



TEXT 4

Regulations Brussels Ibis and Regulation creating a European Enforcement Order

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(Prepared for the purpose of the Legal English seminar, Judicial Academy, Zagreb, 5-9 June 2017)

Study material is developed for the project “Training Legal Languages for Effective Functioning of Judicial Cooperation in EU”. It is produced solely for educational purposes. It has been created for the purposes of legal language training with the financial support of the Justice Programme of the European Union.



REPUBLIKA SLOVENIJA
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1. Introduction

In pursuing the objective of maintaining and developing an area of freedom, security and justice, the EU legislator has undertaken significant action in unifying the rules on jurisdiction, civil procedure and enforcement of judgments.¹ As expressed in Recital (1) of the Regulation Brussels I, '[i]n order to establish progressively such an area, the Community should adopt ... the measures relating to judicial cooperation in civil matters which are necessary for the operation of the internal market.' The majority of legal instruments on private international law on the EU level concern the questions of international civil procedure. The EU legislator attaches particular importance to the principle of mutual recognition of judgments.

The Regulation 44/2001 (hereinafter: Brussels I), as revised in the Regulation 1215/2012 which applies from 10 January 2015 (hereinafter: Regulation Brussels Ibis or Regulation 1215/2012) is certainly the most important legal instrument in the field of international civil procedure. The European Commission submitted the Proposal of 26 July 2013 to amend the Regulation 1215/2012.² The purpose of the suggested changes is to implement the so-called 'patent package' - a legislative initiative on the EU level consisting of two Regulations (the 'Unified Patent Regulations')³ and an international Agreement (the 'Unified Patent Court Agreement' or 'UPC Agreement'). An agreement of the 'patent package' was reached in December 2012 which laid 'the ground for the creation of unitary patent protection in the European Union'.⁴ The changes were adopted in the Regulation No 542/2014,⁵ amending the Regulation 1215/2012

¹See, e.g., Recital 1 of 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 (OJ 2001, L 12/1) (hereinafter: Brussels I Regulation): 'The Community has set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt ... the measures relating to judicial cooperation in civil matters which are necessary for the operation of the internal market.'

²Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels 26.7.2013 COM(2013) 554 final, 2013/0268 (COD) (hereinafter: Commission's Proposal of 2013).

³ Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361/1; Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation requirements, OJ L 361/89.

⁴Explanatory Memorandum to the Commission's Proposal of 2013.

⁵Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules of be applied with respect to the Unified Patent Court and the Benelux Court of Justice, OJ 2014, L 163/1



The Regulation Brussels I applies to all EU Member States. Denmark was not initially bound by the Regulation as has a special regime for judicial cooperation under the Treaty, which is also expressed in Recitals (21) and (22). It became applicable after the EU had concluded an agreement with Denmark by means of the Council Decision 2006/325/EC of 27 April 2006,⁶ which came into force on 1 January 2007. As to the Regulation Brussels Ibis it became applicable in Denmark on the basis of Agreements concluded between the European Union and Denmark in 2013 and 2014.⁷

The predecessor of the Regulation, the 1968 Brussels Convention was the first legal instrument negotiated and drafted on the Community level. Jurisdiction on the interpretation of the Convention was conferred to the European Court of Justice by Protocol in 1971.⁸

2. Autonomous interpretation

In general, the terms and concepts of the Regulation are to be interpreted autonomously. To this end, some concepts are defined in the Regulation, such as the domicile of a legal person in Article 63 of the Regulation Brussels Ibis (ex Art. 60). Thus, there is no need to resort to any national law of a Member State for the purposes of interpretation of this provision. A reference to private international law rules is exceptional under the Brussels I regime. The provision of Article 62 (ex Art. 59) providing for the law determining domicile of a physical person can be mentioned as an example. The ‘autonomous interpretation’ is to be maintained as a matter of principle. The provisions of the Regulation are to be interpreted in accordance with its terms, underlying principles and decisions of the ECJ/CJEU. Thereby generally no reference to national laws is to be made. This view has been expressed in a number of CJEU judgments.⁹

The reasoning in the Judgment of 19 December 2013 is illustrative. The CJEU held that ‘the concepts used by the Regulation must, as a general rule, be interpreted independently, by reference principally to the general scheme and objectives of the regulation, in order to ensure that it is applied uniformly in all the Member States’.¹⁰

⁶OJ 2007, L 94/70. Consequently, the Danish courts have the possibility to submit questions concerning the interpretation of the Regulation Brussels I to the CJEU for a preliminary ruling.

⁷The Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concerning Regulation No 1214/2012 was published on 21 March 2013. Official Journal of the European Union of 21 March 2013 L 79/4. The Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concerning Regulation No 542/2014 was published in the Official Journal of the European Union of 13 August 2014, OJ L 240/1.

⁸Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

⁹See e.g., Judgment in *Kalfelis*, C-189/87, EU:C:1988:459, para. 15, stating that ‘it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention for the Contracting States and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned.’

¹⁰Judgment in *Corman-Collins SA v La Maison du Whisky SA*, C-9/12 EU:C:2013:860, para 30 and Judgment in *Česká spořitelna, a.s. v Gerald Feichter*, C-419/11, EU:C:2013:165, para. 25. See also Judgment in *LT U Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, C-29/76, EU:C:1976:137 holding, *inter alia*, that for



3. Scope of Application

3.1 Substantive scope of application - Art. 1

The substantive scope of application is defined in Article 1 of the Regulation. It has largely been taken over in the Regulation 1215/2012 even though the wording is slightly changed.

Article 1 reads as follows:

‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs **or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)**.

2. This Regulation shall not apply to:

(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship **or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;**

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

(c) social security;

(d) arbitration;

(e) **maintenance obligations arising from a family relationship, parentage, marriage or affinity;**

(f) **wills and succession, including maintenance obligations arising by reason of death.**’

The alterations from the wording under the Regulation Brussels I are indicated in bold. The provision of Article 1(2) is somewhat differently structured under the Regulation 1215/2012 and some text has been added whereby certain matters are expressly mentioned, but that does not imply any substantial changes.

3.1.1 Meaning of ‘civil and commercial’- Article 1(1)

According to paragraph 1 of Article 1 it applies to ‘civil and commercial matters’, regardless of the court or tribunal. The provision of Article 1 paragraph 1 expressly excludes revenue, customs and administrative matters for the purpose of an example. The exclusion is not

the interpretation of the concept 'civil and commercial matters' reference must be made not to the law of one of the States concerned but, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.



intended to limit or modify the concept of ‘civil and commercial’. Rather it is added to clarify, by means of examples, the types of matters that clearly fall outside the scope of ‘civil and commercial’. Obviously, the intention was to include issues of private law within the substantive scope of Regulation’s application, with a general exclusion of matters pertaining to public law. The wording of Article 1 paragraph 1 has been slightly adapted in the Regulation 1215/2012. It merely restates the conclusion that follows from the ECJ in interpreting the expression ‘civil and commercial’ in disputes involving states or entities of public law. Thus, it expressly excludes ‘acts of state’ – *acta iure imperii*.

The terms, concepts and provisions of the Regulation are to be interpreted **autonomously**. The same holds true for the expression ‘civil and commercial matters’ referred to in Article 1(1). The concept of ‘civil and commercial matters’ is autonomous and independent of corresponding national legal concept. However, the clear distinction between matters of private law and those pertaining to public law is not always easily made. It may prove particularly difficult to define the meaning and the reach of ‘civil and commercial matters’ within the context of disputes between a private party and a public authority. The decisions of the ECJ/CJEU provide for some guidance in that respect.¹¹ The same holds true for the matters expressly excluded from the Regulation’s scope, as it may sometimes be difficult to determine whether a subject-matter in a particular case qualify for the ‘excluded matter’ (e.g., the issue of the validity of an arbitration agreement raised to object jurisdiction).¹² In that context, difficulties may be encountered in ‘drawing the line’ regarding the substantive scope of application between different EU legal instruments (e.g., between the Brussels I regime and the Insolvency Regulation¹³ or Regulation Brussels IIbis).¹⁴

The reasons for excluding certain issues were either because they were considered to have been sufficiently regulated by other legal instruments on the global level or they were intended to be the subject of separate regulation on the Community level. Indeed majority of issues that are excluded in Article 1(2) are dealt with in other EU legal instruments (divorce and parental responsibility in Brussels IIbis and the Regulation on wills and successions; matrimonial property regimes - enhanced cooperation; property regimes for registered partnerships – enhanced cooperation.

¹¹ See e.g., Judgment CJEU in *Préservatrice foncière TIARD SA v The Netherlands*, C-266/01, EU:C:2003:282. The dispute was between the Netherlands State and Préservatricefoncière TIARD SA; *Netherlands State v Reinhold Rüffer*, Case 814/79, EU:C:1980:291; Judgment in *Realchemie Nederland BV v Bayer CropScience AG*, C-406/09, EU:C:2011:668. See also, more recent judgments: CJEU judgment of 23 October 2014, Case 302/13 (*flyLAL-Lithuanian Airlines AS, in liquidation v Air Baltic Corporation AS*) and the judgment of 9 March 2017, C- 484/15 (*Ibrica Zulfikarpašić v Slaven Gajer*).

¹² See e.g., judgment CJEU (Grand Chamber) of 10 February 2009, Case C-185/07 (*Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, Generali Assicurazioni Generali SpA, v West Tankers Inc.*) and of 13 May 2015, C-536/13 (*Gazprom*).

¹³ *German Graphic* (for a full reference see slide or the list of cases).

¹⁴ CJEU judgment of 9 September 2015, Case C- 4/14 (*Bohez v Wiertz*)



As to the matters excluded in Article 2(1)(a), all issues except status and legal capacity of natural persons have been put at on the agenda of the EU legislator. Thus, certain questions pertaining to status such as jurisdiction and recognition and enforcement of judgments in matters of divorce and legal separation, as well as parental responsibility are regulated in the Regulation Brussels Ibis. The text of the Succession Regulation has been adopted and applies from 17 August 2015. It regulates issues of international jurisdiction, applicable law and recognition of decisions concerning wills and succession.

Regulation Brussels Ibis excludes wills and successions from its substantive field of application in new provision in Article 1(2)(f). The text of Article 1(2)(a) has been slightly changed and refers to ‘statutes or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effect to marriage’. In that sense, no substantial changes have been introduced, except that property regimes of unmarried couple or a comparable legal relationship is now expressly indicated.

3.2 Territorial scope of application of the rules on jurisdiction (*scope racione personae*)

Just like its predecessor Regulation Brussels I, the Regulation Brussels Ibis has a limited scope of application: with a few notable exceptions, it applies, in principle, only when the defendant has his or her domicile in a EU Member State.¹⁵ Consequently, national rules on jurisdiction of EU Member States remain applicable when a dispute falls outside the Regulation’s scope of application *racione personae*. A defendant with a domicile in a Member State can be sued in the courts of another Member State only on the basis of the rules of jurisdiction provided in the Regulation. No rules on international jurisdiction under national procedural law may be relied upon to assume jurisdiction against defendants domiciled in EU Member States. This is particularly important with respect to the so-called exorbitant jurisdictional grounds, which are listed in Annex I of the Regulation. National rules on jurisdiction including those exorbitant grounds may be used against defendants domiciled outside the European Union.

The Regulation Brussels Ibis takes over the definitions of ‘domicile’ for legal persons as given in Article 60, as well as the provision of Article 59 referring to the conflict of law rules to determine ‘domicile’ of natural persons. The domicile of a legal person is to be interpreted autonomously.

The idea of the universal application of jurisdictional rules and their extension to disputes involving third party defendants suggested in the Proposal has not been accepted in

¹⁵ See also, Judgment in *Group Josi*, C-412/98, EU:C:2000:399. The Court held that the Brussels Convention is ‘in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. See e.g., CJEU Judgment of 15 March 2012, C-292/10 (*G. v Cornelius de Visser*), holding that alternative jurisdictional grounds of the Regulation apply even ‘against a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seised of the case does not hold firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union’.



the Regulation 1215/2012.¹⁶ However, the territorial (or formal/personal) scope of application is somewhat expanded under the Regulation 1215/2012.

