Conflict of Laws

A Comparative Approach

EUROPEAN CIVIL AND COMMERCIAL LITIGATION SUPPLEMENT

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The European Civil and Commercial Litigation Supplement is a supplement to the casebook *Conflict of Laws - A Comparative Approach* (Edward Elgar, 2nd ed. 2022). It offers additional materials on the EU law of jurisdiction in civil and commercial matters (Brussels Ibis Regulation) for teachers willing to get into more depth in their classes, or willing to focus on EU law for part or the entirety of their course.

Certain aspects of the Brussels Ibis regime are covered in the book and are thus not discussed in this supplement: parallel litigation (ch. 4), choice of court agreements (ch. 5), judgments (ch. 7), relationship between contract and tort jurisdiction (ch. 8).

Contents

1 Scope of European Regime

The Brussels Ibis Regulation has not fully harmonised the law of jurisdiction of the Member States. The scope of the Regulation is limited to civil and commercial matters (1). In addition, the Regulation limits the scope of most of its rules on jurisdiction to cases where the defendant is domiciled in a Member State (2).

1 Material Scope (Art. 1)

European Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and on the enforcement and recognition of judgments in civil and commercial matters (Brussels Ibis)

CHAPTER I SCOPE AND DEFINITIONS

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.

As its title makes clear, the Brussels Ibis Regulation only applies in civil and commercial matters. Art 1(1) defines civil and commercial matters negatively, by excluding a range of public law matters. Art 1(2) also excludes certain specific civil or commercial matters from the scope of the Regulation. For most of these specific matters, the reason is that the European Union has adopted separate regulations applying to each of them (divorce, matrimonial property, insolvency, maintenance, succession), or that international conventions existed (arbitration).
The most important exclusion is thus the general public law exception. Read the following cases and explain how it has been defined by the European Court of Justice.

CASE

Court of Justice of the European Communities, 14 October 1976 *LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol* (Case 29/76)

Facts: The European Organization for the Safety of Air Navigation ('Eurocontrol') imposes route charges on owners of aircraft for the use of air safety services. It sued a German corporation (LTU) for payment of such charges in a Belgian court. It then sought to enforce the judgment in Germany.

Judgment – :
3 Under Article 1, the Convention [today the Brussels Ibis Regulation] 'shall apply in civil and commercial matters whatever the nature of the court or tribunal'. (…)
Apart from providing that the [Regulation] shall apply whatever the nature of the court or tribunal to which the matter is referred and excluding certain matters from its area of application, Article 1 gives no further details as to the meaning of the concept in question.
As Article 1 serves to indicate the area of application of the [Regulation] it is necessary, in order to ensure, as far as possible, that the rights and obligations which derive from it for the [Member] 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. (…)
The concept in question must therefore be regarded as independent and must be interpreted by reference, first, to the objectives and scheme of the [Regulation] 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 [Chapter III of the Regulation], certain types of judicial decision must be regarded as excluded from the area of application of the [Regulation], 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 [Regulation], 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.
5 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 [Regulation] (…), reference must not be made to the law of one of the States concerned but, first, to the objectives and scheme of the [Regulation] 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 a public authority has acted in the exercise of its powers, is excluded from the area of application of the [Regulation].

NOTES AND QUESTIONS

1 Art 1 of the Regulation defines the scope of the entire Regulation. It limits, therefore, the scope not only of the jurisdictional rules of the Regulation, but also of the rules on the enforcement of foreign judgments.

2 How does the court define the public law exception? Does the action fall within the exception? Why?

3 In 2012, the Brussels I Regulation was recast, and Art 1 was amended to provide that the public law exception includes 'liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)'. Do you think that this amendment changes the definition adopted in *Eurocontrol*, or endorses it?

4 When the Brussels Ibis Regulation does not apply, it is for each Member State to determine the jurisdiction of its courts. However, under public international law, states acting in the exercise of State authority benefit from a sovereign immunity which prevents other states from entertaining judicial actions against them. In such cases, states must therefore be sued in their home courts, unless they waived their immunity.

5 As this case shows, the public law exception is not limited to actions against states. It also applies to actions against international organisations (which often also benefit from sovereign immunities, depending on the treaty establishing them).

CASE

Court of Justice of the European Communities, 21 April 1993 *Sonntag v. Waidmann* (Case C-172/91)

Facts: Italian Thomas Waidmann was a pupil in a school administered by the Land Baden-Württemberg who, on 8 June 1984, during a school trip to Italy, suffered a fatal accident in the mountains. Criminal proceedings were brought against the accompanying teacher, Mr Volker Sonntag, in an Italian Court which found Mr Sonntag guilty of causing death by negligence and ordered him to pay damages to the family of the victim. The Waidmanns sought to enforce the Italian judgment in Germany under the Brussels Convention.

Judgment – :
13 The wording of the question submitted and the grounds of the order for reference show that the national court is essentially seeking to ascertain whether 'civil matters' within the meaning of the first sentence of the first paragraph of Article 1 of the Convention [today Brussels Ibis Regulation] cover a claim for damages made before a criminal court against a teacher in a State school who, during a school trip, caused injury to a pupil through a culpable and unlawful breach of his duties of supervision, and whether this is so even where cover is provided under a social insurance scheme governed by public law.
14 In order to answer that question, it is necessary first to determine whether a claim for damages made before a criminal court may fall within the scope of the [Regulation].
15 In the words of the first paragraph of Article 1, the [Regulation] 'shall apply in civil and commercial matters whatever the nature of the court or tribunal'.
16 It follows from the wording of that provision that the [Regulation] also applies to decisions given in civil matters by a criminal court. (…)
19 Even though it is joined to criminal proceedings, a civil action for compensation for injury to an individual resulting from a criminal offence is civil in nature. In the legal systems of the [Member] States the right to obtain compensation for injury suffered as a result of conduct regarded as culpable in criminal law is generally recognized as being a civil-law right. That, moreover, is the conception underlying [Article 7(3) of the Regulation].
20 (…) such an action falls outside the scope of the [Regulation] only where the author of the damage against whom it is brought must be regarded as a public authority which acted in the exercise of public powers.
21 The first point to be noted in that respect is that the fact that a teacher has the status of civil servant and acts in that capacity is not conclusive. Even though he acts on behalf of the State, a civil servant does not always exercise public powers.
22 Secondly, in the majority of the legal systems of the Member States the conduct of a teacher in a State school, in his function as a person in charge of pupils during a school trip, does not constitute an exercise of public powers, since such conduct does not entail the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals.
23 Thirdly, a teacher in a State school assumes the same functions vis-à-vis his pupils, in a case such as that in point in the main proceedings, as those assumed by a teacher in a private school.
24 Fourthly, the Court has already held, although in a different factual and legal context, in Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, paragraph 28 in conjunction with paragraph 24, that a teacher does not exercise public powers even when he awards marks to pupils and participates in the decisions on whether they should move to a higher class. That must be so a fortiori in relation to the duty of a teacher, as a person in charge of pupils, to supervise them during a school trip.
25 Finally, it should be added that even if the activity of supervising pupils is characterized in the [Member] State of origin of the teacher concerned as an exercise of public powers, that fact does not affect the characterization of the dispute in the main proceedings in the light of Article 1 of the [Regulation].
26 It follows from all the foregoing considerations that the action for damages brought in the main proceedings against the State-school teacher by the parties seeking enforcement is covered by the

term 'civil matters' within the meaning of the first sentence of the first paragraph of Article 1 of the [Regulation].

NOTES AND QUESTIONS

1 Are criminal proceedings within the scope of the Regulation? Why? Does the Regulation apply to the enforcement of the Italian judgment in Germany?

2 In this case, and although the teacher was supported by the German *Land* in which he taught, the action was initiated by private persons (the Waidmanns) against another private person (the teacher). Can an action between private parties fall within the exception of Art 1(1)? Is the exception limited to actions against public authorities? The Court could have said that the action of the Waidmanns did not fall within the exception because it was not directed against a public authority? What did it say instead?

CASE

Court of Justice of the European Union, 7 May 2020 *LG v. Rina SpA* (Case C-641/18)

Facts: Relatives of the victims and survivors of the sinking of the *Al Salam Boccaccio'98* vessel in the Red Sea in 2006, in which more than 1 000 people lost their lives, sued the Rina companies before an Italian court, arguing that the classification and certification operations for the vessel, which was carried out by the Rina companies under a contract concluded with the Republic of Panama, for the purposes of obtaining that State's flag for that vessel, were the cause of that sinking. The Rina companies relied on the international-law principle of immunity from jurisdiction of foreign States and challenged the jurisdiction of the Italian court on the ground that the classification and certification operations which they conducted were carried out upon delegation from the Republic of Panama and, therefore, are a manifestation of the sovereign powers of the delegating State.

Judgment – :

32 (…) it should be noted that, in order to determine whether a matter falls within the scope of Regulation No 44/2001 [now the Brussels Ibis Regulation], the elements which characterise the nature of the legal relationships between the parties to the dispute or the subject matter thereof must be examined.

33 The Court has thus held that, although certain actions between a public authority and a person governed by private law may come within the scope of [the Brussels Ibis Regulation] where the legal proceedings relate to acts performed *iure gestionis*, the position is otherwise where the public authority is acting in the exercise of its public powers.

34 The exercise of public powers by one of the parties to the case, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes such a case from 'civil and commercial matters' within the meaning of Article 1(1) of [the Brussels Ibis Regulation].

35 In order to determine whether a dispute concerns acts committed in the exercise of public powers, it is necessary to examine the basis and the detailed rules governing the bringing of the action.

36 (…) the action brought by LG and Others is based on Articles 2043, 2049, 2050 and 2055 of the Italian Civil Code which govern non-contractual liability and Articles 1218 and 1228 of that code relating to contractual liability for breach of security obligations.

37 In addition, it must be determined whether the ship classification and certification operations in question, carried out by the Rina companies upon delegation from and on behalf of the Republic of Panama, fall, in the light of their content, within the exercise of public powers. (…)

39 (…), in circumstances such as those at issue in the main proceedings, it is irrelevant that certain activities were carried out upon delegation from a State, since the Court has held, in that regard, that the mere fact that certain powers are delegated by an act of a public authority does not imply that those powers are exercised *iure imperii*.

