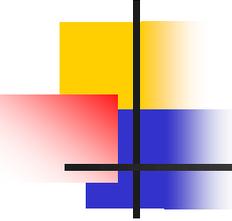


Regulation 1215/2012: Exclusive jurisdiction, prorogation and *lis pendens*

PhD Diana Ungureanu,
NIM trainer





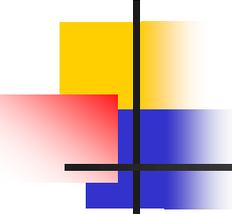
Jurisdiction: The Matrix

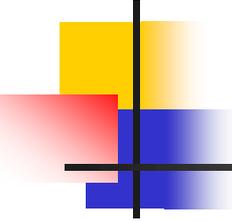
- 1 . Exclusive jurisdiction , regardless of domicile: Article 24
- 2 . Jurisdiction by appearance: Article 26
- 3 . Insurance, consumer and employment contracts : Articles 10-23
- 4 . Agreements on Jurisdiction: Article 25
- 5 . General jurisdiction: defendants domiciled in the MS where a court is seized: Article 4
- 6 . 'Special' jurisdiction: defendants domiciled in another MS: Articles 7-9
- 7 . 'Residual' jurisdiction: defendants not domiciled in any MS: Article 6

- Loss of jurisdiction: *lis alibi pendens* and related actions: Articles 29 ff

- Applications for provisional or protective measures: Article 35

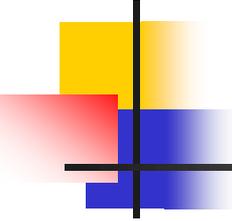
I. Exclusive jurisdiction-Art. 24

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- Exclusive jurisdiction , regardless of domicile: Article 24
 - 24(1): rights in rem, and tenancies of, immovable property- the courts of the MS in which the property is situated.
 - 24(2): companies- the courts of the Member State in which the company, legal person or association has its seat
 - 24(3): the validity of entries in public registers, the courts of the MS in which the register is kept;
 - 24(4): intellectual property. registration or validity , irrespective of whether the issue is raised by way of an action or as a defence- the courts of the Member State in which the deposit or registration... See however the Unified Patent Court – UPC, Regulation 542/2014 amending R. 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice
 - 24(5): the enforcement of judgments- the courts of the Member State in which the judgment has been or is to be enforced



The rule of interpretation

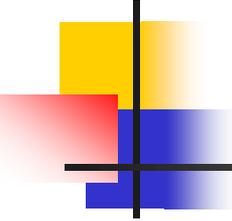
- The rules of jurisdiction should be highly **predictable** and founded on the principle that jurisdiction is generally based on the **defendant's domicile**.
- Jurisdiction should always be available on this ground save in a few well- defined situations in which the **subject-matter of the dispute** or the autonomy of the parties warrants a different connecting factor. (Preamble, par.15)
- art.24- exclusive jurisdiction- an exception to the general rules of jurisdiction– **must not be given an interpretation broader than is required by their objective**



1. Rights in rem/tenancies

- in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, **the courts of the MS in which the property is situated.**
- However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use **for a maximum period of six consecutive months**, the courts of the Member State in which **the defendant** is domiciled shall also have jurisdiction, provided that **the tenant is a natural person** and **that the landlord and the tenant are domiciled in the same Member State;**
- **What if the immovable property situated in two contracting States?**

C-158/87, Scherrens- in a dispute as to the existence of a lease relating to immovable property situated in two contracting States, exclusive jurisdiction over the immovable property situated in each contracting State is held by the courts of that State.



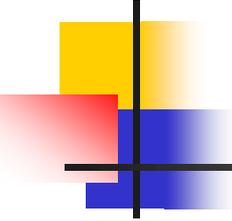
1.1. Rights in rem

- **an independent definition** 'in proceedings which have as their object rights in rem in immovable property' Case C-115/88 *Reichert and Kockler*
- The reason: Jenard Report on the Brussels Convention: the court of the place where property is situated **is best placed to deal with** this matters, the disputes frequently require **checks, inquiries and expert assessments** which have to be **carried out on the spot**, reasons of **proximity**, best placed to ascertain the facts satisfactorily, satisfies the need for the proper administration of justice
- **does not encompass all actions concerning rights in rem** in immovable property, but ONLY those:
 - which come within the scope of the RBI
 - **and** are actions which seek to determine **the extent, content, ownership or possession of immovable property** or **the existence of other rights in rem** therein and to provide the holders of those rights with **protection for the powers which attach to their interest**

Autonomous notion.