In principle it only remains applicable if the defendant is domiciled in an EU Member State. However, in addition to the already existing exceptions of choice of court agreements and exclusive jurisdiction, the territorial scope is further extended so as to include certain ‘weaker’ party disputes, notably consumer and labour law disputes (Article 6; ex Art. 4).¹⁷ Thus, a court in a Member State may establish its jurisdiction on the basis of the jurisdictional rules of Regulation Brussels Ibis 1215/2012 in all disputes involving a consumer or an employee regardless of the domicile of the other party. The provision of Article 6(1) refers only to consumer (Art. 18 para. 1) and labour disputes (Art. 21 para. 2), but there is no reference to insurance contracts. Consequently, the jurisdictional rules contained in Section 3 relating to insurance contracts apply only if a defendant is domiciled in a EU Member State.¹⁸

In addition to that, the amended provision on the prorogation of jurisdiction now contained in Article 25 of the Regulation Brussels Ibis (ex Art. 23 of Brussels I) no longer requires that one of the parties to a forum selection clause is domiciled in a EU Member State.

3.2.1 Territorial scope in respect of recognition and enforcement

Besides the rules on jurisdiction, the Regulation Brussels Ibis deals with the recognition and enforcement of judgments (Arts. 36-57), authentic instruments (Art. 58) and court settlements (Art. 592), in civil and commercial matters.

The territorial scope of application of the Regulation with respect to recognition and enforcement of judgments is defined differently than the scope of application regarding Regulation’s jurisdictional rules. The domicile is irrelevant for the application of the rules on the recognition and enforcement of decisions. Here the only requirement is that the judgment has been rendered by a court of a EU member State, regardless of the domicile of the judgment debtor, even when the jurisdiction is based on national rules of jurisdiction and with few exceptions regardless of whether the rules on jurisdiction have been properly applied by the court in the Member State where the judgment was rendered.

Regulation Brussels Ibis provides for an express definition of a ‘judgment’ in Article 2(a), as well as of a ‘court settlement’ (Art. 2(b)) and authentic instrument (Art. 2(c)). An important alteration from the Regulation is that the definition of a ‘judgment’ clearly indicates when provisional and protective measures ordered by a court in Member State will qualify as a ‘judgment’ within the meaning of the Regulation.

¹⁶ For detailed comments on the proposal for universal jurisdiction, see Weber, Johannes, ‘Universal Jurisdiction in Third States in the Reform of the Brussels I Regulation’, *RechtsZeitschrift* 75 (2001) pp. 620 *et seq.*

¹⁷ The provision of Article 6 paragraph 1 of the Recast Regulation (the current Art. 4 of the Brussels I Regulation) reads as follows: ‘If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 18(1), 21(2) and Articles 24 and 25, be determined by the law of that Member State.’

¹⁸ For more particulars on the territorial scope of application of the Regulation 1214/2012 see Lazić, Legal Culture in Transition, pp. 184-188.



Most relevant change with respect to the rules on the recognition and enforcement is the abolishing of exequatur which clearly follows from the wording of Article 39.

3.3 *Temporal scope (application ratione temporis) – see infra, under 7.*

4. Rules on International Jurisdiction

There are various groups of jurisdictional grounds under the Regulation. In most general terms they can be grouped as follows:

- (a) General rule
- (b) Special/alternative jurisdictional grounds
- (c) Rules on jurisdiction for disputes involving a ‘weaker party’
- (d) Exclusive jurisdiction
- (e) Choice of court (prorogation of jurisdiction)
- (f) Tacit prorogation

The sequence in which the rules on jurisdiction are drafted in the Regulation does not reflect the ‘hierarchy’ of jurisdictional grounds. Yet the importance of the predictability of jurisdictional grounds, as well as the relevance of the general rule based on the defendant’s domicile is clearly expressed in Recital (11) of the Regulation Brussels I, which is identical in wording to Recital (15) of the Regulation 1214/2012:

‘The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor...’

The underlying idea is that a departure from the general rule on defendant’s domicile is permitted only in circumstances when such a departure can be justified by compelling reasons which are clearly defined. In most general such a departure is justified when the link with another jurisdiction is either considered stronger (rules on jurisdiction that prevail over the general rule) or at least equally close as the domicile of the defendant (alternative jurisdictional grounds).

4.1 ‘Connecting factors’ relevant for determining jurisdiction under the Regulation

- (1) Domicile of the defendant (*forum rei*) - general rule – Art. 4; ex Art. 2
- (2) Domicile of one of the defendants in case of plurality of defendants, provided that the claims are closely connected (*forum connexitatis*) – Art. 8; ex Art. 6(1)



(3) Prorogation of jurisdiction (*forum electus*) (court chosen by the agreement of the parties) – Art. 25, ex Art. 23

The Regulation Brussels Ibis introduces some changes which are now contained in Article 25. In particular, it is no longer required that one of the parties is domiciled in a EU Member State for the provision to be applicable. Besides, the conflict of law rules for substantive validity of choice of court agreements has been introduced. Most importantly, the *lis pendens* rule has been adjusted with the purpose of enhancing the efficiency of prorogation clauses.

(4) Tacit prorogation – Art. 26; ex Art. 24

The provision on tacit prorogation has been adjusted so as to more appropriately incorporate the idea of protection the procedural position of weaker parties.

(5) Domicile of the claimant (*forum actoris*) –

In principle, it is considered as an exorbitant jurisdictional ground. Yet under the Regulation it is accepted exceptionally in order to protect the procedural position of a ‘weaker party’, i.e., domicile of a policy holder, an insurer or a beneficiary (Art. 11; ex Art. 9(1)(b) and domicile of the consumer (Art. 18(1), ex Art. 16(1)). Domicile or habitual residence of maintenance creditor (Art. 5(2) of the Brussels I is no longer relevant, as jurisdictional rules are now contained in the Maintenance Regulation.¹⁹

(6) Place where the work has been habitually carried out (*forum laboris*) – Art. 21(2)(a), ex Art. 19(2)(a)

(7) Place where the business which engaged the employee is or was situated – Art. 21(2)(b); ex Art. 19(2)(b)

(8) Place where the harmful event occurred or may occur (*forum delicti*) – Art. 7(2); ex Art. 5(3)

(9) Place of performance of the obligation in question (*forum solutionis*) – Art. 7(10); ex Art. 5(1)

(10) Place where immovable property is situated (*forum rei sitae*) – Art. 24(1); ex Art. 22(1)

(11) Place where a company, legal person or association has its seat (*forum incorporationis*) – Art. 24(2); ex Art. 22(2)

(12) Place where the deposit or registration has been applied for – Art. 24(4); ex Art. 22(4) or where the register is kept (Art. 24(3); ex Art. 22(3) (*forum registrationis*)

(13) Place where cultural object is situated (new provision contained in Article 7(4) of the Regulation 1215/2012) – new provision introduced in the revised Regulation.

¹⁹ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Section II.



(14) Habitual residence/common habitual residence – after removing the rule concerning jurisdiction in cases of maintenance, this connecting remains relevant in the context of prorogation of jurisdiction in some weak party disputes, notable insurance and consumer contracts.

4.2 General Rule

There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.

A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised. However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

The rules of jurisdiction should be highly predictable. Importance of general predictability of jurisdictional rules is expressed in Recital (11):

‘The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.’

Therefore, a departure from a general rule of defendant's domicile should be permitted only in exceptional, clearly defined circumstances. In broadest terms, such a departure is justified when connection with a particular jurisdiction is stronger (e.g., exclusive jurisdiction) or at least equally close as the domicile of the defendant (alternative ground of jurisdiction) or when specific policy considerations of protecting a procedural position of certain category(ies) parties override the general acceptance of jurisdictional rule on *forum rei*.

The general rule on jurisdiction is contained in Article 4 (ex Art. 2) providing for jurisdiction of a court of respondent's domicile. As stated previously, the definition of ‘domicile’ for legal persons is given in Article 60, whereas the provision of Article 59 refers to the conflict of law rules to determine ‘domicile’ of natural persons. The domicile of a legal person is to be interpreted autonomously.²⁰ The purpose of the definition of domicile of a legal person is expressed in recital 11 BI: ‘...The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction’.

²⁰ Vidjeti, CJEU Judgment of 15 March 2012, C-292/10 (*G. v Cornelius de Visser*), holding that alternative jurisdictional grounds of the Regulation apply even ‘against a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seised of the case does not hold firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union’.



In *Owusu*-judgment,²¹ the ECJ has declared that when the court in the EU Member State is competent on the basis of the Convention's/Regulation's jurisdictional rules it must exercise its jurisdiction and may not rely on *forum non conveniens* or other concept of national procedural law in order to decline jurisdiction.

4.3 Rules on jurisdiction prevailing over the general rule

When a connecting factor is considered stronger the jurisdictional rule usually takes precedence over the defendant's domicile (e.g. rules on exclusive jurisdiction in Art. 24; ex Art. 22). The same holds true with respect to jurisdiction based on the agreement of parties (forum-selection clauses Art. 25 of the Regulation Brussels Ibis; ex Art. 23) and the rules formulated in order to protect the procedural position of a 'weaker' party in the dispute (Sects. 3, 4 and 5). The rule on the so-called tacit prorogation is not effective when there is exclusive jurisdiction of courts of a Member State (according to Art. 26 para 1; ex Art. 24) and under the revised Regulation is adjusted in disputes involving 'weak parties' (Art. 26 para 2 Regulation Brussels Ibis).

4.4 Alternative grounds of jurisdiction

Also, there is a possibility to deviate from the main rule in circumstances where connecting factors are considered at least equally close to the dispute and/or the parties as the domicile of the defendant. Such jurisdictional do not exclude the main rule and do not take prevalence over it. Instead they are placed on the same footing and consequently present an alternative to the defendant's domicile (e.g., alternative jurisdictional grounds under Article 7 of the Regulation Brussels Ibis; ex Art. 5; see also, Arts. 8-10, ex Arts. 6-8).

In general, rules on jurisdiction are based on a close link between the court and the claim filed or action, as expressed in Recital (12): 'In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

The alternative jurisdictional grounds provided for in Section 2 of Chapter II present the only alternatives to this general rule.²² Presence of one of those connecting factors is crucial for a court to assume jurisdiction. Identification of such a connecting factor is intended to enable the court which is objectively best placed for deciding the claim filed to assume

²¹ ECJ Judgment of 1 March 2005, Case C-281/02 (*Owusu v. Jackson et al.*).

²² See, e.g., Judgment in *Andreas Kainz v Pantherwerke AG*, C-45/13, EU:C:2014:7, para. 21: 'In that regard, it should be borne in mind that the system of common rules of conferment of jurisdiction laid down in Chapter II of Regulation No 44/2001 is based on the general rule, set out in Article 2(1), that persons domiciled in a Member State are to be sued in the courts of that State, irrespective of the nationality of the parties. It is only by way of derogation from that fundamental principle attributing jurisdiction to the courts of the defendant's domicile that Section 2 of Chapter II of Regulation No 44/2001 makes provision for certain special jurisdictional rules.....'



jurisdiction.²³ Alternative grounds of jurisdiction in Arts. 7-9 (ex Arts. 5 and special jurisdictional grounds 6 and 7). In contrast to other specific jurisdictional grounds under the Regulation which prevail over the main rule (in particular, exclusive jurisdiction under Art. 22, prorogation of jurisdiction in Art. 23, as well as special rules for 'weaker party'- disputes in Sects. 3, 4 and 5) the alternative jurisdictional ground in Article 5 (Art. 7 of the Regulation Brussels Ibis) are on an 'equal footing' with the main rule in Article 2. They provide for an additional or alternative choice to the claimant. Thereby the option is to sue either in the court of the defendant's domicile or some other jurisdiction with which there is a close connection.

