

European Private International Law : a Primer

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What we will study

- General introduction
- Rules of cross-border jurisdiction
- What law governs cross-border contracts?
- Foreign judgments in the EU

European Private International Law : Introduction

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Today's menu...

- *Why* European private international law?
- *A few features* of European private international law

I. Why European private international law?

A. A typical dispute

- Imagine Plastics Polska, Polish company, selling polypropylene in various EU Member States
- One of its customers established in France has placed large order early 2011, but refuses to accept delivery in May 2011 arguing that the price should be renegotiated as market prices have faltered

I. Why European private international law?

A. A typical dispute

- What are the options for Plastics Polska?
 - Bring court proceedings in Poland? - how can it serve process in France? Will the Polish judgment be of any use in France?
 - Bring proceedings in France? - will French courts accept jurisdiction? What law will French courts apply?
 - What if in the meantime French client becomes insolvent - may Plastics Polska file a claim in the insolvency estate?

I. Why European private international law?

A. A typical dispute

- Whatever option *Plastics Polska* selects, need to look at private international law
- Private international law attempts to solve 3 issues
 - *Jurisdiction* – in which circumstances may court of a country entertain proceedings in respect of disputes which have a link with another country?
 - *Applicable law* – selection from the relevant countries the one whose law is to supply the rules applicable
 - *Recognition and enforcement of foreign judgments* – what is the legal value of a foreign judgment?

I. Why European private international law?

B. The case for European private international law

- If private international law offers answer to these questions, why do we need European private international law?
- 1st element : should we not look at the pil of Member State (MS)? Every MS has its own private international law rules (*compare* :
 - Russia : section IV of Part III of the Civil Code - artt. 1186 ff.
 - Belarus : Chapt. 74 Civil Code 7 Dec. 1998 and Chapt. VI Family Code 9 July 1999)

I. Why European private international law?
B. The case for European private international law

- Difficulties associated with 'national' private international law systems
- 1st) Diversity of PIL → additional costs/efforts - e.g. may Plastics Polska bring proceedings in France or Poland : need to examine both French and Polish rules of (cross-border) jurisdiction

I. Why European private international law?

B. The case for European private international law

- 2nd difficulty : result of application of national PIL may run contrary to objectives of EU (and discourage future ventures of Plastics Polska in other EU markets) :
 - _ Polish company exporting to France, but what if under French rules, Polish judgment not recognized in France?
 - _ Polish company exporting to France, but what if under French rules, no jurisdiction of French courts?
 - _ What if under French rules, Polish company may not file a claim in insolvency of its clients?

I. Why European private international law?
B. The case for European private international law

- Situation of *Plastics Polska* in the absence of European private international law : difficult to reconcile with progress made by the EU internal market – national borders remain when business relationship turns sour, while they have disappeared for *access to market*

I. Why European private international law?

B. The case for European private international law

- 2nd element : if national private international law rules do not offer solution, why limit unification of such rules to European MS?
- Idea of harmonisation of rules of private international law fairly old - has long been tackled through international treaties
- Most important efforts : Hague Conference (www.hcch.net - Russia member) - e.g. 1980 Hague Abduction Convention; 1965 Hague Service Convention

I. Why European private international law?

B. The case for European private international law

- Efforts of Hague Conference are important and should be continued
- However, EU felt that it could do better than Hague conference :
 - Explore areas untouched by Hague Conference (e.g. insolvency)
 - Adopt rules going further than Hague compromises – and adopt them faster (negotiations of Hague conventions are time consuming)

I. Why European private international law?

B. The case for European private international law

- 3rd element : why do we need European private international law - has the EE not harmonized private law and hence reduced importance and need for private international law?
- Intervention of EU in private law cannot be denied : *“approximation of laws”* → Art. 114/115 Treaty (old art. 94/95) : Parliament and Council may adopt measures *“for the approximation of the provisions laid down by laws, regulations or administrative action in Member States which have as their object the establishment or functioning of the internal market”*

I. Why European private international law?
B. The case for European private international law

- Efforts of the EU to level out the differences: many examples of harmonization of private law
 - Commercial transactions: *e.g.* Council Directive 86/653 of 18.12.1986 on agency contracts
 - Consumer transactions : *e.g.* Council Directive 93/113 of 05.04.1993 on Unfair Terms in Consumer Contracts

I. Why European private international law?

B. The case for European private international law

- Efforts of the EU have not (and – it is submitted – cannot) eliminate(d) all differences :
 - Limited reach of the efforts : not all sectors and transactions covered → even with efforts of the EU to level out the differences, EU remains union of 27 Member States, with as many legal systems. As far as private law is concerned (civil and commercial law) : more differences between legal systems of Member States than similarities
 - Even if intervention of the EU in a specific matter, room for differences remain (e.g. Agency Directive : compensation of the agent following termination, MS have the choice between 2 systems – either compensation for damage or payment of a goodwill indemnity)S
- Diversity of national private law therefore remains an obstacle (even if not the most important one) to proper functioning of the internal market

I. Why European private international law?
B. The case for European private international law

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- Even if EU were to fully harmonize private law, functioning of the internal market requires *additional* intervention: some issues cannot be solved (properly) with the mere approximation of private laws

I. Why European private international law?

B. The case for European private international law

- Approximation of private laws does not solve all issues – *e.g.*
 - If dispute between Plastics Polska and French client brought before Polish court, will judgment of Polish court be enforceable in France ?
 - procedural cooperation (service of process / taking of evidence) – necessary to set up a European system to ensure level playing field for all actors of the internal market

I. Why European private international law?

B. The case for European private international law

- Hence, action of the EU in the field of private international law (jurisdiction; applicable law and recognition of foreign judgments)
- In other regional unions, similar efforts - e.g. CIS : efforts towards unified private international law -
 - Kiev Convention (Convention for settlement of disputes connected with commercial activities of 20 March 1992)
 - Minsk Convention (Convention on legal assistance and legal relations on civil, family and criminal matters of 22 Jan. 1993)
 - Kishinev Convention (Convention on mutual legal assistance in civil, family and criminal cases of 7 Oct. 2002)

