(c) in matters of recognition and enforcement, where either the State of origin or the State addressed is not applying an instrument referred to in paragraph 1 of this Article.

3. In addition to the grounds provided for in Title III, recognition or enforcement may be refused if the ground of jurisdiction on which the judgment has been based differs from that resulting from this Convention and recognition or enforcement is sought against a party who is domiciled in a State where this Convention but not an instrument referred to in paragraph 1 of this Article applies, unless the judgment may otherwise be recognised or enforced under any rule of law in the State addressed.

Where neither instrument applies, national law will govern.

§ 9 Subject-Matter Scope

Since the Regulation will apply to a case only if the case comes within its subject-matter scope, we must now consider what the subject-matter scope of the Regulation is. Under Article 1 (Panel 3.9), the subject-matter scope of the Regulation is limited to civil and commercial matters, though it applies whatever the nature of the court or tribunal hearing the case.[39] It is, however, provided by the second paragraph of Article 1 that the Regulation does not apply to certain specified matters, even though some of them are clearly civil or commercial.[40] Arbitration was excluded because it was already covered by the New York Convention. Bankruptcy is covered by a separate instrument.[41] Status, matrimonial property, wills and succession were excluded because of the important differences between the laws of the Member States in these areas and the fact that they were of little relevance for international business.[42]

If a case falls within one of the excluded areas, the court hearing it is not bound by the jurisdictional rules laid down in the Regulation. An English court would apply the traditional English rules. On the other hand, other Member States are not required by the Regulation to recognize the resulting judgment. Whether they do so or not would depend on their own law.[43]

Panel 3.9 Subject-Matter Scope
Brussels 2012 (Regulation 1215/2012)

Article 1

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

2. This Regulation shall not apply to:

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

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

(c) social security;

(d) arbitration;

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

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

§ 9.1 What Law Decides?

How is a court to decide whether a case concerns a matter which falls within the scope of the Regulation? Should it apply its own law or that of another Member State? This question came before the CJEU in our first case. At the time, the Brussels Convention was the relevant instrument, but Article 1 of the Convention was identical to Article 1 of the Regulation.

European Union
LTU v. *Eurocontrol*

Court of Justice of the European Union
Case 29/76, [1976] ECR 1541

Background

Eurocontrol, an international air-traffic-control organization with its seat in Brussels, sued LTU, a German airline, for charges payable for the use of Eurocontrol's services. The action was brought in a commercial court in Brussels, and LTU challenged the court's jurisdiction on the ground that the case was not a commercial action. The court, however, held that, under Belgian law, it was commercial. Judgment was given against LTU. When Eurocontrol tried to enforce the judgment in Germany, LTU raised the same argument again: it claimed that the proceedings were of a public-law nature and were consequently outside the scope of the Brussels Convention.

Eurocontrol argued that the classification of the proceedings should be based on the law of the State that granted the original judgment. Since the Belgian court had already determined that the proceedings were commercial, this would have meant that the case fell within the scope of the Convention. Advocate General Reischl took the same view. LTU, however, argued that the law of the State asked to recognize the judgment should apply, and it seems possible that under German law the action might have been regarded as public.

Judgment

3 … As Article 1 serves to indicate the area of application of the Convention it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform, that the terms of that provision should not be interpreted as a mere reference to the internal law of one or other of the States concerned.

By providing that the Convention shall apply 'whatever the nature of the court or tribunal' Article 1 shows that the concept 'civil and commercial matters' cannot be interpreted solely in the light of the division of jurisdiction between the various types of courts existing in certain States.

The concept in question must therefore be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.

4 If the interpretation of the concept is approached in this way, in particular for the purpose of applying the provisions of Title III[1] of the Convention, certain types of judicial decision must be regarded as excluded from the area of application of the Convention, either by reason of the legal relationships between the parties to the action or of the subject-matter of the action.

Although certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the Convention, this is not so where the public authority acts in the exercise of its powers.

Such is the case in a dispute which, like that between the parties to the main action, concerns the recovery of charges payable by a person governed by private law to a national or international body governed by public law for the use of equipment and services provided by such body, in particular where such use is obligatory and exclusive.

This applies in particular where the rate of charges, the methods of calculation and the procedures for collection are fixed unilaterally in relation to the users, as is the

position in the present case where the body in question unilaterally fixed the place of performance of the obligation at its registered office and selected the national courts with jurisdiction to adjudicate upon the performance of the obligation.

The answer to be given to the question referred must therefore be that in the interpretation of the concept 'civil and commercial matters' for the purposes of the application of the Convention and in particular of Title III thereof, reference must not be made to the law of one of the States concerned but, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.

On the basis of these criteria, a judgment given in an action between a public authority and a person governed by private law, in which the public authority has acted in the exercise of its powers, is excluded from the area of application of the Convention.

1 *Editor's note*: Title III is the part of the Convention dealing with the recognition and enforcement of judgments. In the Regulation, it is called 'Chapter' III.

QUESTIONS

1 What precise features of Eurocontrol's claim were decisive, in the court's view, for determining that it was public?

2 Can you imagine a similar claim that might be characterized differently?

Comment

This case was decided under the Brussels Convention. The Brussels Convention did not contain the words 'or to the liability of the State for acts and omissions in the exercise of State authority *(acta iure imperii)*'. The words were added by Brussels 2012 to give effect to the principle originally adopted by the CJEU in this case.

The fact that a judgment is outside the scope of the Regulation does not mean that it cannot be recognized on some other basis. In a later case based on almost identical facts, *Bavaria Fluggesellschaft Schwabe* v. *Eurocontrol*,[44] the CJEU ruled that the Convention did not preclude the enforcement of the judgment under a bilateral con-

vention between Belgium and Germany which existed before the Brussels Convention came into force.[45]

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The use of European rules to determine the scope of the Regulation has both advantages and disadvantages. Its chief disadvantage is that it produces uncertainty. Since no European definition of any of the concepts exists until the CJEU rules on the matter, the scope of the Regulation cannot be determined without a reference for such a ruling. This can take several years.

Its advantage is that it provides uniformity: if the rules of either the State of origin or the State asked to recognize the judgment were applied, a situation could arise in which State A would be obliged to recognize a judgment granted by State B, while State B would not be obliged to recognize a similar judgment granted by State A. This would have been the situation in the *Eurocontrol* case if German law had considered the proceedings to be of a public-law nature. If the test of the State of origin were applied, Germany would have been required to recognize the Belgian judgment, while a similar judgment granted by a German court would not have had to be recognized in Belgium.

So far, the CJEU has always given a Union interpretation to the concepts relevant to the scope of the Regulation;[46] it has also given such an interpretation to most – but not all – of the other concepts used in the Regulation.[47]

§ 9.2 Applying the Test

As the CJEU held in the *LTU* case, proceedings do not cease to be civil or commercial just because one party is a public authority. The crucial question is whether that authority is basing its claim on the exercise of governmental powers. In other words, if the claim arose out of a transaction in which the public authority was doing something that any ordinary citizen could do – concluding a private-law contract, for example – the proceedings would be civil or commercial. If, on the other hand, it was exercising governmental powers – imposing a tax, for example – the proceedings would be public.

This test, which is derived from French law, seems clear enough at first sight. However, it is not always easy to apply in practice. The following cases illustrate some of these

difficulties.

European Union
Netherlands v. *Rüffer*
Court of Justice of the European Union
Case 814/79, [1980] ECR 3807

Background

The defendant, Rüffer, was domiciled in Germany. He owned a ship, the *Otrate*, which sank in the Bight of Watum, a waterway at the mouth of the River Ems, in an area claimed by both Germany and the Netherlands as part of their territory. Under a treaty between the two States, the Ems–Dollard Treaty, the Netherlands was given 'river-police' functions on the waterway. Since the wreck was a danger to other ships, the Dutch Government raised it and disposed of it. They claimed the costs of this operation from Rüffer in proceedings brought before a Dutch court. The question before the CJEU, to which the matter had been referred by the Dutch court, was whether the proceedings came within the scope of the Brussels Convention, the relevant instrument at the time.