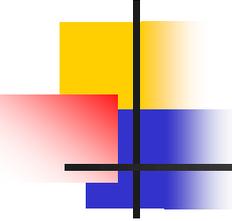
What is NOT included

- **C-343/04- CEZ-** an action which seeks to prevent a nuisance affecting or likely to affect land belonging to the applicant, caused by ionising radiation emanating from a nuclear power station situated on the territory of a neighbouring State to that in which the land is situated, does not fall within the scope of that provision.
- **C-115/88, Dresdner Bank- Action paulienne** . An action whereby a creditor seeks to have a disposition of a right in rem in immovable property **rendered ineffective as against him** on the ground that it was made in fraud of his rights by his debtor does not come within the scope of this article.
- The **action paulienne** is based on the creditor's **personal claim** against the debtor and seeks to protect **whatever security he may have over the debtor's estate**. If successful, its effect is to render the transaction whereby the debtor has effected a disposition in fraud of the creditor's rights ineffective as against the creditor alone.
- does not involve the assessment of facts or the application of rules and practices of the locus rei sitae in such a way as to justify conferring jurisdiction
- **C-261/90, Reichert- action paulienne in French law**, whereby a creditor seeks to obtain the revocation in regard to him of a transfer of rights in rem in immovable property by his debtor in a way which the creditor regards as being in fraud of his rights – Art.24 not applicable



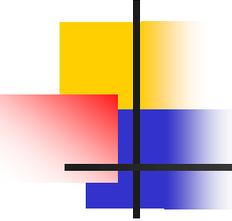
NOT included

- **C-294/92, Webb-** An action for a declaration that a person holds immovable property as **trustee** and for an order requiring that person to execute such documents as should be required to vest the legal ownership in the plaintiff does not constitute an action in rem
 - **C-292/93, Norbert Lieber-**A claim for **compensation for use** of a dwelling after the annulment of a transfer of ownership is not included- **The difference between a right in rem and a right in personam** is that the former, existing in an item of property, has effect against the whole world, whereas the latter can only be claimed against the debtor
 - **C-386/12, Schneider-** not applying to non-contentious proceedings by which a national of a Member State who has been declared to be lacking full **legal capacity** and placed under guardianship in accordance with the law of that State applies to a court in another Member State for **authorisation to sell his share of a property** situated in that other Member State
- **such proceedings are concerned with the 'legal capacity of natural persons' - falls outside the material scope of RBI**



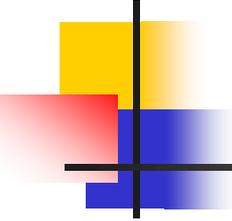
Not included

- **C-518/99, Gaillard** - an action for rescission of a contract of sale relating to immovable property
- **C-417/15, Schmidt** - **an action seeking the avoidance of a gift of immovable property on the ground of the donor's incapacity to contract;** the removal from the land register of the entry relating to his daughter's right of ownership; art.7 (1) a
- the action must be based on a right *in rem* and not on a right *in personam*



Within the scope of application

- **C-438/12, Weber- The right of pre-emption.** there falls within the category of proceedings which have as their object 'rights *in rem* in immovable property' an action seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to that property and which produces effects with respect to all the parties.
- **C-605/14, Komu- an action for the termination of co-ownership in undivided shares** of immovable property by way of sale, by an appointed agent, falls within the category of proceedings 'which have as their object rights *in rem* in immovable property'



LETTINGS. Holiday home

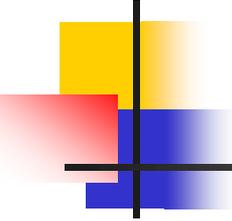
■ **C-241/83, Erich Rosler**

- applies to all lettings of immovable property, even for a short term and even where they relate only to the use and occupation of a holiday home.

- All disputes concerning the **obligations of the landlord or of the tenant** under a tenancy, in particular those concerning the **existence** of tenancies or the **interpretation** of the terms thereof, their **duration**, the giving up of possession to the landlord, the **repairing of damage** caused by the tenant or the **recovery of rent and of incidental charges payable by the tenant**, such as **charges for the consumption of water, gas and electricity**

- On the other hand, disputes which are **only indirectly related to** the use of the property let, such as those concerning the loss of holiday enjoyment and travel expenses, **do not fall within the exclusive jurisdiction** conferred by that article.