I. Why European private international law?

B. The case for European private international law

- In fact, in all federations, question arises whether private international law should be addressed by the federation or by the federated states
- *E.g.* United States
 - Limited rules in US Constitution on private international law (Full Faith and Credit Clause - Art. IV Sec. 1)
 - Only limited number of federal laws adopted by US Congress to deal with private international law matters (*e.g.* in child custody matters, child support and same-sex marriages)
 - Bulk of private international law : state law (which federal courts also apply in diversity case – *Erie Railroad Co. v. Tompkins*)

II. A few features of European private international law

- Characteristic features of European private international law:
 - A. Evolutionary character
 - B. Special character
 - C. Two sides of EU PIL
 - D. Wide scope of EU private international law

II. A few features of European private international law

A. Evolutionary character

- 1st feature : evolutionary character
- European private international law is very young, yet has already undergone substantial evolution
- At first, limited number of achievements, 2 international conventions :
 - 1968 Brussels Convention (jurisdiction and enforcement of foreign judgements)
 - 1980 Rome Convention (which law applies to cross border contracts)

II. A few features of European private international law

A. Evolutionary character

- Since Amsterdam treaty (1999), European private international law has undergone substantial changes:
 - Cooperation between Member States takes the form of European Regulations (instead of international conventions) – advantages (role of ECJ; coming into force; role of Commission)
 - Cooperation goes much further than 'classic' private international law approach
 - Use of 'certificates'
 - Intensive cooperation – European Judicial Network

II. A few features of European private international law

A. Evolutionary character

- Changes are still ahead – evolution is not finished
- Today, civil cooperation is bustling with activity
 - *Revision* of existing instruments (e.g. Brussels I)
 - New projects : e.g. successions, matrimonial property, civil status etc.

II. A few features of European private international law

B. Special character

- European private international law remains subject to special regime in many respects
- Some of the special features may be explained because European private international law does not stand on its own
- It is part of a larger design aimed at creating “an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured ...” (Art. 3(2) of the Treaty on the EU)

II. A few features of European private international law

B. Special character

- 1st example : special position of three Member States (Protocols 21 and 22)
 - UK and Ireland – possibility to 'opt in'
 - Denmark – absolute 'opt out'

II. A few features of European private international law

B. Special character

- 2nd example : role of the ECJ
- Until Lisbon treaty, restricted regime for preliminary references by national courts - former art. 68 : only requested by national courts of last 'resorts'
- Since Lisbon Treaty – application of the general regime for preliminary references

II. A few features of European private international law

B. Special character

- 3rd example : exercise by EU of its competence in private international law subject to demonstration of a link with “*the proper functioning of the internal market*”

II. A few features of European private international law

B. Special character

- 4th example : special position of measures concerning cross-border *family law*
- Instead of being subject to normal procedure (ordinary legislative procedure is the co-decision procedure of art. 294 ff : proposal by Commission; approval by Parliament and Council and conciliation procedure), measures in family law are adopted by the Council, limited role of Parliament (only consulted)

II. A few features of European private international law

C. Two sides of EU PIL

- Next to various instruments of secondary law (Regulations), European private international law is also based on and inspired by EU primary law
- Role of EU primary law : mainly through intervention by the ECJ – which corrects or adapts national rules of private international law
- A few examples

II. A few features of European private international law

C. Two sides of EU PIL

- 1st example : ECJ *Arblade and Others*, joined cases C-369/96 and C-376/96 [1999] ECR I-8453 : no application by MS of its 'overriding mandatory rules' if this constitutes an obstacle to free provision of services (issue : possibility for Belgium to apply its labour law rules regarding French employees posted in Belgium)

II. A few features of European private international law

C. Two sides of EU PIL

- 2nd example : ECJ *Mund & Fester / Hatrex Intl Transport*, 10.02.1994, case C- 398/92: prohibition (on the basis of prohibition of discrimination) of national provision which makes it easier to obtain attachment of assets when enforcement takes place abroad (presumption in German law that enforcement will be more difficult)

II. A few features of European private international law

C. Two sides of EU PIL

- 3rd example : ECJ *Centros Ltd.*, case C-212/97 : MS may not refuse to register branch of a company incorporated in another MS in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital

II. A few features of European private international law

C. Two sides of EU PIL

- 4th example : ECJ *Grunkin Paul*
14.10.2008, case C- 353/06 : obligation for a MS to recognize surname given to a child in another MS even if surname does not correspond to the one which should be given according to national law of the child (obligation based on Art. 18 EC - European citizenship)

II. A few features of European private international law

D. Wide scope of EU PIL

- EU private international law touches today on variety of subjects and topics
- See definition of scope in Treaties:
 - Art. 67(4) TFEU : “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”
 - Art. 81 TFEU (former art. 65) : the Union shall develop “judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments”

II. A few features of European private international law

D. Wide scope of EU PIL

- Art. 81 TFUE lists series of questions which may be addressed:
 - Mutual recognition and enforcement of judgments between MS
 - Cooperation in cross-border service of documents and taking of evidence
 - Measures ensuring the compatibility of rules concerning the conflict of laws and of jurisdiction
 - Measures eliminating obstacles to the proper functioning of civil proceedings

II. A few features of European private international law

D. Wide scope of EU PIL

- Taking stock of what has been achieved
- 1) Cross-border proceedings:
 - Main instruments (jurisdiction of courts / foreign judgments)
 - Brussels I (44/2001)
 - Brussels IIbis (2201/2003)
 - EET (805/2004)
 - Accompanying measures (aim at facilitating cross border procedures):
 - Service of Process (1397/2007)
 - Taking of Evidence (1206/2001)
 - Judicial Aid (2003/8)

II. A few features of European private international law

D. Wide scope of EU PIL

- 2) Applicable law:
 - Rome I – law applicable to cross border contracts (593/2008)
 - Rome II – law applicable to cross border liability (864/2007)
 - Rome III – law applicable to divorce (1259/2010)
- 3) Overall harmonization of specific fields
 - Cross-border insolvency (1346/2000)
 - Cross-border alimony (04/2009)

II. A few features of European private international law

D. Wide scope of EU PIL

- Scope of European private international law is (potentially) very broad
- All three questions covered (jurisdiction, applicable law, foreign judgments) and cooperation (Eur. Judicial Network / Atlas)
- Commercial, civil, family law
- Substantive and procedural

—> Hence, not possible to offer but a broad overview

European Private International Law

(2) Rules of Jurisdiction

Today's menu...

