

Private international law 2016

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PRIVATE INTERNATIONAL LAW

Concept

Private international law (also called 'conflict of laws') is a branch of law which aims to provide legal answers to the issues arising out of cross-border private relationships.

Such relationships may be civil or commercial : it may concern *family* relationships (*e.g.* adoption or a marriage between two spouses having different nationalities), *civil* issues (*e.g.* where may the German owner of an apartment located on the French Riviera bring court proceedings against the German family who has rented out his apartment for one week during the summer holidays and neglected to turn the water tap off when they left the premises) and *commercial* matters (*e.g.* when a business established in Germany pledges its receivables to a Luxembourg bank in order to guarantee a line of credit, which law should the bank use to verify that the pledge may be opposed to other creditors of the business?).

When a private relationship has a *cross-border dimension*, it touches upon several States. The question arises which of those States is empowered to regulate the relationship. This general question may be fine tuned in three more precise questions:

- which court has authority to adjudicate disputes; the same question arises in relation with authorities which are called upon to intervene in non contentious matters, such as *e.g.* when two persons wish to get married. This is a question of '*jurisdiction*'.
- which legal rules will apply to a cross-border private relationship. This is the question of the *applicable law*.
- what will be the effects of a judgment issued by a foreign court or of an act issued by another authority (such as a civil status document).

These three different processes are by no means the only questions which arises in relationship with cross-border private relationships. Other questions arise, in particular in relation to cross-border court proceedings (*e.g.* how to ensure that court documents are duly transmitted to a person located in another country and how to gather evidence which is located in another country).

Private international law : national or international rules?

Private international law is a matter taken up first by States. States decide how to deal with cross-border private relationships. Each State should for example decide in which circumstances its courts may take up a cross-border divorce case. Each State should also decide if and when non-residents may marry on its territory. In many countries, rules of private international law have been included in the Civil code. This is *e.g.* the case in Germany : the German Civil Code ('BGB') includes an introductory section ('EGBGB') which is entirely devoted to private international law issues. In other countries, specific acts have been adopted which provide solutions for private international law questions. This is the case *e.g.* in Switzerland (Federal Private International Law Act of 1987) and in Belgium (Code of Private International Law, adopted in 2004). In yet other countries, private international law issues are dealt with by scattered statutory provisions complemented by case law.

Applying *national* solutions to *cross-border* relationships may prove unsatisfactory. If two spouses wish to divorce, and have a choice between two States because each of these States apply its own

rules of jurisdiction, this may create undue difficulties, as each spouse may rush to the court it deems more favorable to its case. If the spouses find out that the courts of the two States will not necessarily apply the same law to determine their matrimonial property regime, this may be an additional incentive for the spouses to weigh one court against another. The different legal regimes could also mean that spouses who believed they were married under a community of property regime find themselves subject to a separation of assets regime.

For a long time, the international community has attempted to create a more international framework, bringing global answers to private international law. The *Hague Conference on private international law*, which was established in 1893, has been a key actor in unifying private international law rules. The Conference has produced some 40 international treaties ('Conventions') which cover various aspects of cross-border private relationships : traffic accidents (Convention of 4 May 1971 on the Law Applicable to Traffic Accidents); securities held by an intermediary (Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary) and child protection (Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children). The Hague Conventions touch on the three fundamental dimensions of private international law issues : jurisdiction, applicable law and enforcement of foreign judgments. In some fields, the Hague Conference has adopted novel solutions, which go beyond the traditional private international law toolbox. The 1980 Hague Child Abduction Convention is a good example : this Convention does not include uniform conflict of laws rules which help determine which law applies to a cross-border child abduction case. It does not purport to create uniform rules of jurisdiction, allocating jurisdiction among Contracting States in relation to child abduction cases. Neither does it put forward a scheme for the mutual recognition of judgments. Rather, the Convention is based on a general principle, i.e. that a child who has been abducted by one of his parents, should be brought back to the country he or she lived in before the abduction. This principle is worked out further in the Convention using cooperation mechanisms among Contracting States.

The Hague Conference is for a large part dependent on States for ratification. Some Hague Conventions have enjoyed a significant number of signatures and acceptances. This is *e.g.* the case with the 1980 Hague Abduction Convention, which is in force in 95 countries. Other conventions are much less successful. The 1978 Hague Matrimonial Property Convention has only been accepted by three countries. More information on the work of the Hague Conference may be found at www.hcch.net.

A major advantage of *international* solutions for private international law issues, is that all States involved will apply the *same rules*. If two States are party to an international convention which includes conflict of laws rules in relation to the liability of major industrial plants, the courts and authorities of these two States will apply the same law to a cross-border liability case involving such plant. This will do more justice to the cross-border nature of the situation.

In recent decades, the EU has taken up a very active role in private international law. The EU's intervention is premised on the idea that having uniform rules of private international law is necessary for the achievement of the EU's objectives and in particular ensuring that individuals and companies may freely take advantage of the internal market. The EU has adopted a large number of Regulations dealing with various issues of private international law. Among the major Regulations adopted so far, one can mention:

- the Brussels *Ibis* Regulation (Regulation 1215/2012) – this Regulation provides uniform

rules of jurisdiction and introduced a very smooth mechanism of cross-border enforcement for judgments in civil and commercial matters.

- the Rome I Regulation (Regulation 593/2008) – this Regulation includes uniform conflict of laws rules dealing with cross-border contracts.
- the Insolvency Regulation (Regulation 1346/2000) – this Regulation includes uniform rules of jurisdiction, uniform conflict of laws rules and a mechanism for the cross-border enforcement of judgments in insolvency matters.
- the Rome II Regulation (Regulation 864/2007) – this Regulation includes uniform conflict of laws rules dealing with cross-border liability cases.

As with other attempts to unify private international law rules, European private international law offer the advantage of uniformity : the relevant rules are identical in all Member States. Hence, in principle, a situation having links with two or more Member States will be treated exactly the same way in those two States.

The EU is also active in private international law matters thanks to the intervention of the ECJ. The ECJ has indeed issued a number of rulings based on primary EU law, which have a direct impact on private international law questions. In the *Garcia Avello* case, the Court decided for example that when it decides on an application by an individual to have its family name modified, a Member State may not consider that the individual only possesses its nationality, if it appears that the person concerned also possesses the nationality of another Member State. The ECJ based this ruling primarily on the equality principle : treating a dual national, who possesses the nationalities of two Member States, as one would treat somebody who only possesses the nationality of one Member State, constitutes a violation of the prohibition of discrimination, if the difference of treatment is not justified by compelling mandatory reasons.

The policies of private international law

When studying the rules of private international law, one may be struck by their indirect nature : those rules do not spell out precisely the rights and obligations of parties. They do not indicate who is right and who is wrong. Rather, the rules of jurisdiction will indicate which court may hear a dispute. Conflict of laws rules will lead to the applicable norms. And rules relating to the mutual recognition of judgments and acts will ensure that what has been decided in one country, also has effect in another country. Once the court having jurisdiction and the applicable law has been identified, private international law has played out its role.

It would be tempting to infer from this picture that private international law is a rather abstract branch of law, void of any policy preferences or choices. This would be shortsighted. Although it is true that private international law is primarily a law of ‘coordination’, i.e. that its rules help to coordinate the working of different national legal systems, private international law also pursues its own agenda. A primary objective of private international law is to ensure decisional harmony (*‘Entscheidungseinklang’*) among States, i.e. that a given situation is treated equally by the authorities of different States. This ideal is not often achieved. It remains, however, an overall objective of the discipline. Private international law is further not immune for considerations of legal certainty, which also influence the design and interpretation of many of its rules. Private international law rules may also be drafted as to further policy objectives of other disciplines. Rules applicable to cross-border consumer contracts will often attempt to favor the consumer, e.g. by attempting to ensure that a consumer may bring proceedings before a court of its residence and ensuring that a contract dispute will be settled according to the law of the consumer’s residence.

Other languages:

FR : 'Droit international privé'; NL : 'internationaal privaatrecht'; DE : 'Internationales Privatrecht'

JURISDICTION

Concept

Jurisdiction can be defined as the possibility for a public authority to exercise its power. Jurisdiction is a generic concept which is used in many branches of the law. In *tax law*, jurisdiction may refer to the ability of a State to levy a tax on a given activity. In *criminal law*, jurisdiction may be understood as the possibility for the authority of a State to prosecute a crime. Jurisdiction is not a concept specific to the activities of one branch of government (legislative, executive or judiciary), nor is it specific to cross-border activities. It is also widely used in domestic relationships – *e.g.* when referring to the jurisdiction of a given public authority to settle a dispute.

As it is used in cross-border private relationships, jurisdiction refers commonly to the power of a court to hear a dispute which presents an international dimension. In this sense, in private international law, it primarily refers to the jurisdiction to *adjudicate*, i.e. the possibility for a court to render a judgment in a dispute (as opposed to jurisdiction to prescribe, which primarily refers to the activity of the legislative branch; and jurisdiction to enforce, which refers to the possibility for a court to enforce its own rules and laws). If a dispute or a legal relationship has links with more than one country (*e.g.* because one of the parties is not established in the country where the court seized is located, because a party has the nationality of another country, or because the subject matter of the dispute has links with another country), the question arises which one of these countries may hear the dispute. Although the concept is primarily used in relation to courts, it is also relevant when dealing with other authorities such as civil registrars – one may for example examine whether the civil registrar of Belgium may celebrate a marriage between two individuals living in China when of the future spouses possesses Belgian citizenship.

As it is used in private international law, the concept of jurisdiction refers to international jurisdiction. In other words, it leaves open the questions of subject-matter jurisdiction and venue or territorial jurisdiction. When answering the question of international jurisdiction, one will determine not so much which court will hear the claim, but rather which State may address the dispute. In a second stage, one will need to find out which court within that State has venue and subject-matter jurisdiction.

National and international rules of jurisdiction

Some rules of jurisdiction are adopted by States individually. A country may for example decide that its court may always be seized of a divorce petition when the marriage has been concluded by its authorities or when the spouses both possess the nationality of the country. In Belgium, such rules of jurisdiction may be found in the Code of Private International Law (Act of 16 July 2014). The Code includes general rules of jurisdiction, applicable in all matters covered by the Code (articles 5 to 14). It also includes rules of jurisdiction specific to some subject matters such as matrimonial relationships (art. 42-43) or insolvency (art. 118).

Other rules are adopted jointly by several States. Such unified rules of jurisdiction are from time to time included in international conventions. Article 31 of the CMR-Convention (Convention on the Contract for the International Carriage of Goods by Road, Geneva, 19 May 1956) offers one example : this provision includes several rules of jurisdiction dealing with proceedings arising out of carriage of goods by road. Some Conventions adopted by the Hague Conference also include unified rules of jurisdiction – see *e.g.* the articles 5 to 14 of the 1996 Convention on the protection of children. These rules apply uniformly in all countries bound by the treaty or convention, ensuring that a dispute will be treated uniformly by the authorities of these countries.

The EU has also adopted several Regulations which include rules of jurisdiction – this is *e.g.* the case for the Brussels Ibis Regulation, the Insolvency Regulation, the Brussels IIbis Regulation, the Maintenance Regulation etc. The benefit of such unified rules of jurisdiction is that they are shared by all the States bound by the Regulation. This helps reduce the number of instances in which courts of different States will concurrently claim jurisdiction in the same case. At the same time, such unified rules of jurisdiction create a level playing field for litigants, who can more easily assess in which jurisdiction they may bring proceedings or be brought before a court. Common rules of jurisdiction also make it possible for one State to effectively claim exclusive jurisdiction. A unilateral claim of exclusive jurisdiction by a single State is indeed not effective, as this State cannot impose its claim on other States. Finally, unified rules of jurisdiction make it easier for States to accept a far reaching system of mutual recognition of judgments. As all States concerned share the same rules of jurisdiction, a scheme of mutual recognition may be adopted without any prior verification of the jurisdiction of the court of origin. In that respect, the unification of rules on jurisdiction is a prerequisite for an agreement between the States concerned on a mutual recognition of judgments.

International law does not constrain very much States in regulating the cross-border jurisdiction of their courts. Public international law does not indeed include many limits on the extent to which a State may define the adjudicatory authority of its courts.

Varieties of rules of jurisdiction

Whether adopted by a single State or by several States acting together, rules of jurisdiction may use different methods to determine which court has jurisdiction.

Some rules will apportion jurisdiction based on *geographical* factors. Jurisdiction may for example be tied to the fact that a person or company has a physical presence in a country (*e.g.* courts of country A may be seized of a dispute against any individual whose *habitual residence* is located in country A). This is also the case when jurisdiction is granted to the courts of the place where a contract must be performed (Article 7(1) of the Brussels Ibis Regulation), where a harmful event took place (Article 7(2) of the Brussels Ibis Regulation) or where a person habitually resides (Article 4 of the Succession Regulation). The policy behind such rules of jurisdiction is that the rules will grant jurisdiction to courts having a special, substantive link with the dispute or the parties (or both) on account of the geographical element which lies at the basis of the rule. This connecting factor will ensure a sound administration of justice as it will make it easier to conduct the proceedings.

The difficulty with this type of rules is that some activities leading to disputes are scattered among different countries, making it more difficult to find out which country should have the lead in exercising jurisdiction. Further, some disputes may concern non physical activities, such as on line activities. Using geographical concepts may be less suited in that case.

Other rules will allocate jurisdiction based on *substantive policy concerns* - *e.g.* the courts of country B may be seized of any dispute relating to the *in rem* status of immovables located on the national territory. The purpose of such rule is to protect the monopoly of courts of country B in relation to such disputes because country B deems it crucial that only its authorities exercise jurisdiction over such disputes and that its law be applied to them. The rule of jurisdiction is in this case drafted to serve a state's regulatory interests, and more specifically to make sure that certain of its mandatory rules are applied. Another example of this type of rule of jurisdiction may be found in relation to consumer disputes : under Article 18(2) of the Brussels Ibis Regulation, a business may

only bring court proceedings against a consumer before the courts of the State where the consumer is habitually resident. This rule aims to protect the consumer by giving him the benefit of proceedings in his home jurisdiction.

Finally some rules of jurisdiction are based on consent : a court will exercise jurisdiction if the party or parties involved have consented to it. Such consent may be granted *ex ante*, when parties have concluded a choice of forum. Article 25 of the Brussels *Ibis* Regulation provides that when parties have agreed on a court to hear their disputes, such court shall have exclusive jurisdiction. Likewise, Article 4 of the Maintenance Regulation gives effect to the choice of court agreement concluded by parties. Consent to jurisdiction may also become visible when court proceedings are started, if the defendant does not challenge the court's jurisdiction.

Another possible distinction among rules of jurisdiction relates to their scope. Some rules of jurisdiction may have a very broad scope of application and cover a wide range of disputes – a good example may be found in Article 4 of the Brussels *Ibis* Regulation, which applies in all civil and commercial disputes covered by this Regulation. Other rules aim only at one category of disputes – this is the case for example with Article 7(1) of the same Regulation, which is only applicable in contractual matters. Finally, some rules of jurisdiction aim at a very narrow range of disputes. The Brussels *Ibis* Regulation offers again a good example. Under Article 24(1) of this Regulation, courts of the Member State where an immovable is located enjoy exclusive jurisdiction in respect of disputes relating to the rights *in rem* aspects of the immovable.

A final distinction relates to the nature of the rule of jurisdiction : some rules make it possible for parties to predict with reasonable certainty whether a court will or will not take up jurisdiction. Other rules leave courts more discretion, which the court may use to exercise or decline jurisdiction. This makes it more difficult to predict whether a court will take up jurisdiction.

Courts, parties and jurisdiction

What is the role of courts and parties in determining jurisdiction? In other words, may parties freely determine which court has jurisdiction or should the last word on jurisdiction be left to courts? There is no single answer to this question. Different regimes exist, which grant courts and parties different roles. Under the Code of Private International Law (Act of 16 July 2004) in force in Belgium for example, courts have a general duty to verify their jurisdiction on their own motion (Art. 12). This duty suggests that parties may not decide by themselves when a Belgian court has jurisdiction. Allowance must be made, however, for the fact that other provisions of the Code make it possible for parties to conclude agreements on jurisdiction. Under Article 6, parties may agree to grant jurisdiction to Belgian courts. Article 7 provides likewise that parties may agree to exclude the jurisdiction of Belgian courts. Both provisions restrict the possibility of an agreement to matters for which parties may “freely dispose of their rights”. Under Article 6 § 1, courts in Belgium may also exercise jurisdiction when seized of a claim by a plaintiff, if the defendant enters an appearance without challenging the jurisdiction of the court.

The Brussels *Ibis* Regulation adopts another approach : Article 27 limits the duty for courts to examine their jurisdiction on their own motion to the situation where another court could enjoy exclusive jurisdiction under Article 24. In other words, as soon as a court finds out that no other court in another Member State may rely on Article 24 to exercise exclusive jurisdiction, it may cease its investigation of its own jurisdiction. This investigation may only be resumed provided the defendant (or the plaintiff) has challenged the court's jurisdiction. On the other hand, Articles 25 and 26 of the Brussels *Ibis* Regulation make it possible for parties to conclude express or tacit

agreements on jurisdiction, which bind the courts.

The impact of jurisdiction

Jurisdiction is a key ingredient of a proper litigation strategy : the forum where the dispute will be litigated, is not neutral. It pays to select of forum which will hear the dispute. Not all courts will indeed present the same features. Some courts may be more specialized than other. Some courts will deliver justice quicker than other courts. Selecting one court and not another will have consequences on the total costs of the proceedings and the possibility to recover these costs from the other party. Finally, when selecting a court to bring proceedings, a litigant must pay attention to the possibility to obtain representation and assistance by qualified (and affordable) counsels. Hence the issue of jurisdiction could also represent a major stake in the battle between litigants.

Jurisdiction is closely tied to another question, that of the effects to be granted to foreign judgments. When deciding whether or not to grant effects to a foreign judgments, a court will indeed usually inquire whether it accepts the claim that the foreign court had jurisdiction. The review of the jurisdiction of the court foreign court, is called '*indirect jurisdiction*'. This inquiry into the jurisdiction claimed and exercised by the foreign court which has issued the judgment to be recognized or enforced, usually belongs to the review undertaken by the court seized of a request for recognition or enforcement. However, in some contexts, States have accepted to forgo the possibility to review the indirect jurisdiction. This is precisely what happened between States which are bound by common rules of jurisdiction. The existence of such common rules makes it unnecessary for courts to verify the jurisdiction of the court which issued the judgment, since both courts are bound by the same rules This explains why under the Brussels *Ibis* Regulation, it is in principle prohibited to review the jurisdiction of the court which issued the judgment. Such review is only possible in limited circumstances, i.e. to ensure that some rules of jurisdiction, which are deemed to be very important, have been correctly applied by the court of origin (see *e.g.* Art. 45 par. 1, e) Brussels *Ibis* Regulation).

Translation : compétence (FR), Zuständigkeit (DE), bevoegdheid/rechtsmacht (NL)

BRUSSELS IBIS REGULATION

History

Within the EU, work has been undertaken quite early to guarantee that a judgment issued by a court of a Member State, could be given effect in another Member State. These efforts first led to the signature of an international Convention, the 1968 Brussels Convention (signed on 27 Sept 1968, at first only binding on the original six Member States of the EU). Far from only dealing with the effects of foreign judgments, the Convention also included common rules of jurisdiction. The existence of such common rules made it easier for Member State to give effects to foreign judgments.

Gradually, the Convention became part of EU Law. Its rules are today enshrined in the Brussels *Ibis* Regulation, which came into force on 10 January 2015. The Brussels *Ibis* Regulation replaces (and modifies to a certain extent) the Brussels I Regulation (Regulation 44/2001) which was in force between March 2002 and December 2014.

Scope of application

The Brussels *Ibis* Regulation applies in 'civil and commercial matters'. This suggests a very wide application to all private law relationships, whether family, commercial or otherwise. The Regulation, however, carefully excludes a number of matters from its scope of application. It does not apply to family relationships, such as divorce proceedings, disputes between parents relating to their children or proceedings relating to maintenance claims. It does not apply either to social security disputes, insolvency matters or arbitration proceedings. The EU has adopted other Regulations dealing with some of the topics excluded from the scope of application of the Brussels *Ibis* Regulation – such as the 2009 Maintenance Regulation, the 2012 Succession Regulation or the 2003 Divorce and Parental Responsibility Regulation (called the 'Brussels *Ibis* Regulation').

The ECJ has issued a number of important rulings on the concept of 'civil and commercial' matters. The Court has in particular been called to decide whether the provisions of the Regulation could apply in disputes involving states and state entities. According to the Court, disputes between a public authority and a business or individual may come within the scope of application of the Regulation, unless the public authority is acting in the exercise of its public powers. In order to find out whether this is the case, the ECJ directs to take into account the basis of and the rules applicable to the action brought by the public authority.

The ECJ has for example decided that when the tax authorities of the United Kingdom bring proceedings against a company incorporated in Denmark, claiming an amount of money equivalent to the amount of VAT which has been evaded, thanks to the dealings of the defendant, by another company, the Regulation may apply even though the claim was brought by a public authority and it finds its origin in an alleged value added tax 'carousel' type of fraud. According to the Court, the Regulation could apply because the claim was a claim for damages corresponding to the amount of VAT not paid by a person subject to VAT and the claim was based not on the United Kingdom VAT legislation, but on the law of tort. Hence, the legal relationship between the tax authority and the defendant was not a legal relationship based on public law and involving the exercise of powers of a public authority (ECJ, 12 September 2013, *The Commissioners for her Majesty's Revenue & Customs v. Sunico ApS et al.*, case C-49/12).

The Brussels *Ibis* Regulation is only in force between Member States. Its provisions may, however,

have some effects on persons and companies established outside the EU.

In order to find out whether the Regulation is applicable, account must be taken of different elements, depending on whether the issue of one of jurisdiction or relates to the recognition or enforcement of a foreign judgment. When one wants to find out when the European rules regarding recognition and enforcement apply, it is necessary to consider two elements : from which State the judgment originates and where it is relied upon. The Brussels *Ibis* Regulation only applies provided the judgment originates from a Member State and is relied upon in another Member State. In other words, the Regulation is not relevant when one attempts to enforce in Morocco a judgment issued by a court in France, nor is it relevant when one considers the effect in Belgium of a judgment issued by a court in NY.

The rules of jurisdiction included in the Brussels *Ibis* Regulation apply only when one considers whether a court of a Member State has jurisdiction. Those rules are not relevant when the question at stake is whether the courts of Beijing have jurisdiction, even though the two parties involved are established in the EU and the matter in dispute has a strong European flavor. It is, however, not enough for the rules of jurisdiction to apply that the court seized of the dispute is a court of a Member State. The dispute must also demonstrate some links with the EU. The main principle in this respect is that the rules of jurisdiction included in the Brussels *Ibis* Regulation will only apply provided the *defendant* is domiciled in a Member State. This follows from Article 4 of the Regulation. The Regulation provides some limited indications on the concept of domicile – Article 62 for natural persons and Article 63 for legal persons. The requirement that the defendant must be domiciled in a Member State in order for the Regulation to apply, may lead to surprising results. If a dispute arises between a company established in Belgium and a company established in Canada, the Regulation will apply to determine whether the court in Belgium seized of a claim by the Canadian company against the Belgian company, has jurisdiction but it will *not* apply if the Belgian company brings a claim before the same Belgian court against the Canadian company, who is then the defendant.

This principle is, however, qualified for a number of provisions : some of the rules of jurisdiction included in the Brussels *Ibis* Regulation apply even though the defendant is *not* domiciled in a Member State. This is the case *e.g.* for the rule on choice of court provisions (Art. 25) and on exclusive jurisdiction (Art. 24).

Since the Brussels *Ibis* Regulation in principle only applies when the defendant is domiciled in a Member State, Member States may retain residual rules of jurisdiction that apply when the Regulation does not. In some Member States, it has been decided to broaden the scope of application of the Regulation by applying its rules even in cases which do not fall within its scope of application. In other Member States, residual rules of jurisdiction are very different from those included in the Regulation.

Rules of jurisdiction

The Regulation first provides common rules of jurisdiction. These may be found in Art. 4 ff. These rules are diverse. Some of these rules are very general and apply in all disputes falling within the scope of application of the Regulation. This is the case *e.g.* for the basic rule according to which proceedings should be brought before the courts of the *domicile* of the defendant (Art. 4). Other rules focus on specific relationships, such as contracts or torts. According to Article 7(2) of the Regulation, disputes arising in relation to tort may be brought before the courts of the place where the harmful event took place.

The rules of jurisdiction included in the Regulation do not have the same nature : some rules of jurisdiction are *mandatory* and cannot be displaced by parties. This applies in particular for the rules of exclusive jurisdiction to be found in Article 24. Under this provision, some courts are granted exclusive jurisdiction for a limited number of disputes. The courts of the place where an immovable is located, enjoys *e.g.* exclusive jurisdiction in relation to disputes concerning rights in rem in relation to such immovable.

Other rules of jurisdiction are *offered* to litigants, who may make a choice among several rules. A plaintiff may always decide to bring proceedings before the courts of the domicile of the defendant (Article 4). The plaintiff may, however, elect to bring proceedings before another court. Finally some rules of jurisdiction grant legal effects to agreements made by parties in relation to jurisdiction. This is the case for Article 25 of the Regulation, which provides that agreements between parties on the court having jurisdiction should be upheld.

For some disputes, the Regulation also includes mandatory rules of jurisdiction which aim to *protect* one party. This is the case for consumers (art. 17-19), employees (art. 20-23) and insurance takers (art. 10-16) : these litigants are deemed worthy of protection. The Regulation ensures that they may bring proceedings in a court close to the place where they reside. They are also protected against choice of court agreements which would force them to bring disputes in other countries.

The Regulation also includes special rules of jurisdiction aimed at *consolidating complex disputes*. These rules may help avoid that several parts of a complex dispute are heard by different courts. Under Article 8(2) for example, a party brought before the courts of country A, may seek to have a third party joined in the proceedings in the framework of a warranty or guarantee action brought against that third party. Other rules deal with the consequences of parallel proceedings brought simultaneously before different courts (see *lis alibi pendens*).

It is important to note that the rules of jurisdiction included in the Regulation do not all have the same weight. Some of these rules enjoy a privileged position and must therefore be applied before recourse may be had to other rules. This follows among other from the fact that under Article 27 of the Regulation, a court should verify on its own motion whether another court does not enjoy exclusive jurisdiction under Article 24. Other rules enjoy specific features, in that they may not be set aside by agreement among parties. This is the case, to a very large extent, for the so-called protective rules of jurisdiction. Taking into account the relative weight and the specific features of the rules of jurisdiction, one may summarize as follows the various steps to be taken in order to verify whether the court of a Member State has jurisdiction.

JURISDICTION UNDER THE BRUSSELS I BIS REGULATION

I. Does the Regulation apply?

- I.1. Is the court of a MS seized?
- I.2. Does the claim relate to 'civil and commercial' matters?
- I.3. Has the claim not been excluded from the scope of application?

II. Does a court of a Member State enjoy exclusive jurisdiction (Art. 24)?

III. Has the defendant accepted the jurisdiction of the court seized (Art. 26)?

IV. Does a court of a MS enjoy jurisdiction under the protective rules of jurisdiction (Art. 10-23)?

V. Have parties validly agreed upon the jurisdiction of a court of a MS (Art. 25)?

VI. Plaintiff may choose to bring his claim before:

- VI.1 The courts of the domicile of the defendant (Art. 4)
- VI.2. The courts having jurisdiction under Art.7

Foreign judgments

One of the major achievements of the Regulation is that it greatly facilitates the circulation of judgments between Member States. Article 36 of the Regulation provides that judgments issued in one Member State are recognized in other Member States “without any special procedure being required”. Recognizing a foreign judgment means accepting its *res judicata* effect. The principle enshrined in Article 36 means that judgments issued in Member States automatically and immediately enjoy *res judicata* effect in all Member States. In practice, this means that if a court in Member State A has decided that the contract concluded between company X and company Y was valid and enforceable, the companies involved cannot relitigate before the court of another Member State the issue of the validity of the contract : the courts of all other Member States must accept that the contract is valid and enforceable.

Article 39 adopts the same solution for the *enforceability* of foreign judgments : judgments issued in one Member State are enforceable in all other Member States “without any declaration of enforceability being required”. This is a remarkable achievement : it means that the judgment creditor may use the judgment issued in Member State A to obtain payment of its claim in Member State B. The judgment creditor may use all possible means of enforcement such as attachments ('saisie' / 'beslag') in Member State B, without first having to seek prior recognition or approbation of the judgment issued in Member State A. In other words, judgments from other Member States are treated as domestic judgments and not foreign judgments.

Member States may, however, restrict the free circulation of foreign judgments on their territory. They may do so on a limited number of grounds. The most important obstacle which may be raised against the circulation of a judgment issued in another Member State is the so-called 'public policy' exception (Article 45 of the Regulation). This exception may be used whenever the recognition or enforcement of a foreign judgment would violate some fundamental principle essential for the proper functioning of the recognizing State.

Application and interpretation

The Brussels *Ibis* Regulation and its predecessors have been subject to a very large number of preliminary references by national courts. The ECJ has issued more than 150 rulings dealing with the provisions of the Regulation. It is impossible to apply the Regulation correctly without taking into account these rulings.

