioner in the main insolvency proceedings shall be empowered to propose such a measure in accordance with the procedure of that Member State.

2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary insolvency proceedings, such as a stay of payment or discharge of debt, shall have no effect in respect of assets of a debtor that are not covered by those proceedings, without the consent of all the creditors having an interest.

*Article 48*

**Impact of closure of insolvency proceedings**

1. Without prejudice to Article 49, the closure of insolvency proceedings shall not prevent the continuation of other insolvency proceedings concerning the same debtor which are still open at that point in time.

2. Where insolvency proceedings concerning a legal person or a company in the Member State of that person's or company's registered office would entail the dissolution of the legal person or of the company, that legal person or company shall not cease to exist until any other insolvency proceedings concerning the same debtor have been closed, or the insolvency practitioner or practitioners in such proceedings have given consent to the dissolution.

*Article 49*

**Assets remaining in the secondary insolvency proceedings**

If, by the liquidation of assets in the secondary insolvency proceedings, it is possible to meet all claims allowed under those proceedings, the insolvency practitioner appointed in those proceedings shall immediately transfer any assets remaining to the insolvency practitioner in the main insolvency proceedings.

*Article 50*

**Subsequent opening of the main insolvency proceedings**

Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 41, 45, 46, 47 and 49 shall apply to those opened first, in so far as the progress of those proceedings so permits.

*Article 51*

**Conversion of secondary insolvency proceedings**

1. At the request of the insolvency practitioner in the main insolvency proceedings, the court of the Member State in which secondary insolvency proceedings have been opened may order the conversion of the secondary insolvency proceedings into another type of insolvency proceedings listed in Annex A, provided that the conditions for opening that type of proceedings under national law are fulfilled and that that type of proceedings is the most appropriate as regards the interests of the local creditors and coherence between the main and secondary insolvency proceedings.

2. When considering the request referred to in paragraph 1, the court may seek information from the insolvency practitioners involved in both proceedings.

*Article 52*

**Preservation measures**

Where the court of a Member State which has jurisdiction pursuant to Article 3(1) appoints a temporary administrator in order to ensure the preservation of a debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that Member State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

CHAPTER IV

**PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS**

*Article 53*

**Right to lodge claims**

Any foreign creditor may lodge claims in insolvency proceedings by any means of communication, which are accepted by the law of the State of the opening of proceedings. Representation by a lawyer or another legal professional shall not be mandatory for the sole purpose of lodging of claims.

*Article 54*

**Duty to inform creditors**

1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the insolvency practitioner appointed by that court shall immediately inform the known foreign creditors.

2. The information referred to in paragraph 1, provided by an individual notice, shall in particular include time limits, the penalties laid down with regard to those time limits, the body or authority empowered to accept the lodgement of claims and any other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured *in rem* need to lodge their claims. The notice shall also include a copy of the standard form for lodging of claims referred to in Article 55 or information on where that form is available.

3. The information referred to in paragraphs 1 and 2 of this Article shall be provided using the standard notice form to be established in accordance with Article 88. The form shall be published in the European e-Justice Portal and shall bear the heading 'Notice of insolvency proceedings' in all the official languages of the institutions of the Union. It shall be transmitted in the official language of the State of the opening of proceedings or, if there are several official languages in that Member State, in the official language or one of the official languages of the place where insolvency proceedings have been opened, or in another language which that State has indicated it can accept, in accordance with Article 55(5), if it can be assumed that that language is easier to understand for the foreign creditors.

4. In insolvency proceedings relating to an individual not exercising a business or professional activity, the use of the standard form referred to in this Article shall not be obligatory if creditors are not required to lodge their claims in order to have their claims taken into account in the proceedings.

*Article 55*

**Procedure for lodging claims**

1. Any foreign creditor may lodge its claim using the standard claims form to be established in accordance with Article 88. The form shall bear the heading 'Lodgement of claims' in all the official languages of the institutions of the Union.

2. The standard claims form referred to in paragraph 1 shall include the following information:

(a) the name, postal address, e-mail address, if any, personal identification number, if any, and bank details of the foreign creditor referred to in paragraph 1;

(b) the amount of the claim, specifying the principal and, where applicable, interest and the date on which it arose and the date on which it became due, if different;

(c) if interest is claimed, the interest rate, whether the interest is of a legal or contractual nature, the period of time for which the interest is claimed and the capitalised amount of interest;

(d) if costs incurred in asserting the claim prior to the opening of proceedings are claimed, the amount and the details of those costs;

(e) the nature of the claim;

(f) whether any preferential creditor status is claimed and the basis of such a claim;

(g) whether security *in rem* or a reservation of title is alleged in respect of the claim and if so, what assets are covered by the security interest being invoked, the date on which the security was granted and, where the security has been registered, the registration number; and

(h) whether any set-off is claimed and, if so, the amounts of the mutual claims existing on the date when insolvency proceedings were opened, the date on which they arose and the amount net of set-off claimed.

The standard claims form shall be accompanied by copies of any supporting documents.

3. The standard claims form shall indicate that the provision of information concerning the bank details and the personal identification number of the creditor referred to in point (a) of paragraph 2 is not compulsory.

4. When a creditor lodges its claim by means other than the standard form referred to in paragraph 1, the claim shall contain the information referred to in paragraph 2.

5. Claims may be lodged in any official language of the institutions of the Union. The court, the insolvency practitioner or the debtor in possession may require the creditor to provide a translation in the official language of the State of the opening of proceedings or, if there are several official languages in that Member State, in the official language or one of the official languages of the place where insolvency proceedings have been opened, or in another language which that Member State has indicated it can accept. Each Member State shall indicate whether it accepts any official language of the institutions of the Union other than its own for the purpose of the lodging of claims.

6. Claims shall be lodged within the period stipulated by the law of the State of the opening of proceedings. In the case of a foreign creditor, that period shall not be less than 30 days following the publication of the opening of insolvency proceedings in the insolvency register of the State of the opening of proceedings. Where a Member State relies on Article 24(4), that period shall not be less than 30 days following a creditor having been informed pursuant to Article 54.

7. Where the court, the insolvency practitioner or the debtor in possession has doubts in relation to a claim lodged in accordance with this Article, it shall give the creditor the opportunity to provide additional evidence on the existence and the amount of the claim.

## CHAPTER V

## INSOLVENCY PROCEEDINGS OF MEMBERS OF A GROUP OF COMPANIES

### *SECTION 1*

### ***Cooperation and communication***

#### *Article 56*

#### **Cooperation and communication between insolvency practitioners**

1. Where insolvency proceedings relate to two or more members of a group of companies, an insolvency practitioner appointed in proceedings concerning a member of the group shall cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group to the extent that such cooperation is appropriate to

facilitate the effective administration of those proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest. That cooperation may take any form, including the conclusion of agreements or protocols.

2. In implementing the cooperation set out in paragraph 1, insolvency practitioners shall:

(a) as soon as possible communicate to each other any information which may be relevant to the other proceedings, provided appropriate arrangements are made to protect confidential information;

(b) consider whether possibilities exist for coordinating the administration and supervision of the affairs of the group members which are subject to insolvency proceedings, and if so, coordinate such administration and supervision;

(c) consider whether possibilities exist for restructuring group members which are subject to insolvency proceedings and, if so, coordinate with regard to the proposal and negotiation of a coordinated restructuring plan.

For the purposes of points (b) and (c), all or some of the insolvency practitioners referred to in paragraph 1 may agree to grant additional powers to an insolvency practitioner appointed in one of the proceedings where such an agreement is permitted by the rules applicable to each of the proceedings. They may also agree on the allocation of certain tasks amongst them, where such allocation of tasks is permitted by the rules applicable to each of the proceedings.

*Article 57*

**Cooperation and communication between courts**

1. Where insolvency proceedings relate to two or more members of a group of companies, a court which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent that such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to them and does not entail any conflict of interest. For that purpose, the courts may, where appropriate, appoint an independent person or body to act on its instructions, provided that this is not incompatible with the rules applicable to them.

2. In implementing the cooperation set out in paragraph 1, courts, or any appointed person or body acting on their behalf, as referred to in paragraph 1, may communicate directly with each other, or request information or assistance directly from each other, provided that such communication respects the procedural rights of the parties to the proceedings and the confidentiality of information.

3. The cooperation referred to in paragraph 1 may be implemented by any means that the court considers appropriate. It may, in particular, concern:

(a) coordination in the appointment of insolvency practitioners;

(b) communication of information by any means considered appropriate by the court;

(c) coordination of the administration and supervision of the assets and affairs of the members of the group;

(d) coordination of the conduct of hearings;

(e) coordination in the approval of protocols where necessary.

*Article 58*

**Cooperation and communication between insolvency practitioners and courts**

An insolvency practitioner appointed in insolvency proceedings concerning a member of a group of companies:

(a) shall cooperate and communicate with any court before which a request for the opening of proceedings in respect of another member of the same group of companies is pending or which has opened such proceedings; and

(b) may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed;

to the extent that such cooperation and communication are appropriate to facilitate the effective administration of the proceedings, do not entail any conflict of interest and are not incompatible with the rules applicable to them.

*Article 59*

**Costs of cooperation and communication in proceedings concerning members of a group of companies**

The costs of the cooperation and communication provided for in Articles 56 to 60 incurred by an insolvency practitioner or a court shall be regarded as costs and expenses incurred in the respective proceedings.

*Article 60*

**Powers of the insolvency practitioner in proceedings concerning members of a group of companies**

1. An insolvency practitioner appointed in insolvency proceedings opened in respect of a member of a group of companies may, to the extent appropriate to facilitate the effective administration of the proceedings:

(a) be heard in any of the proceedings opened in respect of any other member of the same group;

(b) request a stay of any measure related to the realisation of the assets in the proceedings opened with respect to any other member of the same group, provided that:

(i) a restructuring plan for all or some members of the group for which insolvency proceedings have been opened has been proposed under point (c) of Article 56(2) and presents a reasonable chance of success;

(ii) such a stay is necessary in order to ensure the proper implementation of the restructuring plan;

(iii) the restructuring plan would be to the benefit of the creditors in the proceedings for which the stay is requested; and

(iv) neither the insolvency proceedings in which the insolvency practitioner referred to in paragraph 1 of this Article has been appointed nor the proceedings in respect of which the stay is requested are subject to coordination under Section 2 of this Chapter;

(c) apply for the opening of group coordination proceedings in accordance with Article 61.

2. The court having opened proceedings referred to in point (b) of paragraph 1 shall stay any measure related to the realisation of the assets in the proceedings in whole or in part if it is satisfied that the conditions referred to in point (b) of paragraph 1 are fulfilled.

Before ordering the stay, the court shall hear the insolvency practitioner appointed in the proceedings for which the stay is requested. Such a stay may be ordered for any period, not exceeding 3 months, which the court considers appropriate and which is compatible with the rules applicable to the proceedings.

The court ordering the stay may require the insolvency practitioner referred to in paragraph 1 to take any suitable measure available under national law to guarantee the interests of the creditors in the proceedings.

The court may extend the duration of the stay by such further period or periods as it considers appropriate and which are compatible with the rules applicable to the proceedings, provided that the conditions referred to in points (b)(ii) to (iv) of paragraph 1 continue to be fulfilled and that the total duration of the stay (the initial period together with any such extensions) does not exceed 6 months.

*SECTION 2*

***Coordination***

Subsection 1

**Procedure**

*Article 61*

**Request to open group coordination proceedings**

1. Group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group, by an insolvency practitioner appointed in insolvency proceedings opened in relation to a member of the group.

2. The request referred to in paragraph 1 shall be made in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed.

3. The request referred to in paragraph 1 shall be accompanied by:

(a) a proposal as to the person to be nominated as the group coordinator ('the coordinator'), details of his or her eligibility pursuant to Article 71, details of his or her qualifications and his or her written agreement to act as coordinator;

(b) an outline of the proposed group coordination, and in particular the reasons why the conditions set out in Article 63(1) are fulfilled;

(c) a list of the insolvency practitioners appointed in relation to the members of the group and, where relevant, the courts and competent authorities involved in the insolvency proceedings of the members of the group;

(d) an outline of the estimated costs of the proposed group coordination and the estimation of the share of those costs to be paid by each member of the group.

*Article 62*

**Priority rule**

Without prejudice to Article 66, where the opening of group coordination proceedings is requested before courts of different Member States, any court other than the court first seised shall decline jurisdiction in favour of that court.

*Article 63*

**Notice by the court seised**

1. The court seised of a request to open group coordination proceedings shall give notice as soon as possible of the request for the opening of group coordination proceedings and of the proposed coordinator to the insolvency practitioners appointed in relation to the members of the group as indicated in the request referred to in point (c) of Article 61(3), if it is satisfied that:

(a) the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members;

(b) no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and

(c) the proposed coordinator fulfils the requirements laid down in Article 71.

2. The notice referred to in paragraph 1 of this Article shall list the elements referred to in points (a) to (d) of Article 61(3).

3. The notice referred to in paragraph 1 shall be sent by registered letter, attested by an acknowledgment of receipt.

4. The court seised shall give the insolvency practitioners involved the opportunity to be heard.

*Article 64*

**Objections by insolvency practitioners**

1. An insolvency practitioner appointed in respect of any group member may object to:

(a) the inclusion within group coordination proceedings of the insolvency proceedings in respect of which it has been appointed; or

(b) the person proposed as a coordinator.

2. Objections pursuant to paragraph 1 of this Article shall be lodged with the court referred to in Article 63 within 30 days of receipt of notice of the request for the opening of group coordination proceedings by the insolvency practitioner referred to in paragraph 1 of this Article.

The objection may be made by means of the standard form established in accordance with Article 88.

3. Prior to taking the decision to participate or not to participate in the coordination in accordance with point (a) of paragraph 1, an insolvency practitioner shall obtain any approval which may be required under the law of the State of the opening of proceedings for which it has been appointed.

*Article 65*

**Consequences of objection to the inclusion in group coordination**

1. Where an insolvency practitioner has objected to the inclusion of the proceedings in respect of which it has been appointed in group coordination proceedings, those proceedings shall not be included in the group coordination proceedings.