- Introduction
- Brussels I Regulation : Jurisdiction in civil and commercial matters
 - In general
 - A few applications

I. Introduction

- Importance of European rules of jurisdiction – necessary or at least welcome addition to internal market freedoms
- See other 'internal markets' →
 - USA (harmonization of rules of jurisdiction through case law : Supreme Court as regulator of jurisdiction through 'minimum contacts' doctrine)
 - CIS – 1993 Minsk Convention on Legal Assistance and Legal Relations – section II (artt. 20 ff.) : uniform rules of jurisdiction in civil and family matters

I. Introduction

- Added value of European rules of jurisdiction :
 - Level playing field for litigants
 - High degree of predictability for litigants (where can I bring proceedings / where can I be brought before court ?)
 - Considerably reduces the impact of proceedings abroad - even if proceedings in other MS remain more difficult
 - Crucial element for foreign judgements scheme :
harmonization of rules of jurisdiction make it possible to ease circulation of foreign judgements

I. Introduction

- Important intervention of the EU in the field of cross-border jurisdiction → many 'federal' rules of cross-border jurisdiction:
 - Brussels I Regulation - 44/2001
 - Civil and commercial matters
 - Single most important PIL regulation
 - Brussels IIbis Regulation - 2201/2003
 - Divorce proceedings
 - Parental responsibility
 - Insolvency Regulation - 1346/2001
 - Maintenance Regulation - 4/2009

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II. Regulation 44/2001 – In general

- Text with multiple lives:
 - 1°) Brussels I Regulation 44/2001 – entered into force in 01.03.2002
 - 2°) Lugano Convention 1988 (EFTA – mainly Switzerland) – new version in Oct. 2007)
 - 3°) all other EU Regulations dealing with cross-border jurisdiction modelled and inspired on Brussels I

II. Regulation 44/2001 – In general

- Analysis of a case → 2 dimensions
 - Is Regulation applicable ?
 - Which court has jurisdiction?

II. Regulation 44/2001 – In general

- 1st dimension : is Regulation applicable?
- In order to determine which disputes are covered, distinction between
 - 1st) Material scope
 - 2nd) Geographic scope

II. Regulation 44/2001 – In general

- Material scope : 'civil and commercial matters'
 - Very wide, limits are difficult to define
 - In principle concerns 'horizontal' relationships, not 'vertical' ones (e.g. tax law, administrative law, etc.)
 - e.g. ECJ *Lechouritou*, case 292/05, 15.02.2007 : Regulation not applicable to proceedings against Germany for damage arising out of actions of German army during second World War
 - What if State intervenes as private actor? Regulation applicable

II. Regulation 44/2001 – In general

- Material scope : various matters excluded, e.g.
 - Family law (divorce, parent-child relationship, etc. but not maintenance) (Reg. 2201/2003)
 - Insolvency (Reg. 1346/2000)
 - Social security
 - Arbitration - this raises many questions (e.g. ECJ *Marc Rich*, case 190/89, 25.07.1991 : Regulation not applicable to proceedings concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation)

II. Regulation 44/2001 – In general

- Geographic scope:
- Regulation binds all Member States, except Denmark (Regulation not applicable as such – but extended to Denmark by Agreement between Denmark and the EC)
- Reach of European rules of jurisdiction —> not limited to 'pure' EU disputes
- Key to determine whether Regulation applies is *domicile of the defendant* (art. 2-3-4)

II. Regulation 44/2001 – In general

- Geographic scope:
- *e.g.* Reg. 44/2001 applicable to dispute between German and Russian company?
 - if Russian company is the plaintiff?
 - If German company is the plaintiff?
 - if the dispute concerns validity of a corporation established in a MS?

II. Reg. 44/2001 – Jurisdiction scheme



- 2nd dimension : which court(s) has(-ve) jurisdiction?
- Art. 2 – 31 of the Regulation : uniform rules of jurisdiction
- Rules have a different shape
 - Some rules are *general* (art. 2 : jurisdiction of the courts of the domicile of the defendant)
 - Other rules are more *specific*
 - Art. 23 : only apply to contractual disputes
 - Art. 5(3) : special jurisdiction in tort cases

II. Reg. 44/2001 – Jurisdiction scheme



- How to use the rules? Pay attention to the *hierarchy* of the rules
 - Not all rules have the same weight
 - Different weight given to the rules of jurisdiction has impact on
 - Verification of jurisdiction by court seized (art. 25)
 - Possibility to verify jurisdiction at enforcement stage (art. 35)

II. Reg. 44/2001 – Jurisdiction scheme



- Hierarchy of rules of jurisdiction:
 - **(1) Article 22** : five headings of ‘exclusive’ jurisdiction (e.g. title to land/immovable property : court of *situs*)
 - **(2) Article 24** : Entering an appearance (unconditional) submission to jurisdiction of the court seised
 - **(3) Articles 8-21** : ‘Protective’ (and mandatory) jurisdiction for ‘weaker’ parties (e.g. disputes over consumers contracts - Articles 15-17)
 - **(4) Article 23** : Choice of court agreement - Contracting State court chosen by parties has jurisdiction
 - **(5) Articles 2, 5 and 6** : ‘Optional’ jurisdiction
 - Article 2 : Court for the domicile (seat) of the defendant (‘general’ jurisdiction)
 - Article 5 : seven headings of ‘special’ jurisdiction (contracts, maintenance, torts, civil claims, branches, etc.)

