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Practical exercises in implementing the judicial cooperation instruments in civil and commercial matters

Handbook

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Part I
Jurisdiction, recognition and enforcement of judgments in
civil and commercial matters

1. The Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation Brussel I)

Nicole COCHET

EU Regulation 44/2001 of 22 December 2001, so-called « Brussels 1 » Council regulation, organizes European rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters.

This regulation was adopted a few time after the Amsterdam Treaty, as one of the first illustrations of the Tampere program on implementation of an European judicial area.

Negotiations didn't last very long.

The scheme of the provisions, in particular provisions on jurisdiction, already existed between the European Community Member States, thanks to the Brussels Convention 1968, 27th of September.

The Convention dealt with the same matters. In addition, even before the new Treaty, negotiations for revision had been already engaged, because the Convention itself was already an « old lady », and some amendments appeared as desirable.

In addition, from the early beginning, interpretation of the Convention was submitted to interpretation by the Luxembourg Court of Justice in, so that many guide lines were already drawn to revise the text in the most relevant and not disputable way.

Notwithstanding such technical factors, EU Member States were enthusiastic on the Tampere challenge, and there were only 15 Countries concerned.

For all these reasons, negotiations were led quicker, if you compare it with negotiations for Regulation 1215/2012, more than ten years after, revising Regulation 44/2001.

A presentation on Regulation 1215/2012 is made in the Handbook, in Regulation (EU) N. 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..

This renewed version is not yet applicable: Entry into application is planned on 2015, 10th of January indeed very soon. However, the new Regulation shall apply to decisions issued from litigations engaged, to authentic acts established or registered, or to judicial transactions issued or approved, only from this date: Consequently, during a significant period of time, judges shall have to apply the two versions in parallel.

The future new Regulation is not a revolution in regard to the prior one, and there are more adjustments than radical changes in the new text.

This is why it still makes full sense to present the 44-2001 Regulation in itself, with its provisions, and with explanations on and how courts apply it.

The structure of this chapter is

- Firstly, a **general presentation** (1.1) of the text of initial regulation 44/2000, as currently applicable.

- Second part (1.2.), a summary of **the main « classic » EUCJ case law references** regarding interpretation of the Regulation rules [having in mind that the oldest referenced cases refer to Brussels Convention]

- The last part(1.3), a summary some decisions of French courts, mostly the French Supreme Judicial Court (« Cour de cassation »), on application of Regulation Brussels 1.

1.1. General presentation

Regulation includes 76 articles. The goal in this handbook is not to explain it article by article, but to focus on the main points of interest for an European judge:

An evident preliminary step in the approach of the judge is to determine if Brussels I applies or not to the case that he /she has to determine.

However, Regulation Brussels I frequently applies, and we might consider the issues on the scope as an « acquis », and go directly to the explanations on the jurisdiction rules.

However, as starting point, it is not bad to remind quickly some basic rules, on the material scope of the Regulation, and on the requested condition for its application: It shall be the first part below (1.1.1).

When a case has been identified as a « Brussels I case », the court has to apply Regulation: two steps shall be considered in its application:

Firstly, the court has **to know the jurisdiction rules**, and shall determine if it has jurisdiction or not, pursuant these rules (1.1.2).

But **courts have to go further in the approach**, and there are provisions in Regulation Brussels I for it, too:

- On the one part, there are some cases in which a Court, although theoretically non competent, shall, however, determine the case.

- And on the other part, sometimes a court shall abstain, although it has jurisdiction to decide on the a case: it depends on how the proceedings have been engaged by the parties, and on the course of these proceedings.

In other terms, the knowledge on jurisdiction in itself is not enough, **some other elements are also needed to get a relevant and an efficient court practice of Regulation Brussels 1** (1.1.3).

Finally, Brussels I regulation also designs essential **rules for recognition and enforcement**, and the fourth part of the presentation is devoted to it (1.1.4).

1.1.1. Does Brussels I Regulation apply to the case?

Taking first geography into account, Regulation 44/2000, as all European Legislation in the area of civil law justice, pursuant the Treaty, doesn't apply automatically in all the Member States:

Denmark is excluded: in fact, pursuant a specific protocol in the Treaties, the country doesn't enter the European judicial area.

United Kingdom and Ireland have an option right: Each time a new legislative element is proposed for adoption to the Member States, in the three months following the proposal made by the Commission, both countries have to decide, and announce, if they want to adopt this element – a regulation, or a directive, in civil law – or not: it is the mechanism of « opt-in, opt-out ».

Fortunately, things are easy for Brussels 1, which is, in fact, the sole regulation with a uniform application in all the Member States. Why?

- Because on the one part, UK and Ireland, being already parties to the Brussels Convention, decided to opt in for the Regulation
- And on the other part, Denmark found efficient to be able to apply the same rules than the other Member States. Having no right of option, the country negotiated a specific treaty with the EU. Through this treaty, Denmark accepts to apply the rules of Brussels I concerning jurisdiction, recognition and enforcement of judgments.

Such Agreement was adopted between the European Union and Denmark in 2005, the 19th of October.

Having European rules, under the regime of Tampere – where European law becomes directly part of the internal law system – is anything but neutral for the Member States: Indeed, Regulation has pre-eminence on a number of

prior bilateral agreements between two Member States, replaced by Brussels I Regulation in the relations they have, except if this relation concerns a matter which is not into the scope of the Regulation. There are also certain impacts on multilateral conventions.

Impacts in this respect are precisely listed and specified at the end of the regulation (article 67 to 72).

In addition, there is a significant consequence, at international level, of participating in Brussels I regulation, that is: the Member States have lost any national competence for negotiation or renegotiation of any bilateral or multilateral agreement in the same scope than the Regulation: Competence is lost to the benefit of the exclusive power of the European Union, exercised by the Commission when authorized by, and under the control of, the Council of the Member States..

Note, however, that the European Regulation only determines international jurisdiction, indicating which is -or are - the Member State(s) whose courts are competent to decide on the case. As to decide which court is competent into the Member State concerned, however, the Regulation is of no use: To decide if the competent Court is in Ploiesti or Iasi, or Bucharest or Timisoara, only national internal procedure rules apply.

On the point of view of substance, what is the material scope of Brussels?

Definition is given in article 1 of the Regulation, as concerning « civil and commercial matters », which in the common European sense of the expression, implies some « classical » exclusions, precisely listed.

At first, there is a **general exclusion concerning tax, customs and administrative matters.**

Then

-Civil status and legal capacity of natural persons, rights in property arising out a matrimonial relationship, wills and successions: Among these matters, civil status and capacity are still not impacted by EU

legislation, but there is now a regulation on successions, so that the exclusion of the topic becomes more or less evident. And regards rights in property arising out of a matrimonial relationship, a draft is currently being negotiated.

-Bankruptcy, proceedings relating to the winding up of insolvent companies and other legal persons, compositions, and analogous proceedings¹. On this type of exclusions, it may be stressed that interpretation by case law is oriented restrictedly: the litigations which may emerge in the frame of bankruptcy, for example, on the basis on a specific event or contract, are looked at as independant of the bankruptcy in itself, and jurisdiction to decide in such litigations is determined pursuant the provisions of Regulation.

In addition, as you know, the specific EU Regulation on Insolvency expressly sends back to Brussels I as regards recognition and enforcement of the decisions taken pursuant its application.

-Social security

-Arbitration²: this exclusion created difficulties, and for that reason the EU Commission was in favour to put it aside in the frame of the revision process. Although the point was strongly discussed, the situation stays unchanged after that the revision process is over, except explanatory guide lines given in recital 12, in the pedagogical purpose to clarify some points hugely discussed for long by stakeholders and jurists involved.

1- For the case law of Luxembourg Court, see below, 1.2, paragraphe A, and 1.3 paragraphe A for French case law

2- Idem

-Maintenance obligations: as for successions, an expressed exclusion of the matter in Brussels I Regulation is no more needed, since a new regulation now deals separately the matter.

If you are in the geographical scope, and in the material scope, of Brussels I, you may go further, to the second step: Pursuant the Regulation, does jurisdiction lie with the Court of your country, or not?

1.1.2. What are the rules to decide on jurisdiction to determine the case? (article 4 to 23)

To make your an opinion on it, you need to know jurisdiction rules, as fixed by Regulation Brussels I.

The rules applicable are in articles 4 to 23 of the regulation. They are organised as follows:

- A principle, given in article 4 ;
- Exceptions to the principle,
 - either given by the regulation (article 22)
 - or decided by choice of court agreement between the parties (article 23)
- Specific alternative solutions, depending on the substance of the case (article 5)
- Alternative or mandatory solutions, targeting at the protection of the weak parties in certain types of contracts (article 8 to 21)
- Alternative solutions connected to the issue of a better functioning of justice (article 6)

A.The principle

The main idea –already present in the Brussels Convention – is, that nationality is no longer a criteria to determine the competent Court: this looks quite a normal rule now, however, when expressed as the basic principle for the first time, in the Brussels Convention, it was a kind of revolution...

The basic general provision of the regulation (article 4) is that **persons domiciled on the territory of a Member State, whatever their nationality, shall be sued in the court of that Member State.**

Specific national rules on international jurisdiction, then, no more apply, except if the defendant is domiciled out of the territory of an EU Member State (article 5).

In return, these national rules, in the residual cases where they continue to apply, may be evoked by any EU Member State citizen whose residence is in the Member State concerned (article 6) .

For example,

France has in its Civil code a provision « article 14 », stating that a French citizen, even if not French resident, may sue a foreigner in a French Court in litigations concerning relations that they contracted in France or abroad; accordingly, article 15 of the same Code provides that, in the same situation, a French citizen, although domiciled abroad, may request the concerned foreigner to sue him in a French court.

Application of such provision is largely obsolete, and, in all the cases, strictly no longer applicable, when the domicile or residence « abroad » is in a EU Member State, and/or when the « foreigner » is domiciled in the EU.

In return, for example, a Romanian citizen who lives in France - and, by the way, it'll be the same for a Brazilian or a Japanese citizen in the same situation -, though being not a French citizen, may request the benefit of this rule to sue in a French court a Nigerian citizen with whom he contracted in Panama.

Article 59 precise that if challenged, the domicile is determined by the seised court according to its internal law. If there is no domicile in the Member State of the seised court, determination of a possible domicile in another Member State is searched, by the seised judge, according to the law of this Member State.

Note that some conflicts of jurisdiction may happen, because that domicile has not the same definition all the Member States.

If it is a positive conflict – in case that two Member states which both consider the defendant domiciled in the country, and which consequently consider that they have jurisdiction - the provisions of the Regulation on lispendance shall apply (competence of the Court first seised: see below, 1.1.3.B). If the conflict is negative, in such case the use of a secondary criteria, such as the residence for example, is relevant: otherwise, the situation, where no Court would be considered competent, would lead to denial of justice.

For companies and other legal persons, pursuant Article 60, domicile is situated at the place where is the statutory seat, or central administration, or principal place of business.

If the defendant has no domicile in any Member state, the principle is the non-application of the Regulation, and a return to the national Private international law provisions, as to determine which court has jurisdiction...but we'll see below that however, Regulation, in some cases, may, by exception, apply even when the defendant is domiciled outside EU.

B.Exceptions to the core principle of the court of the domicile: exclusive jurisdiction of another Court in five cases (article 22) 3

There are in article 22 a series of five exceptions *ratione materiae* , in which the domicile of the parties is no more taken into consideration. These exceptions concern proceedings whose object is

a.Rights in rem in immovable property, or tenancies on immovable property –with a possible option in favour of the court of the domicile of the defendant for short term tenancies in certain conditions - : jurisdiction in such case lies exclusively with the courts of the Member State where the immovable property is situated.

However, such exception applies restrictively: it concerns only the determination of the rights in rem concerned (scope, substance, property, possession of the right, or existence of other rights in rem on the same asset), and the measures to be taken, in order to protect the owner in the rights he has on the assets concerned.

a.Validity of constitution, nullity, dissolution, validity of the decisions of the organs, regarding a companies or other legal persons: jurisdiction lies exclusively with the courts of the Member State of the seat.

a.Validity of entries in public registers: the competent courts are exclusively those of the Member State where the register is kept.

a.Registration or validity of patents, trademarks, designs and such similar rights: the competent courts are exclusively those in the Member State in which deposit or registration has been applied for, has taken

3- For the case Law of Luxembourg Court, see below 1.2.B, and 1.3.B for French case law

place, or is deemed to have taken place. The courts of each Member State shall have exclusive jurisdiction for proceedings concerning registration and validity of any European patent (Munich convention) granted for that Member State.

a.Enforcement of judgments: Competence lies exclusively with the courts of the Member State in which the judgement has been, or is to be enforced.

Again, interpretation has to be limited: the exception concerns only implementation of the enforcement measures, but it doesn't prevent a court in a Member state to give an order of seizure on bank accounts, for example, in another Member State.

C.Exception to the principle given by choice of court agreement between the parties (article 23) 4

A number of international commercial contracts, if not all of them, include specific clauses on choice of courts, referred to in Regulation Brussels I under article 23 on « prorogation of jurisdiction ».

If one at least of the parties is domiciled on the territory of a Member State, article 23 admits such clause and considers that, as long as considered valid, the prorogation planned by the parties **in favour of the courts of any Member state** determines an exclusive competence of the courts competent pursuant the contractual clause, [except, however, if the parties expressly decided that the competence determined by the clause is not exclusive].

Validity of the prorogation depends on some formal rules:

4- For Luxembourg Court case law, see below 1.2.C, and 1.3.C for French case law.

-Agreement must be in writing, or evidenced in writing, and maybe electronic, if durably recorded ;

-The form must be in accordance with the practices established by the parties between themselves, or, in a international relationship, in accordance with an usage that the parties are aware of, or ought to be aware of ;

-In addition, such a usage must be well known and regularly observed by the parties in the same type of contracts for the same type of trade.

The limits to the validity of such agreement are not only formal : **article 23 also highlights that a prorogation agreement shall go neither against the rules on exclusive competence in article 22, nor against the protective measures in favour of the weak party in article 13, 17 and 21** (*please refer to the explanations above*).

The prorogation agreement cannot be general, it shall only be provided to apply to a specific contract.

The solution seems very clear, however, a lot of case law is born out of article 23:

In particular, validity appeared as a frequent issue discussed by the parties, and an important issue is to determine what law determines the validity of the clause: the law of the court chosen by the parties? The law of the court which is excluded by the clause?

There are also frequent cases of lispendance, arising out of such clause – a first claimant sues at first the other part in the court competent, pursuant the prorogation agreement... and simultaneously, the other part sues the first one in the court competent, pursuant the provisions of the Regulation: and Regulation 44/2001 doesn't inform on which of the courts seised is competent, to decide on the validity of the prorogation.

Anyway, what we want to highlight at this stage is, that regarding jurisdiction rules, **a valid agreement on choice of court has the pre-eminence on the rules of Brussels I, including on the principle arisen in article 4**, under the above mentioned conditions.

D. Specific alternative solutions connected to the substance of the case (article 5)

These rules, in article 5, allow that the defendant may be sued in a court of a Member State in which he's not domiciled, taking into consideration **that the disputed matter** is

A contractual matter (5 .1)⁵ : jurisdiction may also lie with the court for the place of performance of the obligation in question.

Except of a different agreement between the parties,

- when the obligation in question is the sale of goods, place of performance is considered to be the place where the goods were provided , or should have been provided.

- when the obligation in question is the provision of services, place of performance is considered to be the place in which the services were delivered or should have been delivered.

Such option of competence in contractual matters has opened the floor to very controversial debates, with a lot of litigations and also a lot of case law in the Court of Justice. The main issues were already arisen with the Brussels convention, and they are far to have been entirely solved by the Regulation. These issues are mostly on:

- the sense of « contractual matter » ;
- what obligation may be taken into consideration to apply the provision;
- how to determine « the place of performance of the obligation ».

5- Case law of Luxembourg Court, see below 1.2.D, and 1.3.D for French case law

On this last point in particular, the issue of the law applicable has an impact on determination of the competent Court, which facilitates neither the approach, nor the solution to the issue.

A matter relating to tort (5.3)⁶, delict or quasi-delict: jurisdiction may lie with the court for the place where the harmful event occurred or may occur.

Interpretation is more or less as difficult as for 5.1, considering that the scope of the « tort matter » is far to be uniform between the Member States, so that the development of an autonomous concept was necessary, under the authority of the Court of justice, which again, has developed its case law on this issue from the beginning, on interpretation of the Brussels Convention.

Most significant case law issues are connected to

- situations in which the place where the fact which causes the tort, and the place where the damage occurs, are dissociated.

- or situations in which there are several initial facts, and/or several places in which damages are suffered: the torts caused by defamation in newspapers, radio, television or internet, are a « privileged » field in this regard., as environmental damages.

- Situation of the indirect victim.

A matter relating to compensation of the ground of a criminal infringement (5.4): jurisdiction lies with the court in charge to punish the criminal infringement, as long as this court has competence for it, pursuant its national law.

A dispute arising out of the operation of a branch, agency or other establishment (5.5): jurisdiction may lie with the court for the place where the branch or agency is situated.

Please note that as regards maintenance obligations, the official disappearance of the specific rule provided in article 5 (under point 4) from

⁶- Case Law of Luxembourg Court, see 1.2.E, and 1.3.E the French case law,

Brussels 1, according to the revision by Regulation 1215/2012, is only the confirmation of a fact : the matter is already out of the scope of Brussels1, with the entry into application of Regulation 4/2009 of the 18th th of December 2008, specifically devoted to maintenance obligations issues, including competence, recognition, enforcement and cooperation between EU Member States.

E.Alternative solutions targeting at the protection of the weak parties in certain types of contracts (article 8 to 21)

These specific rules are provided for insurance contracts (article 8 to 14), for consumer contracts (article 15 to 17) and for individual contracts of employment (article 18 to 21) .

The common point between these matters is, that the situation in such contrast is considered as not equally balanced: an insurer, a goods sealer or a provider of services, or an employer, are deemed to be stronger in comparison with the consumer, or with the worker: these weakest parties, then, need particular attention and protection, when a litigation arises, regarding the conclusion, or the application, or the termination of the contract.

Note that the three categories have also in common what follows:

-The so-designed rules apply «notwithstanding article 4 and 5.5»: contrary to the rules of article 22, they don't exclude at all the jurisdiction of the court of the defendant's domicile. On the contrary, we'll see that, when the weak party is the defendant, Regulation restores the rule as the only possible option for the claimant.

-Derogations are not completely forbidden, but strictly limited (see article 13, article 19 and article 23). In particular such derogations, if any, may be decided only by agreements which are entered into after the dispute has arisen, and they shall only enlarge the options open to

the weak party: By no way a convention through which an insured – or a policyholder, or a beneficiary in an insurance contract -, or a consumer, or an employee, abandons his/her right to be sued in a court of his/her Member State residence, may be considered valid.

-Specific rules don't prohibit the counterclaims, for the court seised with the initial claim, provided that jurisdiction for this initial claim has been determined in accordance with these specific rules (See article 12.2, article 16.3, and article 20.2)

Jurisdiction rules for insurance contracts⁷

If the insurer is the defendant– the requesting party being then the subscriber of the contract – he may be sued in the court of the EU Member State where the requesting party is domiciled, as long as this requesting party is a « weak » party : the policy holder, the insure, or a beneficiary .

In insurance cases where no weakness is spotted – if the proceedings involve two insurance companies, respectively claimant and defendant, for example - , the general rule applies (domicile of the defendant, like article 4). However, there is an exception in case of a consortium of co-insurers, with a leader at its head: in this case, the court of the Member State where proceedings are brought against the leading insurer may determine the case for all the insurers involved.

Some options are also open to the requesting party (article 10 and 11). In particular, in case of a liability insurance, or in case of an insurance of immovable property, the insurer may be sued in the court for the place where the harmful event occurred.

Pursuant article 12, **when the insurer is the requesting party**, he shall bring proceedings only in the courts of the Member State in which the defendant is domiciled.

⁷- Case Law of Luxembourg Court, see 1.2.F, an 1.3.F for French case law

Jurisdiction rules for consumers contracts⁸

Definition given for a consumer contract is : a contract

- concluded by a person (the consumer)
- for a purpose which can be regarded as being outside his/her profession or trade,
- when the matter of such contract is either for the sale of goods on instalment credit terms, or for a loan payable by instalments, or for any other form of credit which is made to finance sale of goods,
- or when the contract is concluded with a person pursuing commercial or professional activities in the Member State of the consumer's domicile, or directing his professional or commercial activities to that Member State, or to several States including that Member State, the contract falling in the scope of such activities.

It means that the scope of the protecting rules in article 17 to 19 is determined either in regard of the type of contract (sale or loan with instalment terms for the payment or reimbursement) or in regard of the person contracting with the consumer (a person pursuing commercial/professional activities).

However, contracts for transport are out of the scope of the specific consumers rules, except if the contract combines travel and accommodation for an inclusive price.

What is the rule?

-When the consumer is the requesting party, he or she has an option, to sue the defendant, either in the court of the Member State in which the defendant is domiciled, or in the court of the Member State in which he/she is himself domiciled (article 18.1)

⁸- Case Law of Luxembourg Court, see 1.2.G, and 1.3.G for French case law

Please take note that if the defendant concerned has no domicile in an EU Member State, but if he has, however, a branch, an agency, or any other establishment in any EU Member State, he is deemed to be domiciled in that Member State for the disputes arising out of the activities of this branch, agency or establishment (article 17.2).

-When the consumer is the defendant, proceedings shall be brought against him **only in the courts of the UE Member State where he/she is domiciled** (article 18.2).

Jurisdiction rules for individual contracts of employment ⁹

-As the requesting party, the employee may sue the employer **either in the courts of the Member State in which the employer has his/her domicile** (the rules of article 17.2 for the definition of the domicile is repeated in article 18.2), **or in the court of the place where, or from where, he carries out his work**. If the countries where the work was carried out changed, the competent courts are those of the place where the establishment having hired the worker was situated. (art 19)

-When the employee is the defendant, proceedings shall be brought against him **only in the courts of the Member State where he is domiciled** (art 20)

F. Alternative solutions connected to the issue of a better functioning of justice (article 6)¹⁰

Article 6 provides for special rules **targeting at better functioning of justice**, which allow to sue somebody in a court in a Member State even if this person is not domiciled in the Member State.

9- Case Law of Luxembourg Court, see 1.2.H, and 1.3.H for French case law

10- Case Law of Luxembourg Court, see 1.2.I, and 1.3. I for French case law

When there is a number of defendants (6.1), the court for the place where one of them is domiciled may have jurisdiction for the whole case, as long as the connection of the claims is close enough to hear and determine them together, in order to avoid irreconcilability, which might occur between the judgments, if proceedings were separately conducted.

In case where an initial action is followed by a third-party proceedings (6.2), for example for warranty or guarantee, the court seised of the initial action may determine the whole case, except if the third-party proceedings is only instituted in order to avoid the jurisdiction of the court, which would be otherwise competent for the case.

Please note that pursuant article 65, reference to the provision of article 6.2 for third party proceedings is impossible in Germany, Austria and Hungary: it is an exception protecting the national rules of these Member States, in which an action on warranty, or on guarantee, is not a joined action.

For example

A French court has a case where the initial requesting party (a national French company) sues a British service provider for having failed in advertising and assistance for an event that the provider company was in charge to promote in Paris.

This British provider considers that its bad delivery has been caused by a partner company, which should provide him with specifically adapted advertising gadgets, and which didn't deliver it in time.

If the partner company is a Belgian, or an Italian one, the British defendant may call it directly in the initial litigation in France, and there will be only one judgment determining together the principal request and the call for guarantee against the partner company.

However, if this partner company is a German, Austrian or Hungarian one, it'll be impossible for the British company to attract it in the French Court on the basis of article 6.2, because of the exception provided by article 65.

The court where the original claim is pending has also jurisdiction to solve **the counter-claim** arising from the same contract or from the same facts.

Lastly, when there is an **action pending against a defendant, related to a right in rem on an immovable property**, a combined action regarding a contract against the same defendant may be conducted in the court of the place where the property is situated.

1.1.3. How to determine if your court shall effectively deal with the case?

At these stage, it is interesting to try to summarize how the court has to approach the case in practice to check his theoretical competence

Please suppose that your court is seised with a case in which Regulation applies.

The court shall have in mind two elements, more or less together: Domicile of the defendant, substance of the case

- Please consider, at first, that the defendant is domiciled in the Member State where your Court is situated.

It creates a first assumption, that your Court has jurisdiction.

-However, **a first checking of the substance of the case** may be done in **regard of article 22.**

If you are in one of the 5 cases listed, look at the exclusive jurisdiction rules provided: May be such rule fits with the situation of your court, considering the substance concerned, and may be not.

- If yes, your Court has exclusive jurisdiction to solve the case: everything's fine.
- If not, it means that another court has exclusive jurisdiction ...and it also means that **your Court is not competent** and this shall be declared **ex officio**, pursuant article 25.

-A **second checking is mandatory**, it is **to ensure that there is no agreement on choice of court** which designates a competent Court et that Court is not yours : **if such an agreement exists, and as far as such agreement is valid**, it creates exclusive jurisdiction for the designated Court: Again, **your Court shall dismiss the case ex officio** (article 25)

Without any connection with **article 22**, **without any valid prorogation**, and with a **defendant domiciled in the territory of the Member State** where your Court is situated, **your theoretical competence is agreed**.

•Please consider now that your court is seised, although the defendant is not domiciled in the Member state of your Court.

There are a lot of possible reasons for that:

-At first, **symmetrically to the above hypotheses**, your Court has been seised either because of a case of an exclusive competence out of article 22, designating the court of your Member state, or because of a choice of court agreement ;

-But your Court may also have been seised **by application of any of the optional systems provided by the regulation**: options for contracts, quasi delicts, regimes for insurance contracts, individual employers contracts or consumers contracts.

Again, **be very careful in such case with the weak parties**: in particular **look at their** position in the proceedings: if they are the **requesting parties**, they may introduce actions outside a Court of the Member State in which they are domiciled, but as defendants, they shall not be sued outside of it, even by the way of any contractual agreement: **Concretely, if your not domiciled defendant is an insured, a consumer or an employee, most probably you have no jurisdiction to determine the case.**

With the Regulation provisions and the criteria of domicile of the defendant and of the substance of the case, **your Court knows when it has jurisdiction**, and when it has not.

However, the Court doesn't know if it is able to solve the case or not, because the situation in practice also depends on the way how the proceedings are engaged by the parties, and on the course of these proceedings,

There are cases that you court shall take, even if it has no theoretical jurisdiction, and cases where the court would be competent, in theory, but in which it doesn't decide on the case, because of a lispendance situation

A. Some cases may happen pursuant the Regulation, on which a Court, although theoretically non competent, determines the case

After having checked the rules to conclude to its non-competence, as already said, the Court has no other possible choice than to decline jurisdiction when article 22 or article 23 are at stake , whether the defendant appears or not in court .

▪ But out of such cases, article 24 puts forward a principle, which is: **as long as the defendant appears in court, this court is considered to have jurisdiction.** ¹¹

That means that in principle, it's up to the appearing parties to check the jurisdiction rules, and they are supposed to have done it relevantly. Appearance in court, without any dispute on competence, means that competence determinated by the requesting party is accepted, this notwithstanding that the criteria of Brussels 1 don't determine any competence of the court seised.

11- Case Law of the Luxembourg Court, see 1.2.Jn abs 1.3. J for the French case law

However, article 24 introduces a logical exception to this principle: if appearance in court aims only at denouncing the violation of the jurisdiction rules, the appearing defendant is not deemed to have accepted the competence of this court.

In return, for cases in which the defendant doesn't appear in court, article 25 provides that the judge has to decide *ex officio* on his jurisdiction, and that he rejects the case if jurisdiction has not been determined on the basis of the Brussels I rules.

And please don't forget that, as a judge in the court, you have also another obligation, after checking your competence, which is a condition for the admissibility of the claim: it is to stay the proceedings in case of a default proceedings, in order to ensure that the defendant has been able to receive the document instituting proceedings or any equivalent document, in sufficient time to prepare his defence, in conformity to the rules of Reg 1393/2007 on service of documents.

▪There is a second situation, provided by the regulation, in which your Court may decide , although it has no jurisdiction for the substance of the case : it is the issue of provisional measures (article 31)¹²

Article 31 is a provision targeting at the best efficiency or the Regulation.

It provides that application for provisional, including protective measures, available according to the law of a Member State, may be made by a court of that Member State, even if jurisdiction as to the substance of the matter lies with another Member State.

This exception to the general system of competence, created by the Regulation, only applies to measures which, by themselves, enter in the material scope of Brussels I, ...although that the Court of Luxembourg, once, admitted functioning of article 31 (article 24 of the Convention,

12- Case Law of Luxembourg Court, see 1.2.K, and 1.3.K for French case law

in fact), in a situation ruled by an arbitration - which is out of the scope of Brussels I, as already said.

It is only an opportunity, open to the requesting person, thus notwithstanding his right to lodge a request for provisional measures in the court competent for the substance of the case.

This provision also created a number of case law, relating to the definition of a provisional measure:

In fact, there are significant differences in the Member States, once again, and this time about the concept of « provisional measures ». The Court of Luxembourg gave an autonomous definition, that *provisory measures are those which are in the scope of the matters of Brussels I Regulation, and whose goal is to maintain a factual situation, or a situation established by law, in order to safeguard the rights, whose recognition is requested to the judge on the substance of the matter.*

This definition clarifies partly the concept, but it doesn't give any information to determine, for example, if an investigation measure may be in the scope of article 31 or not, at least in certain cases.

A possible risk, through the use of that disposal, is to put aside the rules on jurisdiction applicable to the decisions on the substance of the matter, if a so-called "provisional" decision deprives the debate on the substance of any interest.

A. *Lispendance* situations (article 27 to 30)¹³

Suppose now that you have a case in hands.

- *You went through our two steps above, and you consider your court competent.*
- *However, one of the defendants pleads that another court in another EU Member State is already seised with the same case : same cause of the action, same parties, ***lispendance***, in other terms.*

13- Case Law of Luxembourg Court, see 1.2.L, and 1.3.L for French case law

The situation of lis pendens is provided and ruled by the Regulation in article 23, and it doesn't happen rarely. Why?

Lis pendens may happen by mistake, either a real mistake, or a voluntary approach in order to delay the proceedings. In particular, declaratory or negatory actions are also an opportunity to create lis pendens situations, sometimes artificial.

Situation may also be the simple result of different choices made by the parties acting separately, in situations in which several options of jurisdiction are possible, which is not rare in Brussels I : think only on article 5, for example, for contracts and torts

For example

A French communication service provider has a contract for marketing assistance and delivery of advertising gadgets with two companies – one company is Italian, the other Romanian - that coorganise a common event in Trieste.

The contract fails for some reasons.

Regarding art 5, jurisdiction may lie with Italy, because of the place of the event where services have to be delivered. However, supposing that the delivery of the advertising gadgets was provided to be done in Romania, Romania may have jurisdiction too (with a possible discussion on what is the most significant part of the contract, which is a mixed one: sale of goods in the one part, service providing in the other part.)

In addition, if the claimants are the clients – the Italian and/or Romanian Company – France may be competent, pursuant article 5, as the place in which the defendant is domiciled.

If the claimants coordinate their action, probably the point will not arise, because they will decide together on the place to sue the provider. If not, each of them acting separately, a situation of lis pendens may occur.

Take the hypothesis in which, being the Romanian judge seised, you are informed on the prior introduction of the claim to a French court.

In such situation, Regulation Brussels I provides for solutions, which look very clear when you read it. However, application of these articles has produced a lot of case law).

Whatever are your doubts about the solution to be given to this conflict of jurisdiction, when you are the court second seised, you have no option:

Article 27 states that **you must stay the proceedings** engaged in your court until the French court - first seised - makes its decision on its competence , and you have to do that ex officio.

An issue into the issue may be to determine which is the court first seised. Taking into consideration the provision of article 9 of Regulation 1393/2007 of 13 November 2007, and the different ways of instituting a procedure which exist in the Member States, article 30 disposes as follows:

-Introduction of the claim is at the time when the document instituting the proceedings is lodged with the court, provided that the claimant has not subsequently failed to take the following steps to serve the document to the defendant.

-When service of the document takes place before lodging it with the court, the court is seised at the time where the document is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the following steps to lodge the document with the court.

Lispendance is a more difficult topic when two simultaneously seised courts are in competition on jurisdiction, since one of them is designated by the rules of Brussels I, while the second one is competent pursuant a prorogation agreement.

It is clear that the writing of article 23 (see above) is like a gold mine for interpretation and case law, and really it happened: in particular, while such situation creates a number of lispendance cases, article 23 is anything but clear on the point to know which of both courts seised is responsible for interpretation of the prorogation agreement at stake: How shall the judge manage it? How does the course of proceedings work regarding lispendance?

The courts in the Member States had a lot of cases to solve, trying to determine some solutions on article 23, and the Court of Luxembourg also gave a lot of clarifications. One of the main points which were discussed in the review of the Regulation was about this article 23, in order to integrate these clarifications into the regulations.

The parties mostly apply the clause spontaneously, and they introduce the claim in the court designated by the contractual prorogation.

However, sometimes, there are conflicts, because one of the parties neglects the contractual provision and engages proceedings along the jurisdiction rules of Brussels I, while the other part simultaneously lodges the same case in the court that he considers to be competent pursuant the contractual prorogation.

Go back to our former example with the French and Romanian clients of the Italian good sealer and service provider, and change a bit the data:

Suppose that the organised event should take place in Brasov, and that both French and Romanian companies engage together the proceedings in the Romanian court, claiming for compensation for the bad quality of the provided services and the incomplete delivery of the promotional gadgets.

The Italian provider is requesting for his payment, because the clients have only paid in advance 20% of the service and goods provided, and nothing

more, and he claims for jurisdiction of an Italian Court because of a clause of the contract, giving competence to the court for the place of payment.

Both courts are seised, and in the French court, the validity of the clause is disputed. How does it work, in the case where French court is the first seised? And if the Italian Court is the first seised?

Next to lis pendens, **article 28 states on** the situation in which different Member States' courts are seised of **related actions** (« actions connexes »). The concept of related actions is defined by 28.2, as the situation in which actions are so closely connected, that separate hearing and determination on them creates a risk to obtain irreconcilable decisions.

In such a situation, you **may** decline jurisdiction **upon request of one of the parties**, and only

- if the court first seised has jurisdiction to determine the connected claim,

- and if this court is able to consolidate the case, pursuant its own procedural law.

For the specific cases in which several courts in different EU Member States are seised, each of them having exclusive jurisdiction, article 29 provides that the court second seised declines jurisdiction in favour of the court first seised.

1.1.4. What rules apply for recognition and enforcement? ¹⁴

Regulation targets at speed up and simplification of the circulation of judicial decisions in civil and commercial matters.

And even if enforcement of decisions is, at first, an issue for the parties, sitting judges also need to know the rules for recognition and enforcement under Brussels I: Because on the one part, recognition or enforceability of an European decision may be challenged in the course of a case. And, on the

14- Case Law of Luxembourg Court, see 1.2.M, and 1.3.M for French case law

other part, the topic is important for enforcement judges, who are more and more seised, on issues about European decisions enforced through the provisions of Brussels I.

Regulation Brussels I provides for special rules for recognition and enforcement of the decisions taken by courts of the EU Member States. Facilitation which marks these provisions is based on the fact that the adoption of common rules of jurisdiction, known and practiced by each Member States, makes the European judicial system quite safe.

And mutual trust allows circulation of the decisions, because even if determined by legal systems which are different, and following internal proceedings rules which are not the same, a German court's decision, or an Italian court's decision, or a Spanish or French court's decision, or a Romanian court's decision, once determined, are considered of equal value, and consequently, they may be enforced in any Member State.

Regulation 44/2000 is a step forwards regarding recognition and enforcement in regard of the rules already put in place by the 1968 Brussels Convention.

It includes rules for recognition and enforcement of the decisions (meaning judgments, and also some other types of decisions: for a precise definition, look at article 2, a) in the one part, and, on the other part, rules for enforcement of authentic acts and court settlements

A.Recognition and enforcement of judgments (articles 32 à 56)

As regards recognition, each judgment given in a Member State shall be recognized in the other MS without any specific procedure (article 33): Everybody is consequently able to refer to such judgments in whatever Member State, considering it with the same value than we give to an internal judgment.

However, in order to prevent any risk of contestation - by somebody which would precisely challenge the value of the judgment -, any interested party may apply - like by anticipation – for a decision which would confirm that there are no grounds for refusal of recognition.

In such cases, the proceedings works exactly like a proceedings on contestation of recognition, once a request for contestation has been done (see below).

Note that recognition, in particular, is enough for the obtention of provisional or protective measures, in the Member State in which the party invokes this judgement.

As regards **enforcement**, any decision given and enforceable in a Member State shall be enforceable, provided that it has been declared enforceable in this Member State(article 38).

Formalities to obtain the declaration of enforceability are very light: the requesting person has only to lodge a request for the court or authority specifically declared competent in the Member State of enforcement (list of the competent authorities is declared to the Commission by each Member state and it is posted on the Atlas of RJECC), in the form and place provided by the internal law of each Member State.

No legalisation shall be requested, neither for the judgment, nor for certificate, or for any equivalent document.

Translation are not mandatory, and shall be done only until request of the authority of the Member State addressed.

The requesting person shall joint a copy of the judgement, in a form allowing to control that it is not a fake, with, in addition, a certificate delivered by the competent authority in the Member State that originated the decision , given in a special form ,annexed to the Regulation. Note that the use of such for mis not mandatory, but for sure it facilitate the obtention of the declaration and the issue of translation : such form is available in the same format and in all the languages used in the EU Member States, on the Atlas RJECC in the EU Portal .

The declaration of enforceability intervenes without any delay when the request with the documents have been lodged. The requesting person is immediately informed, and the declaration of enforceability shall be served

to the defendant, by notification or signification, even together with the judgment itself, if the judgment has not been served before.

Notwithstanding these formalities, the most important is that, once these formalities performed, the decision is declared enforceable without any control on the substance, and without any prior hearing, or any request to collect possible observations from the defendant, or from any other person (Article 41).

Contrary to the system in Brussels convention, justification that the judgment fulfils the conditions to make it enforceable is not the task of the future beneficiary of enforcement: it is up to the person against whom enforcement is requested to demonstrate that the judgement opposed to him/her wasn't enforceable, and that the certificate for enforcement has to be cancelled.

In other terms, there is an *a priori* of enforceability of European judgements in the whole territory of the European justice area, implemented, inter alia, by Regulation Brussels I, which justifies an inversion of the dispute and of the burden of proof. In a large extend, it also institutes a de facto abolition of exequatur, if we consider that statistically, there are only a few number of recourses against declarations of enforceability: and if there is no recourse implemented, there is no control at all.

However the recourse still exists, even if rarely implemented, either on recognition, or on a preventive declaration of recognition, or on a declaration of enforcement: how does it work?

The procedure is defined by each Member State, and declared to the Commission, and reported in the annexes of the Regulation.

The maximum delay is of one month after the declaration has been served, two months if the person against whom enforcement is requested resides in another Member State, that the Member State in which the declaration has been issued. Member States may also provide for a possibility of recourse

against the decision given on the recourse (also declared by the Members States to the Commission, and reported in the annexes of the Regulation).

If there are only a few number of recourses in practice, that is, also, because of the very restrictive possibilities that the result may be successful.

At first, it is clearly expressed that, **by no way, the recourse shall be an opportunity to revise the substance of the foreign decision** (article 36)

Article 34 enounces only three possible motives for refusal to recognise a Member State judgement or to declare it enforceable, which are:

- The decision is **openly contrary to the public policy** (ordre public) of the Member State addressed ; or
- The judgment has been **given in default of appearance** of the defendant, whereas he/she was **not served** with the document which instituted the proceedings **in sufficient time and in such away as to enable him to arrange for his defence** ; in addition, even in such case, enforceability may be given, if it is demonstrated that the defendant abstained to challenge the judgment , when he had the opportunity to do so ; or
- The judgment is **irreconcilable with a judgement given between the same parties in the MS in which enforcement is requested** (= the Member State addressed), or with an earlier judgment given in another Member State or in a third State involving the same cause of action between the same parties, if it fulfils the conditions for its recognition in that Member State.

Article 35 adds a few specific cases in which misapplication of the jurisdiction rules of the regulation prohibits recognition and declaration of enforceability: only three cases, which are violations

- of the jurisdiction rules applicable in insurance contracts, or in consumer contracts, relating to the protection of the weakest parties,

or

- of the rules of exclusive jurisdiction in article 22.

There are the sole situations, in which a duly established mistake on the issue of jurisdiction of the court, which decided upon the case, is an obstacle to the enforcement of the decision.

Outside these specific cases, article 35 gives an inverse principle, that is : non control of the application of the jurisdiction rules, by the court of the Member State of origin, in the course of proceedings on recognition or on declaration of enforceability. Application of the jurisdiction rules by the court of the Member State of origin cannot be challenged in the frame of such recourse.

Article 35 also stresses that the motive of public policy, provided in article 34, shall not be referred to for any control of jurisdiction.

G.Enforcement of authentic acts and transactions (article 57and 58)

Authentic acts and court settlements which are enforceable in the Member State of origin shall be declared enforceable in another Member State, pursuant the same proceedings than for judgments.

The only motive to refuse or revoke a declaration of enforceability for such authentic acts and court settlements is, if enforcement is **openly contrary to the public policy** of the Member State addressed.

Note that these two articles on authentic acts and court settlements only refer to enforceability, and that they don't evoke recognition of such titles.

As said in the introduction of the presentation, the Regulation, whose main provisions are above presented, was recently revised, which results in a new Regulation, not yet applicable.

The two regulations are similarly built, and, as already said, the second one is the review of the first one: it is not a revolution, but better a modernisation, by

integration of interpretative solutions given by the case law of the Luxembourg court, and a step forwards to the total free circulation of the decisions in civil and commercial matters in the EU area.

As a matter of conclusion, and as an introduction to the next reading of the presentation on new Regulation 1215/2012 (part III.1.), the main points where changes are introduced in the new regulation are summarized below, as follows :

-Regarding the scope, expressed exclusion of the acta jure imperii and of maintenance obligations, status quo in arbitration, although the initial purpose of the proposal was to include arbitration as an element in the new regulation. However, look at the recital n°12 which gives clarifying explanations to the practitioners.

-a precision as regards patents, in article 22, that exclusive competence works in all the procedural cases , irrespective of whether the issue is raised by way of an action or as a defense, which corresponds to the solution given by the Court of Luxembourg.

-significant changes in article 23, which will become article 25, in order to clarify the pending points relating to lispendance, in the light of Luxembourg's case law, again

-The issue of option for contractual matters, largely discussed during the negotiation of Regulation 1215/2012, is finally maintained, in an adjusted formulation

-Some reinforcement in the protection of the weak party, both in the consumer contracts and in the individual employment contracts

- solutions for lispendance cases between a court in an EU MS and a court of a non UE country. It has also an article 31 which changes and develops article 29 of Regulation 44-2000 in order to propose a better regime of lispendance when the judge pursuant a prorogation clause is second seised, together with the changes planned in article 23.

-One of the core ideas in the revision of Regulation was to go to the complete abolition of exequatur, meaning that there would be absolutely no control upon any decision issued in a member State, to allow it to enter in any other Member State, by an extension of « experiential » system provided in Regulation for uncontested claims (805/2004).

However, this ambitious result was not fully reached in regulation 1215/2012: The new enforcement rules don't exactly establish the full abolition of exequatur into the EU area, as originally provided in the proposal.

1.2. ECJ case law on Brussels Convention and on Regulation 44/2001.

The decisions mentioned below are far to be a complete list of the decisions of the Court of Luxembourg. Either through the cases, or by answering preliminary rulings, the Court gave interpretations and explanations on the Convention from the beginning;

These decisions were used for drafting the project, for the discussions and negotiations and, finally, for the final writing of the Regulation, and they remain valid to interpret the Regulation.

The Court now continue its endless work, for developing the case law on the Regulation. This case law was the main substance of the Report prepared by the EU Commission as the preliminary document for the revision launched in 2009, and it was largely considered for the writing of the revised proposal...But for sure everything is far to be solved, and there is no doubt that the process will continue, even if it already lasts for more than forty five years.

The cases selected focus mainly on jurisdiction, instead of on enforcement. They are listed by themes, which correspond to the themes of the presentation, in order to facilitate establishment of connections between each main topic and the case law related to it.

A.Scope

Territorial scope

- 2005,1st of March, C 281-02 Owusu vs Jackson (on articulation of Regulation Brussels I with forum conveniens theory)

On exclusion of bankruptcy

- 2009 , 10th of September, C 292-08, German Graphics graphische Maschinen Gmbh vs Alice Van der Schee

(in the sense that exclusion is restricted to bankruptcy in itself, while Regulation plays for actions in civil and commercial matters, although lodged in the context of bankruptcy of the debtor)

On exclusion of arbitration :

- 1998,17th of November, Van Uden vs.Decoline, C 391-95 (mechanisms for recognition and enforcement provided are not applicable ; however, the existence of an arbitration clause does not exclude a request for provisory measures in the scope of the convention)

B.Exclusive competences article 22

- 1979, 27th of March, De Cavel, 143/78
- 1980, 21th of May, Denilauler, 125/79 (this decision and the prior one being also restricting the scope of the exclusion concerning enforcement measures)
- 1990, 10th of January, Reichert I, 115/88
- 1994, 17th of May , Webb vs.Webb, C 294/92
- 1994, 9th of July, Lieber vs.Göbel, C 292/93 (this decision, like the two prior ones, being in the sense to restrict the scope of the exclusions ordered by article 22, as regards rights in rem in immovable property)

- 2008, 2d of October, Nicole Hassett vs.South Easter Health Board and Cheryl Doherty, C 372-07

C.Prorogation of competence (choice of Court agreements) article 23

- 1992, 10th of March, Powell Duffryn vs.Petereit, C 214-89 (clause cannot be general, it has to be connected to a specific contractual relationship)

- 1999, 16th of March, Transporti Castelleti Spedizioni, C159/97

Formal conditions for validity of the clause

- 1978, 9th of November, Meeth vs. Glacetal, 23/78 (competence may be attributed to several States)
- 1985, 11th of July, Berghöfer, 221/48 (precision on what is « evidence in writing » to prove the choice of court agreement),
- 1997, 20th of February MSG vs. Gravières rhénanes, C 106/95 (on the concept of « usage in international trade practices »)
- 1997, 3d of July, Francesco Benincasa vs. Denkavit SARL, C 269/95 (the clause plays in case that the action engaged challenges the validity of the contract which prescribes the clause)
- 2000, 9th of November, Coreck Marine, C 387/98 (no need to prescribe exactly what is the competent court, if the clause contains enough elements to determine it)
- 2013, 7th of February, Refcom SpA vs.Axa Corp, C 543-10 (a prorogation agreement cannot be opposed to a co-contracting party in a chain of contracts)

Prohibition of antisuit injunctions (based on the existence of a choice of court agreement)

- 2004, 27th of April 2004, Turner vs. Felix Fareed Ismail Grovit, C 159-02

- 2009, 10th of February 2009, Allianz SpA et Generali Assicurazioni vs. West Tankers, C 185-07

D. Article 5-1 (alternative jurisdiction rules in contractual matters)

Definition of contractual matters

- 1982, 4th of March, Effer, 38/81
- 1983, 22d of March, Matin Peles, 34/82
- 1992, 17th of June, Jacob Handtke, C 26/91
- 2013, 19 th of December, C 9/12 Corman Collins SA vs Maison du Whisky (qualification of a concession contract)

Determination of the place of performance of contract

- 1976 ; 6th of October, Tessili, 12/76
- 1987, 15th of January, Shenavai, 266/85
- 1988, 27th of September, Kalfelis, 189/87
- 1999, 28th of September, Group Concorde vs. Capitaine du navire Suhadiwarno Panjan, C 440-97
- 2002, 19th of February, Besix, C 256/00

Several places for delivery of goods

- 2007, 3th of May, Color Drack vs Lexx Int. Vertriebs GmbH, C 386-05

Place of delivery in a sales contract

- 2011, 9th of June, Electrosteel Europe SA vs Edil Centro SpA ; C 87-10

Providing services

- 2009, 23d of April, Falco Privatstiftung et Thomas Rabitsch vs. Gisella Weller Landhorst, C 533-07

- 2009, 9th of July, prof.Peter Rehder vs Air Baltic Corp, C 204-08
- 2010, 11th of March, Wood Floor Solutions vs Andreas Bomberger Gmbh, C 19-09

E.Article 5-3 (alternative jurisdiction rules in torts matters)

Place of the initial fact and place of the damages, cases with several initial facts, and/or several places for damages

- 1976, 30th of November, Mines de Potasses d'Alsace, 21/76
- 1990, 11th of January, Dumez vs.Hessische Landesbank, C 220/88
- 1995, 7th of March, Fiona Shevill vs.Presse Alliance, C 68/93

Defective products

- 2009, 16th of July, Zuid Chemie BV vs.Philippes's Mineralen Fabriek NV, C 189-08
- 2014, 16th of January, Kainz vs Pantherwerke AG, C 45-13

F.Protection of the weakest parties : Insurance contracts (articles 8 to 14)

- 1991, 27th of July, Overseas Union Insurance company vs.New Hampshire Insurance Company
- 2000, 13th of July, Groupe Josi Reinsurance Company, C 412/98
- 2005, 26th of May , GIE Réunion européenne vs.Zurich Espagne Sobtrans (no weak parties when litigation is only between insurers)

G.Protection of the weakest parties : Consumer contracts (articles 15 to 17)

Definition of the consumer contract:

- 1978, 21th of June, Bertrand vs.Paul Ott, 150/77
- 1997, 3d of July, Benincasa, C 269/95 (restrictive definition of the consumer)

As regards travel contracts

- 2010, 7th of December, Peter Pammer vs.Reederei Karl Schlüter GmbH, C585-08 (concepts of « travel package » and of « activity directed to one Member State »)

As regards advertising money games

- 14 mai 2009, Renate Ilse vs.Martin Drescher, C 180/06

Concept of activity « directed to» a Member State

- 7 décembre 2010, see above C 585-08
- 2012, 6th of September, Daniela Mühlheimer vs.Amar and WadarYusufi, C 190-11 (Internet)
- 2013, 17th of October, Lokman Emrek vs Vlado Sabranovic C 190-11 (Internet)

H.Protection of the weakest parties : individual employment contracts(article 18 to 21)

- 1982, 26th of May, Ivenel , 133/81
- 1989, 15th of February, Société Six Constructions, 32/88

Travail dans plusieurs pays (Centre effectif des activités professionnelles)

- 1997, 9th of January, PW Rutte vs Cross Medical Ltd, C 383/95
- 2002, 27th of February, Herbert Weber vs Universal Ogden Services, C 37/00

I. Article 6-1 (alternative solutions connected to the issue of a better functioning of justice)

- 2006, 13th of July, ReischMontage AG vs. Kiesel Baumaschinen Handels GmbH, C 130-05
- 2007, 11th of October, Freeport plc vs. Olle Arnoldsson, C 98-06
- 22 mai 2008, GlaxoSmithKline vs. JP Rouard, C 462-06

J. Jurisdiction by appearance of the defendant (article 24)

- CJUE 20 mai 2010, Ceska podnikatelska Pojist'ovna & Viana Insurance Group vs Michel Bilas, C 111-9

K. Provisional measures (article 31)

- 1980, 21th of May, Denilauler, 125/79
- 1998, 17th of November, Van Uden vs. Decoline, C 391/95
- 1992, 26th of March 1992, Reichert II, C 261-90 (on an European definition of the concept of « provisory measures »)

L. Lispendance (article 27)

- 1987, 8th of December, Gubisch Maschinen Fabrik AG vs Palumbo, 144/86 (for an European interpretation of the notion of same parties and of same cause of action)
- 1994, 6th of December 1994, The ship Tatry ; C 406/92 (declaratory and negatory actions and the issue of lispendance)
- 2003, 8th of May, Gantner Electronic GmbH, C 111/2001

- 2003, 9th of December, Erich Gasser Gmbh vs Misat Srl, C 116/02 (position of the court second seised in case of unreasonable delays in of the proceedings in the court first seised)

M.Recognition and execution (articles 32 to 58)

On article 34

- 2006, 14 th of December
- On who is able to attack recognition :
- 2009, 23rd of April, Draka NK Cash LTD (a third party involved cannot lodge any recourse against a decision of enforcement)

1.3. French court's case law on Brussels Convention and on Regulation 44/2001¹⁵ .

A.Scope and general rule of article 4 (domicile)

- Cass Com 2013, 12th of March, pourvoi n°11-27748 and 749 (about the restricted interpretation of exclusion of bankruptcy)

B.Exclusive competences article 22

- Cass 1^{ère} civ, 2000, 21st of March (restricted interpretation : competence doesn't work for action for unfair competition after the breach of contract)

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-- Please note that :

- « Cour de cassation » in France is the Supreme Court for civil, commercial, social and criminal cases .
- « Cass 1^{ère} Civ » is for « Cour de Cassation, first civil Division »
 - « Cass Comm » is for « Cour de Cassation, Commercial Division »
 - « Cass Soc » is for «Cour de cassation, Social Division »
 - A « pourvoi » is the specific recourse lodged for the Cour de cassation

- Cass 1^{ère} Civ, 2011, 15th of March, pourvoi 09-72027 Qualigram vs Qualigram Software (exclusive jurisdiction in article 22 apply even to defendants domiciled in third States –Canada)

C. Prorogation of competence (choice of Court agreements) article 23

- Cass 2^{ème} civ 2002, 4th of April, pourvoi n° 00-18009
- Cass 2^{ème} Civ 2002, 9th of April, pourvoi n° 98-16829
- Cass 1^{ère} Civ, 2007, 9th of January, pourvoi n°05-17741 (condition for the validity on the clause in national law validity of the clause are not considered to appreciate the validity of the clause)
- Cass 1^{ère} Civ, 2008, 23rd of January, pourvoi n°06 21898 (idem)
- Cass 1^{ère} Civ, 2008, 5th of March, pourvoi n°06-20338(idem)
- Cass Comm, 2008, 16th of December, pourvoi n°08-10460
- Cass Soc, 2012, 20th of March, pourvoi n °11-11570 Soc SBBM vs. Sté Ingrid Kranzle

D. Article 5-1 (alternative jurisdiction rules in contractual matters)

- Cass plénière.1991, 12th of July (= CJUE Tessili)
- Cass 1^{ère} Civ., 2006, 3th of October, pourvoi n°04-19466 (plac of performance...)
- Cass 1^{ère} Civ.2007, 14th of November, pourvoi n° 06-21372
- Cass 1^{ère} Civ.2008, 5th of March, pourvoi n°06-21898
- Cass 1^{ère} Civ.2008, 9th of July, pouvoi n° 07-17295
- Cass 1^{ère} Civ. 2010, 7th of May, pourvoi n°09-14324
- Cass Comm.2010, 16th of November, pourvoi n°09-66955

E. Article 5-3 (alternative jurisdiction rules in torts matters)

- Cass 1^{ère} Civ, 1997, 16th of July (=CJUE Fiona Shevill)
- Cass 1^{ère} Civ 2003, 9th of December, Roederer (internet : French judge has jurisdiction as soon as the site is accessible in France)
- Cass Comm 2005, 11th of January , Hugo Boss (the site should be targeting french consumers), pourvoi n°02-18382
- Cass Comm, 2006, 28 th of February, pourvoi n° 04-12344
- Cass Comm, 2010, 9th of March, Delticom (goods must be available on the French territory), pourvoi n° 08-16752
- Cass Comm, 2010, 8th of June , pourvoi n°09-13341
- Cass 1^{ère} Civ, 2014, 22th of January (internet case) pouvoi n° 11-2409

F. Protection of the weakest parties : Insurance contracts (articles 8 to 14)

- Cass 1^{ère} civ, 2006, 14th of November , pourvoi n° 04-15276
- Cass 1^{ère} Civ 2008, 19th of March, pourvoi n° 07-10216 (inoppos .à l'assuré de la clause attributive conclue entre assureur et souscripteur)
- Cass 1^{ère} civ 2012, 26th of September, pourvoi n°11-26022, M.X vs Banque privée Edmond de Rothschild Europe (choice of court clause too bright, and considered as « potestative » : « Luxembourg or any other competent court »)
- Cass 1^{ère} Civ, 2013, 27th of February, pourvoi n° 11-23228

G. Protection of the weakest parties : Consumer contracts (articles 15 to 17)

- Cass 1^{ère} civ, 3 decisions in 2010, 7th of May, pourvois n° 09-11177, 09-14324 and 08-16071 (=CJCE Renate Ilsinger C180-06)

H. Protection of the weakest parties : individual employment contracts (article 18 to 21)

- Cass Soc, 2006, 20th of September, 4 decisions pourvois n° 04-45717, 05-40490, 05-40491 & 05-40493
- Cass Soc 2007, 19th of June, 2 decisions pourvois n° 05-42551 et 05-42570
- Cass soc, 2009, 31st of March (on habitual working place) pourvoi n° 08-40367
- Cass Soc, 2013, 27th of November,, pourvoi n° 12 -24 880, Daniel Albert c. Royal Bank of Scotland (on the working place when the worker had several different working places successively,under the same contract)

I.Article 6-1 (alternative solutions connected to the issue of a better functioning of justice)

- Cass 1ère civ, 2006, 20th of June (agreement in 23 has preminence on 6.1), pourvoi n° 05-16706

J.Jurisdiction by appearance of the defendant (articles 24)

K.Provisional measures (article 31)

- Cass Com, 2011, 8th of March, pourvoi n° 09-13830
- Cass Soc, 2012, 20th of March, pourvoi n° 11-11570 Soc SBBM vs. Sté ingrid Kranzle

L.Lispendance (article 27)

- Cass 1ère civ, 1974, 26th of November

M.Recognition and execution (articles 32 to 58)

- Cass 1ère Civ, 2007, 10th of May , pourvoi n° 06-13017 (no possible control of jurisdiction rules for the delivery of the order of execution)

2. The Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims

Jacinto Jose PEREZ BENITEZ

2.1. Introduction

The cornerstones of judicial cooperation.