Under Dutch law, the person responsible for a waterway has the right to reclaim the cost of removing a wreck from the owner of the wrecked vessel. The action is based on the ordinary private law of tort. In the past, privately operated waterways existed, and the operator had the same rights. In Dutch law, therefore, the claim was a civil matter. In the other Member States, however, the raising of wrecks and the recovery of the costs is regarded as a public function. A similar claim in those States would be regarded as a public matter. For this reason, Advocate General Warner considered that the claim before the Dutch court should be regarded as public in nature and, therefore, outside the scope of the Convention.

Judgment

7. It is apparent from the case-law of the Court … that the concept 'civil and commercial matters' used in Article 1 of the Brussels Convention must be regarded as an independent concept which must be construed with reference first to the objectives and scheme of the Convention and secondly to the general principles which stem from the corpus of the national legal systems.

8. In the light of those considerations the Court has specifically held in that same case-law that whilst certain judgments given in an action between a public authority and a person governed by private law may come within the area of application of the Convention that is not the case if the public authority is acting in the exercise of its public authority powers.

9. Such a case is an action for the recovery of the costs involved in the removal of a wreck in a public waterway, administered by the State responsible in performance of an international obligation and on the basis of provisions of national law which, in the administration of that waterway confer on it the status of public authority in regard to private persons.

10. It is common ground that in this case the Netherlands State had the wreck of the *Otrate* removed in performance of an obligation which was assumed under … the Ems-Dollard Treaty within the framework of the river-police functions conferred on it in that waterway by the said Treaty and that consequently it acted in this case as the body invested with public authority.

11. The granting of such status to the agent responsible for policing public waterways, for the purpose of removing wrecks located in those waterways, is furthermore in keeping with the general principles which stem from the corpus of the national legal systems of the Member States whose provisions on the administration of public waterways precisely show that the agent administering those waterways does so, when removing wrecks, in the exercise of public authority.

12. In view of those factors the action brought by the Netherlands State before the national court must be regarded as being outside the ambit of the Brussels Convention, as defined by the concept of 'civil and commercial matters' within the meaning of the first paragraph of Article 1 of that Convention, since it is estab-

lished that the Netherlands State acted in the instant case in the exercise of public authority.

13. The fact that in this case the action pending before the national court does not concern the actual removal of the wreck but the costs involved in that removal and that the Netherlands State is seeking to recover those costs by means of a claim for redress and not by administrative process as provided for by the national law of other Member States cannot be sufficient to bring the matter in dispute within the ambit of the Brussels Convention.

14. As the Court has stated in the authorities cited above the Brussels Convention must be applied in such a way as to ensure, as far as possible, that the rights and obligations which derive from it for the Contracting States and the persons to whom it applies are equal and uniform. By that same case-law such a requirement rules out the possibility of the Convention's being interpreted solely in the light of the division of jurisdiction between the various types of courts existing in certain States: on the contrary it implies that the area of application of the Convention is essentially determined either by reason of the legal relationships between the parties to the action or of the subject-matter of the action.

15. The fact that in recovering those costs the administering agent acts pursuant to a debt which arises from an act of public authority is sufficient for its action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the ambit of the Brussels Convention.

The judgment in this case has been criticized on the ground that it could have a detrimental effect on environmental law.[48] If a company from one Member State caused pollution in another Member State, proceedings brought in the latter State by the relevant public authority to recover the costs of an environmental clean-up might be outside the scope of the Regulation; consequently, the costs might be more difficult to recover in another Member State.

In Canada, the courts have taken a different approach. In *United States of America* v. *Ivey*,[49] the Ontario courts enforced the judgment of a court in the United States under which the relevant US authority was granted recovery of the costs of cleaning up pollution caused by a Canadian company operating at the time in the United States. The en-

forcement of the judgment was based on the common law, which also has a rule that a judgment based on public law cannot be enforced, but the Canadian courts held that the proceedings in question were not of a public-law nature for this purpose.

Our next case shows a different context in which the question can arise.

European Union
Gemeente Steenbergen v. *Baten*
Court of Justice of the European Union
Case C-271/00, [2002] ECR I-10489

Background

There is a rule in many legal systems that, if a public authority gives social assistance (welfare) to a person in need, it can reclaim the money from another person who was responsible for the support of the needy person. In *Baten*, Mr Baten and Mrs Kil were married and subsequently divorced in Belgium. It was agreed that Mr Baten would not pay any maintenance to Mrs Kil, but he would make monthly payments towards the maintenance of their daughter. Mrs Kil and the daughter then moved to the Netherlands where they both received social assistance from the relevant public authority. That authority then sought to recover the money from Mr Baten. When he failed to pay, the authority obtained a judgment in a Dutch court, which it sought to enforce in Belgium. The question then arose whether it was within the scope of the Brussels Convention.

Judgment

[After referring to the previous cases, the court continued:]

30. Thus the Court has held that, although certain judgments in actions between a public authority and a person governed by private law may come within the scope of the Brussels Convention, it is otherwise where the public authority is acting in the exercise of its public powers [here the court cited *LTU* and *Rüffer*].

31. In order to determine whether that is so in a case such as that in point in the main proceedings, in which a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the former spouse and the child of that person, it is necessary to examine the basis and the detailed rules governing the bringing of that action.

32. In that regard, it appears from Article 93 of the ABW [the Dutch law on social assistance] that the costs of social assistance are recoverable up to the limit of the maintenance obligation under Book I of the Netherlands Civil Code. Thus it is the rules of the civil law which determine the cases in which the public body may bring an action under a right of recourse, namely where there is a person under a statutory obligation to pay maintenance. It is on the basis of those same rules that the person against whom the public body may proceed, namely the person under a statutory obligation to pay maintenance, is identified, and that the limits to the amounts recoverable by that body are determined, those limits being coterminous with those of the statutory maintenance obligation itself.

33. As regards the detailed rules governing the bringing of an action under a right of recourse, Article 103 of the ABW states that that action must be brought before the civil courts and [that it is] governed by the rules of civil procedure.

34. Accordingly, as the Advocate General stated at paragraph 36 of his Opinion, the legal situation of the public body *vis-à-vis* the person liable for maintenance is comparable to that of an individual who, having paid on whatever ground another's debt, is subrogated to the rights of the original creditor, or is comparable to the situation of a person who, having suffered loss as a result of an act or omission imputable to a third party, seeks reparation from that party

35. However, that finding calls for some qualification by reason of Article 94 of the ABW under which an agreement between spouses or former spouses for the purpose of precluding or limiting their maintenance obligations after their divorce does not preclude recovery from one of the parties and is without prejudice to determination of the amounts to be recovered.

36. To the extent to which that provision allows the public body, in a proper case, to disregard an agreement lawfully entered into between spouses or former spouses, producing binding effects between them and enforceable against third parties, it places the public body in a legal situation which derogates from the ordinary law. That is all the more so inasmuch as that provision allows the public body to disregard an agreement approved by a judicial decision and covered by the force of *res judicata* attaching to that decision. In those circumstances, the public body is no longer acting under rules of the civil law but under a prerogative of its own, specifically conferred on it by the legislature.

37. In light of the foregoing considerations, the reply to the first question must be that the first paragraph of Article 1 of the Brussels Convention must be interpreted as meaning that the concept of 'civil matters' encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in 'civil matters'.

Note

In a subsequent part of the judgment, the CJEU ruled that proceedings of the kind in issue were not excluded from the scope of the Convention on the basis that they fell under the heading 'social security' in what is now Article 1(2)(c) of the Regulation.

QUESTION

Is the reasoning of this case inconsistent with that in *Rüffer*?