Only a connection which is sufficiently close can justify a departure from the main rule - *actor sequitur forum rei*. The same idea has been followed in drafting the rules on alternative jurisdictional grounds, as the criteria determinative for jurisdiction are based on internationally accepted standards.

The Regulation Brussels provides for alternative jurisdictional rules under Articles 7 (ex Art. 5), for the following disputes:

- (1) Contractual disputes (Art. 7 para 1; ex Art. 5 para. 1)
- (2) Disputes relating to non-contractual obligations – tort, delict or quasi-delict (Art. 7 para 2; ex Art. 5 para. 3)
- (3) Civil claims for damages or restitution which are based on an act giving rise to criminal proceedings (Art. 7 para 3; ex Art. 5 para. 4). The courts where criminal proceedings have been commenced are competent to decide on a civil law claim based on the criminal act, if it has jurisdiction under its own law.
- (4) Disputes relating to claims for recovery of a cultural object – courts where the cultural object is situated at time the court is seised (Art. 7 para 4).
- (5) Disputes arising out of operations of a branch, agency or other establishment competent are the courts where such branch or agency is situated (Art. 7 para 5; ex Art. 5 para 5)
- (6) Disputes arising out in connection with a trust – competent are the court where the trust is domiciled (Art. 7 para 6; ex Art 5 para. 6)
- (7) Disputes concerning payment of remuneration claimed in respect of the salvage of a cargo or freight – competent is the court where the cargo or freight has been arrested or could have been arrested provided that the defendant had an interest in the freight or cargo at the time of salvage (Art. 7 para 7; ex (Art. 5 para 7).

A new rule on jurisdiction regarding civil claims based on ownership for recovery of cultural objects has been introduced in the Regulation 1215/2012 in Article 7 para 4. The connecting factor for determining jurisdiction is *rei sitae* - competent are the courts at the place where the cultural object is situated at the moment when the claim is filed. For the purposes of application of this provision, relevant is the definition of a cultural object as provided in Article 1 of Directive 93/7/EEC. There are no further substantial changes in Article 5 of the Regulation Brussels I, which is now contained in Article 7 of the Regulation 1215/2012. Due to the deletion of the jurisdictional ground for maintenance, the numbering of some provisions

²³Judgment in *Andreas Kainz v Pantherwerke AG*, C-45/13 =, EU:C:2014:7, para. 24.



has changed, in particular those on the jurisdiction for claims based on non-contractual obligations and civil claims for damages based on acts subject to criminal proceedings.

Jurisdictional grounds under Article 7 (ex Art. 5) present an exception to the general rules under Article 4 (ex Art. 2). As such they should be interpreted and applied restrictively.²⁴

There is a substantial case-law of the CJEU on the application and interpretation of provisions on jurisdiction relating to disputes arising in connection with contractual and non-contractual obligations. Abundant case law on Article 5 in general illustrates that it probably has given rise for preliminary rulings more often than any other provision of the Regulation.

4.4.1 Contractual disputes (Art. 7 par 1; ex Art. 5 para 1)

The relevant provision on jurisdiction for disputes arising in connection with contractual obligation has remained unchanged in the Regulation Brussels Ibis. It reads as follows:

‘A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

— in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

— in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

(c) if point (b) does not apply then point (a) applies;²⁵

4.4.1.1 Jurisdiction of courts at the place of performance – general remarks

Thus, a defendant domiciled in a Member State may be sued in another Member State if that is the place of performance of the contractual obligation in question (*forum solutionis*). As stated in the literature, its complex structure strikes an equal balance between the creditor and the debtor and presents a compromise between an earlier solution under the 1968 Brussels Convention and a trend towards ‘autonomous fact-based concept’²⁶ for certain categories of contracts. Thus, paragraph 1(a) contains a general rule, whereas paragraph 1(b) presents a specific rule for contracts of sales of goods and contracts to provide services. In practice, the provision of second paragraph can be considered as a rule, as it relates to two most important types of contracts, i.e., transactions that are most frequently concluded. Therefore, if a contract giving rise to a dispute can be characterised as a contract of sales of goods or contract to provide services, paragraph 1(b) applies for the purposes of determining the internationally competent court. If it is another type of contract, relevant is paragraph 1(a). From the practical

²⁴ *Kalfelis/Schröder*, ECJ 27 September 1988, 189/87.

²⁵ The provision of Art. 5 para 1 of the 1968 Brussels Convention provided, inter alia, the ‘in matters relating to a contract, in the courts for the place of performance of the obligation in question’.

²⁶ Magnus/Mankowski, see new edition, under B.I.1.



point of view, it is first to be checked whether a contract can be qualified as a contract for sale of good or providing services and if not, only then paragraph 1(a) would come into play.

Both provisions apply if there is no stipulation in the contract on the place of performance. Paragraph 1(c) may be relied upon if the relevant criterion provided under 1(b) points to a place of performance in a non-EU Member State. For example, if the goods were delivered in a third country by applying the rule under paragraph 1(b) and the ‘obligation in question’ is a claim to pay purchase price, than a court in EU Member State would have jurisdiction on the basis of paragraph 1(a) if in there was the place the place of performance of the obligation in questions (i.e., payment of the purchase price).

For the purposes of applying this provision, the following questions may appear relevant:

- Can the legal relationship be characterised as a contract?
- What is the ‘obligation in question’?
- What is the place of performance?

4.4.1.2 Presumption under Art. 7(1)(b) (ex Art. 5(1)(b))

Just like Art. 5(1)(b), Article 7(1)(b) provides that the place of performance of the obligation in question for sales contracts is presumed to be the place where the goods, according to the contract, were delivered or should have been delivered. Similarly, for the contract to provide services the place of performance of the obligation in question is the place where the services, according to the contract, were provided or should have been provided.

It seems appropriate to conclude that the wording ‘unless otherwise agreed’ imply that the presumption is relevant only if there is no agreement on the place of performance of the ‘obligation in question’ (i.e., litigious obligation). It is true that the purpose of concentrating all claims and controversies arising from the contract in one jurisdiction would be diverted if such interpretation was to be applied. Yet if it is to conclude that the presumption in 1(b) applies regardless of whether or not there is an agreement on the place of performance in the contract, the wording ‘unless otherwise agreed’ would be meaningless.²⁷

Most important consequences introduced by this provision when the Convention was converted into the Regulation can be summarised as follows:

- (a) There is a presumption that the place of performance of only one obligation (performance of the obligation which is characteristic to the contract/characteristic performance) is decisive for determining jurisdiction for all obligations under the contract.
- (b) For the purpose of determining the place of performance there should be no reference to national law. Thus, there is no use of private international law rules. Consequently, the *Tessili*-formula is excluded. Instead, an autonomous interpretation

²⁷ Mankowski seems to concur, p. 137, para 101 old edition.



should be employed. The *Tessilli*-formula applies only in determining jurisdiction for ‘other contracts’ under 1(a).

Consequently, in cases under Article 7(1)(b) (ex Art. 5(1)(b)) the distinction between an obligation in kind (specific performance) and obligation in money is less relevant considering the presumption in case under 7(1)(b) - (considering the presumption Art. 7(1)(b) it is more exception than the rule).

Case law analysis

4.4.2 Non-contractual obligations – Art. 7 para 2 Regulation Brussels Ibis (ex Art. 5 para 3)

The provision on jurisdiction for claims based on non-contractual has remained unchanged in the revised Regulation Brussels bis. It is contained in paragraph 2, as the provision concerning maintenance obligations has been omitted. The jurisdiction is conferred to the courts for the place where the harmful event occurred or may occur in matters relating to tort, *delict* or *quasi-delict*. The relevant case law refers to either Article 5 paragraph 3 of the Regulation Brussels I or Article 5 paragraph 3 of the 1968 Brussels Convention.

When the 1968 Brussels Convention was converted into the Regulation, the provision of Article 5 paragraph 3 was somewhat adjusted. In particular, to the wording ‘or may occur’ was added to the text which had referred to ‘in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred.’ The relevance of certainty and predictability of alternative grounds of jurisdiction is reiterated in the Regulation 1215/2014 and further emphasised especially in the context of non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.²⁸

4.4.2.1 Matters arising in ‘tort,*delict* or *quasi-delict*’

The provision does not refer to non-contractual or extra-contractual obligations. Instead the wording ‘tort, *delict* or *quasi-delict*’ is used. The autonomous interpretation is decisive for the purposes of understanding these concepts. In order to determine the meaning of ‘matters relating to tort, *delict* or *quasi-delict*’, it is to be regarded as an autonomous concept to be interpreted in mainly by reference to ‘the scheme and objectives’ of the Regulation.²⁹ There is a clear instruction from the relevant case law of the ECJ that they are to be given an independent meaning and are to be construed independently from any national law (*lex causae*) that may be applicable according to the rules of private international law.

4.4.2.2 Action based on tort and contract – meaning of ‘tort, *delict* or *quasi-delict*’

²⁸Thus, the Recital (16) of the Regulation 1214/2012.

²⁹Judgment of 27 September 1988 in *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, C-189/87ECLI:EU:C:1988:459, para 16, referring to the 1968 Brussels Convention.



According to the ECJ case-law of the concept of matters relating to tort, *delict* or *quasi-delict* extends to ‘all actions which seek to establish the liability of a defendant and are not and are not matters relating to a contract within the meaning of Article 5(1)’ of the Regulation.³⁰ When the claim submitted is based on both tort and contract, Article 5 para 3 confers jurisdiction only with respect to actions requesting to determine the respondent’s liability and which are not related to a ‘contract’. In the latter case such actions would be covered by Article 5 para 1.³¹ Thus, paragraphs 1 and 3 are mutually exclusive. Jurisdiction for the claims arising out contract must be determined independently from the claims based on tort. Therefore it is necessary in the first instance to examine whether an action is contractual in nature. In practice, it means that it first has to be determined that the claim filed is not a matter relating to a contract in order to establish jurisdiction on the basis of 5 para 3 (i.e., Article 7 para 2 of the 1215/2012 Regulation). Nevertheless, it is settled case-law that the term ‘matters relating to tort, delict or quasi-delict’ within the meaning of Article 5(3) of Regulation No 44/2001 covers all actions which seek to establish the liability of a defendant and which are not related to a ‘contract’ within the meaning of Article 5(1)(a) thereof (see, as regards the interpretation of the Brussels Convention, Case 189/87 *Kalfelis* [1988] ECR 5565, paragraph 18; Case C-261/90 *Reichert and Kockler* [1992] ECR I-2149, paragraph 16; Case C-51/97 *Réunion européenne and Others* [1998] ECR I-6511, paragraph 22; and Case C-334/00 *Tacconi* [2002] ECR I-7357, paragraph 21).

However, the application of criteria suggested by the ECJ – purely ‘negative determination’ - does not provide for a satisfactory answer for all situations. In particular, it is not entirely clear how to understand and interpret the wording ‘tort, *delict* or *quasi-delict*’. The wording used may rise questions such as what is the difference between the tort and a *delict* and what is to be understood under ‘*quasi delict*’. These concepts may have different meanings in national laws. Particularly interesting may be the question whether quasi-delict includes non-contractual obligations other than torts, such as vindicatory claims, unjust enrichment, *negotiorum gestio* and restitution.³²

The question submitted to the ECJ by the German in *Kalfelis* court did refer to an action based concurrently on tortious or delictual liability, breach of contract and unjust enrichment, as follows:

‘The second question submitted by the Bundesgerichtshof is intended essentially to ascertain, first, whether the phrase ‘matters relating to tort, delict or quasi delict’ used

³⁰Judgment of 1 October 2002 *Verein für Konsumenteninformation v Karl Heinz Henkel* C-167/00 ECLI:EU:C:2002:555, para 36; Judgment of 27 September 1988 in *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, C-189/87 ECLI:EU:C:1988:459 para 17. Judgment of the Court (Third Chamber) of 27 October 1998 *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht* C-51/97 V002.ECLI:EU:C:1998:509 para 22; Judgment of 26 March 1992, *Mario Reichert, Hans-Heinz Reichert, Ingeborg Kockler v Dresdner Bank AG*, Case C-261/90 ECLI:EU:C:1992:149 para 16; Judgment of 11 July 2002 *Rudolf Gabriel* C-97/00 ECLI:EU:C:2002:436 para 33.