As in other fields of EU law, the ECJ has often chosen to give an *autonomous* interpretation of the concept used in the Brussels *Ibis* Regulation. Such autonomous interpretation is not based on the reading given in the law of a Member State to concepts. Rather, the ECJ attempts to develop its reading by looking at the goal pursued by the Regulation in general and the provision concerned in particular. The Court also pays attention to the origins and the scheme of the Regulation. Among the objectives which the ECJ has identified as being essential for the Regulation, one can mention the wish to strengthen the legal certainty and the legal protection of persons established in the EU, by enabling the litigant to identify easily the court in which he may sue and the defendant reasonable to foresee before which court he may be sued.

In relation to the *forum contractus* provided in Article 7(1), the ECJ has for example indicated that this rule of jurisdiction “reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case” (ECJ, *Color Drack*, paragraph 22).

Progeny

The Brussels *Ibis* Regulation has been used as model for other European Regulations dealing with jurisdiction and effects of foreign judgments. Some of its provisions have been closely inspiring for other Regulations such as the Brussels *Ibis* Regulation, the Maintenance Regulation and the Succession Regulation.

The recipe of the Brussels *Ibis* Regulation has also been copied in the relations between the EU and the EFTA States : an international treaty was concluded between the EU and the EFTA States which replicates to a very large extent the provisions of the Regulation. This treaty is called the ‘Lugano Convention’ (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed on 30 October 2007).

Legal source : Brussels *Ibis* Regulation

Case law : <http://curia.europa.eu/juris/recherche.jsf>

- ECJ, 15 February 2007, *Lechouritou v. Dimosio tis Omospondiakis Dimokratias tis Germanias*, case C-292/05

In this case, a number of Greek citizens brought an action against Germany, claiming compensation as successors of the victims of war massacres perpetrated by German armed forces during WWII in Germany. One of the many questions which arose was whether the plaintiffs could rely on the provisions of the Brussels *Ibis* Regulation to justify the international jurisdiction of Greek courts. According to the plaintiffs, those courts had jurisdiction under Article 7(2), as the facts at the basis of liability took place in

Greece. The ECJ underlined that the concept of 'civil and commercial matters' should be regarded as an independent concept, to be interpreted referring not to the law of one Member State, but to the objective and schemes of the Regulation and to the general principles which stem from the national legal systems. According to the Court, certain legal actions must be excluded from the scope of the Regulation by reason of the legal relationships between the parties or the subject-matter of the action : this is the case for actions between a public authority and a person governed by private law when the public authority is acting in the exercise of its public powers. The Court concludes that the legal action for compensation brought by the plaintiffs against Germany directly derived from operations conducted by armed forces during WWII. There was no doubt, according to the Court that operations conducted by armed forces are one of the characteristic emanations of State sovereignty. Hence an action linked to the loss or damage suffered during such operations should according to the Court be regarded as resulting from the exercise of public powers by a State. Such a legal action cannot be considered to concept a "civil or commercial matter". The Regulation cannot therefore be applied.

- ECJ, 4 September 2014, *Nickel & Goeldner Spedition GmbH v Kintra UAB*, case C-157/13

In this case, a court in Lithuania opened insolvency proceedings against Kintra, which did business in Lithuania. The insolvency receiver requested payment of a substantial amount of money from a German company, which had called upon Kintra to carry goods by truck. A dispute arose between the receiver and the German company on the jurisdiction of Lithuanian courts : according to the receiver, Lithuanian courts had jurisdiction because the claim was related to the insolvency proceedings which were opened in Lithuania. The receiver argued that he was acting in the interests of all the creditors and seeking to increase the amount of the assets of the insolvent company so that as many creditors' claims as possible may be satisfied. The German company argued that the claim was a plain commercial dispute and that the provisions of the Regulation should be applied. The ECJ noted that the Brussels *Ibis* Regulation excluded disputes related to insolvency ("bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings") from its scope of application, while these disputes were covered by the Insolvency Regulation. According to the Court, only those actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of the Brussels *Ibis* Regulation. The key to decide whether an action falls under the Brussels *Ibis* or the Insolvency Regulation is therefore not so much the procedural context, but the legal basis of the action : does it find its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings? The Court then found that the action brought against the German company was a plain contractual action : the action could have been brought by the creditor itself before the opening of insolvency proceedings. It was to be solved using the rules of the law of contract. The action did not therefore have a direct link with the insolvency proceedings. As a consequence, the Brussels *Ibis* Regulation applied.

CHOICE OF COURT AGREEMENTS

Principle

In most legal systems across the globe, it is accepted that parties to a specific legal relationship may validly decide to grant jurisdiction to the courts of a particular country in order to solve their disputes. This freedom has sometimes only been recently conquered over resistance by the courts, which deemed the determination of their jurisdiction to be outside the parties' business. In the United States for example, it took a decision by the Supreme Court in 1972 in the *Bremen* case to overturn the deep reluctance by lower courts vis-à-vis choice of court agreements concluded by parties.

Parties may agree to such a choice *ex ante*, for example by including a choice of court provision in their contract. Such a choice of court provision may read as follows:

“All disputes arising out of or in relation with the present Agreement shall be exclusively settled by the Courts of Amsterdam, Netherlands”

“All disputes between the parties shall be settled at claimant's choice before the Belgian courts of the district of Antwerp or before the competent courts of the defendant's residence”

Provisions of this type are very common in international contracts, whether they are concluded by companies doing business from different sides of the world or operating in neighboring countries. They may be found in individually negotiated contracts, but also in general conditions used by one company.

The freedom to select the court also exists outside the realm of contracts, although it is less frequently used. Two parties involved in a dispute relating to the alleged liability in tort of one of them, could also agree to submit that dispute to the courts of one country.

Parties may also agree to a choice of court *after* a dispute has arisen. Experience shows that this is less likely to occur than when parties have agreed to a choice of court before a dispute arises.

The freedom to select the court which will hear their dispute, allows parties to select a court of their own liking. Parties may select the courts of a country because they assume these courts will deliver high quality justice without undue delay. Parties may also select a court because of its expertise in a given field of law. English courts are said to have a special expertise in financial, banking and insurance matters. A court could also be chosen because of its (perceived) neutrality. It is for example widely assumed that Swiss courts are neutral. Finally, in an unbalanced relationship, the party with the greater say could select its own courts, in the belief that these courts will offer a better place to resolve the dispute. This last scenario is very common.

Parties to a legal relationship (such as a contract) could also *tacitly* decide to entrust the resolution of their dispute to the courts of a particular country. This will be the case if one of the parties brings proceedings before a given court and the other party does not object to the jurisdiction of that court. Under the Brussels Ibis Regulation, this is called 'entering an appearance' (Art. 26). This mechanism is intimately linked to the duty resting upon the court to verify its own jurisdiction. If a court does not have the obligation to verify its own jurisdiction, the fact that a defendant enters an appearance without challenging the court's jurisdiction, creates sufficient ground to vest the court with jurisdiction.

In international commercial law, parties enjoy another possibility : not only may they agree to entrust their dispute to the courts of one particular country, they may also decide to *opt out* altogether of dispute resolution by domestic courts and provide that disputes will be settled by an *arbitral tribunal*. Although there are many similarities between arbitration and choice of court agreements, both are subject to a distinct regime.

In many cases, choice of court agreements will not be stand alone provisions : whether they are included in a contract or general conditions, choice of court agreements will come with a choice of law and other provisions such as one dealing with service of process (indicating how and at which address may service be effected) or a provision repudiating any possibility for the parties to challenge the validity and enforceability of the choice of court provision. Alternative draftings may include language on provisional relief or even an indemnity provision covering the situation in which a party breaches the choice of court agreement.

Legal regime

Different provisions may govern choice of court agreements. Within Europe, choice of court agreements may be subject to Article 25 of the Brussels *Ibis* Regulation. In Belgium, choice of court provisions may be subject to Article 6 and 7 of the Code of Private International Law. Belgium is also bound (since 2015) by the 2005 Hague Convention on Choice of Court Agreements, an international treaty negotiated within the Hague Conference on private international law, which includes specific rules on choice of court agreements. Which of these regimes governs a choice of court agreements, depends on a number of elements. An agreement for the courts of a Member State is by default governed by the Brussels *Ibis* Regulation. It will only fall outside the scope of this Regulation if the agreement concerns a dispute which is excluded out of the substantial scope of application of the Regulation, i.e. if it does not concern a civil or commercial dispute. This could be the case of an agreement between two spouses relating to matrimonial property disputes.

Agreements in favor of a court of a third State (say an agreement conferring jurisdiction to the courts of Singapore) does not fall within the scope of application of Article 25. It will in principle need to be examined using the 2005 Hague Choice of Court Convention – this Convention is in force in all EU Member States; it is also in force in Mexico and Singapore. It is only when this Convention (or another international legal regime) does not apply that the default provisions of the Code of Private International Law will find application.

Code of Private International Law

Article 6 – Agreement between parties on jurisdiction

§1. When parties, in a matter in which, according to Belgian law, they can freely dispose of their rights, validly agreed to confer jurisdiction on the Belgian courts or a Belgian court to hear the disputes, which have arisen or may arise in connection with a legal relationship, the latter courts or court shall have exclusive jurisdiction.

Except when otherwise provided for in the present statute, a Belgian court before which a defendant enters an appearance has jurisdiction to hear the action brought against the latter, unless the appearance has as its main purpose to challenge such jurisdiction.

§2. In the cases described in §1, the court may however decline its jurisdiction when it appears from all the circumstances that the dispute has no meaningful connection with Belgium.

Art. 7. Exclusion of international jurisdiction by agreement

When parties, in a matter in which, according to Belgian law, they can freely dispose of their rights, validly agreed to confer jurisdiction on foreign courts or on a foreign court to hear the

disputes which have arisen or may arise in connection with a legal relationship and proceedings have been brought before a Belgian court, the latter must stay its proceedings, unless it is anticipated that the foreign judgment is not amenable to recognition and enforcement in Belgium or unless the Belgian courts have jurisdiction according to Article 11. The Belgian courts must decline jurisdiction when the foreign decision can be recognized according to the present statute.

Other legal instruments also recognize the possibility for parties to conclude a choice of court agreement. This is the case in succession matters (Article 5 of the 2012 Succession Regulation) and in matters relating to maintenance claims (Article 4 of the 2009 Maintenance Regulation). Outside the realm of commercial relations, the use of choice of court agreements is, however, much less developed.

The various regimes are broadly based on the same principles : they all recognize that parties may validly select the court of their liking and confer it jurisdiction. Differences may exist between the various regimes. They will, however, concern details.

Formal requirements

Choice of court agreements need to be *validly* concluded, as do all contracts. In some jurisdictions, choice of court agreements are subject to the same validity requirements as other contracts. The only question which arises in this situation, is to determine which law applies to the validity requirements of a choice of court provision. This question is a vexed one. The Rome I Regulation excludes the validity of agreements on choice of court from its scope of application (Art. 1, paragraph 2, e).

The main European regime for choice of court agreements is built around *autonomous*, independent validity requirements, which are specifically adopted for choice of court agreements. Article 25 of the Brussels Ibis Regulation includes European rules dealing with the validity of such agreements. These rules constitute a self contained regime : they are the only ones which may be applied in order to find out whether a choice of court is valid. National rules may therefore not be applied either to expand the requirements contained in Article 25 or to limit their effect.

Is a choice of court drafted in another language valid?

In a case decided in 1981, the ECJ had to rule on the question whether a choice for German courts which had been included in a contract of employment concluded between a sales agent working in Belgium and a German company, could be relied upon by the employer even though the contract had been drafted in German (ECJ, 24 June 1981, *Elefanten Schuh GmbH v Pierre Jacqmain*, case 150/80, ECR, 1981, 1671, ECLI:EU:C:1981:148). According to legislation in force in the Flemish region of Belgium, all employment documents had to be drafted in Dutch. Documents drafted in other languages were deemed null and void by Article 10 of the Decree of 19 July 1973 governing the use of languages in relations between employers and employees. The employee, who had been dismissed without notice, sought compensation from the courts in Belgium. The former employer attempted to challenge the courts' jurisdiction using the choice of court included in the employment contract. The ECJ held that the formal requirement included in Article 25 constituted a self-contained code. Member States are therefore not free to lay down formal requirements other than those contained in the Regulation. Consequently, the validity of a choice of court agreement could not be called into question solely on the ground that the language used is not that prescribed by local legislation [note : at that time, the European

rules did not yet include a specific provision relating to choice of court agreements in employment agreements].

Art. 25 of the Regulation provides various scenarios which may be used to validate a choice of court Agreement. Under this provision, an agreement may be concluded:

- i) in writing;
- ii) evidenced in writing;
- iii) in a form which accords with a practice which the parties have established between themselves;
- iv) in international trade, in a form which accords with a usage of which the parties are or ought to have been aware.

There is a substantial amount of court practice on the question of the formal validity of choice of court agreements. The ECJ has issued a large number of rulings on this issue. This is a matter of frequent controversy among parties, especially in situations where the choice of court was included in a document (such as an offer, a confirmation of acceptance or an invoice) drafted by one party and communicated to the other.

What is the relationship between the formal requirements laid out in Article 25 and the consensus which must exist between parties on the choice of court? A choice of court is a contract between parties. As such it must be based on a consensus, a meeting of the minds. The ECJ has, however, held that if a choice of court provision meets one of the scenario's contemplated in Article 25, there is no need to demonstrate the parties' consent. In other words, the parties' consent to the choice of court is presumed to exist as soon as the formal requirements laid down in Article 25 are met. It may therefore well be that one party has not actually agreed to the choice of court. Its consent will nonetheless be presumed to exist if the choice of court meets the formal requirements.

The first scenario contemplated by Article 25 is that of an *agreement in writing or evidenced in writing*. This may cover various situations.

The first and easiest situation is that of a choice of court clause included in a written agreement signed by the two parties. It is certainly not the most common : in international trade, it is not common for parties to take the time and bear the expenses of signing a specific agreement in writing for a particular transaction. This may occur for very large transactions – such as when one business buys all the assets of another one or when a business grants an order for the construction of a very large machine or the construction of a new facility (so-called 'big ticket' transaction).

It is important to note that the Brussels *Ibis* Regulation adopts a broad understanding of the concept of 'writing' : a document is deemed to be written not only if it is available on paper, but also if it part of a communication by electronic means. One may therefore consider that an email sent by a business to another constitutes a writing. Electronic communication may be deemed to correspond to writings, provided a durable record of the agreement may be made. Emails which are recorded on a server, order forms filled on line which are also stored on a server (and a copy of which is sent by email to the parties) may therefore constitute writings within the meaning of Article 25.

Choice of court and click-wrapping

In a recent case (ECJ, 21 May 2015, *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, case C-322/14, ECLI:EU:C:2015:334) the ECJ had to rule on the question whether a choice of court agreement appearing in general conditions of a party on whose website a

sales transaction was concluded, was valid and enforceable. A German car dealer had bought a used car from a German company. The transaction took place on the latter's website. A dispute arose later on between parties and proceedings were brought in Germany. The defendant challenged the court's jurisdiction, arguing that its general conditions included a choice for the courts of Leuven, Belgium. The general conditions were available on the defendant's website. More specifically, the sale could only be concluded after the buyer had clicked a box which contained a reference to the seller's general terms of sale. Failing such a click, the sale could not be concluded. However, clicking the box did not automatically lead to the opening of the document containing the seller's general terms. An extra click on a specific hyperlink was necessary for that purpose.

The ECJ held that by clicking the relevant box on the seller's website, the purchaser had expressly accepted the general terms and conditions of the seller. The Court further clarified that under Article 25, what is required is that there is a possibility of providing a durable record of the agreement conferring jurisdiction, not that the actual agreement has been durably recorded by the purchased before or after he clicks the box. In other words, the test is whether it is possible to create a durable record of the electronic communication (by printing or saving the text to a disk or storing it), not whether a durable record has been effectively made in the case at hand. Drawing on this, the ECJ concluded that since click-wrapping makes it possible to print and save the text of the general terms before the conclusion of the contract, an agreement concluded using this method was valid, even if the webpage containing the information did not open automatically on registration on the website.

In most day to day transactions having a cross border nature, there will not be any written document signed simultaneously by the two parties. Rather, one party will draft a document, or more often use a standardized document which it will submit to the other party. The latter will not necessarily sign the document. A company buying products from another one may send the latter a 'Purchase Order', which includes a description of the items sought and their price, together with a choice of court provision. A seller may send its buyer a 'Confirmation Order', such as the one appearing below.

Sample Company Inc.		Order Confirmation			<table border="1"> <tr> <td>Date</td> <td>Page</td> </tr> <tr> <td>Dec 10, 2010</td> <td>1</td> </tr> <tr> <td colspan="2">Order Number</td> </tr> <tr> <td colspan="2">ORD000000000070</td> </tr> </table>		Date	Page	Dec 10, 2010	1	Order Number		ORD000000000070	
Date	Page													
Dec 10, 2010	1													
Order Number														
ORD000000000070														
123 Sample Company Plaza Any City, Any Province 12345 USA Phone: (123) 456-7890 Fax: (123) 456-7891														
Sold To: Mr. Ronald Black 2520 Wabash Road Los Angeles, CA 90048 USA			Ship To: Mr. Ronald Black 2520 Wabash Road Los Angeles, CA 90048 USA											
Reference	PO Number	Customer No.	Salesperson	Order Date	Ship Via	Terms								
		1200	BB	Dec 10, 2010	CCT	DUETEL								
Qty. Ord.	Qty. Shp.	Qty. B/O	Item Number	Description	Unit Price	UOM	Extended Price							
1	0	1	#OFFICE DESK KIT	Combination package of useful items for the office d	85.950000	Ea.	85.95							
			A1-103/G	Fluorescent Desk Lamp										
			A1-320/G	50W/12V Halogen Bulb										
			A1-401/G	Desk Calendar Pad										
			A1-650/G	Highlighter										
			A1-655/G	Pen										
			A1-656/G	Pencil										
			A1-600/G	Hanging File Folder										
			A1-700/G	Calculator										
			A1-750/G	Stapler - Image-1500 Series										
			HC	Handling Charges			14.95							

These documents are *unilateral* documents : they have been drafted by one of the parties and sent to the other. Most of these documents are *standardized*, and not prepared specifically for a given transaction. The other party may or may not reply expressly when receiving such a document.

When a business has received such a unilateral document and it replies in writing, acknowledging receipt and indicating that it agrees with the written document it received, the choice of court has been concluded in writing. There has indeed been a written acceptance from the two parties involved. It does not matter that this consent has not been expressed simultaneously on the same document. An exchange of letters, telegrams or other written documents signed by the parties or bearing other means of identifying the author of the document, is therefore sufficient to establish that the choice of court agreement has been concluded in writing.

More often than not, a party receiving such a unilateral document will *not* react in writing. The transaction may then be performed. Say a buyer sends a purchase order to a manufacturer. The latter does not acknowledge receipt of the purchase order, but rather ships the good ordered by the buyer. If the seller later finds out that the buyer has not paid the price, is he bound by the choice of court appearing in the purchase order? Likewise, if a buyer has placed an order with a manufacturer on the telephone and the manufacturer later confirms the order by sending a Confirmation Order, which includes a choice of court agreement, should the buyer, who has discovered upon receiving the goods that they are damaged or do not match with its order, bring proceedings before the court indicated in the Confirmation Order?

Some guidance on this issue may be found in cases decided by the ECJ. However, these cases have been decided quite some time ago. Some caution is therefore in order before relying on the principles laid down by the Court in these cases.

In an important case (ECJ, 14 December 1976, *Galeries Segoura SPRL v Société Rahim Bonakdarian*, case 25/76, ECR, 1976, 1851), the ECJ had to deal with a dispute between a German company who had sold a batch of carpets to a Belgian company : the contract between parties had been concluded orally. The German seller had on the same day handed over the carpets to the buyer, who had paid part of the price. Together with the carpets, the seller also handed over a document called 'confirmation of order and invoice', which stated that the sale had taken place "subject to the conditions stated on the reverse". The seller's general conditions of sales were printed on the back of this document. They included a choice for the courts of Hamburg. The buyer did not confirm this document. Was the choice of court clause validly agreed? This question arose when the seller issued proceedings before a court in Hamburg claiming payment of the remainder of the price.

The ECJ held in this case that when parties conclude an agreement orally, and one of the parties later confirms the contract in writing, the fact that this written confirmation includes a reference to the general conditions of sales is not sufficient to hold that the choice of court agreement included in those general conditions is valid and enforceable. According to the Court, it is required that the other party agrees in writing to the confirmation it receives. The Court indicated that this holds whether or not the party wishing to rely on its general conditions has, when concluding the agreement, indicated that it wished to rely on its general conditions. In sum, a unilateral declaration in writing by a party that it wishes to rely on its general conditions including a choice of court, is not sufficient to ensure that this choice of court has validly been agreed upon.

The Court, however, nuanced its ruling by adding that the position is different if the contract forms part of a "continuing trading relationship between the parties" : if it is demonstrated that there have been previous dealings between parties which have been governed by the same choice of court, it

would be, according to the Court “contrary to good faith for the recipient of the confirmation to deny the existence of a jurisdiction conferred by consent, even if he had given no acceptance in writing”.

Therefore, whenever there is a stream of commerce between the two parties, a choice of court provision may become part of the agreement even if it has only been notified by one of the parties to the other, without the latter confirming in writing its acceptance of the choice of court, if there has been no objection against the clause and this clause has always been used in the parties’ dealings.

One may therefore accept that:

- if a choice of court provision is drafted by one party (*e.g.* in an order, an order confirmation or another unilateral document) and communicated in writing to the other, it is not enough that the latter fails to object to the choice of court. Silence on the part of the other party is not sufficient to conclude that the choice of court has been accepted. Note that the test may be different under general rules of commercial law;
- if a party communicates a written document to the other which includes a choice of court provision, the provision will be valid if the document has been accepted in writing by the other party. It is not required that the written acceptance relates specifically to the choice of court;
- A choice of court provision included in a unilateral document communicated by one party to the other may be valid even if the latter has not specifically agreed to the document in writing, provided parties have done business before and the same choice of court provision has been included in this long standing relationship. The fact that there has never been any challenge by the other party is sufficient to indicate that it consented to the choice of court agreement. Such an agreement is then deemed to be evidenced in writing. It is difficult to determine with precision what threshold should be met to consider that parties have been doing business previously. Presumably, the mere fact that parties have entered in one previous contract is not sufficient to speak of a long standing relationship.
- A choice of court provision included in a unilateral document communicated by one party to the other may be valid even if the latter has not specifically agreed to the document and even if parties have not been doing business previously, provided, however, that the choice of court complies with the practice of international trade.

A choice of court agreement concluded orally?

In exceptional situations, parties may reach an oral agreement on a choice of court provision. Needless to say, it will not happen frequently that parties take the time and effort to discuss orally a choice of court provision. The question arises what steps should be taken in this case for the choice of court to be valid. A previous version of the Brussels Ibis Regulation included a rule dealing with this scenario : it indicated that parties could conclude a choice of court “by an oral agreement evidenced in writing”.

This language was considered by the ECJ in the *Berghoef* case : a German company had been acting as agent for a French company for about twenty years. A dispute arose following the termination of the agency contract by the French company. The agency contract,

concluded in 1964, included a choice for the courts of France. However, the German company claimed that parties had agreed orally in 1975 to modify this provision. Their new agreement would have been that the courts of Germany would have jurisdiction (in exchange, the German company would bear the costs of translating their correspondence). According to the German company, it had confirmed the oral agreement shortly thereafter by letter addressed to the French company, a letter which had not been challenged by the later. The question arose whether an oral agreement conferring jurisdiction was valid if it had been confirmed in writing by the party seeking to rely on the choice of court clause. The ECJ had to decide whether this was insufficient because the confirmation had to come from the party against whom the choice of court was raised.

The ECJ held that it was sometimes difficult to determine the party for whose benefit the choice of court agreement has been concluded. Therefore, whenever there is an oral agreement on jurisdiction, it is valid provided it is confirmed in writing by any of the parties, not only by the party against whom the choice of court provision may be used. Any written confirmation will prove sufficient, provided the other party does not object to the written confirmation. Such objection must be made ‘within reasonable time’. Failing such objection, the Court found that it would be “a breach of good faith for a party who did not raise any objection subsequently to contest the application of the oral agreement” (ECJ, 11 July 1985, *F. Berghoefter GmbH & Co KG v ASA SA*, case 221/84, ECR 1985, 2699).

Choice of court agreements frequently appear in general conditions (‘conditions générales’ / ‘algemene voorwaarden’ / Allgemeine Bedingungen’). Those general conditions may be printed on the back of a written document, such as a confirmation order or an invoice. They may also be available online. According to the ECJ, additional requirements are needed when a choice of court is included in such general conditions. First, the party who seeks to use the general conditions must have clearly indicated that these conditions form part of the contract. A reference to the general conditions is therefore needed, which must appear either on a written document or online. The reference should be made clear that the contract is subject to the general conditions. It is not necessary to include a specific reference to the choice of court appearing in the general conditions. A general reference to the terms and conditions proves sufficient. This requirement is needed in order to ensure that the other party was or could have been made aware of the existence and content of the clause.

Further, the other party must have had the opportunity to verify the terms and conditions before entering into a contract. This must be a reasonable opportunity. When a written document handed to one party by another, includes a clear reference to the latter’s general conditions, which includes a choice of court, but those conditions are not made available directly or indirectly, the choice of court is not validly concluded. Likewise, if a party sends its general conditions together with a written document, *e.g.* an offer, the choice of court included in the general conditions will not be deemed to be part of the contract if no reference is made in the main document to the general conditions. Note that under these standards, it is not required that the party against whom the choice of court is used, should have actually received a copy of the standard terms or should have actually read those standard terms. What matters is that this person’s attention must have been drawn to the existence of general conditions and that he should have had the opportunity to check the conditions.

A choice of court agreement concluded by reference?

Are the requirements of Article 25 met if a party (A) makes an offer to another party (B), when the offer includes a reference to A’s general conditions, which includes a general condition, if the parties later conclude an agreement which itself makes a reference to the

initial offer written by A? In this case, the choice of court provision is included in a document to which reference has been made in another document which it itself mentioned in the contract signed by parties.

The ECJ has been faced with this question in an early case (ECJ, 14 December 1976, *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v Rüwa Polstereimaschinen GmbH*, case 24/76, ECR, 1976, 1831, ECLI:EU:C:1976, 177). In that case, a contract had been concluded in Milan between a German company and an Italian company, whereby the former was required to supply to the latter machines for the manufacture of upholstered furniture. The contract had been signed on letterhead of the German company. The company's general conditions, including a choice for German courts, were printed on the back of this document. There was, however, no reference to the general conditions in the contract. The contract included a reference to previous offers made by the German company, which contained an express reference to the same general conditions, which were also printed on the reverse of the offers.

The ECJ first underlined that “the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party” is not sufficient to accept that the choice of court has been validly concluded since “no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction”. According to the Court, “it is otherwise in the case where the text of the contract signed by both parties itself contains an express reference to general conditions including a clause conferring jurisdiction”.

Focusing on the specific facts of the case, the Court further held that a clause may be deemed to have been concluded in writing if “the parties have referred in the text of their contract to an offer in which reference was expressly made to general conditions including a clause conferring jurisdiction”. The Court insisted, however, that this should be an express reference, which can be checked by a party exercising reasonable care. Indirect or implied reference to earlier correspondence is therefore not sufficient. If a party wants to carry over a choice of court provision included in an earlier writing, an express reference to that document should therefore be included in further writings.

A difficult situation arises if both parties use their general conditions, which include conflicting choice of court provisions. This is called a ‘Battle of the forms’.

The second scenario contemplated by Article 25 is that of an agreement concluded according to the *practices between the parties*. This requires that parties have done business on a regular basis and that during the course of their previous dealings, they have developed a certain practice.

Finally, a choice of court agreement may be deemed to be valid if it has been concluded in accordance with international trade usages. This may make it possible to accept that a choice of court has been validly concluded even though it does not comply with the previous scenario. What is required under this scenario is that:

- The contract should concern international trade and more specifically a particular branch of international trade – *e.g.* the sale of commodities; the supply of bulk transport services by ship, etc. This does not mean that there should be links with all MS. The existence of such a

usage needs not be determined by reference to the law of a MS or to international trade in general, but only in relation to the branch of trade or commerce in which the parties to the contract operate; it is therefore not necessary to establish the existence of a practice in specific countries or in all MS. The reference should rather be the operators in the branch of international trade in which the parties to the contract operate. The fact that the practice is generally and regularly observed by operators in the countries which play a prominent role in the branch of international trade concerned, is only evidence which helps to prove that a usage exists.

- In that branch, a particular course of conduct is generally and regularly following by operators when concluding contracts of a particular type;
- It is not required that the practice (*e.g.* the standard forms on which a jurisdiction clause appears) has been given any publicity by professional associations or specialised bodies;
- The parties to the contract must have been aware of the trade usage. This may be demonstrated by showing that parties were actually aware of the usage, or that given their position, they ought to have been aware. The latter conclusion may be accepted if parties have previously had commercial or trade relations between themselves or with other parties operating in the sector in question or that, in that sector, a particular course of conduct is sufficiently well known because it is generally and regularly followed when a particular type of contract is concluded, so that it may be regarded as being an established usage.

In a case where a question arose regarding the validity of a choice of court provision included in a prospectus published by a German bank to support the issue of sophisticated bonds (ECJ, 20 April 2016, *Profit Investment SIM SpA v Stefano Ossi et al.*, Case C-366/13, ECLI:EU:C:2016:282). The prospectus, which was approved by the Irish Stock Exchange and was available to the public, included a provision granting exclusive jurisdiction to the courts of England. An English financial intermediary acquired some of the bonds and sold them to an Italian company. A dispute arose when it appeared later that the bonds were worthless. One question which arose in this respect was whether the insertion of a choice of court provision in a prospectus constitutes a usage in the sector in which the parties operated.