2. The powers of the court referred to in Article 68 or of the coordinator arising from those proceedings shall have no effect as regards that member, and shall entail no costs for that member.

*Article 66*

**Choice of court for group coordination proceedings**

1. Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate court for the opening of group coordination proceedings, that court shall have exclusive jurisdiction.

2. The choice of court shall be made by joint agreement in writing or evidenced in writing. It may be made until such time as group coordination proceedings have been opened in accordance with Article 68.

3. Any court other than the court seised under paragraph 1 shall decline jurisdiction in favour of that court.

4. The request for the opening of group coordination proceedings shall be submitted to the court agreed in accordance with Article 61.

*Article 67*

**Consequences of objections to the proposed coordinator**

Where objections to the person proposed as coordinator have been received from an insolvency practitioner which does not also object to the inclusion in the group coordination proceedings of the member in respect of which it has been appointed, the court may refrain from appointing that person and invite the objecting insolvency practitioner to submit a new request in accordance with Article 61(3).

*Article 68*

**Decision to open group coordination proceedings**

1. After the period referred to in Article 64(2) has elapsed, the court may open group coordination proceedings where it is satisfied that the conditions of Article 63(1) are met. In such a case, the court shall:

(a) appoint a coordinator;

(b) decide on the outline of the coordination; and

(c) decide on the estimation of costs and the share to be paid by the group members.

2. The decision opening group coordination proceedings shall be brought to the notice of the participating insolvency practitioners and of the coordinator.

*Article 69*

**Subsequent opt-in by insolvency practitioners**

1. In accordance with its national law, any insolvency practitioner may request, after the court decision referred to in Article 68, the inclusion of the proceedings in respect of which it has been appointed, where:

(a) there has been an objection to the inclusion of the insolvency proceedings within the group coordination proceedings; or

(b) insolvency proceedings with respect to a member of the group have been opened after the court has opened group coordination proceedings.

2. Without prejudice to paragraph 4, the coordinator may accede to such a request, after consulting the insolvency practitioners involved, where

(a) he or she is satisfied that, taking into account the stage that the group coordination proceedings has reached at the time of the request, the criteria set out in points (a) and (b) of Article 63(1) are met; or

(b) all insolvency practitioners involved agree, subject to the conditions in their national law.

3. The coordinator shall inform the court and the participating insolvency practitioners of his or her decision pursuant to paragraph 2 and of the reasons on which it is based.

4. Any participating insolvency practitioner or any insolvency practitioner whose request for inclusion in the group coordination proceedings has been rejected may challenge the decision referred to in paragraph 2 in accordance with the procedure set out under the law of the Member State in which the group coordination proceedings have been opened.

*Article 70*

**Recommendations and group coordination plan**

1. When conducting their insolvency proceedings, insolvency practitioners shall consider the recommendations of the coordinator and the content of the group coordination plan referred to in Article 72(1).

2. An insolvency practitioner shall not be obliged to follow in whole or in part the coordinator's recommendations or the group coordination plan.

If it does not follow the coordinator's recommendations or the group coordination plan, it shall give reasons for not doing so to the persons or bodies that it is to report to under its national law, and to the coordinator.

Subsection 2

**General provisions**

*Article 71*

**The coordinator**

1. The coordinator shall be a person eligible under the law of a Member State to act as an insolvency practitioner.

2. The coordinator shall not be one of the insolvency practitioners appointed to act in respect of any of the group members, and shall have no conflict of interest in respect of the group members, their creditors and the insolvency practitioners appointed in respect of any of the group members.

*Article 72*

**Tasks and rights of the coordinator**

1. The coordinator shall:

(a) identify and outline recommendations for the coordinated conduct of the insolvency proceedings;

(b) propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. In particular, the plan may contain proposals for:

(i) the measures to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it;

(ii) the settlement of intra-group disputes as regards intra-group transactions and avoidance actions;

(iii) agreements between the insolvency practitioners of the insolvent group members.

2. The coordinator may also:

(a) be heard and participate, in particular by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group;

(b) mediate any dispute arising between two or more insolvency practitioners of group members;

(c) present and explain his or her group coordination plan to the persons or bodies that he or she is to report to under his or her national law;

(d) request information from any insolvency practitioner in respect of any member of the group where that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings; and

(e) request a stay for a period of up to 6 months of the proceedings opened in respect of any member of the group, provided that such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the proceedings for which the stay is requested; or request the lifting of any existing stay. Such a request shall be made to the court that opened the proceedings for which a stay is requested.

3. The plan referred to in point (b) of paragraph 1 shall not include recommendations as to any consolidation of proceedings or insolvency estates.

4. The coordinator's tasks and rights as defined under this Article shall not extend to any member of the group not participating in group coordination proceedings.

5. The coordinator shall perform his or her duties impartially and with due care.

6. Where the coordinator considers that the fulfilment of his or her tasks requires a significant increase in the costs compared to the cost estimate referred to in point (d) of Article 61(3), and in any case, where the costs exceed 10 % of the estimated costs, the coordinator shall:

(a) inform without delay the participating insolvency practitioners; and

(b) seek the prior approval of the court opening group coordination proceedings.

*Article 73*

**Languages**

1. The coordinator shall communicate with the insolvency practitioner of a participating group member in the language agreed with the insolvency practitioner or, in the absence of an agreement, in the official language or one of the official languages of the institutions of the Union, and of the court which opened the proceedings in respect of that group member.

2. The coordinator shall communicate with a court in the official language applicable to that court.

*Article 74*

**Cooperation between insolvency practitioners and the coordinator**

1. Insolvency practitioners appointed in relation to members of a group and the coordinator shall cooperate with each other to the extent that such cooperation is not incompatible with the rules applicable to the respective proceedings.

2. In particular, insolvency practitioners shall communicate any information that is relevant for the coordinator to perform his or her tasks.

*Article 75*

**Revocation of the appointment of the coordinator**

The court shall revoke the appointment of the coordinator of its own motion or at the request of the insolvency practitioner of a participating group member where:

(a) the coordinator acts to the detriment of the creditors of a participating group member; or

(b) the coordinator fails to comply with his or her obligations under this Chapter.

*Article 76*

**Debtor in possession**

The provisions applicable, under this Chapter, to the insolvency practitioner shall also apply, where appropriate, to the debtor in possession.

*Article 77*

**Costs and distribution**

1. The remuneration for the coordinator shall be adequate, proportionate to the tasks fulfilled and reflect reasonable expenses.

2. On having completed his or her tasks, the coordinator shall establish the final statement of costs and the share to be paid by each member, and submit this statement to each participating insolvency practitioner and to the court opening coordination proceedings.

3. In the absence of objections by the insolvency practitioners within 30 days of receipt of the statement referred to in paragraph 2, the costs and the share to be paid by each member shall be deemed to be agreed. The statement shall be submitted to the court opening coordination proceedings for confirmation.

4. In the event of an objection, the court that opened the group coordination proceedings shall, upon the application of the coordinator or any participating insolvency practitioner, decide on the costs and the share to be paid by each member in accordance with the criteria set out in paragraph 1 of this Article, and taking into account the estimation of costs referred to in Article 68(1) and, where applicable, Article 72(6).

5. Any participating insolvency practitioner may challenge the decision referred to in paragraph 4 in accordance with the procedure set out under the law of the Member State where group coordination proceedings have been opened.

CHAPTER VI

**DATA PROTECTION**

*Article 78*

**Data protection**

1. National rules implementing Directive 95/46/EC shall apply to the processing of personal data carried out in the Member States pursuant to this Regulation, provided that processing operations referred to in Article 3(2) of Directive 95/46/EC are not concerned.

2. Regulation (EC) No 45/2001 shall apply to the processing of personal data carried out by the Commission pursuant to this Regulation.

*Article 79*

**Responsibilities of Member States regarding the processing of personal data in national insolvency registers**

1. Each Member State shall communicate to the Commission the name of the natural or legal person, public authority, agency or any other body designated by national law to exercise the functions of controller in accordance with point (d) of Article 2 of Directive 95/46/EC, with a view to its publication on the European e-Justice Portal.

2. Member States shall ensure that the technical measures for ensuring the security of personal data processed in their national insolvency registers referred to in Article 24 are implemented.

3. Member States shall be responsible for verifying that the controller, designated by national law in accordance with point (d) of Article 2 of Directive 95/46/EC, ensures compliance with the principles of data quality, in particular the accuracy and the updating of data stored in national insolvency registers.

4. Member States shall be responsible, in accordance with Directive 95/46/EC, for the collection and storage of data in national databases and for decisions taken to make such data available in the interconnected register that can be consulted via the European e-Justice Portal.

5. As part of the information that should be provided to data subjects to enable them to exercise their rights, and in particular the right to the erasure of data, Member States shall inform data subjects of the accessibility period set for personal data stored in insolvency registers.

*Article 80*

**Responsibilities of the Commission in connection with the processing of personal data**

1. The Commission shall exercise the responsibilities of controller pursuant to Article 2(d) of Regulation (EC) No 45/2001 in accordance with its respective responsibilities defined in this Article.

2. The Commission shall define the necessary policies and apply the necessary technical solutions to fulfil its responsibilities within the scope of the function of controller.

3. The Commission shall implement the technical measures required to ensure the security of personal data while in transit, in particular the confidentiality and integrity of any transmission to and from the European e-Justice Portal.

4. The obligations of the Commission shall not affect the responsibilities of the Member States and other bodies for the content and operation of the interconnected national databases run by them.

*Article 81*

**Information obligations**

Without prejudice to the information to be given to data subjects in accordance with Articles 11 and 12 of Regulation (EC) No 45/2001, the Commission shall inform data subjects, by means of publication through the European e-Justice Portal, about its role in the processing of data and the purposes for which those data will be processed.

*Article 82*

**Storage of personal data**

As regards information from interconnected national databases, no personal data relating to data subjects shall be stored in the European e-Justice Portal. All such data shall be stored in the national databases operated by the Member States or other bodies.

*Article 83*

**Access to personal data via the European e-Justice Portal**

Personal data stored in the national insolvency registers referred to in Article 24 shall be accessible via the European e-Justice Portal for as long as they remain accessible under national law.

CHAPTER VII

**TRANSITIONAL AND FINAL PROVISIONS**

*Article 84*

**Applicability in time**

1. The provisions of this Regulation shall apply only to insolvency proceedings opened after 26 June 2017. Acts committed by a debtor before that date shall continue to be governed by the law which was applicable to them at the time they were committed.

2. Notwithstanding Article 91 of this Regulation, Regulation (EC) No 1346/2000 shall continue to apply to insolvency proceedings which fall within the scope of that Regulation and which have been opened before 26 June 2017.

*Article 85*

**Relationship to Conventions**

1. This Regulation replaces, in respect of the matters referred to therein, and as regards relations between Member States, the Conventions concluded between two or more Member States, in particular:

(a) the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;

(b) the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;

(c) the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;

(d) the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;

(e) the Convention between France and Austria on Jurisdiction, Recognition and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;

(f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;

(g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;

(h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;

(i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;

(j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;

(k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990;

(l) the Convention between the Federative People's Republic of Yugoslavia and the Kingdom of Greece on the Mutual Recognition and Enforcement of Judgments, signed at Athens on 18 June 1959;

(m) the Agreement between the Federative People's Republic of Yugoslavia and the Republic of Austria on the Mutual Recognition and Enforcement of Arbitral Awards and Arbitral Settlements in Commercial Matters, signed at Belgrade on 18 March 1960;

(n) the Convention between the Federative People's Republic of Yugoslavia and the Italian Republic on Mutual Judicial Cooperation in Civil and Administrative Matters, signed at Rome on 3 December 1960;

(o) the Agreement between the Socialist Federative Republic of Yugoslavia and the Kingdom of Belgium on Judicial Cooperation in Civil and Commercial Matters, signed at Belgrade on 24 September 1971;

(p) the Convention between the Governments of Yugoslavia and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Paris on 18 May 1971;

(q) the Agreement between the Czechoslovak Socialist Republic and the Hellenic Republic on Legal Aid in Civil and Criminal Matters, signed at Athens on 22 October 1980, still in force between the Czech Republic and Greece;

(r) the Agreement between the Czechoslovak Socialist Republic and the Republic of Cyprus on Legal Aid in Civil and Criminal Matters, signed at Nicosia on 23 April 1982, still in force between the Czech Republic and Cyprus;

(s) the Treaty between the Government of the Czechoslovak Socialist Republic and the Government of the Republic of France on Legal Aid and the Recognition and Enforcement of Judgments in Civil, Family and Commercial Matters, signed at Paris on 10 May 1984, still in force between the Czech Republic and France;

(t) the Treaty between the Czechoslovak Socialist Republic and the Italian Republic on Legal Aid in Civil and Criminal Matters, signed at Prague on 6 December 1985, still in force between the Czech Republic and Italy;

(u) the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Legal Assistance and Legal Relationships, signed at Tallinn on 11 November 1992;

(v) the Agreement between Estonia and Poland on Granting Legal Aid and Legal Relations on Civil, Labour and Criminal Matters, signed at Tallinn on 27 November 1998;

(w) the Agreement between the Republic of Lithuania and the Republic of Poland on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters, signed at Warsaw on 26 January 1993;

(x) the Convention between the Socialist Republic of Romania and the Hellenic Republic on legal assistance in civil and criminal matters and its Protocol, signed at Bucharest on 19 October 1972;

(y) the Convention between the Socialist Republic of Romania and the French Republic on legal assistance in civil and commercial matters, signed at Paris on 5 November 1974;

(z) the Agreement between the People's Republic of Bulgaria and the Hellenic Republic on Legal Assistance in Civil and Criminal Matters, signed at Athens on 10 April 1976;

(aa) the Agreement between the People's Republic of Bulgaria and the Republic of Cyprus on Legal Assistance in Civil and Criminal Matters, signed at Nicosia on 29 April 1983;

(ab) the Agreement between the Government of the People's Republic of Bulgaria and the Government of the French Republic on Mutual Legal Assistance in Civil Matters, signed at Sofia on 18 January 1989;

(ac) the Treaty between Romania and the Czech Republic on judicial assistance in civil matters, signed at Bucharest on 11 July 1994;

(ad) the Treaty between Romania and the Republic of Poland on legal assistance and legal relations in civil cases, signed at Bucharest on 15 May 1999.