After the Treaty of Amsterdam (2nd October 1997) cooperation on civil matters came under the so-called “first pillar” (that is, the use of the tools of European law); only criminal and penal matters remained under the third one. It meant that the judicial cooperation on civil and commercial matters is onward governed by the “community method”, through the use of regulations, directives and recommendations, fully applicable throughout the European Union.

Reshaping cooperation in Justice was the aim by setting up an area of freedom and security, but strongly linked with the goal of promoting the internal market. Up to this point two objectives came into the front:

- promoting the compatibility of the rules applicable in Member States (MS, hereinafter) regarding the conflicts of laws and jurisdiction,
- eliminating obstacles to the proper functioning of civil proceedings by promoting the compatibility on the rules of civil proceedings applicable in MS, mainly in cross-border cases.

A second cornerstone was the meeting of the European Council in Tampere (Finland, October 1999). Paving the way to endorse the principle of mutual recognition and the creation of a judicial area were the aims in

relation with judicial decisions. MS shared the view that the abolition of intermediate proceedings in order to recognise judgements and make them immediately enforceable was of the essence.

This was the framework for passing Regulation 805/2004 and the main objective was, according to article 1: *"...to create a European Enforcement Order for uncontested claims to permit, by laying down minimum standards, the free circulation of judgments, court settlements and authentic instruments throughout all Member States without any intermediate proceedings needing to be brought in the Member State of enforcement prior to recognition and enforcement."*

And the effects are described as follows, under art. 5:

"A judgment which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition."

Thereby a judgement (also a court settlement or an authentic instrument as well) which has been certified as a European Enforcement Order in the MS of origin shall be recognised and enforced in other MS without the need for a declaration of enforceability and without the possibility of opposing its recognition. It means that these kinds of resolutions are going to be treated as if they had been delivered in the MS in which enforcement is sought. So, definitely, it is a step forward in relation to Brussels I regulation, by setting up minimum requirements for the proceedings which ensure the existence of a sufficient guarantee of observance of the rights of the defence.

As we can see later, a European Enforcement Order (EEO) may consist of:

-judicial resolutions (not necessarily final)

-authentic instruments

-court settlements

2.2. Scope of application

2.2.1. Territorial scope

Regulation 805/2005 is applicable throughout the whole 27 MS, Denmark excluded. So, bearing in mind this exception, the territorial scope is the same as Brussels I.

Public international Law provides the answer about what MS territory means. There are a number of relevant rulings passed by the ECJ about this issue. The defendant domicile does not matter, but insofar as that the Regulation was effective, there should be defendant's properties in the MS in which the claimant ask for enforceability.

2.2.2. Material application

The issue is covered by art. 2, in a similar way to Brussels I (art. 1), before coming into force the recast version, which will provide a revision of the material scope of Regulation 44/2001, since it includes for instance maintenance obligations until Brussels I bis came into force.

But the most relevant matters under the material scope are two: the kind of resolutions which may be certified as an EEO, and the meaning of the legal expression "uncontested claim", assuming the legal concept of civil and commercial matters is also the same under Brussels I regulation.

2.2.2.1. Kind of resolutions

First of all, under art. 4.1, an EEO may consist of "*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 the determination of costs or expenses by an officer of the court".

Though, the kind of proceedings in which the judicial resolution was issued does not matter (for instance, not only civil but labour proceedings are included). As it was mentioned before, the Regulation does not cover arbitration awards and judicial resolutions confirming awards.

Final resolution is not a requirement for the judgement to become an EEO, but under art. 6.2, where a judgement certified as EEO has ceased to be enforceable or its enforceability has been suspended or limited, the defendant can ask for a certificate indicating the lack or limitation of enforceability at any time to the court of origin, by using a standard form (annex IV).

The Regulation is also applicable to court agreements and for authentic instruments, that is to say, according art. 4.3, *"a document which has been formally drawn up or registered as an authentic instrument, 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 by the Member State in which it originates"*.

If it is such a case, the requirements for the enforceability are lower, bearing in mind in an authentic instrument the debtor's consent is expressly included.

2.2.2.2. Uncontested claim

The concept of "uncontested claim" is, undoubtedly, the gist for the application of Regulation 805/2004.

The regulation determines its application only to claims which are considered to be uncontested.

“Credit”, regarding art 4, is a pretention “for payment of a specific sum of money that has fallen due or for which the due date is indicated in the judgment, court settlement or authentic instrument”.

So, the term “claim” includes every pretention for a certain sum of money already determined and payable in a certain date, or debts in which the due date is indicated in the judgement, in the settlement or in the authentic instrument.

Debts arising from non-contractual obligations are not covered by the Regulation, unlike what happens under the scope of the European order for payment Regulation.

The claim may also cover the amount of costs related to the court proceedings, including the interest rates. So it shall be certified as a European Enforcement Order also with regard to the costs unless the debtor has specifically objected to his obligation to bear such costs in the course of the court proceedings, in accordance with the law of the Member State of origin.

The Regulation also provides a legal definition of the adjective “uncontested” (art. 3), as follows:

“A claim shall be regarded as uncontested if:

(a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; or

(b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; or

(c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the

course of the court proceedings, provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or

(d) the debtor has expressly agreed to it in an authentic."

As a consequence, debtor may: a) agreed directly the claim by admission, expressly; or b) by means, or indirectly, in a tacit way (points 2 and 3), when he has never objected the claim before or, whether initially objected, debtor has not appeared before the court at the hearing (but, if it may occur with this effect under the procedural law of the MS of origin).

2.2.3. Temporal application

The Regulation came into force in 21st October, 2005, for judgements given, court settlements approved or concluded and for documents formally drawn up or registered as authentic instruments after this date (art. 27).

2.3. European enforcement order requirements

2.3.1. General requirements

The Regulation allows only certified as EEO three types of documents: judicial decisions, court settlements and authentic instruments.

a) a judicial decision is "*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 the determination of costs or expenses by an officer of the court*".

b) the Regulation does not provide with a legal definition of what is meant by a court settlement. The concept overtly includes an agreement which has been approved by a court or concluded before a court in the course of any proceedings, whenever the court approved it.

c) also includes authentic instruments, according to the law of each MS. The Regulation inserts the definition provided by the ECJ (case 260/97, Unibank), so such an instrument shall fulfil three conditions: the authenticity of the instrument should have been established by a public authority; this authenticity should relate to the content of the instrument and not only, for example, the signature; and the instrument has to be enforceable in itself in the State in which it originates.

Moreover, art. 4.3.b) includes a particular case for maintenance obligations considering *authentic instrument* “an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them”.

2.3.2. Jurisdiction of the MS of origin

For certificate of a judgement as EEO it is of the essence that the requested court compliance with the rules of international jurisdiction established in Brussels I regulation.

Art. 6, in a not very clear way, provides that for a judgement to be certified as EEO is necessary that “*the judgment does not conflict with the rules on jurisdiction as laid down in sections 3 and 6 of Chapter II of Regulation (EC) No 44/2001*”, that is, the judgement must respect the rules about exclusive jurisdiction (art. 22, R 44/2001: rights in rem, tenancies of immoveable properties, public registers, industrial property rights); if the judgement is about an insurance matter, it does not conflict with the rules on jurisdiction in section 3, chapter II, Brussels I, and if the debtor is a consumer, and he or she does not expressly agreed to the claim, the consumer must have his or her domicile in the MS in which the judgement has been given

("the judgment was given in the Member State of the debtor's domicile within the meaning of Article 59 of Regulation (EC) No 44/2001, in cases where a claim is uncontested within the meaning of Article 3(1)(b) or (c); and it relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession; and the debtor is the consumer"). Of course just in the case that the consumer had not expressly agreed to the claim.

According to the ECJ, it does not apply to contracts concluded between two persons who are not engaged in commercial or professional activities.

2.3.3. Minimum standards for the proceedings

As recital 12 stated, the Regulation set up minimum standards for the proceedings with two aims: in order to ensure that the defendant is informed about the court action, and in relation with the service of the decision on the debtor, regarding the existence of a sufficient guarantee of observance of the rights of defence.

In contrast with the European order for payment Regulation or with the European Small claim procedure, in this case there is no unification of the national procedural rules but simply a framework of common rules for certain matters. So the unification is pursued only through the adoption of common rules instead of replacing national law by a single legal text.

The same requirements are applicable for decisions given in second instance or in appeal proceedings (art. 12.2).

The control of these requirements is a matter for the court of origin.

In every case the defendant's domicile shall be known, EJC ruling 15 march 2012 (C-292/10): *"It is therefore apparent from the very wording of*

Regulation No 805/2004 that a judgment by default issued in circumstances where it is impossible to ascertain the domicile of the defendant cannot be certified as a European Enforcement Order. That conclusion also follows from an analysis of the objectives and scheme of that regulation. The regulation institutes derogation from the common system of recognition of judgments, the conditions of which are, as a matter of principle, to be interpreted strictly."

2.3.3.1. Notification requirements

It is a matter for the court of origin to check the minimum procedural requirements, which concern especially the service of the decision to the debtor.

The debtor shall have been notified in accordance with arts. 13-14, but it has to be into account that if the document has not been serviced upon these rules, the court may nevertheless certify the judgement as EEO if it is proved that the debtor has personally received the document to be served in sufficient time to arrange his defence.

a') service with proof of receipt by the debtor

The document instituting the proceedings may have been served on the debtor by one of the following methods:

"a) personal service attested by an acknowledgement of receipt, including the date of receipt, which is signed by the debtor;

(b) personal service attested by a document signed by the competent person who effected the service stating that the debtor has received the document or refused to receive it without any legal justification, and the date of the service;

(c) postal service attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the debtor;

(d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the debtor."

b') service without proof of receipt by the debtor (art. 14)

Service of the documents instituting proceedings may also have been effected by one of the following methods:

(a) personal service at the debtor's personal address on persons who are living in the same household as the debtor or are employed there;

(b) in the case of a self-employed debtor or a legal person, personal service at the debtor's business premises on persons who are employed by the debtor;

(c) deposit of the document in the debtor's mailbox;

(d) deposit of the document at a post office or with competent public authorities and the placing in the debtor's mailbox of written notification of that deposit, provided that the written notification clearly states the character of the document as a court document or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits;

(e) postal service without proof pursuant to paragraph 3 where the debtor has his address in the Member State of origin;

(f) electronic means attested by an automatic confirmation of delivery, provided that the debtor has expressly accepted this method of service in advance.

In these cases, the lack of security in relation with the effectiveness of the reception by the debtor demands some additional requirements: a

document signed by the competent person who effected the service, indicating:

(i) the method of service used; and

(ii) the date of service; and

(iii) where the document has been served on a person other than the debtor, the name of that person and his relation to the debtor.

or

b) an acknowledgement of receipt by the person served, for the purposes of paragraphs 1(a) and (b).

b') minimum requirements in relation with the information provided to the debtor (art. 16)

So as to ensure the fact that the debtor was provided with relevant information about the claim, the Regulation required that the document instituting the proceedings shall contain:

(a) the names and the addresses of the parties;

(b) the amount of the claim;

(c) if interest on the claim is sought, the interest rate and the period for which interest are sought unless statutory interest is automatically added to the principal under the law of the Member State of origin;

(d) a statement of the reason for the claim.

c') Minimum requirements in relation with the information about the course of action (art. 17)

Moreover, the debtor must have been informed in the document instituting the proceedings, the equivalent document or any summons to a court hearing with:

(a) the procedural requirements for contesting the claim, including the time limit for contesting the claim in writing or the time for the court hearing, as applicable, the name and the address of the institution to which to respond or before which to appear, as applicable, and whether it is mandatory to be represented by a lawyer;

(b) the consequences of an absence of objection or default of appearance, in particular, where applicable, the possibility that a judgment may be given or enforced against the debtor and the liability for costs related to the court proceedings.

2.3.3.2. Cure of non-compliance with minimum standards

Art. 18 provide that in case the proceedings in the MS of origin did not meet the procedural requirements as set out in Articles 13 to 17, such non-compliance shall be cured if:

(a) the judgment has been served on the debtor in compliance with the requirements pursuant to Article 13 or Article 14; and

(b) it was possible for the debtor to challenge the judgment by means of a full review and the debtor has been duly informed in or together with the judgment about the procedural requirements for such a challenge, including the name and address of the institution with which it must be lodged and, where applicable, the time limit for so doing; and

(c) the debtor has failed to challenge the judgment in compliance with the relevant procedural requirements.

Finally, if the proceedings in the Member State of origin did not comply with the procedural requirements as set out in Article 13 or Article 14, such non-compliance shall be cured if it is proved by the conduct of the debtor in the court proceedings that he has personally received the document to be served in sufficient time to arrange for his defence.

It is also to be bear in mind that no appeal shall be lodge against the issuing of the EEO certificate (art. 10.4). It is disputed if it is possible to lodge an appeal against the court's decision refusing the granting of EEO. Perhaps it is a question for national law, and, in any case, the claimant has also the option of applying for a new certificate or choosing for the recognition and enforcement under Brussels I Regulation.

2.4. Enforcement procedure

The enforcement procedure is governed by the law of the MS of enforcement altogether, but the EEO can be enforced without any complementary step, equal to the judgements given in such MS. National procedural law will provide the conditions for the enforcement under the same conditions as a judgement handed down in the MS of enforcement, but never the court of this MS can review the decision as to its substance, as it was said before.

In order to obtain the enforcement, the creditor shall provide to the competent court with a copy of the judgement, a copy of the EEO certificate, and a translation into the official language in the MS of enforcement. No security bond or deposit may be required at any case.

Jurisdiction for enforcement is to be determined under the provisions of Brussels I (art. 39.2).

Only on strict limited grounds the enforcement of the EEO can be refusal. It will happen, under art. 21, if the judgement certified as EEO is irreconcilable with an earlier judgement given in any MS or even in a third country if: a) its involved the same cause of action; b) its was given in the MS of enforcement or fulfils the conditions for its recognition; and c) the irreconcilability was not and could not have been raised in the MS of origin.

It also shall be pointed out that according to the Regulation, neither the public policy of the MS of enforcement be an obstacle for the enforcement, in contrast with art. 34 Brussels I.

2.5. Court settlements and authentic instruments under the eeo regulation

As stated above, a claim is to be considered uncontested if it has been expressly agreed to before a court or in an authentic instrument.

The claimant has to ask for the EEO to the court which approved the court settlement or in which it has been concluded, and, again, the enforcement of a certified court settlement is governed by the national law of the MS of enforcement.

Finally, an authentic instrument may be also certified as an EEO (art. 25) under certain requirements which have to do with the authenticity of the signature and the content of the instrument. The authentic instrument has to be established by a public authority empowered for such a purpose.

2.6. The jurisprudence of the EU Court of Justice

The ECJ has had occasion to rule on three occasions directly on issues related to Regulation 805/2004.

1.- As mentioned above, the subject matters that determine the scope of the Regulation must be interpreted as independent and autonomous concepts, and to coincide largely with the same which determine the field of application of Brussels I Regulation, the numerous judgments of the ECJ in relation with this Regulation shall also apply in interpreting the terms of the Regulation on the European Enforcement Order.

This was explicitly stated by the ECJ in some resolutions, for example in the **judgment of 15 February 2007**, which was to determine if within the concept of civil and commercial matters used by the art. 1 Brussels Convention included a dispute relating to a compensation brought by the plaintiffs in the main proceedings against the Federal Republic of Germany derives from operations conducted by armed forces during the Second World War.

ECJ stated firstly that the concepts of "civil and commercial" were autonomous:

"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 (see, inter alia, Case 29/76 LTU [1976] ECR 1541, paragraphs 3 and 5; Case 814/79 Rüffer [1980] ECR 3807, paragraph 7; Case C-271/00 Baten [2002] ECR I-10489, paragraph 28; Case C-266/01 Préservatrice foncière TIARD [2003] ECR I-4867, paragraph 20; and Case C-343/04 ČEZ [2006] ECR I-4557, paragraph 22)."

And secondly ruled that the Regulation shall not apply to cases in which the Administration acts with exorbitant or public powers:

“Disputes of that nature do 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 between private individuals (see, to this effect, Sonntag, paragraph 22; Henkel, paragraph 30; Préservatrice foncière TIARD, paragraph 30; and Case 0265/02 Frahuil [2004] ECR I-1543, paragraph 21)”

Therefore, as the Advocate General has observed in points 54 to 56 of his Opinion, there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States' foreign and defence policy. 38 It follows that acts such as those which are at the origin of the loss and damage pleaded by the plaintiffs in the main proceedings and, therefore, of the action for damages brought by them before the Greek courts must be regarded as resulting from the exercise of public powers on the part of the State concerned on the date when these acts were perpetrated.

The issue of the legal or illegal nature of the conduct developed by the State is, in the opinion of the Court, irrelevant in determining whether it falls within the material scope of the Regulation, and to reinforce such statement the Court invokes the list of its scope of application:

“Furthermore, in the same field of judicial cooperation in civil matters, Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15), which likewise provides, in Article 2(1), that it applies in civil and commercial matters', specifies in that provision that 'it shall not extend... to... the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii)'”,

2.- Also with respect to the scope of Regulation 44/2001, **judgment of 15 March 2012 (C-292/10)** addressed the question of jurisdiction in matters relating to delict or quasi-delict.

Mr de Visser is the owner of a domain name and runs the internet site www.*****.de. Under the link 'Fotos und Videos' (photos and videos) of that internet site, it is possible to see a photograph of Ms G. After having clicked on the link 'für weitere Fotos hier klicken' (click here for more photos), it is possible to see various photographs of her in which she is shown partly naked.

That situation arises from the fact that, in about 2003, Ms G was interested in the internet site and the services offered by Mr de Visser and contacted him for that reason. Subsequently, Mr de Visser, through a colleague and a photographer instructed by him, took photographs of Ms G in Germany, with their intended use being 'für eine Party' (for a party). Nevertheless, Ms G never agreed that those photographs should be published. The question of putting those photographs online on the internet was, in addition, never discussed with her and so is not the subject-matter of any specific agreement.

Both the legal information of the internet site in question and the DENIC database (domain registry of.de) give as 'Admin-C' (administrative contact) Mr N*****, with an address in Dortmund in Germany. However, there is no registration under that name in the Dortmund telephone directory. The location of the server hosting the internet site in question is unknown.

In the legal information of the internet site www.*****.de, Mr de Visser is registered as owner of the domain with an address in Terneuzen and a postal address in Venlo. It has not, however, been possible to effect service at those addresses in the Netherlands, since both letters were returned marked 'Unknown at this address'. The Consulate of the Kingdom of the Netherlands in Munich stated, on request, that Mr de Visser was not listed in any population register in the Netherlands.

After the grant of legal aid to Ms G, the national court ordered, on 8 February 2010, service by public notice of the initiating application and a preliminary written procedure. Previously, in the context of the application proceedings for legal aid, attempts had been made in vain to send Mr de Visser the draft initiating application by standard post to various addresses. Service by public notice of the initiating application, in accordance with the German Code of Civil Procedure, was effected by affixing a notice of that service to the bulletin board of the Landgericht Regensburg from 11 February to 15 March 2010. On the date of adoption of the decision for reference, the time-limits set for Mr de Visser in that notice by which he was to inform the court whether he would defend the action had expired without reaction from him. According to the national court, having regard to the circumstances, it is necessary to assume that, at that date, he was not aware of the proceedings commenced before it.

That court adds that if the possibility of service by public notice of the initiating application under national law were to have to give way to the rules of European Union law, the only possibility remaining for Ms G would be for her to give other addresses for Mr de Visser at which service could be effected, and she will be unable to do so without knowing those addresses or being able to discover them. That would be likely to be incompatible with the first paragraph of Article 47 of the Charter, since Ms G would then be de facto deprived of her guaranteed right to an effective legal remedy.

The ECJ stated that it must be borne in mind, firstly, that where the domicile of a defendant who is a Member State national is unknown, the application of the uniform rules of jurisdiction established by Regulation No 44/2001 instead of those in force in the different Member States meets the essential requirement of legal certainty and the objective, pursued by that regulation, of strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see, to that effect, Case C-327/10 *Hypoteční banka* [2011] ECR I-11543, paragraph 44).

And, secondly, the expression 'is not domiciled in a Member State', used in Article 4(1) of Regulation No 44/2001, must be understood as meaning that application of the national rules rather than the uniform rules of jurisdiction is possible only if the court seised of the case holds firm evidence to support the conclusion that the defendant, a citizen of the European Union not domiciled in the Member State of that court, is in fact domiciled outside the European Union (see, to that effect, *Hypoteční banka*, paragraph 42).

Thus, in the absence of such firm evidence, the international jurisdiction of a court of a Member State is established, by virtue of Regulation No 44/2001, when the conditions for application of one of the rules of jurisdiction laid down by that regulation are met, including in particular that in Article 5(3) thereof, in matters relating to tort, delict or quasi-delict.

The answer of the Court was that, in circumstances such as those in the main proceedings, Article 4(1) of Regulation No 44/2001 must be interpreted as meaning that it does not preclude the application of Article 5(3) of that regulation to an action for liability arising from the operation of an internet site against a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seised of the case does not have firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union.

And in relation with the applicability of Regulation 805/2004, the ECJ was answered whether the European Union law must be interpreted as precluding certification as a European Enforcement Order within the meaning of Regulation No 805/2004 of a judgment by default issued against a defendant whose address is unknown.

The Court noticed that a judgment by default is indeed one of the enforcement titles within the meaning of Article 3 of that regulation which may be certified as a European Enforcement Order. As recital 6 in the preamble to Regulation No 805/2004 states, the absence of objections from the debtor as stipulated in Article 3(1)(b) of that regulation can take the shape of default of appearance at a court hearing or of failure to comply

with an invitation by the court to give written notice of an intention to defend the case. Nevertheless, under Article 14(2) of that regulation, 'for the purposes of this Regulation, service under paragraph 1 is not admissible if the debtor's address is not known with certainty'.

It is therefore apparent from the very wording of Regulation No 805/2004 that a judgment by default issued in circumstances where it is impossible to ascertain the domicile of the defendant cannot be certified as a European Enforcement Order. That conclusion also follows from an analysis of the objectives and scheme of that regulation. The regulation institutes derogation from the common system of recognition of judgments, the conditions of which are, as a matter of principle, to be interpreted strictly.

Thus, recital 10 in the preamble to Regulation No 805/2004 states that where a court in a Member State has given judgment on an uncontested claim in the absence of participation of the debtor in the proceedings, the abolition of any checks in the Member State of enforcement is inextricably linked to and dependent upon the existence of a sufficient guarantee of observance of the rights of the defence.

As is clear from paragraph 57 of the present judgment, the defendant, by opposing, in accordance with Article 34(2) of Regulation No 44/2001, recognition of the judgment issued against him, will have the opportunity to ensure respect for his rights of defence. That guarantee would, however, be lacking if, in circumstances such as those of the main proceedings, a judgment by default issued against a defendant who was unaware of the proceedings was certified as a European Enforcement Order.

It should therefore be held that a judgment by default issued against a defendant whose address is unknown must not be certified as a European Enforcement Order within the meaning of Regulation No 805/2004.

Consequently, the answer to the second part of the third question is that European Union law must be interpreted as precluding certification as a

European Enforcement Order within the meaning of Regulation No 805/2004 of a judgment by default issued against a defendant whose address is unknown.

3.- Finally, the ruling of **5 December 2013, C-508/12**, deals with the applicability of the rule set up in art. 6, when the debtor is a consumer. In such a case a judgement on an uncontested claim delivered in a Member State shall be certified as a European Enforcement Order if the judgement is enforceable in the MS of origin, the judgement does not conflict with the rules on jurisdiction as laid down in Regulation Brussels I, and the judgement was given in the Member State of the debtor's domicile.

The facts of the case were as follows:

By an action brought before the Bezirksgericht Salzburg (District Court, Salzburg) (Austria), Mr Vapenik sought an order that Mr Thurner pay EUR 3 158, plus interest and expenses, resulting from a loan agreement they had concluded. Mr Vapenik brought an action before the Austrian court as the court for the place of performance of the contract chosen by the parties. Neither party was engaged in commercial or professional activities at the time the contract was concluded or when the action was brought.

Despite the fact that the notice of proceedings and summons to appear were served on Mr Thurner in Belgium by a court enforcement officer, Mr Thurner did not enter an appearance before the court. The Bezirksgericht Salzburg therefore gave judgment in default. That judgment was served on Mr Thurner by post, who did not appeal against that judgment, which therefore became final and enforceable.

Mr Vapenik then lodged an application before the Bezirksgericht Salzburg for a European enforcement order for that judgment in accordance with Regulation No 805/2004. That court dismissed the application, referring to Article 6(1)(d) of that regulation, and held that the action against Mr Thurner,

the consumer, had not been brought in the Member State in which he was domiciled.

Mr Vapenik appealed against that judgment before the referring court, arguing that the conditions for issue of a European enforcement order under Article 6(1)(a) to (c) of Regulation No 805/2004 were satisfied because the loan agreement had been concluded between two private individuals. Since Article 6(1)(d) of that regulation provides that such an order is to be issued, in particular, where the consumer's contracting party acts in a commercial or professional capacity, it is not applicable to the case in the main proceedings.

In those circumstances, the Landesgericht Salzburg (Regional Court, Salzburg) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 6(1)(d) of Regulation ... No 805/2004 to be interpreted as applying only to contracts between business persons as creditors and consumers as debtors, or is it sufficient for at least the debtor to be the consumer for the provision also to apply to claims of a consumer against another consumer?'

The ECJ observed that it is clear from the wording of Article 6(1)(d) of Regulation No 805/2004 that a consumer is a person who has concluded a contract for a purpose which can be regarded as being outside his trade or profession. That provision does not state whether or not the status of professional of the consumer's contracting party plays a role in defining the other party as a 'consumer'. Neither does the status of a consumer's contracting party arise from the other provisions of that regulation and, in the absence of a reference in that provision to the law of the Member States, the meaning and scope of the concept of 'consumer' laid down in Article 6(1)(d) must be determined in the light of the context in which it appears and the objective pursued by Regulation No 805/2004.

That's because the Court's answer was:

Article 6(1)(d) of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims must be interpreted as meaning that it does not apply to contracts concluded between two persons who are not engaged in commercial or professional activities.

2.7. National Jurisprudence

As is evident, all national decisions rendered pursuant to Regulation 805/2004 refer to the possibilities of opposition by the enforced debtor and to the enforcement court's powers in order to check the requirements of the European Enforcement order.

2.7.1. Order of Audiencia Provincial de Barcelona, Court of Appeal of Barcelona, section 1st, de 29 July 2008 (511/2007)

Requested the enforcement of a judgment certified as a European enforcement order by a court in England, the debtor objected arguing that the subject matter of the case had already been tried in Spain.

The Court started its ruling by recalling the purpose and general nature of the Regulation and in particular the possibility of opposition under Art. 21.

The defendant argued that before the proceedings began in England, he had filed an application for conciliation with the same object before the Spanish courts.

The Court dismissed the argument. First, the Court finds that the application submitted before the English court was filed in January 2006 and the EEO was issued on April 12, 2006. Furthermore, Art. 21 require that previously has been issued a resolution in a Member State or in a third State which is irreconcilable with an earlier judgement.

Second, the court stated that an order by which it accepts for processing a request for conciliation is not a previous "judicial decision", within the meaning of the Regulation.

Finally, the court finds that the subject matter of the case does not match with the one followed before the English court, therefore art. 21 are not applicable.

The second argument alleged by the debtor was merely formal, stating that the standard form through which the resolution had been certified as a European Enforcement order was not the one following its amendment by Regulation 1869/2005. The reason is rejected because the court finds that the amendments made by this latter Regulation was purely formal nature, limited to include mention of the new states that joined the EU, and their respective currencies. Among which was not the UK, who was a member before this date.

Thirdly, the debtor argued that certain sections of the standard form had not been completed properly by the creditor. Thus, debtor argued that the paragraphs relating to the service of the summons (paragraph 12 of Annex III) had not been fulfilled in a correct manner, but the court finds that such standard form was not completed, because it concerns to the case in which it is certified as a European Enforcement Order one extrajudicial document, which was not the case. Furthermore, the fact that was not completed the paragraph 12, concerning the "service of the summons in his case", was found by the court irrelevant, because section 11 appears completed based on the "service of the document instituting the proceedings under Chapter III if without stating that any hearing has been concluded. The uncontested claim in the case did not refer to the lack of appearance at a court hearing, so it made no sense to complete that section.

It also claimed the debtor as a defence the plus-petition, considering that the amount by which the order was should be lower, but the court replied that it would be a review of background, which was prohibited for the enforcement court by art. 21.2.

Finally, the debtor claimed the lack of enforceability of the order, because it had not complied with the national procedural rule which requires twenty days have elapsed from the issue of the enforcement resolution, required by art. 548 of the Spanish Civil Procedural Act. The court replied that this rule does not apply and the European order is enforcement by direct provision of the regulation.

The Court recalls that the issue of verification of compliance with the minimum procedural standards is on the court of origin, so he rejected all grounds of opposition.

2.7.2. *Order Audiencia Provincial de San Sebastián (Court of Appeal of San Sebastián, Guipúzcoa) 5 February 2008 (3331/2007)*

In this case the debtor opposed the execution dispatched in Spain on the basis of a European Enforcement Order issued by an Austrian court. The defendant claimed that he could not contest the claim because the judgment given by the court of Innsbruck does not provide information on available motions to challenge the judgment, and also it had been issued only in German; also alleged that the order had been issued in a defective way. The debtor also argued the lack of enforceability of the judgment of the Austrian court on the grounds that it had not jurisdiction, and had a lack of motivation.

The court finds that the debtor was duly notified of the possibilities of appeal and the fact that the order was notified only in German was irrelevant because there was no dispute that he understood that language.

The remaining reasons were rejected by the grounds of the general consideration that the enforcement court has no jurisdiction to control, because it was only aspects that could be controlled by the court of origin. Nonetheless, in an ambiguous way, the court examine whether the order had met the minimum standards for notice of art. 13, and the reporting requirements contained in arts. 16 and 17, concluding with an affirmative answer.

Finally, the court finds that the principle of mutual trust which inspires the Regulation prevents the court of enforcement from examining the grounds of the judgment itself.

2.7.3. Order of Audiencia Provincial de Pontevedra, section 6th, 26 September 2011 (nº 4033/10)

The case concerns the temporal application of the Regulation, which came into force after October 21, 2005.

The enforcement proceedings in Spain began earlier, on the basis of Regulation 44/2001, but subsequently an extension of the enforcement was requested, based on a European Enforcement Order.

The defendant argued that the EEO was invalid for being the judgment prior to the entry into force of the Regulation.

The court rejected the argument on the grounds that it could not review the validity of the European order as court of enforcement. If the defendant wanted to request the correction or revision of the EEO should apply to the court of origin, as provided art. 10.

2.7.4. Order of Audiencia Provincial de Almería, (Court of Appeal of Almería), section 3rd, de 30 July 2008 (53/2008)

The peculiarity of the case is that the court of origin-provincial Court of Wels (Austria) - issued the certificate of the European Enforcement order directly only in Spanish, instead of doing so in the language of the resolution, as stipulated in art. 9.2 of the Regulation.

The court, after presenting the characteristics and purposes of the Regulation, finds that the infringement is merely formal, without enough importance to produce the effect of nullity of the execution, given that the certificate met all other requirements and being Spain the state of enforcement.

It was also argued by the debtor that he had not been informed by the court of origin about the possibilities for contesting the claim or about the consequences of an absence of contesting. The court found that these aspects had been included in the certificate in the certificate, adding that according to art. 21.2 the enforcement court cannot review the merits of the judgement or the requirements of the resolution given by the court at the MS of origin.

2.7.5. Order Audiencia Provincial de Zaragoza (Court of Appeal of Zaragoza), section 2nd, 21 May 2009 (28/2009)

In this case, the debtor opposed the enforceability of a certificate issued by a Dutch court alleging that the decision was not final, but could be appealed before the Dutch courts of appeal. Also argued that the judgement and was not served on him by the trial court and the order had been issued in absentia, when the truth was that he had opposed itself in due time.

The court's decision does not consider the application admissible on the ground that the Spanish procedural rules were applicable to the case. Not adequately explain the court his reasons for this decision.

2.7.6. Order of Audiencia Provincial de La Coruña (Court of Appeal of La Coruña) 26 October 2011 (118/2011)

The debtor opposed the payment exception, claiming that he had paid prior to the lodging date of the application for the enforcement, on the basis of a European Enforcement order. The court finds that the payment cannot be taken into account, because according to the defendant, it occurred before the judgment certified as a European Enforcement Order was issued, so that it should have been appreciated by the court that rendered the judgment. So there is no point for the court of enforcement to review this issue.

3. The Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment

Jacinto Jose PEREZ BENITEZ

3.1. Introduction

Alike other instruments on judicial cooperation throughout the European Union, the origin of the Regulation 1896/2006 shall be found in the Treaty of Amsterdam and in the Tampere meeting as well. In those cornerstones of the European judicial area, was expressly highlighted the necessity of setting up a uniform proceeding to obtain a judicial decision in relation with uncontested claims.

In this context, a green paper was issued in December 2002 expressing the aim of creating a European order for payment procedure, speedy and cost-efficient, just for claims that are presumed to be uncontested because of the debtor's behaviour.

The goal was simple: the real demand for combat late payments in commercial transactions, which represent a high cost and a serious risk of insolvency for small-medium-sized enterprises. At the same time some additional advantages were evident: the proper functioning of the internal market, the strength of judicial cooperation and endorsing mutual recognition principle, and accelerate the procedures in which a cross-border element was involved.

The regulation starts from the fact that in almost every MS there are specific proceedings to obtain an order for payment against a debtor under certain circumstances, but experience shows that these procedures not only vary substantially from one country to another, but in most cases these

proceedings were inadmissible or truly useless in relation with cross-border cases. The goal was to overcome the drawbacks at national level, or, in the words used by recital 9:

“The purpose of this Regulation is to simplify, speed up and reduce the costs of litigation in cross-border cases concerning uncontested pecuniary claims by creating a European order for payment procedure, and to permit the free circulation of European orders for payment throughout the Member States by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the Member State of enforcement prior to recognition and enforcement.”

Interestingly, alike Regulation 805/2004, it is an option for creditors to ask for a domestic procedure or for a European payment order.

In this context, another tool like Regulation 805/2004 for uncontested claims was possible: once again the option could be to set up minimum standards for the proceedings on specific matters but, beyond any doubt, a common procedure was preferable to a new directive or a simple regulation setting up common requirements for national proceedings.

This option should produce an additional effect: to enhance the enforceability, because through a common procedure, the decision issued by a court in a MS was going to be recognised and enforced in every MS without additional requirements; it was the final step towards the abolition of exequatur or intermediate proceedings.

3.2. Scope of application

3.2.1. Territorial application

The Regulation is applicable in every member state, except Denmark.

Public International Law will provide with the relevant rules to determine if certain territory is considered as part of the territory of a MS.

But it is important to highlight that, unlike Regulation 805/2004, and in the same way as Regulation 861/2007 (establishing a European small claims procedure), Regulation 1896/2006 is applicable only to cross-border cases. The Regulation provides a legal definition of such a concept: *one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised.*

As a consequence, it is not possible to claim by this procedure against a debtor whose domicile is in the same MS as the court seised, nor against a debtor whose domicile is outside the limits of the European Union.

Domicile shall be determined according to arts. 59 and 60, Regulation 44/2001. The relevant moment for determining whether there is a cross-border case is the time when the application is submitted.

3.2.2. Material application

Two relevant questions are involved in relation with the material framework: the applicability to civil and commercial matters and the features of the claim.

3.2.2.1. Civil and commercial cases

The Regulation is applicable only to civil and commercial matters whatever the nature of the court or tribunal, so labour courts may be included if the issue falls inside such material scope.

Alike Brussels I Regulation, it shall not extend to *acta iure imperii*, that is, revenue, customs or administrative matters.

And the Regulation shall not apply to:

a) Rights in property arising out of a matrimonial relationship, wills and succession;

b) Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

c) Social security;

There are no specialities in relation with the material scope of Regulation 44/2001, with the relevant exception that the European payment order procedure is not applicable to claims arising from non-contractual obligations. The latter with two exceptions:

a) The non-contractual obligation have been the subject of an agreement between the parties or there has been an admission of debt,

b) Or they relate to liquidated debts arising from joint ownership of property.

Note that arbitration it is not excluded of the material scope.

Both exceptions are fully logical if the goal of the procedure is considered. For instance, the non-exclusion of arbitration is because it makes no sense a claim already established in an award, which also has a specific proceeding to obtain enforceability (New York Convention, 1958).

The exclusion of non-contractual obligations is because they are not normally liquids, but usually require a prior determination of their existence and quantity.

3.2.2.2. The pecuniary nature of the claim

Art. 4 provide:

“The European order for payment procedure shall be established for the collection of pecuniary claims for a specific amount that have fallen due at the time when the application for a European order for payment is submitted.”

Therefore, only shall be claimed by this procedure a claim represented by a certain amount of money, whatever the currency in which the credit was expressed.

The claim shall be determined at the lodging date or be determinable through a simple mathematical operation, excluding previous or complicated liquidation proceedings.

If interests on the claim are requested, contractual penalties or cost proceedings, also they have to be previously determined. In relation with the interest of the claim, the interest rate and the period of time for which that interest is demanded, all this matters shall be expressed clearly in the claim (unless statutory interest is automatically added to the principal, under the relevant provisions of the law of the Member State of origin).

Finally it shall be highlighted that, unlike some national legislation, in the European order for payment procedure there are no limits in relation with the amount of the claim, so it is possible to claim for a specific amount of money whatever it is.

3.2.3. Temporal application

Regulation 1896/2006 came into force in 31.12.2006, and it is applicable from 12.12.2008.

3.3. Jurisdiction

The application for a European order for payment shall be submitted before a competent court. Jurisdiction shall be determined in accordance with the rules of Regulation Brussels I. However, if the subject matter of the claim relates to a contract concluded by a consumer and just in case the consumer is the defendant, only the court in the MS where the consumer is domiciled has jurisdiction. It is a relevant different in relation with the general provisions under Regulation 44/2001. Needless to say that concept of domicile shall be determined according arts. 59 and 60 of Brussels I regulation.

3.4. Application process

3.4.1. The claim

The application shall be made using a standard form (standard form A, Annex I). No language barriers should prevent the claimant from filing in the standard form: the European Atlas and the E-justice portal provide full information to overcome any difficulties.

The application must be lodged in paper form or by any other means of communication, even electronically, accepted by the MS, according with the information given (the European Atlas also offers information about the means of communication accepted and the languages permitted).

The application's content shall be stated according both the requirements set up in art. 7 and in the annex. Thus, the application shall state:

- Name and addresses of the parties
- The amount of the claim (principal, interest, costs)
- The interest rate, period of time in which is demanded

- The cause of action (several options are given in the template)
- A description of evidence (note that it is not necessary to present any means of evidence, just a simple mention of them)
- Grounds for jurisdiction (also some options are given)
- The cross-border nature of the case
- Optionally, bank details for payment

In contrast with other regulations (namely, the European small claims procedure), the Regulation doesn't provide that MS shall ensure practical assistance in filling in the forms to the parties.

The cause of action is a relevant requirement because the court is allowed to examine *prima facie* the merits of the claim, so as to exclude clearly unfounded petitions or inadmissible applications.

In an appendix to the application, the claimant may indicate (it can be done in other way, but in any event before the order is issued) to the court that he refuses a transfer to national proceedings in the event of opposition by the defendant.

The application shall be signed by the claimant or by his representative.

3.4.2. Examination of the application. Completion and rectification

Once the application for a European order for payment is submitted, the court shall examine, on the basis of the application form, whether the requirements are met and, *prima facie*, whether the claim appears to be founded (manifestly groundless claims should be dismissed at this stage), as soon as possible.

So the court shall examine:

a) Whether the application falls under the material scope of the Regulation

b) The cross-border nature of the case

c) Whether the claim is a pecuniary claim, for a specific amount of money that has fallen due at the time when the application is submitted.

d) The international jurisdiction,

e) Whether the information provided in the standard form is complete; otherwise the court will inform the claimant using form B included in Annex I. The court will set a time limit, appropriate in the circumstances, for the completion or rectification.

f) The merits of the claim, just in a general way

The whole examination shall be made using the information given in the standard form. To present additional documents in order to complete the claim is not permitted.

If the requirements are met for only part of the claim, the court shall inform the claimant to that effect (once again using a standard form: C as set out in Annex III). In this case, the claimant can accept or refuse the court's proposal for the amount specified. If the claimant accepts, the court will issue the order for payment for the part of the claim accepted. In other case, or if the claimant does not answer within the time limit given by the court, the proposal shall be rejected in it's entirely.

There shall be no right of appeal against the rejection of the application, but the claimant is entitled to present a new petition or to use any other procedure available under the law of a MS.

3.4.3. *Issue of a European order for payment*

3.4.3.1. *Issue an EOP*

In case the requirements are fully met, the court shall issue, as soon as possible and “normally” within a period of time of 30 days of the lodging date, a European order for payment, using standard form E, Annex V.

The terms will be counted according to the provisions of Regulation 1187/1971.

The order shall be issued together with a copy of the application form. The defendant shall be advised of his option, under art. 12.3, and be informed that the order was issued exclusively on the basis of the information given by the claimant, and was not verified by the court.

So the debtor may:

a) Pay the amount indicated in the order

b) Oppose the order by lodging a statement of opposition, within a month of service of the order on him. It is not necessary to provide grounds for such statement.

Also the defendant shall be informed that the order will become enforceable unless a statement of opposition within the time limit had been lodged and in such a case, the proceedings shall continue before the competent court of the MS of origin according national procedural law, unless the claimant has requested that the proceedings be terminated in that event. So the presentation of the statement of opposition comes the order for payment procedure to the end, but may continue before a national court following national proceedings.

Make sure that the order is served on the defendant is a must for the court.

3.4.3.2. Requirements of the service of the European order for payment on the defendant

Instead of referring to the national rules in each MS or referring to the provisions of the Regulation 1393/2007 on the service of documents, the Regulation set up specific rules for the service.

The order may be served on the defendant in accordance with the national law of the MS in which the service is to be effected, but the Regulation prohibits any method based on legal fiction. Consequently there are some minimum rules as happens under arts. 13-15 of Regulation 805/2004. All of these methods may be effected on a defendant's representative. The permitted methods are as follows:

a') Service with proof of receipt by the defendant:

"a) personal service attested by an acknowledgement of receipt, including the date of receipt, which is signed by the defendant;

(b) personal service attested by a document signed by the competent person who effected the service stating that the defendant has received the document or refused to receive it without any legal justification, and the date of the service;

(c) postal service attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the defendant;

(d) service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the debtor."

b') Service without proof of receipt by the defendant (art. 14):

(a) personal service at the defendant's personal address on persons who are living in the same household as the debtor or are employed there;

(b) in the case of a self-employed defendant or a legal person, personal service at the defendant's business premises on persons who are employed by the defendant;

(c) deposit of the document in the defendant's mailbox;

(d) deposit of the document at a post office or with competent public authorities and the placing in the defendant's mailbox of written notification of that deposit, provided that the written notification clearly states the character of the document as a court document or the legal effect of the notification as effecting service and setting in motion the running of time for the purposes of time limits;

(e) postal service without proof pursuant to paragraph 3 where the defendant has his address in the Member State of origin;

(f) electronic means attested by an automatic confirmation of delivery, provided that the defendant has expressly accepted this method of service in advance.

In all of these cases, the defendant's address shall be known with certainty.

Service pursuant to paragraph a), b), c) and d) shall be attested by a document signed by the competent person who effected the service, indicating:

(i) the method of service used; and

(ii) the date of service; and

(iii) where the document has been served on a person other than the defendant, the name of that person and his relation to the defendant.

or

b) an acknowledgement of receipt by the person served, for the purposes of paragraphs 1(a) and (b).

3.4.3.3. Possible positions adopted by the defendant

Summarising what has been said before, the defendant, once had been requested for payment, may: a) pay the amount indicated; b) to lodge a state of opposition; and c) do nothing.

a) Pay the debt

The defendant may pay the amount indicate in the order to the claimant, in the account specified by the claimant or in other acceptable way. The payment requirements are not determined in the Regulation, so it will be a matter subject to national law. The Regulation neither set up any provision in relation with the possibility of a partial payment nor about the intervention of the creditor to take a position on the payment.

If payment takes place and it is to be understood that full-duly-justified, the court will not issue a declaration of enforceability and shall terminate the procedure.

b) Opposition

Debtor may oppose by lodging a statement for opposition within 30 days of service of the order to him, using standard form F, Annex VI, but also it would be possible to oppose in other way in a written form or by electronic means, without the necessity of providing grounds for the opposition.