The ECJ held that in order to answer this question, the court should take into account the fact that the prospectus was approved in advance by a public regulator and made available to the public on its website. According to the ECJ, account should also be taken of the fact that the final buyer of the bonds was a company active in the field of financial investments, as well as of any commercial relationships it may have had in the past with the other parties in the main proceedings. Finally, the ECJ directed the national court to verify whether the issue of bonds on the market is, in that sector, generally and regularly accompanied by a prospectus containing a jurisdiction clause and whether that practice is sufficiently well known to be regarded as 'established'.

If a choice of court agreement is valid under Article 25 of the Brussels *Ibis* Regulation, it may not be overruled on the ground that it does not meet a formal requirement laid down by the law of a Member State, which would otherwise deprive it from its effects.

Separability

What happens to a choice of court agreement if a party bound by the contract in which this agreement appears, challenges the validity of this contract? Since the validity of the contract is

disputed, it may be wondered whether the court designated by parties may find a sufficient legal basis in the choice made by parties. If the court finds that the contract is not valid, the question arises whether it should decline to use the choice of court agreement.

The ECJ had ruled that a court may exercise its jurisdiction in accordance with a choice of court agreement between parties even if one of the parties disputes the validity of the whole agreement. According to the Court, holding that in that case, the court could not longer exercise its jurisdiction would make it possible for a party to easily jeopardize the purpose of Article 25 and frustrate that rule simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law. According to the Court, a distinction should on the contrary be drawn between a jurisdiction clause, which serves a procedure purpose, and the substantive provisions of the contract in which it is incorporated. The jurisdiction clause is in the Court's view exclusively governed by the provisions of the Regulation and not by the law applicable to the main contract.

Drawing heavily from a long standing practice in arbitration, the Brussels *Ibis* Regulation now provides that a choice of court agreement "which forms part of a contract shall be treated as an agreement independent of the other terms of the contract" (Article 25, paragraph 5). Accordingly, the validity of such agreement "cannot be contested solely on the ground that the contract is not valid".

Effects

Once a court has been validly chosen by parties, it enjoys jurisdiction over the disputes which have been entrusted to it. This jurisdiction also extends to the possibility to decide on the validity of the choice of court agreement. Hence, if it is alleged that the contract which includes the choice of court agreement, is not valid, the court chosen by parties keeps its power to decide on the validity of the choice of court agreement.

Choice of court agreements bring about two consequences : first the court chosen by parties enjoy jurisdiction over the dispute. This is called the *prorogation* effect. In addition, if the choice of court is exclusive, the agreement will also oust the jurisdiction of all other courts which could potentially assume jurisdiction over the dispute. The exclusion of the jurisdiction of any other court which might otherwise have power to adjudicate the dispute is called the *derogation* effect. A choice of court agreement could have a prorogation effect, but not derogation effect. This is the case with a non-exclusive choice of court. Such a choice of court could read as follows:

"All disputes arising out of or in relation with the present Agreement may be brought before the courts of Düsseldorf, Germany"

Under the Brussels *Ibis* Regulation, the court designated does not enjoy any discretion to override an otherwise valid jurisdiction agreement. It is not permitted for example for the court designated to resist taking up jurisdiction on the ground that the dispute would be more conveniently settled by another court, as was possible under the law of some Member States. This has been confirmed by the ECJ in the *Owusu* case where the Court held that under the Regulation, the courts of a Member State were precluded from declining jurisdiction conferred on it by the parties on the ground that a court of a non Member State would be more appropriate for the trial of the action (ECJ, 1 March 2005, *Andrew Owusu v N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villa' et al.*, Case C-281/02). This case did not deal directly with choice of court agreements. Nonetheless, the Court's ruling may be extended to the situation in which parties have validly agreed to confer jurisdiction upon the courts of a Member State.

A valid choice of court agreement cannot be set aside by reference to the fact that the court chosen will not apply specific legal provisions which are deemed to be internationally mandatory. If parties have validly granted jurisdiction to the courts of Member State A, the courts of another Member State may therefore not disregard this choice and assume jurisdiction on the basis that the dispute is closely connected with this other Member State and the dispute would be governed by rules of this State which are deemed to be internationally mandatory.

If a court ignores a valid choice of court agreement, its judgment may nevertheless still enjoy the possibility to circulate freely within the EU. The Brussels Ibis Regulation does not make it possible to deny effects to a foreign judgment on the ground that the foreign court disregarded a valid choice of court agreement. The grounds of refusal which are listed in Article 45 of the Regulation do not include a violation of Article 25. The only possibility for a court to refuse to give effect to a judgment ignoring an otherwise valid choice of court agreement is to rely on the public policy exception (Article 45, paragraph 1, a). It may be doubted whether the violation of a choice of court provision justifies using the public policy exception.

Choice of court agreements have given rise to strategic litigation behavior in the recent past : if a party introduces proceedings before the courts of country B, even though parties are bound by a choice of court in favor of courts of country A, the question arises whether such proceedings prevents the other party from introducing proceedings before the courts of country A. In order to answer this question, one should consider the operation of the *lis alibi pendens* mechanism. This mechanism is designed to offer a solution for the situation which arises when two different courts are seized of the same dispute. When this situation arises, the *lis alibi pendens* rules gives priority to the court first seized. The court second seized must stay its proceedings.

Under the previous version of the rule, the designated court did not enjoy priority over the court first seized. The EU Court of Justice had indeed decided (in *Gasser*) that the *lis alibi pendens* mechanism applied even though one of the courts seized had allegedly been designated by the parties. It therefore had to stay its proceedings and wait until the court first seized decided on its jurisdiction. The Brussels Ibis Regulation has modified this position : under Article 31 par. 2 of the Regulation, the court designated by parties enjoys priority even if it is seized second in time. It has priority to settle the issue whether the choice of court agreement is valid and which court therefore has jurisdiction.

Limitations

In most legal systems, parties enjoy today the freedom to choose which courts will settle their dispute. This freedom is, however, not unlimited. States impose various limitations to the possibility for parties to select the competent court. So it is that a choice of court made by parties will not be given effect if it contravenes a mandatory rule of jurisdiction. Such rules grant *exclusive* jurisdiction to specific courts because a State feels that strong policy reasons dictate that these courts should hear the disputes concerned. Many States provide for example that disputes relating to the *in rem* status of immovable should exclusively be heard by the courts of the place where the immovable is located (see *e.g.* Art. 24 par. 1 Brussels Ibis Regulation). When such a rule exists, it makes choice of court provisions moot. See *e.g.* Art. 25 par. 4 Brussels Ibis Regulation, which provides that choice of court provisions cannot displace rules of exclusive jurisdiction.

Other limitations may arise because of the nature of the parties involved. Within the EU, substantial limitations exist regarding the possibility of agreeing to a choice of court provision for specific categories of contracts, such as consumer contracts, employment contracts and insurance contracts. Under Art. 19 of the Brussels Ibis Regulation for example, a choice of court provision included in a

consumer contract cannot be upheld, unless it is concluded *after* the dispute has arisen (a very unlikely prospect) or it grants the consumer the possibility to bring proceedings in other courts than those which otherwise would have jurisdiction. Consumers could also derive additional protection from Directive 93/13 on unfair terms in consumer contracts. In the *Oceano Grupo* case (ECJ *Océano Grupo Editorial SA v Rocio Murciano Quintero* (C-240/98)), the Court of Justice held that a jurisdiction clause which is included in a consumer contract without being individually negotiated, must be regarded as unfair within the meaning of the Directive if it gives exclusive jurisdiction to the court of the seller or supplier, because it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The Brussels Ibis Regulation also severely restricts the possibility to include a choice of court agreement in an employment agreement. Such choice of court agreements may only be concluded after the dispute between the employee and the employer has arisen or if it makes it possible for the employee to bring proceedings in courts other than those already enjoying jurisdiction under the protective rules of jurisdiction (Article 23 of the Brussels Ibis Regulation).

Example:

“The Pledgor agrees for the benefit of the Pledgee that any dispute in connection with this Agreement shall be subject to the exclusive jurisdiction of the courts of Brussels, without prejudice to the rights of the Pledgee to take legal action before any other court of competent jurisdiction.”

« Any dispute or litigation, including in summary proceedings, in connection with this Plan shall be brought exclusively before the competent courts of Switzerland”.

Legal basis : Art. 6/7 Code of Private International Law; Art. 25 Brussels Ibis Regulation; Hague Choice of Court Convention of 30 June 2005.

Case law :

– *The Bremen v Zapata Off-Shore Co* 407 US 1 (1972)

In this case, the US Supreme Court had to decide whether a choice of court provision included in an agreement concluded between a German company and a US company, was enforceable. The agreement concerned an oil drilling rig, which had to be moved from Louisiana to Italy. During the transport, a storm damaged the rig which had to be moved to Tampa, Florida. The German company challenged the proceedings brought before the courts of Tampa, alleging that parties had agreed to confer jurisdiction to the courts of England. The district court and the appellate court both refused to enforce the choice of court agreement. The Supreme Court reversed, holding that: “For at least two decades, we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that, once tended to confine a business concern to a modest territory no longer does so. Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. ... We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts. Forum

selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were "contrary to public policy," or that their effect was to "oust the jurisdiction" of the court. Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward forum selection clauses. This view ... is that such clauses are *prima facie* valid, and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty."

– ECJ, case C-296/95, *Benincasa v Dentalkit Srl* [1997] ECR I-3767

Dentalkit, an Italian company, and Mr Benincasa, an Italian national, concluded a franchising contract with a view to setting up and operate a shop in Munich, Germany. The franchise concerned the sale of dental hygiene products. The contract allowed Mr Benincasa the exclusive right to use the Dentalkit trademark in Munich. Mr Benincasa agreed to sell only Dentalkit products. The contract included a choice of court in favor of the courts of Florence. Although Mr Benincasa paid the initial amount covering the cost of technical and commercial assistance and he set up his shop, he never actively sold products. He brought proceedings in Germany seeking a declaration that the franchising contract was void in view of several provisions of German law relating to franchising contracts. Mr Benincasa argued among other things that the choice of court provision should not be upheld because his action sought to obtain a declaration that the contract containing the provision was void. The ECJ held that a jurisdiction clause serves a procedural purpose, in contrast with the substantive provisions of the main contract. It added that it would run contrary to the objective of legal certainty if a party could avoid the choice of court provision by simply claiming that the whole contract was void. Hence it held that the court designated in a jurisdiction clause validly concluded also has exclusive jurisdiction where the action seeks a declaration that the contract containing the clause is void.

– ECJ case C-116/02, *Erich Gasser GmbH v Misat srl* [2003] ECR I-14693

An Austrian company, Gasser, had sold clothes to an Italian company, MISAT, for years. The clothes were shipped to Italy together with an invoice. Among the general terms appearing on the invoice, there was a choice for the courts of Austria. In April 2000, Misat brought proceedings in Italy. Misat requested the court to declare that the contract had been terminated and that it had not failed to perform its obligations. In December 2000, Gasser brought proceedings in Austria, claiming payment of outstanding invoices. The question arose whether the Austrian court were barred from looking at the case on account of the earlier proceedings brought before the courts in Italy (*lis alibi pendens* mechanism). The ECJ found that the *lis alibi pendens* provision applied without any distinction based on the nature of the jurisdiction exercised by the court second seized. As a consequence, it fell upon the court first seized to decide on its jurisdiction and to examine whether the choice of court provision was indeed valid and enforceable.

Further readings :

I. QUEIROLO, "Choice of Court Agreements in the New Brussels I-bis Regulation : a Critical

Appraisal”, *Yearbook of Private International Law*, 2013-2014, 113-142.

P. ARNT NIELSEN, “Exclusive Choice of Court Agreements and Parallel Proceedings”, in *A commitment to private international law. Essays in honour of Hans van Loon*, Intersentia, 2013, 409-420.

T. RATKOVIC & D. ROTAR ZGRABLJIC, “Choice-of-Court Agreements under the Brussels I Regulation (Recast)”, *Journal of Private International Law*, 2013, 245-268.

Other languages:

FR : 'Clause d'élection de for' / 'convention attributive de compétence'; NL : 'bevoegdheidsbeding' / 'forumbeding'; DE : 'Zuständigkeitsvereinbarung'

* * *

FORUM CONTRACTUS

Concept

Disputes relating to cross-border contracts are very frequent. One of the first questions arising when such a dispute arises is that of the court which has jurisdiction to settle such disputes.

In many cases, parties to the contract will have made arrangement for the resolution of the dispute. Their contract may include a *choice of court* agreement. Alternatively, it may also include an *arbitration agreement*. In such cases, the issue of jurisdiction to settle the dispute becomes moot : it has been preempted by by parties, provided, however, that the court seized finds that the agreement between parties is valid and enforceable.

In some cases, however, the contract will not include any provision relating to the settlement of disputes. It could also be that some contractual document did include a choice of court agreement, but that this agreement was found to be invalid or not part of the contract between parties.

In such case, two basic options are available for litigants : the plaintiff could first start proceedings before the court of the *domicile of the defendant*. In many legal systems in the EU, jurisdiction is indeed granted in civil and commercial matters to the courts of the domicile (or sometimes the habitual residence) of the defendant (see *e.g.* Article 4 of the Brussels Ibis Regulation and Article 5 of the Code of Private International Law). This option offers advantages, as the application of this rule of jurisdiction does not require much investigation and will in most cases not give rise to any dispute. Further, granting jurisdiction to the courts of the defendant's domicile guarantees that the judgment to be issued will easily be enforced.

The *forum contractus* is an alternative rule of jurisdiction which concerns specifically disputes relating to contracts. Under this rule, jurisdiction is granted to a court which is deemed to have a strong connection to the contract. This connection may be found at the place where the contract is concluded. This is the original version of the *forum contractus*. Although it is still included in some national legislations (such as *e.g.* Article 96 § 1 letter a of the Code of private international law), it is not widely used anymore. Experience has indeed shown that it is often very difficult to identify the place at which a contract is concluded. In relation to cross-border contracts, identifying such place requires first identifying which law applies to the contract, making the process of establishing jurisdiction more complex. Further, this place often bears only a weak connection with the contract.

The modern version of the *forum contractus* gives jurisdiction to the courts of the country where the contract has been *performed* or should have been performed. The rationale of this rule is that many disputes in relation to cross-border contracts arise out of the poor or defective performance of the agreement. It therefore seems reasonable to grant jurisdiction to the court of the place of performance.

This rule exists in many national legislations (see *e.g.* § 29 ZPO according to which : “Für Streitigkeiten aus einem Vertragsverhältnis und über dessen Bestehen ist das Gericht des Ortes zuständig, an dem die streitige Verpflichtung zu erfüllen ist.” and Article 6(a) of the Dutch Code of Civil Procedure which provides “De Nederlandse rechter heeft eveneens rechtsmacht in zaken betreffende : a) verbintenissen uit overeenkomst, indien de verbintenis die aan de eis of het verzoek ten grondslag ligt, in Nederland is uitgevoerd of moet worden uitgevoerd”). It may also be found in the Brussels Ibis Regulation, where it plays a very important role.

The European forum contractus

Article 7(1) of the Brussels Ibis Regulation grants jurisdiction to the courts of the place of performance of the contract. This rule has been in force since the earliest version of the Regulation (which was adopted in 1968). It has given rise to an extensive body of case law by the ECJ. Its application remains nonetheless complex. According to the ECJ, Article 7(1) reflects a desire for proximity. This rule is based on the existence of a close link between the contract and the court called upon to hear and determine the case.

Article 7(1) is only applicable 'in matters relating to a contract'. According to the ECJ, one should apply a European definition of the concept of contract when assessing whether Article 7(1) applies, without having regard to the national definition of contractual matters. This is necessary in order to ensure that Article 7(1) is applied uniformly in all Member States. The classification under national law of a relationship as being contractual or not, is therefore not relevant. So it may be that a claim to enforce the rules of a club or the obligation undertaken by a shareholder to a company are of a contractual nature, even though under the relevant national law, another characterization may be applied for such obligations. The ECJ has also held that the claim by a sub-buyer against a manufacturer is not contractual for the purpose of applying Article 7(1) even though it is regarded as being contractual under the relevant national law.

The ECJ has also held that there is no need for a contract to have been concluded in order to justify the application of Article 7(1). What is required is that there is an obligation which has been freely assumed by one party towards another. The concept of 'matters relating to contract' refers, according to the Court, to a situation in which there is an obligation freely assumed by one party towards another. In order to apply Article 7(1), one should therefore identify a legal obligation freely consented to by one person towards another, and on which the claimant's action is based. Accordingly, the concept of 'matters relating to contract' may cover a wide range of situations, which may go beyond the realm of contract law under national law. Examples of this are to be found in the case law of the ECJ : a unilateral engagement by one party may fall under Article 7(1), such as the obligation arising out of the notification to a party that a prize has been awarded (ECJ, 20 January 2005, *Petra Engler v Janus Versand GmbH*, case C-27/02). Another example relates to the claim by an association against one of its members for the payment of membership fee : according to the ECJ, membership in an association creates links of the same kind as those which are created by contract (ECJ, 22 March 1983, *Martin Peters Bauunternehmung GmbH c Zuid Nederlandse Aannemers Vereniging*, case 34/82).

May Article 7(1) be applied in a dispute between the manufacturer of goods and a sub-buyer?

Say company A established in Member State A manufactures widgets. The widgets are sold to a company B, which is also located in Member State A. B then sells the widgets to other companies established in various Member States. One of its buyers, a company C established in Member State B, resells the widgets to a company D, established in Member State D. If D is not satisfied with the quality of the widgets and wants to bring proceedings against A, does the dispute concern a matter relating to a contract? This question was put to the ECJ in the Handte case (ECJ, 17 June 1992, *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA*, case C-26/91, ECR, 1992, I-3967). The dispute arose following the sale by a Swiss company of two metal-polishing machines to a French company. The latter had a suction system fitted to the machines, which was manufactured by a German company, and sold in installed by a French company. It later transpired that the equipment sold did not comply with rules on hygiene and safety at work and was unsuitable

for its intended purpose.

The ECJ found that Article 7(1) could not apply to the dispute, even though the claim was based on contract law under French law. According to the ECJ, where a sub-buyer of goods purchased from an intermediate seller brings an action against the manufacturer for damages, there is no contractual relationship between the sub-buyer and the manufacturer because the latter has not undertaken any contractual obligation towards the former. The Court further underlined that in a chain of international contracts, the parties' contractual obligations may vary from contract to contract so that the contractual rights which the sub-buyer can enforce against his immediate seller will not necessarily be the same as those which the manufacturer will have accepted in his relationship with the first buyer. According to the Court, allowing the application of Article 7(1) in the context of a chain of contract could jeopardize the objective of ensuring that rules of jurisdiction are predictable, as the defendant could not reasonably predict before which courts he may be sued.

May Article 7(1) be applied in a dispute between a company and its manager?

In a case decided in 2015, the ECJ had to rule on the question whether Article 7(1) could be applied in a dispute between a manager who had been hired to manage a company and the company itself. The manager had been appointed director of the company. He had concluded an agreement with the company confirming his appointment as director and setting out his rights and obligations. The dispute arose following the termination of a contract between the manager and the company (ECJ, 10 Sept. 2015, *Holterman Ferho Exploitatie BV et al. V F.L.F. Spies von Büllesheim*, case C-47/14).

The ECJ held that the manager and the company had freely assumed mutual obligations in that the manager chose to manage and administer the company, and the company undertook to remunerate him for those services. Accordingly, the ECJ found that their relationship could be regarded as being contractual in nature. The Court added that the activity of a manager creates close links of the same kind as those which are created between the parties to a contract. Accordingly, the claim was deemed to be contractual even though the action brought by the company against the former manager was based on the alleged breach of his obligation to perform his duties properly under company law.

May Article 7(1) be applied in a dispute regarding a promissory note?

Say a company issues a promissory note in favor of another company in order to guarantee the first company's obligations under an overdraft agreement. The promissory note is signed on behalf of the first company by its managing director. The director also signs the note on his own, marking it 'per aval'. If the note is not paid when it is presented at the due date, do the proceedings initiated by the second company against the managing director fall under Article 7(1)? According to the ECJ (ECJ, 14 March 2013, *Ceska sporitelna, as v Gerald Feichter*, case C-419/11), the legal relationship between the payee of a promissory note and the giver of an aval thereon falls within the concept of 'matters relating to a contract' within the meaning of Article 7(1). This is because the giver of the aval, when signing the promissory note voluntarily consents to act as the guarantor of the obligations of the person who has issued the note. Therefore, the obligation to guarantee those obligations is by his signature, freely accepted.

Article 7(1) may be applied even though the validity of the contract is disputed. It is not enough for one of the parties to challenge the validity of the contract to exclude the application of Article 7(1).

The court having jurisdiction under this provision, also has jurisdiction to rule on the validity of the contract. Article 7(1) may also apply if a party brings a claim to obtain a negative declaration that parties are not bound by a valid contract.

Article 7(1) does not grant jurisdiction to the courts of the place of performance of the contract in general. A contract usually creates several obligations – a sales contract *e.g.* imposes an obligation on the seller to deliver the goods and transfer the property, but also an obligation on the buyer to pay the price. In cross-border situations, the place of performance of these obligations may not be identical – it could be *e.g.* that the seller must deliver the goods at the buyer's premises, in Member State A, while the buyer should pay the price on the seller's bank account, opened with a bank in Member State B. It is therefore impossible to speak of a place of performance of the contract in general. One should rather focus on the place of performance of the *individual obligations* arising out of the contract.

Article 7(1) includes two different rules : a general one (article 7(1)(a)) and a specific rule covering two categories of contract (Article 7(1)(b)). The ECJ has decided that the rule of jurisdiction laid down in Article 7(1)(a) of the Regulation is only intended to apply in the alternative and by default with respect to the rules of jurisdiction in Article 7(1)(b).

Article 7(1)(a) : the general rule

The general rule is applicable to all contracts, provided the dispute falls under the scope of application of the Brussels Ibis Regulation. It grants jurisdiction to the courts of the Member State where the relevant obligation has been or should have been performed. Article 7(1)(a) requires that one should identify the 'relevant obligation'. This is not any one of the obligations arising out of the contract, but rather the obligation which is at stake in the dispute. If a contract creates two obligations, the only one relevant to determine which court has jurisdiction under Article 7(1)(a) is the obligation which forms the heart of the dispute, i.e. the obligation which arises under the contract and the non-performance of which is relied upon in support of the action.

De Bloos : a seminal case

This principle was established in the case *De Bloos* (ECJ, 6 October 1976, *De Bloos v Bouyer*, Case 14/76, ECR, 1976, I, 1497) : in that case, a Belgian company brought proceedings against a French company following the termination by the latter of an exclusive distribution agreement concluded between the two [at that time, there was no specific rule in the Regulation dealing with contract for the provision of services, such as Article 7(1)(b)]. The proceedings sought the dissolution of the contract by the court, on the ground of wrongful conduct by the defendant and the payment of damages.

Drawing on the need to avoid creating a situation in which a number of courts have jurisdiction in respect of one and the same claim, the ECJ held that Article 7(1)(a) could not be interpreted as referring to any obligation whatsoever arising out of the contract. On the contrary, the relevant obligation is, according to the Court, the “contractual obligation forming the basis of the court proceedings”.

The ECJ added that the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based. It is therefore not enough to look at what the plaintiff seeks. The remedy the plaintiff asserts may be only the procedural consequence of the breach of a contractual duty. It is that contractual duty which should be examined to determine which court has jurisdiction and not the remedy. When a party seeks

damages or the termination of a contract based on the fact that the other party has breached the contract, the relevant obligation is that which arises under the contract, the non-performance of which is relied upon to support the claim.

Once this obligation is identified, one should determine its place of performance. The Court of Justice has refused to apply a European standard to localize the place of performance : instead, this place should be determined using the rules and principles of the law applicable to the contract (ECJ, *Industrie Tessili Italiana Como*, case 12/76). In other words, the place of performance of the obligation is to be determined in accordance with the law governing the obligation according to the conflict rules of the court before which the proceedings have been brought. This renders the application of Article 7(1)(a) considerably more complex, as the court should first verify which law applies to the contract in dispute, before being able to decide whether it has jurisdiction. Matters are even more complex if one notes that the contract at stake may be subject to not a national law, but to a uniform law regime (such as the Vienna Sales Convention).

National law make different arrangements for the localization of the place of performance of a contractual obligation. The main principle under most national laws seems to be that an obligation should be performed at the place identified by the parties under their agreement. The ECJ has decided in this respect that given the importance generally granted by national law to the intention of the parties, if the parties to the contract are permitted by the applicable law to specify the place of performance of an obligation, that agreement on the place of performance of the obligation is sufficient to found jurisdiction in that place for the purposes of Article 7(1)(a) of the Regulation. However, parties are not free to designate a place of performance which has no real connection with the reality of the contractual relationship and at which the obligations arising under that relationship could not be performed in accordance with the terms of that relationship.

Failing such agreement between parties, a contractual obligation may be required to be performed at the place where the debtor is located (this is the case *e.g.* under Belgian law) or at the place where the creditor is located (as is the case *e.g.* under English law at least for the obligation by the buyer under a sales agreement to pay the price).

The application of Article 7(1)(a) may lead to a complex situation, if the dispute turns on several different obligations arising out of the same contract. The ECJ has indeed held that when a claim is based on several distinct obligation, the place of performance of each of these obligations should be determined individually. This entails identifying the law applicable to the contract in dispute and using the provisions of that national law to identify the place of performance of each of the obligations. It may well be that under the applicable provisions, all the obligations in dispute should be performed in the same country. In that case, the application of the European *forum contractus* does not lead to the splitting up of the litigation. One may, however, also find out that the various obligations do not have the same place of performance. In that case, a court having jurisdiction for one of the obligations cannot extend its jurisdiction to the other obligations, save when the obligation which should have been performed on its territory, is the main obligation and all other obligations are accessory (*'accessorium sequitur principale'*).

How should Article 7(1)(a) be applied in a dispute regarding a promissory note?

Say a company issues a promissory note in favor of another company in order to guarantee the first company's obligations under an overdraft agreement. The promissory note is signed on behalf of the first company by its managing director. The director also signs the note on his own, marking it 'per aval'. If the note is not paid when it is presented at the due date and the second company brings proceedings against the managing director, which court has

jurisdiction under Article 7(1)(a)? According to the ECJ, one should first take into account what parties have agreed in the promissory note : if the promissory note includes information on where payments should be made, this should be taken into account for the purpose of applying Article 7(1)(a). The only limitation is that parties are not entitled to designate a place of performance having no real connection with the reality of the contractual relationship and at which the obligations arising under that relationship could not be performed in accordance with the terms of the relationship. If the place of performance of the obligation is expressly indicated on the promissory note, the referring court is required to take it into account in order to determine the court having jurisdiction.

Article 7(1)(b) : the specific rule

Article 7(a)(b) offers a different version of the *forum contractus*. It has been adopted in order to simplify the application of this provision. Article 7(1)(b) covers two categories of contracts : sales contracts and contracts for the provision of services. Article 7(1)(b) does not cover all sales contracts and contracts for the provision of services. It only applies to those contracts where the place of delivery or place of provision of services is located in a Member State.

According to the Court of Justice, in order to classify a contract in the light of that provision, the classification must be based on the obligations which *characterise* the contract at issue (Case C-381/08 *Car Trim* [2010] ECR I-1255, paragraph 31 and 32). Hence, a contract may only be classified as a contract for the provision of services if its characteristic obligation is the provision of services. The concept of ‘services’ requires, according to the ECJ, at least that the party who provides the service should carry out a particular activity in return for remuneration (ECJ, *Falco Privatstiftung and Rabitsch*, case C-533/07). As far as the activity is concerned, what is required is the performance of positive acts, rather than mere omissions. The remuneration paid as a consideration for an activity is not to be understood strictly as the payment of a sum of money.

What is the nature of the relationship between a company and its manager?

In a case in which a manager who had been hired to manage a company and been appointed director of the company, had been fired, the Court held that the contract between the company and the manager was a contract for the provision of services. The Court noted that in the context of company law, since the characteristic obligation of the legal relationship between the manager and the company requires a particular activity in return for remuneration, the activity should be classified as a provision of services.

Is a distribution agreement an agreement for the provision of services ?

Say a company A concludes a contract with another one (B) whereby the latter is granted exclusivity to sell the products manufactured by the first one. The exclusivity is limited to a certain geographical area and B is required to buy the products exclusively from A. In the framework of this relationship, B regularly buys products from A. What is the nature of the relationship between A and B? Is this the mere addition of contracts for purchase and sale or is it something more? If the latter is true, is the agreement an agreement for the provision of services or the sale of goods?

This question was put to the ECJ in the case *Maison du Whisky*, in which a French and a Belgian company had worked together for ten years before the commercial relationship broke down.

In order to determine which limb of Article 7(1) could apply, the ECJ first attempted to determine the exact nature of the distribution agreement. The ECJ recalled that there are many different types of distribution agreements. However, they all have in common that a grantor commits to sell to the distributor, which it has chosen for that purpose, the goods to be ordered by the distributor in order to satisfy the requirements of its clients, while the distributor undertakes to purchase from the grantor the goods he needs. Such contracts aim to ensure the distribution of the grantor's products. The Court noted that a distribution agreement takes the form of a framework agreement, which lays down the general rules applicable to the future relations between the grantor and the distributor as to their obligations of supply and/or provision and prepares the subsequent sale agreements.

