

Workbook on Private International and Procedural Law: Selected Topics under the Brussels I bis, Rome I, and Rome II Regulations

2nd updated and revised ed.

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**Workbook on Private International and Procedural
Law: Selected Topics under the Brussels I bis, Rome I,
and Rome II Regulations
2nd updated and revised ed.**

**Workbook of Concise Notes, Case Summaries, and Judicial Decisions for
Law Students**

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International Private and Procedural Law

International Private and Procedural Law deals with a private-law relationship with foreign element and subsequent realisation of this relationship through mechanisms of public authority.

Foreign element is a key issue.

- important to examine a sufficiently relevant “connection to a foreign jurisdiction”
- if there is no foreign element present, no conflict of laws arises
- foreign element / cross-border element / international element
 - e.g. Art. 1(1) of the Rome I Regulation: „This Regulation shall apply, **in situations involving a conflict of laws**, to contractual obligations in civil and commercial matters....“

May appear within private-law relationship or within proceedings (substantive-law and procedural-law dimension).

Objective vs. subjective foreign element.

- Art. 3(3) of the Rome I: „Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.”



- *Inkreal*, C- 566/22

May consist in:

- the subject (natural or legal person)
- the object / subject matter
- the relevant legal fact
- an accessory (incidental) legal relationship

Its nature may be:

- factual (place) / legal (regime)

Must be relevant enough (any interconnection may be insufficient)

- typically relevant: nationality, place of performance of a contract, ...

Notes:

Brussels I bis Regulation

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

Several notes on the development of the European Space of Justice

- the European Space of Justice was created by the Brussels Convention on jurisdiction and the recognition and enforcement of decisions in civil and commercial matters.



The Brussels Convention (1968)

- aim: establishing a common area where judgments in civil and commercial matters could circulate freely among the Contracting States, in order to complete the framework of Community freedoms
- a dual convention, i.e. containing both rules of direct jurisdiction and rules on the recognition and enforcement of judgments in the Member States

The European area of justice is based on mutual trust between the Member States and on equivalence between jurisdictions.

- entry into force of the Treaty of Amsterdam (1999) and its Title IV (Arts. 61-69), the institutional scenario of the EU changed radically: the pursuit of various policies related to the free movement of persons was in fact been included among the objectives of EU law
 - Art. 61(c): adoption by the Council of measures in the field of judicial cooperation in civil matters as set forth in Art. 65:
 - the improvement and simplification of the system of transnational notifications, the taking of evidence, the recognition and enforcement of judgments in civil and commercial matters, the promotion of the compatibility of the rules applied in the Member States to conflicts of laws and of jurisdiction, the elimination of obstacles to the proper conduct of civil proceedings, if necessary by promoting the compatibility of the rules of civil procedure applicable in the Member States
- from the idea of a restyling operation of the Brussels Convention in order to eliminate the differences with respect to the parallel Lugano Convention of 1988, to the drafting of a Community regulation approved under the rules of the new tit. IV of the Treaty of Amsterdam as EC Reg. 44/01 of 22 December 2000 (subsequently, Reg. 44/01 recast as Reg. 1215/2012, Brussels I bis)
 - the driving force behind the evolution and gradual expansion of the system, promoting its basic principles of mutual trust, access to justice, and legal certainty
 - provided the conceptual foundations of the other instruments that integrate the system, which either replicate its notions and rules, or simply refer back to it
- role of the Regulation extended to Member States' own laws: adaptation of national law to European uniform rules, modernising effect on national legal systems

Notes:

Scope of the Brussels I bis Regulation

Territorial scope - EU Member states

Temporal scope

- art. 66(1): „1. This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after **10 January 2015**.“

- previously, Brussels I or the Brussels Convention applies

Personal scope

- **defendant - domiciled in a Member State**
- exceptions - art. 6(1): „If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State...“
- domicile
 - o legal persons - art. 63(1): „...a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: a) statutory seat; b) central administration; or c) principal place of business.“
 - autonomous concept - C-821/21 *Club La Costa and Others*
 - o natural persons - Brussels I bis does not define; it is not an autonomous concept
 - art. 62(1) - whether a party is domiciled in the MS whose courts are seised of a matter - *lex fori*
 - art. 62(1): „If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.“
 - if unable to determine the defendant's current domicile - last known domicile? (see C-327/10 - *Hypoteční banka*)

Notes:



Club La Costa
and Others
C-821/21



Hypoteční
banka
C-327/10



Toplofikatsia
Sofia
C-222/23



Credit
Agricole Bank
Polska
C-183/23

Brussels I bis - Substantive scope (*ratione materiae*)

Inclusionary criteria

- art. 1(1): „This Regulation shall apply in **civil and commercial matters** whatever the nature of the court or tribunal.“

+ foreign element

- subjective element suffices - foreign forum has been chosen (*Inkreal*, C- 566/22)



- „That situation is such as to raise questions in the Contracting State, as it does in the main proceedings, relating to the determination of international jurisdiction, which is precisely one of the objectives of the Brussels Convention, according to the third recital in its preamble.“ (*Owusu*, C-281/02)



Exclusionary criteria

- art.1(1) – revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)
- art. 1(2) - the status or legal capacity of natural persons, bankruptcy, arbitration, maintenance, parentage, ...

Notes:



Pula Parking
C-551/15



LTU v Eurocontrol
C-29/76



Mahá
C-494/23



Lechouritou and Others
C-292/05



Frahuil
C-265/02

Mutual relationships with other sources

- the need to examine only if the scope of the Brussels I bis is simultaneously fulfilled along with other sources:

- international treaties (bilateral and multilateral), other sources of EU law, national regulations on international private and procedural law

1. Brussels I bis - national legislation

- the precedence of EU (community) law.... (*Flaminio Costa v E.N.E.L.*, C 6-64)

2. Brussels I bis - EU law (other regulations)

- art. 67 - *lex specialis derogat legi generali*

3. Brussels I bis - EU law (multilateral conventions concluded by the Union)

- e.g. Convention of 30 June 2005 on Choice of Court Agreements - convention gives way to Brussels I bis in intra-EU cases
- always necessary to assess in relation to the specific convention

4. Brussels I bis - international treaties

- assess *in concreto* between a specific treaty and Brussels I bis
- Art. 68-73 - Brussels I bis shall, as between the Member States, supersede the conventions that cover the same matters as those to which Brussels I bis applies BUT „shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments“

Notes:

The purpose and significance of domicile in the context of Brussels I bis

- Art. 5 (1) of the Brussels I bis: „Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.“

- no exorbitant jurisdiction?