2. The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of Regulation (EC) No 1346/2000.

3. This Regulation shall not apply:

(a) in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that Member State with one or more third countries before the entry into force of Regulation (EC) No 1346/2000;

(b) in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time Regulation (EC) No 1346/2000 entered into force.

*Article 86*

**Information on national and Union insolvency law**

1. The Member States shall provide, within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC [1], and with a view to making the information available to the public, a short description of their national legislation and procedures relating to insolvency, in particular relating to the matters listed in Article 7(2).

2. The Member States shall update the information referred to in paragraph 1 regularly.

3. The Commission shall make information concerning this Regulation available to the public.

*Article 87*

**Establishment of the interconnection of registers**

The Commission shall adopt implementing acts establishing the interconnection of insolvency registers as referred to in Article 25. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 89(3).

*Article 88*

**Establishment and subsequent amendment of standard forms**

The Commission shall adopt implementing acts establishing and, where necessary, amending the forms referred to in Article 27(4), Articles 54 and 55 and Article 64(2). Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 89(2).

*Article 89*

**Committee procedure**

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

*Article 90*

**Review clause**

1. No later than 27 June 2027, and every 5 years thereafter, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied where necessary by a proposal for adaptation of this Regulation.

2. No later than 27 June 2022, the Commission shall present to the European Parliament, the Council and the European Economic and Social Committee a report on the application of the group coordination proceedings. The report shall be accompanied where necessary by a proposal for adaptation of this Regulation.

3. No later than 1 January 2016, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the cross-border issues in the area of directors' liability and disqualifications.

4. No later than 27 June 2020, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the issue of abusive forum shopping.

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[1] Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters (OJ L 174, 27.6.2001, p. 25).

*Article 91*

**Repeal**

Regulation (EC) No 1346/2000 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table set out in Annex D to this Regulation.

*Article 92*

**Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 26 June 2017, with the exception of:

(a) Article 86, which shall apply from 26 June 2016;

(b) Article 24(1), which shall apply from 26 June 2018; and

(c) Article 25, which shall apply from 26 June 2019.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 20 May 2015.

| *For the European Parliament* | *For the Council* |
|---|---|
| *The President* | *The President* |
| M. SCHULZ | Z. KALNIŅA-LUKAŠEVICA |

*ANNEX A*

**Insolvency proceedings referred to in point (4) of Article 2**

BELGIQUE/BELGIË

— Het faillissement/La faillite,

— De gerechtelijke reorganisatie door een collectief akkoord/La réorganisation judiciaire par accord collectif,

— De gerechtelijke reorganisatie door een minnelijk akkoord/La réorganisation judiciaire par accord amiable,

— De gerechtelijke reorganisatie door overdracht onder gerechtelijk gezag/La réorganisation judiciaire par transfert sous autorité de justice,

— De collectieve schuldenregeling/Le règlement collectif de dettes,

— De vrijwillige vereffening/La liquidation volontaire,

— De gerechtelijke vereffening/La liquidation judiciaire,

— De voorlopige ontneming van beheer, bepaald in artikel 8 van de faillissementswet/Le dessaisissement provisoire, visé à l'article 8 de la loi sur les faillites,

БЪЛГАРИЯ

— Производство по несъстоятелност,

ČESKÁ REPUBLIKA

— Konkurs,

— Reorganizace,

— Oddlužení,

DEUTSCHLAND

— Das Konkursverfahren,

— Das gerichtliche Vergleichsverfahren,

— Das Gesamtvollstreckungsverfahren,

— Das Insolvenzverfahren,

EESTI

— Pankrotimenetlus,

— Võlgade ümberkujundamise menetlus,

ÉIRE/IRELAND

— Compulsory winding-up by the court,

— Bankruptcy,

— The administration in bankruptcy of the estate of persons dying insolvent,

— Winding-up in bankruptcy of partnerships,

— Creditors' voluntary winding-up (with confirmation of a court),

— Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution,

— Examinership,

— Debt Relief Notice,

— Debt Settlement Arrangement,

— Personal Insolvency Arrangement,

ΕΛΛΑΔΑ

— Η πτώχευση,

— Η ειδική εκκαθάριση εν λειτουργία,

— Σχέδιο αναδιοργάνωσης,

— Απλοποιημένη διαδικασία επί πτωχεύσεων μικρού αντικειμένου,

— Διαδικασία Εξυγίανσης,

ESPAÑA

— Concurso,

— Procedimiento de homologación de acuerdos de refinanciación,

— Procedimiento de acuerdos extrajudiciales de pago,

— Procedimiento de negociación pública para la consecución de acuerdos de refinanciación colectivos, acuerdos de refinanciación homologados y propuestas anticipadas de convenio,

FRANCE

— Sauvegarde,

— Sauvegarde accélérée,

— Sauvegarde financière accélérée,

— Redressement judiciaire,

— Liquidation judiciaire,

HRVATSKA

— Stečajni postupak,

ITALIA

— Fallimento,

— Concordato preventivo,

— Liquidazione coatta amministrativa,

— Amministrazione straordinaria,

— Accordi di ristrutturazione,

— Procedure di composizione della crisi da sovraindebitamento del consumatore (accordo o piano),

— Liquidazione dei beni,

ΚΥΠΡΟΣ

— Υποχρεωτική εκκαθάριση από το Δικαστήριο,

— Εκούσια εκκαθάριση από μέλη,

— Εκούσια εκκαθάριση από πιστωτές

— Εκκαθάριση με την εποπτεία του Δικαστηρίου,

— Διάταγμα Παραλαβής και πτώχευσης κατόπιν Δικαστικού Διατάγματος,

— Διαχείριση της περιουσίας προσώπων που απεβίωσαν αφερέγγυα,

LATVIJA

— Tiesiskās aizsardzības process,

— Juridiskās personas maksātnespējas process,

— Fiziskās personas maksātnespējas process,

LIETUVA

— Įmonės restruktūrizavimo byla,
— Įmonės bankroto byla,
— Įmonės bankroto procesas ne teismo tvarka,
— Fizinio asmens bankroto procesas,

LUXEMBOURG

— Faillite,
— Gestion contrôlée,
— Concordat préventif de faillite (par abandon d'actif),
— Régime spécial de liquidation du notariat,
— Procédure de règlement collectif des dettes dans le cadre du surendettement,

MAGYARORSZÁG

— Csődeljárás,
— Felszámolási eljárás,

MALTA

— Xoljiment,
— Amministrazzjoni,
— Stralċ volontarju mill-membri jew mill-kredituri,
— Stralċ mill-Qorti,
— Falliment f'każ ta' kummerċjant,
— Proċedura biex kumpanija tirkupra,

NEDERLAND

— Het faillissement,
— De surséance van betaling,
— De schuldsaneringsregeling natuurlijke personen,

ÖSTERREICH

— Das Konkursverfahren (Insolvenzverfahren),
— Das Sanierungsverfahren ohne Eigenverwaltung (Insolvenzverfahren),
— Das Sanierungsverfahren mit Eigenverwaltung (Insolvenzverfahren),
— Das Schuldenregulierungsverfahren,
— Das Abschöpfungsverfahren,
— Das Ausgleichsverfahren,

POLSKA

— Postępowanie naprawcze,
— Upadłość obejmująca likwidację,
— Upadłość z możliwością zawarcia układu,

PORTUGAL

— Processo de insolvência,
— Processo especial de revitalização,

ROMÂNIA

— Procedura insolvenței,

— Reorganizarea judiciară,

— Procedura falimentului,

— Concordatul preventiv,

SLOVENIJA

— Postopek preventivnega prestrukturiranja,

— Postopek prisilne poravnave,

— Postopek poenostavljene prisilne poravnave,

— Stečajni postopek: stečajni postopek nad pravno osebo, postopek osebnega stečaja and postopek stečaja zapuščine,

SLOVENSKO

— Konkurzné konanie,

— Reštrukturalizačné konanie,

— Oddlženie,

SUOMI/FINLAND

— Konkurssi/konkurs,

— Yrityssaneeraus/företagssanering,

— Yksityishenkilön velkajärjestely/skuldsanering för privatpersoner,

SVERIGE

— Konkurs,

— Företagsrekonstruktion,

— Skuldsanering,

UNITED KINGDOM

— Winding-up by or subject to the supervision of the court,

— Creditors' voluntary winding-up (with confirmation by the court),

— Administration, including appointments made by filing prescribed documents with the court,

— Voluntary arrangements under insolvency legislation,

— Bankruptcy or sequestration.

*ANNEX B*

**Insolvency practitioners referred to in point (5) of Article 2**

BELGIQUE/BELGIË

— De curator/Le curateur,
— De gedelegeerd rechter/Le juge-délégué,
— De gerechtsmandataris/Le mandataire de justice,
— De schuldbemiddelaar/Le médiateur de dettes,
— De vereffenaar/Le liquidateur,
— De voorlopige bewindvoerder/L'administrateur provisoire,

БЪЛГАРИЯ

— Назначен предварително временен синдик,
— Временен синдик,
— (Постоянен) синдик,
— Служебен синдик,

ČESKÁ REPUBLIKA

— Insolvenční správce,
— Předběžný insolvenční správce,
— Oddělený insolvenční správce,
— Zvláštní insolvenční správce,
— Zástupce insolvenčního správce,

DEUTSCHLAND

— Konkursverwalter,
— Vergleichsverwalter,
— Sachwalter (nach der Vergleichsordnung),
— Verwalter,
— Insolvenzverwalter,
— Sachwalter (nach der Insolvenzordnung),
— Treuhänder,
— Vorläufiger Insolvenzverwalter,
— Vorläufiger Sachwalter,

EESTI

— Pankrotihaldur,
— Ajutine pankrotihaldur,
— Usaldusisik,

ÉIRE/IRELAND

— Liquidator,
— Official Assignee,
— Trustee in bankruptcy,

— Provisional Liquidator,

— Examiner,

— Personal Insolvency Practitioner,

— Insolvency Service,

ΕΛΛΑΔΑ

— Ο σύνδικος,

— Ο εισηγητής,

— Η επιτροπή των πιστωτών,

— Ο ειδικός εκκαθαριστής,

ESPAÑA

— Administrador concursal,

— Mediador concursal,

FRANCE

— Mandataire judiciaire,

— Liquidateur,

— Administrateur judiciaire,

— Commissaire à l'exécution du plan,

HRVATSKA

— Stečajni upravitelj,

— Privremeni stečajni upravitelj,

— Stečajni povjerenik,

— Povjerenik,

ITALIA

— Curatore,

— Commissario giudiziale,

— Commissario straordinario,

— Commissario liquidatore,

— Liquidatore giudiziale,

— Professionista nominato dal Tribunale,

— Organismo di composizione della crisi nella procedura di composizione della crisi da sovraindebitamento del consumatore,

— Liquidatore,

ΚΥΠΡΟΣ

— Εκκαθαριστής και Προσωρινός Εκκαθαριστής,

— Επίσημος Παραλήπτης,

— Διαχειριστής της Πτώχευσης,

LATVIJA

— Maksātnespējas procesa administrators,

LIETUVA

— Bankroto administratorius,

— Restruktūrizavimo administratorius,

LUXEMBOURG

— Le curateur,

— Le commissaire,

— Le liquidateur,

— Le conseil de gérance de la section d'assainissement du notariat,

— Le liquidateur dans le cadre du surendettement,

MAGYARORSZÁG

— Vagyonfelügyelő,

— Felszámoló,

MALTA

— Amministratur Proviżorju,

— Riċevitur Uffiċjali,

— Stralċjarju,

— Manager Speċjali,

— Kuraturi f'każ ta' proċeduri ta' falliment,

— Kontrolur Speċjali,

NEDERLAND

— De curator in het faillissement,

— De bewindvoerder in de surséance van betaling,

— De bewindvoerder in de schuldsaneringsregeling natuurlijke personen,

ÖSTERREICH

— Masseverwalter,

— Sanierungsverwalter,

— Ausgleichsverwalter,

— Besonderer Verwalter,

— Einstweiliger Verwalter,

— Sachwalter,

— Treuhänder,

— Insolvenzgericht,

— Konkursgericht,

POLSKA

— Syndyk,

— Nadzorca sądowy,

— Zarządca,

PORTUGAL

— Administrador da insolvência,

— Administrador judicial provisório,

ROMÂNIA

— Practician în insolvenţă,

— Administrator concordatar,

— Administrator judiciar,

— Lichidator judiciar,

SLOVENIJA

— Upravitelj,

SLOVENSKO

— Predbežný správca,

— Správca,

SUOMI/FINLAND

— Pesänhoitaja/boförvaltare,

— Selvittäjä/utredare,

SVERIGE

— Förvaltare,

— Rekonstruktör,

UNITED KINGDOM

— Liquidator,

— Supervisor of a voluntary arrangement,

— Administrator,

— Official Receiver,

— Trustee,

— Provisional Liquidator,

— Interim Receiver,

— Judicial factor.