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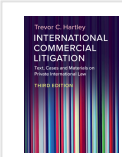
International Commercial Litigation
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Part II Jurisdiction
Chapter 3 Jurisdiction under EU Law

Chapter 3 Jurisdiction under EU Law

§ 1 Background

Before the United Kingdom joined the European Union, the jurisdiction of the courts of England depended on English law. Then things changed: Union law provided the main foundation for their jurisdiction, and it was only where Union law did not operate that the traditional English rules applied. With Brexit, things will change again; however, because Brexit is still uncertain at the time of writing, this chapter will just consider the situation as it was when the United Kingdom was still a Member State.[1]

The European Union began more than sixty years ago when six European nations came together to form the European Coal and Steel Community. From these small beginnings, it has grown to a continent-wide organization with twenty-eight Member States. It has three political organs: the Council, which represents the Member States (its members are the delegates of the national governments); the European Parliament, representing the peoples of Europe (its members are elected by the voters of Europe); and the Commission, a sort of executive, whose members are appointed by the Council but must be approved by the Parliament. There is also a court, the Court of Justice of the European Union (CJEU), which consists of one judge from each Member State.

Most cases before the CJEU fall into one or other of two categories. The first category consists of cases that begin (and end) before the CJEU. These are cases concerning the Union itself – for example, actions to annul Union acts, actions in tort against the Union, or actions by the Union against Member States. The second category consists of cases involving Union law that are referred to the CJEU by a court in a Member State. Here, the role of the CJEU is limited to interpreting the provision of Union law in question and, in some cases, ruling on its validity. After the CJEU has given its judgment, the case goes back to the Member State court. Our interest in the CJEU will be

confined to these latter cases, which are normally called 'preliminary references' or 'references for preliminary rulings'.

The CJEU gives a single judgment of the court: there are no concurring or dissenting judgments. The style is abstract and general. The close reasoning and analysis found in English judgments is absent. In the early days, case law was not cited, though whole passages in a judgment would sometimes be taken, without acknowledgement, from a previous case. Today, the court cites its previous decisions, but they are rarely analysed. It is rarer still for them to be distinguished or overruled.

The office of 'advocate general' is an unusual feature. There are a number of advocates general and one of them is usually assigned to each case. Advocates general have the same status as judges. Their job is to consider the case and to give an opinion on it. This is done after the parties have presented their arguments and before the court gives judgment. The opinion is published alongside the judgment of the court. The court is not bound by it, but pays careful attention to it and often refers to it. More often than not, it will follow it, though it may deal with fewer points than the advocate general: like most courts, it may prefer to leave a point open if it does not have to be decided in order to give judgment. Where this occurs, the advocate general's opinion may be cited before the court in later cases as authority on points not decided by the court. Where the court does not follow the advocate general, his opinion may still be cited in later cases in order to persuade the court to change its mind. Occasionally, it will do so. Above all, the opinion is used by lawyers for the light it casts on the reasoning of the court.

Within its sphere of jurisdiction, the Union can pass legislation. This is normally done by the Council and the Parliament acting together, with the Commission making proposals. In this chapter, we shall be concerned with one particular piece of legislation, Regulation 1215/2012 (Brussels 2012), which applied from 10 January 2015.[2] It lays down a system of jurisdiction in actions *in personam* which is intended to apply throughout the European Union.[3]

§ 2 Origin of Brussels 2012

Brussels 2012 is not a new piece of legislation. It is a re-enactment – with a few changes – of Brussels 2000,[4] itself a re-enactment of the Brussels Convention,[5] an international agreement that was concluded among the six original Member States in 1968.[6] Since it was originally signed, the Convention was amended many times and new Members of the EU joined it.[7] It was adopted to give effect to Article 220 of the EEC Treaty[8] (Panel 3.1, § 4, below), which required the Member States to simplify the formalities governing the reciprocal recognition and enforcement of judgments. As originally adopted, the Convention did not give the CJEU jurisdiction to interpret its provisions, but a Protocol made provision for preliminary references.[9]

After the European Union obtained the power to adopt legislation in the field of civil jurisdiction, the Brussels Convention was replaced by Brussels 2000, known as the 'Brussels I Regulation', because of its origin in the Brussels Convention.[10] It was then replaced by Brussels 2012, also called the 'Brussels I Regulation' or 'Brussels I (recast)'. (In this book, the phrase 'Brussels I Regulation' will be used to refer collectively to Brussels 2000 and Brussels 2012.)

As they are EU measures, the CJEU has an automatic right to interpret Brussels 2000 and Brussels 2012 on a preliminary reference. However, as Brussels 2000 is a re-enactment of the Brussels Convention, and Brussels 2012 is a re-enactment of Brussels 2000, the case-law under the previous instruments continues to apply unless there has been a change in the text.[11] This is important because over a period of almost forty years the CJEU had built up a considerable body of case-law on the Convention and Brussels 2000. It is mainly these cases that we will be considering below.

§ 3 The Lugano Convention

The Lugano Convention is a treaty which was originally signed in the Swiss city of Lugano on 16 September 1988.[12] The original parties were the then Member States of the EU and certain other European States that were members of a free-trade organization called EFTA (European Free Trade Association). The idea was to extend to these States the system applicable to the EU Member States. However, there have always been small differences between the two systems. Some of these were intentional; others

were the result of the fact that the system applicable to the EU Member States kept changing – initially because the Brussels Convention was amended from time to time, and subsequently because it was replaced by Brussels 2000. A new version of the Lugano Convention was adopted on 30 October 2007[13] (Lugano 2007), but the EU system was then amended by Brussels 2012.

All the EU Member States were Parties to the original Lugano Convention. Before Lugano 2007 was signed, however, the CJEU decided in the 'Lugano' case[14] that the conclusion of the new Convention fell within the exclusive competence (jurisdiction) of the Union. This meant that the Member States could not be Parties to it. On the Union side, only the Union itself could be a Party. However, the EU Member States would be bound by it because the Union had concluded it. This follows from Article 216(2) TFEU. In addition to the EU, the Parties are Iceland, Norway and Switzerland. These latter three countries are the current 'Lugano States'.[15]

The rest of this chapter will be focused on Brussels 2012. However, most of what is said will apply under the Lugano system as well.

§ 4 Basic Principles

Article 220 of the EEC Treaty (Panel 3.1) merely required the Member States to simplify the formalities governing the recognition and enforcement of judgments within the Union. This could easily have been done by the adoption of a traditional judgments-recognition convention.

There are many such conventions in force. They are based on a principle sometimes called 'indirect jurisdiction'. Under this principle, the convention lays down a set of jurisdictional rules. These rules are not binding on a court hearing a case, even if one of the parties is from another State. They come into play only if recognition of the judgment is sought. Then, the court asked to recognize it must consider whether the court of origin had jurisdiction under the rules. If it did, the judgment will be recognized (provided certain other requirements are satisfied); if it did not, the judgment will not be recognized. Under this system, which has the merit of simplicity, the convention is applied only at the stage of recognition. The court which originally granted the judgment does not have to consider it.

The authors of the Brussels Convention could have adopted this system, which would have fully satisfied the requirements of Article 220. However, they did not. Instead, they went for something altogether more ambitious. They adopted a convention based on the principle of 'direct jurisdiction'. Under this system, the court which originally grants the judgment is *required* to comply with the jurisdictional rules of the convention. It must do this even if there is no need to recognize the judgment in another State. When it comes to recognition, on the other hand, the court asked to recognize it is not (generally) *allowed* to consider whether the court of origin had jurisdiction under the rules of the convention. It must assume that it did.

Panel 3.1 Recognition and Enforcement of Judgments within the Union EEC Treaty

Article 220

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

…

– the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

Notes:

1. The benefits of the Convention were not given to nationals of the Contracting States, but to persons *domiciled* in those States.
2. The Brussels Convention did not deal with arbitration, a matter covered by the extremely successful New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.
3. Article 220 has now been repealed.

This system, which formed the basis of the Brussels Convention, was carried over into the Brussels Regulation. It has two advantages. First, by laying down fairly restricted grounds on which a court may take jurisdiction, it protects defendants from exorbitant jurisdiction. Secondly, by not permitting the court asked to recognize the judgment to

apply any jurisdictional test, it makes recognition and enforcement easier. However, it has the disadvantage of greater complexity. By requiring the court of origin to apply the jurisdictional rules of the convention, it makes it possible for defendants to raise jurisdictional objections right at the beginning. If this leads – as it will if the objection is pursued high enough up the court system – to a preliminary reference to the CJEU, judgment may easily be delayed for several years, a valuable objective for an unscrupulous defendant who knows he will lose in the end but wants to put off the evil day as long as possible.