40 Such a conclusion is not disproved by the fact that those classification and certification operations were carried out by the Rina companies on behalf of and in the interest of the Republic of Panama. The Court has already ruled that the fact of acting on behalf of the State does not always imply the

exercise of public powers.
41 (…) the fact that certain activities have a public purpose does not, in itself, constitute sufficient evidence to classify them as being carried out *iure imperii*, in so far as they do not entail the exercise of any powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals. Although the Rina companies' activity is intended to ensure the safety of a ship's passengers, that does not mean that their activity stems from the exercise of public powers.
42 Similarly, the fact that, having regard to their objective, some acts are carried out in the interest of a State does not, in itself, result in the operations at issue in the main proceedings being carried out in the exercise of public powers, within the meaning of the case-law cited in paragraph 34 above, since the relevant criterion is the recourse to powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals.
The court concluded that because the certification was carried out through commercial contracts, and consisted in conducting checks of the ship in accordance under a pre-defined regulatory framework, the actions against the Rina companies did not fall within the public law exception.

NOTES AND QUESTIONS

1 What are the decisive factors leading to the conclusion that the Brussels Ibis Regulation applies to this action?

2 The Rina companies were private persons. How relevant was it in the decision of the court? Does it exclude that their activities fall within the public law exception?

3 Is it relevant that a party acted in the public interest, or was pursuing a public purpose? If a public authority serves the public interest by concluding private law contracts, are disputes arising from these contracts covered by the public law exception? If the headquarters of the North Atlantic Treaty Organization (NATO) in Europe enters into a private law contract to purchase fuel for its forces operating in Afghanistan, would a dispute arising out of the performance of such a contract fall within the public law exception? See case C-186/19, *Supreme Site Services Gmbh v. SHAPE*.

4 During World War II, a French resistant was arrested and deported to the concentration camp of Dachau where he was forced to work for the BMW company. In 2000, he sued before a French Labour court the German state and BMW for payment of damages and his salary for the work effected from June 1944 until May 1945. In a judgment of 2 June 2004, the French Supreme Court found that the Brussels Convention [now the Brussels Ibis Regulation] applied to his claim against BMW, but not against Germany. Do you agree?

FURTHER REFERENCES

B. Hess & C. Oro Martinez, 'Civil and Commercial Matters', in *Encyclopedia of Private International Law* (Edward Elgar 2017).

2 Territorial Scope (Art. 4-6)

The territorial scope of the Brussels Ibis Regulation is not limited. However, the Regulation limits the scope of certain of its jurisdictional rules to cases where the defendant is domiciled in a Member State, and provides for the application of national rules of jurisdiction in other cases. In contrast, the rules of the Regulation on foreign judgments apply irrespective of the domicile of the parties.

Brussels Ibis Regulation (2012)

PREAMBLE

(13) There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.
(14) A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.

However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

CHAPTER II JURISDICTION

Section 1 General provisions

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.
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 Member State.

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.
(. . .)

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.

NOTES AND QUESTIONS

1 The principle is that the jurisdictional rules of the Regulation apply when the defendant has his domicile in a Member State. What are the exceptions?

2 The domicile of the defendant in a Member State is the only requirement in this respect. It is irrelevant that the dispute is otherwise primarily connected with a third state. If a Jamaican national has an accident on a beach In Jamaica where he was renting a holiday home from a person domiciled in London, an action in tort against this person is governed by the jurisdictional rules of the Brussels Ibis Regulation for the sole reason that he was domiciled in London. See Case C-281/02, *Owusu v. Jackson*.

3 If there are several defendants, the jurisdictional rules of the Regulation and national rules apply distributively depending on whether the domicile of each defendant is within the EU.

4 Pursuant to Art. 6, actions against parties domiciled in third states are entirely governed by national law. As suggested by Art. 6(2), this includes exorbitant rules of jurisdiction (see Ch. 3 of the casebook). For instance, a French or a Luxembourg court could rely on nationality based jurisdiction.

Given the critical importance of domicile in the operation of the Regulation, it was important to define it.

Brussels Ibis Regulation (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.

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.
3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

NOTES AND QUESTIONS

1. Has the Regulation defined the domicile of natural persons?

2. The determination of the domicile of legal persons raises special problems, as they might have been incorporated in one state, and have their central administration in another. How does the Regulation resolve the issue?

3. Mr Jacques X..., who is a French national, sues his former employer société Laboratoire T. before a French court for payment of Euro 75 million as a employee inventor. Société Laboratoire T. is incorporated in Monaco under no 56S00241 and has its seat avenue Albert II in Monaco. Monaco is not a Member State of the EU. a) Does the Brussels Ibis Regulation apply? Does the French court have jurisdiction? b) Suppose Mr X. was domiciled in Nice, but was a Belgian national. Would your answer be different? See Art. 6(2). c) Suppose the board of directors of Laboratoire T. met in Paris in the last 10 years? Would your answer be different?

4 . In Case C-447/16 flightright GmbH v. Hainan Airlines Co. Ltd, the CJEU held that a Chinese airline which does not have a branch in any Member State of the EU does not have its domicile in the EU for the purpose of the Brussels Ibis Regulation.

2 Contracts, Torts and Unjust Enrichment

1 Jurisdiction in matters relating to a contract (Art. 7(1))

Brussels Ibis Regulation (2012)

SECTION 1 General provisions

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. (. . .)

SECTION 2 Special jurisdiction

Article 7

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;

NOTES

1 In contractual matters, Article 7(1) grants jurisdiction to the courts for the place of performance of the obligation in question. Yet, the general rule of Art. 4 remains applicable: the court of the domicile of the defendant also has jurisdiction.

2 Article 7(1)(b) was introduced in 2000 when the 1968 Brussels Convention became a European Regulation (known as the Brussels I Regulation, or Regulation 44/2001). Before the 2000 reform, then Art. 5(1) of the 1968 Brussels Convention only provided for the jurisdiction of the courts of the place of performance of the obligation in question (see today Art. 7(1)(a)). Article 7(1)(b) adds a specification of the place of performance of the obligation in question for two special contracts: sale of goods and provision of services. As a result, an important distinction is in order:

- for sale of goods or provision of services, Art. 7(1)(b) directly provides where the place of performance is, and thus which court has jurisdiction. For a sale of goods, it is the court of the place of delivery of the goods.

- for other contracts, it is still necessary to determine the place of performance. In *Falco Privatstiftung* (Case C--533/07),[1] the European Court of Justice made clear that it would be necessary to apply the rules that it had laid down for that purpose in the context of the 1968 Brussels Convention

[1] Case C--533/07 *Falco Privatstiftung and Thomas Rabitsch v. Gisela Weller-Lindhorst* ECLI:EU:C:2009:257.

1.1 Default regime: Identification of the obligation in question (Art. 7(1)(a))

For contracts which do not fall within the scope of Article 7(1)(b), the complex regime established by the European Court of Justice before the reform of 2000 continues to apply.

In addition to the court of the domicile of the defendant, the court for the place of performance of the obligation in question has jurisdiction. The first question is the determination of the 'obligation in question'. It was defined by the European Court of Justice in the famous *De Bloos* case.

CASE

Court of Justice of the European Communities, 6 October 1976 *De Bloos v. Bouyer* (Case 14/76)

Facts: The grantee of an exclusive distributorship contract, whose registered office was in Belgium, brought proceedings in a Belgian court against the grantor, who was established in France. The grantee complained of a unilateral breach, without notice, of the said contract and sought, in accordance with Belgian law, the dissolution of the contract, on the ground of the grantor's wrongful conduct, and the payment of damages.

Judgment – :
10 (…) Article 5 (1) of the Convention [now Art. 7(1)(a) of the Brussels Ibis Regulation] cannot be interpreted as referring to any obligation whatsoever arising under the contract in question.
11 On the contrary, the word 'obligation' in the article refers to the contractual obligation forming the basis of the legal proceedings. (…)
13 It follows that for the purposes of determining the place of performance within the meaning of [Article 7], the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based.
14 In a case where the plaintiff asserts the right to be paid damages or seeks a dissolution of the contract on the ground of the wrongful conduct of the other party, the obligation referred to in [Article 7 (1)(a)] is still that which arises under the contract and the non-performance of which is relied upon to support such claims.
15 For these reasons, the answer to the first question must be that, in disputes in which the grantee of an exclusive sales concession charges the grantor with having infringed the exclusive concession, the word 'obligation' contained in [Art. 7(1)(a) of the Brussels Ibis Regulation] refers to the obligation forming the basis of the legal proceedings, namely the contractual obligation of the grantor which corresponds to the contractual right relied upon by the grantee in support of the application.
16 In disputes concerning the consequences of the infringement by the grantor of a contract conferring an exclusive concession, such as the payment of damages or the dissolution of the contract, the obligation to which reference must be made for the purposes of applying [Article 7 (1)(a) of the Regulation] is that which the contract imposes on the grantor and the non-performance of which is relied upon by the grantee in support of the application for damages or for the dissolution of the contract.

NOTES AND QUESTIONS

1 What is the obligation in question? Is it the most important obligation of the contract? Is it the obligation which distinguishes the contract from other contracts? Does it depend on the claim(s) of the plaintiff?

2 In a contract of sale of a house, what is the obligation in question if the buyer does not pay the price? If the house has construction defects?

3 Today, concession contracts fall within the scope of Art. 7(b): see below p. 15.

Read the following case and determine what is the consequence of the *De Bloos* rule where the plaintiffs alleges the violation of several contractual obligations.