- Art. 6 of the Brussels I bis: „1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that Member State of the rules of jurisdiction there in force, and in particular those of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1), in the same way as nationals of that Member State.“

- if the defendant, according to the *lex fori* of the competing jurisdictions is not domiciled in a Member State, Art. 6 allows each jurisdiction to apply its own *lex fori* and the connecting factors provided for therein (including exorbitant fora)

Domicile

- different notions of domicile in the Member States, possible solution: autonomous interpretation

- domicile v habitual residence

- Art. 62 natural persons „1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.

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

- Art. 63: legal entities / associations „1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat;

(b) central administration; or

(c) principal place of business.

(...)“

Notes:



FTI Touristik

C-774/22



Hypoteční banka

C-327/10



G

C-292/10

Exclusive jurisdiction (art. 24)

- the strongest type of jurisdiction

- Article 24 „The following courts of a Member State shall have exclusive jurisdiction, **regardless of the domicile of the parties**:

(1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

(2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

(3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

(4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State;

(5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.“

- the court examines it *ex officio*

- art. 27: “ Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, it shall declare of its own motion that it has no jurisdiction.”

- cannot be altered by a choice of court agreement (neither under art. 25 nor art. 26)

Notes:



Komu and
Others
C-605/14



ČEZ
C-343/04



Dansommer
C-8/98



Hassett and
Doherty
C-372/07

Prorogation of jurisdiction / choice of court agreement (art. 25)

- parties do not need to be domiciled in a Member State
- based on the parties' contractual freedom
- art. 25(5) - independent of the other provisions of the contract (its validity cannot be contested solely on the ground that the contract itself is invalid)
- under the Brussels I bis regime, it confers jurisdiction on the courts of a Member State
- if present, the jurisdiction becomes exclusive
- requirements specified in art. 25 (note the special requirements applicable to the protection of the weaker party)

- art. 25 (1): „1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

- art. 25(2): „Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.“

- acceptance of general terms and conditions via a click-wrap mechanism (online click-through), which includes a jurisdiction clause, qualifies as a communication by electronic means that provides a durable record of the agreement provided that the user is able to save or print the terms and conditions before concluding the contract (C-322/14 *El Majdoub*)

Notes:



El Majdoub
C-322/14



Hőszig.
C-222/15



Società Italiana Lastre
C-537/23



Refcomp
C-543/10

Appearance in the proceedings / implicit prorogation (art. 26)

- based on the defendant's appearance in proceedings
 - exclusive jurisdiction cannot be derogated from, BUT appearance-based jurisdiction takes precedence over an explicit choice-of-court agreement
 - art. 26: „1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.
2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.“
- the obligation to inform the weaker party of the consequences of entering an appearance

Notes:



Taser International
C-175/15



ČPP Vienna Insurance Group
C-111/09



Ryanair
C-464/18

Jurisdiction over consumer contracts (art. 17-19)

- *lex specialis*, purpose - to „correct“ the factual imbalance between the parties - specifically, to protect the party in a structurally weaker position (typically a disparity between an economically stronger entity and a legally less experienced or vulnerable party)

- protection applies only if the conditions for applying the relevant Section are fulfilled

- art. 17(1): „1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

(a) it is a contract for the sale of goods on instalment credit terms;

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, **directs** such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.“

- **directing activity to the consumer's country** – non-exhaustive enumeration of activities

- C-585/08 *Pammer and Hotel Alpenhof* - e.g. „international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language,...“

- art. 18(1): „1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.“

- art. 18(2): „Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.“

- art. 19 - prorogation - agreed after the dispute has arisen / multiple options available to the consumer / if both parties are domiciled or habitually resident in the same Member State at the time the contract is concluded, and the agreement confers jurisdiction on the courts of that Member State, provided that such agreement is not contrary to the law of that Member State

Notes:



Pammer and Hotel Alpenhof

C-585/08



Ilsinger

C-180/06



Mühlleitner

C-190/11



Wurth Automotive

C-177/22

Jurisdiction over individual contracts of employment (art. 20-23)

- the employer need not be domiciled in the EU; the existence of a branch or establishment is sufficient (art. 20(2))
- art. 21: „1. An employer domiciled in a Member State may be sued:
 - (a) in the courts of the Member State in which he is domiciled; or
 - (b) in another Member State:
 - (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
 - (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.
- 2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.“
- art. 22: „1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.“
- limitation on the choice of court under art. 23 - only after the dispute has arisen / the employee must be granted additional options

Notes:



Mahamdia
C-154/11



ROI Land Investments
C-604/20



Markt24
C-804/19



Nogueira and Others
C-168/16

Jurisdiction in matters relating to insurance (art. 10-16)

- an insurer domiciled in a Member State may be sued:

- in the Member State where it is domiciled (the existence of a branch or agency in that Member State is sufficient),
- or in the Member State where the claimant is domiciled, if the claimant is the weaker party (e.g. the policyholder, insured, or beneficiary),
- a co-insurer may be sued in the courts of the Member State where proceedings are pending against the lead insurer,
- in cases of liability insurance or insurance of immovable property, the insurer may also be sued in the courts of the place where the harmful event occurred

- art. 11(2): „An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.“

- the insurer may bring proceedings only before the courts of the Member State in which the defendant is domiciled, regardless of whether that person is the policyholder, the insured, or a beneficiary under the insurance contract

- restrictions on choice of court under art. 15 - after the dispute has arisen / if it grants the weaker party more options / domiciled or habitually resident in the same Member State + additional specific conditions / where the policyholder is not domiciled in a Member State / in cases involving certain types of risks

Notes:



BALTA
C-803/18



CNP
C-913/19



FBTO Schadeverzekeringen
C-463/06

General jurisdiction (art. 4)

- art. 4: „ 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.“
- precedence is given to exclusive jurisdiction, choice of court (whether explicit or implicit) and the special regime for the protection of the weaker party
- the domicile of the defendant (natural person) is not an autonomous concept
- the domicile of legal persons is specified in art. 63(1)
- if a person is domiciled outside the EU and none of the exceptions outlined in the context of personal scope apply, the court may resort to national rules to determine whether it has jurisdiction or not

Notes:



Corman-Collins

C-9/12



Group Josi

C-412/98

Special jurisdiction (art. 7-9)

- **alternative** jurisdiction

- based on a close connection between the court of a Member State and the subject matter of the claim

- two types of alternative jurisdiction:

1. Substantive (material) alternative jurisdiction (art. 7)

- e.g. art. 7(1)(a) „in matters relating to a contract, in the courts for the place of performance of the obligation in question“ or art. 7(2): „in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur“, ...

