

COMMERCIAL DISPUTES: JURISDICTION,
APPLICABLE LAW, ARBITRATION,
MEDIATION & NEGOTIATION

TAIEX

Workshop on European Company Law and Corporate
Governance

Skopje, 2-3 March 2020

INTRODUCTION

JUSTICE PROGRAMME (2014-2020): contributes to the further development of a European Union area of justice based on **mutual recognition** and **mutual trust**, by **promoting judicial cooperation in civil and criminal matters and helping train judges and other legal practitioners**.

ACT: Regulation (EU) No 1382/2013

WHAT DOES THIS REGULATION DO? It establishes the Justice programme for the period 2014-2020.

KEY POINTS:

The Justice Programme aims to ensure that **EU law is fully and consistently applied**. Its mission is to **facilitate access to justice for people and businesses throughout the EU, particularly when they live, work, do business or even face trial in another EU country**. It promotes (inter alia):

- **judicial cooperation in civil matters, including civil and commercial matters, insolvencies**, family matters (such as divorce) and successions, etc.
- **judicial training**, including language training on legal terminology, with a view to fostering a EU common legal and judicial culture

INTRODUCTION

- JUDICIAL COOPERATION IN CIVIL & COMMERCIAL MATTERS are EU HIGH PRIORITIES, but
- CIVIL & COMERCIAL LAW + CIVIL PROCEEDINGS are governed by the laws of the MS
- => need for harmonization
- EU legal instruments: directives and regulations
- PRIVATE INTERNATIONAL LAW: Jurisdiction and enforcement: Brussels Convention 1968 + Lugano Convention 1988 / 2007, later Regulation 44/2001, now Regulation 1215/2015
- PRIVATE INTERNATIONAL LAW: Applicable law: Rome I – contractual obligations, Rome II – non-contractual obligations
- “TECHNICAL” LEGAL INSTRUMENTS: Reg. 1026/2001 – taking of evidence, Reg. 1393/2007 – service of documents
- EUROPEAN SPECIAL PROCEDURES: Reg. 1896/2006 – order for payment, Reg. 861/2007 – small claims procedure, Reg. 805/2004 European Enforcement Order for uncontested claims, Reg. 655/2014 - European Account Preservation Order

JURISDICTION AND ENFORCEMENT

HISTORICAL BACKGROUND

The first EU legal instrument on jurisdiction and the enforcement of judgments in civil and commercial matters → the Brussels Convention dated 27 September 1968.

The Lugano Convention 1988, then 2007, uniform rules EU + Iceland, Norway, Switzerland

Then, the Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters = based mainly on the Brussels Convention from 1968.

In December 2012 the European Economic and Monetary Affairs Council approved amendments to the Brussels Regulation, which came into force on 10 January 2015. The key changes were designed to:

- a) streamline the process for enforcement of judgments across MSs, reduce time & costs for creditors;
- b) strengthen choice of court agreements by ending cross border “torpedo” litigation tactics;
- c) extend the remit of the Brussels Regulation’s jurisdiction rules to non-EU defendants in certain cases; and
- d) protect arbitration clauses against abusive litigation.

SCOPE OF THE REGULATION

Rule: Regulation 1215/2015 applies in civil and commercial matters, whatever the nature of the court or the tribunal - Article 1(1).

It does not apply:

- in revenue, customs or administrative matters
- to liability of the State for actions or omissions in the exercise of state authority (*acta iure imperii*).

The European Court of Justice has consistently held that the term "civil and commercial matters" must be given an autonomous meaning derived from the objectives and scheme of the Community legislation concerned and the general principles underlying the national legal systems as a whole (C-29/76, *LTU v Eurocontrol*).

SCOPE OF THE REGULATION

The Court held that two elements are relevant for deciding whether or not a dispute is of a civil and commercial nature:

- the subject matter of the dispute; and
- the nature of the relationship between the parties involved.

In particular with respect to actions involving a public authority, the Court specified that a matter is not “civil or commercial” when it concerns a dispute between a public authority and a private person when the first acted in the exercise of public power. The Court distinguishes between *acta iure imperii*, which are excluded from the notion of “civil or commercial matters”, and “*acta iure gestionis*”, which are, *a contrario*, included in such notion.

SCOPE OF THE REGULATION

It does NOT apply: - Article 1 (2)

- to 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;
- to bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
- social security;
- arbitration;
- maintenance obligations arising from a family relationship, parentage, marriage or affinity;
- wills and succession, including maintenance obligations arising by reason of death.

SCOPE OF THE REGULATION

Ratione temporis: Regulation 1215/2012 applies only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.

Notwithstanding Article 80 [that repeals Brussels I], Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.

Arbitration is excluded from the scope of Regulation 1215/2012. Art. 73(2) states that the Regulation shall not affect the application of the 1958 New York Convention. (Recital 12 => controversy)

Third country (non EU) decisions are excluded from the scope of Regulation 1215/2012.

REGULATION 1215/2012

DEFINITIONS

(a) ‘judgment’ means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.

For the purposes of Chapter III, ‘judgment’ includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;

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

REGULATION 1215/2012

DEFINITIONS

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

(i) relates to the signature and the content of the instrument; and

(ii) has been established by a public authority or other authority empowered for that purpose;

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

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

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

REGULATION 1215/2012

DEFINITIONS

For the purposes of this Regulation, 'court' includes the following authorities to the extent that they have jurisdiction in matters falling within the scope of this Regulation:

(a) in Hungary, in summary proceedings concerning orders to pay (fizetési meghagyásos eljárás), the notary (közjegyző);

(b) in Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the Enforcement Authority (Kronofogdemyndigheten).

REGULATION 1215/2012

JURISDICTION – GENERAL RULES

- GENERAL RULES: - Articles 4-6

Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of Chapter II.

In particular, the rules of national jurisdiction of which the Member States are to notify the Commission pursuant to point (a) of Article 76(1) shall not be applicable as against the persons referred to in paragraph 1.

REGULATION 1215/2012

JURISDICTION – GENERAL RULES

If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1) [consumer bringing proceedings against the other party to a contract], Article 21(2) [employee sues employer not domiciled in a Member State] and Articles 24 [exclusive jurisdiction] and 25 [prorogation of jurisdiction], be determined by the law of that Member State.