§ 5 Defendants from Third Countries

An important feature of the system under the Brussels I Regulation (and the Convention before it) is that, although it is intended to protect defendants from exorbitant jurisdiction, it grants this protection only to defendants domiciled in other EU (or Lugano) States. No protection is given to defendants from the outside world. With regard to such defendants, national rules of jurisdiction apply as before.[16] This is made clear by Article 6(1) (Panel 3.2). However, the resulting judgments are still covered by the provisions on recognition and enforcement. This means that defendants from outside Europe[17] suffer a double blow from the Regulation: they receive no jurisdictional protection when the case is originally decided, but the resulting judgment must still be recognized and enforced without any jurisdictional control.[18] As might be expected, this has caused resentment in countries outside Europe.

In fact, the Regulation goes even further, since it *extends* the scope of the unfair rules of national jurisdiction when they are applied to defendants domiciled in third countries. This is done by Article 6(2) (Panel 3.2), which provides that, as against such a defendant, claimants domiciled in a Member State must be able to invoke the same grounds of jurisdiction as nationals of the State concerned. Article 6(2) expressly states that this applies in particular to the especially unfair rules which the Member States are obliged to notify to the Commission pursuant to Article 76(1)(a).[19]

Panel 3.2 Defendants Domiciled in Third Countries
Brussels 2012 (Regulation 1215/2012)

Article 6

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

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

The most important consequence of Article 6(2) is that it extends the scope of Article 14 of the French Civil Code in cases in which the defendant is not domiciled in a Member State (or a Lugano State). Article 14 is one of the most exorbitant rules of civil jurisdiction anywhere in the world. As interpreted by the French courts, it provides that a French citizen may sue anyone in the world in France, even if the claim has no connection with France.[20] Article 6(2) of the Regulation requires the same right to be given to foreigners domiciled in France. This makes things even worse for the defendant domiciled in a third country. It means, for example, that a British citizen domiciled in France could bring proceedings in France against a Japanese defendant who is domiciled and resident in Japan, even if the claim is connected exclusively with Japan. The French courts would be obliged to hear the case.[21]

When these provisions were first adopted in the Brussels Convention, they caused something of an outcry in third countries. As a result, a small concession was made.[22] This was originally contained in Article 59 of the Brussels Convention. It permitted a Contracting State – for example, the United Kingdom – to conclude a convention with a non-contracting State – for example, Canada – under which it (the United Kingdom) would undertake not to recognize judgments from other Contracting States against persons domiciled or habitually resident in the non-contracting State (Canada) if the jurisdiction of the court of origin could have been based only on one of the especially

exorbitant grounds set out in the second paragraph of Article 3 of the Convention. These are the grounds referred to in Article 76(1)(a) of Brussels 2012.

Panel 3.3 Conventions with Third Countries
Brussels 2012 (Regulation 1215/2012)

Article 72

This Regulation shall not affect agreements by which Member States, prior to the entry into force of Regulation (EC) No 44/2001,[1] undertook pursuant to Article 59 of the 1968 Brussels Convention not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third State where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

1 Editor's note: 'Regulation (EC) No 44/2001' is Brussels 2000.

This provision has been retained under Brussels 2012, where it is now found in Article 72 (Panel 3.3). However, it now covers such agreements only if they were concluded before Brussels 2000 entered into force. In other words, past agreements are respected, but the door is closed to future agreements. As far as is known, the only two such agreements still in existence were concluded by the United Kingdom, one with Canada and one with Australia. This means that if a French national or a foreigner domiciled in France brings proceedings in France against a person domiciled or habitually resident in Canada, and the French court takes jurisdiction under Article 14 of the French Civil Code, courts in the United Kingdom will not be required to recognize the resulting judgment.

§ 6 Domicile

Domicile is a key concept in the scheme of the Regulation. It is the test adopted to decide whether a person 'belongs' to a Member State. As we saw above, it decides whether the jurisdictional protection granted by the Regulation will apply to a defendant: if a defendant is not domiciled in an EU (or Lugano) State, national rules of juris-

diction apply. In addition, it also constitutes the basis for the most important European jurisdictional rule, the rule that grants general jurisdiction.[23] Article 4(1) of the Regulation (Panel 3.4) provides that a defendant domiciled in a Member State may be sued in the courts of that State. For these reasons, establishing the domicile of the defendant is of the greatest importance.

Panel 3.4 General Jurisdiction
Brussels 2012 (Regulation 1215/2012)

Article 4

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

§ 6.1 Area of Domicile

The Regulation refers to domicile in a *Member State*. The United Kingdom is a Member State. However, it is divided into three law districts (territories subject to a single system of law and courts). These are:

- England and Wales (one unit)[24]
- Scotland and
- Northern Ireland.

As a result, the jurisdiction of the English courts must be established in two steps. First, it must be ascertained whether the defendant is domiciled in the United Kingdom; then, if he is, it has to be ascertained whether he is domiciled in England.[25] The rules for doing this are explained in § 6.3, below.

§ 6.2 Domicile of Natural Persons (Individuals)

There are special rules, laid down in Article 62 of the Regulation (Panel 3.5), for the determination of domicile. These rules, which apply only to natural persons (not corporations), state that, in order to determine whether a party is domiciled in the Member State whose courts are seised of the matter, the court must apply its internal law. Thus, an English court applies United Kingdom law to decide whether a party is

domiciled in the United Kingdom; an Italian court applies Italian law to determine whether a party is domiciled in Italy.

Panel 3.5 Law Applicable to Determine the Domicile of an Individual
Brussels 2012 (Regulation 1215/2012)

Article 62

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

If a court decides that a person is not domiciled within its territory, then in order to determine whether he is domiciled in the territory of another Member State, it must apply the law of that State. Consequently, an English court must apply Italian law to determine whether a person is domiciled in Italy.

It is possible under these rules for a person to be domiciled in two countries at the same time. This does not cause a problem. If the defendant is domiciled in the United Kingdom under UK law, it does not matter if he is also domiciled in Italy under Italian law. For an English court, his UK domicile will be decisive. For an Italian court, his Italian domicile will be decisive.

§ 6.3 United Kingdom Rules of Domicile (Individuals)

United Kingdom law determines whether a person is domiciled in the United Kingdom for the purposes of the Regulation. However, the traditional common-law rules of domicile are not used for these purposes: under the concept of domicile embodied in them, it is too difficult for a person to change his domicile. Instead, there is a statutory concept of domicile laid down in paragraph 9 of the Civil Jurisdiction and Judgments Order 2001[26] (Panel 3.6).

In the case of domicile in the United Kingdom or in a 'part' of the United Kingdom – for example, in England and Wales – paragraph 9(6) lays down an important presumption: if the person has been resident there for the previous three months or more, he is presumed to have a substantial connection with the area in question unless the contrary is proved. This means that, for example, a student who has resided in England for three months will be presumed to be domiciled there, unless it can be proved that he does not have a substantial connection with England.

§ 6.4 Domicile of Legal Persons (Corporations)

These rules do not apply to corporations (defined in the Regulation as 'a company or other legal person or association of natural or legal persons'). Instead of applying Member State law to determine where a company is domiciled, Article 63 of the Regulation (Panel 3.7) lays down a Union rule on the subject. It states that a company or other legal person or association of natural or legal persons is domiciled at the place where it has:

(a) its statutory seat, or

(b) its central administration, or

(c) its principal place of business.

The desirability of having a Union-wide rule of domicile is obvious.[27] However, the reason these particular tests were selected needs some explanation.

In the common law, the law of the place of incorporation is traditionally regarded as important for deciding issues relating to the internal affairs of the company. It is the legal system that gives birth to it and endows it with legal personality. The registered office of the company will be in the country of incorporation, and the company will be subject to the jurisdiction of the courts of that country.