*ANNEX C*

**Repealed Regulation with list of the successive amendments thereto**

Council Regulation (EC) No 1346/2000

(OJ L 160, 30.6.2000, p. 1)

Council Regulation (EC) No 603/2005

(OJ L 100, 20.4.2005, p. 1)

Council Regulation (EC) No 694/2006

(OJ L 121, 6.5.2006, p. 1)

Council Regulation (EC) No 1791/2006

(OJ L 363, 20.12.2006, p. 1)

Council Regulation (EC) No 681/2007

(OJ L 159, 20.6.2007, p. 1)

Council Regulation (EC) No 788/2008

(OJ L 213, 8.8.2008, p. 1)

Implementing Regulation of the Council (EU) No 210/2010

(OJ L 65, 13.3.2010, p. 1)

Council Implementing Regulation (EU) No 583/2011

(OJ L 160, 18.6.2011, p. 52)

Council Regulation (EU) No 517/2013

(OJ L 158, 10.6.2013, p. 1)

Council Implementing Regulation (EU) No 663/2014

(OJ L 179, 19.6.2014, p. 4)

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

(OJ L 236, 23.9.2003, p. 33)

*ANNEX D*

**Correlation table**

| Regulation (EC) No 1346/2000 | This Regulation |
|---|---|
| Article 1 | Article 1 |
| Article 2, introductory words | Article 2, introductory words |
| Article 2, point (a) | Article 2, point (4) |
| Article 2, point (b) | Article 2, point (5) |
| Article 2, point (c) | — |
| Article 2, point (d) | Article 2, point (6) |
| Article 2, point (e) | Article 2, point (7) |
| Article 2, point (f) | Article 2, point (8) |
| Article 2, point (g), introductory words | Article 2, point (9), introductory words |
| Article 2, point (g), first indent | Article 2, point (9)(vii) |
| Article 2, point (g), second indent | Article 2, point (9)(iv) |
| Article 2, point (g), third indent | Article 2, point (9)(viii) |
| Article 2, point (h) | Article 2, point 10 |
| — | Article 2, points (1) to (3) and (11) to (13) |
| — | Article 2, point (9)(i) to (iii), (v), (vi) |
| Article 3 | Article 3 |
| — | Article 4 |
| — | Article 5 |
| — | Article 6 |
| Article 4 | Article 7 |
| Article 5 | Article 8 |
| Article 6 | Article 9 |
| Article 7 | Article 10 |
| Article 8 | Article 11(1) |
| — | Article 11(2) |
| Article 9 | Article 12 |
| Article 10 | Article 13(1) |
| — | Article 13(2) |
| Article 11 | Article 14 |
| Article 12 | Article 15 |
| Article 13, first indent | Article 16, point (a) |
| Article 13, second indent | Article 16, point (b) |
| Article 14, first indent | Article 17, point (a) |
| Article 14, second indent | Article 17, point (b) |

| Regulation (EC) No 1346/2000 | This Regulation |
|---|---|
| Article 14, third indent | Article 17, point (c) |
| Article 15 | Article 18 |
| Article 16 | Article 19 |
| Article 17 | Article 20 |
| Article 18 | Article 21 |
| Article 19 | Article 22 |
| Article 20 | Article 23 |
| — | Article 24 |
| — | Article 25 |
| — | Article 26 |
| — | Article 27 |
| Article 21(1) | Article 28(2) |
| Article 21(2) | Article 28(1) |
| Article 22 | Article 29 |
| Article 23 | Article 30 |
| Article 24 | Article 31 |
| Article 25 | Article 32 |
| Article 26 | Article 33 |
| Article 27 | Article 34 |
| Article 28 | Article 35 |
| — | Article 36 |
| Article 29 | Article 37(1) |
| — | Article 37(2) |
| — | Article 38 |
| — | Article 39 |
| Article 30 | Article 40 |
| Article 31 | Article 41 |
| — | Article 42 |
| — | Article 43 |
| — | Article 44 |
| Article 32 | Article 45 |
| Article 33 | Article 46 |
| Article 34(1) | Article 47(1) |
| Article 34(2) | Article 47(2) |
| Article 34(3) | — |
| — | Article 48 |
| Article 35 | Article 49 |
| Article 36 | Article 50 |
| Article 37 | Article 51 |

| Regulation (EC) No 1346/2000 | This Regulation |
|---|---|
| Article 38 | Article 52 |
| Article 39 | Article 53 |
| Article 40 | Article 54 |
| Article 41 | Article 55 |
| Article 42 | — |
| — | Article 56 |
| — | Article 57 |
| — | Article 58 |
| — | Article 59 |
| — | Article 60 |
| — | Article 61 |
| — | Article 62 |
| — | Article 63 |
| — | Article 64 |
| — | Article 65 |
| — | Article 66 |
| — | Article 67 |
| — | Article 68 |
| — | Article 69 |
| — | Article 70 |
| — | Article 71 |
| — | Article 72 |
| — | Article 73 |
| — | Article 74 |
| — | Article 75 |
| — | Article 76 |
| — | Article 77 |
| — | Article 78 |
| — | Article 79 |
| — | Article 80 |
| — | Article 81 |
| — | Article 82 |
| — | Article 83 |
| Article 43 | Article 84(1) |
| — | Article 84(2) |
| Article 44 | Article 85 |
| — | Article 86 |
| Article 45 | — |
| — | Article 87 |
| — | Article 88 |

| Regulation (EC) No 1346/2000 | This Regulation |
|---|---|
| — | Article 89 |
| Article 46 | Article 90(1) |
| — | Article 90(2) to (4) |
| — | Article 91 |
| Article 47 | Article 92 |
| Annex A | Annex A |
| Annex B | — |
| Annex C | Annex B |
| — | Annex C |
| — | Annex D |

# ANNEX 5—REGULATION 650/2012, THE 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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 81(2) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.

(2) In accordance with point (c) of Article 81(2) of the Treaty on the Functioning of the European Union, such measures may include measures aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) A programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [3], common to the Commission and to the Council, was adopted on 30 November 2000. That programme identifies measures relating to the harmonisation of conflict-of-laws rules as measures facilitating the mutual recognition of decisions, and provides for the drawing-up of an instrument relating to wills and succession.

(5) The European Council meeting in Brussels on 4 and 5 November 2004 adopted a new programme called 'The Hague Programme: strengthening freedom, security and justice in the European Union' [4]. That programme underlines the need to adopt an instrument in matters of succession dealing, in particular, with the questions of conflict of laws, jurisdiction, mutual recognition and enforcement of decisions in the area of succession and a European Certificate of Succession.

(6) At its meeting in Brussels on 10 and 11 December 2009 the European Council adopted a new multiannual programme called 'The Stockholm Programme – An open and secure Europe serving and protecting citizens' [5]. In that programme the European Council considered that mutual recognition should be extended to fields that are not yet covered but are essential to everyday life, for example succession and wills, while taking into consideration Member States' legal systems, including public policy (*ordre public*), and national traditions in this area.

(7) The proper functioning of the internal market should be facilitated by removing the obstacles to the free movement of persons who currently face difficulties in asserting their rights in the context of a succession having cross-border implications. In the European area of justice, citizens must be able to organise their succession in advance. The rights of heirs and legatees, of other persons close to the deceased and of creditors of the succession must be effectively guaranteed.

(8) In order to achieve those objectives, this Regulation should bring together provisions on jurisdiction, on applicable law, on recognition or, as the case may be, acceptance, enforceability and enforcement of decisions, authentic instruments and court settlements and on the creation of a European Certificate of Succession.

[1] OJ C 44, 11.2.2011, p. 148.
[2] Position of the European Parliament of 13 March 2012 (not yet published in the Official Journal) and decision of the Council of 7 June 2012.
[3] OJ C 12, 15.1.2001, p. 1.
[4] OJ C 53, 3.3.2005, p. 1.
[5] OJ C 115, 4.5.2010, p. 1.

(9) The scope of this Regulation should include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.

(10) This Regulation should not apply to revenue matters or to administrative matters of a public-law nature. It should therefore be for national law to determine, for instance, how taxes and other liabilities of a public-law nature are calculated and paid, whether these be taxes payable by the deceased at the time of death or any type of succession-related tax to be paid by the estate or the beneficiaries. It should also be for national law to determine whether the release of succession property to beneficiaries under this Regulation or the recording of succession property in a register may be made subject to the payment of taxes.

(11) This Regulation should not apply to areas of civil law other than succession. For reasons of clarity, a number of questions which could be seen as having a link with matters of succession should be explicitly excluded from the scope of this Regulation.

(12) Accordingly, this Regulation should not apply to questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters, and property regimes of relationships deemed to have comparable effects to marriage. The authorities dealing with a given succession under this Regulation should nevertheless, depending on the situation, take into account the winding-up of the matrimonial property regime or similar property regime of the deceased when determining the estate of the deceased and the respective shares of the beneficiaries.

(13) Questions relating to the creation, administration and dissolution of trusts should also be excluded from the scope of this Regulation. This should not be understood as a general exclusion of trusts. Where a trust is created under a will or under statute in connection with intestate succession the law applicable to the succession under this Regulation should apply with respect to the devolution of the assets and the determination of the beneficiaries.

(14) Property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, should also be excluded from the scope of this Regulation. However, it should be the law specified by this Regulation as the law applicable to the succession which determines whether gifts or other forms of dispositions *inter vivos* giving rise to a right *in rem* prior to death should be restored or accounted for for the purposes of determining the shares of the beneficiaries in accordance with the law applicable to the succession.

(15) This Regulation should allow for the creation or the transfer by succession of a right in immovable or movable property as provided for in the law applicable to the succession. It should, however, not affect the limited number (*'numerus clausus'*) of rights *in rem* known in the national law of some Member States. A Member State should not be required to recognise a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law.

(16) However, in order to allow the beneficiaries to enjoy in another Member State the rights which have been created or transferred to them by succession, this Regulation should provide for the adaptation of an unknown right *in rem* to the closest equivalent right *in rem* under the law of that other Member State. In the context of such an adaptation, account should be taken of the aims and the interests pursued by the specific right *in rem* and the effects attached to it. For the purposes of determining the closest equivalent national right *in rem*, the authorities or competent persons of the State whose law applied to the succession may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law.

(17) The adaptation of unknown rights *in rem* as explicitly provided for by this Regulation should not preclude other forms of adaptation in the context of the application of this Regulation.

(18) The requirements for the recording in a register of a right in immovable or movable property should be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept (for immovable property, the *lex rei sitae*) which determines under what legal conditions and how the recording must be carried out and which authorities, such as land registers or notaries, are in charge of checking that all requirements are met and that the documentation presented or established is sufficient or contains the necessary information. In particular, the authorities may check that the right of the deceased to the succession property mentioned in the document presented for registration is a right which is recorded as such in the register or which is otherwise demonstrated in accordance with the law of the Member State in which the register is kept. In order to avoid duplication of documents, the registration authorities should accept such documents drawn up in another Member State by the competent authorities whose circulation is provided for by this Regulation. In particular, the European Certificate of Succession issued under this

Regulation should constitute a valid document for the recording of succession property in a register of a Member State. This should not preclude the authorities involved in the registration from asking the person applying for registration to provide such additional information, or to present such additional documents, as are required under the law of the Member State in which the register is kept, for instance information or documents relating to the payment of revenue. The competent authority may indicate to the person applying for registration how the missing information or documents can be provided.

(19) The effects of the recording of a right in a register should also be excluded from the scope of this Regulation. It should therefore be the law of the Member State in which the register is kept which determines whether the recording is, for instance, declaratory or constitutive in effect. Thus, where, for example, the acquisition of a right in immovable property requires a recording in a register under the law of the Member State in which the register is kept in order to ensure the *erga omnes* effect of registers or to protect legal transactions, the moment of such acquisition should be governed by the law of that Member State.

(20) This Regulation should respect the different systems for dealing with matters of succession applied in the Member States. For the purposes of this Regulation, the term 'court' should therefore be given a broad meaning so as to cover not only courts in the true sense of the word, exercising judicial functions, but also the notaries or registry offices in some Member States who or which, in certain matters of succession, exercise judicial functions like courts, and the notaries and legal professionals who, in some Member States, exercise judicial functions in a given succession by delegation of power by a court. All courts as defined in this Regulation should be bound by the rules of jurisdiction set out in this Regulation. Conversely, the term 'court' should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.

(21) This Regulation should allow all notaries who have competence in matters of succession in the Member States to exercise such competence. Whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in this Regulation should depend on whether or not they are covered by the term 'court' for the purposes of this Regulation.

(22) Acts issued by notaries in matters of succession in the Member States should circulate under this Regulation. When notaries exercise judicial functions they are bound by the rules of jurisdiction, and the decisions they give should circulate in accordance with the provisions on recognition, enforceability and enforcement of decisions. When notaries do not exercise judicial functions they are not bound by the rules of jurisdiction, and the authentic instruments they issue should circulate in accordance with the provisions on authentic instruments.

(23) In view of the increasing mobility of citizens and in order to ensure the proper administration of justice within the Union and to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, this Regulation should provide that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death. In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation.

(24) In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

(25) With regard to the determination of the law applicable to the succession the authority dealing with the succession may in exceptional cases – where, for instance, the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State – arrive at the conclusion that the law applicable to the succession should not be the law of the State of the habitual residence of the deceased but rather the law of the State with which the deceased was manifestly more closely connected. That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.

(26) Nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of private international law.

(27) The rules of this Regulation are devised so as to ensure that the authority dealing with the succession will, in most situations, be applying its own law. This Regulation therefore provides for a series of mechanisms which would come into play where the deceased had chosen as the law to govern his succession the law of a Member State of which he was a national.

(28) One such mechanism should be to allow the parties concerned to conclude a choice-of-court agreement in favour of the courts of the Member State of the chosen law. It would have to be determined on a case-by-case basis, depending in particular on the issue covered by the choice-of-court agreement, whether the agreement would have to be concluded between all parties concerned by the succession or whether some of them could agree to bring a specific issue before the chosen court in a situation where the decision by that court on that issue would not affect the rights of the other parties to the succession.

(29) If succession proceedings are opened by a court of its own motion, as is the case in certain Member States, that court should close the proceedings if the parties agree to settle the succession amicably out of court in the Member State of the chosen law. Where succession proceedings are not opened by a court of its own motion, this Regulation should not prevent the parties from settling the succession amicably out of court, for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the succession is not the law of that Member State.

(30) In order to ensure that the courts of all Member States may, on the same grounds, exercise jurisdiction in relation to the succession of persons not habitually resident in a Member State at the time of death, this Regulation should list exhaustively, in a hierarchical order, the grounds on which such subsidiary jurisdiction may be exercised.

(31) In order to remedy, in particular, situations of denial of justice, this Regulation should provide a *forum necessitatis* allowing a court of a Member State, on an exceptional basis, to rule on a succession which is closely connected with a third State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State in question, for example because of civil war, or when a beneficiary cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on *forum necessitatis* should, however, be exercised only if the case has a sufficient connection with the Member State of the court seised.

(32) In order to simplify the lives of heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, this Regulation should allow any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, to make such declarations in the form provided for by the law of the Member State of his habitual residence before the courts of that Member State. This should not preclude such declarations being made before other authorities in that Member State which are competent to receive declarations under national law. Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession.