In the present case, the dispute related not so much to the successive sales agreements which concerned the delivery of specific goods, but rather the framework agreement, which concerned the future relationship between manufacturer and distributor. Turning to the application of Article 7(1)(b), the Court indicated that as far as the first requirement was concerned, i.e. the existence of an activity, the distributor is required, in the case of an exclusive distribution agreement, to distribute the grantor's products in order to acquire a larger share of the local market. This is a positive act which corresponds to the activity required under Article 7(1)(b). In other words, the characteristic service provided by the distributor goes beyond the services and benefits a mere reseller is able to offer to its clients.

Because he is selected by the manufacturer and he has the exclusive right to sell the manufacturer's products in a given territory, the distributor further enjoys a competitive advantage. That advantage, coupled with the other benefits to the distributor (such as the possibility to obtain assistance from the manufacturer regarding access to advertising, communicating know-how by means of training or payment facilities), represents an economic value for the distributor that may be regarded as constituting remuneration.

Therefore, a distribution agreement may in principle be regarded as an agreement for the supply of services for the purpose of applying Article 7(1)(b).

Article 7(1)(b) does not include any definition of sales contracts. The ECJ has refrained from providing a general definition. It has, however, given some guidelines which help to determine whether a given contract falls within this category. The first, basic element is that a sales contract aims at the transfer of property of some goods against the payment of a price. This basic definition does not make it possible, however, to solve all difficulties in relation to Article 7(1)(b).

May Article 7(1)(b) be applied to a contract for the sale of goods to be manufactured?

If a contract calls for a company to deliver goods which have yet to be produced, can this be considered a contract of sales? In *Car Trim*, the ECJ has to answer this question (ECJ, 25 February 2010, *Car Trim GmbH v KeySafety Systems Srl*, Case C-381/08). KeySafety, established in Italy, had purchased from Car Trim (established in Germany) components used in the manufacture of airbag systems. The contract required Car Trim to manufacture airbags of a certain shape, in the traditional manner of supplier of equipment for the automobile industry, using products purchased from agreed suppliers, so as to be able to supply them to order, according to the needs of KeySafety's product process and in conformity with a large number of requirements relating to the organisation of the work, quality control, packaging, labelling, delivery orders and invoices. A dispute arose between parties following the termination of the contract by KeySafety.

The ECJ noted that in the automobile sector, there is a high level of cooperation between suppliers and buyers, as the finished product on offer must be tailored to the precise requirement and individual specifications of the customer. The customer in this sector identifies his requirements with precision and provides instructions regarding the manufacture of the products, which the supplier must respect. Therefore, the manufacture of goods may also entail the provision of services, which come together with the supply of finished products.

According to the ECJ, a contract is a contract of sales for the purpose of Article 7(1)(b) if the characteristic obligation is the supply of goods. This provision may, according to the Court, apply whether the product under consideration is ready-made or must be manufactured in accordance with the buyer's requirements. A contract for the sale of goods to be manufactured may therefore also be a contract of sale. A further consideration to be taken into account in this respect is the origin of the raw materials used by the 'seller'. If all the materials to be used by the manufacturer for the goods, or most of them, have been supplied by the purchaser, this fact could be an indication that the contract should be classified as a contract for the provision of services. If on the other hand, the material has not been supplied by the purchaser, this fact is, according to the Court, a "strong indication" that the contract should be classified as a contract for the sale of goods.

Finally, the ECJ found that account should be taken of the supplier's liability : if the 'seller' is liable for the quality of the goods and their compliance with the contract, this may tip the balance in favour of a classification as a contract for the sale of goods. If the 'seller' is only responsible for the correct implementation of the instructions of the purchaser, this indicates that the contract may be a contract for the provision of services.

For these two categories, jurisdiction is also granted to the courts of the Member State where the obligation has been or should have been performed. However, Article 7(1)(b) directly selects the relevant obligation, without having regard to the actual dispute and the obligation at stake. For *sales agreements*, Article 7(1)(b) has selected the obligation to deliver the goods. For *supply agreements*, the relevant obligation is that to supply the services. These obligations are held to be characteristic of the contract. Their place of performance is therefore deemed to be a relevant connection for jurisdiction, no matter what is the actual object of the dispute. It may in other words well be that a given dispute in relation to a sales contract is not at all concerned with the obligation to deliver the goods, but rather with the obligation of the buyer to pay the price. The latter obligation will, however, have no role to play in the determination of the jurisdiction. Under Article 7(a)(b), jurisdiction is exclusively linked to the characteristic obligation.

Another difference with the regime applying in general for all contracts under Article 7(1)(a), is that Article 7(1)(b) directs the court to identify the place of performance of the contract taking into account the contract itself, without having to identify this place of performance under the applicable national law. Article 7(1)(b) requires that the court pays attention to the place which the parties have agreed upon for the performance of the characteristic obligation. If parties have included express provisions in their agreement on the place where the characteristic obligation (i.e. the obligation to deliver the goods or supply the services) should have been performed, application of Article 7(1)(b) should not give rise to much difficulty.

If the contract does not include an express provision on this issue, one should look more broadly for indications in the contract in general but also in the practices established between parties in order to identify the place of performance. The ECJ has indeed held the place where the services were provided or the goods delivered must be deduced 'in so far as possible' from the provisions of the

contract itself. In the absence of a clear, express provision dealing with this issue, the court should attempt to infer the place of performance from other circumstances.

In a case where a dispute had arisen between a company and its manager, the ECJ first noted that the contract concluded between the two did not contain any clause specifying where the manager had to carry out his activities (ECJ, 10 Sept. 2015, *Holterman Ferho Exploitatie BV et al. V F.L.F. Spies von Büllenheim*, case C-47/14). The Court nonetheless held that the national court should attempt to ascertain the place where the services were mainly provided by the manager taking into account other elements such as the articles of incorporation or any other document that defines the obligations of the manager vis-à-vis the company. If those document do not make it possible to determine where the manager should have performed his services, the ECJ directed the national court to look at the actual practice of parties : where did the manager in fact worked most of the time? The national court should in other words look at the time spent by the manager in the various places where he worked and the importance of the activities carried out there. The only limitation imposed by the ECJ was that the national court could only take into account a place which is not contrary to the parties' intentions.

Legal basis : Art. 7(1) Brussels Ibis Regulation; art. 96 Code of private international law

Case law : ECJ, case 56/79, *Zelger v Salinitri* [1980] ECR 89; ECJ, case C-106/95, *MSG v Les Gravières Rhénanes Sarl* [1997] ECI I-911; ECJ, case 14/76, *de Bloos sprl v Bouyer SA* [1976] ECR 1497; ECJ, case C-29/91, *soc. Jakob Handte GmbH v Soc Traitements Mécano-chimiques des surfaces* [1992] ECR I-3967; ECJ, case 12/76, *Industrie Tessili Italiana Como v Dunlop AG* [1976] ECR 1473.

- ECJ, 28 January 2015, case C-375/13, *Harald Kolassa v Barclays Bank plc*

Mr Kolassa, a consumer domiciled in Vienna (Austria) bought financial instruments (bearer bonds linked to an index made up of a portfolio of several target funds) issued by an English bank, Barclays Bank. The investment was made through an Austrian bank, which bought the certificates from a German bank, which had bought them from Barclays. The bearer bonds were issued by Barclays Bank. After several years, the bonds lost all their value. Mr Kolassa brought proceedings in Vienna seeking payment of compensation on the basis of the contractual, precontractual and delictual liability of Barclays. The first question which arose was that of the jurisdiction of the courts in Vienna. The ECJ reviewed whether the dispute could fall under Article 7(1) of the Brussels Ibis Regulation, which applies in “matters relating to a contract”. According to the ECJ, the concept of “matters relating to a contract” must be understood independently of the meaning given to that concept in national law. The ECJ underlined that if Article 7(1) could be applied even if no contract had been concluded between parties, it could, however, only be applied provided an obligation could be identified : Article 7(1) could only be applied provided one establishes a legal obligation freely consented to by one person towards another and on which the claimant's action is based. As there was no such obligation in the relationship between Mr Kolassa and Barclays, Article 7(1) could not be applied.

LIS ALIBI PENDENS

Concept

It is not uncommon to find out that a cross-border dispute may be brought before the courts of two (or even more) States. This may be the case because each State has adopted its own rules of cross-border jurisdiction, without taking into account the jurisdiction claimed by other countries. Say two parents who live in different States are involved in a dispute concerning the place of residence of their child, who currently spends fifty percent of his time with each of his parents : if each of the two States concerned make it possible to bring proceedings relating to parental responsibility before the courts of the habitual residence of the child, each of the parents could indeed start proceedings before the courts of its own residence.

Even when States have adopted common, uniform rules of jurisdiction, such situations of concurrent jurisdiction may exist. Say that country A and country B adopt common rules of jurisdiction and decide that proceedings may be brought before the courts of the State where the defendant habitually resides (a rule to be found in Article 4 of the Brussels Ibis Regulation). Even though A & B use identical rules of jurisdiction, if a dispute opposes two persons who each reside in one of those countries, court proceedings could be brought by one of these parties in country A and by the other in country B. The fact that the same dispute may be brought before the courts of different States creates an opportunity for arbitrage between different options – a phenomenon known as '*forum shopping*'.

The existence of concurrent jurisdiction in cross-border private dispute is very common. It is less common that concurrent proceedings are effectively brought before two different courts by the parties concerned. Starting court proceedings indeed requires that each party invests resources and time. Concurrent proceedings will only arise when each party is convinced that the court it chooses to seize, offers a substantial advantage.

Literally, the phrase *lis alibi pendens* refers to the situation in which concurrent proceedings relating to the same dispute are pending before the courts of different States. This phrase also serves to designate the mechanism used to deal with concurrent proceedings, and more specifically the rule according to which one of the proceedings enjoy priority over the other.

The existence of concurrent proceedings before the courts of different countries, is not conducive to justice. Such concurrent proceedings indeed bring about unnecessary expenses since both courts are seized of the same dispute. It may (although it will not necessarily) also lead to the existence of conflicting judgments. The dispute could indeed be settled differently by the two courts.

Legal regime

In most European countries, situations of *lis alibi pendens* are dealt with by granting priority to the court first seized. In other words, one of the two proceedings is granted priority and the other is forced to stop. The priority is granted based on the date at which the two proceedings were started. The first proceedings enjoy priority. This crude mechanism, which does not take into account the nature and intensity of the link which exists between the two courts and the dispute of which they are seized, has the benefit of clarity and certainty. It is indeed enough to consider the day and time at which both courts were seized to decide on the plea of *lis alibi pendens*. On the other hand, granting priority to the court first seized may give an incentive to parties to rush to court.

The *lis alibi pendens* mechanism has been adopted by a number of countries. In Belgium, it may be found in Article 14 of the Code of private international law. According to this provision,

“When an action is pending before a foreign court and it is anticipated that the foreign decision shall be amenable to recognition or enforcement in Belgium, the Belgian court that is later seized of an action between the same parties, with the same object and cause of action, may stay its proceedings until the foreign decision has been rendered. The court takes into account the requirements of due process. The court declines jurisdiction when the foreign decision can be recognized by virtue of the present statute.”

Article 14 makes it possible for a Belgian court seized of proceedings, to stay those proceedings when it finds out that the dispute has already been brought before another court. This is merely a possibility, not an obligation. Whether or not a Belgian court will indeed grant priority to a foreign court which has been earlier seized of the same dispute, depends among other on the question whether the judgment to be issued by the foreign court, is amenable to recognition in Belgium.

The *lis alibi pendens* mechanism has found its way in most European private international law Regulations. The best well known application of the mechanism may be found in Article 29 of the Brussels Ibis Regulation, which provides that if two courts are seized of the same dispute, the first one enjoys priority. The second one must strike out the case and defer to the court first seized. The same mechanism may be found *e.g.* in Article 19 of the Brussels IIbis Regulation (dealing with cross-border divorces), Article 12 of the Maintenance Regulation (Regulation 4/2009) and Article 17 of the Succession Regulation (Regulation 605/2012). The ECJ has decided that the various *lis alibi pendens* mechanisms found in EU Regulations must be interpreted autonomously, meaning that no reliance should be placed on the meaning of the concepts in the laws of Member State for their interpretation.

Identity of proceedings

One key element of the *lis alibi pendens* mechanism is the definition of the identity between court proceedings. The mechanism only intervenes provided the two concurrent proceedings are sufficiently identical. In EU private international law, this identity is defined with reference to the existence of the same cause and the same object. Those concepts are given a very wide meaning by the case law of the ECJ.

A distinction must be made between the identity between the parties to the proceedings and the identity of the dispute submitted to the courts concurrently seized.

As far as the identity of parties is concerned, the ECJ has decided that it does not matter which role each of the parties play : it may be that a given party is the plaintiff in proceedings started in country A, while the same party is the defendant in the proceedings concurrently started in country B. This does not mean that the parties are not identical. In other words, the question whether the parties are the same cannot depend on the procedural position (plaintiff, defendant) of each of them in the two actions. The Court has also decided that when the two sets of proceedings involve the same dispute, but not all the parties involved are the same, the *lis alibi pendens* mechanism may be used to the extent to which the parties are identical. In other words, the proceedings will only be stopped in relation to some of the parties, but may be continued as between the other parties (ECJ, 6 December 1994, *The owners of the cargo lately laden on board of the ship ‘Tatry’ v. the owners of the ship ‘Maciej Rataj’*, case C-406/92, ECR, 1994, I, 5439).

How does one determine whether the two proceedings relate to the same dispute? In European private international law, the objective identity between proceedings has been defined by using the concepts of cause of object of the action. According to the ECJ, the 'cause of action' includes the facts and the legal rules relied on as the basis of the action, while the 'object of the action' means the end the action has in view.

Should proceedings be exactly identical in order for the lis alibi pendens mechanism to apply?

The European Court of Justice has decided that when a party brings an action seeking performance of a contract while the other party brings concurrent proceedings before the courts of another Member State, seeking a declaration that the contract is inoperative, there is identity of proceedings. In this case, an Italian national had allegedly bought a machine from a German company. Faced with the non-performance by the buyer, the German company brought proceedings before a court in Germany seeking a judgment ordering the Italian buyer to pay the price. The Italian buyer brought proceedings before an Italian court relating to the validity of the contract : the buyer sought a declaration that the contract was inoperative because his order had been revoked before it had reached the German seller for acceptance. The ECJ held that two proceedings had the same 'cause of action' because they were based on the same contractual relationship. Further, the Court held that those proceedings had the same object because the question whether the contract is binding lied at the hear of the two actions. The Court was directly inspired by the need to avoid the existence of conflicting judgments : if the two proceedings were allowed to proceed, it could be that one of the courts decide that the contract was valid and enforceable while the other took the view that the contract was not unforceable (ECJ, 8 December 1987, *Gubisch Maschinenfabrik KG v Giulio Palombo*, case 144/86, ECR, 1987, 4861).

In the same line, there is identity of proceedings according to the ECJ when a first court action seeks to have the defendant held liable for damage caused to a shipment of goods carried by boat, while another action has been brought to seek a declaration that the defendant in the first action is not liable for that loss. The Court underlined that the issue of liability was central to both actions : the action for a declaration of non-liability brought by shipowners and the action brought by the owners of the goods carried on the ships on the basis of shipping contracts were both concerned by the liability of the shipowners. The fact that one of the actions was seeking a declaration of non-liability, and was therefore quite the opposite from the other action, where damages were sought, did not make the object of the dispute different. According to the Court, the fact that a party seeks a declaration that he is not liable for loss implies that he disputes any obligation to pay damages (ECJ, 6 December 1994, *The owners of the cargo lately laden on board of the ship 'Tatry' v. the owners of the ship 'Maciej Rataj'*, case C-406/92, ECR, 1994, I, 5439).

What happens to concurrent proceedings which are not identical?

The ECJ has adopted a very broad definition of the *lis alibi pendens* mechanism. This mechanism applies even if the concurrent proceedings are not identical : it is sufficient that the concurrent proceedings could lead to conflicting judgments. Even taking this interpretation into consideration, there could be cases where related disputes are brought before two courts. Related disputes are disputes which concern the same fact pattern, but are not sufficiently identical to trigger the application of the *lis alibi pendens* mechanism. This could be the case when proceedings in Member State A are concerned with a preliminary question which could be important for the outcome of a dispute pending in the courts of Member State B.

Say a company based in Belgium (A) has ordered handbag metal hardware accessories from a company based in Italy (B) and that the latter has used, to manufacture the accessories, components bought from another company in Italy (C). The buyer (A) finds out that the accessories present serious defects and starts discussion with its seller (B) to obtain compensation. In order to avoid being brought before a court in Belgium, the Italian seller (B) brings proceedings before a court in Italy seeking a declaration of non liability. A few weeks later, the Belgian company (A) brings proceedings before a court in Belgium against both its seller (B) and the latter's own supplier (C), seeking damages. The action brought by A against B must be stayed, since earlier proceedings, having the same object and the same cause, have been brought before the courts in Italy. This is not the case for the proceedings brought by A against C. The court in Belgium may, however, find it appropriate to stay the proceedings against C as well as they are related to the proceedings pending in Italy.

In most European private international law regulations, a specific provision is made for related actions. These provisions make it possible for the court second seized to stay its proceedings. This is not an obligation, but merely a possibility. The related actions mechanism has a residual, subsidiary role : it only comes into play when it appears that the actions are not sufficiently similar to justify the application of the *lis alibi pendens* mechanism.

When is a court seized?

A rule of priority such as the European *lis alibi pendens* only works provided it may clearly be determined which court was seized first. Given that the two courts are located in different States, there is a need for a neutral rule which may be used to determine at what point the courts were seized. If the two courts each determine the time at which they were seized using their own national rule, there is a risk that a court may enjoy a competitive advantage. This is why the Brussels Ibis Regulation includes a European rule which may be used to determine when proceedings were started (Article 32).

Article 32 distinguishes between two situations, depending on how the court proceedings have been instituted:

- if the document instituting the proceedings ('citation' / 'dagvaarding' / 'writ' etc.) must first be served to the defendant before being filed with the court, the relevant point in time is the moment at which the authority responsible for service has received the document
- If the document instituting the proceedings must first be filed with the court, the relevant moment in time is the moment at which the document is indeed lodged with the court.

This definition makes it easier to apply the *lis alibi pendens* mechanism. It avoids the reference to national law. It does not, however, bring about a complete equality between litigants. Depending on the way court proceedings are instituted, it could be easier for a litigant to file proceedings and hence obtain the benefit of the *lis alibi pendens* rule. Further, the rule is not helpful if it appears that the two courts were seized on the very same day.

What should a court do when it is seized in parallel with another court?

When a court is seized of a dispute and it finds out that concurrent proceedings are already pending

before another court, it must first decide whether it has jurisdiction to hear the dispute. If this is not the case, it should decline jurisdiction. There will no longer be any concurrent proceedings. If it finds that it has jurisdiction, then the court second seized should stay its proceedings until the court first seized has decided whether it has jurisdiction. If this is the case, the court second seized should decline to hear the case.

Lis alibi pendens rule and litigation strategy

The fact that the court first seized enjoys priority, may induce a *rush to the court* : when a dispute arises, parties may be tempted not to negotiate and enter into discussion with a view to find a settlement, but rather to seize a court as soon as they can, in order to secure the advantage of the court of their choice.

Since the court second seized is under the obligation to stay its proceedings, the *lis alibi pendens* mechanism could also be used to buy time : a party who may have an advantage in dragging a dispute and prolonging it, may be tempted to seize a court quickly, in order to make it impossible for the other party to go to the court of its choice. A party may even be tempted to bring proceedings before a court with a reputation for not handling disputes quickly, in the hope of delaying the outcome of the dispute. This technique is called the 'torpedo' : bringing a torpedo means launching proceedings before a court in the hope of delaying as much as possible the outcome of the case. This could be made possible if the court seized is incapable of dealing swiftly with the dispute or if the applicable rules and practices make it possible for the plaintiff to delay the proceedings.

Given the far reaching effects of the European *lis alibi pendens* mechanism, a party could gain a major advantage by bringing proceedings before the courts of a given Member State : since no further proceedings could be brought before the courts of any other Member State, this could force the other party to negotiate. The negotiations would then be conducted with a significant advantage for the party who has brought the proceedings, since it could rely on the fact that if discussions fail, the dispute would be litigated before the court of its choice.

What happens if the first proceedings are brought before a court while parties had agreed to grant exclusive jurisdiction to another court?

In principle, choice of court agreements are binding and enforceable. Therefore, if a company concludes such an agreement, it may start from the assumption that proceedings will not be brought before another court. Does this, however, also apply when one takes into account the effects of the *lis alibi pendens* mechanism? Does the court first seized in other words enjoy priority if it appears that parties to the dispute had agreed to grant exclusive jurisdiction to the court second seized? This question was at the heart of the *Gasser* case and the *PrimaCom* case.

PrimaCom was a large German company active in the cable industry. In the 1990's it had acquired several other cable TV companies. At one point, its debt load became, however, unsustainable. It entered into discussions with a syndicate of banks. The resulting agreements included an exclusive choice for English courts and English law. In 2004, PrimaCom brought proceedings before a local court in Germany, challenging the claims for interest made by some of its bankers. PrimaCom argued that some of the provisions in the contracts concluded with its bankers would be in violation of German usury laws. Those proceedings were brought before a German court with the evident intention of frustrating proceedings to enforce the loan agreement in England. PrimaCom was probably seeking to

buy time and to exercise pressure on the banks to negotiate a new package. The banks challenged the jurisdiction of the courts of Germany, arguing that an exclusive choice had been made for the courts of England. Concurrent proceedings were therefore brought by the banks before the courts of England.

In *Gasser*, the ECJ was faced with the question whether to give priority to the *lis alibi pendens* mechanism or to make it possible for the court second seized to hear the claim, notwithstanding the fact that concurrent proceedings had been started earlier before another court, because parties had agreed to grant jurisdiction to the court second seized. The *Gasser* case concerned proceedings brought in Austria, by an Austrian company against an Italian company. The latter argued that the proceeding in Austria should be stayed because it had already seized a court in Italy of concurrent proceedings. The Austrian company challenged the operation of the *lis alibi pendens* mechanism, arguing that the court first seized should not enjoy any priority when parties had agreed to grant exclusive jurisdiction to the court second seized.

The ECJ refused to give priority to the court chosen by parties. It explained that the principle of mutual confidence required that each court decides on its own jurisdiction. The ECJ justified its ruling by the need to prevent parallel proceedings before the courts of different Member States and to avoid conflicts between decisions which might result from them. If parties had indeed made a valid choice of court in favor of the court first seized, the ECJ argued that the court second seized would inevitably decide that it did not have jurisdiction. Hence, the consequence of the *lis alibi pendens* would be limited in time and that the end of the day, choice of court agreements would be upheld (ECJ, *Erich Gasset GmbH v Misat Srl*, case C-116/02).

The *Gasser* decision has been heavily criticized. Critics argued that by upholding the *lis alibi pendens* mechanism, the ECJ has threatened the sanctity of choice of court agreements and has unreasonably broadened the scope of the *lis alibi pendens* mechanism. One of the consequences of the *Gasser* ruling was that if there is a dispute as to the validity or enforceability of the choice of court agreement, it fell on the court first seized to decide this dispute. Indeed, the court second seized, even though it has been chosen by parties, could only stay its proceedings and wait until the court first seized had decided on its own jurisdiction.

The *Gasser* ruling was applied in the *PrimaCom* case : much to its regret, the English court was forced to acknowledge that it had been seized second and that priority should be given to the courts of Germany, which had been seized first.

When the Brussels *Ibis* Regulation was adopted, a new provision was included to overrule the *Gasser* case. According to Article 31, paragraph 2 of the Regulation, if concurrent proceedings are started before the courts of two Member States, the court having jurisdiction under a choice of court agreement, enjoys priority : it may take up the case even though it was seized later than another court. All other courts must stay their proceedings until the court seized on the basis of the agreement has made a decision on its jurisdiction. In other words, the priority in time rule has been replaced by a priority for the court chosen by parties.

Legal basis : Art. 29 Brussels *Ibis* Regulation; Art. 14 Belgian Code of Private International law

Case law :

- ECJ, 6 December 1994, *The owners of the cargo lately laden on board the ship 'Tatry' v the owners of the ship 'Maciej Rataj'*, case C-406/92.

In this case, a cargo of soya bean oil belonging to a number of companies was carried in bulk on board a ship (the 'Tatry') belonging to a Polish company from Brazil to Rotterdam and then Hamburg. Upon arrival, the cargo owners complained that the soya bean had been contaminated with diesel. Before the cargo owners started any proceedings, the shipowner started proceedings before a Dutch court, seeking a declaration that they were not liable or fully liable for the alleged contamination. The shipowners also initiated proceedings seeking to limit their liability. The cargo owners brought various proceedings in England, seeking damages for their alleged loss. These proceedings were issued 'in rem', meaning that they directly aimed at the ship. The question arose whether the various proceedings were identical for the purpose of the *lis alibi pendens* provision. The ECJ held that for the purpose of applying the European *lis alibi pendens* provision, an action seeking to have the defendant held liable for causing loss and ordered to pay damages, has the same cause of action and the same object as the earlier proceedings brought by the defendant seeking a declaration that he is not liable for that loss. According to the Court, the 'cause of action' comprises the facts and the rule of law relied upon as the basis of the action. The 'object' means the end the action has in view. The Court held that an action seeking a declaration that a person is not liable for damage has the same object as an action seeking to have that person held liable for causing loss and ordered to pay damages, as the issue of liability is central to both actions.

- *de Dampierre v de Dampierre* [1988] 1 AC 92

In this case, decided by the English House of Lords (today referred to as the Supreme Court), two French nationals were married in France. They lived in England. When the couple split, the husband issued proceedings before the courts in France, seeking divorce. His wife also sought divorce, but before the English court. The issue put to the English courts was how to react to the existence of concurrent divorce proceedings pending in France. Today, this case would be solved using the *lis alibi pendens* mechanism found in the Brussels IIbis Regulation (Regulation 2201/2003 dealing with cross-border divorce and parental responsibility issues).

Other languages:

FR : 'litispendance'; NL : 'aanhangigheid'; DE : 'Rechtsanhängigkeit'

ROME I REGULATION

Origin

Within the EU, work has been undertaken quite early to unify the conflict of laws rules in relation to cross-border contracts. This first resulted in the adoption of the 1980 Rome Convention. This international treaty was concluded by Member States of the EU. It provided uniform rules determining which law applied to cross-border contracts. The Rome Convention was based on the principle that cross-border contracts are governed by the law chosen by parties. It also provided default rules which made it possible to determine which law applies to a cross-border contract in case parties had not chosen the applicable law.

In 2008, the EU adopted the Rome I Regulation (Regulation 593/2008) : the Regulation takes over for a large part the rules of the Rome Convention, while bringing some adaptations to the text. The Rome I Regulation is in force in all Member States (save Denmark). It applies to cross-border contractual relationships.

Both the Rome Convention and the Rome I Regulation provide uniform conflict of laws rules dealing with cross-border contracts. The method used to provide a European legal framework for these contracts is a modest one : the EU has not attempted to agree on a set of uniform *substantive* rules which would govern cross-border contracts. While the EU has engaged in some efforts to create such a uniform framework in limited areas (*e.g.* the rules adopted in relation to agency contracts or consumer contracts), it has refrained from launching a full scale harmonization effort. This is certainly linked to the lack of proper legal basis which would allow the EU to undertake such an effort. On the other hand, the Member States also resist unification of contract law, as this would take away from their hands an important tool of economic regulation.

According to its Preamble, the Rome I Regulation aims to improve the functioning of the internal market. The argument is that having uniform conflict-of-law rules in all Member States will increase legal certainty and the predictability of the outcome of litigation, as the law applicable to a contract will no longer depend on which court is seized of a dispute. This will in turn make it easier for companies to trade across national borders. As the Court of Justice has held, the function of the Regulation is to “raise the level of legal certainty by fortifying confidence in the stability of legal relationships and the protection of rights acquired over the whole field of private law”. Given that most Member States already recognized the possibility for parties to select the law governing their contract, one may question the need for a European intervention. However, the Rome I Regulation has certainly achieved a very high level of uniformity as it includes detailed conflict-of-laws rules covering various types of contracts. At the same time, some of the rules included in the Regulation serve other purposes, such as protecting consumers or employees.

To some extent, the existence of European conflict of laws rules reduces the incentive for litigants to select a court on the basis of the law which will be applied to the contract. As all European courts are bound by the same rules, it may be assumed that courts will apply the same law to a given contract. In this respect, the Rome I Regulation is a natural complement to the Brussels *Ibis* Regulation. The link between the two Regulations is even stronger if one considers that the application of certain provisions of the Brussels *Ibis* Regulation cannot be contemplated without first determining the law applicable to the contract in dispute. This is the case under Article 7(1)(a) of the Brussels *Ibis* Regulation, which grants jurisdiction to the courts for the place of performance of the contract.