Panel 3.7 Domicile of Companies
Brussels 2012 (Regulation 1215/2012)

Article 63

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

(a) statutory seat;

(b) central administration; or

(c) principal place of business.

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

For jurisdictional purposes, however, the principal place of business and the place of its central management are also important. The latter is the administrative centre of the company, the place where the most important decisions are taken. The principal place of business is the centre of its economic activities. Though normally in the same place, these two could be different. For example, a mining company with its headquarters in London (central administration) might carry on its mining activity in Namibia (principal place of business).

Although some civil-law systems also look to the law of the place of incorporation as the personal law of the company,[28] the dominant view favours the law of the 'corporate seat' (in French, the *siège social*). The place of the corporate seat is also regarded as the domicile of the company. However, there are two views as to how the corporate seat is to be determined. According to the first view, one looks to the legal document under which the company was constituted (the *statut* of the company). This will state where the corporate seat is. The corporate seat thus determined is called the *siège statutaire*, usually translated into English as 'statutory seat'.[29]

The *siège statutaire* may not, however, be the actual corporate headquarters. The second view is that one should look to the place where the company in fact has its central

administration, sometimes called the *siège réel* (real seat). This corresponds to the common-law concept of the central administration.

To cover all points of view, the Regulation provides that a company is domiciled where it has its 'statutory seat', *and* where it has its central administration, *and* where it has its principal place of business. It further provides that, for the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office.[30] This means that, in the common-law Member States, a company has a domicile in the country in which it was incorporated.

As a result, a company could have three domiciles at the same time. In practice, however, the State where it has its central administration will usually be that in which it has its principal place of business. On the other hand, it is not uncommon for a company to be incorporated in one State – for example, Panama or Liechtenstein – and to have its central administration and principal place of business in another. Thus, a company may well have two domiciles, even if it is unlikely to have three.

§ 6.5 The Role of Domicile

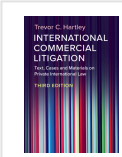
When a court of a Member State is faced with an action covered by the Regulation, its first step must always be to determine the domicile of the defendant. If the defendant is domiciled within its own territory, it has general jurisdiction.[31]

This follows from Article 4(1) of the Regulation (Panel 3.4, set out at the beginning of § 6, above). In such a case, the court does not have to consider whether the defendant might also be domiciled in another Member State. As we have seen, it is possible that the defendant may be domiciled in two or more Member States. However, this does not matter: if the defendant is domiciled in the territory of the forum, the court has general jurisdiction, even if he also has a domicile in another Member State.

If, on the other hand, the court finds that the defendant is not domiciled within its territory, it must consider whether he is domiciled in another Member State.[32] This is necessary in order to determine whether the jurisdictional rules of the Regulation apply.[33] If they do not, the court will apply its own rules of jurisdiction. In the case of an English court, these will be the rules described in Chapter 6.

§ 7 Jurisdiction Irrespective of Domicile

Although domicile is the fundamental principle of the Regulation, there are some special situations in which the Regulation applies irrespective of domicile. The most important are:


International Commercial Litigation
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Part II Jurisdiction
Chapter 3 Jurisdiction under EU Law

Chapter 4 EU Law: Special Jurisdiction

§ 1 Article 7

The only rule of jurisdiction we considered in Chapter 3 was the rule that the Member State in which the defendant is domiciled has general jurisdiction. We also saw that, if the defendant is not domiciled in any Member State, the jurisdictional rules of the Regulation do not (in general) apply at all. Now the time has come to consider the special rules that apply if the defendant is not domiciled in the State of the forum, but is domiciled in another Member State. If the forum does not have jurisdiction under these rules, it cannot hear the case at all. This is made clear by Article 5, which is set out in Panel 4.1.

Panel 4.1 Persons Domiciled in Another Member State
Brussels 2012 (Regulation 1215/2012)

Article 5

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

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

1 *Editor's note*: the rules referred to in paragraph 2 are rules of national law that are regarded as especially objectionable.

The rules of jurisdiction applicable to defendants domiciled in another Member State but not in the State of the forum[1] are those in Sections 2 to 7 of Chapter II of the Regulation. These are Articles 7–26. In addition to rules of a general nature (in Section 2), these Articles contain rules on insurance (Section 3), consumer contracts (Section 4), individual contracts of employment (Section 5), exclusive jurisdiction (Section 6) and choice-of-court agreements (Section 7).[2]

We shall first consider the rules in Article 7 of the Regulation. As the heading of Section 2 indicates, these confer only special jurisdiction ('specific' in US terminology): they apply only when there is an appropriate connection between the claim and the State of the forum. We shall examine only those rules that are of importance in commercial cases.

§ 1.1 Contracts

Actions relating to a contract are dealt with in Article 7(1) of the Regulation.[3] In the Brussels Convention, the equivalent provision was originally fairly simple: it provided that in matters relating to a contract, a person domiciled in one Member State could, in another Member State, be sued in the courts for 'the place of performance of the obligation in question'. This gave rise to a number of problems, however, and it was amended twice, first in one of the revisions of the Brussels Convention,[4] and then in Brussels 2000. The first amendment introduced a special rule for employment contracts;[5] the second introduced a special rule for contracts for the sale of goods or the provision of services. The current version of Article 7(1) is set out in Panel 4.2, § 1.1.4.3, below, where the effects of the changes are considered. First, however, we must discuss some preliminary matters.

§ 1.1.1 When Does a Claim Relate to a Contract?

Since Article 7(1) applies only 'in matters relating to a contract', it is necessary to answer this question in order to discover when it is the appropriate provision. One might have thought that this would depend on how the claimant framed his claim and on the provisions of national law. The CJEU, however, has decided that a Union solution must apply.[6] In other words, a rule of Union law – created, in each case, by the CJEU – decides whether a claim, however formulated, relates to contract or not. This is only for

purposes of jurisdiction: once the jurisdictional issues have been settled, the matter proceeds on the basis of the classification under national law.

In *Kalfelis* v. *Schröder*,[7] the CJEU laid down the important rule that all forms of civil liability that do not fall under Article 7(1)[8] are covered by Article 7(2).[9] This means that claims which are not brought in tort can be covered by Article 7(2), even though Article 7(2) states that it applies to 'matters relating to tort, delict or quasi-delict' (see Panel 4.3, below). For this reason, a decision whether or not a claim falls within Article 7(1) usually also decides whether or not it falls within Article 7(2).

It is important to note that Article 7(1) does not say 'a claim in contract' or 'a claim for breach of contract' but 'in matters relating to contract'. For this reason, the CJEU has held that a claim brought in tort may nevertheless be covered by Article 7(1) if it is based on a contract, or arises out of a contract. This is illustrated by our first case.

European Union
Brogsitter v. *Fabrication de Montres Normandes*
Court of Justice of the European Union
Case C-548/12, ECLI:EU:C:2014:148

Background

In this case, the claimant entered into a contract with the two defendants for the development of movements for luxury watches. He claimed that the defendants had undertaken to work exclusively for him; consequently, when they marketed other watch movements under their own name, they had, in his view, committed a breach of contract. He sued them in Germany, both in contract and in tort. The claims in tort were for unfair competition, breach of business confidentiality and breach of trust, all torts under German law. It seemed that the German courts did not have jurisdiction for the claims in contract, but it was argued that they did have jurisdiction for the claims in tort.[10]

Judgment

20 [I]t is apparent from settled case-law that the concept of 'matters relating to tort, delict or quasi-delict' within the meaning of [Brussels 2012, Article 7(2)] covers all actions which seek to establish the liability of a defendant and which do not concern 'matters relating to a contract' within the meaning of [Brussels 2012, Article 7(1)(a)] (see to that effect, inter alia, Case 189/87 *Kalfelis* [1988] ECR 5565, paragraph 17).

21 In order to determine the nature of the civil liability claims brought before the referring court, it is important first to check whether they are, regardless of their classification under national law, contractual in nature…

22 It is apparent from the order for reference that the parties to the main proceedings are bound by a contract.

23 However, the mere fact that one contracting party brings a civil liability claim against the other is not sufficient to consider that the claim concerns 'matters relating to a contract' within the meaning of [Brussels 2012, Article 7(1)(a)].