CASE

European Court of Justice, 5 October 1999 *Leathertex Divisione Sintetici v. Bodetex* (Case C-▪420/97)

The main proceedings

8 For a number of years Bodetex acted as commercial agent for Leathertex in the Belgian and Netherlands markets under a long-term arrangement. It received 5% commission by way of remuneration.
9 After asking Leathertex to no avail during 1987 for payment of commission which it considered to be owing to it, Bodetex regarded its commercial agency agreement as terminated and, by letter of 9 March 1988, took formal note of the termination and demanded from Leathertex payment of arrears of commission and compensation in lieu of notice.
10 Since Leathertex did not reply to that letter, on 2 November 1988 Bodetex sued it for payment in the Rechtbank van Koophandel (Commercial Court), Courtrai.
11 By judgment of 1 October 1991, the Rechtbank van Koophandel found that two separate obligations formed the basis of the action. It held that the first, namely the obligation to give a reasonable period of notice on termination of a commercial agency agreement and, in the event of failure to give such notice, to pay compensation in lieu, was to be performed in Belgium, whereas the second, namely the obligation to pay commission, was to be performed in Italy under the principle that debts are payable where the debtor is resident. The Rechtbank van Koophandel accordingly found that it had jurisdiction in respect of the obligation to pay compensation in lieu of notice, by virtue of Article 5(1) of the Convention, and then declared that it had jurisdiction over the whole proceedings given the connection between that obligation and the obligation to pay commission. It ordered Leathertex to pay Bodetex arrears of commission and compensation in lieu of notice. (. . .)

Consideration of the question submitted

19 By its question, the national court is essentially asking whether, on a proper construction of Articles 2 and 5(1) of the Convention [*now Arts. 4 and 7(1)(a) of the Brussels Ibis Regulation*], the same court has jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract even though, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another Contracting State. (. . .)
31 It should be noted first of all that, in paragraphs 8, 9 and 10 of the judgment in Case 14/76 *De Bloos v. Bouyer*, after observing that the [Regulation] was intended to determine the international jurisdiction of the courts of the [Member] States, to facilitate the recognition of judgments and to introduce an expeditious procedure for securing their enforcement, the Court held that those objectives implied the need to avoid, so far as possible, creating a situation in which a number of courts had jurisdiction in respect of one and the same contract and that [Article 7(1)(a) of the Regulation] could not therefore be interpreted as referring to any obligation whatsoever arising under the contract in question. The Court concluded, in paragraphs 11 and 13 of the same judgment, that, for the purposes of determining the place of performance within the meaning of [Article 7(1)(a)], the obligation to be taken into account was that which corresponded to the contractual right on which the plaintiff's action was based. It stated in paragraph 14 that, in a case where the plaintiff asserted the right to be paid damages or sought dissolution of the contract on the ground of the wrongful conduct of the other party, that obligation was still that which arose under the contract and the non-performance of which was relied upon to support such claims. (. . .)
33 Also, the Court has held on several occasions that the place of performance of the obligation in question is to be determined by the law governing that obligation according to the conflict rules of the court seised (Case 12/76 *Tessili v. Dunlop*, para. 13, (. . .)).

34 In the present case, the Belgian courts have held, in accordance with the case-law cited above, that the obligation to pay compensation in lieu of notice was to be performed in Belgium while the obligation to pay commission was to be performed in Italy.
35 Furthermore, it is apparent from the order for reference and the file forwarded by the national court that the contract at issue in the main proceedings, under which the claims for payment of commission and of compensation in lieu of notice have been brought, does not constitute a contract of employment.
36 When the specific features of a contract of employment do not exist, it is neither necessary nor appropriate to identify the obligation which characterises the contract and to centralise at its place of performance all jurisdiction, based on place of performance, over disputes concerning all the obligations under the contract (Case 266/85 *Shenavai*, para. 17).
37 Therefore, the obligation which characterises the agency agreement is not to be taken into account in the main proceedings in order to determine jurisdiction based on place of performance.
38 Nor can the court which has jurisdiction to hear the claim for payment of compensation in lieu of notice found its jurisdiction in respect of the claim for payment of commission on any relation between those two claims. As the Court has made clear, Article 22 of the Convention is intended to establish how related actions which have been brought before courts of different Contracting States are to be dealt with. It does not confer jurisdiction. In particular, it does not accord jurisdiction to a court of a Contracting State to try an action which is related to another action of which that court is seised pursuant to the rules of the Convention (see Case 150/80 *Elefanten Schuh v. Jacqmain*, para 19, and Case C-51/97 *Réunion Européenne v. Spliethoff's Bevrachtingskantor*, para 39).
39 Finally, when a dispute relates to a number of obligations of equal rank arising from the same contract, the court before which the matter is brought cannot, when determining whether it has jurisdiction, be guided by the maxim *accessorium sequitur principale* referred to by the Court in paragraph 19 of the judgment in *Shenavai*, cited above.
40 The same court does not therefore have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another Contracting State.
41 It should be remembered that, while there are disadvantages in having different courts ruling on different aspects of the same dispute, the plaintiff always has the option, under [Article 4 of the Regulation], of bringing his entire claim before the courts for the place where the defendant is domiciled.
42 The answer to be given to the question referred for a preliminary ruling must therefore be that, on a proper construction of [Article 7(1)(a) of the Regulation], the same court does not have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another [Member] State.

NOTES AND QUESTIONS

1 The characteristic obligation of a contract is the obligation which makes it different from others. The obligation in question is the one on the basis of which the plaintiff actually sues the defendant (in most cases, for lack of performance). If the plaintiff founds his action on the breach of several obligations, there are several obligations in question. In *Leathertex*, what is the consequence on the number of courts competent to decide the case?

2 Why does the court refer to obligations of equal rank? What is the consequence if one of the two obligations is accessory?

3 The 1968 Brussels Convention did not include any special rule for employment contract. The ECJ had therefore developed one in *Shenavai*. Today, the Brussels Ibis Regulation includes rules for employment contract (*infra*, Ch. 3).

4 In *Leathertex*, was it possible to bring the actions based on different contractual obligations before one single court? Which one?

5 Today, Art. 7(1)(a) does not apply to agency contracts any more, as they are considered to be provisions of services (Case C-19/09, *Wood Floor Solutions v. Silvia Trade, infra* p. 21).

Once you know what is the 'obligation in question', it is necessary to determine its place of performance. The European Court of Justice addressed the issue in the famous *Tessili* case.

CASE

Court of Justice of the European Communities, 6 October 1976 *Tessili v. Dunlop* (Case 12/76)

Judgment – :
12 (…) In accordance with [Article 4] the basis of [the system of the Brussels Ibis Regulation] is the general conferment of jurisdiction on the court of the defendant's domicile. [Article 7] however provides for a number of cases of special jurisdiction at the option of the plaintiff.
13 This freedom of choice was introduced in view of the existence in certain well-defined cases of a particularly close relationship between a dispute and the court which may be most conveniently called upon to take cognizance of the matter. Thus in the case of an action relating to contractual obligations [Article 7 (1)(a)] allows a plaintiff to bring the matter before the court for the place 'of performance' of the obligation in question. It is for the court before which the matter is brought to establish under the [Regulation] whether the place of performance is situate within its territorial jurisdiction. For this purpose it must determine in accordance with its own rules of conflict of laws what is the law applicable to the legal relationship in question and define in accordance with that law the place of performance of the contractual obligation in question.
14 Having regard to the differences obtaining between national laws of contract and to the absence at this stage of legal development of any unification in the substantive law applicable, it does not appear possible to give any more substantial guide to the interpretation of the reference made by [Article 7 (1)(a)] to the 'place of performance' of contractual obligations. This is all the more true since the determination of the place of performance of obligations depends on the contractual context to which these obligations belong.
15 In these circumstances the reference in the [Regulation] to the place of performance of contractual obligations cannot be understood otherwise than by reference to the substantive law applicable under the rules of conflict of laws of the court before which the matter is brought.

NOTES AND QUESTIONS

1 How is the place of performance to be defined? Is it defined autonomously by the European Court of Justice? Is it defined by national law? Which one?

2 Why does the court refer to conflict of law rules? What is the legal relationship in question? Which choice of law rule should apply?

3 Should you apply the Rome I Regulation to determine which court has jurisdiction? Why? Is the Rome I Regulation concerned with choice of law or with jurisdiction?

4 Today, Art. 7(1)(a) does not apply to sales of goods anymore. When it did, do you think that the 1980 Vienna Convention on International Sale of Goods was relevant? Why?

In most contracts, one of the parties has the obligation to pay a sum of money to the other. What is the place of performance of such obligation?

CASE

High Court of England and Wales, 27 March 2001 *Definitely Maybe (Touring) Ltd v. Marek Liebererg Konzertagentur GmbH (no 2)*

Facts: The claimants who are based in England provide the services of the pop group called Oasis to those who organize live concerts. The defendants are a German-based company which organized two pop festivals in Germany in June, 2000 and contracted with the claimants for live performances by Oasis. Unfortunately, there was apparently a rift between the two Gallagher brothers and Noel, the talented lead guitarist, did not play in

Germany. The defendants say that Oasis without Noel Gallagher is not really the group contracted for. Thus, they have refused to pay the full price. The claimants, by these proceedings issued in this jurisdiction, claim the balance of the moneys they say are owing.

Judgment – Morison J.:

4 In order to resolve the jurisdiction issue the court must, initially, turn to the [Brussels Ibis Regulation] (. . .). Under that [Regulation], the normal rule is that a person, including, of course, a corporate entity, should be sued in the place where he is domiciled; in other words, Germany. But the normal rule is displaced if the place of performance of the obligation in question, namely the duty to pay, is England. But the place of performance of an obligation such as this may, and in this case does, depend upon which system of law governs the contract. Under German law the place of performance of an obligation to pay is the domicile of the debtor, namely Germany. Under English law the place of performance of the Defendant's obligation to pay is England, the place where the money is to be received. Thus, the question as to whether these proceedings can continue in this jurisdiction is dependent upon the answer to the question: what is the governing law of the contract? If the answer is English law, then the proceedings can continue here and the appeal must be allowed. Conversely, if the answer is German law then the appeal must be dismissed and the stay of proceedings in this jurisdiction continued.

QUESTIONS

Suppose a dispute arose with respect to a contract of purchase of shares in a company between a German buyer and an English seller, and the buyer refuses to pay the price. How do you determine the place of performance of the obligation of the buyer to pay? Which court has jurisdiction under Art. 7(1)(a)?

1.2 Sale of goods and provision of services (Art. 7(1)(b))

In 2000, new rules were introduced for two contracts: sale of goods and provision of services. These rules, which are now found in Art. 7(1)(b) of the Brussels Ibis Regulation, define the place of performance of the obligation in question for these contracts and thus simplify the determination of the competent court. They raise, however, new issues of characterisation, as they only apply to certain kinds of contracts.

1.2.1 Characterization of contracts

The introduction of new rules applicable to two categories of contract raise the issues of the distinction between these two contracts and other contracts, and of the distinction between the two contracts themselves.