Application

The Rome I Regulation is in force in all Member States, save Denmark. It enjoys a very wide scope of application : it may be applied without any consideration of the domicile, residence or nationality of the parties to the contract at hand. The Regulation may in other words be applied even though the contract at hand was concluded between two companies none of which is established within the EU. The Regulation may also be applied if its rules designate the law of a non member State. This follows from Article 2 of the Regulation, which provides that “[a]ny law specified by this Regulation shall be applied whether or not it is the law of a Member State”. If a court in Belgium finds that a contract between a company established in India and another one established in Belgium is governed by the laws of India, the fact that India is not bound by the Regulation does not prevent the application of the European rules. The ‘universal’ nature of the conflict of laws rules included in the Rome I Regulation is useful, as it obviates the need for Member States to adopt subsidiary conflict of laws rules for cases in which the Rome I Regulation would not apply.

Two basic requirements must be met for the Regulation to apply : first, the dispute must fall within the jurisdiction of the courts of a Member State; second, the dispute must turn on a contractual obligation. The provisions of the Rome I Regulation are also applicable outside its scope of application in Belgium thanks to Art 97 CODIP. This latter provision indeed broadens the application of the European rules to contractual issues not falling under the Regulation.

Scope of application

The Rome I Regulation applies to “contractual obligations in civil and commercial matters”. The Regulation does not define what is to be understood under ‘civil and commercial matters’. Presumably, one may refer to the interpretation given by the Court of justice in relation to the Brussels *Ibis* Regulation. The Preamble of the Regulation indeed refers to the fact that the “substantive scope” of the Regulation should be consistent with that of the Brussels *Ibis* Regulation.

As is the case with the Brussels *Ibis* Regulation, the Rome I Regulation excludes a number of questions from its scope of application. Some of the matters excluded from the scope of application involve obligations arising in relation to fields of law outside the commercial sphere. This is the case for questions involving the status or legal capacity of natural persons, obligations arising out of family relationships and obligations arising out of matrimonial property regimes and wills and successions, which are expressly excluded from the scope of application of the Regulation.

Other exclusions relate to obligations arising in relation to commercial practices, such as obligations arising under bills of exchange, cheques and promissory notes, questions governed by the law of companies and other corporations or the question whether an agent is able to bind a principal. Another issue excluded out of the scope of application of the Regulation relates to the obligations “arising out of dealings prior to the conclusion of a contract” (Art. 1 par. 2, i).

One important exclusion is that of “arbitration agreements and agreements on the choice of court”. This may be surprising, given that these agreements are plainly contractual by nature. However, the application of the Rome I Regulation may endanger the application of the specific standards which aim expressly at those procedural agreements. For choice of court agreements, Article 25 of the Brussels *Ibis* Regulation includes detailed standards dealing with substantial and formal validity requirements. These standards prove sufficient to answer most questions arising in relation to such agreements.

The Regulation is further only applicable to “contractual obligations”. The Regulation neglects to

define this concept. The Court of Justice has yet to provide guidance on the interpretation of this concept. It is very likely that the Court will refuse to refer to national interpretations when defining the exact scope of the Regulation. Instead, the ECJ will in all likelihood prefer an autonomous, European definition of the concept of “contractual obligations”. It remains to be seen whether the ECJ will find inspiration in its case law dealing with Article 7(1) of the Brussels Ibis Regulation. When dealing with this provision, the ECJ has held that there can only be a contractual obligation when a person has freely consented to an obligation. This central element of the definition given by the Court, will most probably find its way in the definition of the concept of “contractual obligations” under the Rome I Regulation.

Although the Rome I Regulation has no binding effect on arbitral tribunals, it may be applied by arbitrators. In fact, the Regulation constitutes useful guidance for arbitrators seeking to determine the law applicable to an international contract. Arbitrators may rely on the provisions of the Rome I Regulation as it represents a useful codification of the conflict of laws rules in contractual matters.

Principle : freedom of choice

The Regulation first recognizes that parties to a cross-border contract have the freedom to select which national law governs their contract. This freedom is enshrined in Art. 3 of the Regulation. Art. 3 confirms the validity and enforceability of choice of law provision. In order to be valid under the Rome I Regulation, a choice should be drafted clearly and unambiguously. Parties need not, however, select the law of one of the countries in which they are established or the law of a country with which the contract is otherwise linked. Parties may also select the law of a non Member State. Parties may even decide to make a partial choice of law, *i.e.* select a governing law but only for a limited section of their contract – although this is in practice not advisable. Parties may also modify a choice of law during the course of their relationship.

A choice of law agreement may read as follows:

“The present Agreement shall be exclusively governed by the laws of Germany”

or : “This Services Agreement, included all matters relating to the validity, construction, performance and enforcement thereof, shall be governed by the laws of the Commonwealth of Massachusetts, without regard to its conflict of laws rules”

Limitations to the freedom of choice

The Regulation limits the freedom of parties in various ways :

- For *purely domestic contracts* : a choice of law will be disregarded if it is included in a contract which does not have any cross-border dimension. Such a choice does not by itself give the contract an international dimension. According to Article 3 par. 3 of the Regulation, such a choice will not have any impact on the contract, save that it will subject the contract to the rules of the law chosen, which are not contrary to the mandatory provisions of the country in which all elements of the contract are located.
- For *European contracts* : a choice for the law of a non Member State will be disregarded if all elements of the contract are located in the EU. Such a choice does not make it possible to escape the mandatory provisions of EU law which would otherwise have been applicable (Art. 4 par. 4 Regulation). It may not be easy to identify which

provisions of EU law are deemed to be mandatory in the sense of Article 4 par. 4.

- For *all contracts* : a choice of law does not allow parties to escape the application of the provisions of the law of the forum (i.e. the court seized of the dispute) which are internationally mandatory. Article 9 par. 2 of the Regulation directs the court to apply its own mandatory provisions, even if parties have chosen to subject the contract to another law. A choice of law is therefore not a good device in order to escape from the application of these mandatory rules.
- For *consumer contracts, employment contracts and insurance contracts* : the Rome I Regulation limits the effects of a choice of law for those categories of agreements. The rationale for this limitation is that in such contracts, one of the parties (the business, the employer or the insurer) will almost always have the upper hand and hence could impose the application of its own law (or the law of its choice), thereby depriving the other party (consumer, employee, insured) not only of the possibility to negotiate a choice of law agreement, but also of the protection of a law which would have applied in the absence of a choice of law. The Rome Regulation therefore limits the effects of a choice of law in such contracts. Under art. 8 par. 1 of the Regulation for example, a choice of law included in an employment contract is in principle valid and must be upheld. However, Article 8 par. 1 provides that such a choice may not deprive the employee of the protection afforded to him by the national law which would have applied in the absence of a choice of law. This mechanism is rather complex : it requires the court to first identify which law would have applied in the absence of a choice of law. This is done using the default rules found in Article 6 par. 1 (consumer contracts) and in Article 8 par. 2 (employment contracts). The court should then compare the protection afforded to the consumer or employee by the contract, as validated by the law chosen by parties, with the protection the consumer or employee would benefit under the mandatory provisions of the law which would apply in the absence of a choice of law.

Which law applies if parties have not selected the applicable law?

The Regulation also provides a default rule: Art. 4 provides guidance to determine which law applies to a contract if parties have not made a choice of law. The main principle of Art. 4 is that a contract is governed by the law of the country where the debtor of the *characteristic performance* is located. The *characteristic performance* is the contractual obligation which distinguishes a given contract from all other types of contract. In a sales agreement for example, the characteristic performance is that of the seller to transfer the property of the goods sold to the buyer.

It is important to note that under Article 4, the *place* of performance of the characteristic obligation is not relevant. Relevant is rather the place where the debtor of that obligation is *established*.

Article 4 par. 1 of the Regulation offers a *first series of rules*, which concern a number of designated categories of contracts. For these contracts, Article 4 par. 1 has already identified the characteristic performance. Article 4 par. 1 indicates for example that a contract for the sale of goods is governed by the law of the country where the seller has his habitual residence, because under Article 4 the seller is deemed to be the debtor of the characteristic performance. The same provision indicates that a contract for the provision of services is governed by the law of the country where the service provider has his habitual residence.

Article 4 par. 2 offers a *general rule* for the contracts which do not fit within one of the categories

listed in Article 4 par. 1. For those contracts, Article 4 par. 2 reiterates the principle that the contract is governed by the law of the country where the party effecting the characteristic performance is located.

If the mechanism of the characteristic performance does not work, Article 4 par. 4 provides another solution : the court may in that scenario look for the law of the country with which the contract is most closely connected. This mechanism does not offer much legal certainty. It is difficult to predict with which law a court will find that a contract is most closely connected.

Special default rules are provided for selected categories of contracts:

- For *consumer contracts*, Article 6 par. 1 provides that the contract is governed by the law of the country where the consumer habitually resides. The consumer enjoys in other words the benefit of the application of its 'own' law. While there is no guarantee that this law is the most protective of consumers' interests, the consumer will at least not bear the burden of a litigation involving the application of a foreign law. This rule only applies to certain contracts : a contract is deemed to be a consumer contract for the application of Article 6 when the consumer is a natural person acting for a purpose outside his trade or profession. The consumer must have concluded a contract with a professional. Further, the contract must have been concluded in specific circumstances : it is required either that the professional pursues his commercial or professional activities in the country where the consumer habitually resides or that the professional directs his activities to that country. In other words, a consumer only enjoys the benefit of this protective rule if he has been 'passive' and the contract acquired an international dimension through the intervention of the professional.
- For *employment contracts*, Article 8 par. 2 of the Regulation indicates that such contracts are governed by the law of the country in which the employee habitually carries out his work. In other words, one should look to the place where the employee is performing his work. The law of this country applies to the contract if parties have not selected the applicable law. Determining where an employee habitually carries out his work may be difficult, for example if an employee works as a pilot for an airline company, is constantly traveling between different places or has been posted for a long period by his employer to work in another country. Article 8 par. 2 includes some wording which may help to answer this question : it indicates that the applicable law is that of the country “from which” the employee habitually carries out his work. It further adds that the country where the work is habitually carried out “shall not be deemed to have changed if he is temporarily employed in another country”. If it remains impossible to locate the place where the employee habitually carries out his work, Article 8 par. 3 provides that the contract shall be governed by the law of the country “where the place of business through which the employee was engaged is situated”.

Exception

Article 4 of the Rome I Regulation allows the court to deviate from the normal results reached under its rules. Article 4 par. 3 makes it possible to deviate from the mechanism of the characteristic performance when it appears that the contract is “manifestly more closely connected” with another country than the country whose law would normally apply.

Scope of the law applicable to a contract

Which issues are governed by the law declared applicable to a contract under the provisions of the Rome I Regulation? If the applicable law has been chosen by parties, this depends in the first place on the wording of the contract and more specifically of the choice of law provision. One should examine the choice of law provision in order to find out which issues parties wanted to submit to the law they have chosen.

Most choice of law provisions are, however, not very precise in defining the scope of the law chosen. A typical choice of law provision will state that “The present contract is governed by the law of ...”. Hence, one is left without much guidance as to the scope of the law chosen.

Furthermore, many contracts do not include a choice of law. The applicable law must then be determined using the default rules, such as Article 4 of the Regulation.

In view of these difficulties, Article 12 of the Regulation provides a list of issues which are governed by the law applicable to the contract. This list is not meant to be an exhaustive guide. It only provides a first indication on the scope of the law applicable to the contract. Among the issues which are deemed to fall under the law governing the contract, one may refer to the interpretation and the performance of the contract. Article 12 also includes in the list the various ways of extinguishing contractual obligations, including rules relating to the statute of limitation and the consequences of the nullity of a contract.

Exclusion of renvoi

The Regulation excludes the mechanism of *renvoi* : when a law is deemed to be applicable under the Regulation, regard should only be had to the substantive provisions of that law and not to its conflict of laws rules (art. 20).

Legal source : Rome I Regulation

Case law :

ECJ, 6 October 2009, *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuizen BV and MIC Operations BV*, case C-133/08.

In this case, the question arose in which circumstances one could apply the exception clause provided in Article 4(3) of the Regulation. This rule makes it possible to put aside the law which would normally apply to a contract if parties have not made a choice of law, i.e. the law of the country where the party effecting the most characteristic performance is established, if it appears “from all the circumstances of the case that the contract is manifestly more closely connected” with another country. The question which arose was whether this escape clause may be used only where it is apparent from all the circumstances of the case that the law, which is normally applicable, has no genuine connection with the case. This would mean that it would not be enough to identify a slight connection with a country other than the one identified under the main rule, to justify applying the escape clause.

The question arose in relation to a contract concluded between a company doing business in Belgium (ICF) and two companies doing business in the Netherlands (MIC and Balkenende). The contract provided that ICF was to make train wagons available to MIC and would ensure their transport via the rail network.

According to the ECJ, the result of the general rules listed in Article 4 may be disregarded not only where they do not have any genuine connecting value, but also where the court finds that the contract is more closely connected with another country. It is therefore not required, in order to justify the application of Article 4(3), to show that the law declared applicable to the contract under Article 4(1) and 4(2) is not closely connected to the contract. It is enough to show that the contract is more closely connected with another country. This opens up the possibility to use the escape clause more broadly than anticipated.

ECJ, 15 March 2011, *Heiko Koelzsch v. Grand Duché du Luxembourg*, case C-29/10.

ECJ, 23 October 2014, *Haeger & Schmidt GmbH v Mutuelle du Mans assurances and others*, case C-305/13

ECJ, 12 September 2013, *Anton Schlecker v Melitta Josefa Boedeker*, case C-64/12

CHOICE OF LAW (BY THE PARTIES)

Concept

In cross-border relationships, the determination of the applicable national law is of the utmost importance. Rules determining which law applies to such relationships come in various shapes and forms. Most of these rules impose a solution : they determine which law apply without any possibility for parties to modify the result. This is the case *e.g.* when one wonders which law applies to the substantial requirements of a marriage. Under the private international law of most countries, such question is determined by the law of the nationality or of the domicile of the future spouses, without any possibility for the latter to influence the outcome.

In most countries, however, parties enjoy a limited possibility to select themselves which law applies to their cross-border relationship. Parties are in other words granted the *freedom to determine which law applies to their relationship*. Such freedom is very often granted in contractual matters (*e.g.* Art. 3 Rome I Regulation). Outside the realm of contracts, party autonomy also exists in matters of divorce, succession (*e.g.* Art. 22 Succession Regulation) and maintenance (*e.g.* Art. 8 of the Hague Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007). The freedom to select the applicable law is, however, in these domains more limited. Parties are granted the possibility to select the applicable law out of a series of options, without having the possibility to go outside this limited list (so-called '*option de droit*').

The benefits of the freedom to choose the law are self-explanatory : when parties may decide *ex ante* which law applies to their relationship, they enjoy legal certainty, as they know which law will govern their relationship without having to wait until a court decides this question. Hence, they also avoid the uncertainty which may derive from the application of the rules defining which law applies in the absence of a choice of law. They may further choose a law which guarantees the validity and enforceability of their contract. Finally, the freedom to choose the law allows parties to select a law which they deem to be particularly well suited to govern their relationship.

The freedom to choose the applicable law also entails a number of risks. First of all, it may be that a party imposes the application of a given law without giving the other party any opportunity to discuss this issue. A choice of law in a (contractual or family) relationship may not rest on a true consensus between parties, but rather on a unilateral decision by one of the parties. Further, the choice of law may be used by parties to avoid the application of a given national law. States may therefore incline to limit the possibility for parties to choose the applicable law.

Example

“The present Agreement shall be exclusively governed by the laws of the Kingdom of the Netherlands, without taking into consideration its private international law rules”.

Legal regime

Whether and in how far parties may select the law applicable to their cross-border relationship depends on the applicable regime. The most liberal regime is to be found for cross-border contracts. Under the Rome I Regulation, parties to a cross-border contract may select the applicable law. They may do so before the contract is concluded or after. Parties may also *modify* a choice of law. They may even select a law which does not have any relationship with the contract. Finally, the Rome Regulation makes it possible for parties to select the law applicable to part of their contract, leaving open the question of the applicable law to the rest of their agreement (so-called '*dépeçage*'). There is

however, a risk that the chosen laws may have contradictory effects. Care must therefore be taken that the choice remains logically consistent.

The Rome I Regulation, however, includes a substantial limitation on the ability of parties to select the regime applicable to their contract : parties may only select the law of a State to apply to their contract. They may not elect to have their contract governed by international law, general principles of law such as *lex mercatoria* or a non state set of rules such as Sharia law. This follows from Article 3(3) of the Regulation which refers to ‘the country whose law has been chosen’. However, parties may directly incorporate into their contract non national rules. This could be done by setting out the relevant provisions explicitly in the contract or referring expressly to those provisions in the contract. In both cases, this would only lead to the incorporation of the relevant rules in the contract. The contract would not be governed by these rules.

In other domains, the boundaries of party autonomy are more restricted. Under Article 22 of the Successions Regulation for example, a person may only choose to subject his/her estate to the law of his/her *nationality*. It is not possible for a person under that provision to choose any other law, such as the law of his/her residence. Further, the choice may not be limited to certain questions arising in relation with the succession : the law chosen governs the entire succession.

The regime may also vary in respect of the time at which the choice must be made. For cross-border contracts, the Rome I Regulation does not limit in any way the possibility for parties to make a choice. A choice of law may be made *before* or *after* the contract has been concluded. The Rome II Regulation, which deals with cross-border liability, only accepts choice of law by parties provided the choice has been made “after the event giving rise to the damage occurred” (Art. 14).

Outside Europe, the possibility for parties to choose the law may not be as widely recognized. Certainly, this freedom is now generally recognized for cross-border contracts. In most countries in the world, parties are granted the freedom to choose the law applicable to their contract. For other relationships than contractual relationships, the possibility to choose the law may not be recognized. This means that a choice of law validly made on the basis of a European private international law rule, could be deemed not to be valid outside the EU.

How may a choice of law be made?

If one focuses on contracts, the best solution is for parties to expressly include in their agreement a provision specifying which law applies to the contract. A choice of law provision may be a stand alone provision. It may also be linked with a dispute resolution provision. Choice of law provisions need not be very elaborate : a couple of words should be sufficient to express the parties' intention to submit their contract to a given law. In practice, choice of court provisions often indicate that the law chosen applies without taking into account its rules of private international law. With this wording, parties attempt to void the application of the mechanism of *renvoi* to their contract. Given that the Rome I Regulation excludes the application of this mechanism to contract it governs, such a proviso may not be necessary.

If doubts arise as to the *substantial validity* of a choice of law provision, the question should be decided taking into account the law chosen. This follows from Article 10 of the Rome I Regulation. According to this provision, any question relating to the validity of a contract should indeed be resolved using the law which would govern the contract under the Regulation if the contract was valid. In other words, one should pretend, for the sake of reasoning, that the choice of law is valid and examine, using the law which has been chosen, whether there are reasons to hold that the choice of law is not valid. This solution may seem a bit awkward, as it involves using the law

chosen by parties precisely in order to determine whether the choice of law is valid. However, the benefit of this mechanism is obvious : it makes it possible, when drafting an agreement, to anticipate on the law which will govern validity issues and hence to make sure that the choice of law is valid. If a dispute arises, the anticipatory mechanism put in place by Article 10 also makes it possible to determine which law governs a validity issue even though the validity of the whole contract is in dispute.

Issues of *formal validity* are dealt with by Article 11 of the Regulation. The relevant formal requirements which must be met are those of either the country where the contract was concluded or that country whose law governs the contract. This liberal regime makes it more difficult to question the formal validity of an agreement in general, and of a choice of law in particular. In order to challenge the formal validity of a choice of law provision, a party should indeed demonstrate that the choice of law is not valid under both laws.

Most international instruments recognize that a choice of law need not be made expressly. A court or arbitral tribunal may infer the existence of an agreement among parties on the applicable law from other elements of the contracts or circumstances of the relationship between parties. A contract may include reference to selected provisions of a given national law. It may have been drafted with a view to conform to the provisions of a given law. If these elements demonstrate with sufficient certainty that parties intended their contract to be governed by a certain law, it may be accepted that they made an '*implicit*' choice of law. Needless to say, the burden of proof to demonstrate the existence of such choice is rather high. The test is quite strict : the parties must have chosen the particular law to govern their contract, even though they have not stated this with so many words in their contract. There is also a risk that a court would give too much weight to some elements, thereby impugning on parties an intention they have not had. One central question in this respect is whether the fact that parties have chosen to submit disputes to the courts of a particular country, should be taken to mean that they have implicitly, but certainly, chosen the law of that country. According to the Preamble of the Regulation, "an agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated."

Limitations

When a legal system recognizes the possibility for a party or parties to a legal relationship to select the applicable law, the recognition of this freedom very often is accompanied by a number of limitations. These limitations aim to protect either certain categories of persons, or the application of certain rules.

Among the categories of persons which may be protected against a choice of law, current private international law has mainly focused on consumers, employees and insured. The freedom to choose the applicable law is substantially limited in respect of consumer contracts, employment contracts and insurance contracts.

Article 6 § 2 of the Rome I Regulation provides for example in relation to consumer contracts that the law chosen by parties "may not ... have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice would have been applicable...". In other words, a choice of law included in a consumer contract which falls under Article 6, may only be upheld in so far as it does not contradict mandatory provisions of the law which would have applied had parties not made any choice. Article 6 § 1 directs that a consumer contract is subject to the law of the habitual residence

of the consumer. The mandatory provisions of that law prevail therefore over any other provision of the law chosen.

Likewise, Article 8 § 1 of the Rome I Regulation provides that a choice of law may not “have the result of depriving the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law” that would be applicable to the contract in the absence of a choice of law. In other words, even if a contract of employment includes a choice of law, the employee may claim the benefit of the protection of those mandatory provisions of the law which would have applied had parties not made any choice of law.

Another limitation to the application of the law chosen by parties does not relate to the type of agreement. It follows from the *nature* of certain rules. Certain legal provisions are indeed deemed to be so important that their application must be guaranteed, even in cross-border relationships. Those rules ('internationally mandatory rules', also called 'overriding mandatory provisions') apply notwithstanding any choice of law.

Additional limitations exist in order to prevent parties from availing themselves of the freedom to choose in purely internal situations (see *e.g.* Art. 3 § 3 Rome I Regulation).

A final limitation follows from the requirement that parties must select the law of a State. Current European private international law does not recognize the possibility for parties to select a non-national law to govern their agreement (or relationship). Such choices may, however, be upheld if the dispute is brought before an arbitral tribunal. Arbitrators may take into account and apply a choice for non-national law such as the so-called '*lex mercatoria*', the Unidroit Principles of International Commercial Contracts or other non national regimes.

Effects

When a choice has been expressed by parties (or a party), the courts or other authorities must apply the law chosen. The choice of law may only be ignored in limited circumstances, such as when the law chosen by parties contravene a provision which is deemed to be internationally mandatory or when it violates basic principles of public policy.

A choice of law has *two main consequences* : first it ensures that the provisions of the law chosen by parties will govern their relationship. A choice expressed for the law of a given country includes in principle the entire legal system chosen. This means that the contract will be governed by the gap-filling (dispositive) and the mandatory rules of the law chosen. When choosing the law of a country, parties also displace the law of all other countries, and in particular the law of the country which would have been applicable in the absence of a choice. Again, this *negative* effect applies both to the gap-filling and the mandatory rules of the national law which would have applied to the contract.

Practice : businesses' favorite laws

Recent research has demonstrated that a handful of countries dominate the international market for contracts. Empirical evidence shows that some countries' laws are chosen much more often than any other national law. When measuring the international attractiveness of contract laws, English and Swiss law dominate the market. One study has showed that, for international contracts involving international parties, English and Swiss laws are, on average, three times more attractive than U.S. State laws and French law and almost five times more attractive than German law. The same study has shown that more than 30% of parties to international contracts chose laws other than

their own to govern them.

Legal basis : Art. 3 Rome I Regulation; Art. 14 Rome II Regulation; Art. 22 Succession Regulation; Art. 5 Rome III Regulation.

Other languages:

FR : 'Clause de choix de loi'; NL : 'rechtskeuzebeding' : DE : 'Rechtswahl'

Case law

American Motorists Insurance Co (Amico) v Cellstar Corporation and Cellstar (UK) Ltd, High Court of Justice, 15 March 2002, [2002] EWHC 421 (Comm)

In this case, the question was put which law governed an insurance contract concluded between a US insurance company (Amico) and a US company manufacturing and selling cell phones. The dispute also involved the US company's UK subsidiary. The dispute arose following the shipment by the UK company of a consignment of cell-phones, which were stolen during transport. The contract concluded between Amico and Cellstar was a global insurance policy covering loss by Cellstar and its subsidiaries. It covered cell phones when in transit in the care and custody or control of the carrier. The contract did not specify which law applied. The insurance company sought a declaration from the English court that it had no liability either to Cellstar or to its English subsidiary for the loss of the shipment of mobile phones.

The High Court reviewed the circumstances of the case to find out whether a choice had been “demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case”, as required under Article 3. It concluded that parties had made an implicit choice for the law of Texas. In order to come to this finding, the court noted that:

- the insured company was incorporated in Delaware, but it had an address in Texas and it also had its principal place of business in Texas;
- the insurance policy was brokered by a Texas agent;
- the policy was issued by an insurance company authorised to do business in Texas;
- the policy was issued in Texas;
- a provision of the contract made a reference to “the laws of the State within which this policy is issued”.

UNIFICATION OF PRIVATE LAW

Concept

States have understood quite early that the differences existing between their laws could hinder the development of international private relations. This is particularly so since the rise of the Nation State in the 19th century, which led to a great movement of codification of national laws. In order to reduce the obstacles caused by the differences existing between their rules, States have therefore attempted to *unify* their rules of private law. This movement started out in the 20th century – Unidroit was founded in 1926 - and gained increased importance with the development of international trade and multilateral relations.

The main purpose of the process of unification is to facilitate cross-border operations and hence to increase trade. The Preamble of the Vienna Sales Convention expressly refers to this idea, when it states that “... the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade”.

Actors

Unification projects have been promoted by specialized organisations, such as *Unidroit* (www.unidroit.org) and *Uncitral* (www.uncitral.org), two international organisations set up within the United Nations in order to work towards unification and harmonisation of private laws. One example of an instrument adopted under the aegis of Uncitral is the 1980 Vienna Sales Convention, which aims to provide a global law for commercial sales contracts.

The *EU* has also undertaken substantial efforts to unify rules of private law. In contrast with other organizations, the EU has favored the use of *directives* in order to bring the laws of Member States closer. By doing so, Member States keep some freedom when implementing the various directives in their national laws. At the same time, the ECJ has jurisdiction in last resort to interpret directives, ensuring that Member States will abide by a common interpretation of the European rules.

E.g. The EU has adopted in 1986 a directive relating to the commercial agency contracts (Council Directive 86/653 of 18 December 1986 on the coordination of laws of the Member States relating to self-employed commercial agents). The Preamble of the Directive makes it clear that its adoption is meant to further the proper functioning of the internal market : “Whereas the differences in national laws concerning commercial representation substantially affect the conditions of competition and the carrying-on of that activity within the [EU] and are detrimental both to the protection available to commercial agents vis-à-vis their principals and to the security of commercial transactions; whereas moreover those differences are such as to inhibit substantially the conclusion and operation of commercial representation contracts where principal and commercial agents are established in different Member States”. This directive requires all Member States to ensure that their laws comply with a number of provisions in relation to the rights and obligations of the parties (including the remuneration of the agent) and the conclusion and termination of the agency contract.

The EU has focused among other on the rules of contract law, adopting a large number of instruments aiming to unify the rules of Member States dealing with consumer contracts. The list includes *e.g.* a Regulation dealing with overbooked airplanes (Regulation 261/2004 of 11 February 2004), directives dealing with consumer credit agreements (Directive 2008/48 of 23 April 2008), time sharing agreements (Directive 2008/122 of 14 January 2009) and more in general with

consumer rights (Directive 2011/83 of 25 October 2011).

Other regional actors also aim to convince States that private law should be harmonized. In Africa, *Ohada* has achieved a remarkable track record in a short period of time. Ohada's goal is to promote the adoption of uniform legal texts dealing with commercial issues on the African continent. Ohada, which was founded in 1993, counts today 17 member states. It has adopted nine major instruments dealing with various issues of commercial law, such as securities, commercial companies, arbitration law, insolvency law etc.

Private actors have also attempted to work towards the unification or harmonization of legal rules. In recent decades, much academic work has been undertaken to provide uniform rules and principles in various fields. One prominent example of this type of work may be found in the activities of the Commission on European Family Law (<http://ceflonline.net>) whose ambition is to create a set of Principles of European Family Law that are thought to be suitable for the harmonization of family law within Europe. Thanks to state of the art comparative research on the law of Member States, the CEFL has been able to determine the common core of the rules applicable to issues such as divorce and maintenance between former spouses, parental responsibility and property relations between spouses. Such private initiatives may also be encouraged by official organizations. This is *e.g.* the case for the work undertaken by the Unidroit working group on international commercial contracts, which has received support from Uncitral.

Methods and instruments

Unification of private law rules can be achieved through various instruments. Most commonly, States will conclude a *treaty* or a *convention* incorporating the uniform rules - leaving open the question how the treaty rules interact with domestic rules. It may be that the treaty is self-executing and directly becomes part of domestic law when adopted by a State. In other cases, the treaty will need to be implemented in domestic law. An essential question when using treaties to unify private law is how to ensure the harmonious integration of the treaty rules within the domestic law.