24 That is the case only where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract.

25 That will a priori be the case where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter.

26 It is therefore for the referring court to determine whether the purpose of the claims brought by the applicant in the case in the main proceedings is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties in the main proceedings, which would make its taking into account indispensable in deciding the action.

27 If that is the case, those claims concern 'matters relating to a contract' within the meaning of [Brussels 2012, Article 7(1)(a)]. Otherwise, they must be considered as

falling under 'matters relating to tort, delict or quasi-delict' within the meaning of [Brussels, Article 7(2)].

28 …

29 Therefore, the answer to the question referred is that civil liability claims such as those at issue in the main proceedings, which are made in tort under national law, must nonetheless be considered as concerning 'matters relating to a contract' within the meaning of [Brussels 2012, Article 7(1)(a)], where the conduct complained of may be considered a breach of the terms of the contract, which may be established by taking into account the purpose of the contract.

Comment

According to this case, a claim is to be regarded as 'relating to a contract' if the defendant's conduct constituted a breach of contract, even if the claim is brought in tort. This will be the case, said the court, if it is necessary to interpret the contract in order to determine whether the defendant's conduct was unlawful.

This judgment will not always be easy to apply, as may be shown by the following examples. First, take the case of a trade-mark licensing agreement. A trade mark gives the holder the exclusive right to market a product under the trade mark. If another person markets it without the holder's consent, the latter is liable in tort for infringement of the trade mark. Assume that the holder grants a licence to another person to market specified goods under the trade mark subject to specified conditions. Then the licensee would commit no tort provided he kept within the terms of the licence.

Now assume that he does not keep within the terms of the licence. He markets other products under the trade mark. In such a case, he could be sued for breach of contract. This claim would come under Article 7(1) of the Regulation. However, since he would no longer enjoy the protection of the licence, he could be sued in tort for infringement. Would this also come within Article 7(1)? It could be argued that since the holder of the trade mark could establish his claim for infringement without referring to the licence – he just has to prove that he was the holder of the trade mark and that the defendant's conduct was an infringement of it – the claim should not be regarded as contractual: the contract would come into the picture only if the defendant raised it as

a defence. This suggests that Article 7(2) might be appropriate. On the other hand, however, the defendant's conduct would constitute a breach of contract; moreover, the contract would have to be interpreted if the defendant raised it as a defence. This suggests that Article 7(1) might be appropriate.

The second example is a case in which X has a contract with Y, and a third party, Z, induces Y to break the contract. In some legal systems, this is a tort. If X sues Z in tort for inducing Y to break the contract with X, would the relevant jurisdictional provision be Article 7(1) or Article 7(2)? Here it could be argued that it should be Article 7(1), since X cannot establish his claim without proving that there was a contract and that Y breached it, something which would necessarily involve interpreting the contract. On the other hand, however, Z's action would not constitute a breach of contract, since Z was not a party to the contract.

These examples show that the CJEU's approach, which was intended to make the law simple and predictable, can nevertheless give rise to difficult problems.

***

Our next case, which was decided more than twenty years before *Brogsitter*, illustrates further difficulties.

European Union
Handte v. *TMCS*
Court of Justice of the European Union
Case C-26/91, [1992] ECR I-3967

Background

A German company, Handte Germany, manufactured goods and sold them to a French company, Handte France. The latter resold them to a second French company, TMCS. The goods were allegedly defective and the question arose whether the sub-purchaser (TMCS) could bring an action in the French courts directly against the German manufacturer, Handte Germany.

The question whether a sub-purchaser can bring an action against the manufacturer is subject to different solutions in different legal systems. In many legal systems, the posi-

tion is that, in the absence of special circumstances, no action can be brought in contract against the manufacturer. In the common law, this is said to be due to the combined effect of the doctrines of privity and consideration. On the other hand, if the defective goods cause injury to a person or damage to property, an action in tort may exist. However, in the *Handte* case, there was no such injury. In these circumstances, many legal systems would give no direct remedy against the manufacturer.

According to the Advocate General, French law adopted a different analysis. At the time in question, it took the view that an action in contract could be brought by the sub-purchaser against the manufacturer. It seems that this was based on a theory of implied assignment, by the original purchaser to the sub-purchaser, of his contractual rights against the manufacturer. Consequently, French law granted a remedy in contract in circumstances in which the law of most of the other Member States would grant a remedy, if at all, only in tort.[11]

The facts of the case are not entirely clear, but it seems that the claimant framed his claim in contract. This required the French court to consider what the 'obligation in question' was, since, at the time, the relevant instrument was the Brussels Convention and, under this, jurisdiction in matters relating to a contract depended on the place of performance of the obligation in question. Clearly, the obligation in question was the delivery of goods in sound condition, but was it the obligation of the manufacturer towards the original purchaser (Handte France) or that of the latter towards the sub-purchaser (TMCS)? Since the place of delivery was almost certainly different in the two cases, and may possibly have been outside France in the former, this was a vital question.[12] The French court referred it to the CJEU. The latter, however, did not answer it. Instead, it considered whether the claim related to a contract at all.

Judgment

13. [After saying that the objective of the Convention was to determine which State's courts were most appropriate to assume jurisdiction, taking into account all relevant matters, the CJEU continued:] The Convention achieves that objective by laying down a number of jurisdictional rules which determine the cases, exhaustively listed in Sections 2 to 6 of Title II of the Convention, in which a defendant domiciled or established in a Contracting State may, under a rule of special jurisdiction, or must, under a rule of exclusive jurisdiction or prorogation of jurisdiction, be sued before a court of another Contracting State.

14. The rules on special and exclusive jurisdiction and those relating to prorogation of jurisdiction thus derogate from the general principle, set out in the first paragraph of Article 2 of the Convention, that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction. That jurisdictional rule is a general principle because it makes it easier, in principle, for a defendant to defend himself. Consequently, the jurisdictional rules which derogate from that general principle must not lead to an interpretation going beyond the situations envisaged by the Convention.

15. It follows that the phrase 'matters relating to a contract', as used in [Article 7(1) of the Regulation], is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.

16. Where a sub-buyer of goods purchased from an intermediate seller brings an action against the manufacturer for damages on the ground that the goods are not in conformity, it must be observed that there is no contractual relationship between the sub-buyer and the manufacturer because the latter has not undertaken any contractual obligation towards the former.

17. Furthermore, particularly where there is 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.

18. The objective of strengthening legal protection of persons established in the [Union], which is one of the objectives which the Convention is designed to achieve, also requires that the jurisdictional rules which derogate from the general principle of the Convention should be interpreted in such a way as to enable a normally well-informed defendant reasonably to predict before which courts, other than those of the State in which he is domiciled, he may be sued.

19. However, in a situation such as that with which the main proceedings are concerned, the application of the special jurisdictional rule laid down by [Article 7(1) of the Regulation] to an action brought by a sub-buyer of goods against the manufacturer is not foreseeable by the latter and is therefore incompatible with the principle of legal certainty.

20. Apart from the fact that the manufacturer has no contractual relationship with the sub-buyer and undertakes no contractual obligation towards that buyer, whose identity and domicile may, quite reasonably, be unknown to him, it appears that in the great majority of Contracting States the liability of a manufacturer towards a sub-buyer for defects in the goods sold is not regarded as being of a contractual nature.

21. It follows that the answer to the question submitted by the national court must be that [Article 7(1) of the Regulation] is to be understood as meaning that it does not apply to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose.

§ 1.1.2 The Place of Performance.

The next question is how the place of performance is to be determined. This will often be clear from the terms of the contract, but, if it is not, it may be necessary to apply a legal presumption. In an older decision, *Tessili* v. *Dunlop*,[13] the CJEU decided that the court hearing the case had to apply its choice-of-law rules to determine the law governing the contract; it should then apply that law to determine the place of performance. As will be seen below, however, this judgment, which was the first given by the CJEU under the Brussels Convention, is now of doubtful authority.[14] Here too a Union solution must be found.