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

REGULATION 1215/2012

SPECIAL JURISDICTION – Art. 7

Article 7

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

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

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

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

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

REGULATION 1215/2012

SPECIAL JURISDICTION – Art. 7

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

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

(3) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

(4) as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised;

REGULATION 1215/2012

SPECIAL JURISDICTION – Art. 7

(5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place where the branch, agency or other establishment is situated;

(6) as regards a dispute brought against a settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

(7) as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

(a) has been arrested to secure such payment; or

(b) could have been so arrested, but bail or other security has been given;

provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

REGULATION 1215/2012

SPECIAL JURISDICTION – Art. 8

A person domiciled in a Member State may also be sued:

(1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

(3) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

(4) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated.

REGULATION 1215/2012

SPECIAL JURISDICTION – Art. 9

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

REGULATION 1215/2012

JURISDICTION - INSURANCE– Section 3 -Art. 10-16

Article 10 - In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 [defendant not domiciled in a MS] and point 5 of Article 7 [dispute arising out of the operations of a branch, agency or other establishment].

Article 11 – 1. An insurer domiciled in a Member State may be sued:

- (a) in the courts of the Member State in which he is domiciled;
- (b) in another Member State, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled; or
- (c) if he is a co-insurer, in the courts of a MS in which proceedings are brought against the leading insurer.

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

REGULATION 1215/2012

JURISDICTION - INSURANCE– Section 3 -Art. 10-16

Article 12

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.

Article 13 - 1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.

2. Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.

3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

REGULATION 1215/2012

JURISDICTION - INSURANCE– Section 3 -Art. 10-16

Article 14 – 1. Without prejudice to Article 13(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.

2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 15

The provisions of this Section may be departed from only by an agreement:

(1) which is entered into after the dispute has arisen;

(2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section;

REGULATION 1215/2012

JURISDICTION - INSURANCE– Section 3 -Art. 10-16

(3) which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that Member State;

(4) which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State; or

(5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 16.

REGULATION 1215/2012

JURISDICTION - INSURANCE– Section 3 -Art. 10-16

Article 16

The following are the risks referred to in point 5 of Article 15:

(1) any loss of or damage to:

(a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

(b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;

REGULATION 1215/2012

JURISDICTION - INSURANCE– Section 3 -Art. 10-16

(2) any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

(a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

(b) for loss or damage caused by goods in transit as described in point 1(b);

(3) any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

(4) any risk or interest connected with any of those referred to in points 1 to 3;

(5) notwithstanding points 1 to 4, all 'large risks' as defined in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

REGULATION 1215/2012

JURISDICTION – CONSUMER CONTRACTS – Section 4 - Art. 17-19

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 [defendant not domiciled in a MS] and point 5 of Article 7 [dispute arising out of the operations of a branch, agency or other establishment], if:

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

REGULATION 1215/2012

JURISDICTION – CONSUMER CONTRACTS – Section 4 - Art. 17-19

Article 17 - continuation

2. Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

REGULATION 1215/2012

JURISDICTION – CONSUMER CONTRACTS – Section 4 - Art. 17-19

Article 18

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

REGULATION 1215/2012

JURISDICTION – CONSUMER CONTRACTS – Section 4 - Art. 17-19

The new provisions in Articles 18 and 6(1) have strengthened consumer rights.

Under the Regulation 44/2001 (Article 15(2) and Article 16(1)), consumers were able to bring proceedings against the other party in the courts of their place of domicile only if the other party maintained at least one establishment within the EU.

In contrast, Articles 18 and 6(1) of the recast Regulation provide that European consumers can always bring proceedings in the courts of their place of domicile – even if the other party against which proceedings are brought is not domiciled within the territorial scope of the Regulation 44/2001.

The restriction in Article 17(1)(c), however, still applies. For jurisdiction under Article 18, the party with which the consumer has entered into a contract must pursue commercial or professional activities within the territory of the EU.

REGULATION 1215/2012

JURISDICTION – CONSUMER CONTRACTS – Section 4 - Art. 17-19

Article 19

The provisions of this Section may be departed from only by an agreement:

- (1) which is entered into after the dispute has arisen;
- (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
- (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

REGULATION 1215/2012

JURISDICTION – INDIVIDUAL EMPLOYMENT CONTRACTS

– Section 5 - Art. 20-23

Article 20

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 6 [defendant not domiciled in a MS] and point 5 of Article 7 [dispute arising out of the operations of a branch, agency or other establishment] and, in the case of proceedings brought against an employer, point 1 of Article 8 [where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;]

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

REGULATION 1215/2012

JURISDICTION – INDIVIDUAL EMPLOYMENT CONTRACTS – Section 5 - Art. 20-23

Article 21

1. An employer domiciled in a Member State may be sued:

(a) in the courts of the Member State in which he is domiciled; or

(b) in another Member State:

(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or

(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

REGULATION 1215/2012

JURISDICTION – INDIVIDUAL EMPLOYMENT CONTRACTS

– Section 5 - Art. 20-23

Article 22

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.
2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 23

The provisions of this Section may be departed from only by an agreement:

- (1) which is entered into after the dispute has arisen; or
- (2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

REGULATION 1215/2012

EXCLUSIVE JURISDICTION – Art. 24

The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

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

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

REGULATION 1215/2012

EXCLUSIVE JURISDICTION – Art. 24

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

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

REGULATION 1215/2012

EXCLUSIVE JURISDICTION – Art. 24

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

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

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

REGULATION 1215/2012

PROROGATION OF JURISDICTION – Art. 25-26

Article 25

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

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

REGULATION 1215/2012

PROROGATION OF JURISDICTION – Art. 25-26

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

REGULATION 1215/2012

PROROGATION OF JURISDICTION – Art. 25-26

Article 26

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

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

REGULATION 1215/2012

EXAMINATION AS TO JURISDICTION AND ADMISSIBILITY

– ART. 27-28

Article 27

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

Article 28

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

REGULATION 1215/2012

EXAMINATION AS TO JURISDICTION AND ADMISSIBILITY

– ART. 27-28

3. Article 19 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) shall apply instead of paragraph 2 of this Article if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.

4. Where Regulation (EC) No 1393/2007 is not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

Article 29

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

Article 30

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

Article 31

1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.
2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.
4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

Article 32

1. For the purposes of this Section, a court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or

(b) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.

2. The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

Article 33

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:

(a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and

(b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

2. The court of the Member State may continue the proceedings at any time if:

(a) the proceedings in the court of the third State are themselves stayed or discontinued;

(b) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or

(c) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

Article 34

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:

(a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

(b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and

(c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

2. The court of the Member State may continue the proceedings at any time if:
 - (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;
 - (b) the proceedings in the court of the third State are themselves stayed or discontinued;
 - (c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
 - (d) the continuation of the proceedings is required for the proper administration of justice.
3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.
4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

One of the main concerns of the Commission when recasting the Brussels I Regulation was the “fight against abuse of rights”.