³¹Judgment of 27 September 1988 in *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, C-189/87 ECLI:EU:C:1988:459 para 18.

³²For differences on the question whether restitutionary claims based on wrongdoing are covered, this issue in national court decisions and literature, see Magnus/Mankowski, subtitle 2, footnote 860.



in Article 5 (3) of the Convention must be given an independent meaning or be defined in accordance with the applicable national law and, secondly, in the case of an action based concurrently on tortious or delictual liability, breach of contract and unjust enrichment, whether the court having jurisdiction by virtue of Article 5 (3) may adjudicate on the action in so far as it is not based on tort or delict.’³³

However, the ECJ refers merely to the distinction between the tort and contract and does not expressly address any other issue, in particular the issues pertaining generally to non-contractual obligations.

The existence of a contract between the parties does not necessarily have to imply that the action is contractual in nature. The reasoning provided in the CJEU Judgment in *Marc Brogitter v Fabrication de Montres Normandes EURL and Karsten Fräßdorf*³⁴ is illustrative in this respect.

ECJ case law analysis

4.4.2.3. Special rules on jurisdiction in Arts. 8 and 9 Recast (ex 6 and 7 BI)

The provision of Article 8 relates to disputes involving multiple defendants, counter-claim, third-party proceedings, matters related to contract combined with matters related to rights *in rem*. They are created for the purpose of procedural economy, efficiency and convenience (Art. 8; ex Art. 6). Article 8 (ex Art. 6) deals with jurisdiction in multiple disputes/multiple parties situations in connected disputes (*fora connexitatis*), i.e., it provides for jurisdictional grounds when different disputes are closely connected. The common denominator of these rules is the possibility to extend the jurisdiction of the court having jurisdiction under the Regulation to other parties or other disputes/matters. The reasons of efficiency of proceedings, procedural economy and convenience underline the jurisdictional rules contained in Article 8.

Paragraph 1 deals with multiple defendants. The court competent to proceed against a defendant domiciled in a Member State under the Regulation may assume jurisdiction over defendants domiciled in other Member States if ‘the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’. In other words, defendants domiciled in different member states may be sued in a member state where any of them is domiciled under the condition provided in paragraph 1 of the Regulation. The wording of Article 6 implies that the court must base its jurisdiction on the domicile of one of the defendants, but not on any other jurisdictional ground provided for in the Regulation, such as Article 5.³⁵

³³ *Kalfelis*, para. 14.

³⁴ CJEU Judgment of 13 March 2014, *Marc Brogitter v Fabrication de Montres Normandes EURL and Karsten Fräßdorf* C-548/12 ECLI:EU:C:2014:148

³⁵ See also, Bogdan, p. 52.



According to the judgment of CJEU in *Freeport*-case,³⁶ it is irrelevant whether or not claims against all defendants are based on the same causes of action (legal basis).

Disputes relating to liability from the use or operation of a ship – when the court would have jurisdiction under the Regulation to decide the claims for liability, it will also be competent to decide over the claims for limitation of such liability (Art. 9; ex Art. 7).

5. Rules on jurisdiction in disputes involving ‘weaker’ parties³⁷

Within the context of territorial scope of application, ‘weaker’ parties - consumers, employees and insurance policy holders - in the European Union can benefit from the jurisdictional rules only against defendants domiciled in the EU Member States under the current text of the Regulation. Indeed, the rules on international jurisdiction intended to protect a procedural position of a weaker party may as well be provided in national laws of the Member States.³⁸ Yet such rules are not necessarily identical, so that the ‘level of protection’ may vary among different EU Member States. Therefore, the changes introduced in the revised Regulation 1215/2012 so as to widen the territorial scope of application in certain ‘weaker party disputes’ are to be met with approval. Thus, consumers and employees domiciled in the EU can benefit from jurisdictional framework under the Regulation Brussels Ia regardless of the domicile of the defendant – ‘stronger’ party.

The provisions on jurisdiction in disputes involving ‘weaker’ parties are contained in Sections 3, 4 and 5 of the Regulation Brussels I. These provisions are to a large extent taken over in the Regulation Brussels Ia. They relate to disputes arising under insurance contracts, consumer and labour disputes respectively. The rules on jurisdiction in these Sections are independent from other jurisdictional rules in the Regulation³⁹ and aim at protecting the jurisdictional position of a weaker party.⁴⁰ They prevail over both the main rule in Article 4 (ex Art. 2) and alternative jurisdictional grounds in Articles 7, 8 and 9 (ex Arts 5, 6 and 7). Additionally, in accordance with Article 23(5), prorogation of jurisdiction is valid only to the extent that it complies with the special rules concerning weaker-party disputes. The rules in Sections 3, 4 and 5 do not modify or otherwise affect the provision of Article 7(5) (ex 5 para 5) relating to disputes arising out of a branch, agency or other establishment and the right to

³⁶ CJEU judgment of ..., C-98/06 [2007] *Freeport v. Arnoldson* ECR I-8319.

³⁷ This part is largely based on a previous publication: ‘Procedural Justice for Weaker Parties in Cross-border Litigation under the EU Regulatory Scheme’, *Utrecht Law Review*, Vol. 10, Issue 4 (November) 2014, p. 100-117 and ‘Procedural Position of a ‘Weaker Party’ in the Regulation Brussels Ibis’, in V. Lazić & S. Stuij (eds.), *Brussels Ibis Regulation: Changes and Challenges of the Renewed Procedural Scheme*, Asser Press/Springer Publishing, 2017, pp. 51-71.

³⁸ See e.g., Art. Of the Dutch Code of Civil Procedure, which incorporates the jurisdictional rules of the Regulation with respect to consumers and employees.

³⁹ See also, Bogdan, M., *Concise Introduction to EU Private International Law*, 2nd edition, Europa Law Publishing (2012) p. 53.

⁴⁰ See e.g., Case C-463/06 *FBTO Schadeverzekeringen* [2007] ECR I-11321, paragraph 28.



bring a counterclaim.⁴¹ What these provisions have in common can be summarised in the following:

- (a) A weaker party (a policyholder, the insured or a beneficiary, consumer or employee) has a choice to bring proceedings against the other party to a contract either in the court of the Member State in which that other party is domiciled or in which it is more convenient to a weaker party (most likely in the country of its own domicile) or which is otherwise closely related to a dispute.
- (b) Conversely, proceedings may be brought against a weaker party to the contract only in the courts of the Member State in which a 'weaker' party is domiciled.
- (c) Forum selection clauses in these disputes have limited binding effect against a 'weaker' party. In other words, they may be successfully invoked against a weaker party only if the conditions provided in the relevant provisions of the Regulation are met.
- (d) Violation of the rules on jurisdiction results presents a reason to refuse the recognition of enforcement in other Member States (Art. 45).

Thus, an insurer domiciled in a Member State may be sued in the Member State of its domicile or in the Member State where the plaintiff is domiciled if an action is brought by a policyholder, the insured or a beneficiary. A co-insurer may be sued in a Member State where proceedings were brought against the leading insurer.⁴² With respect to liability insurance or insurance of immovable property, the insurer may also be sued in the courts for the place where the harmful event occurred. The same holds true 'if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency'.⁴³ Also, the insurer may be joined in the proceedings initiated by an injured party against an insured if the law of the court where such proceedings are pending so permits.

On the other hand, the insured, policy holder or beneficiary as a weaker party may be sued only in the courts of the Member State of its domicile. Thus, a weaker party may choose among the possibilities given in Articles 11 and 12 (ex Arts. 9 and 10) when filing an action against the insurer, whilst it can be sued exclusively in the country of its domicile. The only exception is in the case of direct actions of an injured party against the insurer when the law governing such direct actions provides that the policy holder or the insurer may be joined as a party.⁴⁴

Similarly, when a contract complies with the definition of a 'consumer contract' under Article 17 (ex Art. 15 of the Regulation),⁴⁵ a consumer may choose between *forum rei* and

⁴¹ Arts. 12(2), 16(3) and 20(2).

⁴² Art. 9(1) of the Regulation Brussels I.

⁴³ Art. 10 Regulation Brussels I.

⁴⁴ Art. 12(1) and 11(3) Regulation Brussels I.

⁴⁵ For more particulars, see *infra*, under 2.1.2.



forum actoris.⁴⁶ Conversely, a consumer may be sued only in a courts for the place where he/she is domiciled (Art. 18(2); ex 16(2)). As in the case of insurance contracts,⁴⁷ the right to bring a counter-claim in the court where the original claim is pending remains preserved.⁴⁸

Also, an employee may be sued only in the Member State of his/her domicile. The action against an employer may be brought in courts of the country of its domicile, in the country where the employee habitually carries out or carried out his work or in the courts where the business which engaged the employee is or was situated, if the employee does not carry out his work in any one country. Accordingly, an employee may choose between *forum rei* and *forum laboris* – the courts where he habitually carries out his the work or in the courts for the last place where he carried his work. If the employee does not habitually carry his work in any one country, he may choose between the courts of employer’s domicile and the courts where the business that engaged the employee is or was situated.⁴⁹

In applying the Regulation and its predecessor the 1968 Brussels Convention, the relevant case law of the ECJ illustrates that the criterion ‘habitually carries out his work’ can also be applied when the work is carried out in the performance of a contract of employment in more than one Member State. According to the relevant case law of the Court of Justice EU (CJEU), it is the place where an employee has established the effective centre of his working activities. In order to identify that place, certain relevant circumstances need to be taken into account, such as where the employee spends most of his working time, ‘where he has an office where he organises his activities for his employer and to which he returns after each business trip abroad.’⁵⁰ In the absence of an office, it will be the place in which employee carries out the majority of his work.⁵¹ The Court in its various decisions interpreting the jurisdictional grounds emphasised the need to guarantee adequate protection to the employee as the weaker of the contracting parties also when the employee carries out his work in more than one contracting state.⁵² In other words, such an employee should not be deprived of procedural protection under the Regulation. Only if the effective centre of its working activities cannot be established the employee will have to file the claim against his employer

⁴⁶ Art. 16(1) Regulation Brussels I. In Case C-478/12, Judgment of 14 November 2013 (*Armin Maletic, Marianne Maletic v. lastminute.com GmbH, TUI Österreich GmbH*), the Court that Art. 16(1) also applies with respect to jurisdiction in proceedings against ‘the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled’.

⁴⁷ Art. 12 (2) Regulation Brussels I.

⁴⁸ Art. 16(3) Regulation Brussels I.

⁴⁹ Art. 19 Regulation Brussels I reads: ‘An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or
2. in another Member State:

(a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or

(b) 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

⁵⁰ ECJ Case C-383/95, Judgment of 1 December 1995 (*Petrus Rutten v. Cross Medical Ltd. Case*).

⁵¹ ECJ Case C-37/00 *Weber* [2002] ECR I-2013, para. 42.

⁵² See e.g., ECJ Case C-383/95, Judgment of 1 December 1995 (*Petrus Rutten v. Cross Medical Ltd. Case*) para 22; Case C-437/00, Judgment of 10 April 2003 (*Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio*) para. 18.



either in the courts of employer's domicile or the courts where the business that engaged the employee is or was situated. The need to ensure 'more adequate protection for the party who from the socio-economic point of view is regarded as the weaker in the contractual relationship'⁵³ is reflected not only in private international law instruments that regulate procedural issues, but also those that unify conflict of law rules.⁵⁴

The analysis of the rules on jurisdiction illustrates that the Regulation Brussels I departs to certain extent from the main rule contained in Article 2 – domicile of the defendant - in lawsuits against a 'stronger party'.⁵⁵ In disputes arising under consumer and insurance contract disputes, a weaker party is given the possibility to choose between *forum rei* and *forum actoris* (consumers) and some other fora (the insured). Although following similar lines, a slightly different approach has been adopted in drawing the grounds for jurisdiction in disputes arising from individual employment contracts. A weaker party - an employee – is given the possibility to choose between fora closely related to the individual contract of employment. In particular, he/she can file the claim in the courts where he/she habitually carries out his work. However, differently from insurance- and consumer contracts, the choice does not expressly include *forum actoris*, even though in practice the place where an employee habitually carries out his work and his domicile will most frequently be in the same country. Outside the context of 'weaker party disputes', domicile of the plaintiff, as well as a nationality of a claimant, is generally considered to be an exorbitant jurisdictional ground - i.e., the criterion that according to internationally accepted standards does not justify assuming jurisdiction against a defendant domiciled abroad.