Actions directly related to tenancy

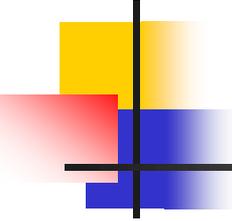


- **C-8/98- Dansommer-** is applicable to an **action for damages for taking poor care of premises and causing damage to accommodation** which a private individual had rented for a few weeks' holiday, even where the action is not brought directly by the owner of the property but by a professional tour operator from whom the person in question had rented the accommodation and who has brought legal proceedings after being subrogated to the rights of the owner of the property.
- **The ancillary clauses relating to insurance** in the event of cancellation and to guarantee of repayment of the price paid by the client, which are contained in the general terms and conditions of the contract concluded between that organiser and the tenant, and which do not form the subject of the dispute in the main proceedings, **do not affect the nature of the tenancy**

Time sharing. Travel Agency.

Location de fonds de commerce

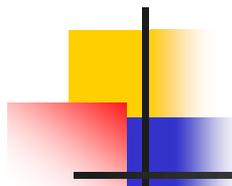
- **C-73/04, Klein-** does not apply to a club membership contract which, in return for a membership fee which represents the major part of the total price, allows members to acquire a right to use on a time-share basis immovable property of a specified type in a specified location and provides for the affiliation of members to a service which enables them to exchange their right of use.
- **C-280/90, Hacker-** not applying to a contract concluded in a Contracting State whereby a **business organizing travel** with its seat in that State undertakes **to procure for a client** domiciled in the same State the use **for several weeks of holiday accommodation** not owned by it in another Contracting State, **and to book the travel arrangements.**
- **C-73/77, Sanders- NOT location de fonds de commerce-** not including **an agreement to rent under a usufructuary lease a retail business** (verpachting van een winkelbedrijf) carried on in immovable property rented from a third person by the lessor; The fact that there is a dispute as to the existence of the agreement which forms the subject of the action does not affect this



I.2. Companies

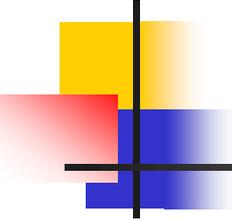
proceedings which have as their object **the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs-** the courts of the Member State in which the company, legal person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

- Jenard Report -**the essential objective**- centralising jurisdiction in order to avoid conflicting judgments as regards the existence of a company /the validity of the decisions of its organs.
- These courts -best placed to deal with such disputes, in that State that information about the company - notified and made public; interests of the sound administration of justice
- it is **not sufficient** that a legal action involve **some link** with a decision adopted by an organ of a company- that would in reality mean that all legal actions brought against a company – whether in matters relating to a contract, or to tort or delict, or any other matter – would almost always come within the jurisdiction of the courts of the Member State in which the company has its seat.



I.2. Scope of application

- **C-372/07, Hassett and Doherty**- proceedings in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, do not concern the validity of the decisions of the organs of a company within the meaning of that provision (In fact, in the case before the referring court, the doctors do not in any way challenge the fact that the MDU's Board of Management was empowered under that company's Articles of Association to adopt the decision rejecting their claim for indemnity. What the doctors do challenge is the manner in which that power was exercised. They maintain that the MDU rejected their claim for indemnity automatically, without examining it in detail, thereby infringing their rights under the MDU's Articles of Association as members of that organisation.)
- covering only disputes in which a party is challenging the validity of a decision of an organ of a company **under the company law applicable or under the provisions governing the functioning of its organs, as laid down in its Articles of Association.**

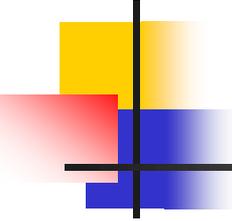


1.2. Not covered

- **C-302/13, flyLAL-Lithuanian Airlines AS**-an action seeking legal redress for damage resulting from alleged infringements of European Union competition law, does not constitute proceedings having as their object the validity of the decisions of organs of companies within the meaning of that provision.