Under Brussels I, the Member State court first seised took priority over those seised subsequently. A Member State court seised subsequently was required to stay proceedings while the first court determined whether or not it had jurisdiction. This mechanism sometimes resulted in abusive litigation tactics: a party fearing a successful action against it could bring an action for negative declaratory relief before a possibly competent Member State court which was overloaded or known for its “sluggishness” so as to delay proceedings. This tactic is widely known as “torpedo action” as it torpedoes timely access to justice.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

This abuse is no longer possible in cases where the parties have *agreed* that a particular court or the courts of a specific Member State shall have *exclusive* jurisdiction. In accordance with Article 31(2) of the recast Regulation, the court on which an agreement confers exclusive jurisdiction has priority. This applies regardless of when that court was seised and whether the choice-of-court agreement is valid in the view of the other court. This means that all other proceedings must be stayed until such time as the court which (potentially) has jurisdiction under an exclusive choice-of-court agreement determines jurisdiction.

The question of whether or not such choice-of-court agreement is valid is no longer determined by means only of an autonomous interpretation of the recast Regulation; it is also to be determined in accordance with the laws of the Member State of the courts agreed (Article 25(1) and recital 20). Abusive actions remain possible in all cases where there is no exclusive choice-of-court agreement.

REGULATION 1215/2012

LIS PENDENS – RELATED ACTIONS – Art. 29-34

Under the Regulation 44/2001, the court of a Member State which had jurisdiction under the Brussels I Regulation was required to accept and conduct proceedings in every case. This applied even if an action regarding the same facts was already pending before a court in a third state outside the EU.

Under the new Articles 33 and 34, a court seised of an action which has jurisdiction under the recast Regulation, in order to avoid parallel proceedings, now may stay proceedings if the case is already pending before a third state court. Courts also have discretion to continue stayed proceedings at any time. The only requirements are that the judgment of the court in the third state will be enforceable in the Member State and that the proper administration of justice is guaranteed.

REGULATION 1215/2012

PROVISIONAL, INCLUDING PROTECTIVE MEASURES

Article 35

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

REGULATION 1215/2012

RECOGNITION – Chapter III, Section 1, Art. 36-38

Article 36

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
2. Any interested party may, in accordance with the procedure provided for in Subsection 2 of Section 3 [refusal of enforcement], apply for a decision that there are no grounds for refusal of recognition as referred to in Article 45.
3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of refusal of recognition, that court shall have jurisdiction over that question.

REGULATION 1215/2012

RECOGNITION – Chapter III, Section 1, Art. 36-38

Article 37

1. A party who wishes to invoke in a Member State a judgment given in another Member State shall produce:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53.

2. The court or authority before which a judgment given in another Member State is invoked may, where necessary, require the party invoking it to provide, in accordance with Article 57, a translation or a transliteration of the contents of the certificate referred to in point (b) of paragraph 1.

The court or authority may require the party to provide a translation of the judgment instead of a translation of the contents of the certificate if it is unable to proceed without such a translation.

REGULATION 1215/2012

RECOGNITION – Chapter III, Section 1, Art. 36-38

Article 38

The court or authority before which a judgment given in another Member State is invoked may suspend the proceedings, in whole or in part, if:

- (a) the judgment is challenged in the Member State of origin; or
- (b) an application has been submitted for a decision that there are no grounds for refusal of recognition as referred to in Article 45 or for a decision that the recognition is to be refused on the basis of one of those grounds.

REGULATION 1215/2012

REFUSAL OF RECOGNITION, Chapter III, Section 3, Art. 45

On the application of any interested party, the recognition of a judgment shall be refused:

- (a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed;
- (b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
- (c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;
- (d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed;

REGULATION 1215/2012

REFUSAL OF RECOGNITION, Chapter III, Section 3, Art. 45

or (e) if the judgment conflicts with:

(i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or

(ii) Section 6 of Chapter II [exclusive jurisdiction].

2. In its examination of the grounds of jurisdiction referred to in point (e) of paragraph 1, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction.

3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.

4. The application for refusal of recognition shall be made in accordance with the procedures provided for in Subsection 2 [refusal of enforcement] and, where appropriate, Section 4 [common provisions] .

REGULATION 1215/2012

ENFORCEMENT – Chapter III, Section 2, Art. 39-44

Article 39

A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required. = the abolition of the exequatur

Article 40

An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures which exist under the law of the Member State addressed.

REGULATION 1215/2012

ENFORCEMENT – Chapter III, Section 2, Art. 39-44

Art. 36(1) + Art. 39 => no declaration of recognition or enforcement by a court in the Member State addressed is required for the recognition or enforcement of a final judgment. Under Articles 58 and 59, the same applies to the enforcement of authentic instruments and court settlements.

=> For the enforcement of a judgment, the creditor now simply needs to present the final judgment to be enforced to the enforcement authority along with the “certificate of enforceability” issued pursuant to Article 53 or Article 60, as the case may be, by the court or public body that gave the judgment.

But (for the debtor’s protection against unlawful enforcements), in accordance with recital 30 of the recast Regulation, rights against enforcement available under the national law of the petitioned Member State also apply in case of enforcement of a judgment given in another Member State (departure from the autonomy of the recast Regulation). This means that national anti-enforcement actions available at the place of enforcement may be used.

REGULATION 1215/2012

ENFORCEMENT – Chapter III, Section 2, Art. 39-44

Article 41

1. Subject to the provisions of this Section, the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.

2. Notwithstanding paragraph 1, the grounds for refusal or of suspension of enforcement under the law of the MS addressed shall apply in so far as they are not incompatible with the grounds referred to in Article 45.

3. The party seeking the enforcement of a judgment given in another Member State shall not be required to have a postal address in the Member State addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.

REGULATION 1215/2012

ENFORCEMENT – Chapter III, Section 2, Art. 39-44

Article 42

1. For the purposes of enforcement in a Member State of a judgment given in another Member State, the applicant shall provide the competent enforcement authority with:

(a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity; and

(b) the certificate issued pursuant to Article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest.

REGULATION 1215/2012

ENFORCEMENT – Chapter III, Section 2, Art. 39-44

2. For the purposes of enforcement in a Member State of a judgment given in another Member State ordering a provisional, including a protective, measure, the applicant shall provide the competent enforcement authority with:

- (a) a copy of the judgment which satisfies the conditions necessary to establish its authenticity;
- (b) the certificate issued pursuant to Article 53, containing a description of the measure and certifying that:
 - (i) the court has jurisdiction as to the substance of the matter;
 - (ii) the judgment is enforceable in the Member State of origin; and
- (c) where the measure was ordered without the defendant being summoned to appear, proof of service of the judgment.