5.1 Interpretation of Article 15 (now Art. 17) by the CJEU

The fact that one of the parties to the contract is a consumer does not necessarily imply that the consumer is a 'weaker' party entitled to the procedural protection under the jurisdictional rules in Article 16 and 17 of the Regulation Brussels I. In particular, it would be inappropriate if a business party was to be compelled to appear before a foreign court when it never intended to pursue any professional activity abroad. For example, a tourist domiciled in France who purchases a souvenir in Greece from a local shop would not be a 'consumer' entitled to the procedural protection under the Regulation enabling him to sue the owner of the shop in France considering that the seller has never pursued its commercial activities

⁵³ Giuliano and Lagarde Report on the Convention on the law applicable to contractual obligations, OJ 1980 C 282, p. 1, referring to Article 6 containing conflict of law rules for individual contracts of employment.

⁵⁴ See e.g., 1980 Convention on the law applicable to contractual obligations, converted into Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation Rome I) in which the party autonomy in determining the applicable is somewhat restricted so as to ensure that rights and interest of consumers and employees receive maximum protection. With respect to the contracts of employment, the objective of relevant provision of Article 6 of the Convention is to guarantee adequate protection to the employee. Within that context, the ECJ emphasised that the criterion of the country in which the employee 'habitually carries out his work' must be given broad interpretation. The subsidiary criterion – place of business through which the employee was engaged – can determine the applicable law only in cases when the court cannot determine the place where the employee habitually carries out his work. See e.g., ECJ Case C-29/10, Judgment of 15 March 2011 (*Heiko Koelzsch v. Luxembourg*) para 44 and Case C-384/10, Judgment of 15 December 2011 (*Jan Voogsgeerd v. Navimer SA*).

⁵⁵ Domicile of the defendant is the main principal rule under the Regulation and in general accepted standard for international jurisdiction (*actor sequitur forum rei*).



abroad. In other words, such a person would not be a ‘consumer’ within the meaning of Article 15 of the Regulation. This provision defines agreements that are considered as ‘consumer contracts’ as follows:

- ‘(a) it is a contract for the sale of goods on instalment credit terms; or
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.’

Only if one of the requirements indicated in Article 15 is fulfilled can the consumer make the use of the jurisdictional grounds and procedural protection provided under Articles 16 and 17. If the contract is not a ‘consumer contract’ as defined in Article 15, the consumer will not be able to rely on jurisdictional grounds in Section 4. Instead he/she will have to sue either in the Member State of the trader’s/professional’s domicile in accordance with Article 2 or to rely on one of the alternative jurisdictional grounds, most likely those in Articles 5(1)⁵⁶ and 5(3). The latter provisions define the rules on jurisdiction for contractual and extra contractual obligations respectively. Also, the consumer will not be entitled to procedural protection under Article 17 which restricts the binding nature of forum-selection-clauses in consumer contracts.

Especially the interpretation and application of the requirement under (c) of Article 15 may prove problematic. Namely it is not always easy to determine whether or not a professional directs its commercial activity to the country of the consumer’s domicile so that a contract can be considered as ‘consumer contract’ within the meaning of Article 5(1)(c). When services and products are offered on internet it may prove particularly difficult to determine whether or not business activities are directed to the Member State of consumer’s domicile, as the information may be accessed from anywhere in the world. National courts of the Member States on several occasions have been submitting questions for the interpretation to the EUCJ and there is substantial case law developed on the issue. Interpretation of Article 15 of the Regulation illustrates that the idea of protecting a procedural position of weaker parties incorporated in the Regulation is firmly supported by the CJEU case law.

Thus, the possibility to access the website in itself is not sufficient to conclude that a trader whose activity is presented on its website can be considered to be ‘directing’ its activity to the Member State of the consumer’s domicile. Rather it is necessary to establish that it is apparent from the website and the professional’s overall activity that the trade envisaged doing business with consumers domiciled in one or more Member State, including the Member State of that consumer’s domicile, ‘in the sense that it was minded to conclude a

⁵⁶ See e.g., ECJ Case C-27/02, Judgment of 20 January 2005 (*Petra Engler v Janus Versand GmbH*).



contract with them'.⁵⁷ The Court states a rather extensive list of circumstances that may be relevant and capable of constituting evidence from which it can be concluded that the commercial party's activity is directed to the Member State of consumer's domicile, as follows:

'...the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States.'⁵⁸

Obviously, such a wide range of relevant matters that may be considered when establishing the fact that the commercial activity is directed to a Member State of consumer's domicile favours a consumer's position when interpreting Article 15(1)(c). The same holds true as far as the nature of some of the relevant matters is concerned, especially the circumstances such as telephone numbers with an international code and a use of top level domain name other than that of the Member State in which the trader is established.

In order to comply with the requirement in Article 15(1)(c) it is not necessary that the contract between the professional and the consumer is concluded at a distance.⁵⁹ Besides, it is not required that there is a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile and the conclusion of the contract. Thus, when it is established on the basis of the information on the website and the professional's overall activity that the commercial activity is directed to the Member State of the consumer's domicile, it is irrelevant whether the consumer has learned about the product by searching the website or from another source. Yet 'existence of such a causal link constitutes evidence of the connection between the contract and such activity'.⁶⁰ The rules on jurisdiction in Section 4 apply only in case when a contract is concluded between a professional and a consumer, but not in transactions between two persons not engaged in commercial or professional activities.⁶¹

⁵⁷ ECJ case C-144/09), Judgment of 7 December 2010 (*Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG*).

⁵⁸ *Id.*

⁵⁹ ECJ Case C-190/11, Judgment of 6 September 2012 (*Daniela Mühlleitner v. Ahmad Yusufi, Wadat Yusufi*).

⁶⁰ ECJ Case C-218/12, Judgment of 17 October 2013 (*Lokman Emrek v. Vlado Sabranovic*).

⁶¹ See e.g., ECJ Case Case C-508/12, Judgment of 5 December 2013 (*Walter Vapenik v. Josef Thurner*). It should be mentioned that this decision does not involve the interpretation of the Regulation Brussels I, but relates to the European enforcement order for uncontested claims - Regulation (EC) No 805/2004. However, the reasoning of the Court may be relevant also for the rules on jurisdiction under the Section 4 of the Regulation Brussels I.



Regulation No. 1215/2012 (Brussels Ibis - Recast) – consequences for weaker party disputes
The revised Regulation extends the territorial (or formal) scope of application in disputes involving weaker parties. Besides, a number of new provisions are inserted either to ensure a greater degree of protection for weaker parties or to clarify the existing regulatory scheme aimed at protecting such parties.

The territorial scope is expanded in the Recast Regulation so as to include certain ‘weaker’ party disputes, notably consumer and labour law disputes. The provision of Article 6 paragraph 1 of the Recast Regulation (the current Art. 4 of the Brussels I Regulation) reads as follows:

‘1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 18(1), 21(2) and Articles 24 and 25, be determined by the law of that Member State.’

The reference to Articles 24 and 25 relate to exclusive jurisdiction and prorogation of jurisdiction respectively (current Arts. 22 and 23). Provisions of Article 18 and 21 relate to disputes involving consumers and employees.

Thus, a court in a Member State may establish its jurisdiction on the basis of the jurisdictional rules of Regulation 1215/2012 in all disputes involving a consumer or an employee regardless of the domicile of the other party. The provision of Article 6(1) refers only to consumer (Art. 18 para. 1) and labour disputes (Art. 21 para. 2), but there is no reference to insurance contracts. Consequently, the jurisdictional rules contained in Section 3 relating to insurance contracts only apply if a defendant is domiciled in an EU Member State.⁶² The relevant provisions on jurisdiction in Article 18⁶³ relating to consumer contracts (Art. 16 of the Regulation Brussels I) and Article 21⁶⁴ relating to contracts of employment

⁶² For more particulars on the territorial scope of application of the Recast Regulation, see Lazić, V., ‘Enhancing the Efficiency of Dispute Settlement Clauses in the European Union, in: N. Bodiřoga-Vukobrat/G.G. Sander/S. Rodin (eds.), *Legal Culture in Transition - Supranational and International Law Before National Courts*, Europäisches und internationales Wirtschaftsrecht, Band 4, Logos Verlag, Berlin (2013) pp. 184-188.

⁶³ Art. 18 of the Regulation 1215/2012 reads as follows:

- ‘1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, **regardless of the domicile of the other party**, in the courts for the place where the consumer is domiciled.
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.’ (emphasis added)

⁶⁴ Art. 21(1) of the Regulation 1215/2012 reads as follows:

- ‘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.



(Art. 19 of the Regulation Brussels I) have been adjusted so as to reflect the changes introduced to the territorial scope of application in Article 6 of the Recast. Accordingly, the new regulatory scheme enhances further the protection of consumers and employees. In particular, such ‘weaker parties’ may rely on the rules on international jurisdiction in disputes against professionals and employees domiciled outside the European Union.

Besides the scope of application and relevant rules on jurisdiction in disputes involving consumers and employees, there is further amendment to the provision on the tacit prorogation of jurisdiction. It has been amended so as to better accommodate the interests of ‘weaker’ parties. Under the current regime of Brussels I, if a defendant enters an appearance, a court in an EU Member State in principle does not examine *ex officio* whether or not it has jurisdiction under the Regulation. The exception is an obligation to examine whether a court in another state has exclusive jurisdiction according to Article 22. This follows from the current text of Article 24 of Brussels I which relates to tacit prorogation⁶⁵ as well as from Article 25.⁶⁶

The jurisdictional rules in disputes involving weaker parties are not mentioned in Article 24 of the Regulation 44/2001. Yet a violation of the jurisdictional grounds in disputes arising out of insurance contracts and consumer disputes, as well as the rules on exclusive jurisdiction presents a valid ground to refuse the enforcement of the judgment under Article 35(1) of the Regulation Brussels I. Considering that the current provision on tacit prorogation in Article 24 of the Regulation 44/2001 does not refer to disputes involving weaker parties, the EUCJ held that the court seised could validly assume jurisdiction in such disputes if a weaker party enters the appearance without contesting jurisdiction.⁶⁷ It reasoned, *inter alia*, that ‘although in the fields concerned by Sections 3 to 5 of Chapter II of that regulation the aim of the rules on jurisdiction is to offer the weaker party stronger protection ..., the jurisdiction determined by those sections cannot be imposed on that party’.⁶⁸ One could expect that a weaker party should be put in the position to be fully aware of the effects of submitting his/her defence as to the substance and that the court seised should therefore determine *ex officio* what is the intention of a entering an appearance. However, the Court held that ‘[s]uch an obligation

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.’ (emphasis added)

⁶⁵ Article 24 of the Regulation 44/2001 reads as follows:

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 22.

⁶⁶ 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 22, it shall declare of its own motion that it has no jurisdiction.

⁶⁷ ECJ Case C-111/09, Judgment of 20 May 2010 (*Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Michal Bilas*), where the Court held that ‘Article 24 ... must be interpreted as meaning that the court seised, where the rules in Section 3 of Chapter II of that regulation were not complied with, must declare itself to have jurisdiction where the defendant enters an appearance and does not contest that court’s jurisdiction, since entering an appearance in that way amounts to a tacit prorogation of jurisdiction.’