The statement for opposition shall lead to an automatic transfer of the case no national proceedings, unless the claimant has requested that the proceedings be terminated in such event. Notice that in such a case, national procedural law may send the case to a specific branch of the jurisdiction, for instance, to the labour jurisdiction. Also national procedural law will set up whether a new application is requested.

c) Absence of opposition

If the defendant let the 30 days without presenting the statement of opposition, and once a reasonable time has elapsed for receipt of the statement for opposition by the court, this will issue the European order for payment soon as possible, using the form G and sent it to the applicant.

3.4.3.4. Review of the European order for payment

Art. 20 provide the possibility for the debtor to ask for a reviewing of the order in certain exceptional cases, after the expiry of the time limit for lodging the statement for opposition under these circumstances:

a) The order for payment was served by one of the methods provided for in art. 14 and service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part,

b) or the defendant was prevented for objecting to the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part.

Also a review of the order may be requested if it was clearly wrongly issued, having regard to the requirements laid down in the Regulation.

In these cases, if the court of origin finds the review founded, the European order for payment shall be null and void.

The reviewing proceeding is governed by national law.

3.5. Enforcement

“European order for payment issued in one Member State which has become enforceable should be regarded for the purposes of enforcement as if it had been issued in the Member State in which enforcement is sought.

Mutual trust in the administration of justice in the Member States justifies the assessment by the court of one Member State that all conditions for issuing a European order for payment are fulfilled to enable the order to be enforced in all other Member States without judicial review of the proper application of minimum procedural standards in the Member State where the order is to be enforced", according Recital 27.

Enforcement procedures shall be governed by the law of the MS of enforcement, under the same conditions as an enforceable decision issued in the MS of enforcement. The MS of enforcement shall apply Brussels I Regulation rules regarding jurisdiction (so it shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement).

No security bond or deposit shall be required on the ground that the claimant is a foreign national or he or she is not a resident or domiciled in the MS of enforcement.

For enforcement in another MS, the claimant shall provide the competent court with a copy of the European order for payment, as declared enforceable by the court of origin and, where necessary, a translation into the official language of the MS of enforcement, or into another language that this MS has indicated as acceptable.

Enforcement may be refused, under art. 22, only if the order is *irreconcilable with an earlier judgment given in any Member State or in a third country, provided that:*

(a) the earlier judgment involved the same cause of action and

was between the same parties; and

(b) the earlier judgment was given in the Member State of enforcement or fulfils the conditions necessary for its recognition in the Member State of enforcement; and

(c) the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State of origin.

For the case that the defendant has requested for a review of the requirement of payment as provided in art. 20, the competent court for enforcement may limit the enforcement proceedings to protective measures or make enforcement conditional on the provision of a security or, in exceptional circumstances, stay the enforcement proceedings, as provided for in art. 23.

3.6. European Court Jurisprudence

3.6.1. Order of the Court, 21 March 2013

The facts were as follows:

On 14 October 2011, Logicdata brought an application before the District Commercial Court, Vienna for a European order for payment against Novontech-Zala, for the payment of EUR 30 586 in respect of a sale which had not been paid for by that company. On 25 October 2011, that court issued a European order for payment. The order was served on Novontech-Zala on 13 December 2011 in Zalaegerszeg (Hungary).

Novontech-Zala sent that order to its lawyer in Hungary, who lodged a statement of opposition on 13 January 2012, that is, after the expiry of the time-limit of 30 days laid down in Article 16(2) of Regulation No 1896/2006. It is clear from the documents before the Court that the lawyer had based his calculation of the period in question on the incorrect assumption that the European order for payment had been notified to Novontech-Zala on 14

December 2011 and not 13 December, as was in fact the case. He calculated that period on the assumption that it would expire on 13 January 2012, whereas, in reality, it expired on 12 January 2012. Without asking the court which had issued the European order for payment the date from which the time-limit had started to run, the lawyer entered the date on which the time-limit was to expire (which had been incorrectly calculated) in the diary and, therefore, lodged the statement of opposition out of time. For this reason, the court dismissed the opposition because it was out of time.

On 8 February 2012, Novontech-Zala, henceforth represented by a firm of lawyers in Austria, challenged the order rejecting the opposition, asking the Bezirksgericht für Handelssachen Wien, in particular, to review the order for payment in accordance with Article 20 of Regulation No 1896/2006. By order of 5 March 2012, that court dismissed the application for review.

Novontech-Zala appealed against that order before the referring court, arguing that the court of first instance had not applied the correct legal rules in reaching its assessment and that that court was required to carry out a review of the European order for payment pursuant to Article 20 of Regulation No 1896/2006.

It is in those circumstances that the Handelsgericht Wien decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the failure on the part of a party's lawyer to comply with the time-limit for lodging opposition to a European order for payment constitute fault on the part of the defendant for the purposes of Article 20(1)(b) of [Regulation No 1896/2006]?

If wrongful conduct on the part of the lawyer representing the defendant is not to be regarded as fault on the part of the defendant itself, is the failure of the former to take note of the correct date of expiry of the time-limit for opposing a European order for payment to be regarded as an

extraordinary circumstance within the meaning of Article 20(2) of Regulation No 1896/2006?’

The ECJ assumed that the referring court asked essentially whether the failure to comply with the time-limit for lodging a statement of opposition to a European order for payment, as a result of the wrongful conduct of the defendant's representative, may justify the review of that order for payment, either by reason of ‘extraordinary circumstances without any fault on the [defendant's part]’, within the meaning of Article 20(1)(b) of Regulation No 1896/2006, or due to ‘exceptional circumstances’ within the meaning of Article 20(2) thereof.

The ECJ set up that it is clear that circumstances such as those in the main proceedings, involving the incorrect calculation and transcription of the time-limit for lodging the statement in opposition by the defendant's representative, *are neither ‘extraordinary’, within the meaning of Article 20(1)(b), nor ‘exceptional’, within the meaning of Article 20(2) of Regulation No 1896/2006.*

It is true that Article 20(1)(b) and (2) of Regulation No 1896/2006 makes it clear that a review of a European order for payment may be carried out where the failure to comply with the 30-day time-limit for lodging a statement of opposition results from extraordinary or exceptional circumstances which prevented that statement of opposition from being lodged within the period prescribed and the other conditions laid down by those provisions are fulfilled. However, where, as in the case in the main proceedings, the failure to comply with the time-limit is due to a lack of diligence by the defendant's representative, such a situation, since it could easily have been avoided, does not constitute extraordinary or exceptional circumstances within the meaning of those provisions.

That is because the possibility of a review of a European order for payment in circumstances such as those at issue in the main proceedings

would give the defendant a second opportunity to oppose the claim within the meaning of recital 25 in the preamble to Regulation No 1896/2006.

Besides, the EJC notices that as is apparent from the wording of Article 20(1)(b) of Regulation No 1896/2006, in order for the defendant to have grounds to apply for the review of a European order for payment pursuant to that provision, it is necessary, in the absence of force majeure, that three cumulative conditions be satisfied, namely, first, there must be extraordinary circumstances by reason of which the defendant was prevented from challenging the claim within the period prescribed for that purpose, second, there should be no fault on the part of the defendant and, third, the defendant must act promptly. The fact that one of those conditions is not fulfilled means that the defendant cannot argue that it satisfies the conditions laid down in that provision.

Therefore, having regard to the foregoing, the answer to the questions referred is that *the failure to observe the time-limit within which to lodge a statement of opposition to a European order for payment, by reason of the wrongful conduct of the defendant's representative, does not justify a review of that order for payment, since such failure to observe the time-limit does not constitute extraordinary circumstances, within the meaning of Article 20(1)(b), or exceptional circumstances, within the meaning of Article 20(2) of Regulation No 1896/2006.*

3.6.2. Ruling C-144/12, 13 June 2013

This ruling concerns the interpretation of art. 6 in relation with art. 24 of Brussels I Regulation.

The merits of the case were as follows: Mr Sperindeo undertook – under a contract for the provision of services entered into with Goldbet, a company which organises sports betting services – to set up and operate such betting services in Italy.

Goldbet took the view that Mr Sperindeo had failed to fulfil his contractual obligations, and applied on 29 December 2009 to the Bezirksgericht für Handelssachen Wien (Vienna District Court for Commercial Matters) for a European order for payment to be issued requiring Mr Sperindeo to pay the sum of EUR 16 406, together with interest and costs, by way of damages; the order for payment was obtained on 17 February 2010.

On 19 April 2010, Mr Sperindeo, acting through his lawyer, lodged a statement of opposition to the European order for payment within the prescribed time-limit. The grounds for his opposition were that Goldbet's claim was unfounded and that the sum claimed was not payable.

Prompted by that statement of opposition, the Bezirksgericht für Handelssachen Wien referred the case to the Landesgericht Innsbruck (Innsbruck Regional Court), taking the view that the latter court was the competent court for the ordinary civil procedure within the meaning of Article 17(1) of Regulation No 1896/2006.

Before the Landesgericht Innsbruck, Mr Sperindeo pleaded, for the first time, a lack of jurisdiction of the Austrian courts, on the ground that he was domiciled in Italy. Goldbet contended that the Landesgericht Innsbruck had jurisdiction as the court for the place of performance of the obligation to pay a sum of money, in accordance with Article 5(1)(a) of Regulation No 44/2001. In any event, according to Goldbet, the Landesgericht Innsbruck had jurisdiction under Article 24 of Regulation No 44/2001, since Mr Sperindeo, having failed to plead lack of jurisdiction when he lodged a statement of opposition to the European order for payment in question, had entered an appearance within the meaning of that article.

By order, the Landesgericht Innsbruck granted Mr Sperindeo's application, declined jurisdiction and dismissed the action brought before it. Goldbet appealed to the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court) against that order. The Oberlandesgericht Innsbruck

dismissed the appeal on the grounds that the Austrian courts did not have jurisdiction because Goldbet's claims arose from a contract for the provision of services the place of performance of which, within the meaning of Article 5(1)(b) of Regulation No 44/2001, was in Italy, and, moreover, the jurisdiction of the Austrian courts could not be founded on Article 24 of Regulation No 44/2001 since the statement of opposition lodged by Mr Sperindeo could not be regarded as constituting the entering of an appearance within the meaning of that article.

Goldbet brought an appeal on a point of law against the decision of the Oberlandesgericht Innsbruck before the referring court. It seeks to have the earlier judicial decisions set aside and resumption of the procedure before the Austrian courts.

The referring court considers that the Austrian courts do not have jurisdiction under Article 5(1)(b) of Regulation No 44/2001, given that the activities with which Mr Sperindeo was tasked by Goldbet were carried out exclusively in Italy. The referring court nevertheless queries whether the opposition to the order for payment, which the defendant lodged without contesting the jurisdiction of the court of origin, might be regarded as constituting the entering of an appearance within the meaning of Article 24 of Regulation No 44/2001, thereby conferring jurisdiction on the Austrian courts.

In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 6 of Regulation [No 1896/2006] to be interpreted as meaning that Article 24 of [Regulation No 44/2001], which confers jurisdiction on a court before which a defendant enters an appearance, must also be applied in the European order for payment procedure?

(2) If question 1 is answered in the affirmative:

Is Article 17 of Regulation No 1896/2006 in conjunction with Article 24 of Regulation No 44/2001 to be interpreted as meaning that the lodging of a statement of opposition to a European order for payment itself constitutes the entering of an appearance, provided that that statement does not contest the jurisdiction of the court of origin?

(3) If question 2 is answered in the negative:

Is Article 17 of Regulation No 1896/2006 in conjunction with Article 24 of Regulation No 44/2001 to be interpreted as meaning that the lodging of a statement of opposition confers jurisdiction by virtue of the entering of an appearance at most where that statement itself presents arguments on the substance of the case but does not contest the jurisdiction?'

The Court rules that article 6 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, read in conjunction with Article 17 thereof, must be interpreted as meaning that a statement of opposition to a European order for payment that does not contain any challenge to the jurisdiction of the court of the Member State of origin cannot be regarded as constituting the entering of an appearance within the meaning of Article 24 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, and the fact that the defendant has, in the statement of opposition lodged, put forward arguments relating to the substance of the case is irrelevant in that regard.

3.6.3. Ruling 13 December 2012 (C-215/11)

On 23 February 2011, Mrs Szyrocka, who is resident in Poland, applied to the Sąd Okręgowy we Wrocławiu for a European order for payment to be

issued against SiGer Technologie GmbH, established in Tangermünde (Germany).

When examining the application, the referring court found that it did not comply with certain formal requirements laid down by Polish law and, in particular, that it failed to specify the value of the subject-matter of the dispute, expressed in Polish currency, as required under Polish law to enable the fee for issuing the application to be calculated. It is apparent from the file before the Court that, on the application form for a European order for payment, Mrs Szyrocka stated the principal amount of the claim in euros. The referring court also points out that, on that form, Mrs Szyrocka indicated that she was claiming interest from a specified date until the date of payment of the principal.

By its first question, the referring court asks whether Article 7 of Regulation No 1896/2006 must be interpreted as governing exhaustively the requirements to be met by an application for a European order for payment, or whether it sets out only the minimum requirements for such an application, so that the provisions of national law are to be applied to the formal requirements for an application for all matters not governed by that provision.

Also the referring court asks, in essence, whether Articles 4 and 7(2)(c) of Regulation No 1896/2006 are to be interpreted as precluding a claimant from demanding, in an application for a European order for payment, interest for the period from the date on which interest falls due until the date of payment of the principal.

And finally, the court asks by its fifth question, in essence, how the European order for payment form, set out in Annex V to Regulation No 1896/2006, is to be completed if the defendant is ordered to pay to the claimant the interest accrued up to the date of payment of the principal.

The EJC ruled as follows:

1. Article 7 of Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure must be interpreted as governing exhaustively the requirements to be met by an application for a European order for payment.

Pursuant to Article 25 of that regulation and subject to the conditions laid down therein, the national court remains free to determine the amount of the court fees in accordance with rules laid down by domestic law, provided that those rules are no less favourable than those governing similar domestic actions and do not make it in practice impossible or excessively difficult to exercise the rights conferred by European Union law.

2. Articles 4 and 7(2)(c) of Regulation No 1896/2006 must be interpreted as not precluding a claimant from demanding, in an application for a European order for payment, interest for the period from the date on which it falls due until the date of payment of the principal.

3. Where the defendant is ordered to pay to the claimant the interest accrued up to the date of payment of the principal, the national court is free to determine the way in which the European order for payment form, set out in Annex V to Regulation No 1896/2006, is to be completed in practice, provided that the form thus completed enables the defendant, first, to be fully aware of the decision that he is required to pay the interest accrued up to the date of payment of the principal and, second, to identify clearly the rate of interest and the date from which that interest is claimed.

3.7. National jurisprudence

3.7.1. *Order of the Audiencia Provincial of Barcelona (Barcelona Provincial Court) 20 October 2010 (543/2000)*

Lodged an application for a European order for payment, the court rejected it considering that under the Spanish procedural law the court had not territorial jurisdiction.

The Court of Appeal overruled this decision. After highlighted the goals of the Regulation, according to its recitals, the Court of Appeal set up that the European Regulation, as a piece of Secondary law, is entirely binding, displacing the internal rules.

The case was about a debt which source was a contract of provision of services, so the competent court, on the grounds of art. 5 of Regulation 44/2001, was the court where, under the contract, the services were provided or should have been provided, that is, in this case in Barcelona.

The Court also states that although two different people had being sued, this was possible because the domicile was common and the amount claimed to each were independent, and had the same cause of action.

3.7.2. *Order of the Audiencia Provincial de Granada (Court of Appeal of Granada, section 3ª, 18 March 2011 (37/11)*

The Court overruled the decision of the court of first instance dismissing the application, which had considered inadmissible an application for a European order for payment by applying national law exclusively. The Court of Appeal considered that the judge had absolutely omitted the application of Regulation, so that returned the case to the first court to decide on the admission again applying the arts. 8 and 11 of the Regulation.

3.7.3. *Order of the Audiencia Provincial de Álava (Court of Appeal of Alava) 30 December 2011 (477/11)*

The court of first instance had denied the execution of a certificate issued under the standard model G of the annex, as provided for in art. 18, by considering that the jurisdiction was for the courts of the domicile of the debtor, in this case in France. The creditor appealed, considering that the enforcement debtor had property in Spain.

The Court reverses the decision of the judge of first instance. After an extensive consideration on the purpose of the European order for payment, based on the Regulation's recitals, the Regulation states that the normal situation would be that the competent judge for execution was not the same that the one that issued the request for payment, but it is also possible, as it was in the case, where the judge with jurisdiction for the enforcement was the same competent judge who issued the order for payment, because of the debtor had assets in that State.

It happened in the case, and the seizure of these goods was far more quickly and efficiently than finding out debtor, assets in another state, as arts. 3 and 6 of Regulation 44/2001 allows. The reason for the confusion seems to be that in Spanish law (disposal 23 of the Civil procedure act) only refers to the court of the debtor's domicile, but it must be understood for cases in which this domicile was Spain, but also it could be possible that there could be assets in another Member State, that also would be competent for the enforcement.

3.7.4. *Order of Audiencia Provincial de Lérida (Court of Appeal of Lérida) 4 April 2012 (129/12)*

In this case the judge of first instance had dismissed the case, which brought because of a European order for payment in which the defendant did not appear. The court continued the procedure under the Spanish procedural law (oral trial proceedings), but the judge did not allow the applicant to submit new documents on the ground that they were simple

photocopies and, in any case, had to have submitted them with their original application.

The decision of the Court shows the antecedents and purposes of European order for payment, especially in its configuration as no-documentary proceeding, in which the applicant is not required to provide the documents on which bases its claim, unlike what happens in other national laws. This is also clear according the text of the Spanish law for the application of Regulation (Law 4/2011, of 24 March, the law introduces a new disposal 23rd in this way).

Therefore the judge's decision was not correct in this case. If the Regulation does not required to present documents with the application (just a description of evidence supporting the claim), it is logical that its presentation be allowed in the event of subsequent trial, in accordance with the rules of ordinary civil procedure, as art. 17 provides.

3.7.5. *Order of Audiencia Provincial de Barcelona 28 September 2012 (51/12)*

In this case, the court of first instance was rejected the issue of a European order for payment on the ground that the applicant had not provided documents to justify the debt was liquid, due and payable.

The Court recalls that both the Regulation and the Spanish law enacted to facilitate its application, explicitly state that no evidence shall accompany the claim, just a description of them.

Nonetheless, surprisingly, the motion was not admitted because of the party does not specifically requested the declaration of nullity of the proceedings, and this statement cannot make by the court on its own.

3.7.6. *Order of the Supreme Court, 4 October 2011 (135/11)*

The Supreme Court resolves the conflict of jurisdiction between the Court of First Instance of Marbella and one Court of First Instance of Valencia, in respect of an application for European order for payment.

The Supreme Court, following the provisions of art. 6 of Regulation 1896/2006, applied the provisions of Regulation 44/2001, instead of internal Spanish rules (which defers the jurisdiction to the court in which the defendant has his or her domicile). As in the case services had been rendered in Marbella, Art. 5 of Brussels I determined to be the courts of this town the competences.

4. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure

Diana UNGUREANU

4.1. General Presentation

4.1.1. *Historical background*

The joint programme of the Commission and the Council of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council on 30 November 2004, called for simplifying and speeding up the settlement of small claims litigation. The need for simplified and accelerated small claims litigation has also been expressed by the

European Parliament.¹⁶

The Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation¹⁷ presented by the Commission on 20 December 2002 gave an overview of the currently existing Small Claims procedures in the Member States and formulated a number of questions concerning the desirable scope and features of a European instrument.

The Green Paper was further debated in a public hearing organised by the Commission and welcomed by the European Economic and Social and by the European Parliament.

¹⁶ OJ C 146, 17.5.2001, p. 4.

¹⁷ COM(2002) 746 final.

In 2005 proposals to Regulation¹⁸ were adopted and in 2007 the Regulation 861/2007 was adopted.

4.1.2. *The objectives and principles of the European small claims procedure*

The European Small Claims Procedure established by the European Regulation is intended to improve access to justice by simplifying and speeding up cross-border small claims litigation in civil and commercial matters and reducing costs. "Small claims" are cases concerning sums under EUR 2 000, excluding interest, expenses and disbursements (at the time when the claim form is received by the competent court).

It will be applicable from 1 January 2009 in all EU Member States except Denmark.

This procedure is uniformly applicable in the different Member States.

Basically, this Regulation introduces a simplified mechanism that is similar to the

one in the national laws for small claims.

It must be noted that the procedure provided for in the Regulation is not mandatory, but alternative to the national procedures for small claims in the Member States¹⁹. According to Article 1 of the Regulation: « The European Small Claims Procedure shall be available to litigants as an alternative to the procedures existing under the laws of the Member States ».

So, this procedure is autonomous, optional and additional to the national procedures. That means that the claimant may choose whether to use the national or European procedure for small claims in a cross-border case. This

¹⁸ Proposal of the Commission of the European Communities for a regulation of the European Parliament

and of the Council establishing a European procedure for small claims, COM (2005) 87.

¹⁹ see Recital 8 of the preamble to Regulation 861/2007 and Article 1

European procedure does not substitute itself for the existing national procedures and is optional in consideration of the other existing mechanisms. The aim of the Regulation is to reduce costs and to simplify this procedure. The courts are also invited to use as simple and inexpensive procedural means as possible to examine such cases. Small claims cases usually are written procedures, but in special events oral hearings are held through video conference.²⁰

Judgments delivered under this procedure are recognised and enforceable in the other Member States without the need for a declaration of enforceability. Article 1 of the Regulation states that: « This Regulation also eliminates the intermediate proceedings necessary to enable recognition and enforcement, in other Member States, of judgments given in one Member State in the European Small Claims Procedure ».

This is a contradictory procedure. However, the European Small Claims Procedure is a written procedure, unless an oral hearing is considered necessary by the court or tribunal or a party so requests. The court or tribunal may refuse such a request. Such refusal may not be contested separately.

Article 10 of the Regulation states that « Representation by a lawyer or another legal professional shall not be mandatory ». Nevertheless, article 11 adds that « The Member States shall ensure that the parties can receive practical assistance in filling in the forms ».

This procedure is facilitated by the availability of standard forms, in all EU languages, on the website of the European Judicial Atlas in Civil Matters²¹.

The procedure is also framed, in its various stages, with a schedule established by the Regulation. In this respect, the Regulation states in its preamble that « For the purposes of calculating time limits as 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 should apply ».

²⁰ See Article 5 (1) and Article 8 of the Regulation

²¹ http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_filling_fr_fr.htm

The EC Regulation also provides for an article dedicated to the service of documents – Article 13: « Documents shall be served by postal service attested by an acknowledgement of receipt including the date of receipt. If service in accordance with paragraph 1 is not possible, service may be effected by any of the methods provided for in Articles 13 or 14 of Regulation (EC) No 805/2004 ».

Finally, EC Regulation states that: « Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted ».

4.1.3. *The scope of application of the Regulation*

4.1.3.1. *The scope of application *ratione materiae**

The Regulation applies, in cross-border cases, to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed **EUR 2000** at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all interest, expenses and disbursements. However, this should affect neither the power of the court or tribunal to award these in its judgment nor the national rules on the calculation of interest.

The Regulation does not extend to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority. It excludes matters concerning:

- the status or legal capacity of natural persons;
- rights in property arising out of a matrimonial relationship, maintenance obligations, wills and succession;
- bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- social security;
- arbitration;

- employment law;
- tenancies of immovable property, with the exception of actions on monetary claims;
- violations of privacy and of rights relating to personality, including defamation.

The regulation applies to cross-border cases, namely cases in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised. The territorial jurisdiction of the court is determined in accordance with the rules of Community law on jurisdiction, in particular the Brussels I regulation.

The relevant moment for determining whether there is a cross-border case is the date on which the claim form is received by the court or tribunal with jurisdiction.

The Regulations apply to monetary claims and non-monetary (as the claim is quantifiable).

a) The notion of small claim

Article 2 (1) of the Regulation 861/2007 stipulates that the net value of a claim

does not exceed **EUR 2000** at the time when the form A is received by the court. This amount excludes all interest, expenses, and disbursements.

The Regulation directly does not solve the issue if the amount of claim exceeding

EUR 2000 can be divided into parts. The meaning of small claims should be interpreted as the claim should not be divided into parts, so the claimant could not divide a claim the total amount of which is EUR 10000 into five different small claim forms. If the actual amount of the claim is more than EUR 2000, the European Small Claims Procedure will not be applicable. But if the amount of the claim is EUR 10 000 and the claimant agrees to recover only

EUR 2000 from the defendant, the European Small Claims Procedure will be applicable.

According to the Regulation, a party may not only recover a debt, but also ask for

the reduction of cost, award of expenses for eliminating inconsistencies of goods or

services, reimbursement of the amount of money paid, etc.

The Regulation in question can be applied not only to monetary claims, but also to **non-monetary claims**, for example, delivery of goods, compensation of damage, etc. Item 7 of form A explains that in such case the items 7.1 and/or 7.2 should be filled in by indicating the subject regarding which the claim has been lodged and the amount of the claim. Explanations to this item show that "in the event of non-monetary claim, it has to be also marked if there is any secondary claim on the compensation in the event it is not possible to satisfy the initial claim."

The Regulation does not stipulate how the claimant or court should assess nonfinancial claims.

Article 5 (5) of the Regulation 861/2007 stipulates: if, in his response, the defendant claims that the value of a non-monetary claim exceeds the limit set out in Article 2 (1), the court or tribunal shall decide within 30 days of dispatching the response to the claimant, whether the claim is within the scope of this Regulation. There is no such separate item in the answer form C, so the defendant will have to make a note at item 1 of the answer form that the amount of non-financial claim exceeds EUR 2000, and thus the claim does not satisfy the conditions of the European Small Claims Procedure. It is for the national court to assess these issues and the court decision may not be appealed.

b) The notion of "cross-border case"

The Regulation shall be applicable only in the event the claim has a crossborder

element in it. The definition of a "cross-border case" in this Regulation is almost identical to the one in Article 3 (1) of the Regulation 1896/2006, and it is also similar to the one in Article 2 of the Legal Aid Directive 2002/8/EC.³⁵³

According to Article 3 (1) of the Regulation, a cross-border case is one in which

at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised. Article 3 (2) adds that domicile shall be determined in accordance with Articles 59 and 60 of Brussels I Regulation.

According its very wording, the text of article 3 of the Regulation 861/2007 can be interpreted as meaning that also domiciles of both parties (and not only one party) may be in this another Member State, except Denmark.

The court to which an application regarding European Small Claims Procedure is submitted shall always be a court of the EU Member State.

In order to establish the existence of a cross-border case, it is crucial to define the domicile or habitual residence of the parties. No other connecting factors, like the location of property or the place where the contract has been concluded, are important. The notion of domicile of a natural person, within the scope of Regulation 861/2007 and Brussels I Regulation, is not an autonomous notion, since the court of the Member State that has received the case shall interpret it pursuant to the national law. Article 59 (1) of Brussels I Regulation stipulates that 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. Article 59 (2) regulates how to establish if a person has domicile in another Member State.

Domicile of a legal person, on its part, is an autonomous notion which does not

oblige the Member States to turn to norms of private international law. Brussels I Regulation establishes that, for its purposes, 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.

4.1.3.2. Application in time

According to Article 29 of the Regulation 861/2007, “the Regulation shall enter into force on the day following its publication in the Official Journal of the European Union. It shall apply from 1 January 2009, with the exception of Article 25, which shall apply from 1 January 2008.”

The Regulation 861/2007 has been published in the Official Journal of the European Union on 31 July 2007³⁵⁰ and entered into force the next day, i.e., 1 August 2007. The legislator of EU has set two dates of applicability. Article 25 of the Regulation (that stipulates obligation to Member States to communicate to

the European Commission specific information) has been applicable starting from 1 January 2008.

The moment to take into consideration in order to determine the applicability of the Regulation is the date of lodging the application to the court. According to the first sentence of Article 4 (1) of the Regulation, “the claimant shall commence the European Small Claims Procedure by filling in standard claim Form A, as set out in Appendix I, and lodging it with the court or tribunal with jurisdiction directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced.”

4.1.3.3. Geographical scope of application

The Regulation is applicable in all EU Member States, also the United Kingdom

and Ireland (Recital 37 of the Preamble), but it is not applicable in Denmark (Article 2 (3) or and Recital 38 of the Preamble to the Regulation).

4.1.4. Jurisdiction

Member States were invited by the regulation to indicate to the European Commission their national jurisdictions which would be competent to deal with the European small claims procedure.

Regarding the international jurisdiction, the explanations (but not the Regulation 861/2007 itself) on filling in item 4 states that: The court shall have jurisdiction pursuant to the provisions of the Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). However, it follows from the Regulation 861/2007 itself that this international jurisdiction may be based not only Brussels I Regulation, but also on other provisions.

The member states involved in the project made the following notifications:

France: The courts or tribunals which have jurisdiction to give a judgment in the European Small Claims Procedure are the district courts (« tribunaux de premiere instance ») and the commercial courts, within the limits of their jurisdiction ». However, the code of judicial organization has not yet been modified to date, so the competent jurisdictions are the «jurisdiction de proximité » and local commercial courts, within the limits of their jurisdiction (for commercial courts).

Italy: The courts or tribunals with jurisdiction for the European small claims procedure are: the justice of the peace, or, in cases in which Italian legislation provides for exclusive jurisdiction over the subject matter, the ordinary civil court or the court of appeal as court of first and final instance.

In particular, within the scope of the Regulation and on matters not excluded by Article 2, the ordinary civil judicial court has jurisdiction in cases of:

- monetary claims in respect of rentals of immovable property and businesses (Article 2(2)(g) of Regulation (EC) No 861/2007 and Article 447-bis of the Italian Code of Civil Procedure);

- claims relating to agricultural contracts (in this case the specialised agricultural divisions of the ordinary court within the meaning of Act No 29 of 14.2.1990 have jurisdiction);
- claims in respect of companies, banks and stockbrokers and loans for public works within the meaning of section 1 of Legislative Decree No 5 of 17.1.2003;
- claims in respect of patents and trademarks (in this case the divisions of the ordinary court specialising in industrial and intellectual property within the meaning of Legislative Decree No 168 of 27.6.2003 have jurisdiction);
- claims under shipping law, in particular damage in connection with the collision of vessels; damage caused by vessels when anchoring or mooring or performing any other manoeuvres in ports and other stopping places; damage caused by the use of loading and unloading mechanisms and the handling of goods in ports; damage caused by vessels to nets and other fishing equipment; charges and compensation for assistance, rescue and recovery; reimbursement of expenditure and awards for recovering wreckage under section 589 of the Shipping Code.
- In particular, within the scope of the Regulation and on matters not excluded by Article 2, the court of appeal is the first and final instance for compensation claims in connection with anti-competitive agreements and abuse of a dominant market position (section 33(2) of Act No 287 of 10.10.1990).

Spain: Courts of first instance.

Romania: In accordance with Article 1 of the Romanian Civil Code, the bodies competent to issue a decision in the context of a European small claims procedure are the **courts of law**.

4.1.5. *The application for an European small claims procedure*

The claimant shall commence the European Small Claims Procedure by filling in standard claim Form A²², as set out in Annex I, and lodging it with the court or tribunal with jurisdiction directly, by post or by any other means of communication, such as fax or e-mail, acceptable to the Member State in which the procedure is commenced.

This standard form is mandatory.

The form A, available on the European Judicial Atlas, includes explanations to help the applicant to fill out the form and understand the usefulness of the information requested.

The applicant must provide information including his contact details and those of the defendant, the jurisdiction of the court, the cross border nature of the case, the nature of the claim and its amount and has to summarily motivate the application. However, the court or tribunal shall not require the parties to make any legal assessment of the claim. The claim form shall also include a description of evidence supporting the claim and be accompanied, where appropriate, by any relevant supporting documents.

The applicant may request that an oral hearing be held, but he is informed that the court/tribunal may decide to hold an oral hearing if it considers it necessary for the fair conduct of the proceedings or it may refuse it, having regard to all the circumstances of the case.

The applicant may also request a certificate concerning the judgment which would be delivered with the judgment (if the applicant intends to ask for recognition and enforcement in a Member State other than that of the court/tribunal).

²² Form A is available on the « European judicial atlas in civil matters » website, in the languages of the European Union: http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_filling_uk_en.htm

Finally, the applicant must date and sign the application and declare that the information provided is true to the best of his knowledge and is given in good faith.

Regarding the language in which Form A shall be filled in, the EC Regulation states for the official language of the forum: « The claim form, the response, any counterclaim, any response to a counterclaim and any description of relevant supporting documents shall be submitted in the language or one of the languages of the court or tribunal. If any other document received by the court or tribunal is not in the language in which the proceedings are conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for giving the judgment ». (art.6 (1,2))

The court shall have choice — to require or not supplementary evidence translations. The court has to balance on a case-by-case basis the principle established in the Regulation that the court should use the simplest and least costly method of taking evidence (Recital 20 of Preamble) and the right to a fair trial and the principle of an adversarial process (Recital 9 of Preamble). When requesting translation of a contract on several pages, the procedure will become more costly, but in case of nontranslating risk may arise that the court is unable to assess all the circumstances of the case.

4.1.6. *Submission of the application*

Article 13 (1) of Regulation 861/2007 establishes autonomous system for issuance

of documents, namely, they shall be served by postal service attested by an acknowledgement of receipt including the date of receipt. If service in accordance with Paragraph 1 is not possible, service may be effected by any of the methods provided for in Articles 13 or 14 of Regulation (EC) No. 805/2004, i.e.:

- personal service attested by acknowledgement of receipt;

- personal service attested by a document signed by the competent person who effected the service stating that the debtor has received the document or refused to receive it;
- service by electronic means such as fax or e-mail, attested by an acknowledgement of receipt including the date of receipt, which is signed and returned by the debtor;
- orally in a previous court hearing on the same claim and stated in the minutes of that previous court hearing;
- personal service at the debtor's personal address on persons who are living in the same household as the debtor or are employed there;
- in the case of a self-employed debtor or a legal person, personal service at the debtor's business premises on persons who are employed by the debtor;
- deposit of the document in the debtor's mailbox;
- deposit of the document at a post office or with competent public authorities and the placing in the debtor's mailbox of written notification of that deposit;
- postal service without proof where the debtor has his address in the Member State of origin;
- electronic means attested by an automatic confirmation of delivery, provided that the debtor has expressly accepted this method of service in advance.

Pursuant to Article 4 (2) of the Regulation 861/2007, Member States had to inform

the Commission which means of communication are acceptable to them and the

Commission has to make such information publicly available (Article 25 (1) (b) of the Regulation).

The situation in the member states involved in the current project is the following²³:

- **Spain:** Application for claim may be submitted either directly, or by mail or fax.
- **France** Application for initiation of proceedings may be sent to the court by mail or electronically.
- **Romania** Pursuant to Article 4 (1) of the Regulation, the acceptable and available means of communication for courts within the European Small Claims Procedure are **mail and fax**.
- **Italy** For the purposes of the European Small Claims Procedure, the acceptable mean of communication is mail.

4.1.7. Examination of the application

The court must review the application as soon as possible.

Different scenarios are possible after the review:

- **The application of the relevant procedural law applicable in the Member State (art.4(3)).**

Where a claim form does not relate to an action within the scope of this Regulation as set out in Article 2, the court or tribunal shall not treat the claim as a European Small Claim, but proceed to deal with it in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted. The court or tribunal shall inform the claimant to that effect. Unless the claimant withdraws the claim, the court or tribunal shall proceed with it in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted.

- Supplementing and Rectifying the Claim. Article 4 (4) (1)

Where the court or tribunal considers the information provided by the claimant to be inadequate or insufficiently clear or if the claim form is not filled in properly, it shall, unless the claim appears to be clearly unfounded or the application inadmissible, give the claimant the opportunity to complete

²³ http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_information_en.htm?countrySession=19&

or rectify the claim form or to supply supplementary information or documents or to withdraw the claim, within such period as it specifies. The court or tribunal shall use standard Form B, as set out in Annex II²⁴, for this purpose.

Form B may be filled in only by the court. In Form B, the court must specify, which parts of the application are inadequate, incorrect or unclear.

When issuing Form B, the judge shall set the time limit for the claimant to fulfil actions specified by the judge. The court or tribunal may extend the time limits in exceptional circumstances, if necessary in order to safeguard the rights of the parties²⁵. Counting of the term shall begin not from the day of preparing or dispatching Form B, but from the day of receipt by the claimant²⁶. If the claimant neither has observed this term nor has requested the court for extension thereof, the court shall dismiss the claim.

If none of these incidents occurs or if the applicant has completed or corrected the application form within the time specified, the procedure continues before the court according to the rules laid down by the regulations.

- Dismissal of the claim. Article 4 (4) (2)

Where the claim appears to be clearly unfounded or the application inadmissible or where the claimant fails to complete or rectify the claim form within the time specified, the application shall be dismissed.

The claim is inadmissible when any of preconditions of Regulation 861/2007 in relation to the European Small Claims Procedure are not fulfilled. For instance, the court has no international jurisdiction, the claim fails to be within the material scope of application specified in Article 2 of Regulation,

²⁴ The Form B « REQUEST BY THE COURT OR TRIBUNAL TO COMPLETE AND/OR RECTIFY THE CLAIM FORM », which is filled in by the Court, is available on the « European judicial atlas in civil matters » website, in the languages of the European Union , http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_filling_fr_en.htm

²⁵ See Article 14 (2) of Regulation 861/2007

²⁶ See Sentence 2 of Article 5 (6) and Article 13 of Regulation

value of the claim exceeds EUR 2000, the case is not a cross-border case (Article 3 of Regulation) etc.

The claim is clearly unfounded where it is obvious that it cannot be satisfied.

4.1.8. Conduct of the Procedure

After receiving the properly filled in claim form, the court or tribunal shall fill in Part I of the standard answer Form C, as set out in Annex III. This Part I of the standard answer form, which is filled in by the Court, relates to the case – number of the case, court, name of claimant, name of defendant (the Part II of the Form C will then be filled in by the defendant, except if the defendant intends to submit a counterclaim).

A copy of the claim form A, and, where applicable, of the supporting documents, together with the answer form C thus filled in, shall be served on the defendant. These documents shall be dispatched within 14 days of receiving the properly filled in claim form.

If the applicant lives in another Member State, the responsibility for the service of documents are transmitting agencies in accordance with Regulation (EC) n°1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents). The form is transmitted to be served to the receiving agency which has jurisdiction in the Member State of the applicant.

Regarding the language in which the documents shall be served, article 6 of the regulation states that:

« Where a party has refused to accept a document because it is not in either of the following languages:

(a) the official language of the Member State addressed, or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected or to where the document is to be dispatched; or

(b) a language which the addressee understands, the court or tribunal shall so inform the other party with a view to that party providing a translation of the document ».

a) **Written and oral process**

Regulation was intended as a specifically simplified procedure comparing to the legal procedure of the claim.

To facilitate course of the procedure, Article 5 of the Regulation provides **written procedure**. The aims of the Regulation — quick and facilitated legal proceedings — may be achieved only in case of a written process and use of modern technologies and Internet. Consequently, majority of processes, when applying the Regulation, shall be conducted in writing. But, simple and cheap processes has to be balanced with the right to be heard. According to Recital 8 of Preamble, oral hearing shall take place, if it jeopardizes a party's right to justice and right to be heard, recognised by the Charter of Fundamental Rights of the European Union, consequently, ECHR practice must also be taken into account. However, ECHR has specified that an oral process shall not be considered an absolute right²⁷, it must be maintained in an emergency case when reviewing of specific legal and technical issues shall be required.²⁸

The court hearing may take place, if the court deems it necessary. The Regulation doesn't specify criteria to be observed by the court, so the court has a wide margin of discretion in this respect. A reason to decline oral reviewing of the case would be that oral reviewing raise the cost of the process (for example, summoning of one party for oral court hearing may raise additional costs).

²⁷ Judgement of ECHR, dated by 12 November 2002, in the case: *Döry v. Sweden* No. 28394/95, ECHR —

2002- V, para 37.

²⁸ Judgement of ECHR, dated by 10 November 2005, in the case *Schelling v. Austria* No. 55193/00, ECHR- 2005- IX, para 30.

Article 5 of the Regulation states that oral litigation may be requested by any of the parties, noting it in Sub-item 8.3 of Form A and stating the reasons, however, stating the reason shall not be mandatory. If the party has failed to state reasons, or reasons are not of prima facie significance, oral hearing shall not be held. Reasons for refusal shall be stated by judge in their decision, furthermore, the court may refer to Recital 14 of Preamble. No ancillary complaint may be submitted for this decision.

According to Article 12 of the Regulation, party shall not be required to make any legal assessment of the claim, unlike in legal proceeding where conditions must be stated, upon which the claim is based. Furthermore, the Regulation emphasizes that party should not be obliged to be represented by a lawyer²⁹, though, at the same time, the process has to ensure an effective legal protection and rule of law.

These norms are included to achieve aims of the Regulation — to review small claims in a quick and non-expensive process. However, the Regulation provides that costs, including those for legal assistance, may be redeemed, if proportional and justified (Article 16), consequently, the party may be provided by legal assistance.

These processes may take place using ODR (online dispute resolution) tools. The Regulation leaves at discretion of Member States the opportunity of using e-environment for such requirements, although, but, at EU level there are proposals to encourage take the advantages of these tools, that make the process cheaper, more centralized, effective, automated and less formal.³⁰ For example, small claims may be reviewed via specific online e-platforms, where the entire process takes place by using only the Internet environment — the claim forms are submitted and judgments are taken in this e-environment.

²⁹ See Recital 15 of Preamble

³⁰ See: Proposal for the European Parliament and Council Directive on Alternative Dispute Resolving and Amendments to Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumers'ADR) COM (2011) 793 and Proposal for the European Parliament and Council Regulation on Online Dispute Resolution for Consumers COM (2011) 794.

4.1.9. The answer of the defendant

4.1.9.1. The Form C

The defendant shall submit his response within 30 days of service of the claim form and answer form, by filling in Part II of standard answer Form C, accompanied, where appropriate, by any relevant supporting documents, and returning it to the court or tribunal, or in any other appropriate way not using the answer form.³¹

The form C includes explanations to help the defendant to fill out the form.

In filling in the Form C, the defendant shall indicate if he accepts the claim or not. If he does not accept the claim, he shall indicate the reasons to contest it, describe the evidence he wish to put forward and precise if he wants on oral heading to be held.

The defendant must date and sign the form and declare that the information provided is true to the best of his knowledge and is given in good faith.

Regarding language, the defendant is informed that he should reply to the claim in the language of the court/tribunal which has sent him the form. Article 6 of the regulation states that the description of relevant supporting documents shall be submitted in the language of the court or tribunal but, if any other document received by the court or tribunal (ie. the relevant supporting document) is not in the language in which the proceedings are conducted, the court or tribunal may require a translation of that document only if the translation appears to be necessary for giving the judgment.

Within 14 days of receipt of the response from the defendant, the court or tribunal shall dispatch a copy thereof, together with any relevant supporting documents to the claimant.

4.1.9.2. The counterclaim

According to Article 5 (6) of Regulation, the defendant can make his own claim against the claimant (a counterclaim). He shall fill in and attach a separate Form A to the Form C and lodge them with the court or tribunal with

³¹ The form C is available on the European Judicial Atlas Website: http://ec.europa.eu/justice_home/judicialatlascivil/html/sc_form3_en.jsp?countrySession

jurisdiction by any means of communication acceptable to the Member State.

In this case the court shall review the documents no longer than for 14 days and shall dispatch Form A submitted by the defendant and partially filled in Form C to the claimant. The claimant is given 30 days to prepare the answer.

According to Recital 16 of Preamble, the concept of "**counterclaim**" should be interpreted within the meaning of Article 6 (3) of Brussels I Regulation as arising from the same contract or facts on which the original claim was based. As mentioned, a simple claim of the defendant against the claimant shall not be considered a counterclaim.³²

Recital 17 of Preamble states that, in cases where the defendant invokes a right of set-off during the proceedings, such claim should not constitute a counterclaim for the purposes of this Regulation.

The counterclaim can be proceed in the European Small Claims Procedure only if it is below the 2000 euros limit.

Article 5 (7) of Regulation states that, if the counterclaim exceeds the limit set out by the regulation, the claim and counterclaim shall not proceed in the European Small Claims Procedure, but shall be dealt with in accordance with the relevant procedural law applicable in the Member State in which the procedure is conducted.

4.1.10. Conclusion of the Procedure

According to Article 7 of Regulation 861/2007, within 30 days of receipt of the response from the defendant or the claimant within the time limits laid down, the court or tribunal shall:

- give a judgment,

or:

³² Judgement of ECJ, dated by 13 July 1995, in the case: C-341/93 *Danvaern Production A/s v. Schuhfabriken Otterbeck GmbH*, ECR [1995], p. I-02053, para. 12

- demand further details concerning the claim from the parties within a specified period of time, not exceeding 30 days;
- take evidence in accordance with Article 9;
- summon the parties to an oral hearing to be held within 30 days of the summons.

In these three situations, the court or tribunal shall give the judgment either within 30 days of any oral hearing or after having received all information necessary for giving the judgment.

If the defendant fails to submit their answer or counterclaim according to article 5 (3) and (6) of Regulation, the court may give a judgement according to Article

7 (3). Furthermore, the abovementioned answer or/and counterclaim must be submitted within the specified time limit — 30 days from the date of issuance, but, if the time limit is delayed, the court shall give a judgment on the claim.

If the court fails to obtain evidence from the party located in another Member State, though, such evidence is required to fully assess the case, other available EU instruments may be used, for example Council Regulation No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. When establishing method of taking of evidence, Article 9 (3) of the Regulation 861/2007 shall be taken into account, stating that the court shall use the simplest and least burdensome method of taking evidence.

In such cases when parties or experts shall be heard, who are located in another Member State, this article of the Regulation suggests to the court using modern technologies³³ (in order to ensure better use of less costly and quickest ways of talking of evidence and to avoid further burden to the court and parties. Namely, according to Article 13 (2), communication with the parties may be effected also by electronic means of communication. Thus, if

³³ See also Recital 20 of Preamble, Article 9 (3))

questioning of the other party, witness or expert located in another Member State is required, the court may use advantages provided by a **video conference** to reduce consumption of time and assets. In this case also shall be used the Taking of Evidence Regulation and practical manual on the use of video conferences.

The court wishing to take evidence directly from the witness in another Member

State may do this in accordance with Article 17 of Taking of Evidence Regulation, which states that, if the court requests opportunity to take evidence directly in another Member State, it shall submit request to its central institution or competent authority (for example, to the court), using Form I attached as appendix thereto. Advantages of such request are that evidence is obtained in accordance with the regulatory enactments of the Member States, which submits request.

The court may use the Taking of Evidence Regulation's handbook at this point.

According to Article 13, the judgment shall be served on the parties by postal service attested by an acknowledgement of receipt. However, if it is not possible, the Regulation refers to Articles 13 and 14 of Regulation 805/2004.

The judgment shall be enforceable notwithstanding any possible appeal. The provision of a security shall not be required.

Article 16 of Regulation states that the unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim. Obligation of the unsuccessful party to bear the costs of the proceedings should enhance the free access to the court, since creditor often are discouraged to litigate, because amount of the claim is small, while costs thereof are large.

4.1.11. Review and appeal

Article 17 of the regulation states that « *Member States shall inform the Commission whether an appeal is available under their procedural law against a judgment given in the European Small Claims Procedure and within what time limit such appeal shall be lodged. The Commission shall make that information publicly available* ».

The Member States involved in the current project transmitted to the Commission the following information:

France

The appeals that can be brought under French law in accordance with Article 17 of the Regulation are as follows:

- ordinary appeal: the defendant who has neither personally received the notice served pursuant to Article 5(2) nor responded in the form prescribed by Article 5(3) (i.e. in the case of a "judgment given by default") may bring proceedings before the court or tribunal that issued the judgment being challenged (Articles 571 to 578 of the Code of Civil Procedure);
- extraordinary appeal: when the judgment may not or may no longer be challenged, the parties may make one of the following two extraordinary appeals:
 - further appeal before the Court of Cassation (Articles 605 to 618-1 of the Code of Civil Procedure);
 - judicial review before the court or tribunal that issued the judgment being challenged (Articles 593 to 603 of the Code of Civil Procedure).

Italy

Under Italian law appeals against decisions of the justice of the peace must be lodged with the district court (*tribunale*), while appeals against decisions of the district court must be lodged with the court of appeal, both within thirty days. Appeals against decisions of the court of appeal on points of law must

be lodged with the Supreme Court of Cassation within sixty days (section 325 of the Code of Civil Procedure).

Romania

In the European Judicial Atlas it appears the following information: “In accordance with Article 17 of the Regulation, an appeal may be lodged with the court only on expiry of **a term of 15 days from notification of the decision** (Article 282¹ of the Romanian Civil Code). But, this information is not up-to-date. Romania has a new Civil Procedural Code and, according to this, , an appeal may be lodged with the court only on expiry of **a term of 30 days from notification of the decision**.

Spain

An appeal is admissible. It must be prepared before the same court of first instance that gave the judgment, announcing the intention to appeal against the judgment and specifying which points are contested within a period of 5 days. Once prepared, the appeal must be formalised and lodged with the corresponding Provincial Court within a period of 20 days.

According to **Article 17 (2)** of Regulation 861/2007, article 16 shall apply to any appeal. Thus, the unsuccessful party shall bear the costs of the proceedings. However, the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim.

Recital 29 of Preamble of the Regulation states that **the costs of the proceedings** should be determined in accordance with national law.

According to **Article 24** of Regulation 861/2007 the Member States shall cooperate to provide the general public and professional circles with information on the European Small Claims Procedure, including costs, in

particular by way of the **European Judicial Network in Civil and Commercial Matters**.³⁴

Unlike Regulation 805/2004, where the review procedure is included in the minimum procedural standards, Article 18 of Regulation 861/2007 contains an independent provision having no relation to any minimum procedural standards (like in case of Regulation 1896/2006).

Regarding the review of the judgment, article 18 sets some minimum standards for review of the judgment:

"1. The defendant shall be entitled to apply for a review of the judgment given in the European Small Claims Procedure before the court or tribunal with jurisdiction of the Member State where the judgment was given where:

(a) (i) the claim form or the summons to an oral hearing were served by a method without proof of receipt by him personally, as provided for in Article 14 of Regulation (EC) No 805/2004; and

(ii) service was not effected in sufficient time to enable him to arrange for his defence without any fault on his part,

or

(b) the defendant was prevented from objecting to the claim by reason of force majeure, or due to extraordinary circumstances without any fault on his part, provided in either case that he acts promptly.

2. If the court or tribunal rejects the review on the basis that none of the grounds referred to in paragraph 1 apply, the judgment shall remain in force.

If the court or tribunal decides that the review is justified for one of the reasons laid down in paragraph 1, the judgment given in the European Small Claims Procedure shall be null and void".

³⁴ Information on proceeding costs provided by each Member State is available from the website of the network at: http://ec.europa.eu/civiljustice/case_to_court

4.1.12. Enforcement of the judgment

4.1.12.1. The applicable procedure

A judgment given in a Member State in the European Small Claims Procedure shall be recognised and enforced in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

According to **Article 21 (1)** of Regulation 861/2007: *"1. Without prejudice to the provisions of this Chapter, the enforcement procedures shall be governed by the law of the Member State of enforcement. Any judgment given in the European Small Claims Procedure shall be enforced under the same conditions as a judgment given in the Member State of enforcement."*

The national law of the Member State of enforcement shall be applicable to the enforcement procedure, except for the reservations provided for in the Regulation.