REGULATION 1215/2012

ENFORCEMENT – Chapter III, Section 2, Art. 39-44

3. The competent enforcement authority may, where necessary, require the applicant to provide, in accordance with Article 57, a translation or a transliteration of the contents of the certificate.

4. The competent enforcement authority may require the applicant to provide a translation of the judgment only if it is unable to proceed without such a translation.

Art. 35 + art. 42 (2) = >where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures will be confined, under the Regulation, to the territory of that Member State (such measures cannot be enforced in another MS).

REGULATION 1215/2012

ENFORCEMENT – Chapter III, Section 2, Art. 39-44

Article 43 - 1. Where enforcement is sought of a judgment given in another Member State, the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. The certificate shall be accompanied by the judgment, if not already served on that person.

2. Where the person against whom enforcement is sought is domiciled in a Member State other than the Member State of origin, he may request a translation of the judgment in order to contest the enforcement if the judgment is not written in or accompanied by a translation into either of the following languages:

(a) a language which he understands; or

(b) the official language of the MS in which he is domiciled or, where there are several official languages in that MS, the official language or one of the official languages of the place where he is domiciled.

REGULATION 1215/2012

ENFORCEMENT – Chapter III, Section 2, Art. 39-44

Where a translation of the judgment is requested under the first subparagraph [subparagraph 1 of paragraph 2], no measures of enforcement may be taken other than protective measures until that translation has been provided to the person against whom enforcement is sought.

This paragraph [paragraph 2] shall not apply if the judgment has already been served on the person against whom enforcement is sought in one of the languages referred to in the first subparagraph or is accompanied by a translation into one of those languages.

3. This Article shall not apply to the enforcement of a protective measure in a judgment or where the person seeking enforcement proceeds to protective measures in accordance with Article 40.

REGULATION 1215/2012

ENFORCEMENT – Chapter III, Section 2, Art. 39-44

Article 44

1. In the event of an application for refusal of enforcement of a judgment pursuant to Subsection 2 of Section 3 [refusal of enforcement], the court in the Member State addressed may, on the application of the person against whom enforcement is sought:

- (a) limit the enforcement proceedings to protective measures;
- (b) make enforcement conditional on the provision of such security as it shall determine; or
- (c) suspend, either wholly or in part, the enforcement proceedings.

2. The competent authority in the Member State addressed shall, on the application of the person against whom enforcement is sought, suspend the enforcement proceedings where the enforceability of the judgment is suspended in the Member State of origin.

REGULATION 1215/2012

REFUSAL OF ENFORCEMENT, Chapter III, Section 3, Art. 46-51

Article 46

On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 [grounds for refusal of recognition] is found to exist.

Article 47

1. The application for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted.

2. The procedure for refusal of enforcement shall, in so far as it is not covered by this Regulation, be governed by the law of the Member State addressed.

REGULATION 1215/2012

REFUSAL OF ENFORCEMENT, Chapter III, Section 3, Art. 46-51

3. The applicant shall provide the court with a copy of the judgment and, where necessary, a translation or transliteration of it.

The court may dispense with the production of the documents referred to in the first subparagraph if it already possesses them or if it considers it unreasonable to require the applicant to provide them. In the latter case, the court may require the other party to provide those documents.

4. The party seeking the refusal of enforcement of a judgment given in another Member State shall not be required to have a postal address in the Member State addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.

REGULATION 1215/2012

REFUSAL OF ENFORCEMENT, Chapter III, Section 3, Art. 46-51

Article 48

The court shall decide on the application for refusal of enforcement without delay.

Article 49

1. The decision on the application for refusal of enforcement may be appealed against by either party.
2. The appeal is to be lodged with the court which the Member State concerned has communicated to the Commission pursuant to point (b) of Article 75 as the court with which such an appeal is to be lodged.

Article 50

The decision given on the appeal may only be contested by an appeal where the courts with which any further appeal is to be lodged have been communicated by the Member State concerned to the Commission pursuant to point (c) of Article 75.

REGULATION 1215/2012

REFUSAL OF ENFORCEMENT, Chapter III, Section 3, Art. 46-51

Article 51

1. The court to which an application for refusal of enforcement is submitted or the court which hears an appeal lodged under Article 49 or Article 50 may stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired. In the latter case, the court may specify the time within which such an appeal is to be lodged.

2. Where the judgment was given in Ireland, Cyprus or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.

REGULATION 1215/2012

COMMON PROVISIONS – Art. 52-57

Article 52

Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed.

Article 53

The court of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex I.

REGULATION 1215/2012

COMMON PROVISIONS – Art. 52-57

Article 54

1. If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests. [functional equivalence]

Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

2. Any party may challenge the adaptation of the measure or order before a court.

3. If necessary, the party invoking the judgment or seeking its enforcement may be required to provide a translation or a transliteration of the judgment.

REGULATION 1215/2012

COMMON PROVISIONS – Art. 52-57

Article 55

A judgment given in a Member State which orders a payment by way of a penalty shall be enforceable in the Member State addressed only if the amount of the payment has been finally determined by the court of origin.

Article 56

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for the enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the Member State addressed.

REGULATION 1215/2012

COMMON PROVISIONS – Art. 52-57

Article 57

1. When a translation or a transliteration is required under this Regulation, such translation or transliteration shall be into the official language of the Member State concerned or, where there are several official languages in that Member State, into the official language or one of the official languages of court proceedings of the place where a judgment given in another Member State is invoked or an application is made, in accordance with the law of that Member State.

2. For the purposes of the forms referred to in Articles 53 and 60, translations or transliterations may also be into any other official language or languages of the institutions of the Union that the Member State concerned has indicated it can accept.

3. Any translation made under this Regulation shall be done by a person qualified to do translations in one of the Member States.

REGULATION 1215/2012

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS, Chapter IV – Art. 58-60

Article 58

1. An authentic instrument which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required. Enforcement of the authentic instrument may be refused only if such enforcement is manifestly contrary to public policy (*ordre public*) in the Member State addressed.

The provisions of Section 2, Subsection 2 of Section 3, and Section 4 of Chapter III shall apply as appropriate to authentic instruments.