⁶⁸ *Id.*, para 30.



could not be imposed other than by the introduction into Regulation No 44/2001 of an express rule to that effect'.⁶⁹

Thereby the protection intended to be ensured in Article 35(1) is somewhat undermined, as the 'violation' of the jurisdictional rules referred to therein would not qualify as a ground for refusal of enforcement of the judgment even if a weaker party was unaware of the protection of its procedural position provided under the Regulation. The newly introduced provision in paragraph 2 of Article 26 of the Recast Regulation (currently Art. 24 Regulation Brussels I relating to tacit prorogation) remedies such a result and improves the positions of weaker parties. It reads as follows:

'Art. 26(2) of the Recast Regulation reads: 'In matters referred to in Sections 3, 4 and 5 (...) where the policyholder, the insured, the injured party of a beneficiary of the insurance contract, the consumer or the employee is the defendant, the court, before assuming jurisdiction under paragraph 1, shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.'

Thus, the court seised is under an obligation to inform a 'weak' party defendant of the consequences of entering an appearance (i.e., a policy holder/an insured/injured party/a beneficiary of the insurance contract, a consumer or an employee). Such additional protection for a weaker party⁷⁰ is to be met with approval.

The provision of Article 26 of the Regulation Brussels I has remained unchanged in the Recast (new Art. 28). In accordance with paragraph 1 of this provision, a weaker party will be 'protected' as any other party domiciled in a one Member State sued in a court of another Member State but does not enter an appearance. In such a case, the court seised is required to declare *ex officio* the lack of competence if it cannot establish its jurisdiction on the provisions of the Regulation. When a defendant does enter an appearance the court seised is required to examine jurisdiction on its own motion only in case that the courts of another Member State have exclusive jurisdiction under the Regulation. As already explained, according to the new regulatory scheme of the Regulation Brussels Ibis will have to warn a weaker party about the need to contest jurisdiction and the consequences of its failure to do so.

6. Prorogation of jurisdiction and Exclusive jurisdiction – see slides

⁶⁹ *Id.* With respect to the dispute against consumers, when interpreting the Consumer Directive, the ECJ on various occasions held that that the courts were to examine *ex officio* whether a dispute settlement clause, including forum-selection-clauses, had to be considered as unfair contractual terms. See e.g., Decision CJEU of 4 June 2009, C-243/08 (*Pannon GSM Zrt.*). For more particulars, see *infra*, under 4.

⁷⁰ See also, Hays, P., 'Notes on the European Union's Brussels-I "Recast" Regulation – An American Perspective', *The European Legal Forum* 1-2013, Jan./Feb. 2013, p.4; Lazić, V., 'The Revised *Lis pendens* rule in the Brussels Jurisdiction Regulation', *Review of European Law*, No. 2 (2013) pp. 12.



7. Common provisions - Provisions of Arts. 26-35 - see slides⁷¹

Provisions of Arts. 26-35 see Lazić, V., 'The Revised *Lis pendens* rule in the Brussels Jurisdiction Regulation', *Review of European Law*, No. 2 (2013) pp. 5-27.

8. Recognition and Enforcement of Judgments – General remarks

The revised Regulation brings some important changes to the procedure and formalities needed for recognition and enforcement of decisions rendered by the courts or other competent authorities in the EU Member States. Most relevant is abolishment of exequatur: it is no longer needed to obtain a declaration of enforceability in order to have such a decision enforced in other Member States. In other words, the enforcement of decisions rendered by the courts of Member States would be treated in the same manner as the enforcement of decisions rendered in the enforcing State, i.e., 'Member State addressed'.⁷² Other alterations are predominantly consequential amendments triggered by this major change of doing away with exequatur. They are primarily expressed in the structure of Chapter III relating to recognition and enforcement.

Abolishing exequatur in the revised Regulation is a further step in pursuing the principle of mutual recognition and in enhancing free circulation of judgments within the European Union.⁷³ When the 1968 Brussels Convention was converted into the Regulation, a first move towards this end was expressed in simplifying the issuance of declaration of enforceability. According to provision of Article 41 of the Regulation Brussels I, obtaining exequatur became automatic upon submitting the documents required. Thereby in that stage of proceedings there is no examination of the grounds for refusal of the recognition and enforcement. Moreover, the party against whom the enforcement is requested does not even participate in this phase of procedure. Only after such declaration has been obtained may the other party lodge a legal remedy – an appeal according to Articles 43 *et seq.* of the Regulation. Thus, the declaration of enforceability in the Regulation Brussels I became in fact an automatic certification of a judgment as enforceable, a mere 'stamp' on the judgment which was the subject of a possible subsequent appeal. Under the revised Regulation, even this formality is definitely eliminated: it is now on the party opposing the enforcement to initiate proceedings in which an application for refusal of enforcement shall be submitted (Articles 46 *et seq.* of the Regulation Brussels Ibis).

⁷¹ See also, Lazić, V., 'The Revised *Lis pendens* rule in the Brussels Jurisdiction Regulation', *Review of European Law*, No. 2 (2013) pp. 5-27.

⁷² Art. 2(e) provides for the definition of the 'Member State addressed'. See also, Recital (26) of the Regulation Brussels Ibis stating that as a result of the abolition of exequatur, 'a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed'.

⁷³ See Recital (26) of the Regulation 1215/2012, which reads in pertinent part: 'Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed.'



Considering that the Regulation Brussels I continues to apply to the enforcement of decisions rendered before 10 January 2015, the enforcement regimes under both Regulations Brussels I and Brussels Ibis will be presented and discussed and differences between them outlined.

8.1 *Scope of application*

8.1.1 Substantive scope

Both Regulations apply to issues of jurisdiction and recognition and enforcement of decisions in ‘civil and commercial matters’ in accordance with Article 1. The substantive scope of application of both Regulations, in particular the meaning of the ‘civil and commercial matters’ have already been extensively discussed in the Introductory Part. The same holds true with respect to the matters expressly excluded from the scope of application in Article 1 paragraphs 1 and 2. This analysis is fully applicable and equally relevant in the context of the recognition and enforcement of judgments. When compared to the Regulation 44/2001, the text of Article 1 of the revised Regulation Brussels Ibis is somewhat adjusted, but no substantial changes are thereby introduced. The matters pertaining to status of natural persons, matrimonial property and similar regimes, bankruptcy, social security, arbitration and wills and succession remain expressly excluded. As a consequence of the Maintenance Regulation coming into force as of 18 June 2011, maintenance obligations are added on the list of excluded matters.

8.1.2 Territorial (geographic; formal) Scope of Application

Just like the Regulation Brussels I, the Regulation 1215/2012 applies to decisions rendered by courts and other competent authorities of a Member State, as well as authentic instruments drawn up or registered and court settlements concluded before or approved by a court of a Member State. Accordingly, the territorial scope of application of these legal instruments concerning the recognition and enforcement of judgments differs from the manner in which the scope of application is defined regarding jurisdictional rules. With respect to the latter, the domicile of the defendant in a EU Member State is determinative as a matter of principle, with only few exceptions.⁷⁴ In contrast to this, the domicile of the parties has no relevance for the application of the rules on the recognition and enforcement of decisions. The same holds true for nationality of the parties. The only requirement is that it is a decision rendered by a court or other tribunal or competent authority in a EU Member State. Thus, the territorial scope of application is limited and determined by this ‘connection’ with a EU Member State. Thereby, the domicile of the judgment debtor is irrelevant: the Regulations apply also if the judgment debtor is domiciled in a third state.⁷⁵

This follows from the provisions of Article 32 and 33 which relate to recognition and Articles 32 and 38 relating to the enforcement under the Regulation Brussels I. They all refer

⁷⁴ As it is explained in the Introductory Chapter

⁷⁵ See Recitals(10) of the Regulation Brussels I and (27) of the Recast.



to ‘a judgment given in a Member State’. In principle, it is also irrelevant whether or not a judgment is rendered on the basis of the jurisdictional rules contained in the Regulation or on the basis national rules of a Member State, including the grounds that are considered exorbitant as set out in Annex I of the Regulation.⁷⁶ At last but not the least, the rules on the recognition and enforcement apply in principle regardless of whether a court of a Member State has correctly applied the rules on jurisdiction. In fact, appropriateness of the decision on jurisdiction may not be the subject of control by the enforcing court, with some notable exceptions mentioned in Article 35.

The territorial scope of application of the revised Regulation is drafted along the same lines, even though the structure of the legal framework is somewhat changed. In contrast to the suggestion to introduce a universal scope of application for jurisdictional rules, in the Commission’s Proposal of 14th December 2010 there was no initiative to alter the territorial scope of application with respect to the enforcement and recognition of foreign judgments. Consequently, the application of the Regulation 1215/2012 has remained limited to judgments rendered by the courts in EU Member States. The provisions of Articles 38 and 39 (ex Art. 33 and 38), as well as Recitals (26) and (27) of the Regulation 1215/2012 refer to a ‘a judgment given in a Member State’.

8.1.3 Types of Decisions to which the Regulation applies

The text of ex Article 32 has been largely retained in the revised Regulation. According to Article 32 of the Regulation Brussels I it applies to the decisions issued by the courts of the EU Member States. Thereby, it is of no importance how a judgment is called – ‘a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court’. Under the structure of the revised Regulation Brussels Ibis, this provision is incorporated and expanded in Article 2. The latter contains a number of definitions, including the definition of a ‘judgment’ in Article 2(a). The first part of Article 2(a) of the Regulation Brussels Ibis in fact incorporates the text of former Article 32. It 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’. Therefore, the case law of the CJEU remains relevant for the application of the relevant provision now contained in Article 2(a) of the Recast.

Decisions granting or denying the enforcement are not included.⁷⁷ The same holds true with respect to decisions rendered in support to arbitration or brought in exercising the control over arbitral awards. It follows already from the arbitration exception in Article 1(2)(d), in particular from Evrigenis/Kerameus Report that also court decisions rendered in proceedings related to arbitration are covered by the exception. The revised Regulation been further explained and clarified in the Recital (12).

⁷⁶ See Art. 3(2) of the Regulation Brussels I.

⁷⁷ Judgment in *Owens Bank Ltd. v. Fulvio Bracco and Bracco Industria Chimica SpA*, C-129/92, EU:C:1994:13.



However, a decision on declining jurisdiction due to a prorogation of jurisdiction clause is a judgment within the meaning of Article 32. That is the view taken in *Gothaer Allgemeine Versicherung AG v. Samskip*⁷⁸ A contract between a German claimant and an Icelandic defendant of transport from Belgium to Mexico contained a jurisdiction clause referring disputes to the Icelandic courts. Consequently the Belgian court declined jurisdiction. Claimant brings proceedings before the German courts, arguing that the previous judgment on the lack of jurisdiction of the Belgian courts is not binding in other Member States. The CJEU held that the term ‘judgment’ in art. 32 also covers a finding that the procedural requirements are not satisfied, for example the decision of a court to decline jurisdiction because of a valid jurisdiction clause. This view supports the objective of the Regulation to stimulate mutual trust between the administration of justice in Member States. For that reason the court before which recognition and enforcement is sought is bound by the earlier judgment of the court of another Member State declining jurisdiction due to existence of a valid jurisdiction clause.

An important addition is provided in the second part of Article 2(a) according to which the definition of a ‘judgment’ includes provisional and protective measures ordered by a court in Member State having jurisdiction on the merits of the matter. Thereby, the controversial issue whether or not a decision on the provisional measure may be enforceable under the Regulation has been expressly dealt with. There has been variety of views expressed in the literature on this issue. The ECJ case law has not been very helpful either and complicated the matter even further.

Under the Regulation Brussels Ibis it is clear that both decisions on the merits, as well as decisions on the provisional measures are included if the conditions under Article 2(a) are complied with, i.e., if it is granted by a court or tribunal which has jurisdiction on the substance of the dispute according to jurisdictional grounds provided in the Regulation. Provisional measures ordered *ex parte* may be included provided that the judgment on the measure has been served on the defendant before the enforcement. Such regulatory scheme present an amendment of the rule established by the ECJ judgment in *Denilaurer*,⁷⁹ according to which defendant must have been summoned and given the opportunity to present the case.