At the request of one of the parties, the court or tribunal shall issue a certificate concerning a judgment in the European Small Claims Procedure using standard Form D, as set out in Annex IV, at no extra cost.

The party seeking enforcement shall produce:

- (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and
- (b) a copy of the certificate referred to in Article 20(2) and, where necessary, the translation thereof into the official language of the Member State of enforcement or, if there are several official languages in that Member State, the official language or one of the official languages of court or tribunal proceedings of the place where enforcement is sought in conformity with the law of that Member State, or into another language that the Member State of enforcement has indicated it can accept. Each Member State may indicate the official language or languages of the institutions of the European Union other than its own which it can accept for the European Small Claims Procedure. The content of Form D shall be translated by a person qualified to make translations in one of the Member States.

Translation of a **certificate** in the state language of the Member State shall be submitted in case of necessity. It might seem this is not a mandatory requirements, but it is not so, because the Member States have clearly (in accordance with Article 25 (1) (d) of the Regulation) specified the acceptable languages. Therefore both of these legal norms must be interpreted systematically. Situations, in which EEO certification has been issued in a language, which the Member State of enforcement has not specified as acceptable, must be understood with the notion "in case of necessity".

The party seeking the enforcement of a judgment given in the European Small Claims Procedure in another Member State shall not be required to have an authorised representative or a postal address in the Member State of enforcement, other than with agents having competence for the enforcement procedure.

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in the European Small Claims Procedure 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.

4.1.12.2. Incidents that may occur in connection with the enforcement of the judgment

Refusal of enforcement

Enforcement shall, upon application by the person against whom enforcement is sought, be refused by the court or tribunal with jurisdiction in the Member State of enforcement if the judgment given in the European Small Claims Procedure is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that:

(a) the earlier judgment involved the same cause of action and was between the same parties;

(b) the earlier judgment was given in the Member State of enforcement or fulfills the conditions necessary for its recognition in the Member State of enforcement; and

(c) the irreconcilability was not and could not have been raised as an objection in the court or tribunal proceedings in the Member State where the judgment in the European Small Claims Procedure was given.

However, the regulation adds that « Under no circumstances may a judgment given in the European Small Claims Procedure be reviewed as to its substance in the Member State of enforcement ».

Irreconcilability of judgments is a classical obstacles for recognition of foreign court judgments. It is a protective filter of the state legal system that aims to safeguard interconnection of court judgments and to protect legal certainty.

Section 22 (1) of Regulation applies **first judgement principle**, according to which the first issued judgment shall be recognized and/or enforced.

Regulation 861/2007 establish no provision that the first judgment must have entered into force.

The concept of "between the same parties" and "the same cause and subject of action" are the same as in Article 34 (3) and (4) of Brussels I Regulation. Thus, the autonomous interpretation of concepts provided by CJEU in its former judicature shall be used here.

The requirement of irreconcilability of judgments is supplemented by another precondition specified in Article 22 (1) (c) of Regulation 861/2007, namely, the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State where the judgment in the European Small Claims Procedure was given. Thus, Article 22 (1) (c) of Regulation refers to reason of irreconcilability of judgments as an extraordinary exception to refuse the enforcement. The interested parties have to be active in the Member State of origin of judgment and not to postpone their defense tactics in the enforcement Member State.

Stay or limitation of enforcement

Where a party has challenged a judgment given in the European Small Claims Procedure or where such a challenge is still possible, or where a party has made an application for review within the meaning of Article 18, the court or tribunal with jurisdiction or the competent authority in the Member State of enforcement may, upon application by the party 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) under exceptional circumstances, stay the enforcement proceedings.

Article 23 aims to safeguard the defendant from situations, in which the judgment has already been appealed in original Member State or time limit for such appeal has not been lapsed yet, however, the court of the Member State of origin has failed to cease or limit enforcement of the judgment.

4.2. National cases

4.2.1. Scope of application

4.2.1.1. Latvia, Judgement of 13.03.2012 in matter No. C12292211 by Daugavpils City Court [not published] ³⁵

The claimant asked to recover maintenance from the defendant residing in another EU Member State. Based on the Regulation 861/2007, the defendant was levied maintenance in the amount of LVL 60 per month until the child reaches majority. **First**, according to Article 2 (2) (b) of the Regulation, the Regulation is not applied to matters concerning rights in property arising out of maintenance obligations. **Second**, on the moment of making the

³⁵ The case is reproduced from Dr.iur. Inga Kačevska , Dr.iur. Baiba Rudevska , Law Office of Inga Kačevska *Practical Application of European Union Regulations Relating to European Union Level Procedure in Civil Cases: the Experience in Baltic States*

judgement, the child had seven years left until reaching majority, which means that the total amount of claim is LVL 5040, which exceeds the amount stipulated in the Regulation for several times.

4.2.1.2. Latvia, Judgement of 27.01.2012 in matter No. C15285811 by Jelgava City Court [not published] ³⁶

A Latvian court has faced a claim that cannot be evaluated only in financial terms. The claimant has ordered summer shoes from a company registered abroad; after some time of non-intensive wearing, a defect has appeared. The claimant, by submitting the form A on the European Small Claims Procedure, has indicated in item 7 that claim is financial, but in item 8 (explanation of claim) has declared an additional request to change the shoes for new similar or equivalent, but in case it is not possible to revoke the contract.

4.2.1.3. Latvia, Decision of 06.02.2012 in matter No. 3-10/004 by Jēkabpils District Court [not published]

A judge of a general court of Latvia justifiably refused to accept an application of a natural person for the European Small Claims Procedure regarding the recovery of unpaid work remuneration from a municipality, by stating that, according to Article 2 (2) (f) of the Regulation, the Regulation is not applicable to employment relations.³⁷

³⁶ The case is reproduced from Dr.iur. Baiba Rudevska , Law Office of Inga Kačevska *Practical Application of European Union Regulations Relating to European Union Level Procedure in Civil Cases: the Experience in Baltic States*, p.144

³⁷ The case is reproduced from Dr.iur. Baiba Rudevska , Law Office of Inga Kačevska *Practical Application of European Union Regulations Relating to European Union Level Procedure in Civil Cases: the Experience in Baltic States*, p.148

4.2.2. The application for an European small claims procedure

4.2.2.1. Netherlands, District Court 's-Hertogenbosch 13 October 2011, ECLI:NL:RBSHE:2011: BY8209, NIPR, 2013, 168

The documents were served in Dutch, the Hungarian defendant refused the documents and replied that he only understood Hungarian and English. The judge then ordered the claimant to provide an English translation.

4.2.2.2. Judgement of 06.07.2011 in civil matter No. [no number] by Jelgava City Court [not published]., Judgement of 27.01.2012 in civil matter No. C15285811 by Jelgava City Court [not published]

Jelgava City Court of Latvia in its judgement of 06.07.2011 decided that the claimant had not specifically and clearly indicated the claim in form A (as provided for by Section 128 Paragraph two Clause 7 of the CPL). The claimant had expressed the claim as follows: 1) states that the claim is monetary claim; 2) in the information on the claim (item 8 of the form) requests to replace the shoes with similar or equivalent ones, but, if it is not possible, to revoke the purchase contract and to reimburse the money paid for the shoes.

During the litigation, the claimant specified the claim by requesting to replace the shoes with similar ones. By examining the case, it was established that the defendant cannot replace the shoes with similar ones since such model of shoes is not manufactured any more. The defendant expressed wish to reimburse the value of shoes, which has been made obligatory for the defendant in the operative part of the judgement of 27.01.2012 by Jelgava City Court.³⁸

³⁸ The case is reproduced from Dr.iur. Baiba Rudevska , Law Office of Inga Kačevska *Practical Application of European Union Regulations Relating to European Union Level Procedure in Civil Cases: the Experience in Baltic States*, p.165

4.2.2.3. Decision of the Jelgava Court, dated by 27 January 2012, in the case No. C15285811 [unpublished] ³⁹

A Latvian claimant— consumer has submitted an European Small Claims Procedure claim against the respondent — resident of Finland. The respondent states in the answer form that he/she agrees to pay value of goods, and states that the case may be litigated without presence of the respondent, since attendance at the court hearing is complicated and time-consuming. The case was reviewed at an open hearing with participation of a claimant's representative, while non-attendance of the respondent is considered justified. The judgment states that the claimant, at the court hearing, agreed that value of goods and legal expenses shall be reimbursed, and the claimant refused to provide any further explanation.

The claimant in this case also submitted claim for repayment of fuel costs in relation to attending the court hearings.

4.2.3. The costs

4.2.3.1. Supplementary decision of the Jelgava City Court dated by 27 January 2012 in the case No. C15285811[unpublished]. ⁴⁰

In one of cases in the European Small Claim Procedures in the Latvian court, costs was one of the most significant issues. Claimant requested reimbursement of costs arising from expertise, translation of documents for the defendant, as well as costs for fuel in relation to bringing an action to the court and other trips in relation to the claim according to the submitted route

³⁹ The case is reproduced from Dr.iur. Baiba Rudevska , Law Office of Inga Kačevska *Practical Application of European Union Regulations Relating to European Union Level Procedure in Civil Cases: the Experience in Baltic States*, p.165

⁴⁰ The case is reproduced from Dr.iur. Baiba Rudevska , Law Office of Inga Kačevska *Practical Application of European Union Regulations Relating to European Union Level Procedure in Civil Cases: the Experience in Baltic States*, p.165

sheet. By additional judgment, costs for expertise and translation were recovered from the defendant. According to Section 44, Paragraph three, Clause 3, in this case costs for the expertise must be unmistakably recovered, since this shall be considered significant evidence in the case. However, facts contained in the case fail to clearly suggest the reason for translation of documents for the defendant, since according to Article 6 of Regulation the proceeding language shall be Latvian, thus, the court, first, should have serviced to the defendant documents in Latvian, and only when he/she has refused to accept them due to not knowing the language, the claimant should have submit the translation.

In this case, costs were considerable. Namely, in the case on the claim amounting

to LVL 62.99, the state duty was LVL 50 and the claimant had performed expertise for LVL 46.72 and translation of documents for LVL 35, thus, first, a question occurs, whether such process has achieved one of the aims of the Regulation — the procedure was simple and cheap, second, whether such costs are proportionate to the amount of the claim.

4.2.4. *The appeal.*

4.2.4.1. Netherlands, Court of Appeal 's-Hertogenbosch 13 December 2012, ECLI:NL:GHSHE:2012: BZ1135, NIPR 2013, 162⁴¹

In front of the Court of Appeal, the Irish defendant lodged an appeal arguing that the court did not have international jurisdiction. The Court of Appeal dismissed the case, referring to the exclusion of appeal under the Dutch Implementation Act. It did not want to make an exception to this rule, underlining that allowing appeals would contradict the aim of the Regulation to provide for an inexpensive, speedy, and simple procedure. Since it

⁴¹ The case is reproduced from X.E. (Xandra) Kramer & E.A. (Alina) Ontanu, *The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections*

concerned a jurisdictional issue, appeal to the Supreme Court may nevertheless be possible.

5. Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings-

Diana UNGUREANU

5.1. General presentation of the Council Regulation 1346/2000

5.1.1. Territoriality vs. Universality. The system of “mitigated universality”

The two main principles that inspire the doctrine and the legislation of cross-border insolvency are universality and territoriality.

The territoriality principle means that insolvency proceedings only affect assets situated in the State where the proceeding has been opened.

On the contrary, the universality means that the effects of the insolvency proceeding affect all the debtor's assets wherever they are located.

When we have to deal with a cross-border insolvency procedure, there are three main questions that have to be answered:

- a) Which court has the jurisdiction to open to insolvency procedure? (Is it only one court to administrate the whole procedure for parent company and subsidiaries regarded as a single entity or there are as many jurisdictions as national subsidiaries, each national court having jurisdiction to open the procedure for the local subsidiary.)
- b) Which national law should be applicable for the insolvency procedure? A single law should govern all the procedure or, on the contrary, each local procedure should be governed by its own national law?
- c) Which effects should have the opening of an insolvency procedure in one state against the parent company for the subsidiary located in another state? The opening of an

insolvency procedure against the parent company in one state should be recognized in the other states with the consequences of the opening of the insolvency procedure against subsidiaries, too?

The answers to the three questions are different depending on the theory that we adopt.

According to the territoriality principle, a court and the officials appointed by that court can only exercise their powers within the territory where the court has jurisdiction. The effects of the opening of an insolvency proceeding and notably the powers of the administrator appointed in the proceeding will not extend to States that apply the territoriality principle. This leads to the opening of multiple - parallel - insolvency proceedings in respect of the same debtor, each procedure governed by the national law of the state of opening.

In the universality model, insolvency proceedings are seen as unique proceedings reflecting the unity of the estate of the debtor. The proceedings should involve all of the debtor's assets, wherever in the world these assets are located. Under this approach, the whole estate will be administrated and reorganised or liquidated according to the law of the state where the unique proceeding has been opened. The applicable law for the proceedings and its legal and procedural consequences is the law of the state in which the insolvency procedure has been opened. This law is referred to as *lex concursus* or *lex forum concursus* ('forum law') and it means the law of the state where a court has opened insolvency proceeding, dealing with concurrent claims of creditor. In this approach, the liquidator (or administrator) is charged with the liquidation (or reorganisation) of the debtor's assets or with the supervision of the administration of the debtor's affairs anywhere in the world. The *lex concursus* determines all consequences

of these proceedings, e.g., with regard to current contracts, the powers of an administrator, the system for distributing dividends to creditors etc..⁴²

The European Regulation established a compromise between the two opposite principles, based on a model of so-called “**mitigated universalism**”. This goal is accomplished in the system of the Regulation through two different types of proceedings: the main and the secondary proceedings. The starting point is a unitary insolvency proceeding for each debtor, with universal scope. The courts of the Member State within the territory of which the debtor’s center of main interest is situated shall have jurisdiction of open insolvency proceedings. These proceedings have universal scope with regard to both (i) the insolvency estate and (ii) the body of creditors. All assets of the debtor, regardless of the Member State where they are situated, are subject to these proceedings; and all creditors are entitled to (and obliged to) participate in them. The Regulation refers to them as **main proceedings**. However, if the debtor has an establishment in another Member State, the courts of this State will have jurisdiction to open **territorial insolvency proceedings**. The effects of those proceedings are restricted to the assets of the debtor situated in the territory of the latter State. The secondary proceedings are aimed to protect the diversity of interests with effects limited to the assets located to a State where the assets are situated ruled by this State’s law. The eleventh recital states that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. Art. 4 of the Regulation stipulates that the applicable law shall be the law of the State in the territory of which such proceeding is opened. Secondary proceeding may be opened only in the state where there is an establishment of the debtor’s enterprise.⁴³

42- L.Panzani, Scope of application of the Council Regulation 1346/2000, www.ejtn.eu

43- The definition of establishment according to art.2 of the Regulation is “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods”.

5.1.2. Scope of application of the Council Regulation 1346/2000

a) Ratione materiae

The Insolvency Regulation does not apply to all proceedings provided for in the national laws of the Member States to deal with insolvency. EIR states that its provisions apply to “*collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator*”.

These very general terms do not determine the strict applicability of the Insolvency Regulation. The proceedings that fall within the scope of the Insolvency Regulation are exhaustively listed in Annex A to the Insolvency Regulation. It is for each Member State to decide whether it wants to notify a particular national procedure to be included in Annex A of the EIR. Also the liquidators are defined by art. 2(b), and they are listed in Annex B. Annex C lists the liquidation proceedings defined by art. 2(c) EIR.

Art. 1 (1) EIR has two functions. Firstly, it establishes the conditions for proceedings to be covered by the Insolvency Regulation. Secondly, it follows from Art. 1 (1) EIR that proceedings listed in Annex A only fall within the scope of the Insolvency Regulation if they are based on the debtor's insolvency.

EIR applies to liquidation as well as reorganization proceedings. The EIR definition covers all the proceedings founded on the insolvency where the debtor is not in possession and a liquidator is appointed. There is a general agreement that these procedures may be aimed both to liquidate the enterprise or to the reorganization. Only secondary proceedings may be only liquidation proceedings.

But the EIR's definition of insolvency proceedings does not cover national “pre-insolvency proceedings” or the proceedings that keeps the debtor in possession and with all his power of management.(“hybrid proceedings”).

The Insolvency Regulation takes a neutral position in respect of the types of debtors that can be subject to an insolvency proceeding. It remains a matter covered by the national law whether a particular type of debtor can be subject to insolvency proceedings or not. According to art. 4 (2) (b) EIR, the

law of the State of the opening of proceedings shall 2 in particular determine the conditions for the opening of those proceedings, including “against which debtors insolvency proceedings may be to obtain satisfaction from the proceeds of or income from brought on account of their capacity.” The scope of application of the Regulation can cover the insolvency of natural persons and some Member States have already notified procedures that apply to “consumer insolvency”.

Art. 1 (2) EIR stipulates that “insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings are excluded from Art.2(a)IR.”

In this respect, we have different instruments regulating cross-border insolvency:

- For credit institutions – Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions and national implementing its provisions
- For insurance undertakings - Directive 2001/17/EC of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, to be replaced by Articles 267-296 of Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) and national implementing its provisions
- For investment undertakings and collective investment undertakings – national provisions of cross-border insolvency law

The EIR also doesn't regulate the group's enterprise insolvency. The ECJ in the *Eurofood* case stated that only the control of corporate direction alone does not suffice to locate the centre of economic interest of a subsidiary at its parent company, rather than at its own registered address. After *Eurofood*, it is still possible to open insolvency proceedings over a subsidiary in the Member State where the parent company has its registered office, but only if

the factors showing that the subsidiary's COMI is located at the seat of the parent company are objective and ascertainable by third parties.

b) Ratione loci

The Insolvency Regulation doesn't apply to insolvency proceedings opened in third Countries at all, even if assets or effects related to the proceeding are in a Member State. The Regulation governs only the intra-Community effects of insolvency proceedings and the effects vis-a-vis third countries are governed by the general rules of private international law of the forum.⁴⁴

In addition, UNCITRAL adopted the Model Law on cross-border insolvency, proposing rules to be adopted by States in order to facilitate coordination of insolvency proceedings and to recognize foreign insolvency proceedings applicable for non-EU cross-border insolvency proceedings.

After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States.

c) Ratione temporis

The Regulation entered into force on 31 May 2002. The provisions of this Regulation are applicable only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

44- The Virgos-Schmidt report stipulated: "As the Convention provides only partial (intra-Community) rules, it needs to be supplemented by the private international law provisions of the State in which the insolvency proceedings were opened. When incorporating the Convention into their legislations, the Contracting States will therefore have to examine whether their current rules can appropriately implement the rules of the Convention or whether they should establish new rules to that end. In this respect, nothing prevents Contracting States from extending all or some of the solutions of the Convention unilaterally on an extra-Community basis, as part of their national law".

In case C-527/10, ERSTE Bank Hungary Nyr, ECJ referred to the application *ratione temporis* of the Regulation and found that: "Article 5(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that that provision is applicable, in circumstances such as those in the main proceedings, even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union where, on 1 May 2004, the debtor's assets on which the right *in rem* concerned was based were situated in that State, which is for the referring court to ascertain."

ECJ stated that, under Article 2 of the Act of Accession, the provisions of the Regulation are applicable in Hungary from the date of accession of that State to the European Union that is from 1 May 2004. Thus, from that date, the Hungarian courts are required, in accordance with Article 16(1) of the Regulation, to recognise any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 thereof. Furthermore, pursuant to Article 17(1), any judgment opening insolvency proceedings handed down by a Member State produces in principle in Hungary, from 1 May 2004 and without any other formality, the effects attributed to it by the law of the State of the opening of proceedings. (par.36)

5.1.3. Rules on jurisdiction

a) Main proceedings. Connecting factor: the COMI

In the system of the Regulation 1346/2000, the relevant connecting factor in order to determine jurisdiction for opening the procedure is the Centre of debtor's Main Interests (**COMI**). Article 3.1 of the Regulation refers to the courts of the Member State "*within the territory of which the centre of a debtor's main interest is situated*". Main insolvency proceedings may be opened only in the jurisdiction where the debtor has his COMI.

The UNCITRAL Model Law on Cross Border Insolvency has chosen the same connecting factor.

Article 3.1 is a rule on international jurisdiction ("*...the courts of a Member State...*"), not on territorial jurisdiction. The territorial jurisdiction remains to be determined by the law of each State.

The COMI is an **autonomous** concept and must therefore be interpreted in a uniform way, independently of national legislation (ECJ, C-341/04, 2.5.2006, *Eurofood*, para. 31; C-396/09, 20.10.2011, *Interedil*, para. 44; C-191/10, 15.12.2011, *Rastelli*, para. 31).

In order to facilitate the application of the rule, the EIR contains a definition and a presumption. The **definition** is not in the main body of the instrument but in the recitals. According to recital 13, *the centre of main interests should correspond to the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties*. The definition gives primacy to the place from which the debtor's interests are administrated (**central administration**) and not where those interests are located. The idea is to give priority to the actual centre of management and supervision of the interest of the debtor (="head office functions"), which may not necessarily coincide with the location of the debtor's principle place of business or operations. The ECJ has underlined this idea in case *Interedil*, para. 48: "*...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*".

The Court also stated, at paragraph 33 of *Eurofood IFSC*, 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. That 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. (*Eurofood*, para. 33; C-1/04, 17.1.2006, *Staubitz-Schreiber*, para. 27; *Interedil*, para. 49, *Rastelli*, para. 33)

The certainty and foreseeability of this factor is very relevant for creditors, because, when they enter into a contract with their debtor, they rely on the insolvency regime that will be applicable if the debtor becomes bankrupt, in order to calculate their insolvency risk.

To simplify the application of the rule, the Regulation lays down a **presumption** for companies or legal persons: the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary (art. 3.1 *in fine*). This functions as a *iuris tantum* presumption. According to the ECJ, "*The 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*"; "*...the simple presumption... 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*" "*... that could be so in particular in the case of a letterbox company not carrying out any business in the territory where the registered office is situated* (*Eurofood*, par.34, *Interedil*, para 34-35; *Rastelli*, para. 35).

Where the bodies responsible for the management and supervision of a company 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 that the centre of the company's main interests is located in that place is wholly applicable. In such a case, it is not possible that the centre of the debtor company's main interests is located elsewhere. (*Interedil.*, para. 50)

The presumption in the second sentence of Article 3(1) of the Regulation may be rebutted, however, where, from the view point of third parties, the place in which a company's central administration is located is not the same as that of its registered office.

The factors to be taken into account 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. Those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case. (*Interedil.*, para. 52; *Rastelli*, para. 36).

In that context, the location, in a Member State other than that in which the registered office is situated, of immovable property owned by the debtor company, in respect of which the company has concluded lease agreements, and the existence in that Member State of a contract concluded with a financial institution – circumstances referred to by the referring court – may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. The fact nevertheless remains that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption laid down by the European Union legislature unless a comprehensive assessment of all the relevant factors makes it possible to establish, 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. (*Interedil*, par.53)

The term “debtor” in the acception of the Regulation is a person, legal or natural, subject to liabilities. The principle, therefore, is that each debtor constituting a legal entity is subject to its own court jurisdiction” (Eurofood,

para. 30). The ECJ stated that where a company carries out its business in the territory of the Member State where its registered office is situated, “the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption” (Eurofood, para. 30 and 36).

In the Rastelli case (C-191/19, Rastelli, 15.12.2011), a French company, with its COMI in Marseille, was put into liquidation. The liquidator brought proceedings against an Italian company, with its COMI in Italy. It requested that the latter be joined to the insolvency proceedings that had been opened against the French company on the ground that the property of the two companies was intermixed. The ECJ affirmed that “a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State only if it is established that the centre of that second company's main interests is situated in the first Member State” (para. 29). Furthermore, the mere finding that the property of those companies has been intermixed is not sufficient to rebut the presumption in favour of the registered office (ibid., para. 39).

b) The relevant date for the purpose of locating the centre of the debtor's main interests

The **relevant time** to determine the situation of the COMI is the date of the filing of the application for opening insolvency proceedings (*Interedil*, para 55).

The first case solved by ECJ dealing with this aspect was C-1/04, *Staubitz-Schreiber*. In this case, the debtor, a natural person, moved her habitual residence from Germany to Spain after she had requested the opening of the proceedings in Germany, but before the resolution to open was delivered. In this case, German courts have jurisdiction to open main proceedings, since

the debtor's COMI was in Germany at the date of filing of the application for opening such proceedings.

The Court has held that, 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 (Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701, paragraph 29). It must be inferred from this that, in principle, it is the location of the debtor's main centre of interests at the date on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction.

Where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office. (*Interedil*).

If the company has ceased all activity, in principle, the *last place* in which that centre was located must be regarded as the relevant place for the purpose of determining the court having jurisdiction to open the main insolvency proceedings (*Interedil*, para. 54).

In practice, there are many difficulties regarding the phenomenon that has been referred to as forum shopping, COMI-shift or insolvency tourism. That means that the debtor moves at the time it suffers financial difficulties, with the intention of invoking the jurisdiction and the insolvency regime of its new COMI.

c) Conflict of jurisdiction

The Regulation is based upon the principle that each debtor, legal person, can have only one COMI and only a single main insolvency proceeding may be opened with regard to the same debtor, international jurisdiction

corresponding, exclusively, to the Member State where the debtor's COMI is located.

Any positive conflicts between jurisdictions must be solved according to the temporal priority principle. Once the court of a Member State have adopted a decision regarding their jurisdiction, this decision must be recognized by all other Member States, without the latter being able to review the jurisdiction of the court of the opening State (see recital 22 and *Eurofood*, para. 44).

The ECJ highlighted this principle in the case *Eurofood*. In the *Eurofood* case, according to Irish insolvency law, the main insolvency proceedings were opened in Ireland the 27 January 2004 (the date on which the application was submitted). A month later, an Italian judge opened insolvency proceedings against the same company, arguing that the debtor's COMI was situated in Parma. In these circumstances, the Irish proceedings prevail.

According to the ECJ, *"By requiring that any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 be recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings, the first subparagraph of Article 16(1) of the Regulation lays down a rule of priority, based on a chronological criterion, in favour of the opening decision which was handed down first. As the 22nd recital of the Regulation explains, '[t]he decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinise the court's decision' (Ibid, para. 49).*

d) The actions that fall within the jurisdiction of the court opening insolvency proceedings

Article 3.1 of the Regulation only refers to the jurisdiction to open insolvency proceedings. The jurisdiction of the insolvency court covers all other decision concerning the course and closure of insolvency proceedings and

composition approved in the context of such proceedings, including provisional measures (art.16 and art.25 of the Regulation).

Art.3 doesn't offer an answer to the question of what actions or disputes fall within the jurisdiction of the court opening insolvency proceedings.

The scope of the jurisdiction of the insolvency court has been clarified by the ECJ (C-133/79, 22.2.1979, *Gourdain*; C-339/07, 12.2.2009, *Seagon*; C-213/10, 19.4.2012, *F-Tex*). According to the case law of the ECJ: the court opening insolvency proceedings have jurisdiction for *any action which derives directly from the insolvency proceedings and are close linked with them*.

According to the ECJ, the following actions fall under the jurisdiction of the courts where insolvency proceedings are opened:

- (i) An action to set aside a transaction (a payment) by virtue of insolvency (*Seagon*, para. 28);
- (ii) An action invalidating a transfer granted by the liquidator appointed in insolvency proceedings on the grounds that the liquidator had no power to disposed of the assets transferred (C-111/08, 2.7.2009, *SCT Industri*).

On the contrary, an action brought against a third party by an applicant on the basis of an assignment of claims which has been granted by a liquidator the subject matter of which is to set aside a transaction does not fall under the category of insolvency matters (*F-Tex*, para. 49). An action brought by a seller based on a reservation of title against a purchaser who is insolvent is also excluded from the scope of the Insolvency Regulation (C-292/08, 10.9.2009, *German Graphics*).

An action for the payment of a debt based on the provision of carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one Member State and taken against a service recipient established in another Member State comes under the concept of 'civil and

commercial matters' within the meaning of that provision. (C-157/13, Nickel & Goeldner Spedition GmbH)

Actions excluded from the Insolvency Regulation are subject to the Brussels I Regulation.

5.1.4. Territorial proceedings

The Regulation permits the opening of territorial proceedings, *i.e.* insolvency proceedings restricted to the assets of the debtor in the corresponding Member State. The territorial proceedings may be independent (art. 3.2), if no main proceedings have been opened, or secondary (art. 3.3), where main proceedings have already been opened.

The Regulation restricts the opening of territorial proceedings in order not to undermine the main procedure. Two conditions are established in this respect:

- (i) territorial proceedings can only be opened where the debtor has an establishment;
- (ii) the body of creditors is not limited territorially; and
- (iii) (iii), when both main and secondary proceedings are opened, the Regulations lays down a regime on cooperation and coordination of proceedings.

The connecting factor for opening of a territorial proceeding is the situation of an establishment of the debtor. When the debtor has its COMI in one Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings only if he possesses an establishment within the territory of that other Member State. The concept of establishment is defined in the Regulation: *any place of operations where the debtor carries out a non-transitory economic activity with human means and goods* (art. 2 (h)).

In the case *Interedil*, ECJ stated that the term 'establishment' within the meaning of Article 3(2) of Regulation No 1346/2000 must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.

When establishing the conditions for the opening of secondary proceedings, Member States must comply with EU law and, in particular, its general principles, as well as the provisions of that regulation. However, where the main insolvency proceedings are winding-up proceedings, whether the court before which the action seeking the opening of secondary insolvency proceedings has been brought may take account of criteria as to appropriateness is governed by the national law of the Member State within the territory of which the opening of secondary proceedings is sought. (C 327/13, *Burgo Group SpA*)

ECJ stated, in Case C-116/11, *Bank Handlowy w Warszawie SA*, that article 27 of Regulation No 1346/200 permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose. It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation. The court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.

The effects of these territorial proceedings are limited to the assets of the debtor situated in the territory of the corresponding Member State, irrespective of whether or not the assets are linked to the activities of the establishment. The Regulation contains a rule on **location of assets** (art. 2 (g):

(i) tangible property, in the Member State where it is physically situated; (ii) registered property, in the Member State under the authority of which the registered is kept; (iii) claims, in the Member State where the debtor's COMI (*debitor debitoris*) is located.

The relevant point in time for determining the location of assets is the time the proceedings are opened.

5.1.5. The applicable law

Because of the non-harmonized Member States' domestic insolvency laws, it is essential that there should be clear and uniform rules to determine which state's law is to be applicable to issues which will typically be encountered during the course of insolvency proceedings. These uniform rules on conflict of laws replace, within their scope of application, national rules of private international law. This enables affected parties to calculate in advance the legal risks inherent in their relationship with a debtor in the event of insolvency.

The uniform rules are applicable to all proceedings governed by the EIR. The uniform rules indicate which state's law shall in fact govern.

Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main 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.

The matters which are to be governed by the law of the state of the opening (the *lex concursus*) are mentioned in a non-exhaustive list in Article 4(2), while the particular exceptions to the regime of the *lex concursus* are contained in Articles 5 to 15.1

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.

Automatic recognition of insolvency proceedings to which the law of the opening State 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, EIR stipulates provisions for a number of exceptions to the general rule.⁴⁵

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 these are of considerable importance for the granting of credit. The basis, validity and extent of such a right *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 the right *in rem* should therefore be able to continue to assert his 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 proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights *in rem* arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights *in rem* must be paid to the liquidator in the main proceedings.⁴⁶

If a set-off is not permitted under the law of the opening State, 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 will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.⁴⁷

There are also special provisions in the case of payment systems and financial markets.

⁴⁵ Recital 24 of the Preamble

⁴⁶ Recital 25 of the Preamble

⁴⁷ Recital 26 of the Preamble

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 is determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, are determined by the law of the opening State.

5.1.6. *The automatic recognition proceedings*

A separate recognition proceeding does not take place under the insolvency regulation. The principle of automatic recognition applies; the office that is called upon in the recognition state reviews the conditions for recognition incidentally.

Moreover, the insolvency regulation dispenses with additional formalities or a legalisation of the actual judgment.

Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 has to 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 is also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

Under Article 17(1), the result of the recognition of the judgment to open a universal proceeding is that the judgment will have the same effects in any Member State as it has in the state of the opening of proceedings, so far as the regulation does not stipulate otherwise and so long as no territorial proceeding has been opened in this Member State. As a rule this first of all means an extension of the effects on legal relationships such as the ban on the institution of individual actions as well as the transfer of disposal rights from the debtor to the liquidator.

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.

In the case Case C-444/07, ECJ stated that, after the main insolvency proceedings have been opened in a Member State the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal derived from Articles 25(3) and 26 of that regulation, to recognise and enforce all judgments relating to the main insolvency proceedings and, therefore, are not entitled to order, pursuant to the legislation of that other Member State, enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory when the legislation of the State of the opening of proceedings does not so permit and the conditions to which application of Articles 5 and 10 of the regulation is subject are not met.

The recognition of the main proceedings doesn't preclude the opening of the secondary proceedings referred to in Article 3(2) by a court in another Member State.

In the case C-116/11, *Bank Handlowy w Warszawie S*, ECJ stated, in the interpretation of article 27 of Regulation No 1346/2000, that the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.

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.

No others grounds for refusal of recognition are admitted.

On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

In case C-341/04, Eurofood, ECJ answered the question whether the jurisdiction assumed by a court of a Member State to open main insolvency proceedings may be reviewed by a court of another Member State in which recognition has been applied for. ECJ stated that "the rule of priority laid down in Article 16(1) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all the 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."

"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 decisions handed down in the context of insolvency proceedings." (par.40) 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.

In the same case, ECJ admitted that, on a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

The automatic recognition applies to all the judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court. These judgments are also recognised with no further formalities. This rule also applies to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court and to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings. The Member States are not obliged to recognise or enforce such a judgment if this might result in a limitation of personal freedom or postal secrecy.

The recognition and enforcement of judgments other than these will be governed by Regulation 44/2001.

5.1.7. Foreign Liquidator in Main Proceedings

The Regulation also states for rules of coordination of the procedures and the powers of foreign liquidator.

The foreign liquidator has, according to the EIR, the following powers:

- May request the opening of secondary proceedings (Art. 29)
- May request a stay of secondary proceedings (Art. 33)
- Shall have an opportunity to present proposals to local liquidator (Art. 31)
- May lodge claims in other proceedings on behalf of creditors in their proceedings of origin (Art. 32(2))
- May participate in other proceedings (Art. 32(3))

5.2. ECJ case law on Regulation 1346/2000

5.2.1. *Jurisdiction and determination of COMI*

5.2.1.1. C-1/04, Susanne Staubitz-Schreiber Facts

15 The applicant in the main proceedings was resident in Germany where she operated a telecommunications equipment and accessories business as a sole trader. She ceased to operate that business in 2001 and requested, on 6 December 2001, the opening of insolvency proceedings regarding her assets before the Amtsgericht- Insolvenzgericht Wuppertal. On 1 April 2002, she moved to Spain in order to live and work there.

By order of 10 April 2002, the Amtsgericht-Insolvenzgericht Wuppertal refused to open the insolvency proceedings applied for on the ground that there were no assets.

The appeal brought by the applicant in the main proceedings against that order was dismissed by the Landgericht Wuppertal, by orders of 14 August 2002 and 15

October 2003, on the ground that the German courts did not have jurisdiction to open insolvency proceedings in accordance with Article 3(1) of the Regulation, since the centre of the main interests of the applicant in the main proceedings was situated in Spain.

The applicant in the main proceedings brought an appeal before the Bundesgerichtshof in order to have the above orders set aside and the case referred back to the Landgericht Wuppertal. She submits that the question of jurisdiction should be examined in the light of the situation at the time when the request to open insolvency proceedings was lodged, or, in this case, by taking account of her domicile in Germany in December 2001.

The preliminary rule

Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the court of the member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.

The ECJ stated that, in the case in the main proceedings, the national court must determine whether it has jurisdiction in the light of Article 3(1) of the Regulation.

23 That provision, which states that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated are to have jurisdiction to open insolvency proceedings, does not specify whether the court originally seised retains jurisdiction if the debtor moves the centre of his main interests after submitting the request to open proceedings but before the judgment is delivered.

24 However, a transfer of jurisdiction from the court originally seised to a court of another Member State on that basis would be contrary to the objectives pursued by the Regulation.

25 In the fourth recital in the preamble to the Regulation, the Community legislature records its intention 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. That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the

proceedings was delivered and thus determine the court having jurisdiction and the applicable law.

26 Such a transfer of jurisdiction would also be contrary to the objective, stated in the second and eighth recitals in the preamble to the Regulation, of efficient and effective cross-border proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself more or less permanently and would often mean in practice that the proceedings would be prolonged.

27 Furthermore, retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor's insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him.

28 The universal scope of the main insolvency proceedings, the opening, where appropriate, of secondary proceedings and the possibility for the temporary administrator appointed by the court first seised to request measures to secure and preserve any of the debtor's assets situated in another Member State constitute, moreover, important guarantees for creditors, which ensure the widest possible coverage of the debtor's assets, particularly where he has moved the centre of his main interests after the request to open proceedings but before the proceedings are opened.

5.2.1.2. Case C-341/04, Eurofood IFSC Ltd

Facts

Eurofood was registered in Ireland in 1997 as a 'company limited by shares' with its registered office in the International Financial Services Centre in Dublin. It is a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy, whose principal objective was the provision of financing facilities for companies in the Parmalat group.

On 24 December 2003, Parmalat SpA was admitted to extraordinary administration proceedings by the Italian Ministry of Production Activities, who appointed Mr Bondi as the extraordinary administrator of that undertaking.

On 27 January 2004, the Bank of America NA applied to the High Court (Ireland) for compulsory winding up proceedings to be commenced against Eurofood and for the nomination of a provisional liquidator. That application was based on the contention that that company was insolvent. On the same day the High Court, on the strength of that application, appointed Mr Farrell as the provisional liquidator, with powers to take possession of all the company's assets, manage its affairs, open a bank account in its name, and instruct lawyers on its behalf.

On 9 February 2004, the Italian Minister for Production Activities admitted Eurofoods to the extraordinary administration procedure and appointed Mr Bondi as the extraordinary administrator.

On 10 February 2004, an application was lodged before the Tribunale Civile e Penale di Parma (District Court, Parma) (Italy) for a declaration that Eurofoods was insolvent. The hearing was fixed for 17 February 2004, Mr Farrell being informed of that date on 13 February. On 20 February 2004, the District Court in Parma, taking the view that Eurofood's centre of main interests was in Italy, held that it had international jurisdiction to determine whether Eurofoods was in a state of insolvency.

By 23 March 2004 the High Court decided that, according to Irish law, the insolvency proceedings in respect of Eurofood had been opened in Ireland on the date on which the application was submitted by the Bank of America NA, namely 27 January 2004. Taking the view that the centre of main interests of Eurofood was in Ireland, it held that the proceedings opened in Ireland were the main proceedings. It also held that the circumstances in which the proceedings were conducted before the District Court in Parma were such as to justify, pursuant to Article 26 of the Regulation, the refusal of the Irish courts to recognise the decision of that

court. Finding that Eurofood was insolvent, the High Court made an order for winding up and appointed Mr Farrell as the liquidator.

Mr Bondi having appealed against that judgment, the Supreme Court considered it necessary, before ruling on the dispute before it, to stay the proceedings and to refer a number of questions to the Court of Justice for a preliminary ruling.

The preliminary ruling

Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, 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 location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its 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 that Regulation.

The ECJ argued that:

- 31 The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.

- 32 The scope of that concept is highlighted by the 13th recital of the Regulation, which states that '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'.
- 33 That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.
- 34 It follows that, 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.
- 35 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.
- 36 By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its 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 the Regulation.

5.2.1.3. C-396/09, Interedil

Facts

Interedil was constituted in the legal form of a 'società a responsabilità limitata' under Italian law and had its registered office in Monopoli (Italy). On 18 July 2001, its registered office was transferred to London (United Kingdom). On the same date, it was removed from the register of companies of the Italian State. Following the transfer of its registered office, Interedil was registered with the United Kingdom register of companies and entered in the register as an 'FC' (Foreign Company).

According to the statements made by Interedil as set out in the order for reference, at the same time as the transfer of its registered office, it was engaged in transactions which concluded in Interedil being acquired by the British group Canopus, contracts being negotiated and entered into for the transfer of a business concern. According to Interedil, a few months after the transfer of its registered office, the title to properties which it owned in Taranto (Italy) was transferred to Windowmist Ltd, as part of the assets of the business transferred. Interedil also stated that it was removed from the United Kingdom register of companies on 22 July 2002.

On 28 October 2003, Intesa filed a petition with the Tribunale di Bari for the opening of bankruptcy ('fallimento') proceedings against Interedil.

Interedil challenged the jurisdiction of that court on the ground that, as a result of the transfer of its registered office to the United Kingdom, only the courts of that Member State had jurisdiction to open insolvency proceedings. On 13 December 2003, Interedil requested that the Corte suprema di cassazione give a ruling on the preliminary issue of jurisdiction.

- 16 On 20 May 2005, the Corte suprema di cassazione adjudicated by way of order on the preliminary issue of jurisdiction referred to it and held that the Italian courts had jurisdiction. It took the view that the presumption in

the second sentence of Article 3(1) of the Regulation that the centre of main interests corresponded to the place of the registered office could be rebutted as a result of various circumstances, namely the presence of immovable property in Italy owned by Interedil, the existence of a lease agreement in respect of two hotel complexes and a contract concluded with a banking institution, and the fact that the Bari register of companies had not been notified of the transfer of Interedil's registered office.

The preliminary ruling

The term 'centre of a debtor's main interests' in Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted by reference to European Union law.

For the purposes of determining a debtor company's main centre of interests, the second sentence of Article 3(1) of Regulation No 1346/2000 must be interpreted as follows:

- a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company 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 that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a**

comprehensive assessment of all the relevant factors makes it possible to establish, 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;

- where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office.**

The term 'establishment' within the meaning of Article 3(2) of Regulation No 1346/2000 must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.

The ECJ stated that:

- 42 The Court has consistently held that 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 (see, *inter alia*, Case C-174/08 *NCC Construction Danmark* [2009] ECR I-10567, paragraph 24 and case-law cited).
- 43 With regard in particular to the term 'the centre of a debtor's main interests' within the meaning of Article 3(1) of the Regulation, the Court held, at paragraph 31 of *Eurofood IFSC*, that that concept is peculiar to the Regulation, thus having an autonomous meaning, and must

therefore be interpreted in a uniform way, independently of national legislation.

The relevant criteria for determining the centre of the debtor's main interests

- 47 While the Regulation does not provide a definition of the term 'centre of a debtor's main interests', guidance as to the scope of that term is, nevertheless, as the Court stated at paragraph 32 of *Eurofood IFSC*, to be found in recital 13 in the preamble to the Regulation, which states that 'the "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties'.
- 48 As the Advocate General observed at point 69 of her Opinion, the presumption in the second sentence of Article 3(1) of the Regulation that the place of the company's registered office is the centre of its main interests and the reference in recital 13 in the preamble to the Regulation to the place where the debtor conducts the administration of his interests reflect 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.
- 49 With reference to that recital, the Court also stated, at paragraph 33 of *Eurofood IFSC*, 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. That 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.

- 50 It follows that, where the bodies responsible for the management and supervision of a company 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 that the centre of the company's main interests is located in that place is wholly applicable. In such a case, as the Advocate General observed at point 69 of her Opinion, it is not possible that the centre of the debtor company's main interests is located elsewhere.
- 51 The presumption in the second sentence of Article 3(1) of the Regulation may be rebutted, however, 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. As the Court held at paragraph 34 of *Eurofood IFSC*, the simple presumption laid down by the European Union 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.
- 52 The factors to be taken into account 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. As the Advocate General observed at point 70 of her Opinion, those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case.
- 53 In that context, the location, in a Member State other than that in which the registered office is situated, of immovable property owned by the debtor company, in respect of which the company has concluded lease

agreements, and the existence in that Member State of a contract concluded with a financial institution – circumstances referred to by the referring court – may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. The fact nevertheless remains that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption laid down by the European Union legislature unless a comprehensive assessment of all the relevant factors makes it possible to establish, 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.

The relevant date for the purpose of locating the centre of the debtor's main interests

54 First, it should be noted that the Regulation does not contain any express provisions concerning the specific case involving the transfer of a debtor's centre of interests. 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.

55 That interpretation finds support in the Court's case-law. The Court has held that, 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 (Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701, paragraph 29). It must be inferred from this that, in principle, it is the

location of the debtor's main centre of interests at the date on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction.

- 56 In a case such as that in the main proceedings in which the registered office is 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.
- 57 The same rules must apply where, at the date on which the request to open insolvency proceedings is lodged, the debtor company has been removed from the register of companies and where, as submitted by Interdil in its observations, it has ceased all activity.
- 58 As is apparent from paragraphs 47 to 51 above, the term 'centre of main interests' meets the need to establish a connection with the place with which, from an objective viewpoint and in a manner that is ascertainable by third parties, the company has the closest links. It is therefore logical in such a situation to attach greater importance to the location of the last centre of main interests at the time when the debtor company was removed from the register of companies and ceased all activities.

The meaning of the term 'establishment' -Article 3(2) of the Regulation

- 61 Article 2(h) of the Regulation defines the term 'establishment' as designating any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

- 62 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'.
- 63 Since, in accordance with Article 3(2) of the Regulation, the presence of an establishment in the territory of a Member State confers jurisdiction on the courts of that State to open secondary insolvency proceedings against the debtor, it must be concluded that, in order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties.

5.2.1.4. C-191/10, Rastelli Davide

Facts

- 8 By judgment of 7 May 2007, the Tribunal de commerce de Marseille (Commercial Court, Marseille) (France) put Médiasucre, which had its registered office in Marseille, into liquidation and appointed Mr Hidoux as liquidator.
- 9 Following that judgment, Mr Hidoux brought proceedings before that court against Rastelli, which had its registered office in Robbio (Italy). It requested that Rastelli be joined to the insolvency proceedings that had been opened against Médiasucre on the ground that the property of the two companies was intermixed.
- 10 By judgment of 19 May 2008, the Tribunal de commerce de Marseille declined jurisdiction with regard to Article 3 of the Regulation, on the grounds that Rastelli's registered office was in Italy and that it had no establishment in France.

- 11 Ruling on the procedural question raised by Mr Hidoux, the Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence), by judgment of 12 February 2009, set aside that judgment and held that the Tribunal de commerce de Marseille had jurisdiction. In that regard, the Cour d'appel held that the liquidator's application was not intended to open insolvency proceedings against Rastelli but to join it to the judicial liquidation already opened against Médiasucre and that, under Article L. 621-2 of the Commercial Code, the court which has jurisdiction to rule on the application for joinder is the court before which the proceedings were initially brought.

The preliminary ruling

- 1. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings is to be interpreted as meaning that a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State only if it is established that the centre of that second company's main interests is situated in the first Member State.**
- 2. Regulation No 1346/2000 is to be interpreted as meaning that, where a company, whose registered office is situated within the territory of a Member State, is subject to an action that seeks to extend to it the effects of insolvency proceedings opened in another Member State against another company established within the territory of that other Member State, the mere finding that the property of those companies has been intermixed is not sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State. In order to reverse the presumption that this centre is the place of the registered office, it is necessary that an overall assessment of all the relevant factors**

allows it to be established, in a manner ascertainable by third parties, that the actual centre of management and supervision of the company concerned by the joinder action is situated in the Member State where the initial insolvency proceedings were opened.

The ECJ argued that:

- 14 It should be borne in mind at the outset that the Regulation does not contain a rule concerning judicial or legislative competence that expressly refers to the joinder to insolvency proceedings opened in one Member State of a company whose registered office is in another Member State on the ground that the property of the two companies has been intermixed.
- 15 With regard to judicial competence, the Regulation provides, in Article 3, that two criteria correspond to two different types of proceedings. According to paragraph 1 of that article, the centre of the debtor's main interests, presumed to be the place of the company's registered office, gives jurisdiction to the courts of the Member State in which it is situated to initiate the 'main' proceedings, which produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States in which the Regulation applies. Under Article 3(2) 'secondary' or 'territorial' proceedings may be opened by the courts of the Member State where the debtor has an establishment, the effects of which are restricted to the assets of the debtor situated in the territory of that Member State (see, to that effect, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 28, and Case C-112/10 *Zaza Retail* [2011] ECR I-0000, paragraph 17).
- 19 It is, therefore, necessary to examine only whether jurisdiction to hear an action for the purposes of joinder of insolvency proceedings can be based on Article 3(1) of the Regulation.

- 20 In that context, it should be noted that the Court has held that Article 3(1) of the Regulation 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 (Case C-339/07 *Seagon* [2009] ECR I-767, paragraphs 19 to 21). It must therefore be examined whether an application for joinder of insolvency proceedings on the ground that property has been intermixed can be deemed to be such an action.
- 23 That single procedure does not, however, alter the fact, referred to by the Netherlands and Austrian governments and by the European Commission, that 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.
- 24 That analysis is supported by the fact, referred to by the national court, that although the single procedure is justified by the finding that the two debtors form a *de facto* unit because their property is intermixed, that finding has no bearing on the legal personality of the two debtors.
- 25 The Court has held that in the system established by the Regulation for determining the competence of the Member States, which is based on the centre of the debtor's main interests, each debtor constituting a distinct legal entity is subject to its own court jurisdiction (*Eurofood IFSC*, paragraph 30).
- 26 It follows that a decision producing, with regard to a legal entity, the same effects as the decision to open main insolvency proceedings can only be taken by the courts of the Member State that would have jurisdiction to open such proceedings.

- 27 In that regard, it should be noted that Article 3(1) of the Regulation confers exclusive jurisdiction to open such proceedings on the courts of the Member State within the territory of which the centre of the debtor's main interests is situated.
- 28 Therefore, the possibility that a court designated under that provision as having jurisdiction, with regard to a debtor, to join another legal entity to insolvency proceedings on the sole ground that their property has been intermixed, without considering where the centre of that entity's main interests is situated, would constitute a circumvention of the system established by the Regulation. This would result, *inter alia*, in a risk of conflicting claims to jurisdiction between courts of different Member States, which the Regulation specifically intended to prevent in order to ensure uniform treatment of insolvency proceedings within the European Union.
- 30 By its second question, the national court is essentially asking whether the Regulation is to be interpreted as meaning that, where a company, whose registered office is situated within the territory of a Member State, is subject to an action that seeks to extend to it the effects of insolvency proceedings opened in another Member State against another company established within the territory of that other Member State, the mere finding that the property of those companies has been intermixed is sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State.
- 31 It should be noted at the outset that the term 'the centre of a debtor's main interests', within the meaning of Article 3(1) of the Regulation, is a concept that is peculiar to the Regulation, thus having an autonomous meaning, and must therefore be interpreted in a uniform way, independently of national legislation (*Eurofood IFSC*, paragraph 31, and *Interedil*, paragraph 43). While the Regulation does not define that concept, guidance as to its scope is, nevertheless, to be found in recital

13 in the preamble to the Regulation, which states that ‘the “centre of main interests” should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties’ (*Eurofood IFSC*, paragraph 32, and *Interedil*, paragraph 47).