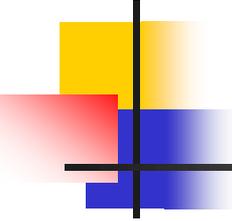
C-144/10, BVG- not applying to proceedings in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes.

see also C-483/13 KA Finanz (Rome I)- corporate exception



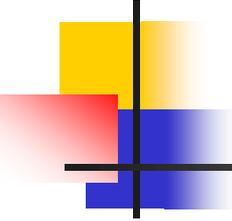
I.3. Intellectual property

- **C-4/03**- the rule of exclusive jurisdiction laid down therein concerns all proceedings relating to the registration or validity of a patent, **irrespective of whether the issue is raised by way of an action or a plea in objection.**
- **C-288/82 , Duijnstee -Independent concept** - proceedings relating to the validity, existence or lapse of a patent or an alleged right of priority by reason of an earlier deposit are to be regarded as proceedings 'concerned with the registration or validity of patents' (C-288/82 , Duijnstee, par. 24)
- If, on the other hand, the dispute does not concern the validity of the patent or the existence of the deposit or registration and these matters are not disputed by the parties, the dispute will not be covered... Such would be the case, for example, with an infringement action, in which **the question of the validity of the patent allegedly infringed is not called into question.**
- does not include a dispute between **an employee** for whose invention a patent has been applied for or obtained and his employer, where the dispute relates to their respective rights in that patent arising out of the **contract of employment.**



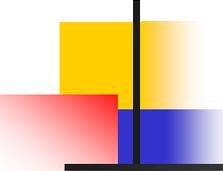
I.4. Enforcement

- **C-220/84- AS Autoteile-** Applications to oppose enforcement, fall within the jurisdiction provision...;
- that provision does not however make it possible, in an application to oppose enforcement made to the courts of the Contracting State in which enforcement is to take place, **to plead a set-off** between the right whose enforcement is being sought and **a claim over which the courts of that State would have no jurisdiction if it were raised independently.**



II. Prorogation. Art.25-26

- the parties may agree that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship
- **regardless of their domicile**- NEW- see under R.44/2001 case C-387/98, **Coreck Maritime**
- that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State
- Such jurisdiction shall be **exclusive** unless the parties have agreed otherwise.
- Art.15 (insurances), 19 (consumers), 23 (employment), 24 (exclusive jurisdiction)- agreements – limited
- **Party Autonomy**-a general Principle of EU Private international law



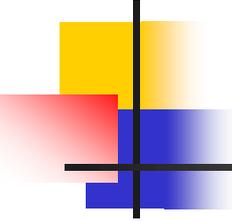
Choice of Court (ex protected categories)

Brussels Regulation: Article 23

"If the parties, **one or more of whom is domiciled in a Member State**, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

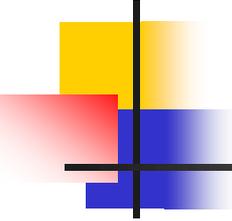
Brussels Regulation (recast): Article 25

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



Prorogation. Tacit Agreement (Art.26)

- The plaintiff files the claim.
- The defendant enters into an appearance and does not contest jurisdiction.
- a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered **to contest the jurisdiction**, or where another court has **exclusive jurisdiction by virtue of Article 24**.
- **New-Art. 26.2**
 - Consumer, Insurance and Labour contracts
 - The defendant is the weaker party the court shall, before assuming jurisdiction, **ensure that the defendant is informed of his right to contest the jurisdiction** of the court and of **the consequences of entering or not entering an appearance**. How?

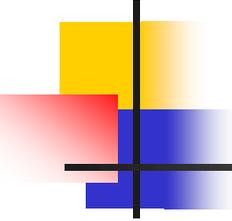


Proposal by EJN-Adopted on 14th May 2014

https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

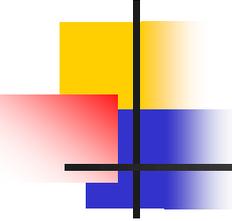
Text:

- **"You are being sued before the court of a Member State of the European Union under Regulation 1215/2012.**
- **Under Article 26 of this Regulation the court before which a defendant enters an appearance shall -in principle -have jurisdiction even if jurisdiction cannot be derived from other provisions of the Regulation.**
- **This rule, however, does not apply where appearance was entered to contest jurisdiction.**
- **If you are certain that the court has no jurisdiction under the other provisions of the Regulation, **you need not respond to the lawsuit in any way.** If you have doubts about the issue of jurisdiction, it is advisable that you challenge jurisdiction of the court prior to entering into the subject-matter of the lawsuit."**