- particular attention must be paid here to autonomous qualification - e.g. „supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a ‘sale of goods’“ (C-381/08 *Car Trim*)

2. Procedural alternative jurisdiction (art. 8)

- e.g. counter-claim arising from the same contract, number of defendants, ...

Notes:



Car Trim

C-381/08



Granarolo

C-196/15



Saey Home & Garden

C-64/17



Kainz

C-45/13



Zuid-Chemie

C-189/08

Venue Rules

Venue Effect of the Brussels I bis

- contrary to a popular belief, the Brussels I bis is not limited to “international jurisdiction”
- multiple rules determine “local jurisdiction”: specific court that can decide the case
 - not unique to the Brussels I bis, see also the Art. 3 of the Maintenance Regulation and the C 400/13 *Sanders* and C-408/13 *Huber*
 - Jenard Report: “[if] a person domiciled in a Contracting State other than the Netherlands who has caused an accident in The Hague may, under the Convention, be sued in a court in The Hague. This accident cannot give other Netherlands courts jurisdiction over the defendant.’ ”

Brussels I bis Rules with and without “Venue Effect”

- Some rules determine only international jurisdiction:
 - Art. 4, Art. 24, Art. 7(6), other rules that use domicile of defendant: Arts. 11(1)(a) and 14; 18(1-2); 21(1)(a); 22(1)
 - these rules usually refer to “courts of that Member State”

Rule Determining Original Venue

- Some rules determine both international jurisdiction and venue:
 - Art. 7 (except Art. 7(6)): these rules determine the original venue
- Venue effect emphasised in the C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH*
- Art. 24 – choice of court – may include a specific court in a MS
- Art. 26 – more controversial, yet leading view is that it also covers venue effect
- most of these rules refer to courts of a specific place, e.g., “the courts for the place where the harmful event occurred”

Notes:



Report by Mr P. Jenard



Color Drack

C-386/05

Venue Rules

Rules with Auxiliary Venue Effect

- among those rules that determine venue, certain rules determine the venue without actually determining the original court
 - Arts. 7(3), 8, 9, 26
 - e.g., a counter-claim rule (Art. 8(3)):
 - the Brussels I bis allows the defendant to bring a counter-claim in the specific court where the claim was brought, but the rule does not determine the original venue

Inconsistencies due to the Venue effect

- according to the dominant view Art. 7 does not apply if its connecting factor is located in the state of the defendant's domicile
 - due to a clause: "A person domiciled in a Member State may be sued in another Member State [...]"
- this could lead to strange results if "Venue Effect" of Art. 7 is accounted for:
 - e.g., if a company domiciled in Singapore contracts via its Trnava branch with a consumer, then due to Art. 17(2), it is assumed to be domiciled in Slovakia and Art. 7(5) cannot be used
 - > the Brussels I bis does not ensure that the consumer can sue in Trnava, but only in Slovakia at large
 - similarly, if the company is domiciled in Slovakia, but concluded the contract via its Trnava branch, the consumer will not be able to rely on Art. 7(5) and have direct access to the court of Trnava
 - however, if the company is domiciled in Hungary, but concluded the contract via its branch in Trnava, then the consumer will be able to rely on Art. 7(5) and have direct access to the court of Trnava

Notes:

Jurisdiction – incidental questions and provisional, including protective, measures

Incidental questions

- court seised of the main issue shall also have jurisdiction to decide incidental questions
- the incidental question may in some cases constitute the main issue (e.g. question of legal capacity)
- such matters often require a separate conflict-of-law solution

Provisional, including protective, measures

- art. 35: „Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.“

Notes:



Supreme Site Services and Others.

C-186/19



TOTO

C-581/20

Lis pendens (art. 29-34)

- coordination between proceedings pending in different Member States, in order to prevent a conflict of decisions that could hinder the movement of judgments across borders (C-116/02 *Gasser*)
- art 29(1): „1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.“
- art. 31: „1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.
2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court. ...“
- articles 33 and 34 address situations where proceedings are pending before the courts of a third State
 - proceedings MAY be stayed
- two cases are to be considered "the same", with respect to the cause of action, when they refer to the same substantive relationship, and, with respect to the object, if they aim to achieve, albeit specularly, the same result, with a unitary assessment of the "substance" of the two competing claims, regardless of the procedural role assumed by the parties in the different proceedings (C-144/86 *Gubisch Maschinenfabrik v Palumbo*)

Notes:



Gubisch Maschinenfabrik
v Palumbo
C-144/86



Gasser
C-116/02



Tatry v Maciej Rataj
C-406/92.