II. Reg. 44/2001 – Jurisdiction scheme



- Analyzing a case:
 - Is Regulation applicable?
 - Is there a case of exclusive jurisdiction? (art. 22)
 - Is there an insurance (artt. 8-14), consumer contract (artt. 15-17), or employment contract case? (artt. 18-21)
 - Is there a choice of court clause? (art. 23)
 - Where is the defendant's domicile in the EU? (art. 2)

III. Regulation 44/2001 – 1st application

- Dispute between a company based in Moscow and a company based in Frankfurt – the former has sold real estate located in France to the latter
- Parties do not agree on the exact *timing* of the transfer of ownership : did it take place when the contract was signed or a few months after, when the price was fully paid by the buyer?
- Where must/may proceedings be brought? Moscow, Frankfurt or France?

III. Regulation 44/2001 – 1st application

- 1st question : is Regulation applicable?
- Principle : Regulation applies if *defendant* is domiciled in EU Member State (art. 2).
Where is the domicile?
 - *Physical person* : no European definition, reference to the national law of the Member State concerned – art. 59
 - *Legal person* : open definition (either the statutory seat, the principal place of business or the place of central administration) – art. 60

III. Regulation 44/2001 – 1st application

- Nuance : in some cases, Regulation will apply no matter where defendant is domiciled →
 - this is the case for proceedings relating to *immovable* located in the EU - fact that one of the parties is established outside EU does not affect application of the Regulation, it is enough that the immovable is located within the EU
 - Other cases - e.g. choice of court clause (*infra*)

III. Regulation 44/2001 – 1st application

- *2nd question* : what is the nature of the dispute?
- Contractual dispute ... but the core is *status* of the immovable (timing of the transfer of ownership)
- Whenever status of immovable is at stake, MS have chosen to reserve jurisdiction to the local court → Article 22(1) grants *exclusive* jurisdiction to the court of the MS where the real estate is located (court of the *situs*) (see art. 30 CCP of the RF of 14.11.2002 : exclusive jurisdiction of the court for the place of location for suits concerning rights in land parcels etc.)
- *Rationale* of this monopoly of jurisdiction?

III. Regulation 44/2001 – 1st application

- *Consequences* of the exclusive nature of the jurisdiction: several features aimed at enforcing the monopoly:
 - Agreements between the 2 companies on jurisdiction must be ignored (even if after the dispute has arisen)
 - Duty of the court to verify its jurisdiction *ex officio / sua sponte* (art. 25)
 - Duty of the court addressed to refuse recognition/enforcement if it appears that art. 22 was breached (art. 35)

III. Regulation 44/2001 – 1st application

- ECJ : art. 22(1) is confined to actions “which seek to determine the extent, content, ownership or possession of land or the existence of other rights *in rem* therein and to provide the holders of these rights with the protection of the powers which attach to their interest” (ECJ, *Reichert v. Dresdner Bank* case C-261/90)
- —> If the dispute between the 2 companies concern the payment of the price, Art. 22(1) does not apply
- Art. 22(1) also applicable to tenancies

III. Regulation 44/2001 – 2nd application

- Russian company sells electronic components to a company established in Italy
- Buyer refuses to pay the price, arguing that the goods delivered are defective
- Proceedings brought by the Russian seller before the Italian courts :
defendant appears, is represented by counsel and does not mention the issue of jurisdiction – arguments on the merits (about defects in the goods delivered)

III. Regulation 44/2001 – 2nd application

- Does the Regulation apply?
 - Commercial dispute
 - Defendant is established in a MS

III. Regulation 44/2001 – 2nd application

- Defendant entering an appearance creates jurisdiction (art. 24) → liability of counsel...
- Court may not question its jurisdiction if parties agree (except if other court has exclusive jurisdiction under art. 22)
- Possibility to challenge jurisdiction of the court *and* to file submissions on the merits at the same time (application of national rules of procedure)

III. Regulation 44/2001 – 3rd application

- German bank posts an employee in Poland, where employee will work on a project (integration of a newly acquired local subsidiary into IT of the group) for the next 18 months
- Employee is made redundant 9 months after having been posted
- Where can employee bring proceedings against ex-employer? Poland or Germany?

III. Regulation 44/2001 – 3rd application

- Is Regulation applicable?
 - Labour dispute is a civil dispute
 - Internal EU dispute

III. Regulation 44/2001 – 3rd application

- For 3 categories of contractual relationship (employment, consumer and insurance) – *protective* rules of jurisdiction
 - Overall goal : ease burden of litigation on 'weaker' party, by allowing the latter to bring proceedings before a court close to his 'centre of life' and requiring other party to bring proceedings before weaker party's domicile
 - No derogation by agreement (except *after* dispute has arisen)
 - Verification by court addressed at the recognition / enforcement stage (art. 35)

III. Regulation 44/2001 – 3rd application

- Comp. under Russian law:
 - Art. 29-7 RF's CCP : suits to protect the rights of consumers : court for the *plaintiff's* place of domicile or residence (or place of conclusion or performance of the contract)
 - Art. 17.2 Law on Protection of Consumer's Rights : courts for the place in which the injury occurred

III. Regulation 44/2001 – 3rd application

- For employment disputes :
 - Employee *may choose* between courts of the employer or place of employment – place where the employee habitually carries out his work (*quaere* in case a worker is posted to another country?) - Art. 19
 - Employer *must* bring proceedings before courts of the domicile of the employee – Art. 20
- Issue of jurisdiction has lost some of its relevance because of harmonization of rules determining the law applicable to employment contracts (see Rome I Regulation)

III. Regulation 44/2001 – 4th application

- Share Purchase Agreement concluded between Russian company and company established in England concerning the sale of 100 % of the shares of a company incorporated in Luxembourg and doing business in Germany and Poland
- 6 months after the sale is completed, Russian buyer discovers that the target company's environmental liability is much more important than disclosed during negotiations
- Russian buyer intends to bring proceedings in order to claim damages for breach of representations and warranties

III. Regulation 44/2001 – 4th application

- Does Regulation apply?
 - Commercial dispute
 - Defendant is a UK company – but Regulation would not apply if preemptive action for a negative declaration by English seller against Russian buyer...