Entering an appearance

- **C-175/15, Taser-** in a dispute concerning the non-performance of a contractual obligation, in which the applicant has brought proceedings before the courts of the Member State in which the defendant has its seat, the jurisdiction of those courts may stem from Article 26 of that regulation, where the defendant does not dispute their jurisdiction, even though the contract between the two parties contains a clause conferring jurisdiction on the courts of a third country.
- Article 26 precludes in a dispute between parties to a contract which contains a clause conferring jurisdiction on the courts of a third country, the court of the Member State in which the defendant has its seat, which has been seised, from declaring of its own motion that it does not have jurisdiction, even though the defendant does not contest the jurisdiction of that court.
- **C-112/13, AB-** if a national court appoints, in accordance with national legislation, a representative *in absentia* for a defendant upon whom the documents instituting proceedings have not been served because his place of domicile is not known, **the appearance entered by that representative does not amount to an appearance** being entered by that defendant for the purposes of Article 24 of that regulation.



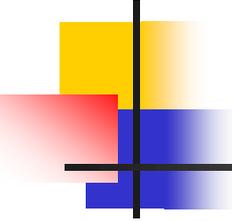
Express Agreement. Art.25

New-it applies regardless of the parties' domicile- Domicile of at least one of the parties no longer required to have choice of court clause in favour of an EU court

- The parties can conclude an agreement in order to confer jurisdiction on the Courts or one Court in particular of a Member State in order to settle a dispute or future disputes in connection to a particular legal relationship.
- Validity of the agreement:
 - Formal validity.-rules established under the Regulation (substantive solution)
 - **New-Substantive Validity-** is to be determined by the law of the forum -lex fori prorogati (conflictual solution). Includes Choice of law provisions-Renvoi-see Para. 20 of the Preamble.

New:

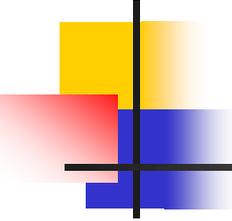
- **Principle of independence** if the agreement is included in a contract- An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
- The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid. **C-269/95, Benincasa**



Form

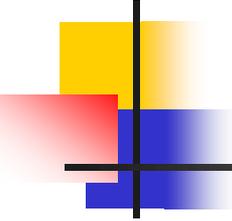
The agreement conferring jurisdiction shall be either:

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



Form

- **MSG, C-106/95** - the court - the duty of examining, first, whether the clause conferring jurisdiction upon it was in fact the subject of **consensus** between the parties, which must be clearly and precisely demonstrated
- the purpose of the requirements as to form is to ensure that consensus between the parties is in fact established
- **C-387/98, Coreck Maritime GmbH** - It does not require that a jurisdiction clause be formulated in such a way that the competent court can be determined on its wording alone. It is sufficient that the clause **state the objective factors** on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the court seized to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case.
- **C-214/89 ,Powell Duffryn, C-269/95 ,Benincasa,** It is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope; to settle **disputes between that company and its shareholders** -an agreement

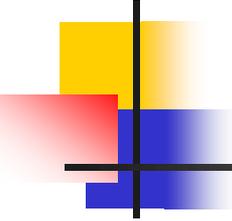


Writing

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

C-322/14, El Majdoub- the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which **provides a durable record of the agreement**, within the meaning of that provision, **where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract.**

C-222/15, Hoszig- a jurisdiction clause, such as that at issue in the main proceedings, which, first, is set out **in the client's general terms and conditions**, referred to in the instruments witnessing the contracts between those parties and forwarded upon their conclusion, and, secondly, designates as courts with jurisdiction those of a city of a MS, meets the requirements of that provision relating to the consent of the parties and the precision of the content of such a clause.