(33) It should not be possible for a person who wishes to limit his liability for the debts under the succession to do so by a mere declaration to that effect before the courts or other competent authorities of the Member State of his habitual residence where the law applicable to the succession requires him to initiate specific legal proceedings, for instance inventory proceedings, before the competent court. A declaration made in such circumstances by a person in the Member State of his habitual residence in the form provided for by the law of that Member State should therefore not be formally valid for the purposes of this Regulation. Nor should the documents instituting the legal proceedings be regarded as declarations for the purposes of this Regulation.

(34) In the interests of the harmonious functioning of justice, the giving of irreconcilable decisions in different Member States should be avoided. To that end, this Regulation should provide for general procedural rules similar to those of other Union instruments in the area of judicial cooperation in civil matters.

(35) One such procedural rule is a *lis pendens* rule which will come into play if the same succession case is brought before different courts in different Member States. That rule will then determine which court should proceed to deal with the succession case.

(36) Given that succession matters in some Member States may be dealt with by non-judicial authorities, such as notaries, who are not bound by the rules of jurisdiction under this Regulation, it cannot be excluded that an amicable out-of-court settlement and court proceedings relating to the same succession, or two amicable out-of-court settlements relating to the same succession, may be initiated in parallel in different Member States. In such a situation, it should be for the parties involved, once they become aware of the parallel proceedings, to agree among themselves how to proceed. If they cannot agree, the succession would have to be dealt with and decided upon by the courts having jurisdiction under this Regulation.

(37) In order to allow citizens to avail themselves, with all legal certainty, of the benefits offered by the internal market, this Regulation should enable them to know in advance which law will apply to their succession. Harmonised conflict-of-laws rules should be introduced in order to avoid contradictory results. The main rule should ensure that the succession is governed by a predictable law with which it is closely connected. For reasons of legal certainty and in order to avoid the fragmentation of the succession, that law should govern the succession as a whole, that is to say, all of the property forming part of the estate, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State.

(38) This Regulation should enable citizens to organise their succession in advance by choosing the law applicable to their succession. That choice should be limited to the law of a State of their nationality in order to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserved share.

(39) A choice of law should be made expressly in a declaration in the form of a disposition of property upon death or be demonstrated by the terms of such a disposition. A choice of law could be regarded as demonstrated by a disposition of property upon death where, for instance, the deceased had referred in his disposition to specific provisions of the law of the State of his nationality or where he had otherwise mentioned that law.

(40) A choice of law under this Regulation should be valid even if the chosen law does not provide for a choice of law in matters of succession. It should however be for the chosen law to determine the substantive validity of the act of making the choice, that is to say, whether the person making the choice may be considered to have understood and consented to what he was doing. The same should apply to the act of modifying or revoking a choice of law.

(41) For the purposes of the application of this Regulation, the determination of the nationality or the multiple nationalities of a person should be resolved as a preliminary question. The issue of considering a person as a national of a State falls outside the scope of this Regulation and is subject to national law, including, where applicable, international Conventions, in full observance of the general principles of the European Union.

(42) The law determined as the law applicable to the succession should govern the succession from the opening of the succession to the transfer of ownership of the assets forming part of the estate to the beneficiaries as determined by that law. It should include questions relating to the administration of the estate and to liability for the debts under the succession. The payment of the debts under the succession may, depending, in particular, on the law applicable to the succession, include the taking into account of a specific ranking of the creditors.

(43) The rules of jurisdiction laid down by this Regulation may, in certain cases, lead to a situation where the court having jurisdiction to rule on the succession will not be applying its own law. When that situation occurs in a Member State whose law provides for the mandatory appointment of an administrator of the estate, this Regulation should allow the courts of that Member State, when seised, to appoint one or more such administrators under their own law. This should be without prejudice to any choice made by the parties to settle the succession amicably out of court in another Member State where this is possible under the law of that Member State. In order to ensure a smooth coordination between the law applicable to the succession and the law of the Member State of the appointing court, the court should appoint the person(s) who would be entitled to administer the estate under the law applicable to the succession, such as for instance the executor of the will of the deceased or the heirs themselves or, if the law applicable to the succession so requires, a third-party administrator. The courts may, however, in specific cases where their law so requires, appoint a third party as administrator even if this is not provided for in the law applicable to the succession. If the deceased had appointed an executor of the will, that person may not be deprived of his powers unless the law applicable to the succession allows for the termination of his mandate.

(44) The powers exercised by the administrators appointed in the Member State of the court seised should be the powers of administration which they may exercise under the law applicable to the succession. Thus, if, for instance, the heir is appointed as administrator he should have the powers to administer the estate which an heir

would have under that law. Where the powers of administration which may be exercised under the law applicable to the succession are not sufficient to preserve the assets of the estate or to protect the rights of the creditors or of other persons having guaranteed the debts of the deceased, the administrator(s) appointed in the Member State of the court seised may, on a residual basis, exercise powers of administration to that end provided for by the law of that Member State. Such residual powers could include, for instance, establishing a list of the assets of the estate and the debts under the succession, informing creditors of the opening of the succession and inviting them to make their claims known, and taking any provisional, including protective, measures intended to preserve the assets of the estate. The acts performed by an administrator in exercise of the residual powers should respect the law applicable to the succession as regards the transfer of ownership of succession property, including any transaction entered into by the beneficiaries prior to the appointment of the administrator, liability for the debts under the succession and the rights of the beneficiaries, including, where applicable, the right to accept or to waive the succession. Such acts could, for instance, only entail the alienation of assets or the payment of debts where this would be allowed under the law applicable to the succession. Where under the law applicable to the succession the appointment of a third-party administrator changes the liability of the heirs, such a change of liability should be respected.

(45) This Regulation should not preclude creditors, for instance through a representative, from taking such further steps as may be available under national law, where applicable, in accordance with the relevant Union instruments, in order to safeguard their rights.

(46) This Regulation should allow for potential creditors in other Member States where assets are located to be informed of the opening of the succession. In the context of the application of this Regulation, consideration should therefore be given to the possibility of establishing a mechanism, if appropriate by way of the e-Justice portal, to enable potential creditors in other Member States to access the relevant information so that they can make their claims known.

(47) The law applicable to the succession should determine who the beneficiaries are in any given succession. Under most laws, the term 'beneficiaries' would cover heirs and legatees and persons entitled to a reserved share although, for instance, the legal position of legatees is not the same under all laws. Under some laws, the legatee may receive a direct share in the estate whereas under other laws the legatee may acquire only a claim against the heirs.

(48) In order to ensure legal certainty for persons wishing to plan their succession in advance, this Regulation should lay down a specific conflict-of-laws rule concerning the admissibility and substantive validity of dispositions of property upon death. To ensure the uniform application of that rule, this Regulation should list which elements should be considered as elements pertaining to substantive validity. The examination of the substantive validity of a disposition of property upon death may lead to the conclusion that that disposition is without legal existence.

(49) An agreement as to succession is a type of disposition of property upon death the admissibility and acceptance of which vary among the Member States. In order to make it easier for succession rights acquired as a result of an agreement as to succession to be accepted in the Member States, this Regulation should determine which law is to govern the admissibility of such agreements, their substantive validity and their binding effects between the parties, including the conditions for their dissolution.

(50) The law which, under this Regulation, will govern the admissibility and substantive validity of a disposition of property upon death and, as regards agreements as to succession, the binding effects of such an agreement as between the parties, should be without prejudice to the rights of any person who, under the law applicable to the succession, has a right to a reserved share or another right of which he cannot be deprived by the person whose estate is involved.

(51) Where reference is made in this Regulation to the law which would have been applicable to the succession of the person making a disposition of property upon death if he had died on the day on which the disposition was, as the case may be, made, modified or revoked, such reference should be understood as a reference to either the law of the State of the habitual residence of the person concerned on that day or, if he had made a choice of law under this Regulation, the law of the State of his nationality on that day.

(52) This Regulation should regulate the validity as to form of all dispositions of property upon death made in writing by way of rules which are consistent with those of the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions. When determining whether a given disposition of property upon death is formally valid under this Regulation, the competent authority should disregard the fraudulent creation of an international element to circumvent the rules on formal validity.

(53) For the purposes of this Regulation, any provision of law limiting the permitted forms of dispositions of property upon death by reference to certain personal qualifications of the person making the disposition, such as, for instance, his age, should be deemed to pertain to matters of form. This should not be interpreted as meaning that the law applicable to the formal validity of a disposition of property upon death under this Regulation should determine whether or not a minor has the capacity to make a disposition of property upon death. That law should only determine whether a personal qualification such as, for instance, minority should bar a person from making a disposition of property upon death in a certain form.

(54) For economic, family or social considerations, certain immovable property, certain enterprises and other special categories of assets are subject to special rules in the Member State in which they are located imposing restrictions concerning or affecting the succession in respect of those assets. This Regulation should ensure the application of such special rules. However, this exception to the application of the law applicable to the succession requires a strict interpretation in order to remain compatible with the general objective of this Regulation. Therefore, neither conflict-of-laws rules subjecting immovable property to a law different from that applicable to movable property nor provisions providing for a reserved share of the estate greater than that provided for in the law applicable to the succession under this Regulation may be regarded as constituting special rules imposing restrictions concerning or affecting the succession in respect of certain assets.

(55) To ensure uniform handling of a situation in which it is uncertain in what order two or more persons whose succession would be governed by different laws died, this Regulation should lay down a rule providing that none of the deceased persons is to have any rights in the succession of the other or others.

(56) In some situations an estate may be left without a claimant. Different laws provide differently for such situations. Under some laws, the State will be able to claim the vacant estate as an heir irrespective of where the assets are located. Under some other laws, the State will be able to appropriate only the assets located on its territory. This Regulation should therefore lay down a rule providing that the application of the law applicable to the succession should not preclude a Member State from appropriating under its own law the assets located on its territory. However, to ensure that this rule is not detrimental to the creditors of the estate, a proviso should be added enabling the creditors to seek satisfaction of their claims out of all the assets of the estate, irrespective of their location.

(57) The conflict-of-laws rules laid down in this Regulation may lead to the application of the law of a third State. In such cases regard should be had to the private international law rules of that State. If those rules provide for *renvoi* either to the law of a Member State or to the law of a third State which would apply its own law to the succession, such *renvoi* should be accepted in order to ensure international consistency. *Renvoi* should, however, be excluded in situations where the deceased had made a choice of law in favour of the law of a third State.

(58) Considerations of public interest should allow courts and other competent authorities dealing with matters of succession in the Member States to disregard, in exceptional circumstances, certain provisions of a foreign law where, in a given case, applying such provisions would be manifestly incompatible with the public policy (*ordre public*) of the Member State concerned. However, the courts or other competent authorities should not be able to apply the public-policy exception in order to set aside the law of another State or to refuse to recognise or, as the case may be, accept or enforce a decision, an authentic instrument or a court settlement from another Member State when doing so would be contrary to the Charter of Fundamental Rights of the European Union, and in particular Article 21 thereof, which prohibits all forms of discrimination.

(59) In the light of its general objective, which is the mutual recognition of decisions given in the Member States in matters of succession, irrespective of whether such decisions were given in contentious or non-contentious proceedings, this Regulation should lay down rules relating to the recognition, enforceability and enforcement of decisions similar to those of other Union instruments in the area of judicial cooperation in civil matters.

(60) In order to take into account the different systems for dealing with matters of succession in the Member States, this Regulation should guarantee the acceptance and enforceability in all Member States of authentic instruments in matters of succession.

(61) Authentic instruments should have the same evidentiary effects in another Member State as they have in the Member State of origin, or the most comparable effects. When determining the evidentiary effects of a given authentic instrument in another Member State or the most comparable effects, reference should be made to the nature and the scope of the evidentiary effects of the authentic instrument in the Member State of origin. The evidentiary effects which a given authentic instrument should have in another Member State will therefore depend on the law of the Member State of origin.

(62) The 'authenticity' of an authentic instrument should be an autonomous concept covering elements such as the genuineness of the instrument, the formal prerequisites of the instrument, the powers of the authority drawing up the instrument and the procedure under which the instrument is drawn up. It should also cover the factual elements recorded in the authentic instrument by the authority concerned, such as the fact that the parties indicated appeared before that authority on the date indicated and that they made the declarations indicated. A party wishing to challenge the authenticity of an authentic instrument should do so before the competent court in the Member State of origin of the authentic instrument under the law of that Member State.

(63) The term 'the legal acts or legal relationships recorded in an authentic instrument' should be interpreted as referring to the contents as to substance recorded in the authentic instrument. The legal acts recorded in an authentic instrument could be, for instance, the agreement between the parties on the sharing-out or the distribution of the estate, or a will or an agreement as to succession, or another declaration of intent. The legal relationships could be, for instance, the determination of the heirs and other beneficiaries as established under the law applicable to the succession, their respective shares and the existence of a reserved share, or any other element established under the law applicable to the succession. A party wishing to challenge the legal acts or legal relationships recorded in an authentic instrument should do so before the courts having jurisdiction under this Regulation, which should decide on the challenge in accordance with the law applicable to the succession.

(64) If a question relating to the legal acts or legal relationships recorded in an authentic instrument is raised as an incidental question in proceedings before a court of a Member State, that court should have jurisdiction over that question.

(65) An authentic instrument which is being challenged should not produce any evidentiary effects in a Member State other than the Member State of origin as long as the challenge is pending. If the challenge concerns only a specific matter relating to the legal acts or legal relationships recorded in the authentic instrument, the authentic instrument in question should not produce any evidentiary effects in a Member State other than the Member State of origin with regard to the matter being challenged as long as the challenge is pending. An authentic instrument which has been declared invalid as a result of a challenge should cease to produce any evidentiary effects.

(66) Should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case. Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the courts having jurisdiction under this Regulation, or, where the question is raised as an incidental question in the course of proceedings, by the court seised of those proceedings. In the event of incompatibility between an authentic instrument and a decision, regard should be had to the grounds of non-recognition of decisions under this Regulation.