- 32 For companies, the centre of main interests is presumed, according to the second sentence of Article 3(1) of the Regulation, to be the place of the company's registered office. That presumption and the reference in recital 13 in the preamble to the Regulation to the place where the debtor conducts the administration of his interests reflect 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 (*Interedil*, paragraph 48).
- 33 With reference to that recital, the Court 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 IFSC*, paragraph 33, and *Interedil*, paragraph 49).
- 34 With regard to a company, the Court held that, 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).
- 35 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 European Union 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, and *Interedil*, paragraph 51).

- 36 Those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case (*Interedil*, paragraph 52).
- 37 With regard to the situation, referred to in the second question, where the property of two companies is intermixed, it is apparent from the explanations provided by the French government that, to characterise such a situation, the national 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.
- 38 As has been submitted by the French, Netherlands and Austrian governments and by the European Commission, such factors are in general difficult to ascertain by third parties. Furthermore, intermixing of property does not necessarily imply a single centre of interests. Indeed, it cannot be excluded that such intermixing may be organised from two management and supervision centres situated in two different Member States.

5.2.2. The jurisdiction of the court opening the main proceeding. Categories of actions

5.2.2.1. C-339/07, Deko Marty B

Facts

On 14 March 2002, Frick, which has its seat in Germany, transferred EUR 50 000 to an account with KBC Bank in Düsseldorf in the name of Deko, a company with its seat in Belgium. Pursuant to an application made by Frick on 15 March 2002, the Amtsgericht Marburg (Local Court, Marburg)

(Germany) opened insolvency proceedings on 1 June 2002 in respect of Frick's assets. By application to the Landgericht Marburg (Regional Court, Marburg), Mr Seagon, in his capacity as liquidator in respect of Frick's assets, requested that court, by way of an action to set a transaction aside by virtue of the debtor's insolvency, to order Deko to repay the money.

The Landgericht Marburg dismissed that application as inadmissible on the ground that it did not have international jurisdiction to hear and determine it. Since the appeal brought by Mr Seagon was also dismissed he brought an appeal on a point of law ('Revision') before the Bundesgerichtshof (Federal Court of Justice) (Germany).

The preliminary ruling

Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning 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 by virtue of insolvency that is brought against a person whose registered office is in another Member State.

5.2.2.2. C-213/10, F-Tex SIA

Facts

Between February and June 2001, NPLC, the registered office of which is in Germany, paid, when insolvent, the sum of LTL 523 700.20 to Jadecloud-Vilma, the registered office of which is in Lithuania.

On 24 January 2005, the Landgericht Duisburg (Regional Court, Duisburg) (Germany) opened insolvency proceedings in respect of NPLC. According to the findings of the referring court, the sole creditor was F-Tex, the registered office of which is in Latvia.

By contract of 28 August 2007, the liquidator appointed in the proceedings opened in respect of NPLC assigned to F-Tex all NPLC's claims against third parties, including the right to demand from Jadecloud-Vilma the return of the sums acquired by the latter in February to June 2001. That assignment was granted without any guarantee on the part of the liquidator regarding the content of the claims or their amount, or as to whether they could, in fact and in law, be enforced. F-Tex was not legally obliged to enforce the claims thus taken over. If it decided to do so, it was agreed that it would pay the liquidator 33% of the proceeds obtained from its action.

By order of 19 August 2009, the Vilniaus apygardos teismas (Regional Court, Vilnius) (Lithuania) dismissed the action brought before it by F-Tex claiming that Jadecloud-Vilma should be ordered to pay to it the sum of LTL 523 700.20 which that company had received from NPLC, together with interest. The Vilniaus apygardos teismas held that that action came within the jurisdiction of the German courts since the insolvency proceedings brought in respect of NPLC had been opened in Germany.

On 5 November 2009, following an appeal by F-Tex, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) reversed the decision of the Vilniaus apygardos teismas and referred the case back to that court. The Lietuvos apeliacinis teismas held that the jurisdiction provided for in Article 3(1) of Regulation No 1346/2000 in respect of an action to set a transaction aside was not an exclusive jurisdiction and that, having regard to the circumstances of the case, that action had to be examined on the basis of the place where the defendant had its registered office.

By decision of 25 November 2009, the Landgericht Duisburg found that the action brought before it by F-Tex against Jadecloud-Vilma did not come within its jurisdiction, on the ground, inter alia, that the registered office of the defendant was not in Germany, and informed F-Tex that its action

would probably be dismissed as inadmissible. F-Tex discontinued that action.

The preliminary ruling

Article 1(1) 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 an action brought against a third party by an applicant acting on the basis of an assignment of claims which has been granted by a liquidator appointed in insolvency proceedings and the subject-matter of which is the right to have a transaction set aside that the liquidator derives from the national law applicable to those proceedings is covered by the concept of civil and commercial matters within the meaning of that provision.

The relationship between Regulation No 1346/2000 and Regulation No 44/2001

- 29 It follows from all of the above considerations, first, that Article 1(2)(b) of Regulation No 44/2001 excludes from the scope of that regulation, which, in accordance with recital 7 in its preamble, is intended to apply to all civil and commercial matters apart from certain well-defined matters, only actions which derive directly from insolvency proceedings and are closely connected with them. It follows from the same considerations, second, that only actions which derive directly from insolvency proceedings and are closely connected with them are covered by Regulation No 1346/2000.
- 30 In order to answer the second part of the first question it is therefore necessary to establish whether the action in the main proceedings, in view of the findings of the referring court, must be regarded as satisfying that dual criterion.

The links between the action in the main proceedings, on the one hand, and the insolvency of the debtor and the insolvency proceedings, on the other hand

- 31 The action in the main proceedings seeks the return by the defendant of sums which it received from a debtor before insolvency proceedings were opened in respect of the latter. The applicant bases its action on the assignment of claims which was granted to it by the liquidator appointed in those proceedings. The subject-matter of that assignment was the right to have a transaction set aside which the German Insolvency Code confers upon the liquidator with regard to acts undertaken before the insolvency proceedings have been opened which are detrimental to the creditors participating in those proceedings.
- 32 It is apparent from the case-file that an action to set a transaction aside, governed under German law by Paragraph 129 et seq. of the Insolvency Code, may be brought only by the liquidator, with the sole purpose of protecting the interests of the general body of creditors. According to the German Government, the right to have a transaction set aside may, however, be assigned provided that that assignment takes place for consideration which is regarded as equivalent, for the benefit of the general body of creditors.
- 33 In that regard, it must be pointed out that the Court has held, in connection with an action by which the applicant, in his capacity as liquidator, requested, by way of an action to set a transaction aside by virtue of the debtor's insolvency, the repayment of a sum paid by the latter, that such an action is covered by Article 3(1) of Regulation No 1346/2000 (see, to that effect, *Seagon*, paragraph 28).
- 34 Furthermore, in *SCT Industri*, the Court held, in connection with the recognition of a judgment which held that a transfer granted by the liquidator appointed in insolvency proceedings was invalid on the ground that the liquidator had no power to dispose of the assets

transferred, that such a matter is covered by the concept of bankruptcy or winding-up for the purposes of Article 1 (2)(b) of Regulation No 44/2001 (see, to that effect, *SCT Industri*, paragraph 33).

35 However, the present main proceedings can be distinguished from the situations which gave rise to those judgments.

36 Unlike the applicant in the case which gave rise to the judgment in *Seagon*, the applicant in the main proceedings is not acting as a liquidator, that is to say as a body responsible for insolvency proceedings, but as the assignee of a right.

37 Furthermore, unlike the case which gave rise to the judgment in *SCT Industri*, the present main proceedings do not relate to the validity of the assignment granted by the liquidator and the liquidator's power to assign his right to have a transaction set aside is not disputed.

38 It must therefore be examined whether, in view of the specific characteristics of the action brought by the applicant in the main proceedings, that action has a direct link with the insolvency of the debtor and is closely connected with the insolvency proceedings.

40 It is true that it cannot be denied that the right on which the applicant in the main proceedings bases its action is linked with the insolvency of the debtor as it has its origin in the right to have a transaction set aside conferred on the liquidator by the national law applicable to insolvency proceedings. Nevertheless, the question arises whether the right acquired, once it becomes owned by the assignee, retains a direct link with the debtor's insolvency.

41 That question may, however, remain open if it is evident that, in any event, the exercise by the assignee of the right acquired is not closely connected with the insolvency proceedings.

- 42 It must be stated that, as observed by F-Tex and the Lithuanian and German Governments, the exercise of the right acquired by an assignee is subject to rules other than those applicable in insolvency proceedings.
- 43 First, unlike the liquidator, who is, as a rule, required to act in the interest of the creditors, the assignee can freely decide whether to exercise the right of claim he has acquired. As the referring court has stated, F-Tex was not legally obliged to enforce the claims taken over.
- 44 Second, the assignee, when he decides to exercise his right of claim, acts in his own interest and for his personal benefit. Like the right of claim which serves as the basis for his application, the proceeds of the action which he brings become owned by him personally. The consequences of his action are therefore different from those of an action to set a transaction aside brought by a liquidator, which is intended to increase the assets of the undertaking which is the subject of insolvency proceedings (*Seagon*, paragraph 17).
- 45 The fact that, in the main proceedings, the benefit granted by F-Tex in consideration for the assignment by the liquidator of his right to have a transaction set aside took the form of an obligation to pay the liquidator a percentage of the proceeds obtained from the claim assigned does not alter that analysis, since it is merely a method of payment. Such a contractual stipulation is within the power of the parties as it is not disputed that the liquidator and the assignee could freely choose to express the consideration paid by the assignee in the form of a fixed sum or a percentage of any sums recovered.
- 46 Furthermore, under German law, which is, in the main proceedings, the law applicable to the insolvency proceedings, the closure of the insolvency proceedings has no effect on the exercise by the assignee of the right to have a transaction set aside which he has acquired. According to the German Government, that right may be exercised by the assignee after the closure of the insolvency proceedings.

- 47 Having regard to its characteristics, the action in the main proceedings is not therefore closely connected with the insolvency proceedings.

5.2.2.3. C-157/13, Nickel & Goeldner Spedition GmbH

Facts

On 28 May 2009, the Vilniaus apygardos teismas (Regional Court, Vilnius) opened insolvency proceedings against Kintra, which has its registered office in Lithuania.

The insolvency administrator of Kintra applied to the Vilniaus apygardos teismas for an order that Nickel & Goeldner Spedition, which has its registered office in Germany, pay, by way of principal sum, LTL 194 077.76 in respect of services comprising the international carriage of goods provided by Kintra for Nickel & Goeldner Spedition, inter alia in France and in Germany.

By judgment of 29 August 2011, the Vilniaus apygardos teismas granted the application of the insolvency administrator of Kintra, holding that its jurisdiction resulted from the provisions of the Lithuanian Law on the insolvency of undertakings and from Regulation No 1346/2000.

By decision of 6 June 2012, the Lietuvos apeliacinis teismas (Court of Appeal of Lithuania) upheld the judgment at first instance. It held that the dispute related to the exception concerning bankruptcy, laid down in Article 1(2)(b) of Regulation No 44/2001, and that the court with jurisdiction in the dispute must be decided in accordance with Article 3(1) of Regulation No 1346/2000 and with the provisions of the Lithuanian Law on the insolvency of undertakings.

The preliminary ruling

Article 1(1) 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 an action for the payment of a debt based on the provision of carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one Member State and taken against a service recipient established in another Member State comes under the concept of ‘civil and commercial matters’ within the meaning of that provision.

5.2.2.4. C-111/08, SCT Industri AB i likvidation

Facts

In 1993, insolvency proceedings were opened against SCT Industri by Malmö tingsrätt (Malmö District Court). A liquidator was appointed. In the course of those proceedings, the liquidator transferred SCT Industri's shares, that is, a holding of 47% in the capital of SCT Hotelbetrieb GmbH, a company incorporated under Austrian law, now Scaniahof Ferienwohnungen GmbH ('Scaniahof'), to Alpenblume for SEK 2. Alpenblume was registered in Austria as owner of those shares in the company.

The insolvency proceedings were closed in 1997 without surplus. On 19 March 2002, Malmö tingsrätt ordered SCT Industri to be wound up.

Further to proceedings brought before an Austrian court by SCT Industri, that court held that the liquidator appointed in Sweden had no power to dispose of assets situated in Austria and that consequently Alpenblume's acquisition of the shares was invalid. Accordingly, the Austrian court ordered Scaniahof to register SCT Industri as owner of the shares transferred from the assets in insolvency. Alpenblume appeared as intervener ('*Nebenintervenientin*') in the Austrian proceedings. The Oberster Gerichtshof (Supreme Court, Austria) dismissed the intervener's appeal ('*außerordentliche Revision*' – exceptional appeal on a point of law) on 17 May 2004.

On 24 August 2004, Alpenblume brought proceedings before a Swedish court against SCT Industri for restitution of title to the shares in question, requesting that SCT Industri be ordered, on penalty of a fine, to take all

measures necessary for Alpenblume to be registered as rightful owner of the shares. By decision of 17 March 2005, Malmö tingsrätt, following an objection by the applicant in the main proceedings, held that there was no obstacle to examination of that request.

The preliminary ruling

The exception provided for in Article 1(2)(b) of Council Regulation No 44/2001 (EC) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted 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.

5.2.2.5. C-292/08, German Graphics

The facts

German Graphics, a company established under German law, concluded, as vendor, a contract for the sale of machines with Holland Binding, a company established under Dutch law, containing a reservation of title clause in its favour.

By a decision of 1 November 2006, the Rechtbank Utrecht (Utrecht District Court) (Netherlands) placed Holland Binding in involuntary liquidation and appointed a liquidator of that company.

By order of 5 December 2006, the Landgericht Braunschweig (Brunswick Regional Court) (Germany) granted the application made by German Graphics for the adoption of protective measures with regard to a certain number of machines situated at the premises of Holland Binding

in the Netherlands. That application was based on the reservation of title clause referred to above.

On 18 December 2006, the voorzieningenrechter te Utrecht (the judge in Utrecht responsible for granting interim measures) declared the decision of the Landgericht Braunschweig enforceable. Subsequently, Ms van der Schee, acting as liquidator of Holland Binding, lodged an appeal against that decision with the Rechtbank Utrecht (Utrecht District Court), which, by decision of 28 March 2007, revoked that decision. German Graphics lodged an appeal in cassation against the decision of the Rechtbank Utrecht with the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).

The preliminary ruling

Article 25(2) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the words ‘provided that that Convention is applicable’ imply that, before it can be concluded that the recognition and enforcement provisions 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 are applicable to judgments other than those referred to in Article 25(1) of Regulation No 1346/2000, it is necessary to determine whether such judgments fall outside the material scope of Regulation No 44/2001.

- 2. The exception provided for in Article 1(2)(b) of Regulation No 44/2001, read in conjunction with Article 7(1) of Regulation No 1346/2000, must be interpreted, account being taken of the provisions of Article 4(2)(b) of the latter regulation, as meaning that it does not apply to an action brought by a seller based on a reservation of title against a purchaser who is insolvent, where the asset covered by the reservation of title is situated in the Member State of the opening of those proceedings at the time of opening of those proceedings against that purchaser.**

5.2.3. Recognition of the main proceeding. Secondary proceedings.

5.2.3.1. C-112/10, Zaza Retail BV

Facts

On 14 November 2006 the Procureur des Konings (Public Prosecutor) at the Rechtbank van eerste aanleg te Tongeren (Court of First Instance, Tongeren) (Belgium) applied for a declaration of insolvency in respect of the Belgian establishment of Zaza Retail, the centre of main interests of which is in Amsterdam (Netherlands).

At that stage no insolvency proceedings had yet been opened against Zaza Retail in the Netherlands.

By decision of 4 February 2008, the Rechtbank van Koophandel te Tongeren (Commercial Court, Tongeren) declared Zaza Retail insolvent.

By judgment of 9 October 2008 the Hof van beroep te Antwerpen (Court of Appeal, Antwerp) revised the decision of the Rechtbank van Koophandel and ruled that neither that court nor the Hof van beroep itself had the requisite international jurisdiction to rule on the opening of territorial insolvency proceedings against Zaza Retail in the light of the establishment that it had in Belgium.

The Public Prosecution Service appealed to the Hof van Cassatie van België against that judgment. It submits, first, that the term 'creditor' used in Article 3(4)(b) of the Regulation cannot be interpreted narrowly and that the Public Prosecution Service may also request the opening of insolvency proceedings. In so doing, the Public Prosecution Service fulfils the function of guardian of the public interest and intervenes in the place of institutional and individual creditors where they fail to act. Secondly, the Public Prosecution Service argues that the exception in Article 3(4)(a) of the Regulation is also applicable to the request to open insolvency proceedings made by the Public Prosecution Service, since – if it had no such competence – it would be unable to have main

proceedings opened in the Netherlands, which is the Member State in which the debtor has the centre of its main interests.

The preliminary ruling

The expression ‘conditions laid down’ in Article 3(4)(a) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, which refers to conditions, which, under the law of the Member State where the debtor has the centre of its main interests, prevent the opening of main insolvency proceedings in that State, must be interpreted as not referring to conditions excluding particular persons from the category of persons empowered to request the opening of such proceedings.

The term ‘creditor’ in Article 3(4)(b) of the Regulation, which is used to designate the persons empowered to request the opening of territorial insolvency proceedings, must be interpreted as not including an authority of a Member State whose task under the national law of that State is to act in the public interest, but which does not intervene as a creditor, or in the name or on behalf of those creditors.

5.2.3.2. C-116/11, Christianapol Facts

Christianapol, which is established in Łowyc (Poland), purports to be a wholly-owned subsidiary of a German company, which in turn is 90% owned by a French company.

By judgment of 1 October 2008, the Tribunal de commerce de Meaux (Meaux Commercial Court) (France) opened insolvency proceedings against Christianapol. That court based its jurisdiction on the finding that the centre of the debtor's main interests is situated in France. The court opened *sauvegarde* proceedings on the ground that the debtor was

not in a situation calling for the cessation of payments, but that it would be in that situation if financial restructuring was not undertaken quickly.

On 21 April and 26 June 2009, Bank Handlowy, established in Warsaw (Poland), in its capacity as creditor of Christianapol, asked the referring court to open secondary insolvency proceedings against Christianapol under Article 27 of the Regulation. In the alternative, in the event that the judgment of the Tribunal de commerce de Meaux of 1 October 2008 was held to be a breach of public policy, in accordance with Article 26 of the Regulation, it made an application for the opening of winding-up proceedings under Polish law.

On 20 July 2009, the Tribunal de commerce de Meaux approved a rescue plan for Christianapol, under which debts would be paid off in instalments spread over 10 years and prohibiting the transfer of the undertaking situated in Łowyń and of certain defined assets belonging to the debtor. The French court maintained the appointment, made previously, of the persons responsible for representing the interests of creditors for the period up to the closure of the procedure for the verification of claims and the submission of a final report on the activities of those representatives. In its judgment it also appointed a person to oversee the implementation of the plan (*commissaire à l'exécution du plan*).

On 2 August 2009, another creditor, Adamiak, established in Łęczysca (Poland), also asked for winding-up proceedings to be opened under Polish law.

Christianapol had originally contended that the application for the opening of secondary proceedings in Poland should be dismissed, since such proceedings were contrary to the objectives and nature of the *sauvegarde* proceedings. Following the approval of the rescue plan by the French court, Christianapol contended that the secondary insolvency proceedings should be discontinued, since the main proceedings had closed. It also contended that it was fulfilling its

obligations under the plan approved by the French court, with the result that no pecuniary claims were outstanding against it under Polish law and there were therefore no grounds supporting a declaration of insolvency in respect of it.

The referring court asked the Tribunal de commerce de Meaux whether the insolvency proceedings in France, which were main proceedings for the purposes of the Regulation, were still pending. The answer given by the French court did not provide the necessary clarification. The referring court then consulted an expert.

The preliminary ruling

Article 4(2)(j) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, as amended by Council Regulation (EC) No 788/2008 of 24 July 2008, must be interpreted as meaning that it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs.

2. Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose. It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.

3. Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another

Member State, even where the latter proceedings have a protective purpose.

5.2.3.3. C-327/13, Burgo Group S.A.

The dispute in the main proceedings and the questions referred for a preliminary ruling

On 21 April 2008, the Tribunal de commerce de Roubaix-Tourcoing (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, the Tribunal de commerce de Roubaix-Tourcoing 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 EUR 359 778.48.

By letter of 5 November 2008, Maître Theetten informed Burgo Group that the statement of liability could not be taken into account because it was out of time.

On 15 January 2009, Burgo Group requested the opening of secondary proceedings in respect of Illochroma before the Tribunal de commerce de Bruxelles (Commercial Court, Brussels) (Belgium). Since that request was rejected at first instance, Burgo Group brought an appeal before the referring court by which it continues to seek the form of order sought at first instance.

The referring court observes in that regard that Regulation No 1346/2000 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.

On the other hand, the respondents in the main proceedings contend that, since Illochroma has its registered office in Belgium, it cannot be regarded as an establishment within the meaning of Regulation No 1346/2000. Secondary proceedings are restricted to establishments without legal personality.

According to the referring court, Belgian law applicable to the present case provides that any creditor, including a creditor established outside Belgium, may bring an action before a Belgian court for the opening of insolvency proceedings against its debtor. However, Illochroma maintains that that right is restricted to creditors established in the Member State of the court before which the action seeking the opening of secondary proceedings has been brought, since the sole purpose of such proceedings is to protect local interests.

Lastly, the referring court observes that Regulation No 1346/2000 does not state whether the possibility for the persons referred to in Article 29 thereof to request, in the Member State within the territory of which the establishment is situated, the opening of secondary proceedings is a right that must be recognised by the court having jurisdiction in that regard or whether that court enjoys a discretion as to whether it is appropriate to grant that request, with a view, in particular, to protecting local interests.

The preliminary ruling

- 1. Article 3(2) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted to the effect that, where winding-up proceedings are opened in respect of a company in a Member State other than that in which it has its**

registered office, secondary insolvency proceedings may also be opened in respect of that company in the other Member State in which its registered office is situated and in which it possesses legal personality.

2. Article 29(b) of Regulation No 1346/2000 must be interpreted to the effect that the question as to which person or authority is empowered to seek the opening of secondary proceedings must be determined on the basis of the national law of the Member State within the territory of which the opening of such proceedings is sought. The right to seek the opening of secondary proceedings cannot, however, be restricted to creditors who have their domicile or registered office within the Member State in whose territory the relevant establishment is situated, or to creditors whose claims arise from the operation of that establishment.
3. Regulation No 1346/2000 must be interpreted to the effect that, where the main insolvency proceedings are winding-up proceedings, whether the court before which the action seeking the opening of secondary insolvency proceedings has been brought may take account of criteria as to appropriateness is governed by the national law of the Member State within the territory of which the opening of secondary proceedings is sought. However, when establishing the conditions for the opening of secondary proceedings, Member States must comply with EU law and, in particular, its general principles, as well as the provisions of that regulation.

5.2.3.4. C-444/07 MG Probud Gdynia

Facts

By judgment of 9 June 2005, the Sąd Rejonowy Gdańsk-Północ w Gdańsku (North Gdansk District Court, Gdansk) ordered that insolvency

proceedings be opened in respect of MG Probud, an undertaking in the building sector whose registered office was in Poland but which engaged in construction work in Germany through the activities of a branch.

Upon application by the Hauptzollamt Saarbrücken (Principal Customs Office, Saarbrücken) (Germany), the Amtsgericht Saarbrücken (Local Court, Saarbrücken), by decision of 11 June 2005, ordered attachment of that undertaking's assets held by banks in the amount of EUR 50 683.08, and of various claims of the undertaking against German parties with whom it had entered into contracts. Those measures were prompted by procedures initiated by the Hauptzollamt Saarbrücken against the manager of MG Probud's German branch, who was suspected of having infringed the legislation on the posting of workers by reason of failure to pay a number of Polish workers and to make social security contributions in their regard.

The appeal lodged against that decision was dismissed by order of the Landgericht Saarbrücken (Regional Court, Saarbrücken) of 4 August 2005. In the grounds of its order, it stated in particular that, as insolvency proceedings had been opened in Poland, there was reason to fear that those responsible within MG Probud would shortly collect the sums payable and transfer the corresponding amounts to Poland in order to prevent the German authorities from having access to them. The Landgericht Saarbrücken held that the opening of the insolvency proceedings relating to MG Probud's assets did not prevent attachment in Germany. It stated that national insolvency proceedings opened in other Member States must be recognised in Germany when they meet the conditions laid down in Article 1(1) of the Regulation and are referred to in the list in Annex A thereto, but it could not be determined from the copy of the judgment enclosed with the appeal whether insolvency proceedings opened in Poland had to be recognised in Germany pursuant to Annex A to the Regulation were in fact involved.

In the insolvency proceedings, the Sąd Rejonowy Gdańsk-Północ w Gdańsku questions whether the attachment effected by the German authorities is lawful since Polish law, which is the law applicable to the insolvency proceedings because the Republic of Poland is the State of the opening of those proceedings, would not allow such attachment after the undertaking has been declared insolvent.

The preliminary ruling

Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in particular Articles 3, 4, 16, 17 and 25, must be interpreted as meaning that, in a case such as that in the main action, after the main insolvency proceedings have been opened in a Member State the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal derived from Articles 25(3) and 26 of that regulation, to recognise and enforce all judgments relating to the main insolvency proceedings and, therefore, are not entitled to order, pursuant to the legislation of that other Member State, enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory when the legislation of the State of the opening of proceedings does not so permit and the conditions to which application of Articles 5 and 10 of the regulation is subject are not met.

5.2.3.5. C-341/04- Eurofood

On a proper interpretation of the first subparagraph of Article 16(1) of Regulation No 1346/2000, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State.

- 3. On a proper interpretation of the first subparagraph of Article 16(1) of the Regulation, a decision to open insolvency proceedings for the purposes of that provision is a decision handed down by a court of**

a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.

4. On a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

5.2.4. Scope of application

5.2.4.1. C-527/10, ERSTE Bank

Article 5(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that that provision is applicable, in circumstances such as those in the main proceedings, even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union where, on 1 May 2004, the debtor's assets on which the right in rem concerned was based were situated in that State, which is for the referring court to ascertain.

5.3. National cases

5.3.1. Jurisdiction

5.3.1.1. Enron Directo Sociedad Limitada, 4 July 2002.

Decision: A Spanish incorporated Enron company trading in Spain, whose head office functions were carried out in London, had its COMI in England. In determining the COMI of the company, it should be considered whether the

registered office corresponded with the company's head office functions. Where the debtor provides proof to the contrary that the head office and registered office are not located in the same MS and the head office is where the main financial, administrative, executive and strategic functions are performed then the presumption can be rebutted.

5.3.1.2. *Daisytek ISA Limited* [2004] B.P.I.R. 30.

- Daisytek-Isa SAS, High Court of Justice of Leeds, May 16, 2003 (Administration order)

- SAS Daisytek-Isa, Commercial Court of Pontoise, May 26, 2003 (Opening decision in France)

- SAS Daisytek-Isa, Commercial Court of Pontoise, July 1, 2003 (Third party proceedings against the French proceeding)

- SAS Daisytek-Isa, Court of Appeal of Versailles, September 4, 2003 (Appeal against the decision of July 1, 2003)

- SAS Daisytek-Isa, French Supreme Court, June 27, 2006

(Final decision)

Facts: Following the insolvency of the holding company of a group of trading companies, a petition was filed before the English court for administration orders in respect of 14 European subsidiaries, including French and German subsidiaries.

The decision: The English court had jurisdiction to make an administration order in respect of each of the companies on the basis that their COMI was in England regardless of their foreign incorporation.

The Court put emphasis on Recital13. In identifying the COMI consideration should be given to the scale and importance of the interests administered at the various locations, which could be regarded as the COMI, including the

jurisdiction of the registered office. The court took into consideration the following issues:

- effective management and control of all the companies in the group was conducted from the head office in England.
- the companies' funding was provided through English financial institutions
- all financial information was compiled in accordance with English accounting principles
- 70% of the supply contracts were negotiated centrally through the English head office.

The SAS Daisytek ISA was the first French judgment applying the EC Regulation where the automatic recognition of a foreign insolvency regime (English Administration procedure) was highlighted in respect of a company born under French Company legislation.

5.3.1.3. MG Rover [2005] EWHC 874(Ch.)

- SAS Rover France:
- MG Rover Group Ltd, High Court of Justice of Birmingham, April 18, 2005 (Administration order)
- SAS Rover France, Commercial Court of Nanterre, May 19, 2005 (denying French jurisdiction)
- SAS Rover France, Court of Appeal of Nanterre, December 15, 2005 (Confirmation of the judgment of the Commercial Court of Nanterre)

Facts: MG Rover Ltd. was the holding company of sales subsidiaries trading in 8 EU jurisdictions, amongst them was France.

Decision: Following the reasoning in *Daisytek* the English court concluded that it had jurisdiction to open administration proceedings in respect of the subsidiaries, as their COMI was in England.

The presumption stated under Art.3(1) was rebutted in the light of the factual evidence.

Public policy argument pursuant to Article could not be invoked, as the French employees' interests were fully protected.

The *SAS Rover France* case demonstrated that finally both English and French courts and practitioners have actively collaborated to find a pragmatic solution in the interests of all parties involved in the *Rover* insolvency.

5.3.1.4. EUROTUNNEL, Commercial Court of Paris, August 2, 2006

The decision: The court had to answer the question of the territorial jurisdiction of the Paris Commercial Court (Article 3 and Article 16 of the EC Regulation). Trying to locate the COMI of (each of) the debtors, the court applied the 'head office functions' test, taking into consideration that art. 16 of the EC Regulation states for the automatic recognition of the first rendered judgment within the European Union.

The Eurotunnel case was the first main French decision applying Regulation 1346/2000 after the European Court of Justice decision in *Eurofood*. Thus, the Court made the application of the ECJ ruling (*Eurofood*), which clarified that the presumption that a company's COMI is in the Member State in which its registered office is situated can be rebutted only if objective factors ascertainable by third parties enable it to be established that the COMI is elsewhere. Parental company control alone is inadequate.

The Paris Commercial Court assessed as relevant factors in determining the location of foreign companies COMI of this group in Paris:

(1) the place where the entities were required to comply with a strategic and operational management plan drawn up by the '*Conseil Commun*';

(2) the place where the finance functions and accountancy principles were applied;

(3) the main place where transactions, assets and employees are located;

and

(4) the place of negotiation of the debt restructuring.

The Paris Commercial Court considered then that there was something more than the mere fact that the parent company may control its subsidiaries' economic choices adding that: 'it is good practice to find a unique solution to the same financial difficulty threatening the applicant entities guarantors of a debt which exceeds their assets'

The Paris commercial court also emphasized the fact that third parties were aware of this organization through Eurotunnel's annual reports and press releases.

Thus, the French simply held that '*a body of corroborating evidence ('un faisceau d'indices concordants')* that were verifiable by third parties' allowed the French court to locate the COMI of all debtors in Paris.

The Eurotunnel case is the first application of the EC Regulation to the safeguard proceeding in France since its insertion in the Annex A of the Regulation by the adoption of the EC Regulation No 694/2005 of 27 April 2006 and it is also the most important application of this procedure considering the size of the Group and its huge financial pressure.

That was also the first time when the location of the restructuring negotiations was taken into account for the determination of the COMI.

5.3.2. Applicable law

5.3.2.1. Court: First instance court - Tribunal d'arrondissement de et à Luxembourg, deuxième chambre ⁴⁸

Date: 03 Dec, 2004 Jurisdiction: Luxembourg Original language: French

Official reference: Commercial judgment II N° 1295/04, (*Numéro 113 189 du rôle*) – bankruptcy N°1295/04, MC MODEMARKT GmbH

Parties: MC MODEMARKT GmbH under German insolvency proceedings
Public source: LJUS 99863626

Summary of the decision

The insolvency practitioner of MC Modemarkt GmbH which was subject to insolvency proceedings (*Insolvenz*) declared by the Court of Landau (Germany) on 15 October 2004 requested that secondary proceedings be opened in Luxembourg on 11 November 2004 with respect to the Luxembourg establishment of MC Modemarkt GmbH.

The question was what type of insolvency proceedings that could be opened in case of secondary proceedings.

The Court applied Article 27 EIR for the automatic recognition of the insolvency proceedings opened for MC Modemarkt in Germany and did not therefore verify whether the Luxembourg establishment was insolvent.

The Court reminded itself that according to Article 28 EIR, the applicable law of the secondary proceedings is the law of the member state within the territory of which the secondary proceedings are opened. With this in mind and in accordance with Luxembourg law, the applicable proceeding in this case would be bankruptcy proceedings.

⁴⁸ All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

5.3.2.2. Court: Appellate court - Cour d'Appel de Versailles Date: 15 Jan, 2004 Jurisdiction: France Original language: French Official reference: CA Versailles, 13e ch., 15 janvier 2004, non publié Parties: SCP Becheret Thierry -v- Industrie Guido Malvestio SpA ⁴⁹

Summary of the decision

A French company paid four invoices dated in April and May 2000 in advance to one of its main suppliers ("Malvestio"), a company incorporated in Italy. A French judgment determined, however, on 31 December 1999 that the date when the company was unable to pay its debts as they fell due. The administrators sought to set aside as preferential payments the advance payments made by the company to Malvestio under French insolvency Law. The Commercial Court of Nanterre rejected the administrators' arguments and refused to set aside preferential payments made by the French company. The insolvency office holders of the French company appealed.

The question was whether French law applied on setting aside preferential payments made by a French insolvent company for the benefit of its main Italian supplier?

The appellate court considered that Article 4(2)(m) EIR applied and the law applicable to insolvency proceedings was the law of the opening member state, and this included provisions relating to the setting aside of preferential payments as acts detrimental to the general body of creditors.

⁴⁹ All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

**5.3.2.3. Court: Appellate court - Cour d'Appel de Paris Date: 15 Nov, 2007
Jurisdiction: France Original language: French Official reference:
CA Paris, 15 novembre 2007, RG n° 06-10596 ⁵⁰**

Parties: M. X... -v- S.A. BNP PARIBAS Public source: www.legifrance.gouv.fr

Summary of the decision:

Insolvency proceedings were opened in the Netherlands in respect of a company registered in that member state. Its shareholders filed a petition in France against a French Bank which had granted loans to that company on the grounds that it had interfered with the management of the insolvent company.

The question was whether legal action could be initiated in France after the opening of insolvency proceedings in the Netherlands.

The Court of Appeal ruled that if the law of the state of the opening of proceedings shall determine the effects of the insolvency proceedings on proceedings brought by individual creditors under Article 4(2)(f) EIR, any person who suffers loss, resulting from the interference of a creditor (a bank) in the management of an insolvent debtor, shall be allowed to initiate legal action in France as long as such complies with French law.

Under French law, only individual damages can be claimed by a shareholder of an insolvent company against a bank which interfered in the management of the debtor. As this was not the case, the Court of Appeal of Paris rejected the legal action.

4. Court: First instance court - English High Court, Chancery Division Date: 09 Jun, 2006 Jurisdiction: England & Wales Original language: English Official reference: Collins & Aikman Europe SA, Re [2006] EWHC 1343 (Ch) ⁵¹

⁵⁰ All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

Parties: Collins & Aikman Europe SA, Collins & Aikman Automotive SystemsSL, Collins & Aikman Automotive Holding GmbH, Collins & Aikman Systems GmbH, Collins & Aikman Systems AB, Collins & Aikman Automotive Company Italia SRL, Collins & Aikman Automotive Trim Bvba, Collins & Aikman Automotive Holdings BV, Collins & Aikman Automotive Trim BV, Collins & Aikman Automotive SRO, by their joint liquidators in each case.

Public source: BAILII [2006] EWHC 1343 (Ch)

Summary of the decision:

A group of companies supplied components to leading car manufacturers on a global basis. The US holding company and US part of the group filed for reorganisation under Chapter 11 of the US Bankruptcy Code on 17 May 2005. The European part of the group consisted of 24 companies, spread over 10 countries, employing 4,000 people at 27 sites, with a turnover of approximately US\$1 billion per annum.

The European companies applied to the English court on 15 July 2005 for the making of administration orders asserting in each case that the centre of main interests was England pursuant to Art 3 EIR. The English court made administration orders on that basis and directed that the proceedings would be main proceedings.

Many of the group companies' functions were organised on a Europe wide rather than national basis. The liquidators therefore recognised that a co-ordinated approach to the continuation of the businesses, funding of the administration and sale of the businesses and assets would lead to a better overall return for creditors.

⁵¹ All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

The European creditors remained entitled to seek the opening of secondary proceedings in their respective jurisdictions against their proper debtor. However, the liquidators believed that this would have made it difficult to trade the businesses and achieve the best outcome on sales processes on a group-wide basis. They therefore gave assurances to creditors that if there were no secondary proceedings then their respective financial positions as creditors under the relevant local law would be respected in the English administration as far as possible. This strategy was supported by creditors with only a few minor exceptions and the liquidators believed that this is what enabled them to achieve very favourable realisations in excess of prior estimates. By April 2006, the liquidators held over \$125 million for distribution to creditors of the European companies.

As the rules of priority between creditors was a matter of *lex concursus*, and so the liquidators were otherwise bound by English law as to priority, the liquidators made an application to the English Court to approve the payments necessary to honour the assurances given, even though the effective application of other member states' priority principles would be to the disadvantage of some creditors. Article 4 EIR provides that the law of main proceedings is that of the member state in which the proceedings are opened. The English court found that it had jurisdiction nonetheless to direct as a matter of English law that the liquidator could depart from the English law rules as to priority between creditors. This allowed the liquidator to honour assurances given to creditors in other member states pursuant to which those creditors had not sought to open secondary proceedings.

5. Court: First instance court - Tribunal de Paix de Luxembourg, siégeant en matière de saisie-arrêt spéciale Date: 26 Apr, 2007 Jurisdiction: Luxembourg Original language: French Official reference: *Rép. Fiscal* n°1908/07, judgment dated 26 April 2007 ⁵²

⁵² All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper

Parties: Banque AAA & others vs XX & others

Public source: *Bulletin d'Information sur la Jurisprudence 2007*, p. 113

Summary of the decision:

In 2005, two banks signed loan agreements with the debtor, Ms X and granted credit to the debtor by way of overdraft facility. To secure the repayment of these loans and overdrafts, Ms X signed wage assignments in favour of the two banks. Ms X did not repay the loans and the banks started legal proceedings in order to attach the wages of Ms X pursuant to the wage assignments. A lawyer, who had represented Ms X in a previous and similar case, also started attachment proceedings to obtain payment of unpaid fees. However, it appeared that Ms X, who was not a trader but resided in France, in the Moselle region (where French insolvency laws applicable to traders are also applicable to non traders) had been subject to insolvency proceedings since 2003, and under judicial liquidation since 7 September 2004. The banks were not aware of this insolvency situation. The appointed trustee claimed that pursuant to Article 5 EIR the wage assignments had to be considered as null and void.

The court reviewed the following notions: (1) Applicable law for the insolvency proceedings and its effects, (2) Validity of wage assignments.

Regarding applicable law, the court acknowledged that the debtor was under insolvency proceedings and that this specific insolvency procedure was foreseen by Article 1 EIR. The court further explained that in accordance with the provisions of Article 4 EIR, the applicable law to insolvency proceedings and its effects was French law, as the insolvency proceedings opened against the debtor was a French insolvency proceedings.

The court then stated that according to relevant provisions of French law, the opening of insolvency proceedings prevents any claim from creditors who

on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

have claims originating prior to the opening of the insolvency proceeding. It appeared that the wage assignments, the loan agreements and the fees of the lawyer all originated after the opening of the insolvency proceedings of the debtor and as such were considered as valid by the court, especially as the banks were not aware that the debtor was subject to insolvency proceedings.

5.3.2.4. Court: Appellate court - Cour d'Appel d'Aix-en-Provence Date: 22 May, 2008 Jurisdiction: France Original language: French Official reference: CA Aix-en-Provence, 22 mai 2008, RG n° 07-17237⁵³

Parties: S.A.S. Telecom Italia -v- S.A.R.L. FEDEROL

Public source: www.legifrance.gouv.fr

Summary of the decision

An Italian company (the company) contracted out services supplied on behalf of a French company. Insolvency proceedings were started against the company in Italy. The French sub-contractor summoned the French company to appear before French courts under the legislation governing the sub-contracting rules which allowed the sub-contractor to act directly against the company on whose behalf the sub-contracts were made.

The French court made clear that a sub-contractor was allowed to summon the sub-contracting company to appear before French courts as the law governing the sub-contracting rules in France did not depend on the opening of an insolvency proceeding of the project leader. French sub-contracting rules only apply when it is proved before the court that the project leader failed to pay the sub-contractor.

⁵³ All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

In conclusion, the Court of Appeal stated that the Insolvency Regulation did not apply to such cases as its scope is limited only to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

The appellate court ruled that the Commercial Court of Marseille had jurisdiction to deal with the present issue which would not be a judgment deriving directly from or closely linked with the insolvency proceedings initiated in Italy. 19

7. Court: Appellate court - Tribunal d'arrondissement de et à Luxembourg, troisième chambre Date: 24 Oct, 2008 Jurisdiction: Luxembourg Original language: French Official reference: Garnishment judgment III N° 221/08, (*Numéro 98691, 98692, 108144 et 108145 du rôle*) ⁵⁴

Parties: Marc Sasha Migge & others -v- Thomas Benedikt Schmidt, in his quality of "Treuhänder" of the assets of Jürgen Rüdiger Migge & others

Public source: LJUS 99863455

Summary of the decision:

By judgment dated 29 September 2005 rendered by the Amtsgericht Wittlich (Germany), insolvency proceedings were opened against an individual, Jürgen Migge. Various attachments to earnings were initiated by the creditors prior to the opening of the insolvency proceedings and the debtor signed two wage assignments, one in favour of his mother on 15 December 2001, and the other in favour of his son on 19 November 2003. The German insolvency practitioner and a creditor disputed the validity of the wage assignments; consequently the court was asked to decide on the allocation

⁵⁴ All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

of the seized amounts according to the attachments to earnings and wage assignments and to decide on validity of the wage assignments.

The court was asked to review the following notions: (1) the effects of the insolvency proceedings on pending lawsuits; (2) the applicable law and jurisdiction for examining the validity of legal acts which could be detrimental to all creditors; and (3) the effect of insolvency proceedings on third parties' rights *in rem*.

The court stated that in accordance with Article 15 EIR, the effects of the insolvency proceedings on pending lawsuits relating to an asset or a right of which the debtor has been divested shall be governed solely by the law of the member state in which the lawsuit is pending and that according to Luxembourg law, the court before which a lawsuit is pending still has jurisdiction in the case of insolvency proceedings. Therefore the court confirmed that it had jurisdiction.

The court stated that the list mentioned at Article 4 EIR on applicable law could be interpreted as entailing the jurisdiction of the court of the state that opened the proceedings to be competent in assessing issues relating to the validity of legal acts. Furthermore, the court explained that even if the jurisdiction of the court in charge prior to the opening of insolvency proceedings was not automatically called into question by the mere fact that insolvency proceedings had been opened, by the effect of universality linked to the insolvency proceedings, the court was incompetent to assess issues for which the court of the state that opened the proceedings" had exclusive jurisdiction. Therefore, the court decided, in accordance with Article 4 EIR that the court having opened the insolvency proceedings against the debtor, i.e. the German court, was solely competent to examine the validity of the wage assignments that were disputed by the German insolvency practitioner. Regarding the effects of the insolvency proceedings on claims brought by individual creditors against the assignees of wages, the court stated that Article 4 EIR provides that the law of the state that opened the proceedings determines the conditions of opening, the course and the conditions of the

closure of the insolvency proceedings as well as the effects of the insolvency proceedings on claims brought by individual creditors, with the exception of the pending lawsuits. The court explained that the suspension of the effects of enforcement proceedings is contemplated by German insolvency law. The court decided that according to Article 4 EIR and the relevant article of German insolvency law, the court of the state that opened the proceedings is solely competent to decide on disputes relating to the admissibility of enforcement measures, especially on the application of Article 5 EIR as to wage assignments. The court decided a stay of the proceedings in order to allow the litigant parties to ask the German court to decide on the validity of the wage assignments and the application of Article 5 EIR to such wage assignments should they be declared valid.

5.3.2.5. Court: Highest appellate court - Cour de cassation, Chambre commerciale Date: 22 Jun, 2010 Jurisdiction: France Original language: French Official reference: Cass. com., 22 juin 2010, n° de pourvoi: 09-65.481, Bulletin 2010, IV, n° 113 ⁵⁵

Parties: Danieli Corus -v- Agintis

Public source: <http://legifrance.gouv.fr>

A claim of a Dutch company was lodged with a French liquidator appointed in insolvency proceedings opened against a French company. The claim was filed by an employee of the Dutch company, entitled to act with a general mandate.

The judge of the lower court, applying French jurisprudence requiring a specific mandate where the lodgement of claims are not filed by the creditor itself, rejected the claim by ruling that the mandate was too wide and vague. There was not sufficient evidence to show that the representative of the creditor had the power to lodge claims for insolvency proceedings.

⁵⁵ All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

The problem was regarding the law of the opening member state applicable to define the powers of the creditor's representative regarding the lodgement of claims.

Summary of the decision

The Cour de cassation approved the rejection of the filed claim, on the basis of the conflict of law set of rules pursuant to Article 4(2)h EIR which states that rules applicable to lodging, verification and admission of claims are defined by the law of the opening State.

The court also noted that conditions required by French jurisprudence were missing in the present case, particularly as regards the powers of the representative of a foreign creditor to lodge claims in an insolvency proceedings.

The judgment does not mention the *lex societatis* applicable to the powers of the manager and of their employees which are normally ruled by the law of the registered office of the company.

**5.3.2.6. Court: First instance court - Tribunal de Commerce de Charleroi
Date: 14 Sep, 2004 Jurisdiction: Belgium Original language:
French Official reference: Tribunal de Commerce de Charleroi, 14
September 2004 ⁵⁶**

Parties: SARL Bati France -v- Alongi et al. Public source: Revue régionale de droit, 2004 at p. 358.

Summary of the decision

A French company had been subject to insolvency proceedings in France. Secondary proceedings were opened in Belgium in respect of an establishment which was in Belgium. The liquidator appointed in Belgium

⁵⁶ All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

sought to have certain detrimental acts set aside and filed proceedings to that effect against the directors of the insolvent company. The latter challenged the capacity of the liquidator to introduce such proceedings and requested that the liquidator appointed in the main proceedings be joined.

The court was asked to decide whether the liquidator had capacity and authority to introduce such proceedings.

The court noted that the proceedings which had been opened in Belgium were secondary proceedings, whose scope was limited to the assets located in Belgium. The court added that the liquidator appointed in the framework of these proceedings could act independently, without requiring any assistance or intervention from the liquidator appointed in the main proceedings. Drawing on Art. 17 EIR, the court noted that when secondary proceedings are opened, such proceedings limit the effects of the main proceedings in the member state where secondary proceedings are opened. According to the court, the result is that the liquidator appointed in the main proceedings can no longer act in that capacity in the member state where secondary proceedings were opened. The court concluded that secondary proceedings operated relatively autonomously from the main proceedings: the liquidator appointed in the secondary proceedings could act without requiring the approval or assistance from the liquidator appointed in the main proceedings.

The court verified whether the request filed by the liquidator appointed in the secondary proceedings concerned assets falling within the secondary proceedings. Drawing on Art. 2(g) EIR, the court found that since the directors targeted by the liquidator's action were domiciled in Belgium and the companies which had contracted with the French company subject to insolvency, were established in Belgium, the request was within the confines of the secondary proceedings. Finally, the court decided that the liquidator's request should be governed by Belgian law in accordance with Article 28 EIR.

5.3.2.7. Court: First instance court - Amtsgericht Duisburg Date: 14 Oct, 2003 Jurisdiction: Germany, Official reference: AG Duisburg v. 14.10.2003 – 63 IN 48/03⁵⁷

Parties: Unknown - [AG Duisburg v. 14.10.2003 – 63 IN 48/03] Public source: AG Duisburg v. 14.10.2003 – 63 IN 48/03, NZG 2003, 1167

Summary of the decision

The debtor was a private limited liability company with its registered office in London. It had been established by a German craftsman from Oberhausen through a company called C-Ltd. as a trustee in order to circumvent the German legal requirements for craftsmen. The sole director was C-Ltd. in London. However, *de facto*, the business was conducted by Y on the basis of a general power of attorney granted in German. Both management and production were conducted in Oberhausen (Germany) under the same address as Y's individual enterprise. The debtor did not have any business premises in London and its letterheads only gave the addresses and bank details in Oberhausen.

On 19 November 2002, the debtor was struck off from the register at Companies House. In November 2002 and March 2003, two creditors filed requests for the opening of insolvency proceedings at the Amtsgericht (local court) Duisburg; one of which was later withdrawn.

The key issue of the case was if the debtor would be still an eligible debtor despite it having been struck off the register.

The german judge applied the English law and said that, since the debtor had been struck off the register it no longer existed as a legal person pursuant to English law (as the *lex societatis*) and was thus no longer an eligible debtor.

⁵⁷ All the abstracts are taken from the EIR Case Register <http://www.insolvencycases.eu/> (1 Jan 2000 - 31 Dec 2012) and the Working paper on applicable law presented by Miodrag Đorđević at the seminar on Cross-Border Insolvency in the EU, 19-20.02.2013, Barcelona

6. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000-

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6.1. General Presentation

Council Regulation no. 2201/2003 (also known as Brussels 2 *bis* Regulation), concerning jurisdiction and the recognition and enforcement of judgments in matrimonial and parental responsibility matters, follows and replaces Regulation no. 1347/2000 (also known as Brussels 2 Regulation).

The Regulation is inspired by international sources on child protection - in particular, the United Nations Convention on the Rights of the Child approved in New York on 20th November 1989 and ratified by all the European Union's Member States (Arts. 2, 3, 5, 7, 8, 9, 11, 12, 16, 18, 20); the European Convention on the Protection of Human Rights and Fundamental Freedoms, approved in Rome on 4th November 1950 (Arts. 8, 14); the European Convention on the Exercise of Children's Rights, approved in Strasbourg on 25th January 1996, ratified by only 12 Member States (Arts. 1, 3); the Hague Convention on the Civil Aspects of International Child Abduction, approved on 25th October 1980; the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, approved on 19th October 1996, ratified by 26 Member States, excluding Belgium and Italy – and contains measures for child protection which are more effective than the ones contained in the Brussels 2 Regulation. It realizes the objectives of the European Union Treaties, in particular the protection of the rights of the child (Art. 3 TUE) and the improvement of judicial cooperation in civil matters having cross-border implications (Art. 81 TFUE), and contributes to protecting

some of the fundamental rights mentioned by the Charter of Fundamental Rights of the European Union (Art. 7, Respect for private and family life; Art. 21, Non-discrimination; Art. 24, The rights of the child; Art. 47, Right to an effective remedy and to a fair trial).

The Brussels 2 *bis* Regulation has been binding on all Member States of the European Union since 1st March 2005, on Romania and Bulgaria since 1st January 2007 and on Croatia since 1st July 2013 (the moment of their accession to the European Union). It is not binding for Denmark.

It lays down rules concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, stating that each State shall designate one or more central authorities to assist with the application of the Regulation, to communicate information on national law, as well as to cooperate on specific cases with the central authorities of other Member States.