III. Regulation 44/2001 – 4th application

- Share Purchase Agreement includes a choice for the courts of London : *“The courts of London shall have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement (including but not limited to a dispute relating to the existence, validity or termination of this Agreement or any non-contractual obligation arising out of or in connection with this Agreement)”*
- Buyer would prefer to bring proceedings in Germany – because it is there that the target is doing business and that the environmental liability is most visible. May it bring proceedings in Germany?

III. Regulation 44/2001 – 4th application

- Most international commercial agreements include a provision on disputes :
 - Either a choice for courts of one State
 - Or an arbitration agreement
- EU law has no direct impact on the latter (see 1958 NY Convention)
- Choice of court agreements : art. 23 Brussels I Regulation

III. Regulation 44/2001 – 4th application

- Freedom of parties to allocate jurisdiction to a given court:
 - EU : art. 23 Brussels I Regulation
 - Russia :
 - CCP : only after dispute has arisen
 - Code of Arbitrage Procedure of the RF (24.07.2002) : territorial jurisdiction of courts of arbitration may be altered either before or after a dispute arises
 - 1993 Minsk Convention : art. 21
 - Worldwide : Hague Convention of 30.06.2005 on Choice of Court Agreements

III. Regulation 44/2001 – 4th application

- Choice of court agreements in Europe
 - Art. 23 applies if court chosen is that of a MS *and* at least one party is domiciled in a MS
 - Presumption that choice is *exclusive* (unless otherwise agreed)
 - No possibility for parties to deviate from rules of exclusive jurisdiction (art. 22)
 - Court chosen by parties *must* exercise jurisdiction – obligation on other courts to decline jurisdiction (even if mandatory rules apply)

III. Regulation 44/2001 – 4th application

- In practice : tension between court chosen by parties and court seized first
- Impact of the *lis alibi pendens* (art. 27) rule on choice of court clauses : see ECJ in *Gasser* : Italian court seized first; Austrian proceedings brought second; plaintiff in Austria alleges that parties have chosen Austrian courts
- Should court second seized stay its proceedings even though clear choice by parties for this court? ECJ : court second seized should stay its proceedings

III. Regulation 44/2001 – 5th application

- Same facts as previous application – save for the fact that the agreement does *not* include a choice of court agreement
- Where could buyer bring proceedings?
Choice
 - Art. 2 : general rule of jurisdiction : domicile of the defendant
 - Art. 5(1) : specific rule for contractual disputes

III. Regulation 44/2001 – 5th application

- Art. 2 ('*forum domicilii*' / '*actor sequitur forum rei*') : general rule of jurisdiction, accepted all over the world:
 - Art. 20 1993 Minsk Convention
 - Art. 28 CCP – art. 35 CAP

III. Regulation 44/2001 – 5th application

- Art. 2:
 - General rule of jurisdiction : all disputes falling within scope of application of Regulation → 'Default' rule of jurisdiction
 - Domicile of the defendant : see definition in Artt. 59/60 Regulation (companies : either statutory seat, principal place of business or central administration)

III. Regulation 44/2001 – 5th application

- Art. 5(1): place of performance of contract widely accepted as basis for jurisdiction
 - Art. 20 § 2 – b 1993 Minsk Convention (“Courts on the territory of a Contracting State shall also be competent where it is in the latter that .. the contractual obligation which is the subject of the dispute was performed or has to be performed in whole or in part”)
 - Art 29.9 CCP
 - Art. 36.4 CAP

III. Regulation 44/2001 – 5th application

- Art. 5(1): only contractual disputes
- Which court?
 - General rule : court for the place of performance of the relevant obligation → difficult exercise for application (which obligation? Where to perform?)
 - Specific rule for contract of sales and service contracts : court of the place where characteristic obligation must be performed (comprehensive jurisdiction over all disputes)

European Private International Law

(3) The Law Applicable to Contracts

Today's menu...

- Harmonization of conflict of laws rules : why, how and when?
- The Rome I Regulation in general
- Which law applies to an international contract from a European perspective : the main principles

I. Harmonization of conflict of laws rules : why, how and when?

- When private actors operate on the internal market, they may be faced with striking differences between (private) laws of MS
- *E.g.* German business sells industrial equipment to French client; its general conditions include a penalty clause (whereby absence or delayed payment of price by purchaser leads to requirement to pay a fixed amount of money)
- German business is surprised to learn that German and French rules differ on the validity and enforceability of such penalty clause

I. Harmonization of conflict of laws rules : why, how and when?

- There have been some efforts to pursue harmonization of private law rules (on the basis of art. 114/115 Treaty : Parliament and Council may adopt measures “*for the approximation of the provisions laid down by laws, regulations or administrative action in Member States which have as their object the establishment or functioning of the internal market*”)
- However, until now, no attempt to pursue comprehensive harmonization
- Why?

I. Harmonization of conflict of laws rules : why, how and when?

- Multi-factor explanations:
 - Strong resistance of Member States – which view harmonization as an assault on their national legal traditions
 - Limited legal basis (need to demonstrate link with internal market)
 - Belief that such harmonization is not necessary for internal market because differences between national laws are only of limited importance for economic actors
 - Reliance on other harmonization efforts undertaken at other levels (such as Uncitral – CISG – or Unidroit)

I. Harmonization of conflict of laws rules : why, how and when?

- If rules of private law remain national, what about rules of conflict of laws?
- Harmonization of these rules offer a simple alternative to the immense burden of harmonization of substantive law rules
- In addition, harmonization of conflict of laws rules usefully complements legal certainty already provided by the unification of rules of jurisdiction
- At this stage, harmonization of conflict of laws rules is much more advanced in the EU than harmonization of substantive law
- In the future : possibly an attempt to unify substantive contract law in the EU (recent outcome : DCFR) but remains controversial whether this is needed for the internal market

I. Harmonization of conflict of laws rules : why, how and when?

- Early efforts of the EU to level harmonize conflict of laws rules led to adoption of the 1980 Rome Convention
- Since then, other instruments have been adopted:
 - Rome II Regulation (864/2007) : law applicable to liability in tort
 - Maintenance Regulation (4/2009) : see in particular art. 15
 - Insolvency Regulation (1346/2000) : artt. 4 ff (law applicable to opening of insolvency and related questions)
 - Divorce Regulation (1259/2010)