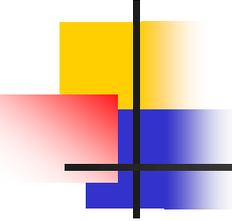
General printed conditions

- **C-71/83**- A jurisdiction clause contained **in the printed conditions on a bill of lading** satisfies the conditions:

- If the agreement of both parties to the conditions containing that clause has been **expressed in writing**, or

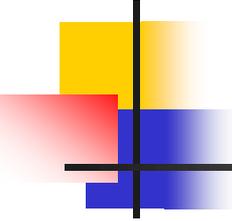
- If the jurisdiction clause has been the subject-matter of a **prior oral agreement** between the parties expressly relating to that clause, **in which case the bill of lading, signed by the carrier, must be regarded as confirmation in writing of the oral agreement**, or

- If the bill of lading comes **within the framework** of a continuing business relationship between the parties, in so far as it is thereby established that that relationship is governed by general conditions containing the jurisdiction clause;



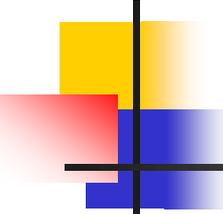
General printed conditions

- **C-25/76, Segoura-** Where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing is fulfilled **only if the contract signed by both parties contains an express reference to those general conditions.**
- In the case of a contract concluded by reference to earlier offers, which were themselves made with reference to the general conditions of one of the parties including a clause conferring jurisdiction, the requirement of a writing is satisfied only if **the reference is express and can therefore be checked by a party exercising reasonable care.**



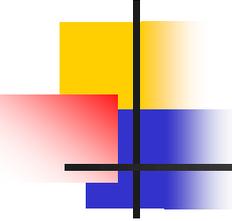
Orally concluded contract

- **C-25/76- Galeries Segoura-** In the case of an orally concluded contract, the requirements as to form are satisfied only if **the vendor's confirmation in writing accompanied by notification of the general conditions of sale has been accepted in writing by the purchaser.**
- The fact that the purchaser **does not raise any objections** against a confirmation issued unilaterally by the other party does not amount to acceptance on his part of the clause conferring jurisdiction **unless the oral agreement comes within the framework of a continuing trading relationship between the parties which is based on the general conditions** of one of them, and those conditions contain a clause conferring jurisdiction.



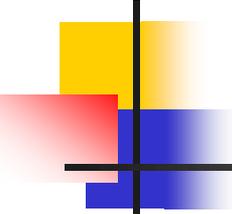
Content

- **C-23/78, Meeth-** the right of the parties to agree on **two or more** courts for the purpose of settling any disputes which may arise.
- the parties have by such an agreement **reciprocally conferred jurisdiction** on the courts specified in the general rule laid down by Article 2 of the Convention.
- Although such an agreement coincides with the scope of Article 2 it is nevertheless effective in that it excludes, in relations between the parties, other optional attributions of jurisdiction, such as those detailed in Articles 5 and 6 of the Convention.
- **Cartel Damage Claims (CDC) Hydrogen Peroxide SA, C-352/13-** in the case of actions for damages for an infringement of Article 101 TFEU - jurisdiction clauses contained in contracts for the supply of goods, provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law- even if the effect thereof is a derogation from Article 5(3) and/or Article 6(1).



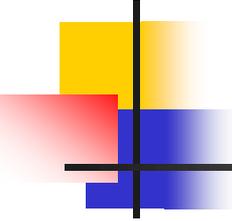
Only between parties.

- **C-71/83**- As regards the relationship between the carrier and a third party holding the bill of lading- the jurisdiction clause has been adjudged valid as between the carrier and the shipper and if, by virtue of the relevant national law, the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations.
- **C-543/10 , Refcomp** -a jurisdiction clause agreed in the contract concluded between the manufacturer of goods and the buyer thereof cannot be relied on **against a sub-buyer** who, in the course of a succession of contracts transferring ownership concluded between parties established in different Member States, purchased the goods and wishes to bring an action for **damages against the manufacturer**, unless it is established that that third party has actually consented to that clause under the conditions laid down in that article.



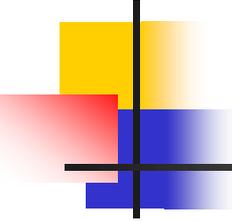
Succession to the rights

- **C-387/98, Coreck Maritime GmbH** - A jurisdiction clause agreed between a carrier and a shipper which appears in a bill of lading is enforceable against a third party bearer of the bill of lading **if he succeeded to the rights and obligations** of the shipper under the applicable national law when he acquired the bill of lading. If he did not, it must be ascertained whether he accepted that clause having regard to the requirements...
- **C-201/82- Gerling Konzern-** where a contract of insurance, entered into between an insurer and a policyholder and stipulated by the latter to be for his benefit and to ensure **for the benefit of third parties to such a contract**, contains a clause conferring jurisdiction relating to **proceedings which might be brought by such third parties**, the latter, even if they have not expressly signed the said clause, may rely upon it provided that, as between the insurer and the policy-holder, the condition as to writing has been satisfied and provided that the consent of the insurer in that respect has been clearly manifested