Weber
C-438/12

Recognition and Enforcement (art. 36-60)

- main objective is to facilitate the **free movement of judicial decision** across borders - by reducing and then substantially eliminating any obstacle to such movement
- judgment - any decision of a court of a Member State, regardless of its designation (art. 2)
- recognition and enforcement take place automatically (*ex lege*) without the need for special proceedings or a declaration of enforceability (art. 36, 39)
 - the judgment must be final or enforceable in the Member State of origin
- only verification of authenticity is permitted, without review as to the substance (art. 52)
- produce a copy of the judgment, authentic instrument, court settlement, and the certificate pursuant to the annex of the Regulation is required (art. 42, 58, 59)
- the enforcement procedure is governed by the *lex fori* (art. 41(1))
- grounds for refusal of recognition and enforcement (art. 45)
 - examined only upon application
 - manifest incompatibility with public policy (primarily of a substantive nature)
 - violation of the right to a fair trial
 - irreconcilability with a judgment given between the same parties in the requested Member State and irreconcilability with an earlier judgment given in another Member State or in a third State in the same matter and between the same parties
 - failure to respect rules on exclusive and mandatory jurisdiction

Notes:



Prism Investments

C-139/10



Krombach

C-7/98



Trade Agency

C-619/10



Gjensidige

C-90/22



Real Madrid Club de Fútbol

C-633/22

Rome I Regulation

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

Scope of the Rome I Regulation

Territorial scope - EU Member states

- except Denmark - which has made use of the opt-out clause and does not participate in Rome I

Temporal scope

- art. 28: „This Regulation shall apply to **contracts concluded after 17 December 2009**.“
 - previously Rome Convention applies
- contractual relationship established before 17 December 2009 falls within the scope of this Regulation only if, by mutual consent expressed after that date, the relationship was altered to such an extent that it must be regarded as a new contract concluded from that date onward (a matter to be assessed by the national court) (C-135/15 *Nikiforidis*)

Personal scope

- *erga omnes*

Substantive scope (*ratione materiae*)

- civil and commercial matters + contractual obligation + foreign element (may be subjective, with limitations – art. 3(3)(4))
- contractual obligation is an autonomous concept - it presupposes the existence of a contract, regardless of whether the obligation arises directly from its performance or from its breach , an offer must be sufficiently clear and express the offeror's intention to be bound and must be voluntarily accepted by the other party + no counter-performance (consideration) is required
- matters excluded from the scope of the regulation– it shall not apply, in particular, to revenue, customs or administrative matters (art. 1(1)) + art. 1 (2) excludes legal capacity of natural persons, obligations arising out of family relationships, matrimonial property regimes, arbitration agreements, ...

Notes:



Nikiforidis

C-135/15



VKI

C-272/18



Kerr

C-25/18



Handte/TMCS

C-26/91

Norms in international private law

Conflict-of-law norms

- do not govern the rights and obligations of the parties themselves, but rather serve to identify, based on specific criteria (connecting factor), which law shall apply, i.e. the legal system of which country will govern the legal relationship in question
- which substantive law is to be applied to a private-law relationship with a foreign element? (procedural – *lex fori*)

Directly applicable rules

- contain the regulation of the parties' rights and obligations - applied directly
- by unifying the substantive law of several states, a form of "uniform law" is created
- examples:

United Nations Convention on Contracts for the International Sale of Goods (**CISG**)



Convention on the Limitation Period in the International Sale of Goods



Soft law

- law of a non-state nature - such as model rules, standard clauses, etc.
- not binding on the contracting parties unless expressly agreed upon
- example: the UNIDROIT Principles of International Commercial Contracts

Notes:

Rome I - Habitual residence

- not domicile - Member States may interpret it differently
- an autonomous concept under EU law
- it is assessed based on a comprehensive set of circumstances - not a single factor
- it does not have to be a permanent residence or domicile, although it may coincide with either
- the key determinant is the **centre of a person's life and interests** (social, professional, family, etc.), accompanied by a certain duration of actual residence, which may be intermittent (temporary or even extended stay abroad does not necessarily change the place of habitual residence)
- legal persons - art.19 (1): „1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.“
- CJEU interprets it in the context of natural persons, particularly in family law matters

Notes:



A

C-523/07



Mercredi

C-497/10 PPU



Lindenbaumer

C-61/24

Rome I - Selected questions concerning the application

- the Rome I Regulation has **universal applicability** - art. 2: „Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.“ (irrelevant whether the applicable law results from the parties' choice or from the conflict-of-law rules)
- foreign law must be applied as it would be applied by the foreign court applying *lex fori*
- exclusion of *renvoi* (art. 20)
- further matters addressed by the Regulation - voluntary assignment and contractual subrogation (art. 14), legal subrogation (art. 15), multiple liability (art. 16), set-off (art. 17), burden of proof (art. 18)

Protective mechanisms - public policy of the forum, overriding mandatory provisions

- public policy - art. 21: „The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.“
 - always assessed in the specific context, defensive mechanism, a limitation on the effects of the applicable foreign law
 - in the field of procedural law - a ground for non-recognition of a foreign judgment or refusal of enforcement

- overriding mandatory provisions (OMP)

- art. 9(1): „Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.“
 - offensive mechanism, applied exceptionally, subcategory of mandatory rules, primarily public-law provisions serving essential and legitimate interests of society (private-law provisions may also qualify, but only if they reflect a substantial public interest)
 - *lex fori* OMP, OMP of the law of the country where the obligations arising out of the contract have to be or have been performed, OMP *lex causae*?, other OMP as matters of fact (C-135/15 *Nikiforidis*)

Notes:



Nikiforidis

C-135/15



Unamar

C-184/12



HUK-COBURG

C-86/23



Krombach

C-7/98

Rome I - Scope of the law applicable

- art. 12: „1. The law applicable to a contract by virtue of this Regulation shall govern in particular: (a) interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions; (e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.“

- **incidental questions** may require a separate conflict-of-law solution, but some are directly addressed within the Regulation itself

- art. 13 **incapacity**: „In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.“

- **validity** - consent and **material validity** (art. 10) – „shall be determined by the law which would govern it under this Regulation if the contract or term were valid“

- **formal validity** (art. 11(1)) – „...formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.“

- art. 11(2): „2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.“

Notes:

Mutual relationships with other sources

- the need to examine only if the scope of the Rome I is simultaneously fulfilled along with other sources:

- international treaties (bilateral and multilateral), other sources of EU law, national regulations on international private and procedural law

1. Rome I - national legislation

- the precedence of EU (community) law.... (*Flaminio Costa v E.N.E.L.*, C 6-64)

2. Rome I - EU law (other regulations)

- Art. 23 - *lex specialis derogat legi generali* : „this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.“

3. Rome I - international treaties

- art. 24-26, assess *in concreto* between a specific treaty and Rome I
- art. 25: „1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.
2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.“

Notes:

Choice of applicable law (art. 3)