I. Harmonization of conflict of laws rules : why, how and when?

- *Compare US* : no harmonization of rules of conflict of laws at federal level for contracts... but:
 - Far less divergence between state laws (every state has adopted UCC and common starting point : English common law)
 - ALI Restatements have provided for consolidation and clarification of state common laws
 - Convergence of state conflict of laws rules (through 2nd Restatement Conflicts)

II. Rome Regulation in general

- At the origin : 1980 Rome Convention - stood out in the system of EU private international law : adopted as a purely public international law instrument (hence, necessary to conclude a separate Protocol to grant ECJ power to hear preliminary references)
- Link between Rome Convention and Brussels Convention / Regulation : it was felt necessary to harmonize conflict of laws rules to avoid forum shopping

II. Rome Regulation in general

- 1980 Rome Convention entered into force in 1991 (and extended to new MS since then)
- In 2008, process of reformatting the Convention in a Regulation :
Regulation 593/2008
- Reformatting also led to some change in substance

II. Rome Regulation in general

- Rome Regulation applies to 'contractual obligations'
 - Not further defined
 - Exclusion of some contracts
 - Contracts in family sphere
 - Agreements on dispute settlement
 - Agreements in the sphere of company law

II. Rome Regulation in general

- Rome Regulation applies 'universally' (art. 2)
 - Typical treaty / convention only applies in the relations between contracting States
 - Rome Regulation goes further and applies as soon as court dealing with the contract is a EU court
 - No matter where parties are established / nationality of the parties
 - No matter what law applies to the contract (law of EU MS or not)
 - Source of inspiration for contracts submitted to arbitration?

III. Which law applies to an int'l contract? 1st Application

- Russian company sells electronic components to a company established in Italy
- Buyer refuses to pay the price, arguing that the goods delivered are defective
- Proceedings brought by the Russian seller before the Italian courts – Italian courts have jurisdiction (e.g. because defendant entered an appearance)

III. Which law applies to an int'l contract? 1st Application

- Contract signed between parties includes following provision :
- *“This Agreement shall be governed by and construed in accordance with the laws of the Russian Federation”*
- Which law applies?

III. Which law applies to an int'l contract? 1st Application

- Is Rome Regulation applicable? Yes:
 - Proceedings before court of a MS
 - Dispute relates to a contract – no exclusion

III. Which law applies to an int'l contract? 1st Application

- Basic principle Rome Regulation : contract is governed by the law chosen by parties (art. 3)
- See also art. 1210 RF CC

III. Which law applies to an int'l contract? 1st Application

- Choice of law : parties enjoy large freedom - may choose:
 - Law of one of their countries
 - Law of a third country (neutral law)
 - Law applicable to the contract or only part of it ('*dépeçage*')

III. Which law applies to an int'l contract? 1st Application

- Outcome : Italian court required to apply Russian law

III. Which law applies to an int'l contract? 2nd Application

- German company sells electronic components to Russian company
- Russian company complains about severe variations in quality of components – some of which may not be used in manufacturing consumer products
- German company refuses to accept liability based on its general conditions which provide:
 - Limitation of liability to
 - Choice for German law

III. Which law applies to an int'l contract? 2nd Application

- Proceedings before a German court – which law applies?
- 1st question : Rome I Regulation applicable? Yes:
 - Proceedings before the courts of a MS
 - Contractual dispute – not an excluded matter

III. Which law applies to an int'l contract? 2nd Application

- 2nd question : which law applies?
- Choice for German law in general conditions
- Is this choice enforceable?
- Art. 10 Rome Regulation : existence and validity of contract governed “by the law which would govern it under this Regulation if the contract or term were valid”

III. Which law applies to an int'l contract? 2nd Application

- Examine under German law if the general conditions have been incorporated in the contractual relation between parties (*ABGesetz*)
- If the general conditions have not become part of the contract, need for a *default* rule to determine law applicable to the contract

III. Which law applies to an int'l contract? 2nd Application

- Default rule : several possibilities:
 - Contract governed by the law of the place where it was concluded?
 - Contract governed by the law of the place where the contract has been / must be performed?
 - Contract governed by the law which presents the closest link with the contract?

III. Which law applies to an int'l contract?

2nd Application

- Art. 4 Rome Reg. opts for another solution : contract is governed by the law of the country in which the debtor of the characteristic performance is established
- Characteristic performance : the obligation which singularizes the contract (*comp.* art. 1211 RF CC : « .. the party responsible for the performance under the contract of crucial significance for the content of the contract... »)
- Why not the place of performance of that obligation? Could give rise to controversy – how to locate the place of performance?

III. Which law applies to an int'l contract? 2nd Application

- Principle of the characteristic performance is applied in 2 different ways:
 - General rule : law of the country (not MS) in which the debtor of the characteristic performance is habitually resident (Art. 4 § 2)
 - Specific rules for most important categories of contracts, e.g. sales agreements, services agreement : direct determination of the applicable law (*comp.* art. 1211 § 3 RF CC)

III. Which law applies to an int'l contract? 2nd Application

- Outcome : German law applies, as law of the seller

III. Which law applies to an int'l contract? 3rd Application

- Danish road transport company hires a German truck driver to drive trucks between Denmark and Germany
- Contract includes a choice for Danish law
- After a couple of months, truck driver joins an union and is chosen by fellow drivers to represent them in discussions with company ('*Betriebsrat*')

III. Which law applies to an int'l contract? 3rd Application

- 4 weeks after truck drivers joined *Betriebsrat*, he is dismissed with very little compensation
- May truck driver benefit from application of German protective legislations (limiting substantially possibility to dismiss employees member of the *Betriebesrat*)?