The **objectives** of the Brussels 2 *bis* Regulation are to create an area of freedom, security and justice within which the free movement of persons is ensured (recital 1) preventing phenomena of “rush to a court” and “forum shopping” and to promote the development of the internal market, favouring the free movement of persons and enhancing the possibility for family ties between European Union citizens residing in different Member States and having different nationalities.

In addition to the fundamental rights in general, it seeks to ensure respect for the fundamental rights of the child as set out in Art. 24 of the Charter of Fundamental Rights of the European Union (recital 33), stating “1. *Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless*

that is contrary to his or her interests", to protect the best interests of the child (recitals 12, 13), adopting the criterion of proximity as main criterion to establish jurisdiction, suffering exceptions only if in the particular case they fit the best interest of the child, to ensure the respect of the principle of mutual trust (recital 21) as the basis of the principles governing *lis pendens*, recognition and enforcement as well as the prohibition of review of jurisdiction and substance.

The **scope** is more extended than that of the Brussels 2 Regulation, since Brussels 2 laid down provisions concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility only if they were delivered in matrimonial proceedings, excluding judgments concerning children born out of wedlock, and did not contain specific provisions for the event of child abduction.

According to **Article 1**, paragraph 1, the scope of the Regulation is civil matters relating to divorce, legal separation or marriage annulment and the attribution, exercise, delegation, restriction or termination of parental responsibility.

The term 'civil matters' has to be interpreted autonomously from the internal legislations, and covers decisions ordering a child to be taken into care and placed outside his or her original home in a foster family even if that decision was adopted in the context of public law rules relating to child protection, considering that, if the decisions concerning the taking into care and placement of the child were excluded from the scope of the Regulation, the objective of mutual recognition and enforcement of decisions in matters of parental responsibility would be frustrated. Consequently, the Member States' justice organization as well as the allocation of powers to administrative authorities cannot exclude the application of the Regulation⁵⁸.

For these reasons, the Regulation also applies to decisions issued by authorities having powers in the matter, such as administrative authorities or social services, as well as to authentic instruments like documents (such as

⁵⁸ See CJEU, Grand Chamber, Case C-435/06.

notarised ones) which, according to the Member State of origin, may be recognised and declared enforceable, equivalent to judgments (recital 22).

Paragraph 1 letter a) refers exclusively to matrimonial matters, excluding various forms of cohabitation ruled by some Member State or the dissolution of unmarried couples. This interpretation is confirmed, on one hand, by the provision of specific rules concerning parental responsibility (that is not included in matrimonial matters *tout court*) and, on the other hand, by recital 8, according to which the Regulation should apply only to the dissolution of matrimonial ties and should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures. The matters of maintenance obligations (jurisdiction, recognition and enforcement of the decisions) are ruled by Regulation no. 4/2009.

Paragraph 2 contains an exemplary list of matters included in the scope as defined in paragraph 1 (rights of custody and rights of access; guardianship, curatorship and similar institutions; designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; placement of the child in a foster family or in institutional care; measures for the protection of the child's property⁵⁹), while paragraph 3 contains a list of the excluded matters (establishment or contesting of a parent-child relationship; adoption⁶⁰; name and forenames of the child; emancipation; maintenance obligations⁶¹; trusts and succession⁶²; measures taken as a result of criminal offences committed by children).

Article 2 contains some **definitions**, to be read taking into account that, according to CJEU case law, the terms of a provision of European Union 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 European Union

⁵⁹ According to recital 9, in matters of the child's property, the jurisdiction is ruled by Brussels 2 *bis* Regulation only if the property is in connection with the child's protection (i.e. when the parents do not agree about the property). In all the other cases it is ruled by Brussels 1 Regulation (Reg. 44/2001, to be replaced by Reg. 1215/2012 from 10th January 2015).

⁶⁰ International adoption is ruled by the 1993 Hague Convention.

⁶¹ They are ruled by Regulation no. 4/2009.

⁶² They will be ruled by Regulation no. 650/2012, in force from 17th August 2015.

having regard to the context of the provision and to the objective pursued by the legislation in question⁶³.

The Regulation does not contain definitions of legal separation, divorce and marriage annulment, for which the provisions of national laws are relevant, but contains the definition of parental responsibility, which includes "*all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access*".

The Regulation does not contain a definition of the concept of child. Therefore, reference can be made to the Hague Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, which defines a child as a person up to the age of 18, or to the Hague Convention of 25th October 1980 on the Civil Aspects of International Child Abduction, which indicates that a child is a person up to the age of 16. Considering that the international and European sources do not provide a univocal definition of the word "child", it might be possible to use the definitions provided by the national legislations.

Although the Regulation contains the definition of the rights of custody – a concept that is autonomous from the national legislations – the Member States law is applicable to determine the holder of the rights of custody⁶⁴. This can create some conflicts (to be solved according to general rules of international private law) considering that there are differences among the Member States' legislations for what concerns determining the holder of the rights of custody in case of children born out of wedlock.

⁶³ CJEU case C- 523/07, recalling Case 327/82 *Ekro*, and Case C-98/07 *Nordania Finans* and *BG Factoring*.

⁶⁴ See CJEU Case C-400/10 PPU, *J. McB.*

6.1.1. Jurisdiction

The Regulation provides rules for determining jurisdiction in matrimonial matters and parental responsibility matters. The legislator's technique is to state general rules – which in matrimonial matters provide alternative grounds for jurisdiction, while in parental responsibility matters provide a general criterion with some exceptions – and to provide residual criteria for the hypothesis in which the general ones are not applicable.

In any case, the relevant moment to determine jurisdiction is the time when the court is seised, while subsequent changes do not have any impact on jurisdiction (principle of *perpetuatio iurisdictionis*).

Considering the different internal procedural laws, the Regulation provides uniform alternative criteria to establish when a court shall be deemed to be seised (Art. 16). The first criterion is applicable when the internal procedural law provides that the application must be lodged with the court before service, the second one when, according to the internal procedural law, the application must be served to the respondent before lodging it with the court. In the first hypothesis, a court shall be deemed to be seised when the application is lodged with the court, provided that the applicant has not subsequently failed to take the required steps to have service effected on the respondent; in the second case, a court shall be deemed to be seised at the time when the application is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the required steps to have the document lodged with the court.

The court seised must examine its jurisdiction of its own motion even when the defendant has appeared (Art. 17). The possible tacit acceptance or extension of jurisdiction does not exonerate the court from checking *ex officio* for one of the jurisdiction criteria provided by the Regulation. Jurisdiction criteria in fact cannot be derogated in these matters, differently from the matters ruled by Regulation no. 44/2001, which expressly provides the

prorogation of jurisdiction upon agreement between the parties (see Art. 23)⁶⁵.

6.1.1.1. Matrimonial matters

In matrimonial matters (divorce, legal separation and marriage annulment) Article 3 provides alternative exclusive **grounds of jurisdiction**:

- habitual residence of the spouses;
- last habitual residence of the spouses if one of them still resides there;
- habitual residence of the respondent;
- habitual residence of either spouse in case of a joint application;
- habitual residence of the applicant provided that he or she has resided there for at least one year before making the application;
- habitual residence of the applicant provided that he or she has resided there for at least six months before making the application and he or she is a national of that Member State;
- common nationality of the spouses.

According to these criteria, the court having jurisdiction also has jurisdiction to examine a **counterclaim**, if it is included in the scope of the Regulation, and to convert legal separation into divorce if it is permitted by the national legislation of that Member State.

If none of these criteria are applicable, residual jurisdiction is determined by the international private law in force in each Member State.

The Regulation determines merely the Member State whose courts have jurisdiction, not the court which is competent within that Member State; therefore, this question is left to domestic procedural law.

⁶⁵ See also Art. 25 of Regulation no. 1215/2012, in force from 10th January 2015.

6.1.1.2. Parental responsibility matters

The **general criterion** to determine jurisdiction in parental responsibility matters is the **habitual residence of the child** (Art. 8, recital 12). As for matrimonial matters, this criterion exclusively determines the Member State whose courts have jurisdiction, not the venue, which is demanded to national legislations.

The Regulation does not state what is meant by habitual residence; therefore, it is necessary to turn to the CJEU case law, which provides that the criterion of habitual residence needs an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question⁶⁶. The meaning of the criterion of habitual residence must be determined within the context of the Regulation's provisions and the objectives pursued by it, especially the objective stated in recital 12 in the preamble to the Regulation.

The grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child, in particular the criterion of proximity⁶⁷.

To establish the place of habitual residence it is necessary to take into account all the actual circumstances specific to each individual case.

In addition to physical presence, in case of the child having recently been moved to a different Member State, consideration must be given to factors indicating the intention to set up a habitual and permanent centre of interests in the new residence and a certain integration of the child within a social and family setting. Another aspect to be considered is the duration, regularity, conditions or reasons leading the holder of parental responsibility to stay in a particular location or move there.

Consideration must also be given to: the child's nationality; the place and conditions of school attendance if the child is of school age; the child's knowledge of languages; the child's family and social relations; the conditions and reasons for the child's stay within the territory of a Member State.

⁶⁶ CJEU Case C-497/10 PPU, 62 and following.

⁶⁷ CJEU Case C-497/10 PPU.

Lastly, in order to distinguish habitual residence from mere temporary presence, it is necessary to consider the intention of the person with parental responsibility to permanently settle (with the child) in another Member State, manifested by certain tangible steps - such as the purchase or rental of accommodation in the host Member State.

The factors to be taken into account change depending on the child's age. In the case of a child of school age, the Member State where the child attends school is relevant, while for an infant the family environment is the most relevant aspect, determined by the reference people with whom the child lives⁶⁸.

The following articles provide **exceptions to the criterion of habitual residence**. They have to be narrowly interpreted, considering that they are exceptions to a general rule.

The **first exception** concerns the case of a child who lawfully moved from one Member State to a different one and acquired a new habitual residence in the new Member State (**Art. 9**).

In this case the courts of the Member State of the former habitual residence can retain jurisdiction for a three-month period following the move only for the purpose of modifying a judgment on access rights issued in that Member State before the child's relocation, where the holder of access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

This exception does not apply if the holder of the rights of access has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

The three-month period has to be counted starting from the child's move and not from the moment in which the child acquires the new habitual residence. In fact, considering the criteria to determine the place of habitual residence

⁶⁸ CJEU Case C-497/10 PPU; see also CJEU Case C-523/07 pt. 31-44.

mentioned above, in the majority of cases the moment of acquiring the new habitual residence will follow the moment of the child's move.

The **second exception** concerns the case of wrongful removal or retention of the child (**Art. 10**).

In this case the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction.

If the child becomes habitually resident in the Member State to where he or she has been wrongfully moved, said Member State will have jurisdiction only provided that:

- each person, institution or other body having rights of custody has acquiesced in the removal or retention;
- the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment. In the latter case, the following is also necessary: that the holder of rights of custody did not lodge any request for the return of the child within one year after he or she has had or should have had knowledge of whereabouts of the child, or that a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the same time limit, or that a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11, or that a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident before the wrongful removal or retention.

The **third exception** pursues the objective of avoiding plurality of litigations, provided that it is in the best interests of the child and that the parties agree on the jurisdiction.

It applies when a question of legal separation, divorce and marriage annulment is pending before a court exercising jurisdiction by virtue of Art. 3, providing that that court will also hold jurisdiction for any related questions connected with parental responsibility if at least one of the spouses has parental responsibility, if the jurisdiction has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility at the time the court is seised, and if it is in the superior interests of the child (**Art. 12, par. 1**).

The acceptance of jurisdiction can be considered express and unequivocal when a genuine agreement (with no particular formal requirements) is concluded between the parties, unequivocal if a party has seised a court concerning matters of parental responsibility or has accepted the court seised by the other party.

Jurisdiction ceases upon definition or termination of the divorce, legal-separation or marriage-annulment judgment or when the judgment on parental responsibility becomes final.

The **fourth exception** provides that, even when there is no pending proceeding of legal separation, divorce or marriage annulment, the courts of a Member State have jurisdiction if the holders of parental responsibility are habitually resident in that Member State or the child is a national of that Member State, the jurisdiction courts have been accepted expressly or otherwise in an unequivocal manner⁶⁹ by all the parties to the proceedings at the time the court is seised and is in the best interests of the child. The objective is to take into account the elements that make the child substantially connected with a certain Member State even if he or she is not habitually resident in that State, provided that this fits with the best interests of the child and the parties agree on jurisdiction (**Art. 12, par. 3**).

Jurisdiction shall be deemed to be in the interests of the child when he or she is habitually resident in a third State which is not a contracting party to the

⁶⁹ For the specific features of this kind of acceptance, see above.

Hague Convention of 19th October 1996, in particular when it is impossible to hold proceedings in the third State in question (Art. 12, par 4).

The Regulation provides a **fallback provision** in case none of the mentioned criteria can determine jurisdiction, stating that the courts of the Member State where the child is present shall have jurisdiction (**Art. 13**). It is clear that this rule pursues the objective of protecting the child, as confirmed by the provision of the second paragraph, which extends the scope of the rule also to refugee children and to children internationally displaced because of disturbances occurring in their country.

If the criterion of the child's presence is also inapplicable, jurisdiction shall be determined in each Member State by the law of that State (**Art. 14**).

By way of exception, the case may be transferred to a different **court that is better placed to hear the case (Art. 15)**. The transfer can be made upon application from a party, of the court's own motion, or upon application by a court of another Member State. In the latter two cases the transfer has to be accepted by at least one party.

A court of another Member State can be deemed better placed to hear the case if the child has a particular connection with that State.

According to paragraph 3, there is particular connection alternatively when a Member State has become the habitual residence of the child after the court referred to in paragraph 1 was seised, if it is the former habitual residence of the child, if it is the place of the child's nationality, if it is the habitual residence of a holder of parental responsibility, if it 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.

Both the courts must be convinced that the transfer corresponds to the best interests of the child and, if the court of the Member State that is assumed to be better placed to hear the case accepts jurisdiction in the provided term, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction.

The court second seised is not allowed to transfer the case to a third court (recital 13).

The courts shall cooperate for the purposes of this Article, either directly or through their central authorities.

In case of the presence before different courts of different Member States of proceedings related to divorce, legal separation or marriage annulment between the same parties or to parental responsibility concerning the same child and the same cause of action (***lis pendens and related actions***), according to **Article 19**, the court second seised shall stay its proceedings until such time as the court first seised decides on its own jurisdiction. If the court first seised holds jurisdiction, the court second seised shall decline it, and the party who brought the relevant action before the court second seised may bring it before the court first seised. If the court first seised decides that it does not hold jurisdiction, the court second seised may deal with the case.

Taking into account that in matrimonial matters and matters of parental responsibility there can be urgent cases, the Regulation allows the courts of a Member State to take **provisional and protective measures** in respect of persons or assets in that State as may be available under the law of that Member State even if a different Member State has jurisdiction on the substance of the matter (**Art. 20**). These measures are provisional and cease when the court of the Member State having jurisdiction has taken the measures it considers appropriate⁷⁰.

6.1.2. Recognition

The Regulation provides, in relation to matrimonial matters and matters of parental responsibility, the **recognition of judgments** delivered in a Member State in all the other Member States **without any special procedure** (Arts. 21 and following), even if they are not final. This rule is founded on the principle

⁷⁰ About the relationship between Art. 19 and Art. 20 see CJEU Case C-296/10, *Purrucker*.

of mutual trust and enhances the free circulation of decisions among the Member States. In particular, the recognition allows updating the civil-status records in a Member State on the basis of a judgment given in another Member State without recourse to any special procedure.

Although the recognition does not need a special procedure, a party may wish to obtain a decision that the judgment be or not be recognised. In this case the party can apply for **either recognition or non-recognition** of the decision.

The application may be lodged with the court holding jurisdiction in the Member State in which recognition is sought. The courts holding jurisdiction for such proceedings in each territory are determined by the internal legislation and their list has to be notified by each State to the Commission according to Art. 68.

At the first stage of the **proceeding** neither the other party nor the child shall be entitled to make any submissions on the application. The procedure to make the application is governed by the law of the Member State of recognition and must be accompanied by an authentic copy of the judgment and a certificate produced by the court of the Member State of origin in accordance with Annex I (concerning matrimonial matters) or Annex II (concerning parental responsibility) to the Regulation (Arts. 30, 37, 39).

The court seised will deliver a recognition judgment unless there are grounds for non-recognition, which are indicated in Article 22 for matrimonial matters and in Articles 23-24 for parental responsibility matters and concern mainly the public policy of the Member States, the rights of defense of the respondent, the existence of a previous judgment in the same matter between the same parties, the failure to hear the child, and the contrast with a later judgment in matters of parental responsibility.

In particular, regarding the failure to hear the child, this constitutes a ground for non-recognition except in the case of urgency and only if it is in violation

of the fundamental principles of procedure of the Member State in which recognition is sought.

The Regulation does not define the case of urgency. In general, it is appropriate to hear the child whenever the necessary age conditions are met, if the child has the ability to form his or her own views and if this is in line with his or her best interests. It is incumbent on the court in the Member State of origin to assess urgency and to provide reasons as to why the child could not be heard. If it was inappropriate to hear the child or the child could not be heard, it is advisable to include a suitable reason for this in the judgment in order to avoid non-recognition.

According to the principle of mutual trust and of free circulation of the decisions, the grounds for non-recognition are exclusive, and the review of substance and the review of jurisdiction of the court of the Member State of origin are absolutely prohibited.

Although the recognition of a judgment that has not yet become final is permitted, the court may stay the proceedings if an ordinary appeal against the judgment has been lodged in the Member State where the decision has been taken.

Once the decision on the application for recognition (or non-recognition) has been adopted, either party may lodge an **appeal** against it before the courts listed for each Member State. In this phase there is a full *inter partes* hearing, and both parties may make submissions. The decision on the appeal proceedings may only be contested in accordance with the procedures communicated by the Member States to the Commission (Art. 34)⁷¹.

6.1.3. Enforcement

As for the enforcement of a judgment on the exercise of parental responsibility in a Member State other than the one where the judgment was

⁷¹ See CJEU case C-195/08 PPU, *Rinau*, regarding the admissibility of submission made by the party against whom the application for non-recognition is lodged.

given, there are provisions for an **exequatur procedure with the exception of judgments relating to access rights and the return of the child** (Arts. 28 and following).

Judgments may be enforced in a different Member State provided that they have been given and are enforceable in the Member State of origin, they have been served, they have been declared enforceable in the Member State where enforcement is sought at the outcome of the *exequatur* procedure.

This means that recognition is useful only for declaratory judgments or for judgments spontaneously observed by the parties.

The application shall be submitted to the court appearing in the list notified by the Member States to the Commission (Art. 68). The venue is determined by the place of habitual residence of the person against whom the enforcement is sought or by the habitual residence of the child to whom the application relates. If none of the places indicated are located in the Member State of enforcement, the venue is determined by the place of enforcement.

The application must be accompanied by an authentic copy of the judgment and the certificate issued by the competent authority or court of the Member State of origin in accordance with Annex I (concerning matrimonial matters) or Annex II (concerning parental responsibility) to the Regulation (Arts. 30 par. 3, 37, 39).

The procedure for recognition is the same (no submissions can be made by the person against whom the enforcement is sought or by the child in the first stage). Then, the decision may be appealed against by either party (Art. 31).

The review of substance and of jurisdiction of the court of the Member State of origin is absolutely prohibited (Arts. 31, 24).

The grounds for refusing *exequatur* of the judgments are the same provided by Articles 22 and 23 in matters of recognition and are exclusively pursuant to the principles of mutual trust and of free circulation of decisions.

It is not required that a judgment be final in order for it to be enforced. Hence, in the event of a challenge to the decision in the Member State of origin, it is possible to suspend the enforcement appeal proceedings under Articles 33-34 on the application of the party against whom the enforcement is sought (Art. 35).

It is possible to apply for partial enforcement. It can be authorized by the court even if the enforcement has been requested for the whole judgment, when a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them (Art. 36).

One of the main objectives of the Regulation is to ensure that a child can maintain contact with all holders of parental responsibility after a separation, even when they live in different Member States. For this reason, the Regulation facilitates the exercise of cross-border access rights by ensuring that a judgment on access rights issued in one Member State is directly recognised and enforceable in another Member State. This is possible considering that the access right – which essentially involves the right to take the child to a place other than his or her habitual residence for a limited period of time and all forms of contact (telephone, e-mail, etc.) - does not usually imply traumatic enforcement interventions similar to those that might exist in the enforcement of a provision dealing with custody, by a **fast-track procedure** which does not need an exequatur decision.

The authority of the Member State of origin of the judgment issues a **certificate**, and the court of the Member State where the enforcement is sought will merely have to accept and enforce the judgment without being able to perform any type of check.

The certificate can be issued under the conditions of Article 41, paragraph 2: where the judgment was given in default, service of documents; sufficient time to arrange a defense or unequivocal acceptance of the judgment; opportunity to be heard for all parties; opportunity to be heard for the child, except when it is inappropriate.

The certificate shall be issued in the standard form of Annex III in the language of the judgment. Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued by the court of its own motion. If the situation subsequently acquires a cross-border character, the certificate shall be issued upon request by one of the parties.

It is not possible to challenge the certificate. Only the court which has issued it may proceed to rectify it, applying the law of the Member State of origin (Art. 43 and recital 24).

A judgment accompanied by a certificate is directly recognised and enforceable in the other Member States. The judgment must be considered in the other Member States just like a national judgment.

The enforcement procedure is governed by the law of the Member State of enforcement.

The authorities of the Member State where enforcement is sought may establish the practical arrangements for organising and guaranteeing the exercise of rights of access if the necessary arrangements have not or have not sufficiently been made in the judgment delivered by the courts of the Member State having jurisdiction, provided the essential elements of that judgment are respected. The practical arrangements made pursuant to paragraph 1 shall cease to apply pursuant to a later judgment by the courts of the Member State having jurisdiction as to the substance of the matter (Art. 48).

The fast-track procedure applies to all the judgments enforceable in the Member State of origin and recognising access rights, even if they are not final, excluding those which deny them (to which the general provisions on recognition are applicable).

Even if a national law does not provide for enforceability of a judgment granting access rights notwithstanding any appeal, the court of origin may declare that the judgment shall be enforceable and consequently may issue

the certificate to make it enforceable in a different Member State (Art. 41 par. 1).

A similar fast-track procedure is provided for the enforceability of decisions on the return of the child.

6.2. ECJ case law

- CJEU, Grand Chamber, **Case C-435/06**: scope: interpretation of the term "civil matters" under Art. 1:

Article 1(1) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, as amended by Council Regulation (EC) No 2116/2004 of 2 December 2004, is to be interpreted to the effect that a single decision ordering a child to be taken into care and placed outside his original home in a foster family is covered by the term 'civil matters' for the purposes of that provision, where that decision was adopted in the context of public law rules relating to child protection;

- CJEU **Case C-400/10** PPU, J. McB., pt. 45-52: interpretation of Art. 2:

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as not precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or

the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that Regulation;

- CJEU **Case C-497/10** PPU, *Mercredi*, pt. 62 and following: interpretation of the criterion of habitual residence (Art. 8):

The concept of 'habitual residence', for the purposes of Articles 8 and 10 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State — other than that of her habitual residence — to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.

If the application of the abovementioned tests were, in the case in the main proceedings, to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the child's presence, under Article 13 of the Regulation.

- CJEU **Case C-523/07**, pt. 31-44: interpretation of the criterion of habitual residence (Art. 8):

The concept of 'habitual residence' under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case;

- CJEU **Case C-296/10**, *Purrucker*, pt. 70 and following: relationship between Art. 19 and Art. 20:

The provisions of Article 19(2) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, are not applicable where a court of a Member State first seised for the purpose of obtaining measures in matters of parental responsibility is seised only for the purpose of its granting provisional measures within the meaning of Article 20 of that regulation and where a court of another Member State which has jurisdiction as to the substance of the matter within the meaning of the same regulation is seised second of an action directed at obtaining the same measures, whether on a provisional basis or as final measures.

The fact that a court of a Member State is seised in the context of proceedings to obtain interim relief or that a judgment is handed down in the context of such proceedings and there is nothing in the action brought or the judgment handed down which indicates that the court seised for the interim measures has jurisdiction within the meaning of Regulation No 2201/2003 does not necessarily preclude the possibility that, as may be provided for by the national law of that Member State, there may be an action as to the substance of the matter which is linked to the action to obtain interim

measures and in which there is evidence to demonstrate that the court seised has jurisdiction within the meaning of that regulation.

Where, notwithstanding efforts made by the court second seised to obtain information by enquiry of the party claiming *lis pendens*, the court first seised and the central authority, the court second seised lacks any evidence which enables it to determine the cause of action of proceedings brought before another court and which serves, in particular, to demonstrate the jurisdiction of that court in accordance with Regulation No 2201/2003, and where, because of specific circumstances, the interest of the child requires the handing down of a judgment which may be recognised in Member States other than that of the court second seised, it is the duty of that court, after the expiry of a reasonable period in which answers to the enquiries made are awaited, to proceed with consideration of the action brought before it. The duration of that reasonable period must take into account the best interests of the child in the specific circumstances of the proceedings concerned.

- CJEU **Case C-403/2009** Deticek: Art. 20:

"(...) the answer to the questions referred is that Article 20 of Regulation No 2201/2003 must be interpreted as not allowing, in circumstances such as those of the main proceedings, a court of a Member State to take a provisional measure in matters of parental responsibility granting custody of a child who is in the territory of that Member State to one parent, where a court of another Member State, which has jurisdiction under that regulation as to the substance of the dispute relating to custody of the child, has already delivered a judgment provisionally giving custody of the child to the other parent, and that judgment has been declared enforceable in the territory of the former Member State (...);

- CJEU **Case C-195/08** PPU, Rinau, pt. 90-107: admissibility of application for non-recognition of a judgment; admissibility of submissions made by the party against whom the application for non-recognition is lodged:

Except where the procedure concerns a decision certified pursuant to Articles 11(8) and 40 to 42 of Regulation No 2201/2003, any interested party can apply for non-recognition of a judicial decision, even if no application for recognition of the decision has been submitted beforehand.

Article 31(1) of Regulation No 2201/2003, in so far as it provides that neither the person against whom enforcement is sought, nor the child is, at this stage of the proceedings, entitled to make any submissions on the application, is not applicable to proceedings initiated for non-recognition of a judicial decision if no application for recognition has been lodged beforehand in respect of that decision. In such a situation, the defendant, who is seeking recognition, is entitled to make such submissions.

6.3. National cases (Italy)

6.3.1. Court of Cassation, Grand Chamber, decision no. 1984 of 13/02/2012 (Rv. 621543)

To establish the jurisdiction of a Member State in parental responsibility matters, Article 8 of Regulation no. 2001 of 27th November 2003 takes into account only the habitual residence of the child at the time the court is seised. The habitual residence is the place where the child actually and continuously leads his/her own life and not the place resulting from a purely arithmetical calculation of the time spent living in a certain place.

6.3.2. Court of Cassation, Grand Chamber, decision no. 30646 of 30/12/2011 (Rv. 620614)

According to Art. 8 of Regulation no. 2201/2003, the criterion of habitual residence of the child underlies the jurisdiction on parental responsibility matters even when the case is pending before a court dealing with the legal separation proceeding. The criterion in question, inspired to the best interests of the child and to the proximity criterion, is so relevant that the acceptance of jurisdiction in matters of legal separation cannot determine the univocal

parent's consent to the prorogation of jurisdiction in matters of parental responsibility under Art. 12 of the Regulation.

6.3.3. Court of Cassation, Grand Chamber, decision no. 3640 of 17/02/2010 (Rv. 611531)

To establish the jurisdiction in a legal separation proceeding between citizens of different Member States of the European Union, pursuant to Art. 3 of Regulation no. 2201/2003, the habitual residence is the place where the party permanently lives and has his or her own interests and personal relationships, on the basis of a factual rather than formal analysis. To determine habitual residence, the place where the party permanently leads his or her personal and professional life at the time the court is seised is the relevant criterion.

6.3.4. Court of Cassation, Grand Chamber, decision no. 22093 of 16/10/2009 (Rv. 610000)

The provisional measures adopted to protect the child under Art. 20 of Regulation no. 2201/2003 in a legal separation proceeding pending in Italy do not prevent from recognising a final judgment of legal separation previously delivered in a different Member State, considering that the grounds for non-recognition under Arts. 22 and 23 of the Regulation apply only if there is a previous final judgment of the same type. The provisional measures under Art. 20 will in fact lose their effect as soon as the court having jurisdiction as to the substance of the matter takes the appropriate measures.

7. Council Regulation (EC) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

Cristina GONZALES BEILFUSS

7.1. Introduction

The so-called Rome III Regulation¹ establishes rules about the law applicable to divorce and legal separation that are meant to supplement the rules on jurisdiction and the recognition and enforcement of judgments of Regulation Brussels II bis², in exactly the same way as Regulations Rome I³ and II⁴ do in relation to Regulation Brussels I⁵. The essential goal of Regulation Rome III is to unify choice of law rules in order to promote decisional harmony, by guaranteeing that one and the same law governs the dispute, independently of where the dispute is heard.

Since unanimity could not be reached, Rome III was, however, only adopted under enhanced cooperation. This means that the Regulation is only binding and applicable in those Member States that have voluntarily decided to participate, namely in Austria, Belgium, Bulgaria, Germany, Greece, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Portugal, Romania, Slovenia and Spain. The other Member States continue to apply their national choice of law provisions.

7.2. Enhanced cooperation

Enhanced cooperation is a mechanism open to Member States outside the areas of the Union's exclusive competences (art 20.1 TEU), and common foreign and security policy. It allows participating Member States to further the objectives of the Union by adopting acts which are only binding to those

participating. Enhanced cooperation therefore permits to unlock situations in which acts cannot be adopted following the ordinary legislative procedure. These acts are not regarded as part of the *acquis* (art. 20.4 TEU). They must therefore respect the competences, rights and obligations of those Member States which do not participate in them (art. 327 TFEU) and do not bind acceding States.

7.3. Scope of application

The Regulation contains choice of law provisions on divorce and legal separation. Unlike the parallel rules on jurisdiction contained in Regulation 2201/2003 it does not deal with marriage annulment. The law governing marriage annulment continues, therefore, to be established by the national Private international law rules of the Member States.

According to Recital 10 of the Preamble the substantive scope and enacting terms of this Regulation should be consistent with those of Regulation Brussels II bis. The Regulation therefore only covers the grounds for divorce or legal separation and excludes preliminary or ancillary matters. Art. 1.2 in consequence provides that the Regulation does not apply to (a) the legal capacity of natural persons; (b) the existence, validity or recognition of a marriage; (c) the annulment of a marriage; (d) the name of the spouses; (e) the property consequences of the marriage⁶; (f) parental responsibility; (g) maintenance obligations⁷ and (h) trusts or successions.

Since the existence, validity or recognition of a marriage is excluded from the Regulation's scope of application, even when these issues arise as preliminary questions in the context of divorce or legal separation proceedings, each participating Member State continues to apply its Private international law rules to these matters. This is particularly meaningful in connection to same-sex marriage; Participating Member States are free to deem such marriages as not valid and hence to refuse to dissolve them, if such is the position of their

national Private international law rules. This is further confirmed by the terms of article 13.

Regulation Rome III became applicable on the 21st of June of 2012 (article 21). Article 18 further specifies that it applies only to legal proceedings instituted as from 21 June 2012. In principle, the same rule also applies to agreements on the law applicable to divorce and legal separation. However effect shall also be given to an agreement on the choice of the applicable law concluded before 21 June 2012, provided that it complies with the rules on consent and material and formal validity laid down in articles 6 and 7.

7.4. The law applicable to divorce and legal separation

The most salient feature of Regulation Rome III is that it allows spouses to choose the law applicable to their divorce and legal separation. Articles 5 to 7 deal with party autonomy. If spouses do not agree on the governing law or if such agreement is not valid, article 8 applies.

1. Party autonomy

Regulation Rome III allows spouses to choose between the law of their common habitual residence, the law of their last common habitual residence provided that one spouse still resides there, the law of either spouse's nationality and the law of the forum. Before analyzing the rules established in articles 5 to 7 it seems therefore adequate to try to determine the rationale of party autonomy in this area of the law.

A) Justification for allowing party autonomy

In Recital (15) of the Preamble it is stated that increasing the mobility of citizens calls for more flexibility and legal certainty. The assumption therefore seems to be that the limited possibility to choose the law applicable that is given to spouses under article 5 of the Regulation is a flexible solution that simultaneously gives more certainty.

A limited party autonomy in the choice of law is a more flexible solution because it does not impose on the spouses a given law, that is considered to be the one corresponding to the closest connection, but allows the spouses to choose the governing law themselves, among legal systems that have a close connection to the marriage. It will therefore not be the legislator who, *in abstracto*, will select the connecting factor that leads to the law with the closest relationship to the matter, but the spouses themselves will be able to make this choice *in concreto*, in view of the circumstances of their particular case.

This solution has, however, a major drawback. When spouses make a choice of law they are not primarily concerned about selecting the law that has the closest connection to their case, but they will try to choose the law more suited to their particular circumstances and expectations. This means that they will not exclude considerations about the implications of their choice and the content of the law chosen. Therefore it is essential that the choice should be informed. Spouses will need to have sufficient information not only about the content of the law they choose but also about the content of the laws they do disregard. Only by comparing the available legal systems will they be able to make the choice that suits their circumstances and expectations best. Since unfortunately in many marriages one of the spouses has a weaker bargaining position, it should as well be made sure that the weaker party is adequately protected.

Recital (18) of the Preamble states, that the informed choice of both spouses is a basic principle of the Regulation. According to the Preamble each

spouse should know exactly the legal and social implications of the choice of the law governing their divorce or legal separation. The Preamble moreover as well points out that the possibility of choosing the applicable law by common agreement should be without prejudice to the rights of, and equal opportunities for the two spouses and that judges in the participating Member States should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded.

In Recital (17) of the Preamble it is stated that spouses can benefit from access to information concerning the essential aspects of national and Union law and of the procedures governing divorce and legal separation, which is available in the Internet-based public information system set up by Council Decision 2001/470/EC.

According to Recital (15) of the Preamble, the Regulation increases legal certainty. The main advantage of party autonomy from that point of view is probably that, once divorce or legal separation procedures are commenced, the judge will not have to determine, by applying the choice of law rule contained in article 8, which is the law that governs the dispute. However, as will be further analysed, the validity of the choice of law agreement might well be challenged and require a legal analysis.

B) Laws that can be chosen and moment at which the agreement can be made

Paragraph 1 of article 15 establishes the basic principle that spouses are free to choose the law governing their divorce or legal separation, but that this possibility is limited since they are only allowed to choose among the legal systems described in (a) to (d), namely, among the law of the State of their common habitual residence at the time the agreement is concluded, the law of the State of their last common habitual residence provided that one of them continues to reside there when the agreement is made, the law of the

State of either spouse's nationality at the time of the agreement or the law of the forum.

The legal systems mentioned under letters (a) to (d) are all connected to the divorce or legal separation. Subparagraphs (a) and (b) allow the spouses to select the law corresponding to their social environment. Subparagraph (c) allows choosing the law of the nationality of either spouse, a legal system that might be closer to the cultural origin or identity of at least one of them. The choice of the law of the forum is justified on grounds of practicality.

It should be stressed that spouses are only free to choose the law of a State⁸. A direct choice of religious rules is excluded. Such a choice would be invalid and the law governing divorce or legal separation would be determined in accordance to article 8. Whether the choice of religious rules would have any legal consequence would be determined exclusively by the law of the State that governs. The consequences of the choice of a legal system that does not provide for divorce are established in article 10. If the law chosen by the spouses does not provide for divorce, the choice is not upheld and the law of the forum applies. There is no provision dealing with the choice of a legal system that does not provide for legal separation in order to govern such separation. It could be argued that the solution of article 10 should apply by analogy and that the law of the forum should govern.

The first legal system that can be chosen corresponds to the law of the State of the spouses' habitual residence at the moment the agreement is concluded. Since the agreement can be concluded at any time during the marriage it might be a law that does not correspond to the spouses' habitual residence when divorce or legal separation proceedings are initiated, either because the spouses have changed their common habitual residence to another State after concluding the agreement, or because at the moment when the divorce or legal separation petition is filed there is no joint habitual residence of the spouses in the same State. If there is dispute among the spouses about their habitual residence at the time the agreement was

entered into, the determination of this matter might require an investigation by the competent authority.

The spouses can choose the law that corresponds to the State in which both have their habitual residence at the moment the agreement is concluded. There is no requirement that the spouses habitually reside in the same location inside that State, or that they share the same dwelling or that this habitual residence qualifies as their matrimonial home.

The concept of habitual residence is not defined in the Regulation, but has been interpreted by the ECJ in the context of the jurisdiction provision on parental responsibility contained in article 8 of Regulation 2201/2003 (Brussels II bis). According to the ruling in case C-523/07⁹ habitual residence corresponds to the place which reflects some degree of integration in a social and family environment. It is for the national court to establish the habitual residence, taking account of all the circumstances specific to each individual case. This flexible autonomous definition of the concept, that combines objective and subjective elements, should be upheld as well for the interpretation of the choice of law provisions contained in Regulation Rome III.

If at the time the agreement is concluded spouses do not reside habitually in the same State they are free to choose the law of the State in which they had their last common habitual residence, provided that one of them continues to reside in that State. If both of them have, at the time the agreement is concluded, left the State in which they had their last habitual residence they will not be able to choose this legal system anymore, regardless of the length of the period of former common habitual residence.

Spouses can as well choose the law of the nationality either of them holds at the time the agreement is concluded. There is no requirement that the spouses choose a nationality that is common to both of them, which considerably widens the possibilities given to spouses in the area of choice of

law as compared to the area of jurisdiction, where the forum is established on the basis of common nationality (see article 3 of Regulation Brussels II bis).

It is doubtful whether Recital (22) of the Preamble applies to cases of multiple nationalities that arise in connection to article 5. This paragraph of the Preamble could be interpreted to refer only to the rule established under article 8 (applicable law in the absence of choice) because it is systematically placed in connection to that provision. It should as well be noted that Recital (22) of the Preamble refers to rules in which nationality is the connecting factor. This is not the case under article 5 since this provision uses party autonomy as the connecting factor. If Recital (22) does not apply in the context of article 5, spouses would be free to choose among any of the nationalities they hold at the time the agreement is concluded.

Spouses are as well free to choose the law of the forum, which has considerable advantages from the point of view of cost- effectiveness. The Regulation does not change the system of pleading and proof of foreign law that prevails in each Member State's law. Proving the content of foreign law might increase the expenses that spouses have to bear, particularly in those Member States where foreign law is not applied *ex officio*. Choosing the law of the forum will as well reduce delays and difficulties that are ordinarily associated to the application of foreign law.

If one bears in mind the wide range of fora available for divorce and legal separation under article 3 of Regulation Brussels II bis, it is immediately apparent, that spouses will only be able to determine the State of the forum, when they file the divorce petition. The law of the forum is therefore not an option if the agreement is concluded, prior to the actual decision to divorce or separate, since under Regulation 2201/2003 it is not possible to conclude a choice of court agreement.

According to the second paragraph of article 5 spouses can conclude an agreement about the applicable law to their divorce or legal separation at any time during the marriage, but at the latest at the time the court is seised.

Agreements entered into, once the divorce or legal separation proceedings have commenced, are dealt with in Paragraph 3 of article 5 that will be analysed below.

Choice of law agreements on divorce and legal separation have to be entered into during the marriage, which seems to exclude prenuptial agreements unless they are drafted in such a way that they are deemed to be concluded after the celebration of the marriage. Post-nuptial agreements on the law applicable to divorce or legal separation are possible at any time before or after the actual break-up of the marriage. Prior agreements can be substituted by posterior ones.

The fact that spouses are able to conclude agreements about the law that should apply to their future divorce or legal separation at a moment when the break-up of the marriage is only hypothetical can be seen as an instrument that allows them to plan the consequences of such a break-up, thus contributing to an increased legal certainty. There are, however, major draw-backs since circumstances might have changed a lot once the agreement becomes effective. It could, for example, happen that the relationship no longer has an international element. Such would be the situation if a married couple of foreign nationality that has concluded an agreement choosing the law of their nationality to govern their divorce establishes its habitual residence in one State and afterwards acquires the nationality of that State and loses the prior nationality. The Regulation does not deal with such a situation. According to article 1 paragraph 1, the Regulation applies, in situations involving a conflict of laws, to divorce and legal separation. Since at the moment divorce or legal separation proceedings are commenced this is no longer the case, it could be argued that the situation does not involve a conflict of laws and, thus, that Regulation Rome III is not applicable. However, it can as well be argued that the situation was international when the agreement was concluded and that agreements that were validly concluded should be upheld.

The possibility of entering an agreement on the law applicable to divorce or legal separation ceases at the moment the court is seised, unless paragraph 3 applies. Regulation Rome III does not define when a court is deemed to be seised. There is, however, a connection of this Regulation and Regulation 2201/2003 (Brussels II bis) that is stressed in Recital (10) of the Preamble. Art. 16 of Regulation 2201/2003 provides that 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 respondent; 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 applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The third paragraph of article 5 provides that spouses may designate the law applicable before the court during the course of the proceeding, if the law of the forum so provides. Whether it will or will not be possible to enter into an agreement about the law that should govern divorce or legal separation after the court has been seised, therefore, depends on the law of the forum. The legal system that can be chosen must be one of those mentioned under letters (a) to (d) of Paragraph 1 of article 5. Agreements entered into after the court has been seised shall be recorded in court in accordance with the law of the forum.

C) Consent and material validity

Article 6 of Regulation Rome III deals with consent and material validity; article 7 is devoted to formal validity. There is no provision dealing with capacity to conclude a choice of law agreement. Paragraph 2 of Article 2, on the contrary, expressly excludes the legal capacity of natural persons even if the matter arises as a preliminary question within the context of

divorce or legal separation proceedings and in relation to choice of law agreements. The capacity to conclude a choice of law agreement is therefore governed by the law established by the Private international law rules of the forum.

According to Paragraph 1 of article 6 the existence and material validity of an agreement choosing the law that governs divorce or legal separation is determined by the law chosen. This solution is inspired by an analogous provision in the Rome I Regulation (art. 10) and has the substantial advantage of being a rather simple, straight-forward rule. As stated in Recital (19) of the Preamble, it facilitates an informed choice of the spouses and guarantees that their consent is respected, basically because the spouses can easily foresee that they need to respect the conditions established in the law they choose to govern their divorce or legal separation.

The law chosen by the spouses governs the substantial conditions that need to be fulfilled for the agreement to come into existence and be valid. The chosen law will therefore determine whether consent of the spouses is vitiated by error, undue influence, duress or any other kind of ground and which are the consequences of any vices of consent. This rule applies to the choice of law agreement as a whole and to any of its terms.

When applying national law to the existence and material validity of the agreement choosing the applicable law, Recital (18) of the Preamble should be born in mind. Judges in the participating Member States should be aware of the importance of an informed choice on the part of the two spouses concerning the legal implications of the choice-of-law agreement concluded when applying the provisions of national law that govern the existence and material validity of a choice of law agreement.

The second paragraph of article 6 contains an exception to the rule established in the first paragraph. A spouse may rely upon the law of the country in which he or she has his or her habitual residence at the time the court is seised in order to establish that he or she did not consent, if it appears

from the circumstances that it would not be reasonable to determine the effect of his or her conduct in accordance with the law chosen.

According to the wording of the provision the exception only operates if a spouse seeks to establish that he or she did not consent. It does therefore not apply *ex officio*, but only at the request of the spouse seeking to invalidate the agreement on the basis of his or her lack of consent to the agreement.

In order for paragraph 2 of article 6 to be applicable a spouse must prove that there are special circumstances that make it unreasonable to determine the effect of his conduct in accordance to the law chosen. It is for the competent authority to determine, whether the circumstances of the case render the application of the chosen law to the existence and material validity of the choice of law agreement unreasonable. The competent authority has a margin of discretion in this regard. A situation in which the application of the chosen law might appear to be unreasonable is when this law does not guarantee that the consent was given with the consenting spouse being sufficiently informed of the legal and social implications of the choice of applicable law or when the rights or opportunities of this spouse were not equal to those of the other spouse, since these are Principles that the Regulation itself considers basic (Recital (18) of the Preamble).

In case the competent authority reaches the conclusion that the application of the chosen law is unreasonable in view of the circumstances of the case, the law of the country, in which the spouse seeking to demonstrate that he or she has not consented has his or her habitual residence at the time the court is seised, applies. In practice the exception will therefore only be relied upon if the content of this law is more advantageous than that of the law it substitutes.

D) Formal validity

Article 7 deals with formal validity. It combines substantive law provisions that are established in Paragraph 1 with choice of law rules that refer to the law of participating Member States (Paragraphs 2, 3 and 4). This means that the formal validity requirements of choice of law agreements do in the end differ, depending on whether the law of a participating Member State is or is not applicable and on whether that law lays down additional formal requirements. As Recital (19) of the Preamble clarifies additional formal requirements may as well depend on whether the choice of law agreement is included in a wider marriage contract that touches upon other issues such as for example the property relationships between spouses. In many legal systems marriage contracts need to be recorded in a public deed which requires the intervention of a notary, or a legal professional fulfilling a similar function. These formal requirements apply as well to the choice of law agreement on divorce and legal separation included in such a marriage contract.

Paragraphs 2-4 of article 7 all presuppose that the spouses or at least one of them have their habitual residence in a participating Member State at the time the agreement is made. If both reside in the same participating Member State the additional formal requirements of the law of that State apply. If the spouses reside in different participating Member States it suffices if the additional requirements of the law of one of those States are complied with. If only one of the spouses habitually resides in a participating Member State when the agreement is entered into, the additional formal requirements of the law of that State have to be respected in order for the agreement to be formally valid.

The Regulation does not contain any provision that applies to the situation in which neither spouse habitually resides in a participating Member State at the time the agreement is made. This should be interpreted to mean that the formal validity of the agreement only requires that the agreement be

expressed in writing, be dated and be signed by both spouses since these are the requirements laid down by the Regulation itself.

2. The law applicable in the absence of choice

If the spouses do not enter an agreement in order to choose the law governing their divorce or legal separation or if such an agreement is invalid, article 8 applies. It establishes that divorce and legal separation shall be subject to the law of the State (a) where the spouses are habitually resident at the time the court is seised; or, failing that (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seised, in so far as one of the spouses still resides in that State at the time the court is seised; or, failing that (c) of which both spouses are nationals at the time the court is seised; or, failing that (d) where the court is seised.

The first connecting factor chosen is the law of the spouses' common habitual residence at the moment the proceedings are initiated. In many cases this will be the law of the forum since the common habitual residence is also a jurisdiction ground under Regulation Brussels II bis. Since it is not very likely that there will be a high number of agreements on the law applicable to divorce or legal separation article 8 a) will probably be the main rule that will apply in practice.

Very often however the break-up of a marriage is connected to relocations by one or both of the spouses. In such a situation the last habitual residence is only used as a connecting factor if two conditions are fulfilled. One of the spouses must have stayed in the jurisdiction and additionally no more than a year has to have passed since this last habitual residence ended. The first condition sounds familiar since it is also established for jurisdiction purposes under article 3 of Regulation Brussels II bis. The second is however a novelty. The reasons for requiring no more than a year to have passed are not explained in the Regulation's Preamble. Probably the idea behind it is that it

would not be fair to tie the spouse that has left the common habitual residence to a legal system that is no longer that of his or her new social environment, unless such change is very recent in time. From a technical perspective the rule might however give rise to difficulties, particularly in situations where the moment at which common habitual residence ended is not easily ascertainable. As stated before the rule only requires the spouses to reside in the same State, it is not necessary that they reside in the same location inside that State or that they share a dwelling or that this dwelling qualifies as their matrimonial home.

If the second connecting factor cannot be used, either because the spouses did not have a common habitual residence or because more than a year has passed since it ended or none of them continues to reside therein, the law of the spouses' common nationality is applicable. In this context Recital (22) of the Preamble becomes relevant. It establishes that where the Regulation refers to nationality as a connecting factor for the application of the law of a State, the question of how to deal with cases of multiple nationalities should be left to national law, in full observance of the general principles of the European Union.

When the spouses hold two common nationalities and none or only one of them is that of a Member State, the nationality that serves as a connecting factor under article 8 is determined according to the rules of the forum. In the case of Spain, for example, this means that article 9.9 of the Civil Code would be fully applicable. In many cases, if one of the concurring nationalities is that of the forum this will be the nationality that prevails as a connecting factor.

If both concurring nationalities are the nationalities of Member States, the situation becomes more complicated. Recital (22) of the Preamble suggests that the general Principles of European Union law come into play. These principles however only state that there can be no discrimination between the nationalities of Member states. In connection to choice of law rules this is however hardly helpful, since it is necessary to select one of these nationalities as the nationality that governs. If the non-discrimination principle is taken to

mean that the effective nationality cannot be given any preference as seems to follow from the ruling in the *Haddadi* case, although it dealt with jurisdiction where concurrence can be solved through the *lis pendens* rules, the only solution would be not to apply this connecting factor. Another possible solution would be to apply the nationality that is considered to be more effective, but to abstain from giving preference to the nationality of the forum.

In the absence of a common nationality the law that applies to divorce or legal separation is the law of the forum. As was highlighted before in connection to party autonomy the application of the law of the forum has many advantages from the point of view of cost-effectiveness.

V. Exceptions to the application of foreign law

Regulation Rome III contains two classical exceptions to the application of foreign law that can be found in almost every international choice of law instrument. According to article 11, where the Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of private international law. *Reenvoi* is thereby excluded. Article 12 contains a provision on *ordre public*. It states that the application of a provision of the law designated by virtue of the Regulation may be refused only if such application is manifestly incompatible with the public policy of the forum.

There are moreover two additional articles of the Regulation that allow not applying the law designated by the Regulation. According to article 10, where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce, or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the *forum* shall apply. Up to a certain extent this is a redundant provision since any foreign law that infringes the principle of equality not only on the grounds of sex but also, one would expect, on any other grounds, such as for example religion, would in

most cases be deemed to infringe the public policy of the forum. Article 10 is however phrased in larger terms than the traditional public policy exception and also covers a situation that might not be considered to infringe public policy, namely that of a foreign law that does not contain any provision for divorce.

Article 13 of the Rome III Regulation establishes that "nothing in the Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation". This provision means that a Member State party to the Regulation, whose law does not provide for divorce, is not obliged, by virtue of its participation, which under enhanced cooperation is voluntary, to pronounce a divorce, even when the law designated by the Regulation provides for such a divorce. After the introduction of divorce into Maltese law the provision is superfluous since there is no Member state of the European Union that does not recognize divorce.

The other part of article 13 is redundant. As we saw before, the existence, validity or recognition of a marriage is excluded from the Regulation's substantive scope of application even when these issues arise as preliminary questions in the course of divorce or legal separation proceedings. This means that such matters are subject to the Private international law rules of the forum and, hence, that the courts of that Member State will not be obliged to deem a marriage for valid for the purpose of pronouncing a divorce.

Articles 10 and 13 are provisions that can only be interpreted in political terms. They aim to take care of the concerns of certain States. Article 10 is tailored in view of the difficulties that might arise particularly in connection to Islamic law and legal systems that do not know divorce as an institution allowing the dissolution of marriage. Article 13 was designed in order to cater for the particular situation of Maltese law as the law of a participating Member state that does not recognize divorce and in order to make it blatantly clear that there is no obligation to recognize same-sex marriages contracted abroad,

even when this recognition is only limited to the purpose of pronouncing a divorce.