CASE

Court of Justice of the European Union, 19 March 2013 *Corman-Collins SA v. La Maison du Whisky SA* (Case C-▪9/12)

32 The Court also observed, regarding the place of performance of the obligations arising from contracts for the sale of goods, that the Regulation, in the first indent of Article 5(1)(b) [*now Art. 7(1)(b) of the Brussels Ibis Regulation*], defines that criterion of a link autonomously, in order to reinforce the objectives of unifying of the rules of jurisdiction and predictability (*Wood Floor Solutions Andreas Domberger*, paragraph 23 and the case-law cited). Those objectives are also those of the second indent of [Article 7(1)(b)], since the rules of special jurisdiction provided for by the regulation for contracts for the sale of goods and the provision of services have the same origin, pursue the same objectives and occupy the same place in the scheme established by that regulation (*Wood Floor Solutions*, paragraph 26 and the case-law cited).

33 It is by taking account of those objectives that it must be examined whether a distribution agreement falls into one of those two categories of contracts referred to in [Article 7(1)(b)] of the Regulation.
34 In that connection, the Court has stated that, in order to classify a contract in the light of that provision, the classification must be based on the obligations which characterise the contract at issue (Case C-381/08 *Car Trim*, paragraphs 31 and 32).
35 Thus, the Court has held that 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 Brussels Ibis Regulation] (*Car Trim*, paragraph 32).
36 That a classification may be applied to a long-term commercial relationship between two economic operators, where that relationship is limited to successive agreements, each having the object of the delivery and collection of goods. However, it does not correspond to the general scheme of a typical distribution agreement, characterised by a framework agreement, the aim of which is an undertaking for supply and provision concluded for the future by two economic operators, including specific contractual provisions regarding the distribution by the distributor of goods sold by the grantor.
37 As to whether an exclusive distribution agreement may be classified as a contract for the 'supply of services' within the meaning of the second indent of [Article 7(1)(b)] of the Regulation, it must be recalled that, according to the definition given by the Court, the concept of 'services' within the meaning of that provision requires at least that the party who provides the service carries out a particular activity in return for remuneration (Case C-533/07 *Falco Privatstiftung and Rabitsch*, paragraph 29).
38 As far as the first criterion in that definition, namely, the existence of an activity, it is clear from the case-law of the Court that it requires the performance of positive acts, rather than mere omissions (see, to that effect, *Falco Privatstiftung and Rabitsch*, paragraphs 29 to 31). That criterion corresponds, in the case of an exclusive distribution agreement, to the characteristic service provided by the distributor which, by distributing the grantor's products, is involved in increasing their distribution. As a result of the supply guarantee it enjoys under the exclusive distribution agreement and, as the case may be, its involvement in the grantor's commercial planning, in particular with respect to marketing operations, factors in respect of which the national court has jurisdiction to make a ruling, the distributor is able to offer clients services and benefits that a mere reseller cannot and thereby acquire, for the benefit of the grantor's products, a larger share of the local market.
39 As to the second criterion, namely the remuneration paid as consideration for an activity, it must be stated that it is not to be understood strictly as the payment of a sum of money. Such a restriction is neither stipulated by the very general wording of the second indent of [Article 7(1)(b)] of the Regulation nor consistent with the objectives of proximity and standardisation, set out in paragraphs 30 to 32 of the present judgment, pursued by that provision.
40 In that connection, account must be taken of the fact that the distribution agreement is based on a selection of the distributor by the grantor. That selection, which is a characteristic element of that type of agreement, confers a competitive advantage on the distributor in that the latter has the sole right to sell the grantor's products in a particular territory or, at the very least, that a limited number of distributors enjoy that right. Moreover, the distribution agreement often provides assistance to the distributor regarding access to advertising, communicating know-how by means of training or yet even payment facilities. All those advantages, whose existence it is for the court adjudicating on the substantive action to ascertain, represent an economic value for the distributor that may be regarded as constituting remuneration.
41 It follows that a distribution agreement containing the typical obligations set out in paragraphs 27 and 28 above may be classified as a contract for the supply of services for the purpose of applying the rule of jurisdiction in the second indent of [Article 7(1)(b)] of the Regulation.
42 That classification excludes the application to a distribution agreement of the rule of jurisdiction laid down in [Article 7(1)(a)] of the Regulation. Taking account of the hierarchy established between points (a) and (b) by point (c) of that provision, the rules of jurisdiction laid down in [Article 7(1)(a)] of the Regulation is intended to apply only in the alternative and by default with respect to the other

rules of jurisdiction in [Article 7(1)(b)] thereof.
43 In the light of all the foregoing considerations, the answer to the second and third questions is that on a proper constitution of [Article 7(1)(b)] of the Regulation, the rule of jurisdiction laid down in the second indent of that provision for disputes relating to contracts for the supply of services is applicable in the case of a legal action by which a plaintiff established in one Member State claims, against a defendant established in another Member State, rights arising from an exclusive distribution agreement, which requires the contract binding the parties to contain specific terms concerning the distribution by the distributor of goods sold by the grantor. It is for the national court to ascertain whether that is so in the proceedings before it.

NOTES AND QUESTIONS

1. The innovation introduced by Art. 7(1)(b) is that, although the provision still refers to the 'obligation in question', this obligation is always the same for sales of goods or provision of services, and does not change depending on the foundation of the action of the defendant. In truth, Art. 7(1)(b) relies on characteristic obligations, rather than obligations in question. Can a situation where several courts have jurisdiction to decide different aspects of a contractual dispute arise under Art. 7(1)(b)?

2. What are the criteria to identify whether a contract can be characterized as a contract for the provision of services? In *Falco Privatstiftung* (Case C-533/07), the court held that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services, because the owner does not have to perform any positive act under the contract.

3. The CJEU has also held that the agency contracts (Case C-19/09, *Wood Floor Solutions, infra* p. 21) andcontracts of loan (Case C-249/16, *Kareda*), are provisions of services.

4. Under Art. 7(1)(b) as interpreted by the European Court of Justice, which court would have jurisdiction in the *De Bloos* case? in the *Leathertex* case?

A separate issue is to determine how to distinguish between contract of sales of goods and provision of services. Certain contracts can be complex, and include obligations to deliver goods and obligations to provide services. Which jurisdictional rule applies to them?

CASE

Court of Justice of the European Union, 25 February 2010 *Car Trim Gmbh v. KeySafety System Srl* (Case C-381/08)

Facts: Italian company KeySafety supplied Italian car manufacturers with airbag systems. Between July 2001 and December 2003, KeySafety purchased from German company Car Trim components used in the manufacture of those systems, in accordance with five supply contracts. KeySafety terminated the contracts with effect from the end of 2003. On the view that those contracts should have run, in part, until summer 2007, Car Trim claimed that the terminations were in breach of contract and brought an action for damages before the German court of the place where the components were manufactured.

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 5(1)(b) of Regulation No 44/2001 [now Article 7(1)(b) of the Brussels Ibis 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 Brussels Ibis 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 Brussels Ibis 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)(b) of the Brussels Ibis Regulation] identifies as a connecting factor the obligation which characterises the contract in question (see, to that effect, Case C-533/07 *Falco Privatstiftung and Rabitsch*, 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 Brussels Ibis 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 Brussels Ibis 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, 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, 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.

39 Furthermore, the Court came to the same conclusion with regard to public procurement contracts. In Case C-300/07 *Hans & Christophorus Oymanns*, paragraph 64, the Court held that the concept of 'public supply contracts' referred to in the first paragraph of Article 1(2)(c) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114) covers the purchase of products, irrespective of whether the product under

consideration is supplied to consumers ready-made or after being manufactured in accordance with consumers' requirements. In paragraph 66 of that judgment, the Court held that, where the goods supplied are individually manufactured and tailored to the needs of each customer, the manufacture of those goods is part of the supply of the goods at issue.
40 Secondly, it is necessary to take into account the criterion, relied upon by the Commission of the European Communities, 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 Brussels Ibis 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 Brussels Ibis Regulation].

NOTES AND QUESTIONS

1 What is the test for distinguishing between sales of goods and provisions of services?

2 Is the court able to conclude about the characterisation of the contract in this case? Why?

3 Suppose an English company is hired by a French company to design promotion brochures. The brochures are designed in the UK, and delivered to the Paris offices of the client. The French company does not pay a bill. Can the English company sue in the UK?

1.2.2 Place of performance

Once you have determined whether a contract is a sale of goods or a provision of services, Art. 7(1)(b) provides that all contractual claims can be brought before the court where, under the contract, either the goods were or should have been delivered (first indent) or the services were or should have been provided (second indent). The identification of the place of delivery of the goods, or provision of the services, is not always easy, however.

CASE

Court of Justice of the European Union, 25 February 2010 *Car Trim Gmbh v. KeySafety System Srl* (Case C-381/08)

Facts: see *supra*.

Judgment – : *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 5(1)(b) of Regulation No 44/2001 [now Article 7(1)(b) of the Brussels Ibis 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 Brussels Ibis 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 Brussels Ibis 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. (…)

49 Regarding the place of performance of 'the obligation in question', the first indent of [Article 7(1)(b) of the Brussels Ibis Regulation] defines that criterion of a link autonomously in the case of the sale of goods in order to reinforce the primary objective of unification of the rules of jurisdiction whilst ensuring their predictability (see, to that effect, *Color Drack*, paragraph 24, and *Rehder*, paragraph 33).

50 In the context of [the Brussels Ibis Regulation], that rule of special jurisdiction in matters relating to a contract thus establishes the place of delivery as the autonomous linking factor to apply to all claims founded on one and the same contract for the sale of goods rather than merely to the claims founded on the obligation of delivery itself (*Color Drack*, paragraph 26).

51 Nevertheless, [the Brussels Ibis 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) thereof.

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), 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 Brussels Ibis 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 Brussels Ibis 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 Brussels Ibis 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 Brussels Ibis Regulation] as the 'place of delivery' for the purposes of the first indent of Article 7(1)(b) of that 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 Brussels Ibis 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.