III. Which law applies to an int'l contract? 3rd Application

- Is Rome Regulation applicable?
 - Proceedings before a MS
 - Labour contract covered by Rome I Regulation
- Which law applies? At first sight, choice for Danish law in the contract should be honored

III. Which law applies to an int'l contract? 3rd Application

- However, Rome Regulation includes substantial limitation to parties' freedom to choose the law governing their agreement
- This applies to 3 categories of contracts: consumer, insurance and employment contracts

III. Which law applies to an int'l contract?

3rd Application

- Special regime for these contracts:
 - Possibility to choose the law, but mandatory provisions of the 'weaker' party prevail over law chosen by parties (law chosen limited by the application of the mandatory provisions of the law which would be applicable in the absence of a choice - art. 8 § 1)
 - In the absence of a choice of law, law of the 'weaker' party applies - in case of labour contract, law of the place “from which the employee habitually carries out his work in performance of the contract” (art. 8 § 2)
- *Comp.* art. 1212 RF CC

III. Which law applies to an int'l contract? 3rd Application

- Outcome : most likely that the court (DK / GER) is bound to apply the German rules protecting members of the *Betriebsrat*

III. Which law applies to an int'l contract? 4th Application

- Russian company grants Belgian company right to distribute its products (plastic derivatives) on the Belgian market
- Contract includes a choice for Russian law
- After a few years, Russian company terminates the relationship
- Belgian distributor claims compensation

III. Which law applies to an int'l contract?

4th Application

- Is Rome Regulation applicable?
 - If dispute is brought before a court of a MS
 - Contractual dispute

III. Which law applies to an int'l contract? 4th Application

- Which law applies?
- In principle, Belgian court is bound to apply Russian law, chosen by parties (art. 3)
- However : courts are always required to apply their internationally mandatory rules (art. 9 Rome I Regulation) - see art. 1192 RF CC

III. Which law applies to an int'l contract? 4th Application

- Internationally mandatory rules?
- Rules which parties may not displace by contract and which trump the normally applicable law
- *E.g.* : mandatory rule protecting local distributor; rule prohibiting export of cultural heritage artifacts, etc.
- Outcome : Belgian distributor may claim compensation under 1961 Belgian Distribution Act

European Private International Law

(4) Foreign Judgments

Today's menu...

- Introduction : foreign judgements as part of the internal market
- 1st stage : the Brussels I Regulation
- 2nd stage : the European Enforcement Title Jurisdiction

I. Foreign judgements as part of the internal market

- May an internal market properly work if judgements cannot freely circulate?
- *e.g.* Plastic Polska obtains a judgement from a Polish court ordering its French client to pay compensation for the lack of performance of the contract : what if Plastic Polska is unable to use this judgement in France?
- Lack of free circulation could impair internal market – and discourage companies established in MS from entering other markets
- Hence, free movement of judgements is seen as a necessary addition to EU internal market

I. Foreign judgements as part of the internal market

- See in other internal markets:
 - CIS : 1993 Minsk Convention (civil and family law disputes) and 1992 Kiev Convention (commercial disputes)
 - US : Full Faith and Credit Clause (Art. IV Sec. 1 US Constitution)

I. Foreign judgements as part of the internal market

- At first, this goal 'delegated' to the MS
—> negotiations between MS (on the basis of a Treaty mandate) —> 1968 Brussels Convention
- With the Amsterdam Treaty, Brussels I Regulation (44/2001) took over and further refined the mechanism for circulation of judgements

I. Foreign judgements as part of the internal market

- One key feature of the European approach to foreign judgement —> *link* between harmonization of rules of jurisdiction and recognition/enforcement
- Another key feature : *mutual trust* - (political) idea that MS should trust one another's judicial system
- This explains *limited reach* of the rules : strictly confined to judgements from MS - not possible to extend it to judgements from non Member States (but judgements from MS may concern litigants from outside the EU)

I. Foreign judgements as part of the internal market

- Today many Regulations provide for free circulation of judgements:
 - Basic Regulation : Brussels I (44/2001) – civil and commercial matters
 - Brussels IIbis (2201/2003) : divorce and parental responsabilité
 - Insolvency (1346/20006)
 - Maintenance (04/2009)
 - Eur. Enforcement Order (805/2004) : uncontested claims

III. 1st stage : Brussels I Regulation

A. Recognition of foreign judgments

- Company based in Austria files a claim against Italian individual to obtain compensation for damage arising out of fire set by the individual to company's plant in Italy
- Judgement of the Italian court finds that the Italian is liable to pay - however, the debtor is insolvent
- Austrian company requests compensation from its Austrian liability insurer

III. 1st stage : Brussels I Regulation

A. Recognition of foreign judgments

- Discussions between Austrian company and its insurer – the latter refuses to pay
- May the Austrian company rely on the Italian judgement in proceedings before an Austrian court, in order to prove that damage suffered in Italy was caused by a 3rd party ?

III. 1st stage : Brussels I Regulation

A. Recognition of foreign judgments

- Question relates to the 'recognition' of the foreign judgement
- Recognition : accepting the *res judicata* effect of a foreign judgement
- Privileged regime for recognition : *as of right / automatic* : no need to submit foreign judgement first to local court for approval
- See art. 33-1 Regulation : « A judgement given in a Member State shall be recognised in the other Member States *without any special procedure being required* »

III. 1st stage : Brussels I Regulation

A. Recognition of foreign judgments

- This does *not* mean that recognition is unconditional : Regulation lays down some requirements (e.g. art. 34 : no recognition is contrary to public policy)
- See art. 52 Minsk Convention : same principle

III. 1st stage : Brussels I Regulation

A. Recognition of foreign judgments

- How are the requirements tested if recognition is as of right?
- Requirements must be tested by any authority which is faced with the judgment
- In this case : incidental recognition during court proceedings (e.g. claim by A to have a contract enforced, B relies on judgment of foreign court which has ruled that contract is void)
- Recognition as principal claim also possible (rare)

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- Polish company has sold some goods to a German company
- Invoices issued remain unpaid
- Polish company issues proceedings before a Polish court (jurisdiction derived from choice of court found in the seller's general conditions)
- Polish court awards damages to Polish seller
- May Polish company request attachment of German company's assets in Germany?