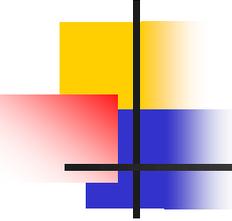
Form. Language

- **C-150/80, Elefanten**- those formal requirements were inserted out of the concern **not to impede commercial practice**, yet at the same time **to cancel out the effects of clauses in contracts which might go unread, such as clauses in printed forms for business correspondence or in invoices, if they were not agreed to by the party** against whom they operate.
- the purpose is to ensure legal certainty and that the parties have given their consent.
- Contracting States are not free to lay down formal requirements other than these
- the legislation of a Contracting State may not allow the validity of such an agreement to be called in question solely on the ground that the language used is not that prescribed by that legislation.



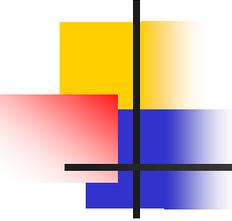
International trade

- **MSG, C-106/95** - under a contract concluded **orally** in international trade or commerce, an agreement conferring jurisdiction- validly concluded by virtue of the fact that one party to the contract **did not react to a commercial letter of confirmation sent to it by the other party to the contract** or **repeatedly paid invoices without objection where those documents contained a pre-printed reference to the courts having jurisdiction**, provided that such conduct is **consistent with a practice** in force in the field of international trade or commerce in which the parties in question operate and the latter are aware or ought to have been aware of the practice in question.
- It is for the national court to determine whether such a practice exists and whether the parties to the contract were aware of it.
- A practice exists in a branch of international trade or commerce in particular where **a particular course of conduct is generally followed** by contracting parties operating in that branch when they conclude contracts of a particular type.
- they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice.



International trade

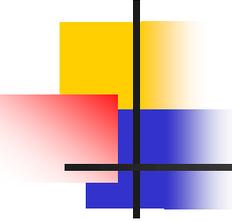
- **C-159/97, Castelletti**-The contracting parties' consent to the jurisdiction clause is presumed to exist where their conduct is **consistent with a usage** which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware.
- The existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is **generally and regularly followed by operators** in that branch when concluding contracts of a particular type.
 - It is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States.
 - A specific form of publicity cannot be required in all cases.
 - The fact that is challenged before the courts is not sufficient to cause the conduct no longer to constitute a usage.



International trade

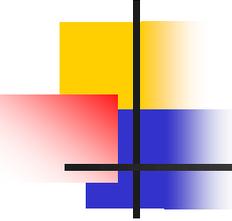
- must be assessed solely **in the light of the commercial usages of the branch of international trade or commerce concerned, without taking into account any particular requirements which national provisions** might lay down.
- Awareness of the usage must be assessed with respect to the original parties to the agreement conferring jurisdiction, their nationality being irrelevant in this regard. Awareness of the usage will be established when, regardless of any specific form of publicity, in the branch of trade or commerce in which the parties operate a particular course of conduct is generally and regularly followed in the conclusion of a particular type of contract, so that it may be regarded as an established usage.
- Considerations about the links between the court designated and the relationship at issue, about the validity of the clause, or about the substantive rules of liability applicable before the chosen court are unconnected with those requirements.

III. Lis pendens and related actions

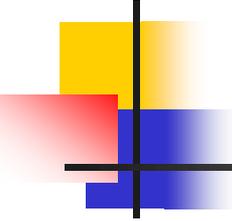


- Lis pendens- proceedings involving the same cause of action and between the same parties
- Related actions-actions so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.
- **Prior temporis rule-** Obligation- lis pendens /Faculty- related actions
- any court other than the court first seised **shall of its own motion** stay its proceedings until such time as the jurisdiction of the court first seised is established.
- related actions - any court other than the court first seised **may** stay proceedings.
- Where the action in the court first seised **is pending at first instance**, any other court **may** also, **on the application of one of the parties, decline jurisdiction** if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
- Where the jurisdiction of the court first seised is established, any court other than the court first seised **shall decline jurisdiction** in favour of that court.