NOTES AND QUESTIONS

1 What is the role of the will of the parties to determine the place of delivery of the goods under Art. 7?

2 What is the role of the national law governing the contract to determine the place of delivery of the goods?

3 Where is the place of delivery where the goods were handed over to one or several carriers (for instance, one road carrier, then an air or a sea carrier, then another road carrier) who ultimately delivered the goods to the buyer? Is It the place where the goods were handed over by the seller to the first carrier?

4 Which court has jurisdiction if the seller did not deliver the goods?

The determination of the place of performance also raises issues where the characteristic obligation of the contract is performed in several states. For instance, which court has jurisdiction under Art. 7(1)(b) if the service is provided in several states?

CASE

Court of Justice of the European Union, 11 March 2010 *Wood Floor Solutions Andreas Domberger Gmbh v. Silva Trade SA* (Case C-19/09)

Facts: Austrian company Wood Floor sued Luxembourg company Silva Trade before an Austrian court seeking damages for termination of a commercial agency contract of EUR 27 864.65 and compensation of EUR 83 593.95. In order to found the jurisdiction of the court seised, Wood Floor relied on Article 5(1)(b) [now Art. 7(1)(b)] of the regulation and claimed to have carried on business exclusively from its seat in Austria, the work of signing up and acquiring of clients thus taking place in Austria. Silva Trade challenged the jurisdiction of the court seised by arguing that more than three quarters of Wood Floor's turnover was generated in countries other than Austria, and that Article 7(1) of the regulation does not expressly provide for such a case. According to Silva Trade, if the place of performance of the obligation in question cannot be established because that obligation is not subject to geographical limitations, Article 7(1) is inapplicable and jurisdiction must be determined on the basis of Article 4 of the regulation.

Judgment – :

Question 1(a)

21 By Question 1(a), the referring court asks the Court essentially whether the second indent of Article 5(1)(b) [now Art. 7(1)] is applicable where services are provided in several Member States.
22 In that connection, it should be noted, first of all, that in the judgment in *Color Drack* the Court held that the rule of special jurisdiction set out in [Article 7(1)] of the regulation in matters relating to a contract, which complements the rule that jurisdiction is generally based on the defendant's domicile, reflects an objective of proximity and the reason for that rule is the existence of a close link between the contract and the court called upon to hear and determine the case (*Color Drack*, paragraph 22; Case C-204/08 *Rehder*, paragraph 32; and Case C-381/08 *Car Trim*, paragraph 48).
23 The Court also observed that, regarding the place of performance of the obligations arising from contracts for the sale of goods, the regulation, in the first indent of [Article 7(1)(b)], defines that criterion of a link autonomously, in order to reinforce the objectives of unification of the rules of jurisdiction and predictability. Accordingly, in such cases the place of delivery of the goods is established as the autonomous linking factor to apply to all claims founded on one and the same contract of sale (*Color Drack*, paragraphs 24 and 26; *Rehder*, paragraph 33; and *Car Trim*, paragraphs 49 and 50).
24 In the light of the objectives of proximity and predictability, the Court held that the rule set out in the first indent of [Article 7(1) of the regulation] is also applicable where there are several places of delivery of goods within a single Member State, since one court must have jurisdiction to hear all the claims arising out of the contract (*Color Drack*, paragraphs 36 and 38, and *Rehder*, paragraph 34).
25 Second, the Court then held that the factors which it took as a basis in order to arrive at the interpretation set out in *Color Drack* are also valid with regard to contracts for the provision of services, including the cases where such provision is not effected in a single Member State (*Rehder*, paragraph 36).
26 The rules of special jurisdiction provided for by the regulation for contracts for the sale of goods and the provision of services have the same origin, pursue the same objectives and occupy the same place in the scheme established by that regulation (*Rehder*, paragraph 36).
27 Where the services in question are provided at several places in different Member States, a differentiated approach cannot be applied to the objectives of proximity and predictability, which are pursued by the centralisation of jurisdiction in the place of the provision of services under the contract at issue and by the determination of sole jurisdiction for all claims arising out of that contract (*Rehder*, paragraph 37).
28 In addition to the fact that it finds no basis in the provisions of the regulation, such a differentiated approach would run counter to the purpose which determined the adoption of that regulation, which, by unifying the rules governing conflict of jurisdiction in civil and commercial matters, contributes to the development of an area of freedom, security and justice, as well as to the proper functioning of the internal market within the Community, as it is clear from recitals 1 and 2 in the preamble to the regulation (*Rehder*, paragraph 37).
29 Having regard to all the foregoing considerations, the answer to Question 1(a) must be that the second indent of [Article 7(1) of the regulation] is to be interpreted as meaning that that provision is applicable in the case in which services are provided in several Member States.

Question 1(b)

30 By Question 1(b), the referring court asks essentially, on the basis of what criteria the place of performance of the obligation that is characteristic of the contract must be established and, therefore, the court with jurisdiction to hear and determine all the claims arising out of the contract in the case where services have been provided in several Member States, in accordance with the second indent of [Article 7(1) of the regulation]. Taking account of the factual background to the case in the main proceedings, that question must be understood as asking, in particular, on the basis of what criteria that place is to be determined in the case of a commercial agency contract.
31 In that connection, it must be recalled, in the first place that, in the judgment in *Color Drack*, the Court held, for the purposes of applying the rule of jurisdiction laid down in the first indent of [Article

7(1) of the regulation] concerning the sale of goods, that where there are several places of delivery of the goods the 'place of performance' must be understood as the place with the closest linking factor between the contract and the court having jurisdiction and, as a general rule, it will be at the place of the principal delivery, which must be determined on the basis of economic criteria (*Color Drack*, paragraph 40).

32 For the reasons set out in paragraphs 25 to 28 of this judgment, the same approach is applicable, *mutatis mutandis*, in the context of the second indent of [Article 7(1) of the regulation].

33 Accordingly, for the purposes of applying the rule of special jurisdiction in matters relating to a contract, laid down in the second indent of [Article 7(1) of the regulation], concerning the provision of services, when there are several places of delivery of the goods the 'place of performance' must be understood as the place with the closest linking factor, which, as a general rule, will be at the place of the main provision of services.

34 In the second place, it must be stated that, in a commercial agency contract, it is the commercial agent who performs the obligation which characterises that contract and who, for the purpose of applying the second indent of [Article 7(1) of the regulation], provides the services.

35 Under Article 1(2) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17), a commercial agent has authority to negotiate the sale or the purchase of goods on behalf of the principal, and, where appropriate, to negotiate and conclude such transactions on behalf of and in the name of that principal. In addition, under Article 3 thereof, a commercial agent 'must … make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of[,] communicate to his principal all the necessary information available to him [and] comply with reasonable instructions given by his principal'.

36 Therefore, in order to apply the rules of special jurisdiction in matters relating to a contract, laid down in the second indent of [Article 7(1) of the regulation], when these are several places where services are provided by the agent the 'place of performance' must, in principle, mean the place of the main provision of services by the agent.

37 Third, it is necessary to indicate the criteria according to which the place of the main provision of services must be determined, when those services are provided in different Member States.

38 Having regard to the objective of predictability laid down by the legislature in recital 11 in the preamble to the regulation, and taking account of the wording of the second indent of [Article 7(1)(b)], according to which it is the place in a Member State where, under the contract, the services were provided or should have been provided which is decisive, the place of the main provision of services must be deduced, in so far as possible, from the provisions of the contract itself. Thus, in the context of a commercial agency contract, the place where the agent was to carry out his work on behalf of the principal, consisting in particular in preparing, negotiating and, where appropriate, concluding the transactions for which he has authority has to be identified, on the basis of that contract.

39 The determination of the place of the main provision of services according to the contractual choice of the parties meets the objective of proximity, since that place has, by its very nature, a link with the substance of the dispute.

40 If the provisions of a contract do not enable the place of the main provision of services to be determined, either because they provide for several places where services are provided, or because they do not expressly provide for any specific place where services are to be provided, but the agent has already provided such services, it is appropriate, in the alternative, to take account of the place where he has in fact for the most part carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary to the parties' intentions as it appears from the provisions of the contract. For that purpose, the factual aspects of the case may be taken into consideration, in particular, the time spent in those places and the importance of the activities carried out there. It is for the national court seised to determine whether it has jurisdiction in the light of the evidence submitted to it (*Color Drack*, paragraph 41).

41 Fourth, if the place of the main provision of services cannot be determined on the basis of the provisions of the contract itself or its actual performance, the place must be identified by another

means which respects the objectives of predictability and proximity pursued by the legislature.
42 For that purpose, it will be necessary for the purposes of the application of the second indent of [Article 7(1)(b)] to consider, as the place of the main provision of the services provided by a commercial agent, the place where that agent is domiciled. That place can always be identified with certainty and is therefore predictable. Moreover, it has a link of proximity with the dispute since the agent will in all likelihood provide a substantial part of his services there.
43 Having regard to all the above considerations, the answer to the Question 1(b) is that the second indent of [Article 7(1) of the regulation] must be interpreted as meaning that where services are provided in several Member States, the court having jurisdiction to hear and determine all the claims based on the contract is the court within 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 determined on that basis, the place where the agent is domiciled.

NOTES AND QUESTIONS

1 Where a party is providing services in several states, is Art. 7(1)(b) applicable?

2 Which criterion should be used to determine which court has jurisdiction under Art. 7(1)(b) where the characteristic obligation is performed in several states? Is it the same criterion for sales of goods and provision of services?

3 The court confirms that the place of main provision of the service should be determined on economic criteria. What does that mean? Does it refer to the value of the service provided, or the time spent to provide it?

4 Which court should have jurisdiction under Art. 7(1)(b) if it is not possible to determine the place of the main provision of the services?

2 Jurisdiction in tort matters (Art 7(2))

The special jurisdictional rule in tort matters is also found in Art. 7 of the Regulation. It supplements the general jurisdictional rule In Art. 4, which remains available.

Brussels Ibis Regulation (2012)

SECTION 1 General provisions

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. (. . .)

SECTION 2 Special jurisdiction

Article 7

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

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

The first issue raised by Art. 7(2) was that of the concept of 'harmful event'. The European Court of Justice clarified it as early as 1976.

CASE

Court of Justice of the European Communities, 30 November 1976, *Bier* ('*Mines de potasse d'Alsace*') (Case 21/76)

Facts: A Dutch company using the water of the Rhine river for irrigation of its plantation, G. J. Bier B.V., sued French company Mines de Potasse d'Alsace for polluting the river by discharge of massive saline waste.