Private law rules may also be unified through *model laws* : such laws are drafted to serve as source of inspiration for national legislators. Any interested country may decide to adopt the text of the model law. When doing so, it may adapt and amend the text to ensure it fits better within the domestic legal framework. A good example is the Model law on cross-border insolvency adopted by Uncitral in 1997 : the model law aims to provide a ready made legal framework for cross-border insolvency proceedings in order to assist States who are willing to modernize their insolvency legislation. Another example is the Unidroit Model Franchise Disclosure Law : adopted in 2002, this model law attempts to provide a legal framework dealing with the disclosure of information between the parties to a franchise agreement. This text may serve as a source of inspiration for national legislators considering the adoption of statutory rules in the field of franchising agreements.

Within the EU, unification of substantive law has most commonly been carried out through *directives*. Directives must be implemented in national law. Hence, unification achieved through the use of directives may be limited, as Member States may be granted some latitude to adapt the European solutions or adopt solutions for issues left untouched by the directive. Ohada works exclusively with 'Uniform Acts'. These Acts are directly binding and applicable in all Member States when adopted by Ohada.

Terminology

Although the terminology is sometimes confused, *unification* should be distinguished from *harmonisation*. The former aims at the process whereby States agree to be bound by identical rules for a given legal relationship. Harmonization indicates that the laws of the various legal systems are converging and brought in harmony, that the differences between the legal systems are reduced.

Another distinction may be made between *minimum* harmonization and *maximum* or full harmonization. The latter does not differ much from unification. When States adopt a uniform text and agrees that the text is based on maximum harmonisation, they also accept not to deviate from the rules contained in the uniform text, even if deviation would further the goal assigned to the harmonisation. An example of full harmonization is the EU Consumer Rights Directive of 25 October 2011 (Directive 2011/83), which replaced existing directives. Article 4 of the Directive provides that

“Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.”

Achievements

Most attempts to unify rules of private law have so far focused on rules of *commercial law*. In the field of international transport law, many conventions have been adopted which provide a uniform liability regime for the carrier:

- 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR)
- United Nations Convention on the Carriage of Goods by Sea ('Hamburg Rules')
- 1980 Convention concerning International Carriage by Rail (COTIF)
- United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991)
- 1999 Convention for the Unification of certain Rules for International Carriage by Air (Montreal Convention)
- United Nations Convention on the Liability for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the 'Rotterdam Rules')

One of the most famous (and probably one of the most successful) examples of unification of private law relate to international sales transactions : the 1980 Vienna Sales Conventions (known under its acronym : CISG) is in force in more than 80 countries. It provides uniform rules covering both the formation and the enforcement of international commercial sales contracts.

Issues of *financial law* have also been covered by successful attempts to harmonize the rules. Unidroit has adopted the Cape Town Convention on International Interests in Mobile Equipment, which was meant to promote international asset-based financing. Together with three protocols aimed at acquisition of aircrafts, railway rolling stock and space assets, the Cape Town Convention provides a uniform legal framework aimed at making asset-based financing more accessible and more secure.

In the field of *intellectual property*, a great number of international conventions have also been concluded to unify the rules applicable to various rights. The Berne Convention for the Protection of Literary and Artistic Works concluded in 1886, and amended, is a good example of the work undertaken in this field : the Convention establishes minimum rules aimed at protecting authors of

copyrighted works. With the Convention, all Contracting States are required to possess a legal framework based on the same principles. Another convention provides similar protection in the field of industrial property (Paris Convention for the Protection of Industrial Property, signed in 1883).

The process of unification of substantive law has not yet touched other fields or sectors. There are in particular very few examples of successful attempts to unify rules of family law. It may be that States are less willing to abandon their claim to sovereignty in this field. It may also be that rules of family law are more intrinsically based on the cultural traditions of States and therefore less amenable to unification. All these arguments, however, could also be made in respect of commercial rules. It may therefore be questioned whether family law is by its nature less susceptible of being harmonized or unified.

Unification of substantive law and of conflict of laws

The unification of substantive private law should not be confused with the unification of *private international law* or conflict of laws rules. When States adopt common rules to determine which law applies to a given legal relationship, they achieve some unity since all States concerned will use identical rules to determine which law applies. However, the law which will actually be applied to a given relationship will still be national law. The Rome I Regulation (Regulation 593/2008) provides a good example of such unification : thanks to this Regulation, all Member States will apply the same law to a given cross-border contract. However, the Regulation leads to the application of national law, and not (necessarily) of uniform law.

When States have adopted *uniform substantive law provisions*, it becomes unnecessary to determine which law applies to a cross-border relationship. This means that uniform substantive law makes choice of law rules in practice superfluous. As the States concerned all share the same substantive rule, identifying the applicable national law becomes moot. It is therefore unnecessary to determine which law applies to a cross-border commercial sales contract when the contract is only linked to countries bound by the CISG, as all States concerned share the same substantive regulation of sales contracts.

When is a uniform law instrument applicable?

Uniform private law texts are adopted to overcome the differences existing between the private laws of the States concerned. Such texts may be *directly* applied to private law relationships which only concern the States bound by the text. This explains that the EU Regulation dealing with the consequences of airplane overbooking or delay/cancellation of flights (Regulation 261/2004) will apply directly to a flight operated between two airports located in Member States. The only question in this case is whether the authority determining which rules applies to a given relationship, is bound by the uniform text.

The question arises whether this is also the case when the cross-border relationship also concerns States not bound by the uniform text.

E.g. The Vienna Sales Conventions is in force in Belgium and Germany, but not in the United Kingdom. A sales contract between a company established in Belgium and another company established in Germany will be governed by the Convention. Should the Convention also apply to a sales contract between a company established in Belgium and another company established in the United Kingdom?

May a person having booked a flight with an airline company established in Germany, in

order to fly from Brussels to Moscow, rely on the provisions of Regulation 261/2004 if it appears that the flight arrives in Moscow with more than 10 hours of delay?

There are no general rules applicable to all uniform private law instruments defining their *geographical scope of application*. In order to find out whether such an instrument may be applied to a relationship which does not exclusively concern States bound by the instrument, one should examine the rules of the instrument closely. Some uniform private law instruments claim a large scope of application and may be applied to private law relationships even if this relationship concern a State which is not bound by the instrument.

E.g. The Vienna Sales Conventions claims application in two situations : according to Article 1(1)(a), it must be applied when the two parties to the contract (buyer and seller) are established in a Contracting State (the list of Contracting States is available at www.uncitral.org). Article 1(1)(b) further provides that the Convention must also be applied even if one of the parties or the two parties are not established in a Contracting State, provided however that the contract is governed by the law of a Contracting State. With this extended application, the Convention may be applied to a contract even though none of the parties are established in a Contracting State. This method of application requires the use of conflict of laws rules in order to determine the scope of application of the Convention.

The economics of uniform private law

The unification of private law aims to lower barriers to trade which may exist due to the differences between the national laws. There is much discussion, however, on the benefits and costs of the unification process. It is not clear whether unification of private law rules brings about substantial *benefits*. Such unification may also entail *disadvantages*, such as increased costs for the companies involved in cross-border trade, which must in a first stage become accustomed to the new rules, or a reduction in legal certainty due to the fact that the new rules may not be well known to all actors concerned and have not yet been tested in courts. On the other hand, unifying rules of private law may facilitate cross-border trade, since companies and consumers will not feel impaired by the existence of different laws and regulations in the States where they operate. The jury is still out on the costs/benefits analysis of uniform private law.

E.g. The Cape Town Convention on International Interests in Mobile Equipment and its three protocols provide a good example of the benefits of unification. The Convention, with its Protocols, is designed to facilitate the extension of credit to companies seeking to acquire very expensive mobile equipment such as aircrafts, railway rolling stocks and space assets. By their nature, these assets have no fixed location. When a creditor grants a credit to a company seeking to buy such an asset, it may be difficult to obtain security to guarantee the repayment of the credit. The national approaches to security and reservation of title on such equipment indeed vary widely. This creates uncertainty as to the efficiency of the security rights granted to creditors. It has been submitted that the result of this situation was to inhibit the extension of credit, particularly to developing countries, and to increase borrowing rights. By creating an international form of security interest which is recognised and enforceable in all Contracting States, the Convention intends to give creditors greater confidence in the decision to grant credit, to enhance the credit rating of equipment receivables and reduce the borrowing costs. The Convention provides a uniform framework for the creation, perfection and enforcement of the international security interest it creates. It also establishes an electronic international register for the registration of security interest, so as to give notice of their existence to third parties and enable creditors to preserve their priority against subsequently registered interests.

Interpretation of uniform private law

The unification of substantive rules does not as such create unified solutions in practice. Unified rules must be applied by courts. In most cases, the application of unified rules will be left out to *national* courts. States are reluctant to entrust the adjudication of disputes involving rules of unified private law to international courts. The EU is an exception : the ECJ has jurisdiction and authority to take final decisions and avoid the existence of different interpretations and applications of the unified rules.

In the absence of a supranational court entrusted with the interpretation of a uniform text, other means may be used to ensure that the interpretation of such a text does not give rise to diverging results. One of these means is to ensure that the case law of Contracting States is made available for other courts – this is done on a large scale for court decisions applying the Vienna Sales Conventions, either through official means (see *e.g.* CLOUT, the official repository of case law dealing with Uncitral instruments, available at www.uncitral.org/uncitral/en/case_law.html) or thanks to private initiatives (see *e.g.* the information made available by the Albert Kritzer CISG Database, at www.cisg.law.pace.edu). Another means is to convene at regular intervals expert meetings to consider the decisions taken by national courts dealing with a given text of uniform law. A final instrument which could be used is to invite all courts and other bodies to take into account the international nature of the text when interpreting it.

Chicago Prime Packers, Inc v Northam Food Trading Co et al., US Dist Ct (ND Ill), 21 May 2004

In this case, a Canadian company ('Buyer') had bought a large party of pork ribs from a US company ('Seller'). The Seller had himself bought the pork ribs from another US company. The Buyer made arrangements with another US company to have the pork ribs processed. After it started processing the meat, the US meat processor found that the meat was in such a poor condition that it had to be destroyed altogether. Having learned that the meat had been destroyed, Buyer refused to pay the price to Seller. Seller had, however, already paid its own seller. Seller therefore issued proceedings before a US court claiming payment of the price. Seller argued in particular that Buyer had not given timely notice of the defect. It was not challenged that the Vienna Sales Convention applied to the contract. Article 38 of the Convention requires the buyer to "examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances". Under Article 39 of the Convention, the buyer "loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it".

The question arose if Buyer in the present case had lost the possibility to rely on the lack of conformity due to the late discovery of the defects. In order to apply the test put forward by the Articles 38 and 39, the US District Court did not refer to its own state law or court precedents applying state law. Instead, the court reviewed a number of cases decided by foreign courts, where the issue had arisen how much time the buyer has to examine the goods and discover the defects under the CISG. The court referred in particular to a number of cases decided by German and Italian courts in order to identify in which circumstances it may be accepted that a buyer has given a notice of non-conformity within the time frame of Article 39.

Other languages:

FR : 'Droit privé uniforme'; NL : ' eenvormig privaatrecht' : DE : 'Einheitliches Privatrecht'

MANDATORY RULES

Concept

Rules adopted by states to govern private law relationships (*i.e.* relationships between two individuals, an individual and a legal persons or two businesses) have different aims. Many of these rules aim to provide a default solution for a legal question for which parties have not adopted a specific answer. This is the case for many rules of national contract law, which are purely *dispositive*, *i.e.* they may be displaced by parties (*'règle supplétive'/'aanvullend recht'*). Parties may in other words contract out of these provisions which are merely there to fill the gaps of their contracts. A typical example may be found in a legal provision whereby the place of performance of an obligation arising out of contract is determined. A rule of this kind is only meant to fill the gap which arises if parties have failed in their agreement to indicate where a specific obligation should be performed. Article 1247 of the French Civil Code provides *e.g.* that “The payment must be made at the place designated in the agreement. If no place for payment of a certain and determined thing was designated, payment must be made where the thing was at the time the obligation was contracted... Apart from those cases, payment must be made at the domicile of the debtor”.

Other rules of private law are on the contrary *mandatory*. They may not be displaced by the agreement of parties. Such rules pursue specific policy aims. The legislator may attempt to protect certain parties or ban certain practices. A State may *e.g.* decide that certain contract terms are so unbalanced that they should not be enforceable (*e.g.* a provision of contract excluding all liability for acts or omission of one of the parties). A State may also adopt rules which impose certain terms to a contractual relationship (*e.g.* a rule whereby agreement in perpetuity are prohibited). In specific fields of law, a great number of rules are mandatory, as they carry out a specific policy objective. This is *e.g.* the case in consumer law and employment law.

In cross-border private relationships, the operation of conflict of laws rules may have as effect that a given relationship is governed by a foreign law, either because parties have chosen this law or because it applies as a result of the application of an objective conflict of laws rule. This means in effect that the gap-filling *and* the mandatory rules of the local law are displaced, and replaced by the relevant provisions of the applicable foreign law. In general, such an effect may be tolerated by the State whose authorities are seized of the dispute. The operation of the conflict of laws rules serves as a legitimate basis to justify displacing the local rules, whether they are gap-filling or mandatory.

In certain cases, however, a State may not be willing to accept that some of its own mandatory rules be displaced. Some of these rules are deemed to be so important that a State cannot contemplate the possibility that they would not be applied to a private law relationship. Such rules are not simply mandatory : they are said to be *internationally mandatory* or *overriding mandatory provisions*. Such rules are deemed to be so important that a State requires that they be applied in all situations, even in cross-border situations in which the operation of conflict of laws rules calls for the application of foreign law. Internationally mandatory rules displace in other words the normal application of conflict of laws rules. When a question falls under such an internationally mandatory rule, the rule applies immediately, without any need to verify which law would normally govern the relationship on the basis of the conflict of laws rules. The application of internationally mandatory rules is in other words not dependent on the identification of the applicable law. When a court or another state authority applies its own mandatory rules, it decides to ignore altogether any provision of a foreign law which might have been applicable to the case at hand. This is clearly expressed in the provision of the Rome II Regulation dealing with mandatory rules : according to Article 16, “Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory *irrespective of the law otherwise applicable to the non-contractual*

obligation".

The application of cross-border mandatory rules stands on its own. It is not necessary to verify first that the law of a given State is applicable in order to justify the application of its mandatory rules. This explains why there is no 'conflict of laws' rule leading to the application of mandatory rules. However, in order to provide a firmer legal basis for the application of such mandatory rules, many instruments include a general provision requiring the court seized to apply its own mandatory rules. This is the case *e.g.* in Article 9 of the Rome I Regulation, Article 16 of the Rome II Regulation or Article 20 of the Code of Private International Law.

How to identify internationally mandatory rules?

In a limited number of situations, a legislator adopting a set of rules aimed at a particular private law relationship, will from the outset make it clear that these rules are internationally mandatory and therefore ought to be applied no matter which law governs according to the conflict of laws rules. This occurs very rarely.

Consider the Act on exclusive distribution agreements adopted by Belgium in 1961 (Law of 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration, *Moniteur belge*, 5 October 1961), as amended. This Act protects distributors operating in Belgium, when they have concluded a contract granting them the exclusive right to represent a foreign manufacturer on the Belgian market. If the manufacturer unilaterally terminates the agreement, the distributor enjoys some very generous provision : first, the manufacturer terminating the agreement should observe a reasonable notice period, failing which the distributor is entitled to compensation in lieu of notice, which is calculated based on the length of the notice period which should have been observed. Further, the distributor may be entitled to additional compensation for developing the customer base or increasing the volume of business as well as the costs of termination of employment agreement. Article 4 of the Act (which is today incorporated in the Code of Business Law, see article X-39 of the Code) provides that any court in Belgium seized of a dispute relating to the termination of such an agreement, shall apply Belgian law. This is a clear expression of the wish of the Belgian legislator that the Act of 1961 be applied immediately, without first inquiring which law applies to the cross-border contract.

In most cases, the legislator will not indicate clearly whether the private law provisions it adopts, are meant to be internationally mandatory. Hence, it will be up to courts to decide whether a given provision of law is so important that it must be considered to be internationally mandatory. In order to decide on this issue, courts will first look at the aims pursued by the legislator and consider whether these aims require that the provisions be applied immediately. The courts will also consider whether the aims of the relevant provisions could still be achieved if for the issues at stake, application was made of foreign law.

What are the criteria guiding courts in the process of deciding whether a given provision of national private law constitutes a mandatory provision? Article 9 § 1 of the Rome I Regulation provides some guidance on how to identify overriding mandatory provisions. According to this provisions, a rule may be said to be overriding mandatory provision if the respect of this rule "is regarded as crucial by a country for safeguarding its public interest, such as its political, social or economic organisation...". This definition, which finds its origin in the *Arblade* case decided in 1999 by the Court of Justice, makes it possible to consider *e.g.* that provisions included in statutory legislation dealing with the marketing of financial instruments which renders unenforceable an investment agreement made through an unauthorized person, may be deemed to be internationally mandatory.

The application of internationally mandatory rules

Mandatory rules differ from the public policy exception which is part of the (normal) operation of conflict of laws rules. When a court or another State authority considers a cross-border situation, it will immediately make application of its own mandatory rules, without even considering the content of the foreign law which would potentially apply to the dispute. This is clearly expressed in Article 9 § 1 of the Rome I Regulation, which indicates that overriding mandatory provisions are “applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation”. The same formula may be found in Article 16 of the Rome II Regulation.

Mandatory rules constitute a clear expression of a State’s policy preferences. As such these preferences may be carried out as soon a situation comes within the jurisdiction of the State’s courts. In most cases, the normal operation of rules of jurisdiction will be sufficient to ensure that only situations bearing a substantial connection with the State whose courts are seized, come before these courts. However, in some cases, a court of a given State might have jurisdiction over a situation, even though the situation only bears a limited or weak connection with the forum. In that case, the court might hesitate to apply its mandatory rules, as this would imply imposing the State's policy objectives to a situation which is only weakly linked to the State.

In order to avoid the application of mandatory rules to a situation having only a marginal connection with the forum, courts have developed the idea that mandatory rules may only apply provided that the situation at hand bears a close connection with the State whose rules are at stake. This close connection may be different depending on the context and the nature of the provisions at hand. In cross-border employment situations, courts have for example required that the employee should at least have performed part of his work in the country whose mandatory rules are at stake, in order to justify the application of those rules. In most cases, the connection which is required before mandatory rules may be applied is of a territorial nature.

When a cross-border situation is governed by an overriding mandatory provision, this does not mean that the normal choice of law process is set aside altogether : for the question or issue governed by the mandatory rule, there will indeed be no need to apply the choice of law rule. However, for all other questions, the normal choice of law process remains relevant. This leads to a ‘dépeçage’ of the situation.

Foreign mandatory rules

Several national and international instruments make it possible for courts and other authorities to take into account and apply foreign mandatory rules. This is the case *e.g.* in Article 9 § 3 of the Rome I Regulation. This possibility has been created in view of the fact that thanks to the application of rules of jurisdiction, a situation could come before a court even though it has a limited or weak link with that jurisdiction.

The application of foreign mandatory rules remains quite exceptional. There are very few reported cases where courts have effectively applied such foreign mandatory rules. The possibility given by Article 9(3) is discretionary : courts are given the possibility to give effect to mandatory rules of another law, but are not required to do so. Article 9(3) clarifies some of the elements which are to be taken into account when exercising this discretion. A court should for example have regard to the “nature” and “purpose” of the application of the relevant rules, as well as to the consequences of their application of non-application. It is not totally clear what is the precise effect of Article 9(3),

which requires to give “effect” to the relevant provision.

Overriding mandatory rules and European private law

A delicate question arises when a question falls under a legislation adopted by the EU. If the EU has adopted a directive (or another instrument) aiming at harmonizing the rules applicable to a given private law relationship, may a Member State claim that its own implementation of the directive in its national law, constitutes a set of overriding mandatory provisions which should be applied in all cases, without any consideration of the law which would normally apply?

This question was put to the ECJ in the Unamar case (17 October 2013, case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*). In a nutshell, the case arose out of a dispute between Unamar, a Belgian commercial agent, and NMB, a Bulgarian company. Parties had concluded a commercial agency agreement in relation to the operation of NMB's container liner shipping service. The contract called for the application of Bulgarian law. When NMB terminated the agreement, Unamar brought proceedings before a Belgian court, claiming application of the Belgian Act on Commercial Agency Agreements (which is today part of the Code of Business Law). It was not challenged that this Act included overriding mandatory provisions. The difficulty, however, was that this Act implemented in Belgium the provisions of the EU Agency Directive 86/653 of 1986. This Directive required Member State to afford a minimum protection to commercial agents. When implementing this Directive, the Belgian legislator has offered a wider protection to the agent than the minimum level of protection required by the directive. Bulgarian law, which governed the contract, did not go as far as Belgian law. The ECJ had to consider the question whether a Member State could set aside the law of another Member State and favor the application of its own law which it deemed to be internationally mandatory, even though the two Member States were bound by the same Directive, which had been implemented in the two States.

The ECJ did not exclude the possibility for a Member State to favor its own version of the implementation of a Directive and to set aside the rules of another Member State on the basis that its own version constitutes internationally mandatory provisions. The ECJ, however, qualified this possibility by emphasizing that before rejecting the application of the law of another Member State, a Member State should proceed to a detailed assessment of its own law in order to find out whether the local implementing legislation is indeed deemed to be crucial. In other words, it is not enough to refer to the fact that under the Member State's own law, a given provision is internationally mandatory. The threshold to excludes the application of the law of another Member State, giving effect to the same directive, is higher.

Overriding mandatory rules and dispute resolution

When a given State adopts a substantive rule which it deems so important that it wants it to apply directly, without the intervention of a conflict of laws rule, it should pay attention to the operation of rules of jurisdiction. If a dispute arises, the effect of those rules could indeed be that the dispute is not submitted to the State's own courts, but to other courts. It may then be doubted whether those courts will give effect to the mandatory rules. Save in very exceptional cases, it is indeed quite unlikely that the courts of State A will apply mandatory rules of State B.

In order to avoid this result, a State could adopt a rule of exclusive jurisdiction in order to guarantee that all disputes relating to the matter covered by the mandatory provision, will be handled by its own courts. The rule of exclusive jurisdiction would then operate as a useful addition to the

mandatory rule, ensuring that the latter may be applied. Rules of exclusive jurisdiction, however, may not always lead to the desired result. States have indeed granted businesses a large freedom to select the dispute resolution method they deem appropriate, through a choice of court agreement or an arbitration agreement. By concluding an arbitration agreement, parties to a contract could therefore avoid that courts of a given State look at a dispute and hence avoid the application of this State's mandatory rules. The relationship between mandatory rules and choice of court/arbitration agreements is a complex one. It is settled law (at least within the EU) that a court seized of a dispute may not put aside a choice of court agreement on the ground that the application of this agreement would serve to neutralize the application of a mandatory rule in force in the State where the court is established. The same cannot, however, be said of an arbitration agreement.

May a court of a Member State exercise jurisdiction in order to safeguard the application of a mandatory rule ?

Say a Member State A has adopted a set of mandatory provisions which apply to a given contract. One of the mandatory provisions indicates that whenever the mandatory provisions apply, the courts of Member State A may exercise jurisdiction. What is the role and effect of such a provision? May it effectively be applied even if the dispute is otherwise governed by the rules of the Brussels Ibis Regulation? This question has been put to the ECJ in the *Maison du Whisky* case : a French company had done business for some ten years with a Belgian company. When the French company terminated the agreement, the Belgian company brought proceeding in Belgium, claiming compensation under the provisions of the Exclusive Distribution Act of 1961 (which is today incorporated in the Code of Business Law, see article X-39 of the Code). Article 4 of the Act provides that a distributor may “in any event” bring court proceedings against the supplier before the Belgian courts. Does this mean that the court seized should disregard the provisions of the Brussels Ibis Regulation?

In *Maison du Whisky*, the ECJ held that whenever court proceedings fall under the provisions of the Brussels Ibis Regulation, those provisions should be applied. There is no room for the application of national rules of jurisdiction. Article 5(1) provides that a person domiciled in a MS may only be sued in the courts of another MS than that of his domicile under the rules set out in the Regulation. This necessarily excludes the application of national rules of jurisdiction, something which is confirmed by Article 5(2), which refers to a list of national rules of jurisdiction which cannot be relied upon. The ECJ concluded that “if a case presenting an international element falls within the scope *ratione materiae* of the Regulation ... and if the defendant is domiciled in a Member State..., the rules of jurisdiction laid down by the Regulation must in principle be applied and prevail over national rules of jurisdiction.”. The fact that a rule of jurisdiction in force in one MS is intended to guarantee the application of mandatory rules, does not make it possible to derogate from the European rules of jurisdiction (ECJ, 19 December 2013, *Corman-Collins SA v La Maison du Whisky SA*, Case C-9/12).

Legal basis : Art. 9 Rome I Regulation; Art. 16 Rome II Regulation; Art. 20 Code of private international law

Case law : ECJ, 17 October 2013, case C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*.

Other languages:

FR : 'Lois de police' / 'lois d'application immédiate'; NL : 'politiewetten' / 'voorrangsregels' ; DE :

'Eingriffsnormen'

PUBLIC POLICY

Concept

Public policy is a legal mechanism which is widely used in private law. In domestic relationships, public policy indicates the limits of the freedom enjoyed by parties when concluding an agreement. When parties conclude a contract whereby one of them agrees to sell part of his body or whereby one agrees to commit a crime, or to defraud the tax authorities, public policy may intervene to invalidate the agreement. The mechanism of public policy embodies the vital interests of the community, which in turn limit the freedom enjoyed by parties entering into a contract. When a contract offends public policy, it will be deemed to be void and null.

In cross-border relationships, public policy has *another function* : it indicates the limits of a State's tolerance towards the law of another State and its application. The general structure of private international law is an open one : the conflict of laws rules do not give priority to the application of local rules (i.e. the forum's rules). They may lead to the application of local or foreign law. Likewise, in most countries there is a willingness in principle to give effects to foreign judgments, provided certain requirements are met. In these two contexts, public policy is used as a mechanism to express the limit of a State's openness towards foreign law or a foreign judgment.

As a limiting device, public policy may intervene at two different stages in private international relationships:

- Public policy is first used when a State is called to *apply a provision of foreign law*. It is widely accepted that a State may refuse to apply a given provision of foreign law if it finds that such application would contradict one of its fundamental principles. This possibility is recognized not only when a State accepts to apply foreign law following the operation of its own conflict of laws rules, but also when States agree on common rules of private international law, which may lead one State to apply a provision of foreign law.
- Public policy is also used to allow a State to refuse to *give effect to a foreign judgment*. Public policy is probably the most common ground used to refuse effect to a foreign judgment. It is used both when a State devises its own rules relating to the recognition and enforcement of foreign judgments, as when States agree on common rules dealing with these questions.

As the concept of public policy is used to depart from the normal application of conflict of laws rules, it is often referred to as the 'public policy *exception*'.

Content

Although the public policy mechanism is a classic tool of private international law, its boundaries and content are *not sharply defined*. Whether or not the public policy mechanism may intervene (and prevent the application of a provision of foreign law or justify denying effect to a foreign judgment), is a policy decision. A State should ask itself what are the boundaries of the tolerance it is willing to extend to a foreign law / a foreign judgment. There is no precise or closed list of fundamental principles or values which belong to the 'public policy' and justify refusing to give effect to a provision of foreign law or a foreign judgment.

In some situations, not much doubt will exist on the application of the public policy exception – *e.g.* when France is required to apply a provision of Iranian law which grants male heirs twice as much as what female heirs are entitled to receive in the estate of a deceased. Application of the relevant provisions of Iranian law would contravene the fundamental prohibition of discrimination based on sex. Likewise, if according to the law of a given State, a person who has tortured another cannot be held civilly liable for the physical and mental damage arising out of his acts because the torturer's action did not constitute a negligence, the application of this law could easily be refused in Belgium.

In other instances, it will be *more difficult* to determine whether the application of a given provision of foreign law contravenes fundamental principles or is so repugnant to Belgian standards that it must be excluded. If a court in Belgium is required to apply English law to the administration of the estate of a deceased, it may find that under English law, the family members (spouse and children) of the deceased are not allocated a reserved portion of the estate. In other words, these family members may not automatically claim a portion of the estate which should be allocated to them whatever the deceased has decided. If the deceased has bequeathed all his assets to a charity, leaving nothing to his surviving spouse and children, the question arises whether it may be accepted that the application of English law is really repellent to Belgian standards.

Experience has shown that the public policy exception is *most frequently used in cross-border family relationships*. This is not to say that the public policy exception may not be used in other matters, such as cross-border commercial relationships. There is certainly room to rely on the exception in cross-border commercial relationships. However, practice has shown that this will happen rather infrequently. It may be that the rules applicable in such matters are less susceptible to touch delicate policy issues.

The content of the public policy exception may *vary over time*. As the exception is intimately linked with principles which are deemed to be fundamental for a State, it will undergo the same evolution as the rest of the law. A provision of foreign law discriminating against children born out of wedlock may have been looked at with little indignation fifty years ago. Such provision would today inevitably encounter the exception and be disregarded.

Protection of national values

The public policy exception is a mechanism intended to ensure that the forum may safeguard what it believes are its most fundamental principles. In that sense, the public policy exception used in cross-border relationships always protects local values. Its content may therefore differ from country to country. This is also the case when the public policy exception is incorporated in an international instrument (such as a European Regulation or a Hague Convention). Even when the public policy exception is a tool which may be used to depart from the application of a uniform conflict of laws rules, its content will in the first place be dictated by the local values and fundamental principles. This explains why *e.g.* Article 21 of the Rome I Regulation is entitled 'Public policy *of the forum*' and refers to the situation in which a provision of a law is incompatible "with the public policy [...] *of the forum*". Likewise, Article 45, paragraph 1, a) of the Brussels Ibis Regulation indicates that recognition or enforcement of a foreign judgment may be refused if such recognition "is manifestly contrary to public policy (*ordre public*) in the Member State addressed". There is therefore no such thing as a 'European public policy'.