- dominant option - reflects party autonomy and emphasises contractual freedom
- restrictions in case of protection of the weaker party
- recital 11 of the Rome I: „The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.“
- the choice of law may be made within the main contract or in a separate agreement, and it may also be made after the dispute has arisen
- non-state legal systems?
 - (e.g., lex mercatoria, UNIDROIT Principles, and other optional legal instruments) - the incorporation of such rules into the contract is not excluded, however, this incorporation can only take place by reference and not as a valid choice of applicable law under the Regulation

Article 3 Freedom of choice

„1. A contract shall be governed by the law chosen by the parties. The choice shall be made **expressly or clearly demonstrated** by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

(author's note: splitting of the contractual statute „dépeçage“)

2. The parties may at any time agree to subject the contract to a **law other than that which previously governed it**, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

(author's note: limitation in single-country contracts)

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement. *(author's note: protection of the EU internal market)*

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.“

Notes:



SC Gruber Logistics C-152/20



Club La Costa and Others C-821/21

Applicable law in the absence of choice (art. 4)

- recital 16 of the Preamble: „To contribute to the general objective of this Regulation, **legal certainty in the European judicial area**, the conflict-of-law rules should be highly **foreseeable**. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.“
- art. 4 contains a catalogue of conflict-of-law rules that apply following the autonomous qualification of the given contractual obligation according to the following rules:

Article 4 Applicable law in the absence of choice

„1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

- (a) **a contract for the sale of goods** shall be governed by the law of the country where the **seller has his habitual residence**;
- (b) **a contract for the provision of services** shall be governed by the law of the country where the **service provider has his habitual residence**;
- (c) **a contract relating to a right *in rem* in immovable property or to a tenancy** of immovable property shall be governed by the **law of the country where the property is situated**;

.....“

„2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

(author's note: clause of manifestly closer connection)

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.“

(author's note: clause of the closest connection)

Notes:



Haeger & Schmidt

C-305/13



ERGO Insurance

C-359/14



ICF

C-133/08

Applicable law - Contracts of carriage (art. 5)

- this category includes contracts for the carriage of goods and contracts for the carriage of passengers (the passenger is considered the weaker party)

1. Carriage of Goods (there is no protection of the weaker party in this case)

- contracts for the operation of a means of transport for a single-voyage and other contracts whose main purpose is the carriage of goods are considered contracts of carriage of goods (recital 22 of the Preamble)

- this category also includes charterparties, freight forwarding agreements, and other transportation contracts whose purpose is the carriage of goods

- term 'consignor' - any person who enters into a contract of carriage with the carrier and the term 'the carrier' - party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself (recital 22 of the Preamble)

- applicable law (art. 5(1)): choice of law → if no choice has been made: the contract is governed by the law of the country where the carrier has its habitual residence, place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country → if these requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated + art. 5(3) escape clause (manifestly closer connection)

- note - the application of direct norms, e.g. the Convention on the Contract for the International Carriage of Goods by Road (CMR)

2. Carriage of Passengers (weaker party protection)

- purpose - to enable the passenger to foresee which law would govern their contract

- art. 5(2): choice (*numerus clausus* of connecting factors for the choice of law) → if no choice is made, the law of the country where the passenger has their habitual residence, provided that either the place of departure or the place of destination is also in that country → if these requirements are not met, the law of the country where the carrier has his habitual residence + art. 5(3) escape clause (manifestly closer connection)

Notes:



Haeger & Schmidt

C-305/13



ICF

C-133/08



CMR

Convention

Applicable law - Consumer contracts (art. 6)

- an effort to balance the consumer's factually weaker position – „... the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques...“ (recital 24 of the Preamble)
- art. 6(1) - the consumer is a natural person concluding contract for a purpose which can be regarded as being outside his trade or profession and the professional is another person acting in the exercise of his trade or profession
- in the absence of a choice (art. 6(1)), a consumer contract „shall be governed by the law of the country where the **consumer has his habitual residence**, provided that the professional:
 - (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
 - (b) by any means, directs such activities to that country or to several countries including that country,and the contract falls within the scope of such activities.“
- the concept of directing activities to the consumer's country - see the interpretation under Brussels I bis and C-585/08 *Pammer and Hotel Alpenhof*
- choice (art. 6(2)) – „...Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable.“
 - principle of **the most favourable treatment**
- certain contracts are excluded from the scope of Article 6 (art. 6(4))

Notes:



Pammer and
Hotel Alpenhof
C-585/08



Diamond Resorts
Europe and Others
C-632/21



Verein für
Konsumenteninformation
C-272/18



Gruber
C-464/01



ShareWood
Switzerland
C-595/20

Applicable law - Insurance contracts (art. 7)

- excluded: reinsurance and insurance contracts under art. 1(2)(j) of Rome I

1. Insurance contracts covering large risks regardless of whether the insured risk is located in a Member State

- choice of law - under art. 3 of Rome I (with the exception of life insurance) – no protection for the weaker party applies
- in the absence of a choice → the applicable law is that of the country where the insurer has their habitual residence (art. 7(2)) + escape clause (manifestly closer connection)

2. Other insurance contracts

- the insured risks must be located within the territory of a Member State
- choice of law is allowed but subject to *a numerus clausus* of connecting factors (art. 7(3)) + a return to national conflict-of-law regimes is allowed for selected categories
- in the absence of a choice → the applicable law is that of the Member State in which the risk is situated at the time of conclusion of the contract (if the risks are situated in more than one Member State, the contract is considered as constituting several contracts each relating to only one Member State)
- art. 7(4) - risks for which a Member State imposes an obligation to take out insurance
- the place where the risk is situated (Directive 2009/138)
 - art. 13(13) of the Directive: „‘Member State in which the risk is situated’ means any of the following: (a) the Member State in which the property is situated, where the insurance relates either to buildings or to buildings and their contents, in so far as the contents are covered by the same insurance policy; (b) the Member State of registration, where the insurance relates to vehicles of any type; (c).....“
 - art. 13(14) of the Directive: „‘Member State of the commitment’ means the Member State in which either of the following is situated: (a) the habitual residence of the policy holder; (b) if the policy holder is a legal person, that policy holder’s establishment, to which the contract relates;“

Notes:



ERGO Insurance

C-359/14



Directive 2009/138

Applicable law - Individual employment contracts (art. 8)

- subordinate work performed personally by the employee for remuneration

- protection of the weaker party - the employee

- applicable law:

- choice of law (art. 8(1)): „...may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable...”