Part II

The Applicable Law

8. Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)-

Cristina GONZALES BEILFUSS

8.1. Introduction

The Rome II Regulation contains uniform choice-of-law provisions on non-contractual obligations that apply in situations involving a conflict of laws, that is, whenever the situation has an international dimension. The main purpose of such rules is to ensure so called decisional harmony, that is, that the same law applies irrespective of the country in which an action is brought (Recital 6 of the Preamble).

The Regulation applies in the Member States of the European Union, except Denmark (art. 1.4 and Recital 40 of the Preamble). This means that any competent authority in the Member States (with the exception of Denmark) has to apply the choice-of-law provisions contained in the Regulation. Whether the law specified by the Regulation is or is not the law of a Member State is irrelevant since the choice-of-law provisions are of so called universal application (art 3).

Regulation Rome II does not deal with the pleading and proof of foreign law. Each Member State will therefore continue to apply its internal procedural provisions in order to ascertain the contents of foreign law.

8.2. Scope

8.2.1. *Material scope*

The Regulation applies to non-contractual obligations in civil or commercial matters, irrespective of the nature of the Court or Tribunal seised.

The concept of civil and commercial matters should be defined autonomously and consistently to Regulation Brussels I and the instruments dealing with the law applicable to contractual obligations and to the case-law of the ECJ. If a situation involves a public body the matter will qualify as civil or commercial if that public body does not make use of public prerogatives. Liability of the State for acts or omissions in the exercise of State authority (*acta iure imperi*) is not covered (art.1.1 and Recital 11).

In accordance to article 1.2 certain non-contractual obligations are excluded from the scope of the Regulation. Non-contractual obligations out of family relationships or matrimonial property regimes and non-contractual relationships arising out of negotiable instruments or in connection to companies or trusts as well as non-contractual obligations arising out of nuclear damage are not included due to their special nature. The original intention had been to include violations of privacy and rights relating to personality, including defamation; no consensus could however be reached as regards these rules because the balance between respect for personality rights and freedom of press is struck differently in different countries and has constitutional implications.

8.2.2. Temporal scope

The Regulation became applicable on 11 January 2009 and applies to events giving rise to damage which occurred after that date (articles 31 and 32).

8.3. International Conventions

European Union law does not prejudice the application of international conventions on the law applicable to non-contractual obligations to which one or more Member States are parties (art. 28.1), unless such Conventions have been concluded exclusively between Member States (art. 28.2). Member States have to respect their international obligations vis a vis third

States. This is particularly meaningful as regards two conventions concluded by the Hague Conference on Private international law in 1971 and 1973, dealing respectively with the law applicable to traffic accidents and product liability. Member States that are parties to these Conventions have to continue to apply them. In the case of the Hague Convention on the law applicable to traffic accidents this concerns Austria, Belgium, Croatia, Czech Republic, France, Latvia, Lithuania, Luxemburg, Netherlands, Poland, Slovakia, Slovenia and Spain. The Hague Convention on the law applicable to product liability continues to apply in Croatia, Finland, France, Luxemburg, Netherlands, Slovenia and Spain. More information on these Conventions is available on www.hcch.net. Member States not bound by these Conventions will apply the Rome Regulation.

8.4. Party autonomy

The Regulation allows parties to choose the applicable law to a non-contractual obligation if the agreement is entered into after the event giving rise to damage occurred or before such event where all the parties are pursuing a commercial activity (art.14). Party autonomy is not permissible in connection to non-contractual obligations arising out of acts of unfair competition or acts restricting competition (see art. 6.3) and out of acts of infringement of intellectual property rights (art. 8).

The choice has to be either express or be demonstrated with reasonable certainty by the circumstances of the case. It cannot prejudice the rights of third parties. The Preamble requires that courts respect the intentions of the parties whenever they have to decide about the existence of agreements. It as well recommends that protection should be given to weaker parties by imposing certain conditions on the choice. These conditions are however not further specified in the Regulation and would therefore need to be based on national law.

The Regulation permits to choose any law regardless of whether it is or is not connected to the case. There are however two provisions in order to counteract an illegitimate choice. If the situation is internal, that is, if all the elements relevant are connected to a country other than the country whose law has been chosen, the rules of the law of that other country that cannot be derogated by agreement continue to apply. The same rule applies if the event giving rise to the damage is located in one or more of the Member States and the law of a Third State is chosen. Then the choice shall not prejudice the application of provisions of Community law as implemented by the law of the forum.

8.5. Tort or delict

The Regulation includes provisions on special types of torts or delicts and a general provision that applies to all other torts or delicts.

8.5.1. *Special provisions*

There are special rules on product liability, unfair competition and acts restricting free competition, environmental damage, infringement of intellectual property rights and industrial action.

A) Product liability

If the person, claimed to be liable, and the person sustaining damage have their habitual residence in the same country at the time when the damage occurs the law of that country applies (art 5.1 and 4.2). According to article 23.1, in the case of companies or other bodies the habitual residence is the place of central administration; where the event giving rise to the damage or the damage arises in the course of operation of a branch, agency or any establishment, the place where that branch or establishment is situated is equivalent to the place of central administration.

In other cases the law applicable is that of the country where the person sustaining the damage has his or her habitual residence when the damage occurred if the product was marketed in that country. Failing that, the law of the country in which the product was acquired provided that the product was marketed there, applies. Failing that the law of the country in which the damage occurred governs if the product was marketed in that country.

The objectives of these rules are explained in Recital (20) of the Preamble. The main idea is to spread the risks inherent in a modern high-technology society by protecting the interests of both parties.

The provision also contains a so called foreseeability clause: if the person claimed to be liable could not foresee that the product would be marketed there where the person sustaining the damage has his or her habitual residence, the product was acquired or the damage occurred the law of this person's habitual residence governs. The burden of proof is on the person claimed to be liable.

Article 5 of the Regulation contains as well an escape clause that allows applying the law of a country that is more closely connected to the claim. The use of such an escape clause should be exceptional because the provision requires it to be clear from all the circumstances of the case that the tort or delict is more closely connected to a law other than that that governs. An example is given by the provision: a manifestly closer connection might be based on a pre-existing relationship between the parties such as a contract. The competent authority has however discretion in order to decide whether this is or is not the case on the basis of the particular circumstances of the case. The escape clause can be applied ex officio even when none of the parties pleads its application.

B) Unfair competition

Article 6 contains special rules on unfair competition and acts restricting free competition.

According to the first paragraph the applicable law to an act of unfair competition is the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. In this context it is worth highlighting that the Regulation does not require that the damage has already arisen but applies also to non-contractual obligations that are likely to arise and therefore covers so-called preventive actions (see art. 2.2).

Whenever the act of unfair competition only affects the interests of one competitor the special rule is not applicable. The governing law will therefore be determined according to the general rule established under art. 4. The concept of an act of unfair competition against only one competitor is somehow contradictory since any act that qualifies as an act of unfair competition always has a public or collective dimension. An example of such an act could be an act of sabotage, where the intention is to damage one competitor only by directly addressing an important sector of its customers.

Paragraph 3 deals with non-contractual obligations arising out of a restriction of competition that is prohibited by EU law or by the law of a Member State. Restrictions of competition 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. Non-contractual obligations arising out of a violation of competition law are governed by the law of the country where the market is or is likely to be affected.

If the act restricting competition affects the market of 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. This means that the person seeking compensation can either choose to base its claim on a variety of different laws corresponding to the countries where the markets are affected (so-called multi-state tort) or applying the lex fori provided that the latter is substantially connected with the case. The aim of such rule is clearly to facilitate the claim since it would in most cases be difficult and expensive to have to plead and prove a variety of foreign laws while the application of the lex fori is covered by the general principle "iura novit curiae".

Where the claimant sues more than one defendant at the domicile of one defendant, in accordance with the applicable rules on jurisdiction (see art. 6.1 of Regulation Brussels I) the choice of the law of the forum is further restricted. 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. The aim of this rule is to prevent excessive forum and law shopping which would occur if the claimant were allowed to pick out a defendant in a country whose law is favourable in order to be able to choose this law even when the acts presumably committed by the other defendants did not affect the market corresponding to the country whose law is chosen

C) Environmental damage

Article 7 deals with non-contractual damage arising out of environmental damage. Environmental damage means 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 (see Recital (24) of the Preamble). The provision covers as well damage sustained by persons or property as a result of environmental damage.

Art. 7 is clearly inspired by article 174 of the Treaty, which as the Preamble (see Recital no 25) specifies, fully justifies discriminating in favour of the person sustaining the damage. It therefore allows the person sustaining the damage to choose between the application of the *lex loci damni*, that is the law of the country where the damage occurred, or the application of the law of the country where the event giving rise to the damage occurred. The implication is that the claimant will regularly choose the law that is more favourable to his or her interests, which will be the law more protective to the environment. If the claimant does not plead the application of the law of the place where the event giving rise to the damage occurred the *lex loci damni* applies. 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. If the place where the event giving rise to the damage occurred and the place where the damage was sustained are located in the same country the claimant will have no choice.

D) Infringement of Intellectual property rights

Article 8 contains a choice of law provision about the infringement of intellectual property rights. Non -contractual obligations arising from such infringement are governed by the law of the country for which protection is claimed. Recital (26) of the Preamble specifies that 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.

Paragraph 2 contains a special provision for non-contractual obligations arising from an infringement of a unitary Community intellectual property right, such as the Community trademark. 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.

E) Industrial action

Article 9 of Regulation Rome II contains a special conflict-of-laws provision as regards 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. Recital (27) of the Preamble clarifies that the concept of industrial action is not to be interpreted autonomously and is governed by each Member State's internal rules. This means that it is up to the law of the country where the action has been taken or is about to be taken to determine whether an action qualifies as an industrial action. The Recital gives some examples of an industrial action in referring to strikes and lockouts and does as well specify the aim of provisions on industrial action which are intended to protect the rights and obligations of workers and employers.

The law that applies to industrial action is the law of the country, where the action is to be or has been taken, unless the person claimed to be liable and the person sustaining the damage, both have their habitual residence in the same country. In such a case the law of that country applies.

Recital (28) of the Preamble further specifies that the special rule on industrial action 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. These issues are outside the scope of the law applicable.

8.5.2. General Provision

The choice of law provision that applies whenever the tort cannot be qualified as pertaining to one of the special categories discussed above is laid down in art.4. The general rule is the application of the law of the country where the damage occurred, regardless of whether the event giving rise to the damage occurred in the same or in a different country. The rules of safety

and conduct which were in force at the place and time of the event giving rise to the liability can however be taken into account when it comes to assessing the conduct of the person claimed to be liable. The indirect consequences of the event are not relevant. The Preamble further specifies that 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.

If the alleged tortfeasor and the person claiming to have sustained the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country applies. According to art.22 the habitual residence of companies and other bodies, corporate or unincorporated, is the place of central administration. the habitual residence of a natural person acting in the course of his or her business activity is his or her principal place of business.

Article 4.3 contains an escape clause that establishes that 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 applies. It gives an example of such a closer connection by referring to cases in which that parties had a pre-existing relationship through contract which is closely connected with the tort/delict in question. The escape clause is to be applied restrictively as is apparent from its wording. It involves a certain amount of discretion when it comes to establishing the existence of such a closer relationship. If the competent authority however establishes that there is such a closer relationship it must however apply the law of that other country.

8.6. Unjust enrichment, negotiorum gestio and culpa in contrahendo

Chapter III of the Regulation contains special rules on unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.

8.6.1. Unjust enrichment

Article 10 contains a rule on unjust enrichment, which is not further defined in the Regulation or its Preamble. The concept should however be given an autonomous interpretation. The definition given by Draft Common Framework of Reference in article VII- 1: 101 might be helpful. It captures the basic principle that a person who obtains an enrichment that is attributable to another person's disadvantage is obliged to reverse that enrichment unless it is justified.

Article 10.1 deals with unjust enrichment concerning a relationship existing between the parties that arises either out of contract or out of tort or delict and is closely connected with that unjust enrichment. Such an unjust enrichment is governed by the law that governs that relationship.

Where the law applicable cannot be determined according to paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to the unjust enrichment occurs, the law of that country applies (art. 10.2). In case the parties have not their habitual residence in the same country the law of the country in which the unjust enrichment took place governs. (art. 10.3).

Art. 10.4 contains an escape clause that allows to apply a law other than that resulting from the former paragraphs where it is clear from all the circumstances of the case that the obligation arising out of unjust enrichment is manifestly more closely connected to law of another country. The law of that country applies. The escape clause is to be applied restrictively.

8.6.2. *Negotiorum gestio*

Negotiorum gestio is defined in art. 11.1 as an act performed without due authority in connection to the affairs of another person. If a non- contractual obligation in connection to such *negotiorum gestio* concerns a relationship existing between the parties, such as one arising out of a contract or a tort or

delict and is closely connected to such relationship, the law governing that relation applies. Failing that, where the parties have their habitual residence in the same country when the event giving rise to damage occurs, the law of that country governs. If the parties do not have their habitual residence in the same country the law of the country in which the act took place becomes applicable.

8.6.3. *Culpa in contrahendo*

According to Recital (30) *Culpa in contrahendo* has to be given an autonomous interpretation, which should not necessarily be interpreted within the meaning of national law. It includes the violation of the duty of disclosure and the break-down of contractual negotiations and covers only non-contractual obligations that have a close link with the dealings prior to the conclusion of a contract. It would thus not cover a personal injury suffered while a contract is being negotiated.

Culpa in contrahendo is governed by the law that applies to the contract. If a contract is not concluded the law applicable is that that would have governed the contract had it been entered into. This means that in order to determine the law applicable to *culpa in contrahendo* it is actually necessary to resort to the Rome I Regulation.

Where it is not possible to determine the law that governs or would govern the contract because, for example the negotiations broke off before the type of contract had been determined, paragraph 2 of article 12 becomes applicable. The law governing *culpa in contrahendo* is thus the law of the country where the damage occurs (irrespective of where the event giving rise to the damage occurred and irrespective of where the indirect consequences of that event occurred. Alternatively the competent authority can decide to apply either the law of the country where the parties had their habitual residence at the time when the event giving rise to the damage occurs. If there is a law manifestly more closely connected to the situation

than that of the place where the damage occurred or that corresponding to the country here both parties were habitually resident the law of the country with a closer relation can be applied.

8.7. Common rules

Chapter V contains common rules that apply both to torts and delicts and to unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.

Art. 15 contains a list of the issues covered by the law applicable. The list is not exhaustive.

Art. 16 deals with overriding mandatory provisions that is provisions that are mandatory regardless of which is the applicable law. The Regulation does not restrict the application of the overriding mandatory provisions of the forum.

Art. 17 refers to the rules of safety and conduct of the law of the place where the event giving rise to the damage occurred. It becomes relevant when the law applicable is not the law of that place and allows taking them into account as a matter of fact and insofar as appropriate in assessing the conduct of the person claimed to be liable. According to Recital (35 O of the Preamble the term " rules of safety and conduct" refers to all regulations having any relationship to safety and conduct, including, for example, road safety rules.

Article 18 deals with the direct action of the person having suffered damage against the person claimed to be liable. A direct action is possible if either the law applicable to the tort or the law applicable to the insurance contract so provides.

Article 19 is about subrogation and applies 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 already satisfied that duty. The law which governs the third person's duty to satisfy the creditor determines whether and to which extent the third person is entitled to exercise against the debtor the

rights which the creditor had against the debtor, even though the rights of the creditor against the debtor are governed by another law.

Article 20 is about multiple liability and establishes that 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 or part of the claim, the question of that debtor's right to demand compensation from the other debtors is governed by the law that applies to that debtor's obligation towards the creditor.

Part III.

New steps in the judicial cooperation in civil and commercial matters

9. Regulation (EU) N. 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.

Arturo PICCIOTTO

9.1. Introduction.

The European 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.

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 thus essential, and 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).

As you have seen before (up to Part I, Chapter I, Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), Council Regulation (EC) N. 44/2001 ("Brussels I") is the matrix of European judicial cooperation in civil and commercial matters. It lays down uniform rules to settle conflicts of jurisdiction and facilitate the free circulation of judgments, court settlements and authentic instruments in the European Union. It replaced the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, as amended by

several conventions on the accession of new Member States to that Convention⁷².

In accordance with article 73⁷³ of the Regulation N. 44/2001 (hereafter: "the Regulation"), the Commission of the European Union, on 21.4.2009, prepared a **report** on the application of the Regulation to the Parliament, on the basis of general studies and information on the practical application of the Regulation itself.

The report concluded that, in general, the operation of that Regulation was satisfactory, but that it was 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 were to be made to that Regulation it should, in the interests of clarity, have been recast.

A **green paper** has accompanied the report, with the purpose to launch a broad consultation among interested parties, calling on all interested persons to send their comments on possible ways to improve the operation of the Regulation, with respect to the points raised in the report.

In its general evaluation of the Regulation, the report noted that the Regulation has facilitated cross-border litigation through:

- ✓ an efficient system of judicial cooperation based on comprehensive jurisdiction rules;
- ✓ the coordination of parallel proceedings;
- ✓ the circulation of judgments.

⁷² Regulation N. 44/2001 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 Decision 2006/325/EC¹, the Community concluded an agreement with Denmark ensuring the application of the provisions of Regulation N. 44/2001 in the Member State. The 1988 Lugano Convention, a parallel convention to the 1968 Brussels Convention, was concluded in 1988, and it's known as the Lugano Convention: it was signed between the Member States of the European Communities and certain EFTA States. The 1988 Lugano Convention was revised by the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Lugano on 30 October 2007 by the Community, Denmark, Iceland, Norway and Switzerland ('the 2007 Lugano Convention').

⁷³ Article 73 states: "no later than five years after the entry into force of this Regulation, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, if need be, by proposals for adaptations to this Regulation".

It has been highly appreciated among practitioners as an useful instrument for European integration. Nevertheless, the Commission in its report to the European Parliament, the Council and the European Economic and Social Committee on the application of the Regulation, on April 2009, has considered that the functioning of the Regulation may be improved, particularly regarding:

A. the abolition of the *exequatur* procedure in all matters covered by the Regulation. As regards the existing *exequatur* procedure, in the opinion of the Commission, first instance proceedings before the courts in the Member States tend to last even more than 4 months, and longer if the application is incomplete. Even if most applications for a declaration of enforceability are successful (between 90% and 100%), appeal proceedings may last between one month and three years, depending on the different procedural cultures in the Member States and the workload of the courts: the ground of refusal of recognition and enforcement most frequently invoked is the lack of appropriate service pursuant to Article 34. It has seemed extremely rare, in civil and commercial matters, that courts would apply the public policy exception with respect to the substantive ruling by the foreign court. For these reasons the Commission proposed the abolition of the *exequatur*.

B. The operation of the Regulation in the international legal order. As far as access to justice is concerned, the absence of harmonized rules on subsidiary jurisdiction ought to be cause of inequality, particularly in situations where a party would not get a fair hearing or adequate protection before the courts of third States. The absence of common rules determining jurisdiction against third State defendants may compromise the application of mandatory Community legislation, for example on consumer protection, data protection or product liability. In addition, the absence of common rules on the effect of third State judgments in the Community may lead to situations where third State judgments are recognised and enforced even where such judgments

are in breach of mandatory Community law or Community law provides for exclusive jurisdiction of Member States' courts. That's why the Commission willed to extend the operation of the Regulation;

C. Choice of court. In the opinion of the Commission, it must be avoided that a choice of court agreement may be considered valid in one Member State and invalid in another. This happens because in some instances, besides the uniform conditions laid down in the Regulation, the consent between the parties is made subject, on a residual basis, to national law, determined either by reference to the *lex fori* or to the *lex causae*. The existence of parallel proceedings may lead to delays, and, in some cases, a party may make use of such delays to effectively frustrate a valid choice of court agreement, thereby creating an unfair commercial advantage for itself. The Commission proposed to sign the Convention on choice of court agreements that was concluded on 30 June 2005 under the auspices of the Hague Conference on Private International Law: in its opinion, a coherent application of the rules of the Convention and those of the Regulation should have been ensured. Thus, the main question is whether it's appropriate to maintain two different legal regimes, even in coordinating jurisdiction between the courts of Member States, depending on whether or not one of the parties is domiciled in a third State;

D. Industrial property. Industrial property litigation is one of the areas where parties have attempted abusive tactics ("*torpedoes*"), by starting proceedings before another court which usually lacks jurisdiction, to pre-empt the exercise of jurisdiction by a competent court: often these States are the ones where the proceedings to decide on the jurisdiction issue and/or on the merits take a long time. "*Torpedoes*" are used also with respect to counterclaims based on the invalidity of an industrial property right such as a patent raised in infringement actions. Defendants in infringement proceedings may effectively block these proceedings by raising, as a defence, the alleged invalidity of the patent, advantage of the fact that

proceedings concerning the validity of patents must be brought before the courts of the Member State in which the patent has been registered. Therefore the Commission proposed important new provisions;

E. Provisional measures. The Commission took note of the opinion of the Court of Justice (Case C-125/79, *Denilauler*) about protective measures ordered without the defendant being summoned to appear and which are intended to be enforced without prior service of the defendant: according to this case-law, such *ex parte* measures fall outside the scope of the recognition and enforcement system of the Regulation. It was not entirely clear, however, whether such measures can be recognised and enforced on the basis of the Regulation if the defendant has the opportunity to contest the measure subsequently. The ECJ expressed negative opinion also with respect to protective orders aimed at obtaining information and evidence (Case C-104/03, *St. Paul Dairy Industries NV*). Further difficulties have been reported for the issuance of provisional measures ordered by a court which does not have jurisdiction on the substance of the matter⁷⁴;

F. The interface between the Regulation and arbitration. The Commission observed that parallel court and arbitration proceedings arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court; procedural devices under national law aimed at strengthening the effectiveness of arbitration agreements (such as anti-suit injunctions) should be incompatible with the Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Regulation (Case C-185/07, *West Tankers*). Other issues were relevant, in the opinion of the Commission, about the interface between the Regulation and

⁷⁴ Concerning provisional, including protective measures, the proposal for the Regulation of the European Commission 14 December 2010 provides for the free circulation of those measures only which have been granted by a court having jurisdiction on the substance of the case, including – subject to certain conditions – of measures which have been granted *ex parte*. By contrast, the proposal prevents the circulation of provisional measures ordered by a court other than the one having jurisdiction on the substance, thereby preventing the risk of abusive forum-shopping.

arbitration, also because the recognition and enforcement of judgments merging an arbitration award is uncertain.

These and other issues found expression in the 14 December 2010 **proposal** for the Regulation of the European Commission, but it's relevant to keep in mind that not all of them have been accepted by the Parliament.

The European Commission observed that the consultation of stakeholders and a number of legal and empirical studies commissioned by itself revealed a number of deficiencies in the current operation of the Regulation, which should be remedied. Essentially, four main shortcomings could be identified, thus modifying the previous report seen before:

A. the procedure for recognition and enforcement of a judgment in another Member State ("*exequatur*") remains an obstacle to the free circulation of judgments which entails unnecessary costs and delays for the parties involved and deters companies and citizens from making full use of the internal market;

B. access to justice in the EU is overall unsatisfactory in disputes involving defendants from outside the EU. With some exceptions, the Regulation N. 44/2001 only applies where the defendant is domiciled inside the EU: otherwise jurisdiction is governed by national law⁷⁵. The diversity of national law could lead to unequal access to justice for EU companies in transactions with partners from third countries: some can easily litigate in the EU, others cannot, even in situations where no other court guaranteeing a fair trial is competent. In addition, where national legislation does not grant access to court in disputes with parties outside the EU, the enforcement of mandatory EU law protecting (e.g.: consumers, employees or commercial agents) is not guaranteed;

⁷⁵ These considerations are often founded on the ECJ case-law. In Case C-412/98 (Josi), the Court clarified that the jurisdiction rules of the Regulation (previously the Convention) apply in a dispute between a defendant domiciled in a Member State and a claimant domiciled in a third State. As a result, defendants domiciled in the Member States may rely on the protection offered by the Regulation in disputes involving parties domiciled in third States. In Case C-281/02 (Owusu), the Court held that the rules of the Regulation, in particular the basic rule of the jurisdiction of the courts of the defendant's domicile, are mandatory in nature and their application cannot be set aside on the basis of national law. This is the case, not only in relation to other Member States, but also when the dispute is connected to a third State and shows no other connecting factors to other Member States

C. the efficiency of choice of court agreements needs to be improved. Currently, the Regulation obliges the court designated by the parties in a choice of court agreement to stay proceedings if another court has been seised first. This rule enables litigants acting in bad faith to delay the resolution of the dispute in the agreed forum by first seizing a non-competent court, with additional costs and delays, undermining the legal certainty and predictability of dispute resolution which choice of court agreements should bring about⁷⁶.

D. as the efficiency of choice of court agreements, also the interface between arbitration and litigation needs to be improved. Although arbitration is excluded from the scope of the Regulation, however, by challenging an arbitration agreement before a court, a party may effectively undermine the arbitration agreement and create a situation of inefficient parallel court proceedings, which may lead to irreconcilable resolutions of the dispute. As seen before, this leads to additional costs and delays, undermines the predictability of dispute resolution and creates incentives for abusive litigation tactics.

The summary⁷⁷ of the proposed action was:

- ✓ abolition of the intermediate procedure for the recognition and enforcement of judgments (*exequatur*) with the exception of judgments in defamation cases and judgments given in collective compensatory proceedings;
- ✓ extension of the jurisdiction rules of the Regulation to disputes involving third country defendants, including regulating the situations where the same issue is pending before a court inside and outside the EU;

⁷⁶ The understood reference is to the tactic of the '*Torpedo actions*', often used to thwart a jurisdiction agreement according to Art. 23 Brussels I Regulation. In the *Gasser* case (C-116/02), the ECJ had ruled that even where the court second seised had exclusive jurisdiction according to a jurisdiction agreement, it must nevertheless stay the proceedings until the court first seised has decided on its jurisdiction. This ruling had opened up a debate about the *lis-pendens* rule, according to which the Commission proposed, and the European legislator accepted, to introduce an exception to the *lis-pendens* rule for jurisdiction agreements under Art. 31 (2) of Regulation (EU) N. 1215/2012 that will finally bring an end to the "*Torpedo actions*" in connection with jurisdiction agreements.

⁷⁷ You can find this and other information at:

http://ec.europa.eu/prelex/detail_dossier_print.cfm?CL=en&DosID=199991

- ✓ enhancement of the effectiveness of choice of court agreements;
- ✓ improvement of the interface between the Regulation and arbitration;
- ✓ better coordination of proceedings before the courts of Member States;
- ✓ improvement of access to justice for certain specific disputes;
- ✓ clarification of the conditions under which provisional and protective measures can circulate in the EU.

9.2. Instruments and Case-law.

9.2.1. Instruments

Below will be shown the main differences between the Regulation and its recast, the Regulation N. 1215/2012, regarding more particularly the Chapter I (Scope and definitions).

Article 1 now provides that the Regulation shall not extend, in particular, to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). This new provision dues to ECJ decision (C-292/05, *Lechouritou*), according to which *"on a proper construction of the first sentence of the first paragraph of Article 1 of the Brussels Convention, 'civil matters' within the meaning of that provision does not cover a legal action brought by natural persons in a Contracting State against another Contracting State for compensation in respect of the loss or damage suffered by the successors of the victims of acts perpetrated by armed forces in the course of warfare in the territory of the first State"*.

Article 1, point a) and e) of the Regulation, besides matrimonial relationship, shall not apply either to rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship having comparable effects to marriage, nor to maintenance

obligations arising from a family relationship, parentage, marriage or affinity. The provision dues to the fact that in several Member States marital and non-marital relationships have been admitted or regulated by law. Moreover, the adoption of Regulation N. 4/2009, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, has almost fully ruled the subject.

As far as wills and succession are concerned, including maintenance obligations arising by reason of death, the exclusion depends on the adoption of Regulation N. 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.

Regulation N. 1215/2012 now lays down a definition of 'judgment'. According to article 2, '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. Disagree with the Commission's proposal, the term 'judgment' 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. The result is that *inaudita altera parte* measures won't be covered by any provision of the Regulation. After the recast, article 31 of the Regulation has become now article 35 of Regulation N. 1215/2012: substantially, nothing is changed. Nevertheless, recital n. 25 suggests that the notion of provisional/protective measures should include 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. Unlike the Commission's proposal, the Regulation does not include measures which are not of a protective nature, such as measures ordering the hearing of a

witness. This provision dues to ECJ decision⁷⁸, according to which a measure ordering the hearing of a witness for the purpose of enabling the applicant to decide whether to bring a case, determines whether it would be well founded and assess the relevance of evidence which might be adduced in that regard, is not covered by the notion of “*provisional, including protective, measures*”.

A new special jurisdiction has been introduced in Article 7 (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. It's relevant to observe that the Commission proposed the creation of a forum for claims of rights *in rem* at the place where moveable assets are located, and this final is a modest result.

Unlike arbitration, in order to enhance the effectiveness of exclusive choice-of-court agreements provided in Article 25 and to avoid abusive litigation tactics, it has been provided for an exception to the general *lis pendens* rule in order to deal satisfactorily with particular situations, 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 shall 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 provision is now contained in Article 31 (2) of the Regulation recast, according to which “*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*

⁷⁸ C-104/03, St. Paul Dairy Industries NV, seen before.

seised, *any court*⁷⁹ 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". Logically, Article 31 (2) provides that "Where the court designated in the agreement has established jurisdiction in accordance with the agreement, *any court*⁸⁰ of another Member State shall decline jurisdiction in favour of that court".

In addition to this innovations and others below, the final result, probably, has been unsatisfactory if compared with the expectations.

Firstly, as far as the extension of jurisdiction rules to disputes involving third country defendants is concerned, this idea has been abandoned.

In addition, despite of the proposal the Regulation N. 1215/2012 shall not apply to arbitration. Nothing in the Regulation 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. Nevertheless, Article 73 (2) provides now that "This Regulation shall not affect the application of the 1958 New York Convention". The "Torpedo Actions" problems still remain in the arbitration matters.

Certainly, the abolition of any procedure for the recognition and enforcement of judgments (*exequatur*), together with the enlargement of the concept and the definition of judgement⁸¹, implement in full of Article 36, according to which "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being

⁷⁹ I.e.: also the court first seised.

⁸⁰ Ut supra.

⁸¹ Article 2 of the Regulation N. 1215/2012 now provides that "'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". Accordingly to the purposes of Chapter III (recognition and enforcement), 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of the Regulation has jurisdiction as to the substance of the matter, but not includes 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.

required". Furthermore, provision under Article 53 plays an important role, to the extent that the certificate issued by the court of origin entails any judgement, even if provisional. Actually, the form in Annex I contains much more information than the previous one contained in Annex V of the Regulation N. 44/2001, as far as the enforceability of the judgement is concerned. The final result is not too far from the discipline of the European Enforcement Order Certificate, issued pursuant Regulation N. 805/2004.

To ensure rapid and simple recognition and enforcement of judgments given in a Member State, is essential the provision under Article 40, according to which *"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"*⁸². Before it, is also relevant the disposition in 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"*) that marks the end of the procedure for the declaration of enforceability (Article 41 *et seq.* of Regulation N. 44/2001)

There are no substantial modifications as far as the refusal of recognition and enforcement of judgements (Section III) is concerned, except the new provision regarding conflicts of judgements with jurisdiction rules over individual contracts of employment (Chapter II, Section V). Nevertheless, a great change is set down in Article 50, according to which not only the decision on the application for refusal of enforcement may be appealed, but also the decision given on the appeal may, only 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.

Another new rule is contained in Article 54. It lays down that *"If a judgment contains a measure or an order which is not known in the law of*

⁸² It's relevant to remind that ECJ (Case C-119/84, Capelloni) ruled that article 39 (of the Brussels Convention of 1968) *"does not prevent the party against whom those measures have been applied from taking legal proceedings in order to secure, by recourse to the appropriate procedures laid down in the national law of the court dealing with the matter, adequate protection of the rights which he alleges to have been infringed by the measures in question"*.

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", provided that such adaptation shall not result in effects going beyond those set forth by the law of the Member State of origin. Obviously, the adaptation may be challenged before a court. The jurisprudence has observed that the expression "*to the extent possible*" may suggest that adaptation can be unsuccessful if the law of the Member State in which enforcement is sought does not know such measures. But it's relevant to keep in mind the opinion of Advocate General Eleanor SHARPSTON (Case C-256/09, Purucker, § 144) that "*The present Regulation – unlike the Brussels Convention and Regulation No 44/2001 – specifically contemplates communication between courts, facilitated where necessary by the central authorities of the relevant Member States. It is in conformity with the spirit of mutual cooperation which underpins the Regulation for such communication to extend to all matters which can facilitate or expedite proceedings concerned with the recognition or enforcement of judgments...*". So it's undoubted that every effort shall be done before ruling out adaptation.

We can therefore conclude that there has not been such "universalization" of the Regulation as extensive as the Commission had hoped. In fact, Article 6 (1), now provides that "*If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall ... be determined by the law of that Member State*", subject to Article 18 (1) for matters relating to individual contracts of employment, Article 21(2) for matters relating to individual contracts of employment, and Articles 24 (exclusive jurisdiction) and 25 (prorogation of jurisdiction). These exceptions have been set for 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 the Regulation shall apply regardless of the defendant's domicile. As the Commission observed, the absence of common rules determining jurisdiction against third State

defendants may jeopardize the application of mandatory Community legislation.

Finally, transitional provisions have been laid down to ensure continuity between the 1968 Brussels Convention, the Regulation and its recast, Regulation N. 1215/2012. Article 66 now provides that 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. Notwithstanding Article 80, Regulation N. 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.

9.2.2. Case Law

By reference to "Torpedo actions" (art. 21 of the Brussels Convention, i.e. Article 23 Brussels I Regulation and Article 25 of Brussels I recast), according to the ECJ's established case-law (C-116/02 Case Gasser, § 54) "*Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction*".

It's relevant to observe that, before the recast of the Regulation N. 44/2001, the ECJ (C-438/12 Case Weber) has recently ruled above this question (*inter alia*):

"Is the court second seised, when making its decision under Article 27(1) of Regulation No 44/2001, and hence before the question of jurisdiction is decided by the court first seised, obliged to ascertain whether the court first seised lacks jurisdiction because of Article 22(1) of Regulation No 44/2001, because such lack of jurisdiction of the court first seised would, under Article 35(1) of Regulation No 44/2001, lead to a judgment of the court first seised not being recognised? Is Article 27(1) of Regulation No 44/2001 not applicable for

the court second seised if the court second seised comes to the conclusion that the court first seised lacks jurisdiction because of Article 22(1) of Regulation No 44/2001?"

The following paragraphs outline the decision.

§ 48 By that question, which it is appropriate to examine second, the referring court asks essentially whether Article 27(1) of Regulation No 44/2001 must be interpreted as meaning that, before staying proceedings in accordance with that provision, the court second seised is required to examine whether, by reason of the failure to have regard to the exclusive jurisdiction laid down in Article 22(1) thereof, a judgment on the substance by the court first seised will not be recognised in the other Member States, in accordance with Article 35(1) of that regulation.

§ 49 It is clear from the wording of Article 27 of Regulation No 44/2001 that, in a situation of lis pendens, any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established and, where that jurisdiction is established, it must decline jurisdiction in favour of that court.

§ 52 Having subsequently been asked about the relationship between Article 21 of the Brussels Convention and Article 17 thereof, relating to exclusive jurisdiction pursuant to a jurisdiction clause, which corresponds to Article 23 of Regulation No 44/2001, it is true that the Court held in Gasser that the fact that the jurisdiction of the court other than the court first seised is assessed under Article 17 of that Convention cannot call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

§ 53 However, as stated in paragraph 47 of the present judgment, and unlike the situation in case which gave rise to the judgment in Gasser, in the present case exclusive jurisdiction has been established in favour of the court second

seised pursuant to Article 22(1) of Regulation No 44/2001, which is in Section 6 of Chapter II thereof.

§ 54 According to Article 35(1) of that regulation, a judgment is not to be recognised in another Member State if it conflicts with Section 6 of Chapter II of that regulation, relating to exclusive jurisdiction.

§ 56 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.

§ 57 Any other interpretation would run counter to the objectives which underlie the general scheme of Regulation No 44/2001, such as the harmonious administration of justice by avoiding negative conflicts of jurisdiction, the free movement of judgments in civil and commercial matters, in particular the recognition of those judgments.

§ 60 In the light of all of the foregoing considerations, the answer to the fourth question is that Article 27(1) of Regulation No 44/2001 must be interpreted as meaning that, before staying its proceedings in accordance with that provision, the court second seised must examine whether, by reason of a failure to take into consideration the exclusive jurisdiction laid down in Article 22(1) of that regulation, a decision on the substance by the court first seised will be recognised by other Member States in accordance with Article 35(1) of that regulation.

The Regulation N. 1215/2012 now provides (recital 21) that “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". The above mentioned case-law is already aligned with this indication.

As far as the Italian case-law is concerned, we can define it ambiguous, at the moment.

Recently, the Italian Supreme Court (Case n. 14508/2013, Palomar Medical Technologies Inc.) held the existence of the Italian jurisdiction in relation to the application for a negative declaration regarding the declaration of counterfeiting of industrial products covered by European patent, applied by a foreign company in respect of foreign companies with no offices in Italy. The Italian Supreme Court deemed it necessary to extend jurisdiction also to the German part of the European patent, by considering such a dispute falling within the scope of Article 5 (3) of the Regulation 44/2001, as interpreted by the European Court of Justice, in Case C-133/11.

This decision represents a *revirement* of the previous decisions of the Supreme Court on the same issue, and could facilitate the bringing of "*Torpedo actions*".

On the other hand, the Milan Tribunal Court (Case n. 1143/2014) held that each national part of the European patent produces its effects only on the territory of the State to which it portion relates, and can only be defined counterfeit in that territory.

It cannot be excluded that the Italian Supreme Court could change its case-law in future.

10. The Proposal for a Regulation of the european parliament and of the council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings

Diana UNGUREANU

10.1. Need for a revision of the Insolvency Regulation

Article 46 of Regulation 1346/2000 stipulates that no later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation.

On the 23.03.2011, the Legal Affairs Committee held a workshop on "Harmonisation of insolvency proceedings at EU level" trying to identify the areas eligible for harmonization in national insolvency laws. The debated issues were structured in 4 categories to be considered in future legislative initiatives:

- harmonization where possible in the matters of opening insolvency proceedings, filling of claims, avoidance actions, liquidators, restructuring plan
- revision of the Insolvency Regulation regarding COMI, definition of the establishment, duty of cooperation for liquidators and for courts
- insolvency of groups of companies
- creation of an EU Registry in order to find information about the opening of insolvency proceedings and the deadlines and the form requested to fill in the claims.

In one of the papers⁸³ issued by the Directorate General for Internal Policies after the workshop, we can find also the practitioners point of view (INSOL Europe working Group) about the improvements needed to be made. In brief, the document added to the 4 presented categories some practical problems as follows: - extension of the scope of the Regulation (including reorganization proceedings);

- recognition of the proceedings opened in the case when COMI is situated in a non EU country;
- the different treatment for pledged assets, having in mind article 5(1) regulating third parties right in rem;
- difficulty to challenge detrimental acts (article 13) by selecting the law applicable to the contract;
- effects of insolvency proceedings on lawsuits pending (coordination of article 4(2)f and article 15);
- the treatment of secured and non-secured claims in different insolvency proceedings regarding the same debtor; different contract approach when a territorial proceeding is opened, by contrast with the law of the Member State where the main proceedings are opened.

At this point is interesting to mention some of the suggestion made by the Committee on Employment and Social Affairs to be incorporated by the Legal Affairs Committee in the motion for resolution. According to the Committee, greater harmonization of insolvency proceedings will promote equality and may have a positive impact on Member State's competitiveness and also on potential employment opportunities. In the context of economic crisis, the issue of insolvency must be considered also from an employment-law perspective; The Committee considers necessary to be increased the priority of employees' claims relative to other creditors' claims and underlines the need for the timeframes for main and secondary proceedings to be

⁸³ "The revision of the EU insolvency regulation", Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2011, available at <http://www.europarl.europa.eu/studies>.

harmonized and shortened in order to offer legal certainty to paid employees.

The European Parliament Resolution of 15 November 2011, having regard to the Report of the Committee on Legal Affairs and the opinions of the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs, requested the Commission on insolvency proceedings in the context of EU company law to submit one or more proposals relating to an EU corporate insolvency framework.

The detailed recommendations as to the content of the proposals requested was structured in 4 parts⁴, as follows:

1. Harmonization of specific aspects of insolvency law and company law

Opening of insolvency proceedings:

- insolvency proceedings can be brought against natural persons, legal entities or associations or can concern assets of entities without legal personality (European Economic Interest Grouping);
- proceedings are opened if the debtor is insolvent or if the request is made by the debtor if debtor's insolvency is imminent;
- the Member States must regulate the situations when the debtor is liable in the event of non-filing or improper filing.

Recommendation on the harmonization of certain aspects of the filings of claims:

- creditors file in written form within a certain period of time and Member States are required to regulate this period of time within one to three months from the date of publication of the bankruptcy decision;
- the creditor must disclose the documentation in support of the claim;
- after this period filings imply if verified but additional costs for the creditor.

Harmonization of avoidance actions

Harmonization in the field of qualification of liquidator

Harmonization of restructuring plans:

- “unimpaired creditors, or parties that are not affected by the plan, should not be entitled to vote on the plan or, at least, should not be able to impede it”;
- the plan must be approved before the relevant court.

The consultation of stakeholders and legal and empirical studies commissioned by the Commission revealed a range of problems in the application of the Regulation in practice.⁸⁴ Moreover, the Regulation does not sufficiently reflect current EU priorities and national practices in insolvency law, in particular in promoting the rescue of enterprises in difficulties. Essentially, the evaluation of the Insolvency Regulation identified five main shortcomings:

- The Regulation's scope does not cover national procedures which provide for the restructuring of a company at a pre-insolvency stage (“pre-insolvency proceedings”) or proceedings which leave the existing management in place (“hybrid proceedings”). However, such proceedings have recently been introduced in many Member States⁸⁵ and are considered to increase the chances of successful restructuring of businesses. In addition, a number of personal insolvency proceedings are currently outside the Regulation's scope.
- There are difficulties in determining which Member State is competent to open insolvency proceedings. While there is wide support for granting jurisdiction for opening main insolvency proceedings to the Member State where the debtor's COMI is located, there have been difficulties in applying

⁸⁴ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1346/2000 on insolvency proceedings

⁸⁵ For an overview of national pre-insolvency and hybrid proceedings, see Section 2 of the Commission report of 12.12.2012 on the evaluation of Council Regulation (EC) No 1346/2000 on insolvency proceedings.

the concept in practice. The Regulation's jurisdiction rules have also been criticised for allowing forum shopping by companies and natural persons through abusive COMI-relocation.

- Problems have also been identified with respect to secondary proceedings. The opening of secondary proceedings can hamper the efficient administration of the debtor's estate. With the opening of secondary proceedings, the liquidator in the main proceedings no longer has control over the assets located in the other Member State which makes a sale of the debtor on a going concern⁸⁶ basis more difficult. Moreover, secondary proceedings currently have to be windingup proceedings which constitutes an obstacle to the successful restructuring of a debtor.

- There are problems relating to the rules on publicity of insolvency proceedings and the lodging of claims. There is currently no mandatory publication or registration of the decisions in the Member States where a proceeding is opened, nor in Member States where there is an establishment. There is also no European Insolvency Register which would permit searches in several national registers. However, the good functioning of cross-border insolvency proceedings relies to a significant extent on the publicity of the relevant decisions relating to an insolvency procedure. Judges need to be aware whether proceedings have already been opened in another Member State; creditors or potential creditors need to be aware that proceedings have commenced. In addition, creditors, particularly small creditors and SMEs, face difficulties and costs in lodging claims under the Insolvency Regulation.

- Finally, the Regulation does not contain specific rules dealing with the insolvency of a multi-national enterprise group although a large number of cross-border insolvencies involve groups of companies. The basic premise of the Insolvency Regulation is that separate proceedings must be opened for each individual member of the group and that these proceedings are entirely independent of each other. The lack of specific provisions for group

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insolvency often diminishes the prospects of successful restructuring of the group as a whole and may lead to a break-up of the group in its constituting parts.

10.2. The elements of the Proposal of revision of Council Regulation (EC) No 1346/2000

The main elements of the proposed reform of the Insolvency Regulation are the following:

10.2.1. Scope of application:

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.

The proposal extends the scope of the Insolvency Regulation by amending the current definition of "insolvency proceedings" in its Article 1 (1). At present art. 1 as amended by the Commission's proposal says:

"Article 1(1)

Scope

1. This Regulation shall apply to collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency or adjustment of debt and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation,

(a) the debtor is totally or partially divested of his assets and a liquidator is appointed, or

(b) the assets and affairs of the debtor are subject to control or supervision by a court.

The proceedings referred to in this paragraph shall be listed in Annex A.

The Commission staff report supporting the proposal of amendment of the EIR, says that the Heidelberg University study, committed by the Commission, observed that almost two thirds of Member States have pre-insolvency or hybrid proceedings which are not covered by the Regulation with the consequence that there is no EU-wide recognition of their effects, notably the stay of individual enforcement actions.

As a result, foreign creditors can continue with individual enforcement actions against the company and its assets, which can jeopardize the success of the rescue or restructuring. Opportunities for the continuation of businesses through pre-insolvency and hybrid proceedings are then reduced and jobs are lost.

The Commission' staff Report mentions as example the case **Rechtsbank 's Gravenhage, judgment of 10 June 2010**.⁸⁷

A Dutch national had lived for several years in Germany and had taken out loans from several German banks to invest in the German property market. After his return to the Netherlands, his business went into financial difficulties and he was unable to repay the instalments on the loans. He eventually filed a petition with the court in The Hague requesting the opening of debt reorganisation proceedings under the Dutch Bankruptcy Act. In these proceedings, a debtor can request the court to oblige dissenting creditors that have not consented to an offer made by the debtor to do so if the judge considers that they are unreasonably withholding their consent from the proposed arrangement ("cram down"). However, the court refused to grant the requested order, arguing that since the debt reorganisation proceedings were not covered by the EIR, the cram-down of dissenting creditors would not be recognised in Germany, where the debtor's creditors were located, and therefore be ineffective. The Dutch entrepreneur had to apply for insolvency and have his business liquidated.

⁸⁷ 8Rechtsbank's Gravenhage, First instance court, Netherlands, judgment of 10 June 2010, www.insolvencycases.eu.

The case illustrates that the fact that a national pre-insolvency, hybrid or personal insolvency procedure is not covered by the EIR can prevent the successful rescue of business or reorganisation of personal debt in cross-border situations.

The Report mentions some concerns that have been raised by the fact that a few Member States have included proceedings in Annex A, which actually do not fulfil the criteria of the EIR. This situation creates a risk to mutual trust since some courts do not consider it appropriate to recognise certain proceedings, yet they are required to. This was the case in *Eurofood* case, where the national judge refused to recognize the foreign Court decision, according to art. 26 of EIR, as being manifestly contrary to the State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. According to the preliminary ruling of the CJEU in the *Eurofood* case, a court cannot challenge the validity or appropriateness of any proceedings included in the Annex of the Regulation.

In order to avoid all these problems, it is proposed to open the scope to proceedings which do not involve a liquidator but in which the assets and affairs of the debtor are subject to control or supervision by a court. This amendment would allow proceedings where the debtor remains in possession without a liquidator being appointed to benefit from the EU-wide recognition of the effects of insolvency proceedings which the Regulation brings about.

The definition says that the proceedings, included interim proceedings, must be based on a law relating not only to insolvency as in the past, but also to adjustment of debt for the purpose of rescue, adjustment of debt, reorganisation or liquidation. Then it's not more required that the debtor is totally or partially divested of his assets and a liquidator is appointed, as it was until now, because it's alternately needed that the assets and affairs of the debtor are subject to control or supervision by a court. Interim proceedings and hybrid procedures where the debtor is in possession are included.

In addition, it is proposed an express reference to proceedings for the adjustment of debts and to the purpose of rescue in order to include also

those proceedings which enable the debtor to find an arrangement with his creditors at a preinsolvency stage. The Commission considers that the amendments would also bring the Regulation more in line with the approach taken by the UNCITRAL Model Law on cross-border insolvency.

The extension of the Regulation's scope to pre-insolvency and hybrid proceedings will not encompass insolvency proceedings which are confidential. There are indeed a number of national preinsolvency proceedings where the debtor enters into negotiations with (certain) creditors in view of reaching an agreement on its refinancing or reorganisation but this information is not made public. These proceedings may entail a moratorium of individual enforcement proceedings or prevent creditors from filing for insolvency proceedings during a certain time period in order to give the debtor some "breathing space".

In the proposal it is expressed the concern that the contractual and confidential nature of these proceedings would make it difficult to recognise their effects EU-wide because a court or creditor located in another Member State would not know that such proceedings are pending. This does, however, not prevent such a procedure from being subsequently covered by the scope of the Insolvency Regulation as from the moment it becomes public.

The proposal does not envisage changing the existing mechanism according to which the national insolvency procedures covered by the Regulation are listed in Annex A and the Member States decide whether to notify a particular insolvency procedure to be included in that Annex.

The European Commission proposal for the amendment of the EIR proposes the solution that, before adopting a delegated act amending the list of national proceedings in the annexes, the Commission should scrutinize if the procedure notified fulfils the criteria set out in the Regulation. In this way the mutual trust between the Member States that presently is the only rule governing the foreign procedure recognition is supported by a previous scrutiny done by the Commission. This should ensure that only proceedings which fit the rules of the

Regulation are listed in the Annex.

The Commission's proposal for EIR revision also extends the scope of the Regulation by revising the definition of insolvency proceedings to include debt discharge proceedings and other insolvency proceedings for natural persons which currently do not fit the definition.

This proposal should be very important for the goal of offering a second chance to honest entrepreneurs and debt discharged persons, and allowing them to make full use of the opportunities of the single market. The fact that the EIR does not cover some personal insolvency schemes means, according to the actual text, that the debt discharge has no effect against foreign creditors of the individual. Consequently, an honest entrepreneur, who has been discharged from its debts in one Member State may be prevented from starting a new business in or trading with another Member State, thereby affecting his freedom of establishment or to provide services and to conduct business. The problem can also discourage debtors who have benefited from a debt discharge at home to live or seek employment in another Member State, thereby affecting the free movement of persons and workers.⁸⁸

10.2.2. Jurisdiction:

The proposal clarifies the jurisdiction rules and improves the procedural framework for determining jurisdiction.

The **Commission's Proposal** keeps the COMI as a main connecting factor. This option is explained in the proposal by its capacity of ensuring that the case will be handled in a jurisdiction with which the debtor has a genuine connection rather than in the one chosen by the incorporators.. Even though its application has provoked certain difficulties in practice, there is already an important body of national and ECJ case law clarifying the concept and providing guidance for its practical application. The COMI approach is also in line with international developments since it has been chosen as a

⁸⁸ L. Panzani, Scope of application of Regulation 1346/2000, at EJTN seminar **Cross border Insolvency in the EU, Barcelona, Escuela Judicial, 19-20.02.2013**

jurisdictional standard by UNCITRAL in its Model Law on cross-border insolvency. However, in order to provide certain guidance to legal practitioners in determining COMI, the proposal complements its definition. The new text introduces a definition in the main body of the instrument, inspired by recital 13 of the current text, a provision determining the COMI of natural persons and a recital clarifying the nature of the presumption of the registered office.