Judgment – :

13 (…) the meaning of ['the place where the harmful event occurred'] is unclear when the place of the event which is at the origin of the damage is situated in a State other than the one in which the place where the damage occurred is situated, as is the case inter alia with atmospheric or water pollution beyond the frontiers of a State.

14 The form of words 'place where the harmful event occurred', used in all the language versions of the Convention, leaves open the question whether, in the situation described, it is necessary, in determining jurisdiction, to choose as the connecting factor the place of the event giving rise to the damage, or the place where the damage occurred, or to accept that the plaintiff has an option between the one and the other of those two connecting factors.

15 As regards this, it is well to point out that the place of the event giving rise to the damage no less than the place where the damage occurred can, depending on the case, constitute a significant connecting factor from the point of view of jurisdiction.

16 Liability in tort, delict or quasi-delict can only arise provided that a causal connexion can be established between the damage and the event in which that damage originates.

17 Taking into account the close connexion between the component parts of every sort of liability, it does not appear appropriate to opt for one of the two connecting factors mentioned to the exclusion of the other, since each of them can, depending on the circumstances, be particularly helpful from the point of view of the evidence and of the conduct of the proceedings. (…)

19 Thus the meaning of the expression 'place where the harmful event occurred' in [Article 7 (2)] must be established in such a way as to acknowledge that the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it.

NOTES AND QUESTIONS

1 What does the court decide? What is the 'harmful event'? Is it the damage or the event giving rise to the damage?
2 In theory, how many courts are available for tort actions? In practice, however, in which courts could Bier bring proceedings? Does Art. 4 offer a useful alternative for the plaintiff? Is the situation different for environmental torts? Why?
3 As far as choice of law is concerned, does Art. 4 of the Rome II Regulation allow the plaintiff to choose? Why?

In subsequent cases, the European Court of Justice made two further clarifications which will be discussed below, but should be underscored at the outset. First, the ECJ established (still) an additional ground of jurisdiction for internet violations of personality rights (see below 2.2.1). Second, the ECJ has limited the scope of the jurisdiction of the court of the place of the damage to the damage suffered on the territory of that court (Case C-68/93 *Shevill v. Presse Alliance*). This limitation is of general application and we will see numerous cases where it was applied.

The second issue raised by Art. 7(2) was that of the determination of the place where either the event giving rise to the damage or the damage occurred.

2.1 Product Liability

See Casebook, Ch. 3, p. 150.

2.2 Cyber torts

The operation of the rule in Art. 7(2) raises particular issues where torts are committed on the internet. Is it still possible to distinguish between the place where the event giving rise to the damage or the place where the damage occurred? And is it possible to establish these places? The European Court of Justice has established an important distinction between infringements of personality rights and other torts.

2.2.1 Infringements of personality rights

Infringement of personality rights must be distinguished from other torts, because the CJEU established an additional head of jurisdiction. Read the following cases and explain what it is, and how the court has defined the places of the damage and the event giving rise to it.

CASE

Court of Justice of the European Union, 25 October 2011, *eDate Advertising* and *Martinez* (Cases C-509/09 and C-161/10)

Facts of the second case: British newspaper the *Sunday Mirror* published an article on its website suggesting that French actor Olivier Martinez had met with Australian pop singer Kylie Minogue. Martinez sued the *Sunday Mirror* in French courts for violation of his right to privacy.

Judgment – :
41 It must also be borne in mind that the expression 'place where the harmful event occurred' is intended to cover both the place where the damage occurred and the place of the event giving rise to

it. (…)
42 In relation to the application of those two connecting criteria to actions seeking reparation for non-material damage allegedly caused by a defamatory publication, the Court has held that, in the case of defamation by means of a newspaper article distributed in several Contracting States, the victim may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all of the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised (Case C-68/93 *Shevill and Others*, paragraph 33).
43 In that regard, the Court has also stated that, while it is true that the limitation of the jurisdiction of the courts in the State of distribution solely to damage caused in that State presents disadvantages, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established (*Shevill and Others*, paragraph 32).
44 Those considerations may, as was noted by the Advocate General at point 39 of his Opinion, also be applied to other media and means of communication and may cover a wide range of infringements of personality rights recognised in various legal systems, such as those alleged by the applicants in the main proceedings.
45 However, as has been submitted both by the referring courts and by the majority of the parties and interested parties which have submitted observations to the Court, the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content. That content may be consulted instantly by an unlimited number of internet users throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control.
46 It thus appears that the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal. Moreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State.
47 The difficulties in giving effect, within the context of the internet, to the criterion relating to the occurrence of damage which is derived from *Shevill and Others* contrasts, as the Advocate General noted at point 56 of his Opinion, with the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a world-wide basis.
48 The connecting criteria referred to in paragraph 42 of the present judgment must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice, referred to in paragraph 40 above.
49 The place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.
50 The jurisdiction of the court of the place where the alleged victim has the centre of his interests is in accordance with the aim of predictability of the rules governing jurisdiction (see Case C-144/10 *BVG*, paragraph 33) also with regard to the defendant, given that the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the persons who are the subject of that content. The view must therefore be taken that

the centre-of-interests criterion allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued (see Case C-533/07 *Falco Privatstiftung and Rabitsch*, paragraph 22 and the case-law cited).
51 Moreover, instead of an action for liability in respect of all of the damage, the criterion of the place where the damage occurred, derived from *Shevill and Others*, confers jurisdiction on courts in each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.
52 Consequently, the answer to the first two questions in Case C-509/09 and the single question in Case C-161/10 is that [Article 7(2)] of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.

NOTES AND QUESTIONS

1 The court establishes a new ground of jurisdiction for infringement of personality rights on the internet. There are, therefore, four grounds of jurisdiction for such tort actions: what are they? How important is it to distinguish between them? Does each of the four grounds grant jurisdiction to the same extent?

2 Where is the centre of the interests of a victim of such infringements? Is it where s/he resides? Is it the country where s/he works? Suppose a French singer lives in California: where is the centre of his interests?

3 Where does the event giving rise to the damage occur?

4 Where does the damage occur? How many courts in the EU have jurisdiction on this ground? What is the extent of their jurisdiction? What is the extent of the damage suffered by a French actor in Sweden or Romania by an online publication? Is the situation different for a world-wide famous Australian pop singer?

Can legal persons also benefit from the new ground of jurisdiction?

CASE

Court of Justice of the European Union, 17 October 2017, *Bolagsupplysningen OÜ v. Svensk Handel AB* (Case C-194/16)

Facts: Estonian company Bolagsupplysningen OÜ sued Swedish company Svensk Handel AB In Estonian courts for blacklisting Bolagsupplysningen on its website, as it paralysed its business activities in Sweden, and sought a court order demanding that Svensk Handel rectify the information.

Judgment – :
22 By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located and, if that is the case, what are the criteria and the circumstances to be taken into account to determine that centre of interests. (…)
38 (…) given that the option of a person who considers that his rights have been infringed to bring an

action before the courts of the Member State in which his centre of interests is located for all the alleged damage is justified in the interests of the sound administration of justice and not specifically for the purposes of protecting the applicant, the matter of whether the person is a natural or legal person is also not conclusive. (…)

41 As regards a legal person pursuing an economic activity, such as the applicant in the main proceedings, the centre of interests of such a person must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities. While the centre of interests of a legal person may coincide with the place of its registered office when it carries out all or the main part of its activities in the Member State in which that office is situated and the reputation that it enjoys there is consequently greater than in any other Member State, the location of that office is, not, however, in itself, a conclusive criterion for the purposes of such an analysis.

42 Thus, when the relevant legal person carries out the main part of its activities in a Member State other than the one in which its registered office is located, as is the case in the main proceedings, it is necessary to assume that the commercial reputation of that legal person, which is liable to be affected by the publication at issue, is greater in that Member State than in any other and that, consequently, any injury to that reputation would be felt most keenly there. To that extent, the courts of that Member State are best placed to assess the existence and the potential scope of that alleged injury, particularly given that, in the present instance, the cause of the injury is the publication of information and comments that are allegedly incorrect or defamatory on a professional site managed in the Member State in which the relevant legal person carries out the main part of its activities and that are, bearing in mind the language in which they are written, intended, for the most part, to be understood by people living in that Member State.

43 It is also appropriate to point out that, in circumstances where it is not clear from the evidence that the court must consider at the stage when it assesses whether it has jurisdiction that the economic activity of the relevant legal person is carried out mainly in a certain Member State, so that the centre of interests of the legal person which is claiming to be the victim of an infringement of its personality rights cannot be identified, that person cannot benefit from the right to sue the alleged perpetrator of the infringement pursuant to Article 7(2) of Regulation No 1215/2012 for the entirety of the compensation on the basis of the place where the damage occurred.

44 The answer to the second and third questions therefore is that Article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located.

When the relevant legal person carries out the main part of its activities in a different Member State from the one in which its registered office is located, that person may sue the alleged perpetrator of the injury in that other Member State by virtue of it being where the damage occurred.

The first question

45 By its first question, the referring court asks, in essence, whether Article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that a person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him can bring an action for rectification of that information and removal of those comments before the courts of each Member State in which the information published on the internet is or was accessible.

46 That question must be answered in the negative.

47 It is true that, in paragraphs 51 and 52 of the judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10), the Court held that the person who considers that his rights have been infringed may also, instead of an action for damages in respect of all the harm caused, bring his action before the courts of each Member State in whose territory content placed online is or has been accessible, which have jurisdiction only in respect of the harm caused in the territory of the Member State of the court seised.

48 However, in the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal (see, to that effect, judgment of 25 October 2011, *eDate Advertising and Others*, C-509/09 and C-161/10, paragraph 46), an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage pursuant to the case-law resulting from the judgments of 7 March 1995, *Shevill and Others* (C-68/93, paragraphs 25, 26 and 32), and of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, paragraphs 42 and 48), and not before a court that does not have jurisdiction to do so.
49 In the light of the above, the answer to the first question is that Article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that a person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to him cannot bring an action for rectification of that information and removal of those comments before the courts of each Member State in which the information published on the internet is or was accessible.