2. The authentic instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

REGULATION 1215/2012

AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS, Chapter IV – Art. 58-60

Article 59

A court settlement which is enforceable in the Member State of origin shall be enforced in the other Member States under the same conditions as authentic instruments.

Article 60

The competent authority or court of the Member State of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex II containing a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement.

REGULATION 1215/2012

GENERAL PROVISIONS – Art. 61-65

Article 61

No legalisation or other similar formality shall be required for documents issued in a Member State in the context of this Regulation.

Article 62

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

REGULATION 1215/2012

GENERAL PROVISIONS – Art. 61-65

Article 63

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

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

2. For the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

- 3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

REGULATION 1215/2012

GENERAL PROVISIONS – Art. 61-65

Article 64

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Member State who are being prosecuted in the criminal courts of another Member State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Member States.

REGULATION 1215/2012

GENERAL PROVISIONS – Art. 61-65

Article 65

1. The jurisdiction specified in point 2 of Article 8 and Article 13 in actions on a warranty or guarantee or in any other third-party proceedings may be resorted to in the Member States included in the list established by the Commission pursuant to point (b) of Article 76(1) and Article 76(2) only in so far as permitted under national law. A person domiciled in another Member State may be invited to join the proceedings before the courts of those Member States pursuant to the rules on third-party notice referred to in that list.

2. Judgments given in a Member State by virtue of point 2 of Article 8 or Article 13 shall be recognised and enforced in accordance with Chapter III in any other Member State. Any effects which judgments given in the Member States included in the list referred to in paragraph 1 may have, in accordance with the law of those Member States, on third parties by application of paragraph 1 shall be recognised in all Member States.

3. The Member States included in the list referred to in paragraph 1 shall, within the framework of the European Judicial Network in civil and commercial matters established by Council Decision 2001/470/EC (16) ('the European Judicial Network') provide information on how to determine, in accordance with their national law, the effects of the judgments referred to in the second sentence of paragraph 2.

REGULATION 1215/2012

RELATIONSHIP WITH OTHER INSTRUMENTS – Art. 67-73

Article 67

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments. (*specialia generalibus derogant*)

Article 68

1. This Regulation shall, as between the Member States, supersede the 1968 Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.

2. In so far as this Regulation replaces the provisions of the 1968 Brussels Convention between the Member States, any reference to that Convention shall be understood as a reference to this Regulation.

REGULATION 1215/2012

RELATIONSHIP WITH OTHER INSTRUMENTS – Art. 67-73

Article 69

Subject to Articles 70 and 71, this Regulation shall, as between the Member States, supersede the conventions that cover the same matters as those to which this Regulation applies. In particular, the conventions included in the list established by the Commission pursuant to point (c) of Article 76(1) and Article 76(2) shall be superseded.

Article 70

1. The conventions referred to in Article 69 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given, authentic instruments formally drawn up or registered and court settlements approved or concluded before the date of entry into force of Regulation (EC) No 44/2001.

REGULATION 1215/2012

RELATIONSHIP WITH OTHER INSTRUMENTS – Art. 67-73

Article 71

1. This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:

(a) this Regulation shall not prevent a court of a Member State which is party to a convention on a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not party to that convention. The court hearing the action shall, in any event, apply Article 28 of this Regulation;

(b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation on recognition and enforcement of judgments may be applied.

REGULATION 1215/2012

RELATIONSHIP WITH OTHER INSTRUMENTS – Art. 67-73

Article 72

This Regulation shall not affect agreements by which Member States, prior to the entry into force of Regulation (EC) No 44/2001, undertook pursuant to Article 59 of the 1968 Brussels Convention not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third State where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

Article 73

1. This Regulation shall not affect the application of the 2007 Lugano Convention.
2. This Regulation shall not affect the application of the 1958 New York Convention.
3. This Regulation shall not affect the application of bilateral conventions and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation.

APPLICABLE LAW

PRIVATE INTERNATIONAL LAW:

Applicable law:

- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

APPLICABLE LAW

ROME I – contractual obligations

MATERIAL SCOPE: this Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall **not apply**, in particular, to **revenue, customs or administrative matters.**

The following shall be **excluded from the scope of this Regulation**:

- (a) questions involving the status or legal capacity of natural persons;
- (b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
- (c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
- (d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

APPLICABLE LAW

ROME I – contractual obligations

(e) arbitration agreements and agreements on the choice of court;

(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;

(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;

(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(i) obligations arising out of dealings prior to the conclusion of a contract;

(j) professional insurance contracts

This Regulation shall not apply to evidence and procedure.

- **VERY IMPORTANT: Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.**

APPLICABLE LAW

ROME I – contractual obligations

OVERRIDING MANDATORY PROVISIONS

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for **safeguarding its public interests**, such as its **political, social or economic organisation**, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

Nothing in this Regulation **shall restrict the application of the overriding mandatory provisions** of the law of the forum.

Effect may be given to the overriding mandatory provisions of the law of the country **where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful**. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

APPLICABLE LAW

ROME I – contractual obligations

MAIN PRINCIPLE: Freedom of choice

- A **contract shall be governed by the law chosen by the parties**. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the **law applicable to the whole or to part only of the contract**.
- The parties may at any time agree **to subject the contract to a law other than that which previously governed it**, whether as a result of an earlier choice or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity or adversely affect the rights of third parties.
- Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, **the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement**.
- Where all other elements relevant to the situation at the time of the choice are located in one or more MSs, **the parties' choice of applicable law other than that of a MS shall not prejudice the application of provisions of EU law**, as implemented in the MS of the forum, **which cannot be derogated from by agreement**.

APPLICABLE LAW

ROME I – contractual obligations

APPLICABLE LAW IN THE ABSENCE OF CHOICE

- To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
 - (a) a contract for the **sale of goods** shall be governed by the law of the country where the **seller** has his habitual residence;
 - (b) a contract for the **provision of services** shall be governed by the law of the country where the service **provider** has his habitual residence;
 - (c) a contract relating to a **right in rem in immovable property** or to a tenancy of immovable property shall be governed by the law of the country where the **property is situated**;
 - (d) notwithstanding point (c), **a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months** shall be governed by the law of the country where the **landlord has his habitual residence**, provided that the tenant is a natural person and has his habitual residence in the same country;

APPLICABLE LAW

ROME I – contractual obligations

APPLICABLE LAW IN THE ABSENCE OF CHOICE:

e) a **franchise** contract shall be governed by the law of the country where the **franchisee** has his habitual residence;

(f) a **distribution** contract shall be governed by the law of the country where the **distributor** has his habitual residence;

(g) a contract for the **sale of goods by auction** shall be governed by the law of the country **where the auction takes place**, if such a place can be determined;

(h) a contract concluded within a **multilateral system** which brings together or facilitates the bringing together of **multiple third-party buying and selling interests in financial instruments**, in accordance with non-discretionary rules and **governed by a single law**, shall be governed by that law.