When the public policy exception is part of a set of uniform conflict of laws rules, its application may, however, need to take into account the goals and objectives pursued by the common rules. Finally, the content of the public policy exception may converge as States are bound by the same

international instruments embodying the same fundamental values (e.g. the ECHR).

Application of the public policy exception

The decision to use the public policy exception in a given case is an important one. It signals that the forum cannot accept the application of a provision of foreign law or is not willing to extend effect to a foreign judgment. This decision should not be seen as an outright condemnation or blame of the foreign law or judgment. First, the public policy exception is triggered by one specific provision of the applicable foreign law and not by the law in its entirety, and this in light of the specific circumstances of the case. Second, the State which relies on the exception to refuse the application of a provision of foreign law, has no interest nor any right to censure foreign law. That it refuses to apply a provision of foreign law or to give effect to a foreign judgment, only signals that the two States diverge on an important issue.

When the public policy exception is used, the court or authority concerned will refuse to take into account a provision of foreign law or a foreign judgment. In the latter case, the matter is quite simple : no effect will be given to the foreign judgment (or part thereof). The request for enforcement or recognition of that judgment will be denied (in part or totally). When the exception is used to refuse the application of a provision of foreign law, this may lead the court to dismiss a claim based on that provision. In most cases, however, the court will continue to examine the claim, but without taking into account the provision of foreign law which has been found to violate fundamental principles.

The application of the public policy exception has given rise to a number of important theoretical questions. Courts have for example struggled with the idea that the intervention of the public policy mechanism could vary in the light of the *intensity* of the link existing between the relationship at hand and the legal system addressed. If it appears for example that under the applicable foreign law, a child may not claim to be the child of his biological father because the latter is not validly married to the child's mother, should the court's reaction to this rule vary depending on where the child was born, where he lives, etc.? Allowing the court to take into account the intensity of the link between the situation and the country where the question arises (something called the '*Inlandsbeziehung*'), could mean that the relevant foreign law will be applied in a case where child and father both live abroad, whereas the public policy exception will be triggered if the child was born and resides in the forum. This would mean treating differently a child because of the nature of the links between his parents, a distinction which would not be allowed in a purely domestic situation. If this analysis is followed, one should investigate what degree of connection with the forum is required in order to trigger the application of the public policy defense.

Legal basis : Art. 21 Code of private international law (applicable law); Art. 25 § 1-1 Code of private international law (foreign judgments); Art. 21 Rome I Regulation (applicable law); Art. 45 § 1-a Brussels Ibis Regulation (foreign judgments); Article 26 Rome II Regulation (applicable law); Article 12 Rome III Regulation (applicable law).

Other languages:

FR : 'Ordre public de droit international privé'; NL : 'openbare orde' : DE : 'Öffentliche Ordnung'

Case law :

- ECJ, 28 Marc 2000, *Dieter Krombach v André Bamberksi*, case C-7/98

Mr Krombach, a person domiciled in Germany, had been found guilty of a horrible crime by a French criminal court. He was sentenced to 15 years in jail. At the same time, Mr Krombach had been ordered by the same court to pay a substantial amount to Mr Bamberski, the father of the victim. Although he was duly summoned and was required to appear in person, Mr Krombach did not appear before the French criminal court. As a consequence and in application of French criminal law, the court decided that Mr Krombach could not be represented by counsel ('contempt' procedure – 'procédure par contumace'). Mr Bamberski attempted to enforce the judgment in Germany. Mr Krombach contested the enforcement, arguing that he had been unable to effectively defend himself.

The ECJ first underlined that under the scheme of the Brussels *Ibis* Regulation, the court addressed was prohibited from reviewing the case decided by the court of origin : it could not review the accuracy of the findings of laws or fact made by the latter court.

According to the Court, the public policy exception could be used when recognition or enforcement of the foreign judgment would infringe a fundamental principle regarded as essential in the State where enforcement was sought. Referring to the case law of the European Court of Human Rights, the ECJ added that the right to be defended was one of the fundamental elements in the conduct of a fair trial. According to the Court, a national court is therefore allowed to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right. The Court concluded that recourse to the public policy exception must be regarded as being possible in exceptional cases where the guarantees provided by the European Convention on Human Rights have been insufficient to protect the defendant from a manifest breach of his right to defend himself.

– ECJ, 16 July 2015, *Diageo Brands BV v Simiramida-04 EOOD*, case C-681/13

A dispute opposed a Dutch company to a company established in Bulgaria. The latter had imported a container holding 12.000 bottles of 'Johnny Walker' whiskey from Georgi. The Dutch company, which held the trade mark on this whiskey and had granted an exclusive licence to another Bulgarian company, obtained an order seizing the container. Bulgarian courts, however, later refused to uphold the Dutch company's claim in the merits, because they were of the opinion that the import into Bulgaria of goods placed on the market outside the European Economic Area with the permission of the trade mark owner did not infringe the rights conferred by the trade mark.

The Bulgarian company later brought proceedings in the Netherlands seeking compensation for the damage suffered as a consequence of the seizure of its container. The claim was based on a judgment given by a court in Bulgaria, dismissing the Dutch company's claim on the merits.

The question arose whether Dutch courts could refuse to recognize this judgment on the ground of public policy because it found that the Bulgarian court's ruling misapplied EU law and in particular the trademark directive.

The ECJ emphasized that the Brussels *Ibis* Regulation is built on a principle of mutual trust between Member States, which requires these States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and

particularly with the fundamental rights recognised by EU law. The ECJ also underlined that while Member States in principle remain free to determine, according to their own national conceptions, what the requirements of their public policy are, the limits of that concept are a matter of interpretation of that regulation. As a consequence, the ECJ may not define the content of the public policy of a Member State, but it has the possibility to review the limits within which the courts of a Member State may have recourse to the public policy in order to refuse recognition of a judgment emanating from a court in another Member State. Giving guidance on how to operate the public policy, the Court stressed that this mechanism may only be used “where recognition of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought, inasmuch as it would infringe a fundamental principle”. Given that the Regulation prohibits any review of the substance of a judgment of another Member State, “the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as being fundamental within that legal order”.

According to the ECJ, the fact that the court of origin had misapplied a rule of national law or even a rule of EU law could not justify as such applying the public policy exception. The public-policy clause can apply only where that error of law means that the recognition of the judgment concerned in the State in which recognition is sought would result in the manifest breach of an essential rule of law in the EU legal order. The ECJ concluded that a mistake in applying the EU directive on trade mark did not qualify under this test as error in the implementation of that directive would not be at variance to an unacceptable degree with the EU legal order inasmuch as it would infringe a fundamental principle of that legal order.

ROME II REGULATION

Origin

The Rome II Regulation was adopted in 2007. Member States started in fact to discuss the possibility to harmonize conflict of laws rules in relation to cross-border liability in the 1970's. Those discussions, however, did not lead to the adoption of a text. It is only after the EU gained competence in matters of private international law that Member States succeeded in reaching an agreement on common conflict of laws rules. They found inspiration in various Hague Conventions (such as the 1971 Hague Traffic Accidents Convention and the 1973 Product Liability Convention), without, however, limiting themselves to the solutions found in those Conventions.

The Rome II Regulation is a useful addition to the Brussels *Ibis* Regulation : the latter makes it possible to identify the court having jurisdiction in cross-border liability cases. With the Rome II Regulation, litigants may also determine easily which law the court will apply. The Rome II Regulation limits the possibility of forum shopping, as courts of all Member States will in principle apply the same law to a given case.

Application

The Rome II Regulation applies in all Member States, except Denmark, which has opted out of the possibility to be bound by the private international law regulations.

The Rome II Regulation applies without taking into consideration the domicile or residence of parties involved. Likewise, it is not relevant whether the events which gave rise to the liability, took place in a Member State or not. Finally, the Rome II Regulation applies whether it leads to the application of the law of a Member State or of a third state. This is the meaning of Article 3, whose title ('universal application') may be misleading.

Two basic requirements must be met for the Regulation to apply : first, the dispute must fall within the jurisdiction of the authorities of a Member State. The Rome II Regulation is only relevant provided it falls upon the courts of a Member State to determine which law applies.

Second, the Regulation only applies to "situations involving a conflict of laws", provided the relevant question is one of "non-contractual obligations in civil and commercial matters".

The Regulation is therefore only applicable in :

- civil and commercial matters,
- provided the issue relates to a non-contractual obligation,
- and the situation has a cross-border dimension.

How should one understand the limitation of the application of the Regulation to civil and commercial matters? According to the preamble of the Regulation, this phrase should be interpreted taking into account the 'acquis' of the Brussels *Ibis* Regulation (recital 7). The extensive case law of the ECJ in respect of the phrase 'civil and commercial matters' is therefore also applicable when trying to find out whether the Rome II Regulation applies.

Article 1, paragraph 1 of the Regulation adds that it does not apply in particular to "revenue, customs or administrative matters". A further exclusion is that of the "liability of the State for acts

and omissions in the exercise of State authority (*acta iure imperii*)". The Regulation may therefore be applied if one attempts to rely on the liability of a State, provided the State has not acted in its capacity as public authority. Nothing prevents therefore the application of the Regulation to a dispute involving the liability of a government official who has injured a private citizen while driving a car on his way to his office.

The Rome II Regulation only applies to non-contractual obligations. This phrase is not further defined in the Regulation. Article 2 only indicates that the Regulation shall also apply to non-contractual obligations that are likely to arise. The Regulation may therefore be applied to determine which law applies to the liability arising out of future events. Another element which may be inferred from the text is that the Regulation has no ambition to apply when parties are bound by a contract : questions of cross-border contractual liability are dealt with by the Rome I Regulation. There is a mutual exclusion between the two Regulations. The Rome II Regulation only applies if the question raised is not one linked to an issue of contractual liability. In principle, this should mean that there should be no overlap between the Rome I and the Rome II Regulation, but also that there should be no gap between the two Regulations.

It is also clear that the category 'non-contractual obligation' should not be understood by reference to the meaning of this phrase under national law. This is a European concept, which has an autonomous meaning (as confirmed by the ECJ in the *Ergo Insurance* case : ECJ, 21 January 2016, joined cases C-359/14 and C-475/14). One could refer to the definition given by the Court of Justice in relation to Article 7(2) of the Brussels Ibis Regulation, which includes a rule of jurisdiction specifically aimed at non-contractual obligations. According to the ECJ, Article 7(2) covers "all actions which seek to establish the liability of a defendant and which are not related to a "contract" within the meaning of Article 7(1). Looking further at the case law of the ECJ, it is apparent that matters relating to contracts presupposes the existence of a legal obligation freely consented to by one person towards another. The Rome II Regulation would therefore only be applicable in the absence of such an obligation freely entered into. In the *Ergo Insurance* case, the ECJ held that the Regulation applies to an obligation which derives from a tort, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.

It is apparent from the various provisions of the Rome II Regulation that it covers a very wide range of situations. They range from classic liability cases such as the consequences of car accidents and physical injuries to non-physical or material liability cases such as misrepresentation or infringement of intellectual property rights. The Regulation also expressly includes non traditional torts such as unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.

A number of non-contractual obligations are expressly excluded from the scope of the Rome II Regulation. This is *e.g.* the case for non contractual obligations "arising out of nuclear damage" or "arising out of violations of privacy and rights relating to personality, including defamation". The first exclusion may be explained by the fact that many Member States have adopted specific regimes in order to deal with nuclear liability. Those regimes have a strong mandatory character. Member States may not be ready to accept that an issue of nuclear liability is governed by the law of another State. The exclusion of defamation may be explained by the fear that the application of the law of some States may limit the freedom of speech and more specifically the freedom for the press to report on the issues it wants to cover.

Other exclusions relate to non contractual obligations arising out of family relationships (such as an action to recover unpaid maintenance) or arising out of the law of companies. One may refer in this respect to the issue of the personal liability of the officers of the company for the obligations of the company.

Principle : law of the place of damage

Article 4 of the Regulation provides the general rule : an issue of cross-border liability is in principle governed by the law of the country “in which the damage occurs” (*lex loci damni*). Article 4 further explains that the law of the place of damage applies “irrespective of the country in which the event giving rise to the damage occurred”. According to the Preamble, [a] connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability” (Recital 16).

If an event occurs in a given country and it leads to damage in that country, no difficulty arise : the law of that country will govern the question of liability. If the event giving rise to the damage takes place in one country and the damage occurs in another country (as was the case in the seminal *Bier v Mines de Potasse d’Alsace* dispute), the Regulation clearly gives priority to the law of the country where the damage occurs. This rule is probably meant to favor the victim. However, the victim may only rely on the direct damage : Article 4 further excludes the possibility to take into account the “indirect consequences” of an event. This means that under Article 4, no account may be taken of the place where adverse consequences take place of an act which has already caused damage in another place. It may not always be easy to distinguish between the direct and indirect consequences of an event.

It may not always be easy to identify the place where the damage occurs. If a company is given instructions to carry a cargo of fresh bananas by ship from the port of Rotterdam to the South of Spain and the ship is arrested in the port of Rotterdam, because a creditor of the shipowner has obtained an arrest measure from a local court, it is obvious that if the ship stays in Rotterdam for three weeks and the bananas start to rot, the damage occurred in Rotterdam. It may be different if the ship carries out a normal journey from Rotterdam to its port of destination and it is only discovered upon arrival that the bananas were severely damaged during the transport. In the latter case, the damage may be discovered at the point of arrival of the ship. It does not necessarily mean that the damage occurred at that place. Similar difficulties may arise in case financial damage is sustained. Say a company established in country A publishes an announcement which mistakenly includes confidential information regarding the financial dealings of a competitor doing business from country B, the question arises where to locate the damage which may result from this announcement.

Article 4 includes two further principles, which may serve to nuance the operation of the main rule. According to Article 4, paragraph 2, the law of the place of damage is set aside if the person claimed to be liable and the person sustaining the damage habitually reside in the same country. In that case, the non contractual liability is governed by the law of this country. Take two Belgian friends enjoying a holiday in the south of Spain. One day, one of them jumps in the swimming pool of their hotel, not realizing that his friend is already swimming. The swimmer is severely injured when his friend crashes upon him. Although the event and the damage unquestionably occurred in Spain, Belgian law will apply to find out whether there is any liability and what are the consequences, as the two friends habitually reside in Belgium. In this case, the place of damage may be said to be fortuitous, as there is very little connection between that place and the case at hand. The application of the law of the common habitual residence is not a mere option, which may be applied by the court. When both the victim and the tortfeasor habitually reside in the same

country, the law of that country must be applied. This seems to suggest there is no further room to apply the escape clause found in Article 4, paragraph 3, when the two parties habitually reside in the same country.

Article 4 includes another nuance : under Article 4, paragraph 3, a court may not apply the law of the country in which the damage occurs if the whole situation is more closely connected with another country. This exception may only be applied provided there is a “manifestly closer connection” with another country. It remains to be seen in which circumstances courts will use this escape clause. In particular, one may wonder whether the escape clause should be applied taking into account the test developed by the Court of Justice in *Intercontainer Interfrigo SC v Balkenende*, in which it interpreted the escape clause found in Article 4 of the Rome I Regulation. This would mean that the escape clause of Article 4, paragraph 3 of the Rome II Regulation may be applied even though there is some connection between the events and the law declared applicable under Article 4 paragraph 1.

Article 4 applies to all cross-border liability cases, save for those which fall under a specific rule. Cases which fall under Article 4 include *e.g.* personal injury cases, damage to goods or inducement to breach a contract.

Nuance : freedom of choice

Article 14 of the Rome II Regulation allows parties, in some circumstances, to choose the law applicable to a situation of cross-border liability. The freedom to choose the law is much more limited under the Rome II Regulation than it is under the Rome I Regulation. According to Article 14, a choice of law may only be accepted if

- the agreement to choose the law has been concluded after the event giving rise to the damage occurred;
- or all parties are businessmen, pursuing a commercial activity.

In the latter case, a choice of law may be concluded *before* the event giving rise to the damage occurred.

As is the case under the Rome I Regulation, some choice of laws are neutralized. This is the case if the choice of law is expressed in a situation in which all relevant elements are located in a single country : if this is the case, the choice for the law of another country may be disregarded in so far as the law chosen derogates from mandatory provisions of the law of the country in which the situation is grounded.

Specific rules

The general rule of Article 4, according to which cross-border liability is governed by the law of the place of damage, does not apply to all situations of cross-border liabilities. A number of specific matters are governed by specific rules. This is the case for unfair competition, product liability, environmental damage, infringements of intellectual property rights and liability which may arise from industrial actions.

With these specific rules, the Rome II Regulation attempts to strike a different balance between the interests of the parties. In some cases, a specific rule will give more weight to the interests of the victim, as is the case for the rule covering environmental liability. In other cases, the specific rule

attempts to protect a policy interest, such as the desire to further undistorted competition.

- Environmental liability

According to Article 7 of the Rome II Regulation, the law applicable to damage to the environment may be chosen by the person seeking compensation : the action may be brought either under the law of the place where the damage occurred or under the law of the country in which the event giving rise to the damage occurred.

The justification for this special choice may be found in the desire to preserve the environment as much as possible : the Rome II Regulation favors the person sustaining the damage in order to ensure that the polluter may be held fully liable for the damage and that, hence, a high level of protection to the environment is maintained.

According to the Preamble, environmental damage should be understood as covering adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

- Product liability

Article 5 provides a special rule for damage arising out of product liability. The rule refers in the first place to the law of the country in which the victim habitually resided. This law is, however, only applicable provided the product was marketed in that country. If the product was not marketed in the country in which the victim habitually resided, the liability is governed by the law of the country in which the product was acquired. Again, this rule is subject to the caveat that the product must have been marketed in that country. Finally, a last rule provides that the liability should be examined taking into account the law of the country in which the damage occurred. This rule is subject to the same caveat as the previous ones.

The caveat is meant to be a foreseeability rule protecting the person claimed to be liable : if he or she could not reasonably foresee the marketing of the product in a given country, the law of that country does not apply. In case the product manufacturer could not reasonably foresee that the product would be marketed in one of the countries mentioned in the cascade of Article 5, another solution prevails : the case is governed by the law of the country in which the person claimed to be liable is habitually resident.

What should be understood under ‘marketing’ a product? This covers a range of actions including selling the product through a network, and advertising a product. Whether or not advertising a product on line is sufficient to say that a product has been marketed in a given country, remains to be seen.

- Industrial action

Article 9 of the Regulation includes a specific rule for damage arising out of industrial action. This rule covers damage arising out of strikes and lock-out. This may include for example damage arising out of actions meant to prevent people from working or to induce people to breach their contract.

The liability of a person (be it a worker or an employer) or of an organization representing the professional interests of workers or employers is subject to the law of the country where the action is to be, or has been taken. This rule protects the legitimate expectations of employers and workers : if they take care to respect the rules of the country in which they act, they are protected against an action in tort.

Exclusion of renvoi

The Regulation excludes the mechanism of *renvoi* : when a law is deemed to be applicable under the Regulation, regard should only be had to the substantive provisions of that law and not to its conflict of laws rules (art. 24). This applies whether the law declared applicable is that of a Member State or of a third state.

Public policy

Article 26 of the Regulation allows in exceptional cases a State to refuse to apply the provisions of the law designated by the rules of the Regulation. Such refusal is only possible if the application of those provisions would be “manifestly incompatible with the public policy (ordre public) of the forum”.

Mandatory rules

The Rome II Regulation makes it possible for a court to apply its own internationally mandatory rules, whatever law should normally apply to a situation. Those rules enjoy priority of the law declared applicable, whether this law has been chosen by parties or designated by the objective conflict of laws rules.

The Rome II Regulation does not contemplate the possibility for a court to take into account mandatory rules of a third state.

Legal source : Rome II Regulation

Case law :

- ECJ, 10 December 2015, *Florin Lazar v Allianz SpA*, case C-350/14.

Mr Florin Lazar, a Romanian national, claimed compensation from an Italian insurance company for the damage he suffered following the death of his daughter in a road traffic accident which occurred in Italy. The claim was made before an Italian court. It covered material and non-material damage allegedly suffered by Mr Lazar. The question arose whether the damage suffered by Mr Lazar following the death of his daughter should be regarded as damage or merely as indirect consequences of the accident, within the meaning of Article 1, paragraph 1 of the Regulation.

According to the ECJ, the damage which must be taken into account to determine the place where the damage occurred is the “direct damage”. The Court underlined that the damage sustained by the close relative of the person who died in the traffic incident, must be regarded as indirect consequences of that incident. This does not mean those close relatives will be deprived of the possibility to seek compensation for their loss.

What the ECJ made clear is that their claim for damage is the indirect consequence of the initial damage which occurred following the car accident. These claims for damage are therefore not relevant to identify which law applies to the claim. Once that law is identified, it will be up to that law to determine whether a person other than the direct victim may obtain compensation, for example for psychological or financial damage suffered following the death of a close relative. This is also apparent from Article 15 letter f, which indicates that the law applicable determines the “persons entitled to compensation for damage sustained personally”.

CROSS-BORDER EMPLOYMENT CONTRACTS

Cross-border employment situations are quite frequent. Sometimes, an employee living in a country is recruited by a local company to work abroad, either permanently or from time to time. In other situations, a company established in country A will recruit an employee living in country B to work in that country. In some contexts, the cross-border nature will be inherent in an employment relationship, *e.g.* when a pilot is recruited to fly airplanes over different countries or a truck driver to drive a truck all over Europe. In all these situations, there is a need to determine which courts will have jurisdiction in case of disputes and which national law will be applicable. This need arises even though in many countries, employment law is protective of employees. If the latter benefit from some form of protection in many countries, the level of protection they enjoy may be very different, ranging from a basic one to a very substantial protection level under some national laws.

The private international law rules dealing with cross-border employment relationships are characterized by their protective nature : the European rules dealing with such relationships are conceived to protect employees. This is apparent both in respect of the rules of jurisdiction and of the conflict of laws rules.

Cross-border employment relationships also raise difficult issues of social security and tax law. Those matters remain regulated at national level, with some very sharp differences between the law of various Member States. Within the EU, various rules have been adopted to make sure that there is coordination between the legal systems of Member States (see *e.g.* Regulation No. 883/2004 of 29 April 2004 on the coordination of social security systems). Incidentally, cross-border employment situations may also give rise to work permit issues (and other related migration issues).

Jurisdiction

Jurisdiction in relation to cross-border employment relationship is first and foremost determined by the rules of the Brussels *Ibis* Regulation. The Regulation devotes a specific section to employment disputes (Article 20 to 23). These provisions are self-sufficient : with a few exceptions (such as Article 8(1)), no other rules of jurisdiction of the Regulation may be applied in relation to cross-border employment disputes. This ensures that the protection afforded to employees cannot be undermined by the application of other rules.

In order to give employees a stronger protection, the Brussels *Ibis* Regulation includes a rule extending the scope of application of the rules relating to employment disputes. Those rules apply not only when the defendant is domiciled in a Member State. Article 20, paragraph 2 also provides that an employer who is domiciled outside the EU, may also be subject to the specific rules of jurisdiction included in the Brussels *Ibis* Regulation when the employer possesses a branch, agency or other establishment in one Member State, and the dispute arises out of the operations of this branch, agency or establishment. This rule also helps protect employees against attempts by businesses established in the EU to avoid the application of the protective rules of jurisdiction. A business may indeed be tempted to establish its main headquarter outside the EU and only keep a branch or another establishment in the EU in order to avoid being subjected to the rules of the Brussels *Ibis* Regulation. This will not prevent the application of the Articles 20 to 23 if an employee is working in a Member State, where the employer has established a branch. In that case, the employer is deemed to be domiciled in the Member State where it has a branch.

The Brussels *Ibis* Regulation provides different rules depending on whether the employee is the plaintiff or the defendant. In most cases, the employee will be the one bringing the action. The vast

majority of employment disputes indeed relate to the consequences of the dismissal / termination of the employment relationship by the employer, with the employee bringing proceedings to challenge the dismissal and/or obtain additional compensation. The relevant rules of jurisdiction may be said to be rules of privileged jurisdiction, as they afford the employee a large protection. A further sign of the privileged nature of those rules of jurisdiction is that, contrary to the general principle under the Regulation, which prohibits the review by the court addressed of the jurisdiction of the court of origin (article 45, paragraph 3 of the Brussels *Ibis* Regulation), the Regulation mandates that a foreign judgment be denied recognition or enforcement if it appears that it violates a rule of jurisdiction relating to employment contracts (Article 45, paragraph 1, e), i)), at least if the employee was the defendant.

When the *employer* brings a dispute against the employee, he does not have the choice : such proceedings must according to Article 22 be brought before the court of the employee's domicile. It does not matter that the employee actually worked in another country than that of his domicile. This rule aims to protect the employee by guaranteeing that he benefits from a home court advantage.

Article 21 of the Brussels *Ibis* Regulation gives the *employee* a much wider choice when he brings proceedings against his employer (or ex-employer). According to this provision, such proceedings may first be brought before the court of the employer's domicile (Art. 21(1)(a)). Article 63 of the Regulation defines the 'domicile' of a corporation as the place where it has its statutory seat, its central administration or its principal place of business.

The employee may also bring proceedings before the courts of the Member State where he carried out his job. If the employee is no longer working, proceedings may be brought before the "last place" where the employee carried out his duties under the employment contract. The rationale of this rule is that the employee (or ex-employee) will in most cases be familiar with the courts and court proceedings of the country in which he worked. In some situations, it may, however, be difficult to find out with precision where an employee actually worked. This question will be explored in more details in a later section. If it does not prove possible to locate the place where the employee habitually carried out his work, Article 21 instructs to bring proceedings before the court where the business is located which hired the employee. This rule should only be applied in exceptional cases.

Article 23 of the Brussels *Ibis* Regulation adds another layer of protection for the benefit of employees : in order to avoid that employers would contract out of the protection afforded by the articles 21 and 22, Article 23 provides that choice of court provisions appearing in contract of employment may only be taken into consideration in two scenarios : *first*, when the agreement has been concluded after the dispute (a rather unlikely hypothesis, given that the employee will not want to forsake the protection afforded by the Articles 21 and 22) and *second*, if the choice of court provision allows the employee to bring proceedings in another court than those already enjoying jurisdiction under the Regulation. This makes it in effect quite unlikely that a choice of court provision would be valid and enforceable in cross-border employment situations.

In the *Mahamdia* case, the ECJ had the opportunity to provide some guidance on Article 23. The case arose out of a contract of employment concluded between a person living in Germany, who possessed both the Algerian and German nationality, and the Ministry of Foreign Affairs of the Republic of Algeria : under the contract, the person was to work as a driver at the Algerian embassy in Berlin. The contract included an agreement on jurisdiction, which gave exclusive jurisdiction to the courts of Algeria. Five years after starting his employment, the driver brought proceedings in Germany against his employer, seeking to be paid for overtime he claimed to have worked. Shortly thereafter, the driver was dismissed. The question then arose whether this dismissal was justified

and whether the ex-employee could claim compensation (ECJ, 19 July 2012, *Ahmed Mahamdia v People's Democratic Republic of Algeria*, case C-154/11).

After ruling that an embassy could be deemed to be a branch under Article 20, paragraph 2, so that the Regulation could be applied even though the Republic of Algeria was evidently not domiciled in a Member State, the Court found that in order for a choice of court agreement concluded before the dispute arise, to be valid, it must confer jurisdiction over the action brought by the employee on courts additional to those provided for in Articles 21 and 22. According to the Court, the effect of such an agreement must therefore not be to exclude the jurisdiction of the courts designated under the Articles 21 and 22, but to extend the employee's possibility of choosing between several courts with jurisdiction. The Court added that an agreement on jurisdiction may further only held to be valid if they 'allow' the employee to bring proceedings in courts other than those indicated in Articles 21 and 22. This is not the case with an agreement granting exclusive jurisdiction to a court and prohibiting the employee from bringing proceedings before the courts which have jurisdiction under these two articles. With this judgment, the ECJ has made it clear that there is only very limited room for valid choice of court agreements in employment matters.

Applicable law

The law applicable to cross-border employment situations is determined by the Rome I Regulation. The main principle of the Rome I Regulation is that a cross-border contract is governed by the law chosen by parties (Article 3). However, in relation to cross-border employment contracts, Article 8 deviates from this general rule, in order to protect the employee.

Parties may according to Article 8 include a choice of law in their employment contract. Such a choice will, however, only have limited effect : it may indeed, according to Article 8, paragraph 1, not deprive the employee of the protection which would have been afforded to him in the absence of a choice of law. In order to determine with precision the extent of the effects of a choice of law provision, one must therefore first determine which law would apply to a contract in the absence of a choice of law provision.

According to Article 8, paragraph 2, a contract of employment is governed by the law of the country where the employee habitually carries out his work in performance of the contract. The Rome I Regulation refers to the same concept used by the Brussels *Ibis* Regulation. In order to understand how much freedom parties to an employment contract enjoy when making a choice of law, one needs to identify the mandatory provisions of the law of the habitual place of employment : those provisions apply in any case to the contract, even if parties have chosen to subject the contract to another law. The law chosen by parties may therefore receive no application when its provisions conflict with those of the law which would have applied in the absence of a choice, provided, at least, that the latter are mandatory. Article 8 does not refer to the 'internationally mandatory rules', as meant in Article 9 of the Rome Regulation ('overriding mandatory provisions'), but rather to the domestic concept of mandatory rules.