§ 1.1.3 The Obligation in Question.

In its original form, Article 7(1) gave jurisdiction to the courts 'for the place of performance of the obligation in question'. Article 7(1)(a) is still drafted in these terms, though there is now an exception in sub-paragraph (b). So, to determine the scope of Article 7(1), we must ascertain what the 'obligation in question' is.

According to the CJEU, it is the obligation the breach of which gives rise to the claim.[15] However, this is not entirely clear. Assume that a Danish company agrees to perform a service for an English company in England. Payment is to be made in Denmark. The Danish company performs the service, but the English company claims that it is defective. As a result, it refuses to pay. If the Danish company sues for payment, what is the 'obligation in question'? Is it the obligation to pay (in which case the Danish courts would have jurisdiction) or is it the obligation to perform the service (in which case only the English courts would have jurisdiction)?[16] If one takes a formalistic approach, it is the former, since the actual claim before the court is for payment. However, on this approach, jurisdiction would be entirely dependent on procedural manoeuvring: if the English company had sued for rescission of the contract, the obligation in question would have been the obligation to perform the service. The English courts would then have had jurisdiction.

It was to avoid these problems that Article7(1) was amended by inserting two further paragraphs. The amended version of Article 7(1) (set out in Panel 4.2) makes clear that, for the two most important kinds of contract – contracts for the sale of goods and contracts for the provision of services – the courts having jurisdiction under Article 7(1) are those for the place of delivery of the goods or the performance of the service, even if the actual claim concerns payment. In other contracts, the problem remains unresolved. Today, therefore, the answer to the question in the previous paragraph would be that the Danish company must sue the English company in England: Article 7(1) would not give jurisdiction to the Danish courts.

Panel 4.2 Matters Relating to a Contract Brussels 2012 (Regulation 1215/2012)

Article 7(1)

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

(1)

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

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

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

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

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

§ 1.1.4 The Revised Version of Article 7(1).

As already mentioned, Brussels 2000 (Regulation 44/2001) brought in a new version of Article 7(1) (set out in Panel 4.2), which has been carried over to Brussels 2012.[17] This retains the old rule for contracts in general, but lays down exceptions for the two most important kinds of contract, contracts of sale and contracts for the provision of services. As Article 7(1) makes clear, these new rules are *exceptions*: where they do not apply, the old rule continues to operate even for these two kinds of contract. There are two circumstances in which this might occur: first, where sub-paragraph (b) does not apply (for example, because the goods are to be delivered in a non-member State) and, secondly, where the parties have agreed otherwise. It is, however, far from clear what the 'unless otherwise agreed' clause actually means. Does it give the parties the power to agree that the place of performance of the obligation in question will not be determined by sub-paragraph (b), in which case sub-paragraph (a) will apply, as it did before the provision was amended, even in the case of the sale of goods or the provision

of services? It is hard to see why such a clause would be included in a contract: if the parties did not want Article 7(1)(b) to apply, a choice-of-court clause would be the obvious solution.

In the first case decided on the new version of Article 7(1) (as contained in Brussels 2000), *Color Drack* v. *LEXX International*,[18] the CJEU held that, where, in the case of a sale of goods, there are several places of delivery all within the same Member State, the first indent of Article 7(1)(b) gives jurisdiction with regard to all the deliveries to the courts for the principal place of delivery. This must be determined on the basis of economic criteria. If it is not possible to determine the principal place of delivery, the applicant may sue the defendant in the courts for the place of delivery of its choice. This case expressly left open the question whether sub-paragraph (b) applies where delivery is to take place in two or more Member States, or partly in a Member State and partly in a non-member State. Our next case considers this problem in the context of a contract for the provision of services.

European Union
Rehder v. *Air Baltic Corporation*
Court of Justice of the European Union
Case C-204/08, [2009] ECR I-6073

Background

Mr Rehder resided in Munich, Germany. He booked a flight from Munich to Vilnius, Lithuania. The airline was Baltic Airlines, a company whose registered office was in Riga, Latvia. The flight was cancelled and he wanted to claim the €250 compensation to which he was entitled under EC Regulation 261/2004.[19] He brought proceedings in a court in Munich. Did it have jurisdiction under what is now Article 7(1)(b) of the Regulation?[20] This question was referred to the CJEU by the German Federal Supreme Court (*Bundesgerichtshof*).

option, either the starting point or the destination, it was reasonable to say that, in the two *flightright* cases, the final destination was the place of performance.

European Union
Car Trim v. *KeySafety Systems*
Court of Justice of the European Union
Case C-381/08, [2010] ECR 1255

Background

KeySafety, an Italian company, supplied Italian car manufacturers with airbag systems. It obtained components from Car Trim, a German company. The components were manufactured by Car Trim to specifications provided in advance by KeySafety. A dispute broke out, and Car Trim brought proceedings against KeySafety in Germany, in the courts for the place where the components were manufactured. The jurisdiction of the German courts depended on what is now Article 7(1)(b).[30] Two questions arose: first, was the transaction a contract for the sale of goods or for the provision of services; secondly, if the former, where was the place of delivery? If the place of delivery is to be regarded as the place where the manufacturer hands over the goods to the first carrier, this would normally give jurisdiction to the courts for the seller's place of business; if, on the other hand, the place of delivery is to be regarded as the place where the goods are actually delivered to the buyer, this will normally give jurisdiction to the courts for the buyer's place of business. A reference was made to the CJEU by the German Federal Supreme Court (*Bundesgerichtshof*).

Judgment

Question 1

27 By Question 1, the referring court is asking the Court, in essence, how 'contracts for the sale of goods' are to be distinguished from 'contracts for the provision of services', within the meaning of [Article 7(1)(b) of the Regulation], in the case of contracts for the supply of goods to be produced or manufactured, where the customer has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced.

28 First of all, it should be noted that that question has been raised in proceedings between two manufacturers in the automobile sector. That industrial sector is characterised by a high level of cooperation between manufacturers. The finished product on offer must be tailored to the precise requirements and individual specifications of the customer. As a rule, the customer identifies his requirements with precision and provides instructions regarding the manufacture of the product which the supplier must respect.

29 In a manufacturing process of that type, which is also used in other sectors of the modern economy, the manufacture of goods can entail the provision of services, which, together with the subsequent supply of the finished product, contributes to fulfilling the ultimate aim of the contract in question.

30 [Article 7(1)(b) of the Regulation] is silent both as regards the definition of the two types of contract and as regards the distinguishing features of those two types of contract in the context of a sale of goods which at the same time involves the provision of services. Specifically, the first indent of that provision, which relates to the sale of goods, does not state whether, in cases where the seller must manufacture or produce the goods in compliance with certain requirements specified in that regard by the customer, it still applies, regard being had to the fact that such manufacture or production, or part thereof, could be classified as a 'service' within the meaning of the second indent of [Article 7(1)(b) of the Regulation].

31 In that connection, it should be noted that, for the purposes of identifying the court with jurisdiction in relation to contracts for the sale of goods or the provision of services, [Article 7(1) of the Regulation] identifies as a connecting factor the

obligation which characterises the contract in question [reference to *Falco Privatstiftung and Rabitsch*, below, paragraph 54].

32 In view of that fact, it is therefore necessary to take as a basis the obligation which characterises the contracts at issue. A contract which has as its characteristic obligation the supply of a good will be classified as a 'sale of goods' within the meaning of the first indent of [Article 7(1)(b) of the Regulation]. A contract which has as its characteristic obligation the provision of services will be classified as a 'provision of services' within the meaning of the second indent of [Article 7(1)(b) of the Regulation].

33 It is necessary to take the following factors into consideration in order to determine the characteristic obligation of the contracts at issue.

34 First, it should be noted that the classification of a contract the aim of which is the sale of goods which must first be manufactured or produced by the seller is governed by certain provisions of European Union law and international law which can affect the interpretation to be given to the concepts of 'sale of goods' and 'provision of services'.

35 First of all, under Article 1(4) of Directive 1999/44,[1] contracts for the supply of consumer goods to be manufactured or produced are also to be deemed contracts of sale and, under Article 1(2)(b) of that directive, any tangible movable item is classified as 'consumer goods', with certain exceptions which are not relevant in a case such as that before the referring court.