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

APPLICABLE LAW

ROME I – contractual obligations

APPLICABLE LAW IN THE ABSENCE OF CHOICE:

- Where it is **clear from all the circumstances** of the case that the **contract is manifestly more closely connected with a country other than** that indicated **above**, the law of that other country shall apply.
- Where the **law applicable cannot be determined pursuant to the rules above**, the contract shall be governed by the **law of the country with which it is most closely connected**.

APPLICABLE LAW

ROME I – contractual obligations

SPECIAL SITUATIONS:

CONTRACTS OF CARRIAGE

CARRIAGE OF GOODS: **If not chosen** by the parties, expressly or implicitly, **the law applicable shall be the law of the country of habitual residence of the carrier**, provided that **the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country**. **If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.**

CARRIAGE OF PASSENGERS: **The parties may choose** as the law applicable to a contract for the carriage of passengers in accordance with Art. 3 **only the law of the country where:**

(a) the passenger has his habitual residence; or

(d) the place of departure is situated; or

(b) the carrier has his habitual residence; or

(e) the place of destination is situated.

(c) the carrier has his place of central administration; or

APPLICABLE LAW

ROME I – contractual obligations

CARRIAGE OF PASSENGERS

To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the rules above, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

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

APPLICABLE LAW

ROME I – contractual obligations

SPECIAL SITUATIONS:

CONSUMER CONTRACTS:

Without prejudice to Arts 5 (carriage) and 7 (insurance), a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) **shall be governed by the law of the country where the consumer has his habitual residence**, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities. If these conditions are not met, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Arts 3 and 4.

APPLICABLE LAW

ROME I – contractual obligations

SPECIAL SITUATIONS:

CONSUMER CONTRACTS:

The parties may choose the law applicable to a consumer contract, in accordance with Article 3. **Such a choice may not, however, deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable** = the law of the country where the consumer has his habitual residence

The rules above are not applicable to: (a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence; (b) a contract of carriage other than a contract relating to package travel; (c) a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis; (d) rights and obligations which constitute a financial instrument and rights and obligations in transferable securities; (e) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments.

APPLICABLE LAW

ROME I – contractual obligations

SPECIAL SITUATIONS:

INSURANCE CONTRACTS: To the extent that the applicable law has not been chosen by the parties, the **insurance contract** shall be governed by the **law of the country where the insurer has his habitual residence**. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

In accordance with Art. 3, the parties may only choose from the following laws :

- (a) the law of any Member State where the risk is situated at the time of conclusion of the contract;
- (b) the law of the country where the policy holder has his habitual residence;
- (c) in the case of life assurance, the law of the Member State of which the policy holder is a national;
- (d) for insurance contracts covering risks limited to events occurring in one MS other than the Member State where the risk is situated, the law of that Member State;

APPLICABLE LAW

ROME I – contractual obligations

INSURANCE CONTRACTS:

(e) where the policy holder of an insurance contract pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the MS concerned or the law of the country of habitual residence of the policy holder.

If not chosen according to the rules above, such a contract **shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.**

For insurance contracts covering risks for which a MS imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail; (b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

APPLICABLE LAW

ROME I – contractual obligations

INDIVIDUAL EMPLOYMENT CONTRACTS

An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

Where the law applicable cannot be determined pursuant to the rules above, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs above, the law of that other country shall apply.

APPLICABLE LAW

ROME I – contractual obligations

CONSENT AND MATERIAL VALIDITY:

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

Nevertheless, **a party, in order to establish that he did not consent**, may rely upon **the law of the country in which he has his habitual residence** if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified above.

APPLICABLE LAW

ROME I – contractual obligations

FORMAL VALIDITY:

A **contract concluded between persons who, or whose agents, are in the same country** at the time of its conclusion is formally **valid** if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

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

A **unilateral act** intended to have legal effect relating to an existing or contemplated contract is formally **valid** if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, **or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.**

APPLICABLE LAW

ROME I – contractual obligations

FORMAL VALIDITY:

The rules above shall **not apply to consumer contracts**. The form of such contracts shall be governed by the **law of the country where the consumer has his habitual residence**.

A **contract** the subject matter of which is a **right *in rem* in immovable property** or a **tenancy of immovable property** shall be subject to the requirements of form of **the law of the country where the property** is situated if by that law:

- (a) **those requirements are imposed irrespective of the country where the contract is concluded** and irrespective of the law governing the contract; and
- (b) **those requirements cannot be derogated from by agreement**.

APPLICABLE LAW

ROME I – contractual obligations

- SCOPE OF THE LAW APPLICABLE: The law applicable to a contract shall govern in particular:
 - - interpretation & performance & the consequences of nullity of the contract
 - - within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law; In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.
 - - the various ways of extinguishing obligations, and prescription and limitation of actions;
- BURDEN OF PROOF: the law governing the contractual obligation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law / determine the burden of proof.
- A contract / an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws applicable on the formal validity under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

APPLICABLE LAW

ROME I – contractual obligations

- INCAPACITY: In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.
- VOLUNTARY ASSIGNMENT AND CONTRACTUAL SUBROGATION: The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee.
- The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged. Assignment includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

APPLICABLE LAW

ROME I – contractual obligations

- LEGAL SUBROGATION: Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, **the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights** which the creditor had against the debtor under the law governing their relationship.
- MULTIPLE LIABILITY: If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, **the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors.** The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.
- SET-OFF: Where the right to **set-off is not agreed by the parties**, set-off **shall be governed by the law applicable to the claim against which the right to set-off is asserted.**

APPLICABLE LAW

ROME I – contractual obligations

- HABITUAL RESIDENCE:
- - the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
- - the habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
- - where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
- For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

APPLICABLE LAW

ROME I – contractual obligations

- EXCLUSION OF RENVOI: the application of the **law of any country means the application of the rules of law in force in that country other than its rules of private international law.**
- PUBLIC POLICY OF THE FORUM: The application of a provision of the law of any country may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.
- STATES WITH MORE THAN ONE LEGAL SYSTEM: each territorial unit shall be considered as a country for the purposes of identifying the law applicable.
- RELATIONSHIP WITH EXISTING INTERNATIONAL CONVENTIONS: This Regulation shall not prejudice the application of international conventions to which one or more MSs are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.
- However, this Regulation shall, as between MSs, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

