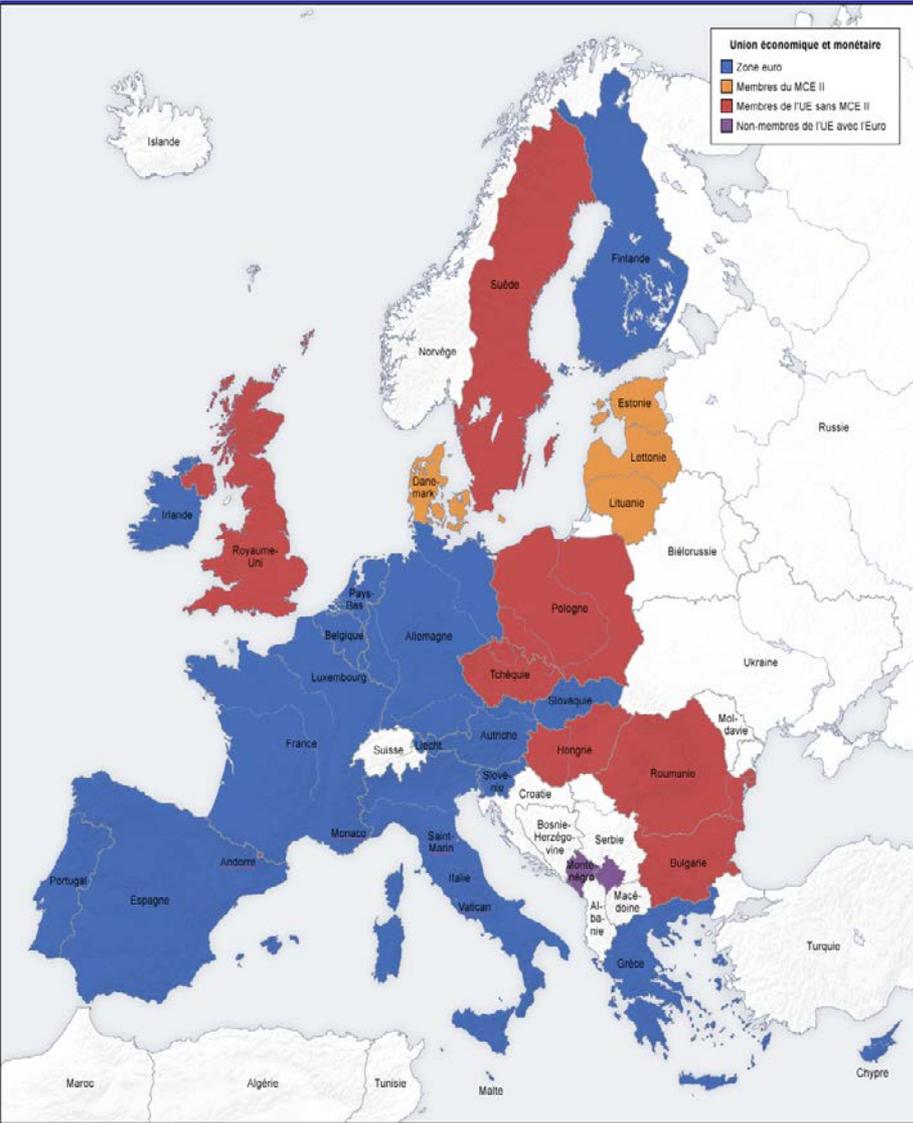


Regulation (No) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

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Introduction. Mutual trust



- One of the most successful instruments on judicial cooperation
- Successor of the 1968 Brussels Convention
- Entered into force on 1 March 2002
- 10 January 2015: it will be replaced by Reg. No. 1215/2012 (Recast)

Content and objectives

- provide predictable grounds of **jurisdiction**
- minimise the possibility of concurrent proceedings and avoid irreconcilable judgments
- simplify the formalities with a view to rapid and simple **recognition and enforcement**

Material scope

- Civil and commercial matters, Article 1 (1)
- ECJ: autonomous interpretation; no recourse to national law
- C-154/11- Mahamdia

Jurisdiction over individual contracts of employment – Contract with an embassy of a third State – Immunity of the employing State

Excluded matters

- **status and legal capacity of natural persons
matrimonial relationships - Reg. 2201/20, Brussels II
bis**
- **wills and succession-Regulation 650/2012**
- **Bankruptcy- Regulation 1346/2000**
- **social security**
- **arbitration- New York Convention on Arbitration**
- **Maintenance Regulation- Regulation 4/2009**
- **Recast: maintenance obligations will expressly be
excluded**

Material scope

- **Case C-185/07 West Tankers**

Jurisdiction of a court of a Member State to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State on the ground that those proceedings would be contrary to an arbitration agreement - New York Convention.

Material scope. Rule

- In order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the **subject-matter of the proceedings.**
- More specifically, its place in the scope of Regulation No 44/2001 is determined by the **nature of the rights which the proceedings in question serve to protect.**

Arbitration or claim for damages?



- preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application
- the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope

Personal and territorial scope

- **Art. 2 (1): Principle - jurisdiction rules apply only to defendants domiciled in a MS,**
- **Exceptions: Articles 22, 23; in future (Recast) also Articles 16 (1) and 19 (2)**
- **Art. 4 (1): If the defendant is not domiciled in a Member State, national law applies**
- **International Agreements:**
 - **2005 Parallel Agreement with Denmark**
 - **2007 new Lugano Convention (Denmark, Iceland, Norway and Switzerland)**
 - **In future: 2005 Hague Convention on Choice of Court Agreements**

Jurisdiction

- Precondition: cross-border situation
- C-327/10 – Lindner

mortgage loan contract concluded by a consumer who is a national of one Member State with a bank established in another Member State – Legislation of a Member State making it possible, in the case where the exact domicile of the consumer is unknown, to bring an action against the latter before a court of that State

Jurisdiction

- **Article 2 ff. determine international jurisdiction, sometimes also territorial jurisdiction (e.g. Art. 5 (3) – depends on the wording)**
- **1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.**
- **2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.'**

Practical case no. 1

- C-281/02, Owusu
- Applicability
- Doctrine *forum non conveniens*



Practical case no. 1

- The international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of Article 2 of the Brussels Convention, from the involvement, either because of the subject-matter of the proceedings or the respective domiciles of the parties, of a number of Contracting States.
- The involvement of a Contracting State and a non-Contracting State, for example because the claimant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature.