36 Moreover, under Article 3(1) CISG [United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna on 11 April 1980], contracts for the supply of goods to be manufactured or produced are to be considered sales contracts unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

37 Furthermore, Article 6(2) of the United Nations Convention of 14 June 1974 on the Limitation Period in the International Sale of Goods provides also that contracts for the supply of goods to be manufactured or produced are to be considered to be sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

38 The above provisions are an indication, therefore, that the fact that the goods to be delivered are to be manufactured or produced beforehand does not alter the classification of the contract at issue as a sales contract.

[After referring to its own case-law in other contexts, the CJEU continued:]

40 Secondly, it is necessary to take into account the criterion, relied upon by the Commission of the European Union, relating to the origin of the raw materials. Another factor which can be taken into consideration is whether or not those materials were supplied by the purchaser, for the purposes of the interpretation of [Article 7(1)(b) of the Regulation]. Where all the materials from which the goods are manufactured, or most of them, have been supplied by the purchaser, that fact could be an indication that the contract should be classified as a 'contract for the provision of services'. On the other hand, where the material has not been supplied by the purchaser, that fact is a strong indication that the contract should be classified as a 'contract for the sale of goods'.

41 It is clear from the case-file referred to the Court that, in the case before the referring court, even though KeySafety determined the suppliers from which Car Trim had to obtain certain parts, it did not provide Car Trim with any materials.

42 Thirdly, even though the referring court does not provide any information in that regard, it is necessary to note that the supplier's responsibility can also be a factor to consider for the purposes of classifying the characteristic obligation of the contract at issue. If the seller is responsible for the quality of the goods – the result of its activity – and their compliance with the contract, that responsibility will tip the balance in favour of a classification as a 'contract for the sale of goods'. On the other hand, if the seller is responsible only for correct implementation in accordance with the purchaser's instructions, that fact indicates rather that the contract should be classified as a 'provision of services'.

43 In view of the above, the answer to Question 1 is that where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and

their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of [Article 7(1)(b) of the Regulation].

Question 2

44 By Question 2, the referring court asks in essence whether, in the case of a sales contract involving carriage of goods, the place where, under the contract, the goods sold were 'delivered' or should have been 'delivered' within the meaning of the first indent of [Article 7(1)(b) of the Regulation] is to be determined by reference to the place of physical transfer to the purchaser.

45 It should be stated at the outset that, under [Article 7(1)(b) of the Regulation], the parties to the contract enjoy a certain freedom in defining the place of delivery of the goods.

46 The words 'unless otherwise agreed' in [Article 7(1)(b) of the Regulation] show that the parties can come to an agreement concerning the place of performance of the obligation for the purposes of the application of that provision. Furthermore, under the first indent of that provision, which contains the words 'under the contract', the place of delivery of the goods is in principle to be that agreed by the parties in the contract.

[After referring to its previous judgments in *Color Drack* and *Rehder*, and saying that the relevant links (connecting factors) must be interpreted autonomously, the CJEU continued:]

51 Nevertheless, [the Regulation] is silent as to the definition of the concepts of 'delivery' and 'place of delivery' for the purposes of the first indent of [Article 7(1)(b)].

52 Moreover, it should be noted that, at the time of drafting that provision, the Commission, in its Proposal of 14 July 1999 for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final, p. 14),[2] stated that it was intended 'to remedy the shortcomings of applying the rules of private international law of the State whose courts are seised' and that that 'pragmatic determination of the place of enforcement' was based on a purely factual criterion.

53 First of all, it should be noted that the autonomy of the linking factors provided for in [Article 7(1)(b) of the Regulation] precludes application of the rules of private international law of the Member State with jurisdiction and the substantive law which would be applicable thereunder.

54 In those circumstances, it is for the referring court to determine first whether the place of delivery is apparent from the provisions of the contract.

55 Where it is possible to identify the place of delivery in that way, without reference to the substantive law applicable to the contract, it is that place which is to be regarded as the place where, under the contract, the goods were delivered or should have been delivered, for the purposes of the first indent of [Article 7(1)(b) of the Regulation].

56 On the other hand, there could be circumstances in which the contract would not contain any provisions indicating, without reference to the applicable substantive law, the parties' intentions concerning the place of delivery of the goods.

57 In such circumstances, since the rule on jurisdiction provided for in [Article 7(1)(b) of the Regulation] is autonomous, it is necessary to determine that place in accordance with another criterion which is consistent with the origins, objectives and scheme of that regulation.

58 The referring court contemplates two places which could serve as the place of delivery for the purposes of fixing an autonomous criterion, to be applicable in the absence of a contractual provision. The first is the place of the physical transfer of the goods to the purchaser and the second is the place at which the goods are handed over to the first carrier for transmission to the purchaser.

59 It must be held, in concurrence with the referring court, that those two places seem to be the most suitable for determining by default the place of performance, where the goods were delivered or should have been delivered.

60 It should be noted that the place where the goods were physically transferred or should have been physically transferred to the purchaser at their final destination is the most consistent with the origins, objectives and scheme of [the Regulation] as

the 'place of delivery' for the purposes of the first indent of [Article 7(1)(b) of the Regulation].

61 That criterion is highly predictable. It also meets the objective of proximity, in so far as it ensures the existence of a close link between the contract and the court called upon to hear and determine the case. It should be pointed out, in particular, that the goods which are the subject-matter of the contract must, in principle, be in that place after performance of the contract. Furthermore, the principal aim of a contract for the sale of goods is the transfer of those goods from the seller to the purchaser, an operation which is not fully completed until the arrival of those goods at their final destination.

62 In the light of all the above considerations, the answer to Question 2 is that the first indent of [Article 7(1)(b) of the Regulation] must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

1 *Editor's note*: OJ 1999, L 171/12.

2 *Editor's note*: the point the Commission was making in its proposal for what was to become Brussels 2000 was that it is unsatisfactory to determine the place of performance of an obligation according to the applicable law under the choice-of-law rules of the forum. This was the rule laid down in *Tessili* v. *Dunlop* (discussed in § 1.1.2, above). What the Commission meant by 'pragmatic determination of the place of enforcement' was that it must be determined by an autonomous, European rule, not by a rule of Member State law.

Comment

The second question in this case is of considerable importance. In answering it, the CJEU implicitly overruled its previous decision in *Tessili* v. *Dunlop* (outlined in § 1.1.2, above). Although the *Tessili* case concerned what is now Article 7(1)(a), while the *Car Trim* case concerned Article 7(1)(b), it is unlikely that *Tessili* will now be applied.

The new rule is that, first, the court seised must look at the contract in order to see whether the place of delivery can be determined from its terms, without regard to the substantive law applicable to the contract. If it can, that will conclude the matter. If it cannot, the place of delivery will be the place of actual delivery to the buyer. If the CJEU had held that delivery to the carrier was the relevant criterion, this would have given sellers a big advantage: they would be able to sue either in the courts of the buyer's domicile or at their own place of business (assuming the goods were manufactured there). By saying that actual delivery to the buyer is what counts, the court gave an advantage to buyers: they can now bring proceedings either in the courts of the seller's domicile or in the courts for their own place of business, assuming (as will normally be the case) that the goods are delivered there.[31]

Our next case deals with an intellectual property licensing agreement.

European Union
Falco Privatstiftung and Rabitsch
Court of Justice of the European Union
Case C-533/07, [2009] ECR I-3327

Background

The licensors (claimants), Falco Privatstiftung and Mr Rabitsch, were both Austrian. The licensee (defendant), Ms Weller-Lindhorst, was domiciled in Munich (Germany). The proceedings were brought by the licensors against the licensee in Austria. The claimants were asking for payment of royalties, information on sales so they could calculate supplemental royalties and payment of supplemental royalties. The first claim was brought in contract; the latter two in tort. It was argued by the claimants that the Austrian court had jurisdiction under the second indent of what is now Article 7(1)(b) (provision of services).[32]