NOTES AND QUESTIONS

1 Can legal persons benefit from the new ground of jurisdiction? How is their centre of interest to be determined?

2 In this case, where was the centre of interest of Bolagsupplysningen? On which ground could it sue in Estonia? in Sweden?

3 Why were Estonian courts unable to grant the remedy that Bolagsupplysningen sought?

2.2.2 Other cybertorts

The new ground established in *eDate/Martinez* only applies for infringement of personality rights. For other torts committed on the Internet, it does not apply, and the jurisdiction to entertain tort claims is governed by the general rule in Article 7(2).
Read the following cases and explain how the place of the event giving rise to the damage and of the damage are determined in the context of violations of intellectual property rights.

CASE

Court of Justice of the European Union, 19 April 2012, *Wintersteiger v. Product4U* (Case C-523/10)

Facts: German company Product4U sold ski accessories that it described as 'Wintersteiger accessories'. Austrian company Wintersteiger, however, had been the proprietor of an Austrian trademark 'Wintersteiger' for 15 years. When Product4U reserved the keyword 'Wintersteiger' in the advertising system developed by Google for the German top-level domain ('.de'), Wintersteiger sought an injunction in Austrian courts against the infringement of its trademark.

Judgment – :
The place where the event giving rise to the damage occurred
(…)
34 In the case of an alleged infringement of a national trade mark registered in a Member State because of the display, on the search engine website, of an advertisement using a keyword identical to that trade mark, it is the activation by the advertiser of the technical process displaying, according to pre-defined parameters, the advertisement which it created for its own commercial communications which should be considered to be the event giving rise to an alleged infringement, and not the display of the advertisement itself.

35 As the Court has already held in the context of interpretation of the directive to approximate the laws of the Member States relating to trade marks, it is the advertiser choosing a keyword identical to the trade mark, and not the provider of the referencing service, who uses it in the course of trade (*Google France and Google*, paragraphs 52 and 58). The event giving rise to a possible infringement of trade mark law therefore lies in the actions of the advertiser using the referencing service for its own commercial communications.
36 It is true that the technical display process by the advertiser is activated, ultimately, on a server belonging to the operator of the search engine used by the advertiser. However, in view of the objective of foreseeability, which the rules on jurisdiction must pursue, the place of establishment of that server cannot, by reason of its uncertain location, be considered to be the place where the event giving rise to the damage occurred for the purpose of the application of [Article 7(2) of the Brussels Ibis Regulation].
37 By contrast, since it is a definite and identifiable place, both for the applicant and for the defendant, and is therefore likely to facilitate the taking of evidence and the conduct of the proceedings, it must be held that the place of establishment of the advertiser is the place where the activation of the display process is decided.
38 It follows from the foregoing that an action relating to alleged infringement of a trade mark registered in a Member State through the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may also be brought before the courts of the Member State of the place of establishment of the advertiser.

CASE

Court of Justice of the European Union, 22 January 2015, *Pez Hejduk v EnergieAgentur.NRW GmbH* (Case C-441/13)

Judgment – :
22 (…) although copyright rights must be automatically protected, in particular in accordance with Directive 2001/29, in all Member States, they are subject to the principle of territoriality. Those rights are thus capable of being infringed in each Member State in accordance with the applicable substantive law (see judgment in *Pinckney*, C-170/12, EU:C:2013:635, paragraph 39). (…)
24 In a situation such as that at issue in the main proceedings, in which the alleged tort consists in the infringement of copyright or rights related to copyright by the placing of certain photographs online on a website without the photographer's consent, the activation of the process for the technical display of the photographs on that website must be regarded as the causal event. The event giving rise to a possible infringement of copyright therefore lies in the actions of the owner of that site (see, by analogy, judgment in *Wintersteiger*, C-523/10, paragraphs 34 and 35).
25 In a case such as that in the main proceedings, the acts or omissions liable to constitute such an infringement may be localised only at the place where EnergieAgentur has its seat, since that is where the company took and carried out the decision to place photographs online on a particular website. It is undisputed that that seat is not in the Member State from which the present reference is made.
26 It follows that in circumstances such as those at issue in the main proceedings, the causal event took place at the seat of that company and therefore does not attribute jurisdiction to the court seised.
27 It is therefore necessary to examine, secondly, whether that court may have jurisdiction on the basis of the place where the alleged damage occurred.
28 Thus, the Court must determine the conditions in which, for the purposes of [Article 7(2) of the Brussels Ibis Regulation], the damage arising out of an alleged infringement of copyright occurs or is likely to occur in a Member State other than the one in whichthe defendant took and carried out the decision to place photographs online on a particular website.
29 In that regard, the Court has stated not only that the place where the alleged damage occurred within the meaning of that provision may vary according to the nature of the right allegedly infringed,

but also that the likelihood of damage occurring in a particular Member State is subject to the condition that the right whose infringement is alleged is protected in that Member State (see judgment in *Pinckney*, paragraphs 32 and 33).

30 With regard to the second aspect, in the case in the main proceedings, Ms Hejduk alleges infringement of her copyright as a result of the placing of her photographs online on the website of EnergieAgentur. It is not disputed, as is clear in particular from paragraph 22 above, that the rights on which she relies are protected in Austria.

31 With regard to the likelihood of the damage occurring in a Member State other than the one where EnergieAgentur has its seat, that company states that its website, on which the photographs at issue were published, operating under a country-specific German top-level domain, that is to say 'de', is not directed at Austria and that consequently the damage did not occur in that Member State.

32 It is clear from the Court's case-law that, unlike [Article 17(1)(c) of the Brussels Ibis Regulation], which was interpreted in the judgment in *Pammer and Hotel Alpenhof* (C-585/08 and C-144/09,), [Article 7(2)] does not require, in particular, that the activity concerned be 'directed to' the Member State in which the court seised is situated (see judgment in *Pinckney*, paragraph 42).

33 Therefore, for the purposes of determining the place where the damage occurred with a view to attributing jurisdiction on the basis of [Article 7(2) of the Brussels Ibis Regulation], it is irrelevant that the website at issue in the main proceedings is not directed at the Member State in which the court seised is situated.

34 In circumstances such as those at issue in the main proceedings, it must thus be held that the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility in the Member State of the referring court, via the website of EnergieAgentur, of the photographs to which the rights relied on by Ms Hejduk pertain.

35 The issue of the extent of the damage alleged by Ms Hejduk is part of the examination of the substance of the claim and is not relevant to the stage in which jurisdiction is verified.

36 However, given that the protection of copyright and rights related to copyright granted by the Member State of the court seised is limited to the territory of that Member State, a court seised on the basis of place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that Member State (see, to that effect, judgment in *Pinckney*, paragraph 45).

37 The courts of other Member States in principle retain jurisdiction, in the light of [Article 7(2) of the Brussels Ibis Regulation] and the principle of territoriality, to rule on the damage to copyright or rights related to copyright caused in their respective Member States, given that they are best placed, first, to ascertain whether those rights guaranteed by the Member State concerned have in fact been infringed and, secondly, to determine the nature of the damage caused (see, to that effect, judgment in *Pinckney*, paragraph 46).

38 Having regard to all the foregoing considerations, the answer to the question referred is that [Article 7(2) of the Brussels Ibis Regulation] must be interpreted as meaning that, in the event of an allegation of infringement of copyright and rights related to copyright guaranteed by the Member State of the court seised, that court has jurisdiction, on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction. That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.

NOTES AND QUESTIONS

1 These cases are concerned with infringements of intellectual property (IP) rights (copyrights, patents, trademarks, etc…). These are tort claims, which fall within the scope of Art. 7(2) of the Brussels Ibis Regulation. Note that for IP rights which require to be registered, Art. 24(4) provides for the exclusive jurisdiction of the court of the place of registration to entertain any proceedings concerned with their registration or validity, including if such challenge is made as a defence in infringement proceedings (requiring, therefore, an Art. 7(2) court to stay proceedings).

2 Where does the event giving rise to the damage occur where an IP right is infringed by placing certain contents on the internet? Is it different depending for trademarks (*Wintersteiger*) or copyrights (*Hejduk*)?

3 With respect to the place where the damage occurred, the CJEU has ruled consistently that, in IP cases, a damage can only occur in a given Member State if the relevant IP right is protected in that state. Certain IP rights are protected in all Member States without any particular procedure to be followed by their holders, like copyrights. But other rights such as trademarks or patents will only be protected if they were registered in the relevant state.

4 Infringements committed by placing certain contents on the internet can cause damage in any Member State where the website is accessible and the relevant IP right is protected. Does it mean that the courts of all Member States have jurisdiction on this ground? Is it relevant whether the website targeted a particular Member State, for instance by using a particular language? Is the jurisdiction of these courts limited?

2.3 Purely Financial Damage

The operation of the rule in Article 7(2) raises a particular issue for financial losses, because financial loss can be difficult to locate. In this respect, it is important to distinguish between two kinds of financial losses. Certain financial losses are the consequence of personal injury (loss of income after an accident) or property damage (loss of value of a property). They can be located at the place where the injury or the property damage occurred, or considered at least as an indirect consequence of the tort (the direct consequence being the personal injury, for instance). But other financial losses are unrelated to other more tangible losses. They are called pure economic losses and are governed by specific rules under the laws of many States. They are much more delicate to locate, and the determination of the place of damage under Article 7(2) is thus complex.

The first question which arose is whether all purely economic losses should be considered to occur at the place of the domicile of the victim, since it is where his assets are concentrated.

CASE

Court of Justice of the European Union, 10 June 2004 *Kronhofer v. Maier and Others* (Case C-168/02)

Facts: an Austrian national was persuaded, by German-based investment professionals to invest in a call option contract relating to shares without being warned of the risks involved. He transferred money to an investment account held in Germany which was then used to subscribe for highly speculative call options on the London Stock Exchange. He was only repaid part of the capital he invested and brought a claim in tort before an Austrian court against the defendants.

Judgment:

17 It is clear from the order for reference that the [Austrian Supreme court] takes the view that, in the case in the main proceedings, the place where the damage occurred and the place of the event giving rise to it were both in Germany. The distinguishing feature of this case lies in the fact that the financial damage allegedly suffered by the claimant in another Contracting State is said to have affected the whole of his assets simultaneously.