Additionally, the revised Regulation in Article 2 provides for other definitions. Thus, there is a definition of a ‘court settlement’ (Art. 2(b)),⁸⁰ authentic instrument (Art. 2(c)),⁸¹ the

⁷⁸*Gothaer Allgemeine Versicherung AG and Others v. Samskip GmbH*, C-456/11, EU:C:2012:719

⁷⁹CASE 125/79, Judgment of the Court of 21 May 1980, *Bernard Denilaurer v SNC Couchet Frères* C-125/79, EU:C:1980:130.

⁸⁰(b) ‘court settlement’ means a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings;

⁸¹(c) ‘authentic instrument’ means a document which has been formally drawn up or registered as an authentic instrument in the Member State of origin and the authenticity of which:

- (i) relates to the signature and the content of the instrument; and
- (ii) has been established by a public authority or other authority empowered for that purpose;



meaning of the ‘Member State of origin’ (Art. 2(d)),⁸² the ‘Member State addressed’ (Art. 2(e))⁸³ and of the ‘court of origin’ (Art. 2(f)).⁸⁴

8.1.4 Temporal scope

According to Article 81, the Regulation 1215/2012 shall apply from 10 January 2015, with the exception of Articles 75 and 76, which apply from 10 January 2014. As provided under Article 80 paragraph 1, this Regulation shall repeal the Brussels I Regulation. Yet the latter continues 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.’⁸⁵ The Regulation 1215/2012 ‘applies 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.’⁸⁶

The temporal scope of application of the Regulation 44/2001 expresses similar considerations in Article 66 paragraph 1. According to this provision, the Regulation applies also, in principle only to proceedings instituted before its entry into force. However, in paragraph 2 some exceptions to this rule are provided so that the enforcement of a judgment rendered may be requested under the Regulation even if the proceedings had been initiated before entry into force of the Regulation. In particular, the exception applies if the proceedings were instituted after the Lugano and Brussels Convention had entered into force (Art. 66 para. 2(a)) or when jurisdiction was based on the rules which are in line with the Chapter II of the Regulation or on the rules contained in a treaty concluded between the two Member States applicable at the moment of instituting the proceedings (Art. 66 para 2(b)). Rationale behind these exceptions is to enable more favourable enforcement regime of the Regulation to apply to judgments brought in the proceedings conducted according to the principles put forward in the Regulation.⁸⁷

The ECJ interpreted the provision of Article 66 paragraph 2 in *Wolf Naturprodukte GmbH v SEWAR spol. s r. o.*⁸⁸ Company with the seat in Czech Republic was ordered to pay a

⁸² ‘Member State of origin’ means the Member State in which, as the case may be, the judgment has been given, the court settlement has been approved or concluded, or the authentic instrument has been formally drawn up or registered;

⁸³ (e) ‘Member State addressed’ means the Member State in which the recognition of the judgment is invoked or in which the enforcement of the judgment, the court settlement or the authentic instrument is sought;

⁸⁴ (f) ‘court of origin’ means the court which has given the judgment the recognition of which is invoked or the enforcement of which is sought.

⁸⁵ Art. 66 para 2 of the Regulation 1215/2012.

⁸⁶ Art. 66 para 1 of the Regulation 1215/2012.

⁸⁷ In similar sense, Case C-406/09 *Realchemie Nederland* [2011] ECR I-9773, paragraph 38; Case 125/79 *Denilauler* [1980] ECR 1553, paragraph 3; Jenard Report OJ 1979 C 59, p. 1, at p. 46.

⁸⁸ Judgment of 21 June 2012, Case C-514/10, ECLI:EU:C:2012:367 (*Wolf Naturprodukte GmbH v SEWAR spol. s r. o.*)



claim brought by an Austrian company by judgment rendered in 2003 by Regional Civil Court, in Graz, Austria, thus before 1 May 2004 when Czech Republic became a EU Member State. The claimant applied in 2007 to the District Court Znojmo in Czech Republic for a declaration of enforceability on the basis of Regulation No 44/2001, as well as for a seizure of defendant's assets for the purpose of ensuring the enforcement. The Court denied the motion holding, *inter alia*, that the judgment was rendered in default and it could be concluded from the facts of the judicial proceedings that the defendant had been denied the opportunity of participating in the proceedings. Additionally, it held that the condition of reciprocity between the Czech Republic and the Republic of Austria was not met. Upon the claimant's application against this ruling the Czech Supreme Court submitted the question for a preliminary ruling to the ECJ on the interpretation of Article 66 paragraph 2. The question was whether it was necessary for both states to be EU Member States at the moment of delivery of judgment for the purposes of relying on the enforcement regime of the Regulation. The ECJ reasoned as follows:

'Article 66(2) 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, for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed.'

When read outside the context of the entire judgment this reasoning may appear somewhat misleading. In other words, there is a risk of concluding that the mere fact that both states are Member States at the time of rendering the judgment is sufficient to trigger applicability of the Regulation on the enforcement of the judgment. Such conclusion is indeed incorrect and does not follow from Article 66 paragraph 2. This provision simply specifies when a departure from the main rule in paragraph 1 (moment of instituting the proceedings) is permitted. Therefore, the reasoning of the ECJ is properly understood so as to mean that it is required that the Member State of origin and the Member State addressed are Members at least at the moment of rendering the judgment. Only then would it be a 'judgment given after' ... 'the entry into force of the Regulation' within the meaning of Article 66 paragraph 2. And only then would it be possible to consider whether the requirements provided in Article 66 paragraph 2 are met, i.e., whether the judgment has been rendered in the proceedings based on the rules compatible with those in the Regulation, including the requirement that the defendant has been given sufficient opportunity to participate in the proceedings. Considering that in the case at hand the judgment concerned was not a 'judgment rendered after' entering into force of the Regulation, there was no need to discuss whether or not the procedure in which the judgment was rendered complied with the standards provided under the Regulation.

To sum up, the reasoning of the ECJ should not be understood to mean that for the Regulation to apply it is *sufficient* that a judgment is rendered after entry into force of the



Regulation in both Member States. For example, in the circumstances of this case, even if the judgment would have been rendered after 1 May 2004 (thus, when both states were Member States) in the proceedings instituted before 1 May 2004, it does not mean that the Regulation would necessarily apply on the enforcement of the judgment. It would apply only if the conditions under (a) or (b) of paragraph 2 of Article 66 would have been met. The same follows from the reasoning of the ECJ in particular in paras 31 and 32,⁸⁹ even though this is not entirely reflected in the wording of the final ruling.

The Regulation 1215/2012 does not contain a provision corresponding to paragraph 2 of Article 66 of the Regulation 44/2001. As already explained, in Article 66 paragraph 1 it clearly states that it applies ‘only to legal proceedings instituted ... on or after 10 January 2015’. Thus, for a possible future Member State the revised Regulation would apply only if proceedings would be initiated after such state has become a Member State. If proceedings were instituted before, but a judgment would be rendered after a new state has become a Member of the EU, the Regulation 1215/2012 will not apply. The Regulation 44/2001 continues to apply to judgments rendered in proceedings instituted before 10 January 2015. Consequently, the interpretation of the provision of Article 66 paragraph 2 may still be relevant for judgments falling within the enforcement regime of the Regulation 44/2001.

9. Relationship with international conventions and other sources (Articles 67-73)

According to Article 69 of the 1215/2012 Regulation, it shall as between the EU Member States supersede all conventions that concern the same matters as the Regulation. The Commission shall provide for the list of such conventions Art. 79 paras 1© and 2). However the Regulation shall not affect or prejudice the application of:

- (1) Provisions on jurisdiction and recognition and enforcement of judgments in specific matters contained in other EU legal sources or national legal instruments harmonised pursuant to such sources in matters governed by the Regulation (Art. 67)
- (2) Any convention to which a Member State is a party and which, regarding particular subject-matter, deals with jurisdiction or the recognition and enforcement of judgments (Art. 71)
- (3) Conventions regarding the matters that are not governed by the Regulation (Art. 70)
- (4) Certain conventions conclude before entry into force of the Regulation Brussels I (Art. 72)

⁸⁹ In para 33 of the ECJ-judgment in *Wolf* the Court particularly refer to the relevance of the provision of Article 26 and expressed doubts as to whether the defendant was in the position to benefit from this provision. It reads as follows: ‘It should be noted in this respect that, in the main proceedings, it is apparent from the order for reference that the judgment sought to be recognised and enforced was a judgment in default and that it may be supposed that the defendant in the main proceedings, who was unable to benefit from the protection mechanisms provided for in Article 26 of Regulation No 44/2001 in that the Czech Republic had not yet acceded to the European Union at the time of delivery of the judgment in the Member State of origin, was denied the opportunity of taking part effectively in the legal proceedings, since the judgment was given on the very date on which the document instituting the proceedings was served.’



(5) Lugano Convention, New York Convention and bilateral agreements concluded before entry into force of the Regulation Brussels I

Analysis of the ECJ case law

The judgment, *TNT Express Nederland BV v. AXA Versicherung AG* (C-533/08) illustrates that there may be certain restrictions in the application of Article 71 of the Brussels I Regulation. This provision gives prevalence to international instruments that in relation to particular matter govern jurisdiction or the recognition or enforcement of foreign judgments. According to Article 71(1), the Brussels I Regulation ‘shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments’. In paragraph 2(a) it provides that ‘this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that Convention ...;’. In paragraph 2(b) it provides that ‘judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member State in accordance with this Convention. (...)’.

The decision in *TNT Express Nederland BV v. AXA Versicherung AG* (C-533/08) involves the Convention on the Contract for the International Carriage of Goods by Road, Geneva 19 May 1956, as amended by the Protocol signed at Geneva on 5 July 1978 (hereinafter: ‘CMR’). In interpreting Article 71 of the Regulation, the Court held that even though Article 71 provides for the application of such conventions, ‘their application cannot compromise the principles which underlie judicial co-operation in civil and commercial matters in the European Union, such as the principles, recalled in recitals 6, 11, 12, and 15 to 17 ...’. Also, its application cannot undermine the ‘free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.’ (*TNT Judgment*, par.49).

European Enforcement Order⁹⁰

1. General remarks

It was the first legal instrument enacted by the EU legislator in the area of ‘civil of commercial matters’⁹¹ that abolished exequatur, as it had been envisaged by the programme

⁹⁰ 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, L 143/15.

⁹¹ Indeed, the exequatur had been abolished already in 2005 in the Regulation Brussels II bis in access rights and child abduction cases. However, this regime of enforcement applies in matters that are substantially distinct from those falling under the substantive scope of application of the EEO. Namely, it relates to the enforcement of return orders brought by the court of a Member State of child’s habitual residence immediately before its unlawful removal or retention, as well as the enforcement of decisions on the right of access under Articles 41 and 42 of the Regulation Brussels II bis.



adopted by the Council in 2000.⁹² The principle of mutual recognition of judicial decisions was endorsed at the European Council meeting in Tampere on 15 and 16 October 1999 ‘as the cornerstone for the creation of a genuine judicial area’.⁹³ It was concluded that the enforcement of the judgment given in a Member State should be accelerated and simplified in other Member States so as to abolish any intermediate proceeding in the Member State of enforcement. The intention was that a judgment that has been certified as a European Enforcement Order in a Member State should in the enforcement stage be treated as if it had been delivered in the Member State in which enforcement is sought.⁹⁴ Such an approach was perceived as an important improvement compared to the regime of the enforcement under the Regulation Brussels I. It was meant to simplify and accelerate the procedure and to reduce costs of enforcement. The purpose of the Regulation is to create a system of enforcement without any intermediate proceedings needed to be brought in the Member State of enforcement prior to recognition and enforcement.⁹⁵

When a decision is rendered in the absence of a debtor it is essential to ensure that the requirement of fair trial have been complied with, considering that no control in that respect may be exercised in the Member State of the enforcement. Instead the right to examine whether requirements of due process have been respected is vested with the court where the judgment is rendered – a ‘Member State of origin’.⁹⁶ Therefore the control carried out in a Member State where a decision is rendered must ensure that the requirement of a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union is respected. To this end the Regulation sets minimum standards that have to be fulfilled when a decision is to be certified as an European Enforcement Order. The purpose of defining these minimum standards is to ensure that the debtor has duly and timely been informed of:

- the fact that a claim against him/her has been filed with a court
- conditions and the procedure according to which he/she is to engage in the proceeding so as to contest the claim, and
- legal consequences of his/her failure to participate in the proceeding and a failure to contest the claim.