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- Recognition of the Polish judgment is not sufficient
- Need to go further and make sure that the judgment may be 'enforced' - i.e. that the judgment may serve as title for enforcement measures (such as attachment)

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- Regime for enforcement of foreign judgments is much stricter than for recognition
- No enforcement *as of right* : Regulation requires that court addressed first verifies the judgment – art. 38 Regulation : “A judgment given in a MS ... shall be enforced in another MS when ... it has been declared enforceable there”
- Similar principle : art. 53 Minsk Convention (petition for enforcement of judgments)

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- In order to ease up enforcement, the court proceedings are organized in *two stages*
- 1st stage : *ex parte* proceedings; court only verifies that documents required are produced (art. 41 : “The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application”) - no contradictory procedure (*Comp. Art. 54 Minsk Convention*)

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- 2nd stage : if debtor wishes to challenge the enforcement, may do so (art. 43). Contradictory proceedings, court must decide on grounds of refusal

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- Expectation built in in the system is that the debtor (who has lost a first time before court of origin) will in most cases not challenge declaration of enforceability
- Further, scope of review of the court addressed during second stage of the proceedings is limited → no possibility to review the merits of the case, foreign judgment should be taken as an existing fact and only reviewed from an outsider's perspective (not an internal perspective)

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- Company in France brings proceedings before French court against English company, claiming damages for breach of contract
- English company does not appear, is not represented by counsel
- French court:
 - Does not review its jurisdiction
 - Misapplies important EU directive on contract law
 - Awards supplementary damages to French company because of the fact that English company did not show up

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- May this judgment be enforced in England?
- English court may not:
 - Review the merits of the judgment (would I have come to the same conclusion?)
 - Review the jurisdiction of the court of origin – fact that French court did not review its jurisdiction (while it is required to do so – art. 25 Reg.) not a ground for refusal of recognition

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- Limits to the mutual trust : the grounds of refusal, for both recognition and enforcement (artt. 34-35 Regulation):
 - Public policy
 - Service of process (limited to default judgments)
 - Irreconcilable judgments
 - Some selected grounds of jurisdiction (mainly art. 22)

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- Public policy:
 - No European definition, each MS decides
 - Exceptional cases - when recognition or enforcement is truly intolerable
 - Both substantive and procedural issues covered
- Fact that French court did not review its jurisdiction and misapplied EU law : no ground to justify public policy

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- *Comp.* list of refusal grounds under Minsk Convention (art. 55):
 - Public policy not a refusal ground
 - Judgment is not enforceable in state of origin
 - Irreconcilable judgments
 - Defendant defaulted because not duly served
 - Exclusive jurisdiction of State addressed
 - Period of limitation for enforcement has expired
- Art. 9 1992 Kiev Convention on commercial disputes

III. 1st stage : Brussels I Regulation

B. Enforcement of foreign judgments

- How smooth are enforcement proceedings today in the EU?
 - *Plus* :
 - Limited scope of review of court addressed
 - 2 stage-proceedings ease up conduct of proceedings
 - *Downsides* :
 - No strict time limit for the first stage
 - There are still grounds of refusal (e.g. public policy)
 - Above all, need to initiate court proceedings in MS addressed to obtain declaration of enforceability

IV. 2nd stage : Uncontested Claims Regulation

- Starting point : concern that free movement of judgments achieved with Brussels I Regulation is not yet perfect
- How to go further? Suppress the requirement that a court of the State addressed should first review the judgment?
 - Plus : will definitively fasten the process of enforcing judgment from one MS in another (and lower costs)
 - Minus : is this realistic, in particular in Europe with 27 MS? What about possibility to refuse enforcement in exceptional cases? (safety valve)

IV. 2nd stage : Uncontested Claims Regulation

- Two applications of this idea :
 - Regulation 805/2004 on uncontested claims
 - Regulation 2201/2003 (Brussels IIbis) : specifically for some judgments relating to parental responsibility, i.e. rights of access (right to take a child to a place other than his or her habitual residence for a limited period of time) and return of the child in case of abduction

IV. 2nd stage : Uncontested Claims Regulation

- Regulation 805/2004 : compromise between the ideal (free circulation of judgments) and the realistic position (recognizing that mutual trust is not given in all cases)
- Principle is straightforward : no requirement to first submit the foreign judgment to local court for approval – European Enforcement Order may freely circulate in all MS, without any intermediate proceedings prior to enforcement in MS addressed
- Application of the principle : limited and technical

IV. 2nd stage : Uncontested Claims Regulation

- Limited scope of application:
 - Application to civil and commercial matters (no excluded matters) – art. 2
 - Principle of free circulation only applies to *uncontested claims* – double definition in Art. 3
 - Only claim for the payment of a specific sum of money (which has fallen due or for which the due date is known)
 - Uncontested claim : debtor must have expressly agreed to the claim (by admission, in a settlement or authentic instrument, or if never objected to the claim)

IV. 2nd stage : Uncontested Claims Regulation

- How does it work?
 - Court of origin must certify the judgment as a European Enforcement Order (issuing a certificate) - artt. 5-11
 - Certification only possible if
 - Judgment is enforceable in MS of origin (art. 6 (1)(a))
 - Certain jurisdictional rules must have been respected (art. 6(1)(b))
 - Minimum standards for uncontested claims procedures (methods and proof of service of process link with Regulation 1393/2007)

IV. 2nd stage : Uncontested Claims Regulation

- How does it work?
 - Once certified, European Enforcement Order may be enforced in all MS without additional proceeding : art. 5 : EEO must be recognized and enforced *“without the need for a declaration of enforceability and without any possibility of opposing its recognition”*
 - Sole ground of refusal of enforcement : if EEO is irreconcilable with an earlier judgment in MS of enforcement

IV. 2nd stage : Uncontested Claims Regulation

- Appraisal:
 - Overall purpose to be commended
 - Limited scope of application
 - Technical aspects make application difficult, if not cumbersome

V. The future

- Review of Brussels I Regulation under way
- One the issues discussed : abolishing exequatur proceedings, so that judgments may freely circulate in all EU MS
- End of discussions : 2013?