Practical case no. 1

- Application of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the **predictability** of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention.

Jurisdiction

- **Order of examination of jurisdiction:**
 - **Exclusive jurisdiction (Articles 22, 23)**
 - **Jurisdiction in matters of insurance, consumer contracts and individual contracts of employment (Article 8 ff.)**
 - **Special jurisdiction (Articles 5-7)**
 - **General jurisdiction (Article 2)**
 - **Article 24 (entering an appearance without contesting jurisdiction)**

Jurisdiction

- General forum of **the defendant's domicile** (Article 2)
- Problems: determination of the domicile (Article 59); unknown domicile (C-327/10) – Lindner

mortgage loan contract concluded by a consumer who is a national of one Member State with a bank established in another Member State – Legislation of a Member State making it possible, in the case where the exact domicile of the consumer is unknown, to bring an action against the latter before a court of that State

C-327/10 – Lindner

- **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.**
- **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.'**

Jurisdiction

- Other forums are linked to the subject-matter of the litigation or based on the principle of party autonomy; important grounds of jurisdiction are e.g.:
 - the place of performance in contract matters
 - the place of the tort
 - consumer contracts
 - Prorogation of jurisdiction

Jurisdiction on the place of performance

- Autonomous interpretation, “**matters relating to a contract**”
- Which obligation does the term “place of performance” refer to? (the obligation in dispute/the characteristic obligation of the contract?)
- autonomous interpretation or *lex causae*?
- Agreements concerning the place of performance- The validity is determined by the *lex causae*
 - Exception: no real connection between the contract and the agreed place of delivery, art. 23



Jurisdiction of the place of performance

- Case C-19/09, **Wood Floor Solutions Andreas Domberger GmbH**
- Wood Floor sued Silva Trade before the Landesgericht Sankt Pölten (Austria) seeking damages for termination of a commercial agency contract and compensation

Special jurisdiction – Article 5(1)(a) and (b), second indent – Provision of services – Commercial agency contract – Performance in several Member States)

Case C-19/09

- The second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that where services are provided in several Member States, the court which has jurisdiction to hear and determine all the claims arising from the contract is the court in whose jurisdiction **the place of the main provision of services is situated.**
- For a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be established on that basis, the place where the agent is domiciled.

Contracts with the consumer.

Practical case no. 2



Practical case no. 2

1. it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.

(the simple existence website not sufficient)

Practical case no. 2

The following matters, **the list of which is not exhaustive**, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely

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

Practical case no. 2

- use of a top-level domain name other than that of the Member State in which the trader is established
- and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.
- On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established.

Jurisdiction over consumer contracts

- **Art. 16 (1):** a consumer may sue the entrepreneur either in the MS of the entrepreneur's domicile or in the MS of his own domicile (Article 16 may also provide for territorial jurisdiction, if not provided for by the national law)
- **Note:** Art. 16 (1) actually requires that the entrepreneur is domiciled in a MS or at least runs a branch, agency or other establishment in a MS (Art.15 (2))
- **Art. 16 (2):** proceedings may be brought against a consumer only in the courts of the MS of the consumer's domicile (Art. 24 applies)

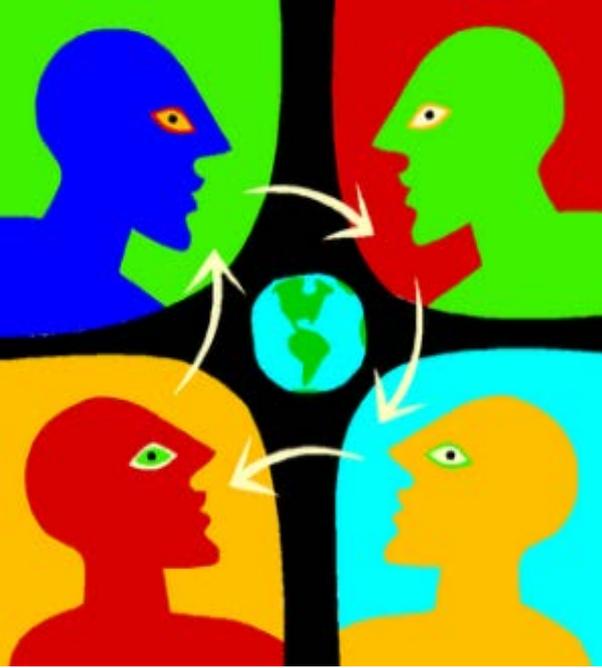
Jurisdiction over consumer contracts

- **Art. 17: The provisions of this Section may be departed from only by an agreement:**
- **1. which is entered into after the dispute has arisen; or**
- **2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or**
- **3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.**

Jurisdiction over consumer contracts

Future amendments under the Recast:

- Article 16 (1) (2nd alt.) will apply also to entrepreneurs from third States (regardless whether they run a branch, agency or other establishment in a MS)
- If the consumer is the defendant, jurisdiction can be based on Article 24 only after the court has ensured that the consumer has been informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance



**Communication works
for those who work at it.**

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