When the jurisdiction is established?

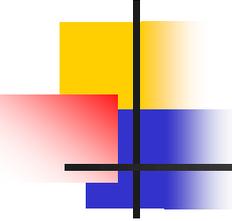


- **C-1/13, Cartier parfums – lunettes SAS-** except in the situation where the court second seised has exclusive jurisdiction by virtue of that regulation, the jurisdiction of the court first seised must be regarded as being established, within the meaning of that provision, **if that court has not declined jurisdiction of its own motion** and none of the parties has contested its jurisdiction prior to or up to the time at which a position is adopted which is regarded in national procedural law as **being the first defence on the substance submitted before that court.**



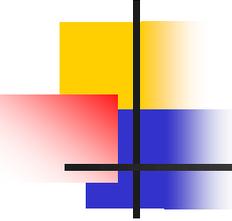
Priority of the forum prorogati

- New: Exception to the Prior Temporis Rule (Art. 31 paras. 2-4)
- The prior tempore *lis pendens* rule is adapted to cases where the court was seized in breach of an exclusive choice-of-court agreement
- Forum prorogati to get priority in accepting (or not) jurisdiction: – prevention of the so-called “*Italian torpedo*” Response to the **GASSER case (C-116/02)**
- Difference- case Gasser: a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.
- Even if the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long.
- **NOW: where a court of a Member State on which an agreement confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.**



Recent case law

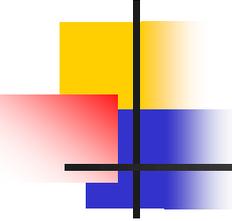
- **C-523/14, Aertssen**- Complaint seeking to join a civil action to proceedings , Ongoing judicial investigation, art. 30 — Time when a court is deemed to be seised
- Lis alibi Pendens rule does not apply in the event of exclusive jurisdictional rules (with the court second seised having such jurisdiction): **C-438/12 Weber**
- before staying its proceedings in accordance with that provision, the court second seised is required to examine whether, by reason of a failure to take into consideration the exclusive jurisdiction laid down in Article 22(1) thereof, the decision of the court first seised will be recognised in the other MS in accordance with Article 35(1) of that regulation.



Exception

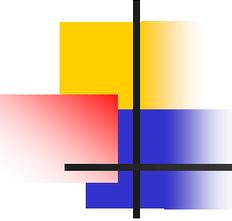
- Exception to the exception and back to prior temporis
- Weaker party contracts- if the weaker party is the claimant and the agreement is not valid under the Regulation

Lis Pendens /Related actions and 3rd states



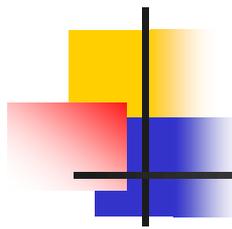
- The Regulation can only establish rules applicable to the Member State Courts.
- The Rules apply if the MSC is the court second seised and when jurisdiction is based on domicile (art. 4) or special grounds of jurisdiction (arts. 7-9).

Rules concerning third States litigation



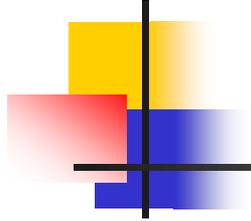
- Discretionary *lis pendens* and related actions – rules concerning third States litigation (art. 33 – 34)
- the court of the Member State may stay the proceedings if:
 - it is expected that the court of the third State will give a judgment capable of recognition /enforcement in that Member State; and
 - is necessary for the proper administration of justice.
- may continue the proceedings at any time if:
 - the proceedings are themselves stayed or discontinued;
 - the proceedings are unlikely to be concluded within a reasonable time; or
 - required for the proper administration of justice.
- The court of the MS shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition/ enforcement in that Member State.
- on the application of one of the parties or, where possible under national law, of its own motion.

The proper Administration of Justice



Preamble:

- The court of the MS should **assess all the circumstances of the case** :
 - connections between the facts , the parties and the third State concerned,
 - the stage of the proceedings in the third State
 - If a judgment can be expected within a reasonable time.
- That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction.



- All things are subject to interpretation. Whichever interpretation prevails at a given time is a function of power and not truth.

Friedrich Nietzsche

Just in case of (mis)interpretation...

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