- permitted, but may not undermine the employee's mandatory protection under the law that would otherwise apply

- in the absence of a choice (art. 8(2) and 8(3)) → in which or, failing that, from which the employee habitually carries out his work in performance of the contract → if the employee does not habitually carry out work in any one country, then the applicable law is that of the country where the place of business through which the employee was engaged is situated + escape clause (manifestly closer connection (art. 8(4)))

Notes:



Schlecker

C-64/12



Koelzsch

C-29/10



SC Gruber Logistics

C-152/20



Nikiforidis

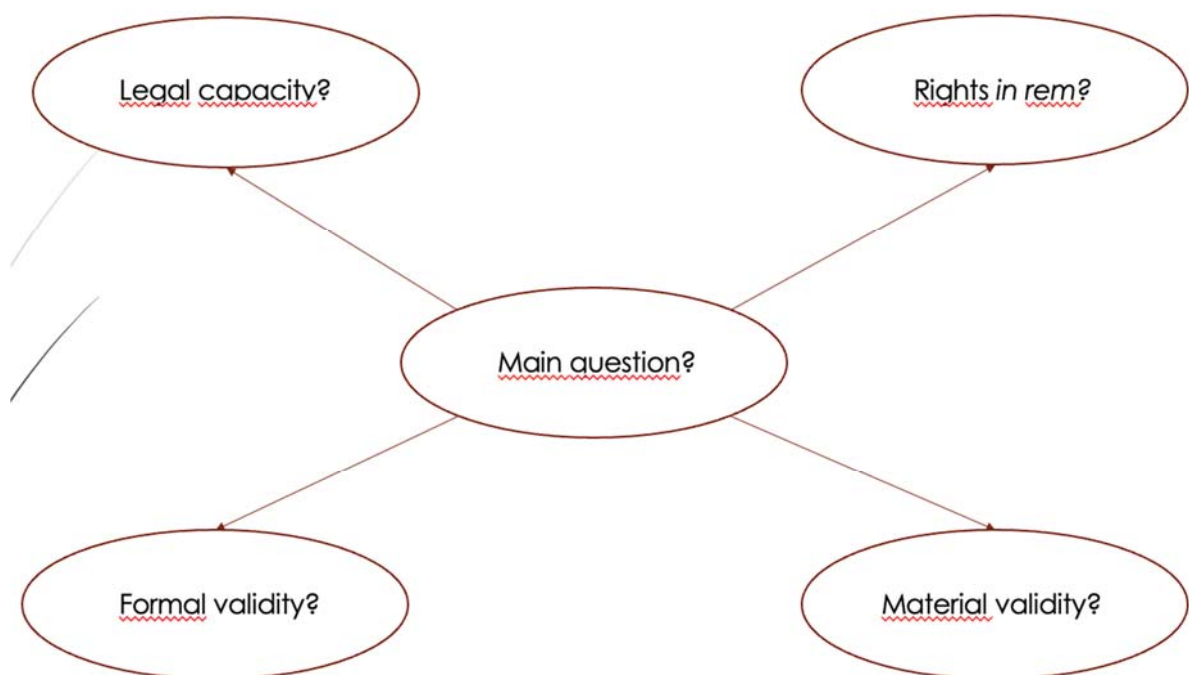
C-135/15

Mosaic of applicable law

Ancillary, incidental questions may require a separate conflict-of-law solution, but some are directly addressed within the Regulation itself.

- e.g. Art. 13 incapacity: „In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.“

Validity - consent and material validity (art. 10), formal validity (art. 11(1))



Notes:

Legal acts (art. 10, 11)

General Assessment of validity as main/ ancillary question

A distinction must be made between assessing the validity of a legal act and **the legal relationship itself** established by that legal act.

The validity of a legal act is assessed separately from the main question and by applying an independent conflict of laws rule.

The validity of a legal act **may also be the main question**, for instance, in proceedings concerning the determination of the validity / invalidity of a particular legal act.

For legal act to be valid it is important to examine its material and formal validity.

Validity of contracts

Material validity (Art. 10 Rome I)

- Both the existence and validity of the main contract (and all of its terms) are determined by the law that would be applicable if the contract or its terms were valid.
- Art. 10 (1) Rome I: „The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.“
 - need to identify a main contract
 - applicable law for the main contract will (generally) also govern the agreement on the choice of law

Existence of a contract: Issues regarding offer and acceptance of a contract (process, *invitatio ad offerendum*, counter-offers).

Validity of a contract: Issues regarding valid conclusion of a contract other than the issues of the contract's existence and formal validity.

- **Autonomous** definition of validity (e. g. Article 4 CISG)

Notes:

Legal acts (art. 10, 11)

Habitual residence = additional protective measure

- under the law of the country where a party has his **habitual residence**
- **requirements for effective consent** to the **conclusion** of a contract were lacking
- must be raised as an **objection**
- Art. 10 para 2 Rome I: „Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.“

Formal validity

- Art. 11 (1) Rome I: „A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.“
- Art. 11 (2) Rome I: „A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.“

Opposability of legal acts

- involvement of **three parties**
 - a **creditor** challenges the legal act between his **debtor** and a **third party**
- **main question (always)**
- jurisdiction: **general, contractual**
 - according to the **place of performance of the contract** between the creditor and the debtor (not of the challenged/contested contract).