Illustration

A German company hires a sales representative, who lives in Belgium, to try to find new customers in Belgium. The sales representative will be in charge of the Belgian market and work in Belgium, save for one or two meetings a month, which will be held in Germany. Parties chose to submit their contract to German law. The application of German law will only be possible in so far as it does not deprive the employee of the protection afforded to him by those rules of the law which would be applicable to the contract of employment if parties had not made any choice of law. Since the

employee spends most of his time working in Belgium, Belgian law would have applied to the contract in the absence of a choice of law. The employee will therefore benefit from the provisions of Belgian labor law which are mandatory. This may be the case for example in relation to the notice period to be given by the employer in case of termination of the contract.

The protection afforded by Article 8 comes in addition to the protection an employee may benefit under the internationally mandatory rules. Under Article 9 of the Rome I Regulation, those rules apply to cross-border contract without any consideration of the law chosen by parties.

The place of habitual employment

The place of habitual employment plays a central role in determining the status and legal regime of cross-border employment situations : it is relevant to determine which court has jurisdiction and which law applies to cross-border employment contract.

In many situations, it will not be very difficult to determine where an employee actually works. Even with the development of flexible working methods such as home working, most employees have a central place where they either spend most of their time or at least receive their instructions. In some situations, however, it may be difficult to locate this place of habitual employment.

The ECJ has given some useful guidance to help find out how to apply the concept of 'place of habitual employment'. In *Rutten* (ECJ, 9 January 1997, *Rutten v Cross Medical Ltd*, case C-383/95), the ECJ held that the place of employment must be understood to mean the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer. This interpretation was needed according to the Court in order to afford proper protection to the employees as the weaker party to the contract, as this was the place where it is the least expensive for the employee to commence proceedings against the employer. Mr Rutten, a Dutch national residing in the Netherlands, was working for a company incorporated under English law and with registered office in London. A dispute arose between parties following termination of the termination of Mr Rutten's contract of employment by Cross Medical Ltd. Mr Rutten carried out his duties not only in the Netherlands but also in the UK, Belgium, Germany and the US. He spend approximately one third of his time in these countries, but after each trip he returned to an office he had established at home. The Court found that the place where Mr Rutten habitually performed his work, was the place where he had established the effective centre of his activities.

In *Rutten*, the Court of Justice placed great emphasis on the location of the employee's office and the distribution of the working time among various countries. These two factors, however, coincided in the Rutten case, as Mr Rutten had established his office in the Netherlands and he spend most of his working time in that country. If this was not the case, should preference be given to the court where the employee's office is established or should preference should be given to the 'time factor'? On the basis of the various decisions of the Court, it may be argued that if the employee has an office in a country, this creates a presumption that the habitual place of work is in that country. That presumption may be rebutted, but this will take exceptional circumstances, such as when all other relevant factors (including but not limited to the time spent in other countries) point to another country.

Some employees may not have a central office. This was the case of Mr *Weber* (ECJ, 27 February 2002, *Weber v Universal Ogden*, case C-37/00) : Mr Weber, a German national domiciled in Germany, was employed by a Scottish company. He worked as a cook on board of various vessels but also of various sea installations (oil platforms) in the Netherlands and in Scotland. As the

criterion of the effective centre was not relevant in his case, the ECJ held that the habitual place of work should be the place where the employee spends most of his working time. The court should therefore look at the whole period of employment in order to find out where the employee spends most of this time.

The prevalence of the quantitative criterion is, however, in the eyes of the Court, not absolute. The Court left the possibility open that in certain cases, the particular circumstances would demonstrate that the employee had a stronger link with another country, taking in account all the circumstances of the case.

The practical application of those guidelines may depend on the particular circumstances of each case and also on the sector concerned. As far as the international transport sector is concerned, the ECJ had held that the court should take into account “the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated” and that the court should also “determine the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks” (ECJ, 15 March 2011, *Heiko Koelzsch v. Grand Duché de Luxembourg*, case C-29/10).

What is certain is that an employee may not have more than one 'habitual place of work'. Even if a person divides his time between several countries, it should be possible to determine a single habitual place of work. The Court's consistent interpretation of the criterion of the place where the employee 'habitually carries out his work' has the result that that rule can also be applied in cases where work is carried out in several Member States. As a result, the subsidiary rule (Article 21, paragraph 1, b), ii)), according to which jurisdiction goes to the court of the place where the business is located which hired the employee, will only be applied in very rare circumstances. The ECJ has expressly recognized this, by holding (in relation to the Rome I Regulation) that the criterion of the country in which the employee 'habitually carries out his work' “must be given a broad interpretation”, while the criterion of ‘the place of business through which [the employee] was engaged’ “ought to apply in cases where the court dealing with the case is not in a position to determine the country in which the work is habitually carried out” (ECJ, 15 March 2011, *Heiko Koelzsch v. Grand Duché de Luxembourg*, case C-29/10). In other words, there is a hierarchy of rules within Article 8 of the Rome I Regulation and 21 of the Brussels Ibis Regulation.

The Court has also consistently held that where work is carried out in more than one Member State, the criterion of the country in which the work is habitually carried out must be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities. If the employee has a central office from which he works, even if only for a portion of his working time, there is strong chance that this office points to the habitual place of work. In the absence of such an office, the court should look to the time spent at the various locations. The quantitative assessment, however, may be nuanced by taking into account particular circumstances.

Posting of workers

It happens regularly that an employee is 'posted' : an employee who is posted, is sent by his employer to carry out a service in another EU Member State. Posting of workers occurs in principle on a temporary basis. This may be the case *e.g.* where a French company has signed a contract with a Belgian customer to build a water treatment plant in the premises of the Belgian company in Belgium : the French company may send a team of skilled workers who will spend a number of months in Belgium in order to complete the assignment. Posted workers are in principle not

migrating or using the possibility to move from one country to the other. Once the assignment is completed, the posted workers will move back to the country where their employer is established. Posting workers is a useful component of the freedom to provide services, which is one of the key elements of the EU internal market.

In order to avoid undesirable effects of large scale (and long term) posting of workers and also to ensure that posted workers enjoy a certain level of protection, the EU has adopted a Directive (Directive 96/71 on posting of workers) which impose certain rules to posted workers. Under the Directive, posted workers must be entitled to a minimum set of core rights, as they are in force in the host Member State, whatever law applies to their contract of employment. These rights relate to the minimum rates of pay, the maximum work periods and minimum rest periods, the minimum paid annual leave, the health, safety and hygiene at work and equal treatment between women and men. These rights may not be contracted out by subjecting the employment contract to another law than that of the country where the employee is posted. In principle, this Directive should ensure that companies may benefit from the possibility to provide services in other Member States while at the same time guaranteeing a fair competition among companies.

The Posting of Worker Directive does not take care of all issues in relation to posted workers. Beyond the 'core rights' which are listed in the Directive, other questions could arise in relation to a posted worker. When a posted worker is laid off for example, the Directive does not specify which law should apply, that of the home country or of the country where the employee is posted. The application of the rules of jurisdiction of the Brussels Ibis Regulation and the conflict of laws rules of the Rome I Regulation may raise some issues, as these rules are predicated on the concept of 'habitual place of work'. When an employee working in France for a French employer, is posted to Germany where he will work for the next 18 months, does he keep his habitual place of work in France, or should one accept that the employee's habitual place of work is transferred to Germany? And if the latter is the case, does the employee acquire a new habitual place of work immediately upon being posted, or only after having spent some time in the country of posting?

At this stage, it remains unclear how the concept of habitual place of work should be applied in relation to posted workers. Article 8, second paragraph of the Rome I Regulation provides that the country where the work is habitually carried out "shall not be deemed to have changed if [the employee] is temporarily employed in another country". There is no equivalent provision in the Brussels Ibis Regulation. The European Commission has suggested that when a posting assignments lasts for a period longer than 24 months, the employee should be deemed to acquire a new habitual place of work. This would mean that the law of the host Member State would apply to the employment contract of such posted workers. However, this interpretation has yet to be firmly accepted by courts.

Who is the employer?

In principle, there should be no difficulty in finding out who is the employer : the employer is the natural or legal person bound by the employment contract. The application of the various rules of European private international law in relation to cross-border employment may, however, become difficult in situations where it is not immediately clear who is (was) the employer of a given employee. This may be the case when the employee has signed a contract with a company, which is part of a group of companies, and is later assigned to work for another company of the same group. The same may be said if the employee receives instructions from another company than the one he is bound to by a contract of employment, without that this leads to a formal assignment.

In various cases, the ECJ had the opportunity to shed some light on how to apply European rules of

private international law in order to identify the real employer. In *Voogsgeerd* (ECJ, 15 December 2011, *Jan Voogsgeerd v Navimer SA*, case C-384/10), a Dutch national had concluded a contract of employment with a company established in Luxembourg, Navimer. The contract was signed at the headquarters of the Belgian subsidiary of Navimer, Naviglobe. It included a choice for the law of Luxembourg. The employee worked as a seaman on board of various ships belonging to Navimer. He received his salary from Navimer. But he was required to report to and received his instructions from Naviglobe in Belgium. All his assignments also started and ended in Belgium. The ECJ had to deal with the issue of the triangular relationship between the employee, Navimer and Naviglobe. It held that it was for the national court to assess what was the real relationship between the two companies in order to establish whether Naviglobe could indeed be considered to be the employer of the persons hired by Navimer, taking into account all objective factors (including the fact that there is or not transfer of authority between the two companies concerned) making it possible to establish that there exists a real situation different from that which appears from the terms of the contract. The ECJ did, however, indicate that the fact that the employee had always received instructions from Naviglobe and not from Navimer, could be taken into consideration in order to determine the place where the sailor actually carried out his work.

What happens in case of insolvency?

European private international law rules aim to protect employees. Does this protection also apply when the employer becomes insolvent? The Insolvency Regulation (first version adopted in 2000; updated version adopted in 2015 : Regulation 2015/848 of 20 May 2015, in force starting in June 2017) provides that the law applicable to insolvency proceedings is the law of the country where such proceedings were started (Article 4 Regulation 1346/2000; Article 7 Regulation 2015/848). This means that if a company incorporated and doing business in Germany becomes insolvent and proceedings are opened in Germany, the question whether the opening of such insolvency proceedings will have any effect, and if yes, which, on the employment situation of an employee working for the company in Belgium, will be governed by German law.

There may be a tension between the law applicable to the insolvency proceedings and the law applicable to the employment contract, at least when the employee habitually performed his work in another country than the one where insolvency proceedings are opened. In order to avoid this tension and better protect the employee, the Insolvency Regulation (Article 10 Regulation 1346/2000; Article 13 Regulation 2015/848) provides that the effects of insolvency proceedings on employment contracts remain governed by the law of the Member State applicable to the contract of employment. That law remains exclusively applicable to determine whether the opening of insolvency proceedings brings about the automatic termination of the employment contract, or whether it is up to the insolvency administrator to decide whether the employment contract is terminated or not.

This carve out seeks to protect the integrity of the special conflict of laws rule of the Rome I Regulation dealing with employment contracts. It is limited to the question of the “effects of insolvency proceedings on employment contracts”. This special regime does not apply when an employment contract has been terminated in the framework of insolvency proceedings and the question arises whether the claim made by an ex-employee (to obtain compensation for the termination or to obtain other advantages) enjoys any priority in the distribution of the proceeds. The rules governing the distribution of proceeds are indeed solely governed by the law of the country where the insolvency proceedings were initiated.

Legal basis : Art. 8 Rome I Regulation; Art. 20-23 Brussels Ibis Regulation (foreign judgments);

Art. 97 Code of private international law

Case law :

- ECJ, 15 March 2011, *Heiko Koelzsch v. Etat du Grand Duché du Luxembourg*, case C-729/10

Mr Koelzsch, a German citizen domiciled in Germany had been hired to work as a truck driver by a company doing business in Luxembourg. The contract included a choice for Luxembourg law and a provision conferring exclusive jurisdiction to the courts of Luxembourg. The employer was a subsidiary of a Danish company. It was active in the carriage of plants and flowers from Denmark to different destinations in Germany and other European countries. The employer had no office in Germany. The trucks were registered in Luxembourg and were covered by Luxembourg social security. Shortly after Mr Koelzsch was elected to the works council, he was dismissed by his employer. At first, Mr Koelzsch brought proceedings in Germany. After these proceedings were dismissed because the German courts found they had no jurisdiction, Mr Koelzsch brought proceedings in Luxembourg, seeking damages for unfair dismissal and compensation in lieu of notice and arrears of salary. After the courts in Luxembourg had refused to apply German law (protecting members of the work council) to the dispute, Mr Koelzsch brought new proceedings against the State of Luxembourg. During those proceedings, a question arose concerning the habitual place of work of Mr Koelzsch, which was a relevant factor under the Rome I Regulation. The ECJ held that the criterion of the country in which the employee habitually carries out his work should be given a broad interpretation, while the subsidiary criterion of the place of business which hired the employee should only apply in those cases where the court is not in a position to determine the country in which the work is habitually carried out. The Court added that given the nature of the work performed by Mr Koelzsch, account should be taken, in order to determine the habitual place of work, of the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated. The national court should also take into account the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks.

- ECJ, 12 September 2013, *Anton Schlecker v Melitta Josega Boedeker*, case C-64/12

Ms Boedeker, who resided in Germany, was employed by Schlecker, a German retail business with a number of branches in various Member States. After working for more than 15 years in Germany, Ms Boedeker was offered in 1994 a new contract of employment to work as Schlecker's manager in the Netherlands, where she managed 300 shops. In 2006, Ms Boedeker was informed that her position as manager in the Netherlands was canceled and that she would start as manager in Germany. Ms Boedeker complained about this unilateral change of her employment conditions. Shortly after starting to work in Germany, she was reported to be ill. Ms Boedeker brought proceedings in the Netherlands against her employer. A question arose as to the law applicable to her employment contract. It was not disputed that Ms Boedeker had worked for more than 11 years in the Netherlands. The employer, however, argued that under Article 8, paragraph 4 of the Rome I Regulation, the contract should be governed by German law because the contract as a whole was more closely connected with Germany than with the Netherlands. Indeed, the employer was a German company, the

remuneration was paid (until 2001) in DM, the pension arrangements were made with a German pension provider; Ms Boedeker had continued to reside in Germany where she paid her social security contributions; the employment contract referred to mandatory provisions of German law and the employer reimbursed Ms Boedeker's travel costs from Germany to the Netherlands.

The ECJ found that the law normally applicable under Article 8, paragraph 2 of the Rome I Regulation could be disregarded not only where the habitual place of employment was not genuinely indicate of a connection but also when the employment contract was more closely connected with another country. The Court only limited the operation of the exception clause by indicating that a court cannot automatically conclude that the rule laid down in Article 8, paragraph 2 of the Rome I Regulation must be disregarded solely because, by dint of their number, the other relevant circumstances – apart from the actual place of work – would result in the selection of another country. Among the circumstances a court could take into account to decide whether a contract of employment is more closely connected with another country, the ECJ indicated that the following circumstances could be relevant : the country in which the employee pays taxes on the income from his activity, the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes and the parameters relating to salary determination and other working conditions.

CISG – VIENNA SALES CONVENTION

The Vienna Sales Convention is one of the most ambitious attempts to work towards unification of the law of international trade. The Convention has a long history. Although it may not always play a significant role in practice due to the habit of many established players to exclude the application of the Convention, it has attracted a very large support from many States and it is applied routinely in cross-border sales transactions.

History

Work on the unification of the law of international sales contract started with the attempt by Ernst Rabel, a German lawyer, to produce an academic treatise comparing the law of sales contracts in many countries (*Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung*, Tübingen/Berlin [Law of the sale of goods], published in 1936). Ernst Rabel was one of the first to recognize that unification projects could only succeed provided the law of the various participating states had been mapped in a comparative exercise. Rabel also initiated discussions within the Unidroit with a view to work towards the unification of the rules governing cross-border sales transactions. This resulted in a first draft which was transmitted by the League of Nations to governments for comments in 1935.

After the second World War, the efforts to unify the law of sales contracts continued. A series of diplomatic conferences were convened during which various drafts were discussed. During a diplomatic conference held in The Hague in 1964, two texts were adopted and signed : each of the two conventions contained a uniform law. The first uniform law (Uniform Law on the Sale of Goods - ULIS) included rules on the basic obligations and rights of parties to a sales contract. The second uniform law (Uniform Law on the Formation of Contracts for the International Sales of Goods - ULFC) provided rules on offer and acceptance, revocation of offers and other issues related to the formation of a contract of sales. It took some time for these two instruments to come into force : they finally entered into force in 1972, after obtaining the minimum number of ratifications required. Belgium ratified the two Conventions in 1968.

The two conventions never attracted much support. They were only ratified by a handful of countries (notably Germany, Italy, the Netherlands and the UK). The Conventions only attracted nine ratifications. Today only three States are still bound by the Conventions. Even though the Conventions were not highly successful, a substantial number of court cases dealt with the two instruments. This gave rise to an impressive body of case law, especially in Germany, Belgium and the Netherlands. Courts in these countries therefore grew accustomed to applying not their own, national rules, but international rules when dealing with sales transactions.

In the 1960's, the twin conventions were already criticized. It was often said that the 1964 Hague Conventions were too 'Euro-centric' and did not sufficiently reflect the diversity of legal systems. Uncitral, which had been established by the UN General Assembly in 1966, started working on a new instrument, with a view to replace the Hague Conventions. Various drafts were produced by committees set up with a view to draft a single instruments dealing with international sales contracts. These efforts led to a diplomatic conference convened in 1980 in Vienna, during which the Vienna Sales Convention was agreed.

The Convention first entered into force on 1 January 1988. It took some ten years for the Convention to be ratified by twenty countries. In the 1980's the Convention was ratified by small and big countries, scattered all over the planet (Argentina, Australia, Austria, Belarus, China,

Denmark, Egypt, Finland, France, Germany, Hungary, Italy, Lesotho, Mexico, Norway, Sweden, Syria, USA, Zambia). In the 1990's ratifications picked up steam and the number of ratifications increased steadfastly. Among the countries which ratified in the 1990's one may mention Belgium, Canada, Chile, the Netherlands, New Zealand, Peru, Poland and Singapore. The Convention continued to attract new ratifications after the new millennium started. Between 2000 and 2010, eighteen new countries acceded to the Convention. Since then, we have witnessed 11 new accessions. It is likely that new countries will continue to join the Convention in the future.

In July 2016, the Convention was in force in 85 countries. Among them, almost all largest economies of the world are bound by the Convention (all countries members of the G7 are bound by the Convention, save the United Kingdom; all countries members of the G20 are bound by the Convention save South Africa, India, Indonesia, Saudi Arabia, and the United Kingdom).

That the United Kingdom has decided not to adhere to the CISG is a conscious decision : the United Kingdom intends to preserve its special position in international commerce. A substantial number of international contracts include a choice for English law (and for English courts, or arbitration). Research has shown that English law is by far the favorite law of businessmen. Adhering to the Convention could imperil this privileged position, as the English law of cross-border sales contracts would no longer be different from the laws of other countries.

Uncitral has also adopted an international Convention on the Limitation Period in the International Sale of Goods (1974), which is a useful complement to the CISG.

Why unify the law of cross-border sales contracts?

The contract of sale is the backbone of international trade. It provides the foundation for many cross-border transactions. It is undeniable that substantial differences exist between the legal regimes governing sales contracts in various countries in the world. By providing a uniform regime governing international sales contracts, the Vienna Sales Convention hopes to increase legal certainty and also decrease the transaction costs which are associated with cross-border transactions. Whether the Convention indeed succeeds in doing so, is difficult to measure.

The Convention is also relevant in that it provides a modern law of sales contracts, which is carefully balanced between the interests of the seller and those of the buyer. In that sense, the Convention is acceptable in countries with a strong export industry (such as *e.g.* Germany, one of the top exporting economies in the world) and in countries which import lots of good (such as *e.g.* Lebanon). The Vienna Sales Convention may also serve as a source of inspiration for national legislators. In many countries, the law of sales contracts is still governed by rules shaped a long time ago. These rules may not be adapted to the needs of modern trade. Countries may therefore find inspiration in the international rules to revise their laws. The Vienna Sales Convention also served as inspiration for later attempts to provide a uniform code of contract rules (such as the Unidroit Principles).

Which contracts are governed by the CISG?

The Vienna Sales Convention only applies to *cross-border sales contracts*. It is not relevant when both seller and buyer are established in the same country. This follows from Article 1, first paragraph, which provides that the Convention only applies to "contract of sale of goods between parties whose places of business are in different States". When buyer and seller are established in the same country, no application may be made of the Convention, even though part of the sales operation may be linked to another country (*e.g.* as when the goods bought must be delivered to

another country).

The Convention is not linked to the 'nationality' of parties – in fact, it may be wondered whether one may refer to the nationality of a company : whether seller and buyer possess the nationality of a Contracting State, is not relevant. What matters is whether they are established in two different countries. Likewise, the commercial or civil nature of the parties is of no relevance.

In order for the Convention to apply, the contract must be linked to one or more Contracting States. Article 1, first paragraph defines this link using two alternatives:

- There is a sufficient link between the contract and the Convention if both seller and buyer are established in Contracting States; according to Article 10, if a party has more than one place of business, one should take into account the place of business “which has the closest relationship to the contract and its performance”. If a party does not have a place of business, reference is to be made to his “habitual residence”.
- If only one of the parties, or none of the parties is established in Contracting States, the Convention nonetheless also applies, if the contract of sale is governed by the law of a Contracting State. Under this alternative, the link with the Convention is not purely territorial. Rather, the link is to be found in the fact that according to the normal conflict of laws rules, the contract is governed by the law of a Contracting State. The operation of this rule requires that one first determines which law applies to the contract. This may seem to be a paradox, as the Vienna Sales Convention precisely aims to overcome the differences between national laws and also to avoid the application of private international law rules.

The conflict of laws rules are, however, only called upon to help determine the scope of application of the Vienna Sales Convention. Once the latter is found to apply, the applicable national law loses in principle all relevance. A number of States (such as China and the United States) have made a declaration opposing the application of this rule. Accordingly, the courts of these States will only apply the Vienna Sales Convention when the two parties are established in Contracting States.

The Convention includes a rule dealing with the situation in which one party did not know and could not know, at the time the contract was concluded, that the other party was established in another country : in that case, the fact that the parties have their places of business in different States may be disregarded (Article 1, paragraph 2).

When one takes into account these rules, the application of the Vienna Sales Convention to export sales by companies operating from Belgium may be summarized as follows :

- Export sale by a company established in Belgium to a seller operating in a Contracting State (such as the Netherlands or Germany) → the CISG applies;
- Export sale by a company established in Belgium to a seller operating in a non Contracting State (such as the UK or Morocco) → the CISG only applies if the contract is governed by the laws of Belgium (or of another Contracting State). This will be the case if parties do not include a choice of law in their contract, as sales contracts are governed by the law of the seller.

The Vienna Sales Convention further excludes a number of cross-border sales contracts from its

scope of application :

- Article 2(a) excludes the application of the Convention to consumer sales (defined as sales contracts for the sale of goods bought for personal, family or household use). In many countries, consumer sales are subject to special rules, which aim to protect consumers. Most of these rules are mandatory, and sometimes even considered to be internationally mandatory. The application of these rules would be displaced if those contracts fell under the Vienna Sales Convention.
- Other sales contracts which are excluded from the scope of application are auction sales, sale of ships or aircraft and sale of electricity. In some countries, these sales are indeed governed by specific regimes. Contracting States did not want the Convention to displace these regimes.

Which issues are governed by the CISG?

The CISG purports to give a legal framework for most legal issues arising in relation to cross-border sales contracts. It includes rules on the formation of sales contracts : when and how may a sales contract be concluded, what are the requirements for an offer to be valid, how long an offer remains valid etc. The Convention also includes a rule on the so-called ‘Battle of the forms’, i.e. the situation in which each party to a contract uses its own general conditions. According to Article 19, when a company replies to an offer, which came with general conditions, by sending its own trade conditions, this reply is deemed to be a counter-offer, unless there are no significant differences between the two sets of general conditions. Unless the offeror then objects to the counter-offer, the contract is deemed to be concluded on the basis of the general conditions of the offeree.

The Convention also includes detailed rules on the performance, non-performance and remedies available to parties. Obligations of the sellers include delivering goods in conformity with the quantity and quality stipulated in the contract, as well as related documents, and transferring the property in the goods. Obligations of the buyer include payment of the price and taking delivery of the goods. Further rules help for example to determine when a contract may be terminated and by whom. Additional rules regulate passing of risk, anticipatory breach of contract, damages, and exemption from performance of the contract.

One of the key concepts of the Convention is that of ‘*fundamental breach*’ : according to Article 25, a breach by one of the parties of his obligations is deemed to be ‘fundamental’ “if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract”. The debtor may challenge the fundamental nature of the breach by showing that he could not foresee that the breach would lead to such a result. When a breach by one parties is fundamental, this brings about important consequences : it opens the possibility for the creditor of the obligation to use radical remedies such as requesting delivery of substitute goods (possibility offered to the buyer if the lack of conformity constitutes a fundamental breach of contract, Article 46) and avoiding the contract (Articles 49 and 64).

Two important issues are expressly not governed by the Convention (Article 4):

- The CISG does not include any rule on the *validity* of the contract (this exclusion may be difficult to reconcile with the existence in the Convention of detailed rules on the formation of a sales contract).

- The CISG is also silent on the effect which the contract may have on the *property* of the goods sold. Rights in rem issues are left outside the scope of the harmonization.
- The CISG also excludes the issue of the *liability* of the seller for death or personal injury caused by the goods sold.

Exclusion of the CISG

The CISG is not mandatory. Article 6 makes it clear that the provisions of the Convention are only meant to apply provided parties have not themselves crafted a solution in their contract. The Convention therefore only has a *gap filling* effect. When applying the Convention, one should therefore first verify whether the contract concluded between parties does not include a solution for a given problem. The contractual solution prevails over the rule found in the Convention. In practice, it will therefore often be the case that only some of the rules of the Convention apply to a contract.

In practice, the application of the Vienna Sales Convention is very often excluded altogether. Many contracts and general conditions include a provision excluding the application of the Vienna Sales Convention. Such an exclusion has practically become a boilerplate provision. Research has revealed that in many cases, the exclusion of the Vienna Sales Convention does not arise out of discontent with its provisions or of a comparison with the rules of a given national law, but rather out of ignorance or lack of expertise.

Interpretation of the CISG and uniform application

The Vienna Sales Convention purports to bring uniformity to the law of international sales contract. In countries in which it is in force, it replaces the rules of national law. As with other instruments of private uniform law, the benefits of harmonization may, however, be lost if the provisions of the Convention are applied differently in the various countries in which it is in force. The risk of losing the uniformity is amplified by the fact that the CISG exists in six official languages (English, French, Russian, Arabic, Spanish and Chinese), non of which prevails over the other.

The Contracting States bound by the Convention have not created a specific, international tribunal which would have jurisdiction to hear disputes involving the Convention and would ensure uniformity in the application of its provisions. This would have required too large an investment from those States. Disputes involving the Convention are therefore heard by national courts (or arbitral tribunals). In order to ensure that these courts do not adopt an interpretation colored by national law, Article 7 of the Convention provides that its interpretation should be carried out taking into account “its international character” and “the need to promote uniformity in its application”. This is only an invitation. The non-observance of this invitation will not lead to any sanction. Further it may not always be easy for a national court to identify the guiding principles which it should observe in order to its interpretation of the Convention to respect its ‘international character’.

Since the entry into force of the Convention, courts have decided many cases applying the Convention. One key feature of the Convention is that much of this case law is collected and made available. Uncitral itself has developed a tool to help practitioners access the case law : the CLOUT (Case Law on UNCITRAL Texts) is an online database containing summaries of many cases in which national courts have applied the Convention. Uncitral has also compiled a ‘digest’ of those cases. Private initiatives have also flourished : many online sources offer access to cases decided

under the Vienna Sales Convention. The most well-known is the Albert H. Kritzer database operated by Pace University, which offers full text access to thousands of cases decided by national courts. Many of these cases have been translated in English.

These tools are important, because they make it possible for judges to access the case law of other countries. This is a key requirement if courts are to apply the provisions of the Convention in an open, international way. Research has shown that a great number of national courts take into account cases decided by courts of other Contracting States when trying to identify the exact meaning of a provision of the Convention.

Leading scholars have established a 'CISG Advisory Council' which issues opinions on the interpretation of the provisions of the Convention. These opinions take stock of current court practice in different countries and offer an interpretation which could possibly go beyond national traditions.

Whether or not the Convention indeed achieves uniformity in practice remains an open question. Some scholars have doubted the Convention could lead to more uniform practices (see *e.g.* Clayton Gillette & Robert Scott, 'The Political Economy of International Sales Law' (2005) 25 *International Review of Law and Economics* 446 and Gilles Cuniberti, 'Is the CISG Benefiting Anybody?' 39 *Vanderbilt J. Transnat'l L.* 1511 (2016)).

Case law : <http://iicl.law.pace.edu/cisg/cisg/> / www.uncitral.org/uncitral/en/case_law.html

Other languages:

FR : 'Convention de Vienne sur la vente internationale de marchandises' (CVIM); NL : 'Weens Koopverdrag' ; DE : 'Wiener Kaufrechtsübereinkommen' / 'UN-Kaufrecht'