APPLICABLE LAW

ROME II – non-contractual obligations

MATERIAL SCOPE: this Regulation shall apply, in **situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.**

It shall **not apply**, in particular, to **revenue, customs or administrative matters.**

The following shall be **excluded from the scope of this Regulation:**

- (a) non-contractual obligations arising out of **family relationships** and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;
- (b) non-contractual obligations arising out of **matrimonial property regimes**, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
- (c) non-contractual obligations arising under **bills of exchange, cheques and promissory notes and other negotiable instruments** to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

APPLICABLE LAW

ROME II – non-contractual obligations

(d) non-contractual obligations arising out of the **law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;**

(e) non-contractual obligations arising out of the relations between the **settlers, trustees and beneficiaries of a trust** created voluntarily;

(f) non-contractual obligations arising out of **nuclear damage**;

(g) non-contractual obligations arising out of **violations of privacy and rights relating to personality, including defamation.**

This Regulation shall not apply to evidence and procedure.

TERRITORIAL SCOPE : applicable in all Member States except Denmark.

VERY IMPORTANT: Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

APPLICABLE LAW

ROME II – non-contractual obligations

- **OVERRIDING MANDATORY PROVISIONS:** Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.
- **NON-CONTRACTUAL OBLIGATIONS :**

For the purposes of this Regulation, **damage** shall cover **any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.**

This Regulation shall apply also to **non-contractual obligations** that are **likely to arise**.

Any reference in this Regulation to:

- (a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and
- (b) damage shall include damage that is likely to occur.

APPLICABLE LAW

ROME II – non-contractual obligations

- TORTS/DELICTS:
- **PRINCIPLE:** the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
- However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
- Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated above, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

APPLICABLE LAW

ROME II – non-contractual obligations

- PRODUCT LIABILITY: The law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

 - (a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
 - (b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
 - (c) the law of the country in which the damage occurred, if the product was marketed in that country.
- However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).
- Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated above, the law of that other country shall apply. A manifestly closer connection with another country might be based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

APPLICABLE LAW

ROME II – non-contractual obligations

- ENVIRONMENTAL DAMAGE: The law applicable to a non-contractual obligation arising out of **environmental damage or damage sustained by persons or property as a result of such damage** shall be the **law of the country in which the damage occurs** irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur, **unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.**
- INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS: The law applicable to a non-contractual obligation arising from an **infringement of an intellectual property right (including unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*)** shall be **the law of the country for which protection is claimed.** In the case of a non-contractual obligation arising from an **infringement of a unitary Community intellectual property right**, the law applicable shall, for any question that is not governed by that instrument, be the law of the country in which the **act of infringement was committed.** The law applicable may not be derogated from by an agreement.
- INDUSTRIAL ACTION: The law applicable to a non-contractual obligation in respect of the **liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests** for **damages caused by an industrial action**, pending or carried out, shall be **the law of the country where the action is to be, or has been, taken.**

APPLICABLE LAW

ROME II – non-contractual obligations

- UNJUST ENRICHMENT:
- If a non-contractual obligation arising out of **unjust enrichment**, including **payment of amounts wrongly received**, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, **it shall be governed by the law that governs that relationship**.
- Where the law applicable cannot be determined on the abovementioned basis and the **parties have their habitual residence in the same country** when the event giving rise to unjust enrichment occurs, **the law of that country shall apply**.
- Where the law applicable cannot be determined on any of the abovementioned basis, it shall be the law of the country in which the unjust enrichment took place.
- Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is **manifestly more closely connected with a country other than that indicated in paragraphs above**, the law of that other country shall apply.

APPLICABLE LAW

ROME II – non-contractual obligations

- NEGOTIORUM GESTIO:
- If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.
- Where the law applicable cannot be determined according to the rule above, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.
- Where the law applicable cannot be determined according to the rules above, it shall be the law of the country in which the act was performed.
- 4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs above, the law of that other country shall apply.

APPLICABLE LAW

ROME II – non-contractual obligations

- CULPA IN CONTRAHENDO
- The law applicable to a non-contractual obligation arising out of **dealings prior to the conclusion of a contract**, regardless of whether the contract was actually concluded or not, **shall be the law that applies to the contract or that would have been applicable to it had it been entered into**.
- Where the law applicable cannot be determined on the abovementioned basis, it shall be:
 - (a) the **law of the country in which the damage occurs**, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or
 - (b) where the **parties have their habitual residence in the same country** at the time when the event giving rise to the damage occurs, **the law of that country**; or
 - (c) where it is **clear from all the circumstances of the case** that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is **manifestly more closely connected with a country other than that indicated in points (a) and (b)**, the law of that other country.

APPLICABLE LAW

ROME II – non-contractual obligations

- FREEDOM OF CHOICE
- The parties may agree to submit non-contractual obligations to the law of their choice:
 - (a) by an agreement entered into after the event giving rise to the damage occurred; or
 - (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.
- The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.
- Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
- Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

APPLICABLE LAW

ROME II – non-contractual obligations

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

APPLICABLE LAW

ROME II – non-contractual obligations

- RULES OF SAFETY AND CONDUCT: In **assessing the conduct** of the person claimed to be liable, **account shall be taken**, as a matter of fact and in so far as is appropriate, of the **rules of safety and conduct which were in force at the place and time of the event giving rise to the liability**.
- DIRECT ACTION AGAINST THE INSURER OF THE PERSON LIABLE: The **person having suffered damage** may bring his or her claim **directly against the insurer of the person liable** to provide compensation **if the law applicable** to the non-contractual obligation or the law applicable to the insurance contract **so provides**.
- SUBROGATION: Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, **the law which governs the third person's duty to satisfy the creditor** shall determine **whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship**.
- MULTIPLE LIABILITY: If a creditor has a **claim against several debtors** who are **liable for the same claim**, and one of the debtors has already satisfied the claim in whole or in part, **the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor**.

APPLICABLE LAW

ROME II – non-contractual obligations

- FORMAL VALIDITY:
- A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the non-contractual obligation in question or the law of the country in which the act is performed.
- BURDEN OF PROOF:
- The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.
- Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws applicable to the formal validity under which that act is formally valid, provided that such mode of proof can be administered by the forum.