(67) In order for a succession with cross-border implications within the Union to be settled speedily, smoothly and efficiently, the heirs, legatees, executors of the will or administrators of the estate should be able to demonstrate easily their status and/or rights and powers in another Member State, for instance in a Member State in which succession property is located. To enable them to do so, this Regulation should provide for the creation of a uniform certificate, the European Certificate of Succession (hereinafter referred to as 'the Certificate'), to be issued for use in another Member State. In order to respect the principle of subsidiarity, the Certificate should not take the place of internal documents which may exist for similar purposes in the Member States.

(68) The authority which issues the Certificate should have regard to the formalities required for the registration of immovable property in the Member State in which the register is kept. For that purpose, this Regulation should provide for an exchange of information on such formalities between the Member States.

(69) The use of the Certificate should not be mandatory. This means that persons entitled to apply for a Certificate should be under no obligation to do so but should be free to use the other instruments available under this Regulation (decisions, authentic instruments and court settlements). However, no authority or person presented with a Certificate issued in another Member State should be entitled to request that a decision, authentic instrument or court settlement be presented instead of the Certificate.

(70) The Certificate should be issued in the Member State whose courts have jurisdiction under this Regulation. It should be for each Member State to determine in its internal legislation which authorities are to have competence to issue the Certificate, whether they be courts as defined for the purposes of this Regulation or other authorities with competence in matters of succession, such as, for instance, notaries. It should also be for each Member State to determine in its internal legislation whether the issuing authority may involve other competent bodies in the issuing process, for instance bodies competent to receive statutory declarations in lieu of an oath. The Member States should

communicate to the Commission the relevant information concerning their issuing authorities in order for that information to be made publicly available.

(71) The Certificate should produce the same effects in all Member States. It should not be an enforceable title in its own right but should have an evidentiary effect and should be presumed to demonstrate accurately elements which have been established under the law applicable to the succession or under any other law applicable to specific elements, such as the substantive validity of dispositions of property upon death. The evidentiary effect of the Certificate should not extend to elements which are not governed by this Regulation, such as questions of affiliation or the question whether or not a particular asset belonged to the deceased. Any person who makes payments or passes on succession property to a person indicated in the Certificate as being entitled to accept such payment or property as an heir or legatee should be afforded appropriate protection if he acted in good faith relying on the accuracy of the information certified in the Certificate. The same protection should be afforded to any person who, relying on the accuracy of the information certified in the Certificate, buys or receives succession property from a person indicated in the Certificate as being entitled to dispose of such property. The protection should be ensured if certified copies which are still valid are presented. Whether or not such an acquisition of property by a third person is effective should not be determined by this Regulation.

(72) The competent authority should issue the Certificate upon request. The original of the Certificate should remain with the issuing authority, which should issue one or more certified copies of the Certificate to the applicant and to any other person demonstrating a legitimate interest. This should not preclude a Member State, in accordance with its national rules on public access to documents, from allowing copies of the Certificate to be disclosed to members of the public. This Regulation should provide for redress against decisions of the issuing authority, including decisions to refuse the issue of a Certificate. Where the Certificate is rectified, modified or withdrawn, the issuing authority should inform the persons to whom certified copies have been issued so as to avoid wrongful use of such copies.

(73) Respect for international commitments entered into by the Member States means that this Regulation should not affect the application of international conventions to which one or more Member States are party at the time when this Regulation is adopted. In particular, the Member States which are Contracting Parties to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions should be able to continue to apply the provisions of that Convention instead of the provisions of this Regulation with regard to the formal validity of wills and joint wills. Consistency with the general objectives of this Regulation requires, however, that this Regulation take precedence, as between Member States, over conventions concluded exclusively between two or more Member States in so far as such conventions concern matters governed by this Regulation.

(74) This Regulation should not preclude Member States which are parties to the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration from continuing to apply certain provisions of that Convention, as revised by the intergovernmental agreement between the States parties thereto.

(75) In order to facilitate the application of this Regulation, provision should be made for an obligation requiring the Member States to communicate certain information regarding their legislation and procedures relating to succession within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC [1]. In order to allow for the timely publication in the *Official Journal of the European Union* of all information of relevance for the practical application of this Regulation, the Member States should also communicate such information to the Commission before this Regulation starts to apply.

(76) Equally, to facilitate the application of this Regulation and to allow for the use of modern communication technologies, standard forms should be prescribed for the attestations to be provided in connection with the application for a declaration of enforceability of a decision, authentic instrument or court settlement and for the application for a European Certificate of Succession, as well as for the Certificate itself.

(77) In calculating the periods and time limits provided for in this Regulation, Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits [2] should apply.

(78) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission with regard to the establishment and subsequent amendment of the attestations and forms pertaining to the declaration of enforceability of decisions, court settlements and authentic instruments and to the European Certificate of Succession. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms

[1] OJ L 174, 27.6.2001, p. 25.
[2] OJ L 124, 8.6.1971, p. 1.

for control by Member States of the Commission's exercise of implementing powers [1].

(79) The advisory procedure should be used for the adoption of implementing acts establishing and subsequently amending the attestations and forms provided for in this Regulation in accordance with the procedure laid down in Article 4 of Regulation (EU) No 182/2011.

(80) Since the objectives of this Regulation, namely the free movement of persons, the organisation in advance by citizens of their succession in a Union context and the protection of the rights of heirs and legatees and of persons close to the deceased, as well as of the creditors of the succession, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(81) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. This Regulation must be applied by the courts and other competent authorities of the Member States in observance of those rights and principles.

(82) In accordance with Articles 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, those Member States are not taking part in the adoption of this Regulation and are not bound by it or subject to its application. This is, however, without prejudice to the possibility for the United Kingdom and Ireland of notifying their intention of accepting this Regulation after its adoption in accordance with Article 4 of the said Protocol.

(83) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

[1] OJ L 55, 28.2.2011, p. 13.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

**SCOPE AND DEFINITIONS**

*Article 1*

**Scope**

1. This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

(a) the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects;

(b) the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26;

(c) questions relating to the disappearance, absence or presumed death of a natural person;

(d) questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage;

(e) maintenance obligations other than those arising by reason of death;

(f) the formal validity of dispositions of property upon death made orally;

(g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);

(h) questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members;

(i) the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;

(j) the creation, administration and dissolution of trusts;

(k) the nature of rights *in rem*; and

(l) any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

*Article 2*

**Competence in matters of succession within the Member States**

This Regulation shall not affect the competence of the authorities of the Member States to deal with matters of succession.

*Article 3*

**Definitions**

1. For the purposes of this Regulation:

(a) 'succession' means succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession;

(b) 'agreement as to succession' means an agreement, including an agreement resulting from mutual wills, which, with or without consideration, creates, modifies or terminates rights to the future estate or estates of one or more persons party to the agreement;

(c) 'joint will' means a will drawn up in one instrument by two or more persons;

(d) 'disposition of property upon death' means a will, a joint will or an agreement as to succession;

(e) 'Member State of origin' means the Member State in which the decision has been given, the court settlement approved or concluded, the authentic instrument established or the European Certificate of Succession issued;

(f) 'Member State of enforcement' means the Member State in which the declaration of enforceability or the enforcement of the decision, court settlement or authentic instrument is sought;

(g) 'decision' means any decision in a matter of succession given by a court of a Member State, whatever the decision may be called, including a decision on the determination of costs or expenses by an officer of the court;

(h) 'court settlement' means a settlement in a matter of succession which has been approved by a court or concluded before a court in the course of proceedings;

(i) 'authentic instrument' means a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

(i) relates to the signature and the content of the authentic instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin.

2. For the purposes of this Regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or act under the control of a judicial authority, provided that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and provided that their decisions under the law of the Member State in which they operate:

(a) may be made the subject of an appeal to or review by a judicial authority; and

(b) have a similar force and effect as a decision of a judicial authority on the same matter.

The Member States shall notify the Commission of the other authorities and legal professionals referred to in the first subparagraph in accordance with Article 79.

CHAPTER II

**JURISDICTION**

*Article 4*

**General jurisdiction**

The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.

*Article 5*

**Choice-of-court agreement**

1. Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter.

2. Such a choice-of-court agreement shall be expressed in writing, dated and signed by the parties concerned. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

*Article 6*

**Declining of jurisdiction in the event of a choice of law**

Where the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the court seised pursuant to Article 4 or Article 10:

(a) may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets; or

(b) shall decline jurisdiction if the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of the Member State of the chosen law.

*Article 7*

**Jurisdiction in the event of a choice of law**

The courts of a Member State whose law had been chosen by the deceased pursuant to Article 22 shall have jurisdiction to rule on the succession if:

(a) a court previously seised has declined jurisdiction in the same case pursuant to Article 6;

(b) the parties to the proceedings have agreed, in accordance with Article 5, to confer jurisdiction on a court or the courts of that Member State; or

(c) the parties to the proceedings have expressly accepted the jurisdiction of the court seised.

*Article 8*

**Closing of own-motion proceedings in the event of a choice of law**

A court which has opened succession proceedings of its own motion under Article 4 or Article 10 shall close the proceedings if the parties to the proceedings have agreed to settle the succession amicably out of court in the Member State whose law had been chosen by the deceased pursuant to Article 22.

*Article 9*

**Jurisdiction based on appearance**

1. Where, in the course of proceedings before a court of a Member State exercising jurisdiction pursuant to Article 7, it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings who were not party to the agreement enter an appearance without contesting the jurisdiction of the court.

2. If the jurisdiction of the court referred to in paragraph 1 is contested by parties to the proceedings who were not party to the agreement, the court shall decline jurisdiction.

In that event, jurisdiction to rule on the succession shall lie with the courts having jurisdiction pursuant to Article 4 or Article 10.

*Article 10*

**Subsidiary jurisdiction**

1. Where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as:

(a) the deceased had the nationality of that Member State at the time of death; or, failing that,

(b) the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seised, a period of not more than five years has elapsed since that habitual residence changed.

2. Where no court in a Member State has jurisdiction pursuant to paragraph 1, the courts of the Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on those assets.

*Article 11*

***Forum necessitatis***

Where no court of a Member State has jurisdiction pursuant to other provisions of this Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected.

The case must have a sufficient connection with the Member State of the court seised.

*Article 12*

**Limitation of proceedings**

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

2. Paragraph 1 shall not affect the right of the parties to limit the scope of the proceedings under the law of the Member State of the court seised.

*Article 13*

**Acceptance or waiver of the succession, of a legacy or of a reserved share**

In addition to the court having jurisdiction to rule on the succession pursuant to this Regulation, the courts of the Member State of the habitual residence of any person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court.

*Article 14*

**Seising of a court**

For the purposes of this Chapter, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the defendant;

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court; or

(c) if the proceedings are opened of the court's own motion, at the time when the decision to open the proceedings is taken by the court, or, where such a decision is not required, at the time when the case is registered by the court.

*Article 15*

**Examination as to jurisdiction**

Where a court of a Member State is seised of a succession matter over which it has no jurisdiction under this Regulation, it shall declare of its own motion that it has no jurisdiction.

*Article 16*

**Examination as to admissibility**

1. Where a defendant habitually resident in a State other than the Member State where the action was brought does not enter an appearance, the court having jurisdiction shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in time to arrange for his defence, or that all necessary steps have been taken to that end.

2. Article 19 of 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 or commercial matters (service of documents) [1] shall apply instead of paragraph 1 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

[1] OJ L 324, 10.12.2007, p. 79.

3. Where Regulation (EC) No 1393/2007 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

*Article 17*

***Lis pendens***

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

*Article 18*

**Related actions**

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where those actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable decisions resulting from separate proceedings.

*Article 19*

**Provisional, including protective, measures**

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER III

**APPLICABLE LAW**

*Article 20*

**Universal application**

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

*Article 21*

**General rule**

1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.

*Article 22*

**Choice of law**

1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.

A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.

3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.

4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.

*Article 23*

**The scope of the applicable law**

1. The law determined pursuant to Article 21 or Article 22 shall govern the succession as a whole.

2. That law shall govern in particular:

(a) the causes, time and place of the opening of the succession;

(b) the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner;

(c) the capacity to inherit;

(d) disinheritance and disqualification by conduct;

(e) the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy;

(f) the powers of the heirs, the executors of the wills and other administrators of the estate, in particular as regards the sale of property and the payment of creditors, without prejudice to the powers referred to in Article 29(2) and (3);

(g) liability for the debts under the succession;

(h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs;

(i) any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries; and

(j) the sharing-out of the estate.

*Article 24*

**Dispositions of property upon death other than agreements as to succession**

1. A disposition of property upon death other than an agreement as to succession shall be governed, as regards its admissibility and substantive validity, by the law which, under this Regulation, would have been applicable to the succession of the person who made the disposition if he had died on the day on which the disposition was made.

2. Notwithstanding paragraph 1, a person may choose as the law to govern his disposition of property upon death, as regards its admissibility and substantive validity, the law which that person could have chosen in accordance with Article 22 on the conditions set out therein.

3. Paragraph 1 shall apply, as appropriate, to the modification or revocation of a disposition of property upon death other than an agreement as to succession. In the event of a choice of law in accordance with paragraph 2, the modification or revocation shall be governed by the chosen law.

*Article 25*

**Agreements as to succession**

1. An agreement as to succession regarding the succession of one person shall be governed, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law which, under this Regulation, would have been applicable to the succession of that person if he had died on the day on which the agreement was concluded.

2. An agreement as to succession regarding the succession of several persons shall be admissible only if it is admissible under all the laws which, under this Regulation, would have governed the succession of all the persons involved if they had died on the day on which the agreement was concluded.

An agreement as to succession which is admissible pursuant to the first subparagraph shall be governed, as regards its substantive validity and its binding effects between the parties, including the conditions for its dissolution, by the law, from among those referred to in the first subparagraph, with which it has the closest connection.

3. Notwithstanding paragraphs 1 and 2, the parties may choose as the law to govern their agreement as to succession, as regards its admissibility, its substantive validity and its binding effects between the parties, including the conditions for its dissolution, the law which the person or one of the persons whose estate is involved could have chosen in accordance with Article 22 on the conditions set out therein.