The new definition of the COMI is a mere reformulation of the one included in the recitals, but with no intention of changing the substance. The COMI shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties. The case law of the ECJ remains applicable.

The Proposal also introduces a provision determining the COMI of natural persons. In the case of an individual exercising an independent business or professional activity, the center of main interest shall be that individual's **principal place of business**; in the case of any other individual the centre of main interests shall be the place of the individual's **habitual residence**. This reference is inspired by the solution adopted in other Regulations (Roma I, see art. 19, and Rome II, see art. 23) and had already been proposed by legal scholars as the pertinent interpretation under the current text and confirmed by the General Advocate in the Staubitz-Schreiber case: "...the centre of main interests of an individual who carries out a business activity is deemed to be his or her business address, for other natural persons, it is deemed to be their habitual residence".

In addition, a new recital clarifies the circumstances in which the presumption that the COMI of a legal person is located at the place of its registered office can be rebutted. "... It should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and 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...". The

language of this recital is taken from the "Interedil" decision of the Court of Justice of the European Union.

The Commission's Proposal does not amend the current regime regarding the relocation of the COMI. First, the Report on the application of the Insolvency Regulation (COM (2012) 743 final) argues that (i) the COMI moves of companies is a legitimate exercise of the freedom of establishment and (ii) the COMI relocation often benefits the debtor and his creditors rather than disadvantaging them.

The proposal also improves the procedural framework for determining jurisdiction for the opening of proceedings.

This Proposal includes a provision for the examination of jurisdiction. As has been said, the fact that the jurisdiction is exclusive should entail that the appreciation is *ex officio*, but, according to their domestic law, Member States have followed different approaches. The proposal requires the court to examine its jurisdiction *ex officio* prior to opening insolvency proceedings and to specify in its decision on which grounds it based its jurisdiction. The Proposal lays down an obligation to examine the jurisdiction *ex officio*, a declaration of the jurisdictional basis and recognises a right of appeal to foreign creditors (Article 3b of the Proposal). The judge has the obligation to examine his jurisdiction *ex officio* prior to opening insolvency proceedings and to specify in the decision on which grounds the jurisdiction is based. The court seised of a request to open insolvency proceedings shall *ex officio* 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). This latter obligation was already imposed by the current text (art. 21.1), but now it is more visible.

Furthermore, the proposal grants all foreign creditors a right to challenge the opening decision and ensures that these creditors are informed of the opening decision in order to be able to effectively exercise their rights. Any creditor or interested party who has his habitual residence, domicile or

registered office in a Member State other than the State of the opening of proceedings, shall have the right to challenge the decision opening main proceedings. The court opening main proceedings or the liquidator shall inform such creditors insofar as they are known of the decision in due time in order to enable them to challenge it. The right of appeal may be exercised prior or once the decision has been taken (this is left to national law).

These changes aim at ensuring that proceedings are only opened if the Member State concerned actually has jurisdiction. It should therefore reduce the cases of forum shopping through abusive and non-genuine relocation of the COMI.

The proposal clarifies that the courts opening insolvency proceedings also have jurisdiction for actions which derive directly from insolvency proceedings or are closely linked with them such as avoidance actions. The **Commission's Proposal** includes a provision that tries to codify the case law of the ECJ in the "DekoMarty" decision but also incorporates a new rule on related actions. According to Article 3a of the Proposal, "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 an action which derives directly from the insolvency proceedings and is closely linked with them". Where such an action is related to another action against the same defendant which is based on general civil and commercial law, the proposal gives the liquidator the possibility to bring both actions in the courts of the defendant's domicile if these courts are competent pursuant to Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (as amended).

The purpose of this provision is to clarify the delimitation between the Brussels I Regulation and the Insolvency Regulation, but it does not change the current regime, only makes it clearer.

This rule would allow a liquidator to bring, for example, an action for directors' liability based on insolvency law together with an action against that director based on tort law or company law in the same court.

There is, however, a new rule on related actions, giving the liquidator a option of accumulation on an insolvency-related action with an action covered by the Brussels I Regulation: *“Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the liquidator may bring both actions in the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, in the courts of the Member State within the territory of which any of them is domiciled, provided that that court has jurisdiction pursuant to the rules of Regulation (EC) No 44/2001”*. For the purpose 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.”* This rule is envisaged for cases, for example, where the liquidator wishes to combine an action for director’s liability on the bases of insolvency law with an action based on company law or general tort law⁸⁹.

10.2.3. 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.

The preliminary study done by the Commission demonstrated that the opening of secondary proceedings can jeopardize the efficient administration of the estate. According to the current Regulation, main

⁸⁹ see recital 13b of the Proposal

insolvency proceedings have EU-wide effect and encompass all of the debtor's assets. Secondary insolvency proceedings can be opened in any other Member State where the debtor has an establishment. The system of secondary proceedings was introduced to protect the interests of local creditors and/or to facilitate the administration of complex cases. In practice, however, secondary proceedings can obstruct both the effective administration of the estate and the successful reorganisation of a company, because the opening of secondary proceedings removes part of the assets from the control of the insolvency administrator of the main proceedings.

In the Commission's staff report on the EIR revision proposal are cited few examples of difficulties in the administration of secondary proceedings.

One of this is the case *Bank Handlowy and Ryszard Adamiak v. Christianopol sp.zoo*, which was the object of a preliminary question (case C-116/11, *Christianopol*).

Christianopol is a Polish company specialised in the production of furniture. It is part of the Cauval Industries Group with its head office in France to which it supplies all its production. The group suffered from the recession and went into financial difficulties. In an attempt to rescue the group, several members, including *Christianopol*, filed for *sauvegarde* proceedings in France. These proceedings aim at permitting solvent companies to restructure themselves under court protection at a pre-insolvency stage. They are covered by the Regulation although concerns have been raised as to whether they comply with the definition. One of the Polish creditors of *Christianopol*, *Bank Handlowy*, applied for secondary proceedings in Poland where the company's furniture factory was located. The winding-up of the factory would have prevented the successful implementation of the restructuring plan elaborated in the French *sauvegarde* proceedings. This problem prompted the Polish court to seek a preliminary ruling from the CJEU. In her conclusions of 24 May 2012, advocate-general Kokott strongly encouraged the European Legislator to modify the Regulation: The fact that secondary winding-up proceedings can disrupt or even frustrate the purpose of such rescue proceedings is made clear by the submissions of the referring court. This is indeed an undesirable outcome. It is apparent, not least from the shift in many Member States'

insolvency laws away from pure winding-up proceedings towards rescue and reorganisation proceedings, and the resulting additions made to Annex A to the Regulation in recent years, (24) which have increasingly included rescue proceedings, that the latter proceedings are gaining increasing importance and ought therefore also to fall within the ambit of the Regulation.

56. Apart from the additions to the Annex, however, the wording of the Regulation has remained otherwise unchanged, which can lead to contradictions and practical problems in individual cases, as the present case demonstrates. In order that rescue proceedings may be conducted effectively and efficiently within the framework of the Regulation, the relevant rules on the coordination of procedures must therefore be interpreted in a manner consistent with the objectives pursued by the Regulation, which interpretation, as Christianapol rightly submits, must take into account the way in which the Regulation has evolved. Such an interpretation may at the same time serve to mitigate the adverse consequences of initiating secondary proceedings, as described by the referring court.

57. In my opinion, there is therefore no need to impose a general prohibition on proceedings secondary to main rescue proceedings."

Another example from the same report is the liquidation of Alitalia.

By August 2008, the well-known airline Alitalia was heavily insolvent. In September of the same year, extraordinary administration proceedings aiming at reorganising the company were opened in Italy and an administrator was appointed. Since Alitalia's COMI was in Italy, these proceedings were main proceedings for the purposes of the EIR. The administrator found a buyer for the company's assets which, however, took over only those employees indispensable for the operational activity. All other employment contracts were terminated but the administrator reached an agreement with the employees which provided for a payment of an equivalent of 3 months' salary in compensation for the failure to comply with the information and consultation requirements under the Directive on Transfer of Undertakings. The administrator kept one of the company's UK bank accounts with funds sufficient to make the compensation payment to the UK

employees. In November 2008, secondary proceedings over the UK branch of Alitalia were opened in the UK. The UK liquidator blocked the distribution of the monies to the UK employees, arguing that under UK law employees had no priority rights and divided the sum among all of Alitalia's UK creditors. This argument was approved by the High Court. As a consequence, the Italian administrator was obliged to pay the UK employees from the funds of the Italian estate to the detriment of other unsecured creditors.

The EIR revision proposal establishes new rules to solve these problems. The more important changes of the new regime suggested by the revision proposal are indicated in the new recitals 19a, 19b and 20:

(19a) Secondary proceedings may also hamper the efficient administration of the estate. Therefore, the court opening secondary proceedings should be able, on request of the liquidator, to postpone or refuse the opening if these proceedings are not necessary to protect the interests of local creditors. This should notably be the case if the liquidator, by an undertaking binding on the estate, agrees to treat local creditors as if secondary proceedings had been opened and to apply the rules of ranking of the Member State where the opening of secondary proceedings has been requested when distributing the assets located in that Member State. This Regulation should confer on the liquidator the possibility to give such undertakings.

(19b) In order to ensure an effective protection of local interests, the liquidator of the main proceedings should not be able to realise or re-locate the assets situated in the Member State where an establishment is located in an abusive manner, in particular, with the purpose of frustrating the possibility that such interests be effectively satisfied if afterwards secondary proceedings were opened.

"(20) Main insolvency proceedings and secondary proceedings can only contribute to the effective realisation of the total assets if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators and the courts involved must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary

insolvency proceedings which are pending at the same time. In particular, the liquidator 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. In their cooperation, liquidators 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 associations active in the area of insolvency law."

Several modifications are proposed with the aim of improving the efficient administration of the debtor's estate in situations where the debtor has an establishment in another Member State.

- The court seised with a request for opening secondary proceedings should be able, if so requested by the liquidator in the main proceedings, to refuse the opening or to postpone the decision if such opening would not be necessary to protect the interests of local creditors. This could, for example, be the case if an investor made an offer to buy the company on a going-concern basis and that offer would give more to the local creditors than a liquidation of the company's assets. The opening of secondary proceedings should also not be necessary, if the liquidator of the main proceedings promises to the local creditors that they would be treated in the main proceedings as if secondary proceedings had been opened and that the rights they would have had in such a case with respect to the determination and ranking of their claims would be respected in the distribution of the assets. The practice of such "synthetic secondary proceedings" has been developed in several cross-border insolvency cases where main proceedings were opened in the United Kingdom (notably in the insolvency proceedings concerning Collins&Aikman, MG Rover and Nortel Networks). The English courts accepted that the English liquidators were entitled to distribute part of the assets according to the law of the Member State where the establishment was located. Since such a practice is currently not possible under the law of many Member States, the proposal introduces a rule of substantive law

enabling the liquidator to give such undertakings to local creditors with binding effect on the estate.

- The proposed amendment will not affect the possibility of the liquidator to request the opening of secondary proceedings where this would facilitate the administration of complex cases, for example where a considerable number of employees have to be laid off in the State of the establishment. In such cases, the opening of local proceedings and the appointment of a local liquidator may still be useful to ensure an efficient administration of the debtor's estate.
- The proposal obliges the court seised with a request to open secondary proceedings to hear the liquidator of the main proceedings prior to taking its decision. This amendment aims to ensure that the court seised with a request for opening secondary proceedings is fully aware of any rescue or reorganisation options explored by the liquidator and is able to properly assess the consequences of the opening of secondary proceedings. This obligation is complemented by the right of the liquidator to challenge the decision opening secondary proceedings.
- The proposal abolishes the current requirement that secondary proceedings have to be winding-up proceedings. The last phrase of paragraph 3 of art. 3 - These latter proceedings must be winding-up proceedings is not maintained in the new suggested text of the Regulation.

Where secondary proceedings are opened, the opening court can choose from the full range of proceedings available under national law including restructuring. This amendment ensures that the opening of secondary proceedings does not automatically thwart the rescue or restructuring of a debtor as a whole. This amendment should be without prejudice to the rules on the recovery of state aid and the jurisprudence of the Court of Justice of the European Union on recovery from insolvent companies.

- In addition, the proposal improves the coordination of main and secondary proceedings by extending the obligation to cooperate, which currently only

applies to the liquidators, to the courts involved in the main and secondary proceedings.

The success of cross-border insolvencies within the European Community depends primarily on how effectively harmonisation between the different proceedings is conducted and on how thoroughly cooperation between the respective liquidators and courts can be achieved. Prior to the Insolvency Regulation taking force, the European Community lacked a legal framework for the coordination of cross-border insolvencies.

The Insolvency Regulation lacks a provision similar to Art. 31 as far as the insolvency courts are concerned. Additionally, recital 20 of the Insolvency Regulation exclusively addresses the liquidators, stating that their mutual cooperation is a crucial basis for the effective realisation of the total assets.

Accordingly, art. 31 of the Insolvency Regulation might be interpreted in such a way, that insolvency courts are not only free to cooperate, but legally obliged to do so.

Consequently, according to the Proposal courts will be obliged to cooperate and communicate with each other; moreover, liquidators will have to cooperate and communicate with the court in the other Member State involved in the proceedings. Cooperation between courts will improve the coordination of main and secondary proceedings. It can notably be crucial to ensure a successful restructuring, e.g. concerning the approval of a protocol setting out a rescue plan.

The Commission's Proposal introduces more precise rules on location of assets. According to these new provisions, "the Member State in which assets are situated" means, in the case of:

- (a) Tangible property, the Member State within the territory of which the property is situated.
- (b) Property and rights ownership of or entitlement to which must be entered in public register, the Member State under the authority of which the register is kept.

(c) Registered shares in companies, the Member State within the territory of which the company having issued the shares has its registered office.

(d) Financial instruments, 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. This definition is taken from the collateral Directive.

(e) Cash held in accounts with a credit institution, the Member State indicated in the account's IBAN.

(f) Claims against third parties other than those relating to assets referred to in subparagraph (v), 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).

The new provision on the location of bank account is very relevant. According to the current text, bank accounts follow the criteria set forth to any other claim, i.e. the location of the COMI of the debtor of such claim. Hence, even though a bank account is opened with a branch of a credit institution in Member State A, it would be considered to be located where that credit institution has its central administration, which may be in State B. The Commission's Proposal locates bank accounts in the corresponding branch (which is identified by the International Bank Account Number).

10.2.4. *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.

According to the current text, registration and publication of insolvency proceedings opened under the Regulation is optional rather than mandatory,

although applicable local law may require it. Where parties do elect to register or publish, there is no central place for registration or publication.

This can result in ineffective notice of insolvency proceedings, particularly in cases where the proceedings are opened in a place other than where the debtor has its registered office. In turn this can result in proceedings being incorrectly opened or classified in other jurisdictions, leading to disputes and wasted time and costs.

The proposal provides that certain minimum information relating to the insolvency proceedings have to be published in an electronic register available to the public free of charge via the internet. This obligation concerns the court opening the insolvency proceedings, the date of opening and – for main proceedings, the date of closing proceedings, the type of proceedings, the debtor, the liquidator appointed, the decision opening proceedings as well as the decision appointing the liquidator, if different, and the deadline for lodging claims. In light of the disparities in national legal systems as to the publication of insolvency proceedings and the different needs of creditors, the obligation to publish this information is limited to companies, self-employed and independent professionals; it does not extend to insolvency proceedings relating to consumers. The proposal provides for the establishment of a system for the interconnection of national registers which will be accessed via the European e-justice portal. The Commission will determine minimum common criteria for searching the registers and for obtaining results which will be based on the information to be published in the insolvency registers by way of implementing act. The interconnection of national registers will ensure that a court seised with a request for opening insolvency proceedings will be able to determine whether proceedings relating to the same debtor have already been opened in another Member State; it will also enable creditors to find out whether proceedings have been opened concerning the same debtor and, if so, which powers the liquidator has, if any. For debtors which are companies, Member States will be able to build on the obligations arising from Directive 2012/17/EU of 13 June 2012 on the interconnection of central, commercial and companies registers¹¹.

However, for the purpose of this Regulation, the mere information that proceedings have been opened concerning a debtor is insufficient for the purpose of coordinating cross-border insolvency proceedings and enabling creditors to make use of their rights in relation to such proceedings.

The proposal facilitates the lodging of claims for foreign creditors, particularly small creditors and SMEs, in three ways: First, it provides for two standard forms to be introduced by way of implementing act, one for the notice to be sent to creditors and the other for the lodging of claims. These standard forms will be available in all official languages of the European Union, thereby reducing translation costs. Second, the proposal gives foreign creditors at least 45 days following publication of the notice of opening of proceedings in the insolvency register to lodge their claims, irrespective of any shorter periods applicable under national law. They will also have to be informed in case their claim is contested and be given the possibility to supplement the evidence provided in order to prove their claim. Finally, legal representation will not be mandatory for lodging a claim in a foreign jurisdiction, thereby reducing costs for creditors.

10.2.5. 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.

The EIR doesn't regulate the group's enterprise insolvency. The ECJ in the Eurofood case stated that control of corporate direction alone does not suffice to locate the centre of economic interest of a subsidiary with its parent company, rather than at its own registered address. The insolvency

proceedings relate to a single legal entity and that, in principle, separate proceedings must be opened for each individual member of the group. After *Eurofood*, it is still possible to open insolvency proceedings over a subsidiary in the Member State where the parent company has its registered office, but only if the factors showing that the subsidiary's COMI is located at the seat of the parent company are objective and ascertainable by third parties. There is no compulsory coordination of the independent insolvency proceedings opened for a parent company and its subsidiaries.

The proposal creates a specific legal framework to deal with the insolvency of members of a group of companies while maintaining the entity-by-entity approach which underlies the current Insolvency Regulation.

The Commission's proposal for EIR revision provides a group notion.

The group's notion offered by the EIR revision's proposal says:

- a) "group of companies" means a number of companies consisting of parent and subsidiary companies" (art. 2, i);
- b) "parent company" means a company which
 - (i) has a majority of the shareholders' or members' voting rights in another company (a "subsidiary company"); or
 - (ii) is a shareholder or member of the subsidiary company and has the right to
 - (aa) appoint or remove a majority of the members of the administrative, management or supervisory body of that subsidiary; or
 - (bb) exercise a dominant influence over the subsidiary company pursuant to a contract entered into with that subsidiary or to a provision in its articles of association" (art. 2, ii).

Starting from the idea that the EIR should ensure the efficient administration of insolvency proceedings relating to different members of the group, the proposal introduces an obligation to coordinate insolvency proceedings relating to different members of the same group of companies by obliging the liquidators and the courts involved to cooperate with each other in a similar way as this is proposed in the context of main and secondary proceedings. Such cooperation could take different forms depending on the

circumstances of the case. Liquidators should notably exchange relevant information and cooperate in the elaboration of a rescue or reorganization plan where this is appropriate. The possibility to cooperate by way of protocols is explicitly mentioned in order to acknowledge the practical importance of these instruments and further promote their use. Courts should cooperate, in particular, by exchanging information, coordinating, where appropriate, the appointment of liquidators which can cooperate with each other, and approving protocols put before them by the liquidators.

In addition, the proposal gives each liquidator standing in the proceedings concerning another member of the same group. In particular, the liquidator has a right to be heard in these other proceedings, to request a stay of the other proceedings and to propose a reorganisation plan in a way which would enable the respective creditors' committee or court to take a decision on it.

The liquidator also has the right to attend the meeting of creditors. These procedural tools enable the liquidator which has the biggest interest in the successful restructuring of all companies concerned to officially submit his reorganisation plan in the proceedings concerning a group member, even if the liquidator in these proceedings is unwilling to cooperate or is opposed to the plan.

In providing for the coordination of different proceedings relating to members of the same group, the proposal does not intend to prevent the existing practice in relation to highly integrated groups of companies to determine that the centre of main interests of all members of the group is located in one and the same place and, consequently, to open proceedings only in a single jurisdiction.

The EIR revision proposal stipulates only cooperation between two or more proceedings related to different companies of the same group through cooperation between the courts and the liquidators or the administrators. It's not provided that the court of the parent company or the administrator of the parent company may rule all the subsidiaries giving binding directives. This

solution is coherent with the solution of solution suggested by the UNCITRAL insolvency working group (working group 5).

10.3. Conclusions

The aim of the proposal is not only to solve the problems, but also to modernise the provisions of the insolvency Regulation no.1346/2000.

The technological issues, procedural issues and substantive issues of the Regulation are mutually dependent, as it is clear from the operational objectives of the amendments as they are presented in the Commission Staff working Document, Impact assessment, accompanying the document Revision of Regulation(EC) No 1346/2000 on insolvency proceedings⁹⁰

Many solved problems are old facts spoken about since Virgo-Schmit report in 1996.

The idea to help continuation of business through pre-insolvency and hybrid proceedings is a reflection that was the cornerstone of many policies focusing on the necessity to "produce" more entrepreneurs and not so much on the necessity to preserve the stock of entrepreneurs".⁹¹

Cases as Rechtsbank's Gravenhage, when the court decision determined Dutch entrepreneur to apply for insolvency and have his business liquidated because the debt reorganisation procedure was not covered by the EIR or the apparition of the risk in the matter of mutual trust between courts, as we can follow in the ruling of CJEU in the Eurofood case (Case C-341/04, Eurofood IFSC Ltd) are the reality that made the revision much needed.

⁹⁰ Commision Staff working document, IMPACT ASSESMENT, Accompanying the document Revision of Regulation(EC) No 1346/2000 on insolvency proceedings, 2012, available at <http://register.consilium.europa.eu>

⁹¹ Report of the expert Group, "A second chance for entrepreneurs- Prevention of bankruptcy, simplification of bankruptcy procedures and support for a fresh start", 2011, European Commission, Enterprise and Industry Directorate- General, <http://www.ec.europa.eu>.

The lack of provisions concerning multinational groups of companies was one of the big omissions of the Regulation after a discussion that started over forty years before the Regulation finally enacted⁹² and concerned complex problems. Even if, at the time, the decision to postpone “group insolvencies” to a later date was considered both politically and practically prudent, the wideness of the phenomenon of groups of companies in the first decade of the 21st century urged for a solution.

We can only remain optimistic regarding the working in practice of the proposed Regulation, which reflects the current evolution of national and European case law and provides for modern tools to deal with cross-border insolvency.

⁹² Wessels, Bob, “Revision of the EU Insolvency Regulation: What type of facelift?”, presented at the Conference “The Future of the Insolvency Regulation”, Amsterdam, 2011, available at www.eir-reform.eu

11. Regulation on European account preservation order

Maria Giuliana CIVININI

11.1. Introduction.

On June 2011 the European Commission adopted a **Proposal for a European Regulation (COM (2011)445 of 25 June 2011) on European Account Preservation Order (“EAPO”)** which will enable creditors, either before or after having obtained an enforcement title, to apply for a Bank attachment (“preservation order”) which can be enforced throughout the European Union (see The Proposal)

On June 2012 the Opinion of the European Economic and Social Committee on the ‘Proposal for a Regulation of the European Parliament and of the Council creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters’ was issued - COM(2011) 445 final — 2011/0204 (COD), 29/6/2012 (see The ESC Opinion)

On the 13th of May 2014 Member States in the General Affairs Council **signed off on the agreement** recently reached with the European Parliament to establish a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters.

On the 27th of June the Regulation was published on the Official Journal with number 655/2014. It shall apply from 18 January 2017, with the exception of Article 50 (information will be provided by Member States), which shall apply from 18 July 2016

The Regulation will be directly applicable in the Member States, except in UK, that didn't opt-in, and Denmark.

11.2. Towards the Regulation.

The milestones that led to the adoption of the new Regulation are as follows:

- **The Tampere Declaration on mutual recognition**, which envisaged a programme of measures for implementing the principle of mutual recognition of decisions in civil and commercial matters, common to the Commission and the Council. "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." (point 37 of the Tampere Declaration)
- **The programme of measures for implementation of the principle of mutual recognition** of decision in civil and commercial matters adopted on November 2000 (Council Draft Programme). Among the proposals in the area already covered by existing instruments, progress should be made strengthening the effects in the requested State of judgments made in the State of origin, "Establishing protective measures at European level will enable a decision given in one Member State to embrace the authorisation to take protective measures against the debtor's assets in the whole territory of the Union."
- **The Green Paper on Improving the Efficiency of the Enforcement of Judgments in the European Union**: the attachment of bank account, presented by the Commission on October 2006. The paper affirms: "The problems of cross-border debt recovery risk constituting an obstacle to the free circulation of payment orders within the European Union and an impediment for the proper functioning of the Internal Market. Late payment and non-payment jeopardises the interests of businesses and consumers alike. The differences in the efficiency of debt-recovery within the European Union also risk distorting competition among businesses operating in Member States as between efficient systems of enforcing payment orders and those where this is not the case. Community action on this subject therefore needs to be considered."

A possible remedy is identified in the creation of “an European order for the attachment of bank accounts which would allow a creditor to secure a sum of money due to or claimed by him by preventing the removal or transfer of funds held to the credit of his debtor in one or several bank accounts within the territory of the European Union” (see the Green Paper 2006).

oThe **2009 Stockholm Programme** that emphasizes that the European judicial area should serve to support economic activity in the Single Market and invites the Commission to bring forward appropriate proposals for i.a. improving the efficiency of enforcement of judgments in the EU regarding bank accounts and debtor's assets: The European Council invites the Commission to: — assess the need for, and the feasibility of, providing for certain provisional, including protective, measures at Union level, to prevent for example the disappearance of assets before the enforcement of a claim, — put forward appropriate proposals for improving the efficiency of enforcement of judgments in the Union regarding bank accounts and debtors' assets, based on the 2006 and 2008 Green Papers” (see Stockholm Programme C 115/16)

11.3. Four main shortcomings at present.

The current situation of a creditor seeking to recover his debt in another MS presents **four main shortcomings**:

1.The conditions for issuing orders preserving assets in bank accounts under national law vary considerably throughout the EU; the consequence is the forum shopping. In this context a major problem is the non-enforcement of provisional measures issued without a prior hearing in another MS based on case law of European Union Court of Justice (see decision 2 April 2009 in dei that so decided: “Article 27(1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended is to be interpreted as follows: **the court of the State in**

which enforcement is sought may take into account, with regard to the public policy clause referred to in that article, the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, **if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard.**

2. In many Member States it is **difficult, if not impossible, for a creditor to obtain information about the whereabouts of his debtor's bank account** without having recourse to the services of private investigation agencies.

3. The **costs** of obtaining and enforcing an account preservation order in a cross-border situation are generally higher than in domestic cases

4. The **divergences in and length of national enforcement systems** are enormous.

11.4. Regulation's goals

The Regulation aims at

- Enabling creditors to obtain account preservation orders on the basis of the same conditions irrespective of the country where the competent court is located;
- Allowing creditors to obtain information on the whereabouts of their debtors' bank accounts; and
- Reducing costs and delays for creditors seeking to obtain and enforce an account preservation order in cross-border situations.

11.5. Legal basis, subsidiarity and impact on fundamental rights.

Legal basis: the proposal is based on Article 81 (2) TFEU

Subsidiarity: the problems outlined above have a clear cross-border dimension and cannot be adequately attained by the Member States alone

Impact on fundamental rights: the proposal improves the right of the creditor to an effective enforcement of his claims which forms part of the right to an effective remedy as laid down in Article 47 (1) of the Charter

Protection of the debtor's rights is ensured in particular by the following elements of the proposal:

- The requirement to notify the debtor immediately after the order is implemented with all documents which the creditor submitted to the court.
- The possibility of the debtor to contest the order by applying for a review to the court of origin, the court of enforcement or - if the debtor is a consumer, employee or insured – to the court at his place of domicile;
- The provision of a mandatory security;
- The fact that amounts necessary to ensure the livelihood of the debtor and his family will be exempt from execution.

The European Account Preservation Order ("EAPO") will be available to citizens and companies as an additional preservation and enforcement instrument next to national proceedings, which remain available. It's a clear adoption of an alternative or optional approach, which leaves claimants entirely free to choose national law, is particularly positive.

It will prevent the withdrawal or transfer of funds held by the debtor in a bank account within the UE (art, 1). More specifically, the EAPO shall prevent that the amount specified therein is transferred, withdrawn or disposed of by the defendant or the defendant's creditors from the designated account or accounts (21, 6° co).

11.6. The contents

11.6.1. Scope (Articles 2 and 3)

The Regulation will apply to civil and commercial matters.

The EAPO is not available in matters of revenue and customs or administrative matters, bankruptcy, winding up or similar proceedings, social security and arbitration. Despite of the proposal's suggestion, the EAPO is not available in matters of matrimonial property, property consequences of registered partnership or successions.

About **bankruptcy, winding up or similar proceedings**, the Financial Market Law Committee, on august 2013, observed: "it is not clear whether the Proposed Regulation is thereby immediately disapplied once insolvency proceedings concerning the debtor have been opened notwithstanding an application for an EAPO may already be in progress or an EAPO in fora. Nor is it entirely clear whether the Proposed Regulation is available to an insolvency practitioner seeking to recover detrimental payments made by the debtor to third parties as an incidental aspect of the administration of the debtor's estate. Considerable uncertainty may arise in circumstances where a company is in financial difficulty, but has not yet formally entered into an insolvency procedure. If an EAPO were to be served on a company short of insolvency, this may have a detrimental effect on a company's planned restructuring.". It is my opinion that the solution to the raised problems is pretty easy, based on general insolvency principles: once an insolvency proceeding is open, individual actions and individual enforcement procedures cannot be started or continued; the liquidator or administrator or debtor's assets may make recourse to the EAPO procedure; the complained adverse effects are common to national procedures and are not an argument against the European measure.

The main issue is expressly solved: The effects of the opening of insolvency proceedings on individual enforcement actions, such as the enforcement of

a Preservation Order, shall be governed by the law of the Member State in which the insolvency proceedings have been opened.

11.6.2. EAPO available only in Cross Border Situations

Under the draft Regulation a matter is considered to have cross border implications when the bank account or accounts to be preserved by the EAPO are maintained in a Member State other than:

- the Member State of the court seised of the application for an EAPO or;
- the Member State in which the creditor is domiciled.

Unlike other regulations, it could be irrelevant if the creditor, the debtor and the Court are domiciled in the same Member State, provided that the bank accounts to be preserved by the order are located elsewhere in EU

The EAPO is not applicable to Denmark, neither is it applicable to UK, that didn't opted-in.

11.6.3. Conditions and procedure

A request for a EAPO can be filed **before** (in this case EAPO has to be issued within 10 calendar days of the lodging of the application at the latest, article 18, § 1), **during and after** (in this case EAPO has to be issued within 5 days, article 18, § 2) **obtaining a title** enforceable in the Member State where the account is located (art. 5). When a **security** is requested, the deadlines "shall apply to the decision requiring the creditor to provide security. The court shall issue its decision on the application for a Preservation Order without delay once the creditor has provided the security required". (article 18, § 4).

Curiously enough the Regulation has introduced a rule nullifying all terms: Where, in exceptional circumstances, it is not possible for the court or the authority involved to respect the time frames provided for in Article 14(7), Article 18, Article 23(2), the second subparagraph of Article 25(3), Article 28(2), (3) and (6), Article 33(3) and Article 36(4) and (5), the court or authority shall take the steps required by those provisions as soon as possible.

More specifically, an EAPO may be applied for and decided at different points in time:

- Prior to the initiation of judicial proceedings for a decision or to enforce a decision against the defendant;
- At any stage during a judicial proceeding;
- After obtaining a judgment against the defendant or any other enforceable title in the Member State where the account is located;
- After obtaining an enforceable title which is already enforceable in the Member State where the account is located

When the creditor has not obtained an enforceable title yet, he shall initiate the proceeding on the substance and provide proof of such initiation to the court with which the application for the order was lodged within 30 days of the date on which he lodged the application or within 14 days of the date of the issue of the Order, whichever date is the later

11.6.4. Jurisdiction (Articles 6)

As a general rule, the courts of the Member State having jurisdiction on the substance as determined by European instruments or national law are competent for issuing a European account preservation order. When the creditor has already obtained an enforceable title, it is competent the courts of the Member State in which the judgment was issued or the court settlement was approved or concluded, or the courts designated for that purpose in the M.S. in which that instrument was drawn up.

11.6.5. Conditions (Articles 7 and 12)

Two conditions are set down: the claim has to be *prima facie* well-founded, and there is the risk that the enforcement of a subsequent judgment would be frustrated if the measure is not granted (*fumus boni juris* and *periculum in mora*).

In the opinion of the Rapporteur of EU Parliament Committee on Legal Affairs, *"The proposal, in fact, appears to be overly biased in favour of the claimant and does not offer the necessary safeguards to mitigate the potentially draconian nature of the EAPO"*. The Rapporteur recommended adding a provision that specifies that part of the test to obtain an EAPO should be that *"there is a real and current risk that, without the issue of the order, the creditor's claim may be impaired, either wholly or in part"* rather than just demonstrating (as the existing draft requires) that, without the order, the subsequent enforcement of a future judgment *"is likely to be frustrated or made substantially more difficult"*. Further, the Rapporteur's proposed amendments to the recitals suggest a claimant/applicant must satisfy the court that its claims are *"legitimate"* and *"that there is a real and current risk that, without the order, the creditor's claim may be impaired, even if only in part, and the subsequent enforcement of this judgment may be frustrated or made substantially more difficult. To this end, the creditor should provide sufficient evidence, corroborated by relevant facts, to satisfy the court that the claim is well founded"*.

Even if the summarised condition are common to the equivalent national procedures, the suggestion of a stronger formulation was accepted and article 7 § 1 provides: *"The court shall issue the Preservation Order when the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for a protective measure in the form of a Preservation Order because there is a real risk that, without such a measure, the subsequent enforcement of the creditor's claim against the debtor will be impeded or made substantially more difficult."*

The rule, accompanied by the provision of a mandatory security (article 12), will get very difficult to obtain a preservation order.

As a condition, the creditor may not submit to several courts at the same time parallel applications for a Preservation Order against the same debtor aimed at securing the same claim (article 10; see also article 27).

11.6.6. Application (Article 8)

In annex I the **application form** can be found.

The application may be submitted by **any means of communication**, including electronic.

When the requirements are not met, the court shall give the possibility to **complete or rectify** "where national law so allows" (Article 9; a without national restriction rule is in Reg. 1896/2006 on order for payment procedure, article 9, Completion and rectification. See also article 17 § 3 that seems to refer to a general power of the court for requesting information). When information are requested, "the court shall issue its decision without delay once it has received the information ... provided that any security required has been provided by the creditor by that time. " (article 18 § 5).

The proposal contained an interesting rule in article 20, that introduced the possibility for the court seised for EAPO **to seek information from the Court seised on the substance** or to request the claimant to obtain such information "such as the risk of dissipation of assets by the defendant or any refusal of a similar measure by the court seised as to the substance. Such information may be sought directly or **through the contact points of the European Judicial Network** in civil and commercial matters established by Decision 2001/470/EC". Unfortunately the provision disappeared in the final draft.

11.6.7. Security deposit or equivalent assurance (Article 12)

The Proposal previewed that the court **may** require a security deposit or equivalent assurance. In the Proposal the security deposit has an unsystematic character, taking in consideration that a systematic deposit would reduce the access of the creditor to EAPO, especially when is a

consumer. Additionally the measure could cause postponement and delay of the procedure

In the Report of the EU Parliament Committee on Legal Affairs on 5 February 2013 the Rapporteur suggested

- that the claimant/applicant should be liable to the debtor for any damage caused to the defendant as a result of an EAPO being set aside or modified or the underlying claim being deemed unfounded; and
- that some form of security should be required to be given by a claimant/applicant when seeking an EAPO.

The Cypriot Presidency agreed on these proposals, suggesting that "in principle" the claimant/applicant should have to provide a form of security to ensure adequate compensation to the debtor for damage caused by "any violation by [the applicant] of his duties under the proposed Regulation" but the court should have the discretion to dispense with this requirement.

The Rapporteur appeared to fortify this security requirement. Referring to his desire to encourage a "responsible" use of the procedure, he proposed "making it compulsory for creditors [applicants] to provide a security deposit or a sufficient guarantee to compensate for any damage suffered by debtors further to the enforcement of an EAPO that is subsequently revoked". He proposed an amendment to the recitals to provide that a competent court may exempt the claimant from this requirement in certain circumstances.

These proposals have been agreed with the compromised text of february 2014; they are likely to have a **deterrent effect** on claimants who are considering whether or not to seek an EAPO.

Now article 12 provides for: "Before issuing a Preservation Order in a case where the creditor has not yet obtained a judgment, court settlement or authentic instrument, the court shall require the creditor to provide security for an amount sufficient to prevent abuse of the procedure provided for by this Regulation and to ensure compensation for any damage suffered by the

debtor as a result of the Order to the extent that the creditor is liable for such damage pursuant to Article 13.

By way of exception, the court may dispense with the requirement set out in the first subparagraph if it considers that the provision of security referred to in that subparagraph is inappropriate in the circumstances of the case.

2. Where the creditor has already obtained a judgment, court settlement or authentic instrument, the court may, before issuing the Order, require the creditor to provide security as referred to in the first subparagraph of paragraph 1 if it considers this necessary and appropriate in the circumstances of the case. "

11.6.8. Prior hearing of the debtor is not needed (Articles 11)

Admissible evidence.

Article 11 of the Proposal provided for the admission of additional evidence such written statements of witnesses or experts.

The Report of the EU Parliament Committee on Legal Affairs on 5 February 2013 proposed that a claimant/applicant should give some form of declaration/affirmation that the information in the application is true and complete and that he is aware of the penalties for making false or incomplete declarations. The Rapporteur also proposed regulating the methods for gathering evidence under national law. He asserted that he *"does not consider it appropriate to use written statements of witnesses or experts"*. This gives rise to some uncertainty as to how *"sufficient evidence"* of the underlying claim (see below) should be put before the court. The Rapporteur also asserted *"national provisions governing the definition of "expert" differ in individual national legal systems; this raises the serious risk of fraudulent evidence being given"*. The Rapporteur suggested deleting from the text the option for using expert witness statements at the application stage (see European Order of Payment: Article 7 Application, requests a description of evidence supporting the claim - point e. The claimant shall

declare that the information provided is true to the best of his knowledge and belief and shall acknowledge that any deliberate false statement could lead to appropriate penalties under the law of the Member State of origin; Article 18, Enforceability 1. If within the time limit laid down in Article 16(2), taking into account an appropriate period of time to allow a statement to arrive, no statement of opposition has been lodged with the court of origin, the court of origin shall without delay declare the European order for payment enforceable using standard form G as set out in Annex VII. The court shall verify the date of service).

Article 9 § 1 of the Regulation doesn't contain reference to experts and witnesses statements and refers to "information and evidence provided by the creditor" (that, in theory, leaves open the question if written statements are admissible).

Oral hearing: the second paragraph of article 9 the court may, provided that this does not delay the proceedings unduly, also use any other appropriate method of taking evidence available **under its national law**, such as an **oral hearing of the creditor or of his witness(es)** including through videoconference or other communication technology. In case of oral hearing, the decision shall be issued in the following 5 working days (article 18, § 3).

11.6.9. Information on debtor's account (Article 14)

Article 17 of the proposal established a general mechanism for the case the claimant is not able to provide complete information on the debtor's account; in the application for an EAPO, the creditor could request that the competent authority of the Member State of enforcement obtain the necessary information. Once that information obtained, the competent authority should have served the EAPO on the bank in accordance with proposal's article 24.

The Proposal leaves Member States the choice between two different mechanisms facilitating obtaining of information: Member States can provide

for an order of disclosure obliging all banks in their territory to disclose whether the debtor has an account with them. Alternatively, they could grant their enforcement authorities access to information held by public authorities in registers or otherwise.

The latter mechanism also figures in Article 61 of the Maintenance Regulation (access to information for central authorities): the public authorities or administrations which holds, within the requested State, the relevant information concerning the income and other financial circumstances of the debtor or creditor, including the location of assets and which control the processing thereof within the meaning of Directive 95/46/EC shall, subject to limitations justified on grounds of national security or public safety, provide the information to the requested Central Authority at its request in cases where the requested Central Authority does not have direct access to it. Member States may designate the public authorities or administrations able to provide the requested Central Authority with the referred information.

The EUP Rapporteur suggested that the Regulation should establish a mechanism to enable the competent authority in a Member State of enforcement to obtain the information required in order to identify the debtor's bank accounts. The recitals "may involve obliging the banks to disclose the whereabouts of the debtor's accounts located in that Member State, granting access to information held in registers or otherwise by public authorities or administrations". The Rapporteur suggested a further alternative, namely, "requiring the debtor to state where the account is held and prohibiting him from carrying out any transactions, including withdrawals and transfers, against the account that would cause the amount held therein to fall below the amount due, as specified in the preservation order".

The final text contains some substantial change.

The possibility to request information on bank's account is restricted. Creditors can have access to information:

if they have already obtained an enforceable title;

if they have obtained a title but it is not enforceable yet, "and the amount to be preserved is substantial taking into account the relevant circumstances, and the creditor has submitted sufficient evidence to satisfy the court that there is an urgent need for account information because there is a risk that, without such information, the subsequent enforcement of the creditor's claim against the debtor is likely to be jeopardised and that this could consequently lead to a substantial deterioration of the creditor's financial situation" (article 14, § 2).

With the request, "the creditor shall substantiate why he believes that the debtor holds one or more accounts with a bank in the specific Member State and shall provide all relevant information available to him about the debtor and the account or accounts to be preserved. If the court with which the application for a Preservation Order is lodged considers that the creditor's request is not sufficiently substantiated, it shall reject it." (article 14, § 3).

Member States can choose among different mechanisms to grant the information, in line with the recommendations of the EUP Rapporteur:

"Each Member State shall make available in its national law at least one of the following methods of obtaining the information referred to in paragraph 1:

(a) an obligation on all banks in its territory to disclose, upon request by the information authority, whether the debtor holds an account with them;

(b) access for the information authority to the relevant information where that information is held by public authorities or administrations in registers or otherwise;

(c) the possibility for its courts to oblige the debtor to disclose with which bank or banks in its territory he holds one or more accounts where such an obligation is accompanied by an *in personam* order by the court prohibiting the withdrawal or transfer by him of funds held in his account or accounts up to the amount to be preserved by the Preservation Order; or

(d) any other methods which are effective and efficient for the purposes of obtaining the relevant information, provided that they are not disproportionately costly or time-consuming. “ (Article 14 par 5).

The result is that access to information will be very difficult; another element, beside strengthened requirements and mandatory security, which does predict a likely failure of the new European instrument.

11.6.10. Amount of EAPO (Article 17)

11.6.11. Form and content of the preservation order (Article 19)

The order shall be issued using the form

11.6.12. No exequatur (Article 22)

Like in case of the European Small Claims Procedure established by Regulation (EC) No 861/2007 and the European Order for Payment procedure established by Regulation (EC) No 1896/2006, the exequatur is not needed.

11.6.13. Enforcement (Article 23)

The enforcement is ruled by the national law

Where the Preservation Order was issued in a Member State other than the Member State of enforcement, part A of the order as indicated in Article 19(2) and a blank standard form for the declaration of the bank concerning the preservation of funds (Article 25) shall be transmitted to the competent authority of the Member State of enforcement.

The order shall be accompanied, where necessary, by a translation or transliteration prepared using the standard form.

11.6.14. Implementation of the order (Articles 24 and 25)

The bank implements the order without delay and preserve the amount specified in the Order either:

(a) by ensuring that that amount is not transferred or withdrawn from the account or accounts indicated in the Order or identified pursuant to paragraph 4; or

(b) where national law so provides, by transferring that amount to an account dedicated for preservation purposes.

By the end of the third working day following the implementation of the order, the bank or other entity responsible for enforcing the order in the MS of enforcement shall issue a declaration indicating whether and to what extent funds in the debtor's account or accounts have been preserved and, if so, on which date the order was implemented. If, in exceptional circumstances, it is not possible for the bank to issue the declaration within three working days, it shall issue it as soon as possible but by no later than the end of the eighth working day following the implementation. (article 25).

Liability of the bank is ruled by national law (article 26).

Under the proposal the following problem arise: Has the local authority the power to take into account ex officio amounts exempt from execution?

Article 32 of the proposal provides that Member States can maintain their national system.

For the UK Financial Market Law Committee "It is ... unclear how the meaning of "exempt" should be applied. By way of example, under English law, the question of an exemption from an asset protection order is at the discretion of the court granting the order having regard to all the circumstances. In applying Article 32, it is not clear how discretion of this nature would operate when a foreign court is granting a preservation order..... In order to provide adequate protection for debtors, the provision for sums to be made available for normal living expenses and legal expenses should also be explicit in this article. In particular, if there is no specific provision in the Member State of enforcement for such matters to be decided separately from an application which the courts in that State are competent to hear, it should be made

express that Member States can set up a stand-alone process for determination of these matters where an EAPO is being enforced. Otherwise, as things stand in English law it will be uncertain whether the defendant to an EAPO can get any relief of this sort, except from the issuing court which may result in the defendant suffering irreparable damage before any relief can be obtained. Further still, the relief available may be unsuited to the economic conditions in the Member State of enforcement given differences in living and business costs in different parts of the EU." (see the UK FMLC REPORT)

The final article 31 contains a more detailed discipline: amounts that are exempt from seizure under the law of the MS of enforcement shall be exempt from preservation. Where amounts are exempted from seizure without any request from the debtor, the body responsible for exempting such amounts in that Member State shall, of its own motion, exempt the relevant amounts from preservation. Where the request of the debtor is needed, such amounts shall be exempted from preservation upon application by the debtor.

11.6.15. Service of the order on the defendant (Article 28)

The service (of the order, application and support on document) on the defendant **domiciled in the MS of origin** has to be initiated within 3 working days after receiving the declaration set down in article 25. If the debtor is **domiciled in another MS**, the subject responsible for initiating the service based on national law will send relevant document to the competent authority of the MS of destination. Where the debtor is **domiciled in a third State**, service shall be effected in accordance with the rules on international service applicable in the Member State of origin.

Preservation of joint or nominee accounts (article 30): based on national law.

THE PRESERVATION ORDER CAN BE DONE only on 'funds', that means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits

In the proposal it was extended to cash and financial instruments (see articles 1, 21, 26). These were the relevant definition in article 4

23. "financial instruments" means a financial instrument within the meaning of point 17 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council;

4. "cash" means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits;

5. "funds" means cash or financial instruments²

The Report of the European Parliament's Committee on Legal Affairs proposed amendments to the draft Regulation on EAPOs, The Rapporteur considers that "financial instruments" as defined in Article 4(1)(17) of Directive 2004/39/EC (MiFID) should not be included in the definition of "bank account" caught by the Regulation. The Rapporteur suggests that EAPOs should focus on freezing traditional bank deposit accounts. The Rapporteur pointed to certain complexities that would arise if financial instruments were within scope, noting *"the precautionary freezing of financial instruments poses risks that are different from the freezing of "traditional" bank deposit accounts. Indeed, the value of financial instruments is subject to change due to fluctuations in market rates"*

For UK FML Committee, it is not clear if the bank can exercise the right of **set-off and netting** (set-off allows a bank to combine the accounts held by a customer, allowing the bank to transfer money from an account that is in credit in order to make payments due on another account).

In my opinion this possibility is clearly excluded.

11.6.16. Ranking of competing creditors (Article 32)

Article 32 provide that "The order shall have the same rank, if any, as an equivalent national order in the Member State of enforcement." More precisely article 33 of the proposal had the prevision that "The EAPO confers the same rank as an instrument with equivalent effect under the law of the Member State where the bank account is located".

11.6.17. Remaining in force (Article 20)

- until it is set aside (revoked or terminated)
- until the effect of the EAPO is replaced by an equivalent effect of an enforcement measure under national law with respect to the fund preserved by the order.

11.6.18. Appeal against refusal (article 21)

The creditor can file an appeal against the rejection's decision within 30 days from the communication. The procedure will be *inaudita altera parte* in case of total rejection.

11.6.19. Remedies (Article 33 - 37)

Article 33: application of the debtor; possible reasons: requirements not met; declaration and documents not served; documents not having language requirements; exceeding amount not released; partial or total payment of the credit; a judgment rejected the claim; the enforceable title was annulled. The lack of service can be cured.

Article 34: on application of the debtor, the enforcement can be imited on the ground that certain amounts held in the account should be exempt from seizure and terminated in case of account excluded from the scope of the Regulation, enforcement of the title refused by the MS of destination, enforceability of the title suspended, enforcement contrary to public policy.

Article 35: both debtor and creditor can apply for modification or revocation due to changed circumstances.

In case of settlement of the claim, debtor and creditor can apply together for limitation or termination of the order.

11.6.20. Procedure (article 36)

Application: Standard remedy form

The decision on the application shall be issued after both parties have been given the opportunity to present their case

The decision will be delivered no later than 21 days after the court or, where national law so provides, the competent enforcement authority has received all the information necessary for its decision.

The decision limiting or terminating the enforcement of the Preservation Order shall be enforceable immediately

Based on article 46, all procedural issues not specifically dealt with in this Regulation shall be governed by the law of the Member State in which the procedure takes place.

11.6.21. Appeal (Article 37):

Right to appeal against decisions pursuant to art. 34, 35, 36. Application using stand appeal form.

Right to provide security in lieu of preservation (article 38) if the debtor provide a security, the preserved funds can be realised and the enforcement of the order terminated.

11.6.22. Article 39: third party has the right to raise objection in case of prejudice

11.6.23. Legal representation (Article 41)

In the proposal there was the provision that legal representation is not mandatory in proceedings for obtaining a European account preservation order

The European Economic and Social Committee (EESC) suggest: "The following should be added at the end of the article: 'except in cases where the national law of the competent court stipulates that provision of a lawyer is mandatory'." (see EESC Observations).

The Regulation presents a compromise formulation: representation by a lawyer or another legal professional shall not be mandatory unless, under the law of the Member State of the court or authority with which the application for a remedy is lodged, such representation is mandatory irrespective of the nationality or domicile of the parties.

11.6.24. Court fees (Article 42)

Court fees cannot be higher than for national order, non-disproportionate or discouraging the claimant

Cost of the bank in implementing an order: only if national law authorize reimbursement for equivalent national order.

11.6.25. Costs of the proceeding for unsuccessful party

Article 42 of the proposal stated that cost must be non-unnecessary and disproportionate and are awarded by substance judge or - if proceeding after obtaining a title - by the enforcement authority.

Unfortunately this opportune provision have been abandoned in favour of the following: "Fees charged by any authority or other body in the Member State of enforcement which is involved in the processing or enforcement of a

Preservation Order, or in providing account information pursuant to Article 14, shall be determined on the basis of a scale of fees or other set of rules established in advance by each Member State and transparently setting out the applicable fees. In establishing that scale or other set of rules, a Member State may take into account the amount of the Order and the complexity involved in processing it. Where applicable, the fees may not be higher than the fees charged in connection with equivalent national orders. “

11.6.26. Information to be provided by MS (50)

Some of the information can request a normative activity to the MS (method to obtain information on bank account, fee of the banks, court fees for issuing EAPO)

The forms in annex will be available in all community languages

EESC recommendation: The option of using secured electronic means of communication should be extended to all instruments, including relations between courts, under the Commission's *e-Justice* programme, to speed up procedures.

By 18 January 2022, the Commission shall submit to the European Parliament, to the Council and to the European Economic and Social Committee a report on the application of the Regulation.