Feniks
C-337/17

Notes:

Rome II Regulation

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

Scope of the Rome II Regulation

Territorial scope - EU Member states

- except Denmark - which has made use of the opt-out clause and does not participate in Rome II

Temporal scope

- art. 31: „This Regulation shall apply to events giving rise to **damage which occur** after its entry into force.“ + art. 32: „This Regulation shall apply from **11 January 2009**, except for Article 29, which shall apply from 11 July 2008.“

Personal scope

- *erga omnes*

Substantive scope (*ratione materiae*)

- civil and commercial matters + non-contractual obligation + foreign element (may be subjective, with limitations - art. 14(2)(3))
- „...damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo“ (art. 2(1))
- damage - autonomous concept - direct damage (determined according to the place where the direct damage occurred)
- e.g. „...damage related to the death of a person in such an accident which took place in the Member State of the court seised and sustained by the close relatives of that person who reside in another Member State, must be classified as ‘indirect consequences’ of that accident...“ (C-350/14 *Lazar*)
- matters excluded from the scope of the regulation - it shall not apply, in particular, to revenue, customs or administrative matters, *acta iure imperii* (art. 1(1)) + art. 1(2) excludes family relationships, matrimonial property regimes, nuclear damage, violations of privacy and rights relating to personality, including defamation...

Notes:



Lazar

C-350/14



Homawoo

C-412/10



Verein für Konsumenteninformation

C-191/15



ERGO Insurance

C-359/14

Rome II - Selected questions concerning the application

- habitual residence - see the interpretation provided for the Rome I Regulation
- the Rome II Regulation has **universal applicability** - art. 3: „Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.“
- foreign law must be applied as it would be applied by the foreign court applying *lex fori*
- exclusion of *renvoi* (art. 24) – „The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.“
- further matters addressed by the Regulation - direct action against the insurer of the person liable (art. 18), subrogation (art. 19), multiple liability (art. 20), burden of proof (art. 22)

Protective mechanisms – *ordre public*, overriding mandatory provisions, safety rules

- public policy - art. 26: „The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.“
 - see the interpretation provided for the Rome I Regulation
- overriding mandatory provisions (OMP) - art. 16: „Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.“
 - offensive mechanism, applied exceptionally, subcategory of mandatory rules, primarily public-law provisions serving essential and legitimate interests of society (private-law provisions may also qualify, but only if they reflect a substantial public interest), note that explicitly only *lex fori* OMP (*lex causae*?, other OMP as matters of fact (C-135/15 *Nikiforidis*))
- rules of safety and conduct - art. 17: „In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.“ (affect the assessment of conditions under the applicable law but do not influence the determination of that law)

Notes:



HUK-COBURG

C-86/23



Da Silva Martins

C-149/18



Prüller-Frey

C-240/14



NK

C-535/17



FGTI

C-264/22

Rome II - Scope of the law applicable

- art. 15: „The law applicable to non-contractual obligations under this Regulation shall govern in particular:

- (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;
- (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;
- (f) persons entitled to compensation for damage sustained personally;
- (g) liability for the acts of another person;
- (h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.“

- **incidental, ancillary questions** may require a separate conflict-of-law solution, but some are directly addressed within the Regulation itself

- recital 12 of the Preamble „The law applicable should also govern the question of **the capacity to incur liability in tort/delict**.“

- **formal validity** - art. 21: „A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed.“

Notes:



Nintendo

C-24/16



FGTI

C-264/22

Mutual relationships with other sources

- the need to examine only if the scope of the Rome II is simultaneously fulfilled along with other sources:

- international treaties (bilateral and multilateral), other sources of EU law, national regulations on international private and procedural law

1. Rome II - national legislation

- the precedence of EU (community) law.... (*Flaminio Costa v E.N.E.L.*, C 6-64)

2. Rome II - EU law (other regulations)

- art. 27 - *lex specialis derogat legi generali* : „This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.“

3. Rome II - international treaties

assess *in concreto* between a specific treaty and Rome II

- art. 28: „1.This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.
2.However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.“

Notes:

Choice of applicable law (art. 14)

Article 14

Freedom of choice

- „1. The parties may agree to submit non-contractual obligations to the law of their choice:
(a) by an agreement entered into after the event giving rise to the damage occurred; or
(b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

(author's note: limitation in single-country delicts)

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.“

(author's note: protection of the EU internal market)

- objective - preserving the autonomy of the parties' will

Notes:

Applicable law - tort/delict (art. 4-9)

- potential qualification issues - in favour of a contractual regime?
- breach of an objective legal norm resulting in damage
- non-contractual obligation between the injured party and the person liable for the damage
- *lex specialis*:
 - Product liability (art. 5)
 - Unfair competition and acts restricting free competition (art. 6)
 - Environmental damage (art. 7)
 - Infringement of intellectual property rights (art. 8)
 - Industrial action (art. 9)
- *lex generalis* (art. 4 – General rule)

General rule – art. 4

- cascading structure of the provision; objective: to ensure legal certainty and to seek a fair balance between the person allegedly liable and the person who has suffered the damage
- art. 4(1): „1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be **the law of the country in which the damage occurs** irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.“
 - where direct damage occurs in several countries, the relationships shall be assessed separately
- art. 4(2) - habitual residence in the same country - the law of that country
- art. 4(3) - escape clause of manifestly closer connection

Notes:



Lazar
C-350/14



BMA Nederland
C-498/20



Da Silva Martins
C-149/18



ERGO Insurance
C-359/14

Applicable law - product liability (art. 5), unfair competition (art. 6)

Product liability

- Directive (EU) 2024/285 - art. 4(1): „product’ means all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software;“
- Directive (EU) 2024/285 - art. 7(1): „A product shall be considered defective where it does not provide the safety that a person is entitled to expect or that is required under Union or national law.“
- applicable law - art. 5 of the Rome II
 - art. 4(2) is not affected (same country of habitual residence at the time the damage occurred)
 1. the law of the country in which the person sustaining the damage had their habitual residence at the time the damage occurred (provided that the product was marketed in that country – intended to strike a balance between the legitimate expectations of the seller and consumer protection)
 2. if 1 not applicable → the law of the country in which the product was acquired (provided that the product was marketed in that country)
 3. if 2 not applicable → the law of the country in which the damage occurred (provided that the product was marketed in that country)
 - if the person claimed to be liable could not reasonably have foreseen that the product would be marketed in the country whose law would otherwise be applicable, the law of the country of that person's habitual residence shall apply

+ escape clause of manifestly closer connection

Unfair competition

- law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected / law of the country where the market is, or is likely to be, affected
- where an act of unfair competition affects exclusively the interests of a specific competitor
→ art. 4 (general rule) shall apply
- when the market is, or is likely to be, affected in more than one country - art. 6(3)(b)
- art. 6(4) - no choice of law agreement (collective interests)