*Article 26*

**Substantive validity of dispositions of property upon death**

1. For the purposes of Articles 24 and 25 the following elements shall pertain to substantive validity:

(a) the capacity of the person making the disposition of property upon death to make such a disposition;

(b) the particular causes which bar the person making the disposition from disposing in favour of certain persons or which bar a person from receiving succession property from the person making the disposition;

(c) the admissibility of representation for the purposes of making a disposition of property upon death;

(d) the interpretation of the disposition;

(e) fraud, duress, mistake and any other questions relating to the consent or intention of the person making the disposition.

2. Where a person has the capacity to make a disposition of property upon death under the law applicable pursuant to Article 24 or Article 25, a subsequent change of the law applicable shall not affect his capacity to modify or revoke such a disposition.

*Article 27*

**Formal validity of dispositions of property upon death made in writing**

1. A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law:

(a) of the State in which the disposition was made or the agreement as to succession concluded;

(b) of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death;

(c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death;

(d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; or

(e) in so far as immovable property is concerned, of the State in which that property is located.

The determination of the question whether or not the testator or any person whose succession is concerned by the agreement as to succession had his domicile in a particular State shall be governed by the law of that State.

2. Paragraph 1 shall also apply to dispositions of property upon death modifying or revoking an earlier disposition. The modification or revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under paragraph 1, the disposition of property upon death which has been modified or revoked was valid.

3. For the purposes of this Article, any provision of law which limits the permitted forms of dispositions of property upon death by reference to the age, nationality or other personal conditions of the testator or of the persons whose succession is concerned by an agreement as to succession shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications to be possessed by any witnesses required for the validity of a disposition of property upon death.

*Article 28*

**Validity as to form of a declaration concerning acceptance or waiver**

A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of:

(a) the law applicable to the succession pursuant to Article 21 or Article 22; or

(b) the law of the State in which the person making the declaration has his habitual residence.

*Article 29*

**Special rules on the appointment and powers of an administrator of the estate in certain situations**

1. Where the appointment of an administrator is mandatory or mandatory upon request under the law of the Member State whose courts have jurisdiction to rule on the succession pursuant to this Regulation and the law applicable to the succession is a foreign law, the courts of that Member State may, when seised, appoint one or more administrators of the estate under their own law, subject to the conditions laid down in this Article.

The administrator(s) appointed pursuant to this paragraph shall be the person(s) entitled to execute the will of the deceased and/or to administer the estate under the law applicable to the succession. Where that law does not provide for the administration of the estate by a person who is not a beneficiary, the courts of the Member State in which the administrator is to be appointed may appoint a third-party administrator under their own law if that law so requires and there is a serious conflict of interests between the beneficiaries or between the beneficiaries and the creditors or other persons having guaranteed the debts of the deceased, a disagreement amongst the beneficiaries on the administration of the estate or a complex estate to administer due to the nature of the assets.

The administrator(s) appointed pursuant to this paragraph shall be the only person(s) entitled to exercise the powers referred to in paragraph 2 or 3.

2. The person(s) appointed as administrator(s) pursuant to paragraph 1 shall exercise the powers to administer the estate which he or they may exercise under the law applicable to the succession. The appointing court may, in its decision, lay down specific conditions for the exercise of such powers in accordance with the law applicable to the succession.

Where the law applicable to the succession does not provide for sufficient powers to preserve the assets of the estate or to protect the rights of the creditors or of other persons having guaranteed the debts of the deceased, the appointing court may decide to allow the administrator(s) to exercise, on a residual basis, the powers provided for to that end by its own law and may, in its decision, lay down specific conditions for the exercise of such powers in accordance with that law.

When exercising such residual powers, however, the administrator(s) shall respect the law applicable to the succession as regards the transfer of ownership of succession property, liability for the debts under the succession, the rights of the beneficiaries, including, where applicable, the right to accept or to waive the succession, and, where applicable, the powers of the executor of the will of the deceased.

3. Notwithstanding paragraph 2, the court appointing one or more administrators pursuant to paragraph 1 may, by way of exception, where the law applicable to the succession is the law of a third State, decide to vest in those administrators all the powers of administration provided for by the law of the Member State in which they are appointed.

When exercising such powers, however, the administrators shall respect, in particular, the determination of the beneficiaries and their succession rights, including their rights to a reserved share or claim against the estate or the heirs under the law applicable to the succession.

*Article 30*

**Special rules imposing restrictions concerning or affecting the succession in respect of certain assets**

Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.

*Article 31*

**Adaptation of rights *in rem***

Where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it.

*Article 32*

***Commorientes***

Where two or more persons whose successions are governed by different laws die in circumstances in which it is uncertain in what order their deaths occurred, and where those laws provide differently for that situation or make no provision for it at all, none of the deceased persons shall have any rights to the succession of the other or others.

*Article 33*

**Estate without a claimant**

To the extent that, under the law applicable to the succession pursuant to this Regulation, there is no heir or legatee for any assets under a disposition of property upon death and no natural person is an heir by operation of law, the application of the law so determined shall not preclude the right of a Member State or of an entity appointed for that purpose by that Member State to appropriate under its own law the assets of the estate located on its territory, provided that the creditors are entitled to seek satisfaction of their claims out of the assets of the estate as a whole.

*Article 34*

***Renvoi***

1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of private international law in so far as those rules make a *renvoi*:

(a) to the law of a Member State; or

(b) to the law of another third State which would apply its own law.

2. No *renvoi* shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30.

*Article 35*

**Public policy *(ordre public)***

The application of a provision of the law of any State specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

*Article 36*

**States with more than one legal system – territorial conflicts of laws**

1. Where the law specified by this Regulation is that of a State which comprises several territorial units each of which has its own rules of law in respect of succession, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.

2. In the absence of such internal conflict-of-laws rules:

(a) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the habitual residence of the deceased, be construed as referring to the law of the territorial unit in which the deceased had his habitual residence at the time of death;

(b) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to provisions referring to the nationality of the deceased, be construed as referring to the law of the territorial unit with which the deceased had the closest connection;

(c) any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the law applicable pursuant to any other provisions referring to other elements as connecting factors, be construed as referring to the law of the territorial unit in which the relevant element is located.

3. Notwithstanding paragraph 2, any reference to the law of the State referred to in paragraph 1 shall, for the purposes of determining the relevant law pursuant to Article 27, in the absence of internal conflict-of-laws rules in that State, be construed as referring to the law of the territorial unit with which the testator or the persons whose succession is concerned by the agreement as to succession had the closest connection.

*Article 37*

**States with more than one legal system – inter-personal conflicts of laws**

In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons in respect of succession, any reference to the law of that State shall be construed as referring to the system of law or set of rules determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the deceased had the closest connection shall apply.

*Article 38*

**Non-application of this Regulation to internal conflicts of laws**

A Member State which comprises several territorial units each of which has its own rules of law in respect of succession shall not be required to apply this Regulation to conflicts of laws arising between such units only.

CHAPTER IV

**RECOGNITION, ENFORCEABILITY AND ENFORCEMENT OF DECISIONS**

*Article 39*

**Recognition**

1. A decision given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a decision as the principal issue in a dispute may, in accordance with the procedure provided for in Articles 45 to 58, apply for that decision to be recognised.

3. If the outcome of the proceedings in a court of a Member State depends on the determination of an incidental question of recognition, that court shall have jurisdiction over that question.

*Article 40*

**Grounds of non-recognition**

A decision shall not be recognised:

(a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought;

(b) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the decision when it was possible for him to do so;

(c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;

(d) if it is irreconcilable with an earlier decision given in another Member State or in a third State in proceedings involving the same cause of action and between the same parties, provided that the earlier decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

*Article 41*

**No review as to the substance**

Under no circumstances may a decision given in a Member State be reviewed as to its substance.

*Article 42*

**Staying of recognition proceedings**

A court of a Member State in which recognition is sought of a decision given in another Member State may stay the proceedings if an ordinary appeal against the decision has been lodged in the Member State of origin.

*Article 43*

**Enforceability**

Decisions given in a Member State and enforceable in that State shall be enforceable in another Member State when, on the application of any interested party, they have been declared enforceable there in accordance with the procedure provided for in Articles 45 to 58.

*Article 44*

**Determination of domicile**

To determine whether, for the purposes of the procedure provided for in Articles 45 to 58, a party is domiciled in the Member State of enforcement, the court seised shall apply the internal law of that Member State.

*Article 45*

**Jurisdiction of local courts**

1. The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement communicated by that Member State to the Commission in accordance with Article 78.

2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

*Article 46*

**Procedure**

1. The application procedure shall be governed by the law of the Member State of enforcement.

2. The applicant shall not be required to have a postal address or an authorised representative in the Member State of enforcement.

3. The application shall be accompanied by the following documents:

(a) a copy of the decision which satisfies the conditions necessary to establish its authenticity;

(b) the attestation issued by the court or competent authority of the Member State of origin using the form established in accordance with the advisory procedure referred to in Article 81(2), without prejudice to Article 47.

*Article 47*

**Non-production of the attestation**

1. If the attestation referred to in point (b) of Article 46(3) is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be done by a person qualified to do translations in one of the Member States.

*Article 48*

**Declaration of enforceability**

The decision shall be declared enforceable immediately on completion of the formalities in Article 46 without any review under Article 40. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

*Article 49*

**Notice of the decision on the application for a declaration of enforceability**

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.

2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the decision, if not already served on that party.

*Article 50*

**Appeal against the decision on the application for a declaration of enforceability**

1. The decision on the application for a declaration of enforceability may be appealed against by either party.

2. The appeal shall be lodged with the court communicated by the Member State concerned to the Commission in accordance with Article 78.

3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.

4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 16 shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.

5. An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.

*Article 51*

**Procedure to contest the decision given on appeal**

The decision given on the appeal may be contested only by the procedure communicated by the Member State concerned to the Commission in accordance with Article 78.

*Article 52*

**Refusal or revocation of a declaration of enforceability**

The court with which an appeal is lodged under Article 50 or Article 51 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Article 40. It shall give its decision without delay.

*Article 53*

**Staying of proceedings**

The court with which an appeal is lodged under Article 50 or Article 51 shall, on the application of the party against whom enforcement is sought, stay the proceedings if the enforceability of the decision is suspended in the Member State of origin by reason of an appeal.

*Article 54*

**Provisional, including protective, measures**

1. When a decision must be recognised in accordance with this Chapter, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State of enforcement without a declaration of enforceability under Article 48 being required.

2. The declaration of enforceability shall carry with it by operation of law the power to proceed to any protective measures.

3. During the time specified for an appeal pursuant to Article 50(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

*Article 55*

**Partial enforceability**

1. Where a decision has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.

2. An applicant may request a declaration of enforceability limited to parts of a decision.

*Article 56*

**Legal aid**

An applicant who, in the Member State of origin, has benefited from complete or partial legal aid or exemption from costs or expenses shall be entitled, in any proceedings for a declaration of enforceability, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State of enforcement.

*Article 57*

**No security, bond or deposit**

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for recognition, enforceability or enforcement of a decision given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State of enforcement.

*Article 58*

**No charge, duty or fee**

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State of enforcement.

CHAPTER V

**AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS**

*Article 59*

**Acceptance of authentic instruments**

1. An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (*ordre public*) in the Member State concerned.

A person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the advisory procedure referred to in Article 81(2) describing the evidentiary effects which the authentic instrument produces in the Member State of origin.

2. Any challenge relating to the authenticity of an authentic instrument shall be made before the courts of the Member State of origin and shall be decided upon under the law of that State. The authentic instrument challenged shall not produce any evidentiary effect in another Member State as long as the challenge is pending before the competent court.

3. Any challenge relating to the legal acts or legal relationships recorded in an authentic instrument shall be made before the courts having jurisdiction under this Regulation and shall be decided upon under the law applicable pursuant to Chapter III. The authentic instrument challenged shall not produce any evidentiary effect in a Member State other than the Member State of origin as regards the matter being challenged as long as the challenge is pending before the competent court.

4. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question relating to the legal acts or legal relationships recorded in an authentic instrument in matters of succession, that court shall have jurisdiction over that question.

*Article 60*

**Enforceability of authentic instruments**

1. An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58.

2. For the purposes of point (b) of Article 46(3), the authority which established the authentic instrument shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 81(2).

3. The court with which an appeal is lodged under Article 50 or Article 51 shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

*Article 61*

**Enforceability of court settlements**

1. Court settlements which are enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58.

2. For the purposes of point (b) of Article 46(3), the court which approved the settlement or before which it was concluded shall, on the application of any interested party, issue an attestation using the form established in accordance with the advisory procedure referred to in Article 81(2).

3. The court with which an appeal is lodged under Article 50 or Article 51 shall refuse or revoke a declaration of enforceability only if enforcement of the court settlement is manifestly contrary to public policy (*ordre public*) in the Member State of enforcement.

CHAPTER VI

**EUROPEAN CERTIFICATE OF SUCCESSION**

*Article 62*

**Creation of a European Certificate of Succession**

1. This Regulation creates a European Certificate of Succession (hereinafter referred to as 'the Certificate') which shall be issued for use in another Member State and shall produce the effects listed in Article 69.

2. The use of the Certificate shall not be mandatory.

3. The Certificate shall not take the place of internal documents used for similar purposes in the Member States. However, once issued for use in another Member State, the Certificate shall also produce the effects listed in Article 69 in the Member State whose authorities issued it in accordance with this Chapter.

*Article 63*

**Purpose of the Certificate**

1. The Certificate is for use by heirs, legatees having direct rights in the succession and executors of wills or administrators of the estate who, in another Member State, need to invoke their status or to exercise respectively their rights as heirs or legatees and/or their powers as executors of wills or administrators of the estate.

2. The Certificate may be used, in particular, to demonstrate one or more of the following:

(a) the status and/or the rights of each heir or, as the case may be, each legatee mentioned in the Certificate and their respective shares of the estate;

(b) the attribution of a specific asset or specific assets forming part of the estate to the heir(s) or, as the case may be, the legatee(s) mentioned in the Certificate;

(c) the powers of the person mentioned in the Certificate to execute the will or administer the estate.

*Article 64*

**Competence to issue the Certificate**

The Certificate shall be issued in the Member State whose courts have jurisdiction under Article 4, Article 7, Article 10 or Article 11. The issuing authority shall be:

(a) a court as defined in Article 3(2); or

(b) another authority which, under national law, has competence to deal with matters of succession.