Before issuing a certificate the court in a Member State of origin must establish that a debtor has duly and timely been informed of these facts and consequences, i.e., in such a manner and in sufficient time as to enable him to arrange for his defence.

2. Subject and the purpose of the Regulation

The purpose of this Regulation is to create a European Enforcement Order for uncontested claims so as to permit the free circulation of judgments, court settlements and authentic instruments throughout all Member States without exequatur. In other words, the purpose is to abolish any intermediate proceedings in the Member State of enforcement prior to recognition

⁹² See Recital (4) of the EEO, which provides as follows: ‘On 30 November 2000, the Council adopted a programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters. This programme includes in its first stage the abolition of exequatur, that is to say, the creation of a European Enforcement Order for uncontested claims’.

⁹³ European Enforcement Order, Recital (3).

⁹⁴ Recital (8).

⁹⁵ Art. 1.

⁹⁶ Article 4(4): ‘Member State of origin’: the Member State in which the judgment has been given, the court settlement has been approved or concluded or the authentic instrument has been drawn up or registered, and is to be certified as a European Enforcement Order;



and enforcement.⁹⁷ The Regulation lays down minimum standards that have to be fulfilled for certifying a decision as a European Enforcement Order. A court in a ‘Member State of origin’, i.e. where the decision is rendered, must ensure that such minimum standards have been met and only if this is the case may the decision be certified as a European Enforcement Order. The courts in a Member State of enforcement are, as a matter of principle, not permitted to exercise any control over a judgment so certified by a court in a Member State of origin. They must enforce such a decision without any intermediate proceedings. Irreconcilability of an earlier rendered judgment is the only reason for which the enforcement may be refused.

The underlying principle is mutual recognition or mutual trust endorsed at the meeting in Tampere on 15 and 16 October 1999 and incorporated in the programme of measures for implementation of the principle adopted by the Council on 30 November 2000.

The Regulation provides for a number of definitions in Article 4, such as ‘judgment’, ‘claim’, ‘authentic instrument’,⁹⁸ ‘Member State of origin’, ‘Member State of enforcement’ and ‘court of origin’. In its recent judgment, CJEU has held that notaries, ‘acting within the framework of the powers conferred on them by national law in enforcement proceedings based on an ‘authentic document’, do not fall within the concept of ‘court’ within the meaning of that regulation.’⁹⁹

3. Substantive scope of application

Substantive scope of application is defined almost identically as in the Brussels I Regulation. Thus, it applies to ‘civil and commercial matters’ so that decisions rendered in disputes of ‘public law nature’, such as revenue, customs or administrative do not fall within the scope of application. Certain civil and commercial matters are expressly excluded in the same manner and the wording used in the Regulation Brussels I. The Regulation does not apply in Denmark.

4. Types of decisions falling within the enforcement regime of the Regulation

Judgments, court settlements and authentic instruments on uncontested claims and decisions delivered following challenges to such decisions, settlements and authentic instruments certified as European Enforcement Orders may be enforced under the Regulation.¹⁰⁰

5. Uncontested claims

⁹⁷ Article 1 of the EEO.

⁹⁸ In CJEU (Second Chamber) Judgment of 9 March 2017, Case C-484/15 (*Ibrica Zulfikarpašić v Slaven Gajer*) the CJEU has held that ‘a writ of execution adopted by a notary, in Croatia, based on an ‘authentic document’, and which has not been contested may not be certified as a European Enforcement Order since it does not relate to an uncontested claim within the meaning of Article 3(1) of that regulation’. See also an earlier CJEU judgment (Fourth Chamber) of 17 December 2015, Case C-300/14, (*Imtech Marine Belgium NV v Radio Hellenic SA*), holding that the ‘certification of a judgment as a European Enforcement Order, which may be applied for at any time, can be carried out only by a judge.

⁹⁹ *Id.*

¹⁰⁰ Recital (7).



The Regulation in Article 3 determines which claims are considered uncontested. Thereby two ‘categories’ of uncontested claims may be distinguished:

5.1. *Claims expressly admitted by the debtor* – Art. 3(a) and (d)

As defined under (a) and (d) of Article 3, these are claims with respect to which there is a ‘verified absence of a dispute by the debtor as to the nature or extent of a pecuniary claim’.¹⁰¹ Such an absence of a dispute may be evidenced, for example, by a court decision in which that debtor expressly admits the claim. Also it may be an enforceable document that may be issued only by the debtor's express consent, such as a court settlement or an authentic instrument.

5.2 *Claims considered to be uncontested due to a debtor’s failure to object or another passive behavior of the debtor* – Art. 3(b) and (c)

According to the Regulation certain claims which are not expressly admitted by the debtor, are considered as uncontested when the debtor has been given a fair opportunity to participate in the proceedings and dispute the claim, but has failed to do so. Such is the case reflected in Article 3(b) of the Regulation relating to the situation when the debtor has never contested the claim in the course of the proceedings. It will be, for example, when the debtor duly served with the necessary documents initiating the litigation has failed either to attend the hearing or to otherwise contest the claim by submitting a written statement of defence or complying with the instructions that may be given by the court in that respect. The meaning of ‘uncontested’ claim under Article 3(b) is to be determined autonomously with no reference to national law of a Member State.¹⁰²

As determined in Article 3(c), uncontested will also be the claim that the debtor initially opposed, but failed to enter the appearance at the court hearing either in person or through a representative, if such a behavior may be qualified as a tacit admission under the law of the country where proceedings are initiated.

The requirements that must be fulfilled in order to certify a judgment as an EEO differ for these two categories of uncontested claims, as it will in a greater detail addressed *infra*, under 6.

6. Requirements for certification as a European Enforcement Order

The conditions that must be fulfilled in order to certify a judgment as a European Enforcement Order are provided in Article 5 of the Regulation.

6.1 *Requirements for certification of decision in which claims are expressly admitted by the debtor*

If the debtor has admitted the claim in a manner defined in Article 3 paragraphs (a) and (d), a decision may, upon a request of a party, be certified as a European Enforcement Order if the following conditions are met:

¹⁰¹ European Enforcement Order, Recital (5).

¹⁰² CJEU Judgment COURT (Third Chamber) of 16 June 2016, Case C-511/14 (*Pebros Servizi Srl v Aston Martin Lagonda Ltd*)



(a) the judgment is enforceable in the Member State of origin; and

(b) the judgment does not conflict with the rules on jurisdiction concerning insurance contracts and on exclusive jurisdictions of the Regulation Brussels I.

There are the only conditions that have to be fulfilled in a case where a claim has been expressly admitted by the debtor. Complying with these conditions suffices also in cases where a judgment is rendered against a consumer.

6.2 *Requirements for certification of judgments concerning claims that are not expressly admitted by the debtor*

As explained supra under 5.2, there are claims that are considered to be uncontested due to the debtor's failure to raise an objection to the claim or his/her passive behavior as specified in Article 3 paragraphs (b) and (c). There are additional requirements that must be met in order to certify a judgment rendered in such cases as a European Enforcement Order. Considering that such judgments are rendered in the absence of the debtor, it is essential to ensure that the requirement of due process and fair trial are met, i.e., that the debtor has been given an opportunity to participate in the proceedings. To this end, the Regulation sets out in Chapter III a number of minimum standards that have to be met to certify a judgment as a European Enforcement Order. These are the following minimum standards:

(1) **Proper service of the document instituting the proceedings or an equivalent document.**

The Regulation determines the acceptable or permitted methods of service that either provide evidence that the debtor has received the relevant document (Service with proof of receipt by the debtor defined in Article 13) or offer a high degree of certainty of the service (Service without proof of receipt by the debtor in Article 14).

(2) **The document instituting the proceedings must contain sufficient information about the claim.**

In particular it must state the names and the addresses of the parties, the amount of the claim, if interest on the claim is sought, the interest rate and the period for which interest is sought unless statutory interest is automatically added to the principal under the law of the Member State of origin and a statement of the reason for the claim (Article 16).

(3) The document instituting the proceedings must contain **due information about the procedural steps necessary to contest the claim**. In particular, it must clearly indicate the procedural requirements for contesting the claim, the consequences of an absence of objection or default of appearance (Art. 17).

(4) The debtor must be entitled under the law of the Member State of origin, to apply for **review of the judgment in exceptional circumstances**.¹⁰³ The Regulation specifies such circumstances in Article 19 as follows: the document instituting the proceedings has been served by a method without the proof of receipt by the debtor and the service was not effected in sufficient time to enable him to arrange for his defence, without any fault on his part or 'the debtor was prevented from objecting to the claim by reason of force majeure, or due to

¹⁰³ There is no need for a Member State to establish in their national law a review procedure such as that referred to in Article 19 of that regulation, as long as the national law allows for a full review and the possibility for time limits for challenge of the judgment to be extended in extraordinary circumstances preventing a debtor to object. CJEU judgment (Fourth Chamber) of 17 December 2015, Case C-300/14, (*Imtech Marine Belgium NV v Radio Hellenic SA*),



extraordinary circumstances without any fault on his part, provided in either case that he acts promptly' (Art. 19).

These conditions apply in addition to the general requirements of the enforceability of the judgment in a Member State of origin and the compliance with the rules on jurisdiction in cases involving consumers and rules on exclusive jurisdiction.

The judgment rendered in non-compliance with the requirements indicated under (1)-(3) may still be certified as a European Enforcement Order (i.e., these deficiencies may be 'cured') if the judgment has been duly served on the defendant and the defendant had an opportunity to challenge the judgment, but failed to do so (Article 18).

6.2.1 *Requirements for certification of judgments against a consumer concerning claims that are not expressly admitted by the debtor*

If a judgment is rendered against a consumer concerning a claim that are not expressly admitted, but are considered uncontested within the meaning of Article 3(b) and (c) only a court of a Member State of the consumer's domicile may certify the judgment as a European Enforcement Order.¹⁰⁴

7. Enforcement

A judgment certified as a European Enforcement Order is enforceable in other Member States without the need for an intermediary procedure (exequatur). It may be enforced as a judgment rendered in the Member State where the enforcement is sought in accordance with its rules of procedure. The judgment is enforceable after submitting the documents specified in Article 20 para 2: a copy of the judgment and of the certificate and where necessary, a transcription or a translation of the European Enforcement Order in the official language of the Member State of enforcement.

The only reason to refuse the enforcement is irreconcilability of the judgment with an earlier decision between the same parties and the same cause of action rendered or enforceable in the Member State, provided that 'the irreconcilability was not and could not have been raised as an objection in the court proceedings in the Member State of origin' (Art. 21).

8. Relationship with the Regulation Brussels I

It is a choice of the party requesting the enforcement on which of the two legal instruments he/she wishes to rely. In other words, a judgment certified as a European Enforcement Order can be enforced under the Brussels I regime: with the exequatur under the Regulation Brussels I or without the exequatur under the Brussels Ibis, but with the possibility for the debtor to apply for non-enforcement on the grounds which are virtually identical to those under the Regulation Brussels I.

¹⁰⁴This additional requirement does not apply to contracts concluded by two consumers. CJEU (Ninth Chamber) judgment of 5 December 2013, Case C-508/12 (*Walter Vapnik v Josef Thurner*).