Notes:

Applicable law - environmental damage (art.7), infringement of intellectual property rights (art. 8), industrial action (art. 9)

Environmental damage

- recital 24 of the Preamble: „‘Environmental damage’ should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.“
- nuclear damage is excluded from *ratione materiae* (art. (1)(2)(f))
- applicable law (art. 7) - the law determined pursuant to art. 4(1) + the person seeking compensation for damage may choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred

Infringement of intellectual property rights

- applicable law - law which grants protection to the intellectual property right = the law of the country for which protection is sought
- where protection is granted at Union level - the law of the country in which the infringement occurred



- choice of law is excluded (collective interests)

C-421/20 Acacia

Industrial action

- art. 4(2) remains unaffected (same country of habitual residence)
- applicable law to a non-contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out - the law of the country where the action is to be, or has been, taken
- recital 27 of the Preamble: „... concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State’s internal rules..“
- recital 27 of the Preamble: „The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

Notes:

Applicable law - unjust enrichment (art. 10), *negotiorum gestio* (art. 11), *culpa in contrahendo* (art. 12)

Unjust enrichment

- if the unjust enrichment relates to an existing relationship between the parties (such as a contract or a tort/delict) which is closely connected with that enrichment, it shall be governed by the same law as that relationship → if no, and the parties have their habitual residence in the same country at the time when the event giving rise to the unjust enrichment occurred - the law of that country shall apply → all other cases - the applicable law shall be the law of the country in which the unjust enrichment took place + escape clause of manifestly closer connection

Negotiorum gestio

- if the non-contractual obligation arises out of a relationship existing between the parties (such as a contract or a tort/delict) which is closely connected with that obligation, it shall be governed by the same law as that relationship → if no and the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurred - the law of that country shall apply → all other cases - the law of the country in which the event giving rise to the damage occurred + escape clause of manifestly closer connection

Culpa in contrahendo

- recital 30 of the Preamble: „*Culpa in contrahendo* for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations..“

- the law that applies to the contract or that would have been applicable to it had it been entered into → where the applicable law cannot be determined on that basis → the law of the country in which the damage occurred / if the parties have their habitual residence in the same country - the law of that country shall apply + escape clause of manifestly closer connection

Notes:

Model practical cases

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. Is it possible to choose a different applicable law?
4. Which law governs the circumstances excluding liability?
5. Will a judgment issued in one Member State be automatically recognised and enforceable in another Member State?

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and extend across the width of the page. There are no margins, text, or other markings on the paper.

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. How would the situation change if the general terms and conditions that Martin agreed to included a choice-of-law clause designating Hungarian law?
4. How would the situation change if the product had been ordered for business purposes under a company name?
5. Which law governs the question of formal and material validity, assuming that the order was placed online at a distance?
6. Will a judgment issued in one Member State be automatically recognised and enforceable in another Member State?

[illegible]

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. Which law governs the question of the formal and material validity of the contract?
4. Can Anna initiate proceedings before the Austrian courts?
5. Will a judgment issued in one Member State be automatically recognised and enforceable in another Member State?

This image shows a single page of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page, leaving small margins at the top and bottom. There are no vertical margin lines, and the paper is completely blank except for the lines.

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. Which law governs the question of the formal and material validity of the contract?
4. How would the situation change if the contract did not specify the place of performance?
5. Could the Dutch service provider initiate proceedings in Spain as well?

[illegible]

5. Emma, a French national with habitual residence in Lyon, was employed in 2021 as a flight attendant. She was hired by an agency based in Milan for a position involving cross-border European flights. In the summer of 2022, she stopped receiving her salary and now wishes to bring a claim against her employer, an Italian company (09.03.2025).

1. Courts of which country have jurisdiction?

2. What is the applicable law?

3. How would the situation change if the employment contract included a choice-of-law clause designating German law?

4. How would the situation differ if the employer were bringing the claim, for example, in a dispute concerning breach of the employment contract?

5. Will a judgment issued in one Member State be recognised and enforceable in another Member State?

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. How would the situation change if the tenancy was a short-term rental for 7 weeks?
4. How would the situation change if the contract contained a jurisdiction clause designating the Czech courts?
5. How would the situation change if there was a choice of Czech law clause in the contract?

[illegible]

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. Which law governs the question of the formal and material validity of the contract?
4. How would the situation change if the contract contained a jurisdiction clause in favour of the German courts?
5. Will a judgment issued in one Member State be recognised and enforceable in another Member State?

[illegible]

8. Julia, a Croatian student from Rijeka, went on a short-term Erasmus exchange programme to Portugal. During her stay, she purchased a smartphone on an instalment plan from a local Portuguese retailer. After making payments for two months, she stopped paying the remaining instalments. The Portuguese seller now seeks to recover the outstanding amount of 600 EUR (13.09.2024).

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. Which law governs the question of the formal and material validity of the contract?
4. How would the situation change if the contract contained a jurisdiction clause in favour of the Portuguese courts?
5. Will a judgment issued in one Member State be recognised and enforceable in another Member State?

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 20 lines visible. The paper has a slight shadow on its right side, suggesting it's resting on a surface.

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. Which law governs the question of capacity to incur liability in tort/delict?
4. How would the situation change if they had made a reservation at the restaurant for a planned celebration and the shelter was damaged during the event?
5. Can the parties agree on the applicable law and jurisdiction?

[illegible]

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. Would the situation change if the contract on the basis of which the relevant invoice was issued contained a choice-of-law clause designating Austrian law?
4. Can the company initiate proceedings before Austrian courts?
5. Will a judgment issued in one Member State be recognised and enforceable in another Member State?

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1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. How would the situation change if no choice-of-court agreement had been concluded?
4. Are there any limitations on choosing the law of a third country?
5. Will a judgment issued in one Member State be recognised and enforceable in another Member State?

[illegible]

1. Courts of which country have jurisdiction?
2. What is the applicable law?
3. Can the parties agree on the applicable law?
4. Can the parties agree on the choice of court?

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- This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page, leaving small margins at the top and bottom. There are no vertical margin lines, and the paper is completely blank except for the lines.