*Article 65*

**Application for a Certificate**

1. The Certificate shall be issued upon application by any person referred to in Article 63(1) (hereinafter referred to as 'the applicant').

2. For the purposes of submitting an application, the applicant may use the form established in accordance with the advisory procedure referred to in Article 81(2).

3. The application shall contain the information listed below, to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified, and shall be accompanied by all relevant documents either in the original or by way of copies which satisfy the conditions necessary to establish their authenticity, without prejudice to Article 66(2):

(a) details concerning the deceased: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address at the time of death, date and place of death;

(b) details concerning the applicant: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relationship to the deceased, if any;

(c) details concerning the representative of the applicant, if any: surname (if applicable, surname at birth), given name(s), address and representative capacity;

(d) details of the spouse or partner of the deceased and, if applicable, ex-spouse(s) or ex-partner(s): surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable) and address;

(e) details of other possible beneficiaries under a disposition of property upon death and/or by operation of law: surname and given name(s) or organisation name, identification number (if applicable) and address;

(f) the intended purpose of the Certificate in accordance with Article 63;

(g) the contact details of the court or other competent authority which is dealing with or has dealt with the succession as such, if applicable;

(h) the elements on which the applicant founds, as appropriate, his claimed right to succession property as a beneficiary and/or his right to execute the will of the deceased and/or to administer the estate of the deceased;

(i) an indication of whether the deceased had made a disposition of property upon death; if neither the original nor a copy is appended, an indication regarding the location of the original;

(j) an indication of whether the deceased had entered into a marriage contract or into a contract regarding a relationship which may have comparable effects to marriage; if neither the original nor a copy of the contract is appended, an indication regarding the location of the original;

(k) an indication of whether any of the beneficiaries has made a declaration concerning acceptance or waiver of the succession;

(l) a declaration stating that, to the applicant's best knowledge, no dispute is pending relating to the elements to be certified;

(m) any other information which the applicant deems useful for the purposes of the issue of the Certificate.

*Article 66*

**Examination of the application**

1. Upon receipt of the application the issuing authority shall verify the information and declarations and the documents and other evidence provided by the applicant. It shall carry out the enquiries necessary for that verification of its own motion where this is provided for or authorised by its own law, or shall invite the applicant to provide any further evidence which it deems necessary.

2. Where the applicant has been unable to produce copies of the relevant documents which satisfy the conditions necessary to establish their authenticity, the issuing authority may decide to accept other forms of evidence.

3. Where this is provided for by its own law and subject to the conditions laid down therein, the issuing authority may require that declarations be made on oath or by a statutory declaration in lieu of an oath.

4. The issuing authority shall take all necessary steps to inform the beneficiaries of the application for a Certificate. It shall, if necessary for the establishment of the elements to be certified, hear any person involved and any executor or administrator and make public announcements aimed at giving other possible beneficiaries the opportunity to invoke their rights.

5. For the purposes of this Article, the competent authority of a Member State shall, upon request, provide the issuing authority of another Member State with information held, in particular, in the land registers, the civil status registers and registers recording documents and facts of relevance for the succession or for the matrimonial property regime or an equivalent property regime of the deceased, where that competent authority would be authorised, under national law, to provide another national authority with such information.

*Article 67*

**Issue of the Certificate**

1. The issuing authority shall issue the Certificate without delay in accordance with the procedure laid down in this Chapter when the elements to be certified have been established under the law applicable to the succession or under any other law applicable to specific elements. It shall use the form established in accordance with the advisory procedure referred to in Article 81(2).

The issuing authority shall not issue the Certificate in particular if:

(a) the elements to be certified are being challenged; or

(b) the Certificate would not be in conformity with a decision covering the same elements.

2. The issuing authority shall take all necessary steps to inform the beneficiaries of the issue of the Certificate.

*Article 68*

**Contents of the Certificate**

The Certificate shall contain the following information, to the extent required for the purpose for which it is issued:

(a) the name and address of the issuing authority;

(b) the reference number of the file;

(c) the elements on the basis of which the issuing authority considers itself competent to issue the Certificate;

(d) the date of issue;

(e) details concerning the applicant: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relationship to the deceased, if any;

(f) details concerning the deceased: surname (if applicable, surname at birth), given name(s), sex, date and place of birth, civil status, nationality, identification number (if applicable), address at the time of death, date and place of death;

(g) details concerning the beneficiaries: surname (if applicable, surname at birth), given name(s) and identification number (if applicable);

(h) information concerning a marriage contract entered into by the deceased or, if applicable, a contract entered into by the deceased in the context of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage, and information concerning the matrimonial property regime or equivalent property regime;

(i) the law applicable to the succession and the elements on the basis of which that law has been determined;

(j) information as to whether the succession is testate or intestate, including information concerning the elements giving rise to the rights and/or powers of the heirs, legatees, executors of wills or administrators of the estate;

(k) if applicable, information in respect of each beneficiary concerning the nature of the acceptance or waiver of the succession;

(l) the share for each heir and, if applicable, the list of rights and/or assets for any given heir;

(m) the list of rights and/or assets for any given legatee;

(n) the restrictions on the rights of the heir(s) and, as appropriate, legatee(s) under the law applicable to the succession and/or under the disposition of property upon death;

(o) the powers of the executor of the will and/or the administrator of the estate and the restrictions on those powers under the law applicable to the succession and/or under the disposition of property upon death.

*Article 69*

**Effects of the Certificate**

1. The Certificate shall produce its effects in all Member States, without any special procedure being required.

2. The Certificate shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements. The person mentioned in the Certificate as the heir, legatee, executor of the will or administrator of the estate shall be presumed to have the status mentioned in the Certificate and/or to hold the rights or the powers stated in the Certificate, with no conditions and/or restrictions being attached to those rights or powers other than those stated in the Certificate.

3. Any person who, acting on the basis of the information certified in a Certificate, makes payments or passes on property to a person mentioned in the Certificate as authorised to accept payment or property shall be considered to have transacted with a person with authority to accept payment or property, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.

4. Where a person mentioned in the Certificate as authorised to dispose of succession property disposes of such property in favour of another person, that other person shall, if acting on the basis of the information certified in the Certificate, be considered to have transacted with a person with authority to dispose of the property concerned, unless he knows that the contents of the Certificate are not accurate or is unaware of such inaccuracy due to gross negligence.

5. The Certificate shall constitute a valid document for the recording of succession property in the relevant register of a Member State, without prejudice to points (k) and (l) of Article 1(2).

*Article 70*

**Certified copies of the Certificate**

1. The issuing authority shall keep the original of the Certificate and shall issue one or more certified copies to the applicant and to any person demonstrating a legitimate interest.

2. The issuing authority shall, for the purposes of Articles 71(3) and 73(2), keep a list of persons to whom certified copies have been issued pursuant to paragraph 1.

3. The certified copies issued shall be valid for a limited period of six months, to be indicated in the certified copy by way of an expiry date. In exceptional, duly justified cases, the issuing authority may, by way of derogation, decide that the period of validity is to be longer. Once this period has elapsed, any person in possession of a certified copy must, in order to be able to use the Certificate for the purposes indicated in Article 63, apply for an extension of the period of validity of the certified copy or request a new certified copy from the issuing authority.

*Article 71*

**Rectification, modification or withdrawal of the Certificate**

1. The issuing authority shall, at the request of any person demonstrating a legitimate interest or of its own motion, rectify the Certificate in the event of a clerical error.

2. The issuing authority shall, at the request of any person demonstrating a legitimate interest or, where this is possible under national law, of its own motion, modify or withdraw the Certificate where it has been established that the Certificate or individual elements thereof are not accurate.

3. The issuing authority shall without delay inform all persons to whom certified copies of the Certificate have been issued pursuant to Article 70(1) of any rectification, modification or withdrawal thereof.

*Article 72*

**Redress procedures**

1. Decisions taken by the issuing authority pursuant to Article 67 may be challenged by any person entitled to apply for a Certificate.

Decisions taken by the issuing authority pursuant to Article 71 and point (a) of Article 73(1) may be challenged by any person demonstrating a legitimate interest.

The challenge shall be lodged before a judicial authority in the Member State of the issuing authority in accordance with the law of that State.

2. If, as a result of a challenge as referred to in paragraph 1, it is established that the Certificate issued is not accurate, the competent judicial authority shall rectify, modify or withdraw the Certificate or ensure that it is rectified, modified or withdrawn by the issuing authority.

If, as a result of a challenge as referred to in paragraph 1, it is established that the refusal to issue the Certificate was unjustified, the competent judicial authority shall issue the Certificate or ensure that the issuing authority re-assesses the case and makes a fresh decision.

*Article 73*

**Suspension of the effects of the Certificate**

1. The effects of the Certificate may be suspended by:

(a) the issuing authority, at the request of any person demonstrating a legitimate interest, pending a modification or withdrawal of the Certificate pursuant to Article 71; or

(b) the judicial authority, at the request of any person entitled to challenge a decision taken by the issuing authority pursuant to Article 72, pending such a challenge.

2. The issuing authority or, as the case may be, the judicial authority shall without delay inform all persons to whom certified copies of the Certificate have been issued pursuant to Article 70(1) of any suspension of the effects of the Certificate.

During the suspension of the effects of the Certificate no further certified copies of the Certificate may be issued.

CHAPTER VII

**GENERAL AND FINAL PROVISIONS**

*Article 74*

**Legalisation and other similar formalities**

No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.

*Article 75*

**Relationship with existing international conventions**

1. This Regulation shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of this Regulation and which concern matters covered by this Regulation.

In particular, Member States which are Contracting Parties to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions shall continue to apply the provisions of that Convention instead of Article 27 of this Regulation with regard to the formal validity of wills and joint wills.

2. Notwithstanding paragraph 1, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

3. This Regulation shall not preclude the application of the Convention of 19 November 1934 between Denmark, Finland, Iceland, Norway and Sweden comprising private international law provisions on succession, wills and estate administration, as revised by the intergovernmental agreement between those States of 1 June 2012, by the Member States which are parties thereto, in so far as it provides for:

(a) rules on the procedural aspects of estate administration as defined by the Convention and assistance in that regard by the authorities of the States Contracting Parties to the Convention; and

(b) simplified and more expeditious procedures for the recognition and enforcement of decisions in matters of succession.

*Article 76*

**Relationship with Council Regulation (EC) No 1346/2000**

This Regulation shall not affect the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [1].

*Article 77*

**Information made available to the public**

The Member States shall, with a view to making the information available to the public within the framework of the European Judicial Network in civil and commercial matters, provide the Commission with a short summary of their national legislation and procedures relating to succession, including information on the type of authority which has competence in matters of succession and information on the type of authority competent to receive declarations of acceptance or waiver of the succession, of a legacy or of a reserved share.

The Member States shall also provide fact sheets listing all the documents and/or information usually required for the purposes of registration of immovable property located on their territory.

The Member States shall keep the information permanently updated.

*Article 78*

**Information on contact details and procedures**

1. By 16 January 2014, the Member States shall communicate to the Commission:

(a) the names and contact details of the courts or authorities with competence to deal with applications for a declaration of enforceability in accordance with Article 45(1) and with appeals against decisions on such applications in accordance with Article 50(2);

(b) the procedures to contest the decision given on appeal referred to in Article 51;

(c) the relevant information regarding the authorities competent to issue the Certificate pursuant to Article 64; and

(d) the redress procedures referred to in Article 72.

The Member States shall apprise the Commission of any subsequent changes to that information.

[1] OJ L 160, 30.6.2000, p. 1.

2. The Commission shall publish the information communicated in accordance with paragraph 1 in the *Official Journal of the European Union*, with the exception of the addresses and other contact details of the courts and authorities referred to in point (a) of paragraph 1.

3. The Commission shall make all information communicated in accordance with paragraph 1 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters.

*Article 79*

**Establishment and subsequent amendment of the list containing the information referred to in Article 3(2)**

1. The Commission shall, on the basis of the notifications by the Member States, establish the list of the other authorities and legal professionals referred to in Article 3(2).

2. The Member States shall notify the Commission of any subsequent changes to the information contained in that list. The Commission shall amend the list accordingly.

3. The Commission shall publish the list and any subsequent amendments in the *Official Journal of the European Union*.

4. The Commission shall make all information notified in accordance with paragraphs 1 and 2 publicly available through any other appropriate means, in particular through the European Judicial Network in civil and commercial matters.

*Article 80*

**Establishment and subsequent amendment of the attestations and forms referred to in Articles 46, 59, 60, 61, 65 and 67**

The Commission shall adopt implementing acts establishing and subsequently amending the attestations and forms referred to in Articles 46, 59, 60, 61, 65 and 67. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 81(2).

*Article 81*

**Committee procedure**

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

*Article 82*

**Review**

By 18 August 2025 the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation, including an evaluation of any practical problems encountered in relation to parallel out-of-court settlements of succession cases in different Member States or an out-of-court settlement in one Member State effected in parallel with a settlement before a court in another Member State. The report shall be accompanied, where appropriate, by proposals for amendments.

*Article 83*

**Transitional provisions**

1. This Regulation shall apply to the succession of persons who die on or after 17 August 2015.

2. Where the deceased had chosen the law applicable to his succession prior to 17 August 2015, that choice shall be valid if it meets the conditions laid down in Chapter III or if it is valid in application of the rules of private international law which were in force, at the time the choice was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed.

3. A disposition of property upon death made prior to 17 August 2015 shall be admissible and valid in substantive terms and as regards form if it meets the conditions laid down in Chapter III or if it is admissible and valid in substantive terms and as regards form in application of the rules of private international law which were in force, at the time the disposition was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed or in the Member State of the authority dealing with the succession.

4. If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with this Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.

*Article 84*

**Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 17 August 2015, except for Articles 77 and 78, which shall apply from 16 January 2014, and Articles 79, 80 and 81, which shall apply from 5 July 2012.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 4 July 2012.

*For the European Parliament*
*The President*
M. SCHULZ

*For the Council*
*The President*
A. D. MAVROYIANNIS

# INDEX