APPLICABLE LAW

ROME II – non-contractual obligations

- **HABITUAL RESIDENCE:** For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
- Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
- For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.
- **EXCLUSION OF RENVOI:** The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

APPLICABLE LAW

ROME II – non-contractual obligations

- STATES WITH MORE THAN ONE LEGAL SYSTEM: Where a State comprises **several territorial units**, each of which has its own rules of law in respect of non-contractual obligations, **each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.**
- PUBLIC POLICY OF THE FORUM: The **application of a provision of the law of any country** specified by this Regulation **may be refused only if such application is manifestly incompatible with the public policy** (*ordre public*) of the forum.
- RELATIONSHIP WITH EXISTING INTERNATIONAL CONVENTIONS:
 - This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.
 - However, **this Regulation shall, as between MSs, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.**

ARBITRATION

- ARBITRATION: method of settling disputes arising in the context of (international) commercial relations, alternative to judicial dispute resolution:
- ARBITRATION is binding
- 2 approaches:
 - (a) international conventions: United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), ICSID Convention
 - (b) UNCITRAL model law → incorporated in the national legislations

ARBITRATION

- LEADING ARBITRAL INSTITUTIONS (2018):
- ICC (International Chamber of Commerce, Paris): 842 cases, 75% int'l cases
- DIS (German Arbitration Institute): 153 cases, 39% int'l cases, 1.084 bill. EUR amount in dispute
- SCC (Stockholm Chamber of Commerce): 152 cases, 50% int'l cases, 13.3 bill. EUR amount in dispute
- VIAC (Vienna International Arbitration): 64 cases, 0,43 bill. EUR amount in dispute
- SCAI (Swiss Chamber's Arbitration Institution): 82 cases
- LCAI (London Court of International Arbitration): 317 cases, 79% int'l cases
- ICSID (International Centre for Settlement of Investment Disputes): 56 cases
- Source: <https://globalarbitrationnews.com/international-arbitration-statistics-2018-another-busy-year-for-arbitral-institutions/>

ARBITRATION

INTERNATIONAL CONVENTIONS

- UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (1958)

- Applicable to the **recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought**, and arising out of differences between persons, whether physical or legal. Applicable also to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
- "Arbitral awards" = not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.
- All Contracting States shall recognize:
 - - the arbitration clauses → **courts shall refer the parties to arbitration**, unless the arbitration clause null / void / inoperative / incapable of being performed
 - - the **arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, in the same conditions as the domestic arbitral awards.**

ARBITRATION

INTERNATIONAL CONVENTIONS

- UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (1958)
- To **obtain the recognition and enforcement** mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
 - (a) the **duly authenticated original award** or a **duly certified copy thereof** + translation certified by a sworn translator / diplomatic or consular agent;
 - (b) the **original arbitration agreement** or a **duly certified copy thereof**.
- **Recognition and enforcement of the award may be refused**, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) The **parties to the agreement were**, under the law applicable to them, **under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made**; or

ARBITRATION

INTERNATIONAL CONVENTIONS

- UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (1958)

- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

ARBITRATION

INTERNATIONAL CONVENTIONS

- UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (1958)

- Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
 - (a) The **subject matter of the difference is not capable of settlement by arbitration under the law of that country**; or
 - (b) The **recognition or enforcement of the award would be contrary to the public policy of that country**.
- If an application for the setting aside or suspension of the award has been made to a competent authority, the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARBITRATION

INTERNATIONAL CONVENTIONS

- ICSID is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.
- ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment.
- ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process. It is also available for state-state disputes under investment treaties and free trade agreements, and as an administrative registry.
- ICSID provides for settlement of disputes by conciliation, arbitration or fact-finding. The ICSID process is designed to take account of the special characteristics of international investment disputes and the parties involved, maintaining a careful balance between the interests of investors and host States. Each case is considered by an independent Conciliation Commission or Arbitral Tribunal, after hearing evidence and legal arguments from the parties. A dedicated ICSID case team is assigned to each case and provides expert assistance throughout the process. <https://www.italaw.com/cases/4721>

ARBITRATION

Regulation 1219/2012 and BITs

- REGULATION (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between MSs and 3rd countries
- The Regulation addresses the status of the bilateral investment agreements of the Member States under Union law, and establishes the terms, conditions and procedures under which the Member States are authorised to amend or conclude bilateral investment agreements.
- 'bilateral investment agreement' (BIT) means any agreement with a third country that contains provisions on investment protection.
- PRINCIPLE:
- MSs have an obligation to notify the Commission of the BITs already concluded / they intend to conclude
- Commission assesses the BITs / intended BITs and authorises / imposes alterations to their clauses / refuse authorisation if:

ARBITRATION

Regulation 1219/2012 and BITs

- REGULATION (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries
- (a) BIT / intended BIT is in conflict with Union law other than the incompatibilities arising from the allocation of competences between the Union and its Member States;
- (b) is superfluous, because the Commission has submitted or has decided to submit a recommendation to open negotiations with the third country concerned pursuant to Article 218(3) TFEU;
- (c) is inconsistent with the Union's principles and objectives for external action as elaborated in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union; or
- (d) constitutes a serious obstacle to the negotiation or conclusion of bilateral investment agreements with third countries by the Union.

MEDIATION & NEGOTIATION

- Alternative Dispute Resolution (ADR):
- Mediation: Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters
- Objective: to facilitate access to ADR and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.
- Applicable to cross-border disputes (= in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date the parties agree to use mediation after the dispute has arisen or mediation is ordered by the court / the court invites the parties to use mediation, or an obligation to use mediation arises under national law), to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law.
- 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*).

MEDIATION & NEGOTIATION

- Alternative Dispute Resolution (ADR):
- 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question.
- It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.
- 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

MEDIATION & NEGOTIATION

- Alternative Dispute Resolution (ADR):
- **ENFORCEABILITY:** Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.
- **CONFIDENTIALITY OF MEDIATION:** Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except: when necessary for overriding considerations of public policy (e.g. the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person or where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement).

MEDIATION & NEGOTIATION

- Alternative Dispute Resolution (ADR):
- **EFFECT OF MEDIATION ON LIMITATION AND PRESCRIPTION PERIODS:** MSs shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.
- **INFORMATION FOR THE GENERAL PUBLIC:** MSs shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.
- **NEGOTIATION:** negotiation is almost always attempted first to resolve a dispute. It is the preeminent mode of dispute resolution. Negotiation allows the parties to meet in order to settle a dispute. The main advantage of this form of dispute settlement is that it allows the parties themselves to control the process and the solution. Source: https://www.law.cornell.edu/wex/alternative_dispute_resolution

QUESTIONS ?

THANK YOU FOR
YOUR ATTENTION !