18 As the Advocate General rightly noted at point 46 of his Opinion, there is nothing in such a situation to justify conferring jurisdiction to the courts of a Contracting State other than that on whose territory the event which resulted in the damage occurred and the damage was sustained, that is to say all of the elements which give rise to liability. To confer jurisdiction in that way would not meet any objective need as regards evidence or the conduct of the proceedings.

19 As the Court has held, the term 'place where the harmful event occurred' cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere (see Case C-364/93 *Marinari* [1995] ECR I-2719, para. 14).

20 In a situation such as that in the main proceedings, such an interpretation would mean that the determination of the court having jurisdiction would depend on matters that were uncertain, such as the place where the victim's 'assets are concentrated' and would thus run counter to the strengthening of the legal

protection of persons established in the Community which, by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued, is one of the objectives of the Convention [now Regulation] (see Case C-256/00 *Besix* [2002] ECR I-1699, paragraphs 25 and 26, and *DFDS Torline*, paragraph 36). Furthermore, it would be liable in most cases to give jurisdiction to the courts of the place in which the claimant was domiciled. As the Court found at paragraph 14 of this judgment, the [Regulation] does not favour that solution except in cases where it expressly so provides.

21 In view of the foregoing considerations, the answer to the question referred must be that [Article 7(2) of the Regulation] must be interpreted as meaning that the expression 'place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where 'his assets are concentrated' by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Contracting State.

NOTES AND QUESTIONS

1. Does the fact that the victim is domiciled or has his assets located in a Member State suffice to confer jurisdiction to the courts of this Member State if he suffers financial damage?

2. An important reason why granting jurisdiction to the court of the victim should be limited is that it would allow all victims in their home courts. The jurisdiction of the court of the domicile of the plaintiff has traditionally been regarded as an exorbitant rule of jurisdiction, and is thus excluded, unless other factors point to the relevant country.

The most frequent instance of pure financial loss is loss of investments on the financial markets. Such investments are especially difficult to locate, because the vast majority of financial instruments are dematerialised. They are typically held on investment accounts maintained by financial institutions. Where financial losses related to investments in financial instruments occur, this means that the relevant financial instruments (certificate, shares in a company) will lose some or all of their values. The CJEU has addressed the issue of the location of such losses in a series of judgments.

Case

Court of Justice of the European Union, 28 January 2015 *Kolassa v. Barclays Bank* (Case C-375/13)

Facts: an Austrian national, Mr Kolassa invested through an Austrian bank in certificates issued by an English bank, Barclays. He lost his investment and brought a tort claim before Austrian courts against Barclays on the ground that he had received incorrect information in the prospectus issued in relation to the certificates and distributed in Austria. The certificates of Mr Kolassa were ordered from Barclays by the German parent company of his Austrian bank, and were thus held in Germany.

Judgment:

49 Therefore, the mere fact that the applicant has suffered financial consequences does not justify the attribution of jurisdiction to the courts of the applicant's domicile if, as was the situation in the case giving rise to the judgment in *Kronhofer* (EU:C:2004:364), both the events causing loss and the loss itself occurred in the territory of another Member State (see, to that effect, judgment in *Kronhofer*, EU:C:2004:364, paragraph 20).

50 By contrast, such an attribution of jurisdiction is justified if the applicant's domicile is in fact the place in which the events giving rise to the loss took place or the loss occurred.

51 In that regard, it is apparent from the decision for reference that, first, the certificates' loss of value was due, not to the vagaries of the market, but to the management of the funds in which the money from the issue of those certificates had been invested, preventing, at the end of the term, an increase in its value. Second, the actions or omissions alleged against Barclays Bank with respect to its legal information obligations took place before the investment made by Mr Kolassa and were, in his view, decisive for that investment.

52 On the assumption that the actions and omissions of Barclays Bank constituted a necessary precondition for the loss suffered by Mr Kolassa, which is sufficient for Article 5(3) of Regulation No 44/2001 [*today Article 7(2) of the Brussels Ibis Regulation*] to apply (see, to that effect, judgment in *DFDS Torline*, C-18/02, EU:C:2004:74, paragraph 34), it is also necessary, for that purpose, to ascertain to what extent the facts of the case in the main proceedings lead to the conclusion that the place in which the events causing the loss took place or in which the loss occurred was where the applicant is domiciled.

53 As regards the events giving rise to the loss claimed, namely, the alleged breach by Barclays Bank of the legal obligations relating to the prospectus and information for investors, it should be pointed out that the acts and omissions that might constitute such a breach cannot be considered to have taken place where the investor who claims to have suffered loss is domiciled, given that there is no information in the case-file to show that the decisions regarding the arrangements for the investments proposed by Barclays Bank and the contents of the relevant prospectuses were taken in the Member State in which the investor is domiciled or that those prospectuses were originally drafted and distributed anywhere other than the Member State in which Barclays Bank has its seat.

54 As regards, by contrast, the place where the loss occurred, it must be held that, in circumstances such as those summarised at para 51 of this judgment, the loss occurred in the place where the investor suffered it.

55 The courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, in particular when that loss occurred itself directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts.

56 The place where the loss occurred thus identified meets, in circumstances such as those referred to in paragraph 51 of this judgment, the objective of [the Brussels Ibis Regulation] of strengthening the legal protection of persons established in the European Union, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued (see, to that effect, judgment in *Kronhofer*, EU:C:2004:364, paragraph 20), given that the issuer of a certificate who does not comply with his legal obligations in respect of the prospectus must, when he decides to notify the prospectus relating to that certificate in other Member States, anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer loss.

57 Having regard to the foregoing considerations, the answer to Question 3 is that [Article 7(2) of the Brussels Ibis Regulation] must be interpreted as applying to an action seeking to put in issue the liability of the issuer of a certificate on the basis of the prospectus relating to it and of breach of other legal information obligations binding on the issuer, in so far as that liability is not based on a matter relating to a contract, within the meaning of [Article 7(1)] of the regulation. Under [Article 7(2) of the Brussels Ibis Regulation], the courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, particularly when the damage alleged occurred directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts.

NOTES AND QUESTIONS

1. In *Kronhofer*, the court held that victims could not sue under Art. 7(2) in the courts of their domicile. Does *Kolassa* allow it? Why? Can the case be reconciled with *Kronhofer*?

2. In this case, where did the damage occur? Where did the event giving rise to the damage occur? On which ground does the Austrian court have jurisdiction?

3. In *Kolassa*, the investor purchased the certificates by making a payment in Austria on his Austrian bank account. As result, he acquired certificates which were held in Germany. These certificates lost most of their value. Was his loss the loss of value of the certificates, or the loss of the money paid to acquire them? Where did it occur?

4. In *Kolassa*, Barclays had distributed the prospectus in Austria. For a case where the defendant was not subject to statutory reporting information in the Member State of the victim, see below Case C-709/19, *Effectenbezitters v. BP.*

5. Mr. Kolassa was a consumer. However, the special rules protecting consumer only apply to consumer contracts. The court ruled that they do not apply in this case, as there was no contract between Kolassa and Barclays.

Case

Court of Justice of the European Union, 12 September 2018 *Löber v. Barclays Bank* (Case C-304/17)

Facts: A bank based in England issued certificates in which Ms Löber, domiciled in Austria, invested through two Austrian banks. She suffered a financial loss and brought a tort claim against the English bank before an Austrian commercial court.

Judgment:

31 In the present case, it appears that, taken as a whole, the specific circumstances of the present case contribute to attributing jurisdiction to the Austrian courts.

32 As is apparent from the order for reference, Ms Löber is domiciled in Austria and all the payments in relation to the investment transaction at issue in the main proceedings were made from Austrian bank accounts, namely the personal bank account of Ms Löber and the clearing accounts specifically intended for the execution of that transaction.

33 Moreover, besides the fact that Ms Löber, in connection with that transaction, had dealings only with Austrian banks, it is furthermore apparent from the order for reference that she acquired the certificates on the Austrian secondary market, that the information supplied to her concerning those certificates is that in the prospectus which relates to them as notified to the Österreichische Kontrollbank (Austrian supervisory bank) and that, on the basis of that information, she signed in Austria the contract obliging her to make the investment, which has resulted in a definitive reduction in her assets.

34 In addition, conferring jurisdiction on the Austrian courts in circumstances such as those in the case in the main proceedings is consistent with the objectives, set out in recitals 11 and 12 of Regulation No 44/2001, of the predictability of the rules on jurisdiction laid down in that regulation, of proximity between the courts designated by those rules and the dispute and of the sound administration of justice.

35 In this connection, given that the issuer of a certificate who does not comply with his legal obligations in respect of the prospectus must, when he decides to notify the prospectus relating to that certificate in other Member States, anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer damage, the objective of Regulation No 44/2001 [*today the Brussels Ibis Regulation*] — which is to strengthen the legal protection of persons established in the European Union by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued — is met by upholding as the place where the damage occurred the place where the bank is established in which the applicant possessed the bank account in which the damage occurred (see, to that effect, judgment of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37, paragraph 56).

36 Consequently, the answer to the question referred is that [Article 7(2) of the Brussels Ibis Regulation] must be interpreted to the effect that in a situation, such as that in the main proceedings, in which an investor brings, on the basis of the prospectus relating to a certificate in which he or she invested, a tort action against the bank which issued that certificate, the courts of that investor's domicile, as the courts for the place where the harmful event occurred within the meaning of that provision, have jurisdiction to hear and determine that action, where the damage the investor claims to have suffered consists in financial loss which occurred directly in that investor's bank account with a bank established within the jurisdiction of those courts and the other specific circumstances of that situation also contribute to attributing jurisdiction to those courts.

NOTES AND QUESTIONS

1. In *Kolassa*, the court had ruled that the court of the State where the victim was domiciled and had the bank account in which she had suffered her loss had jurisdiction under Article 7(2) of the Brussels Ibis Regulation. Was the situation the same in *Löber*?

2. In *Löber*, the court rules that jurisdiction pursuant to Art. 7(2) requires that the investor's bank account was held with a bank established in the relevant Member State and that 'other specific circumstances' point to that same Member State. On which other circumstances does the court rely on in that particular case?

3. The direction taken by the court in *Löber* was confirmed in Case C-12/15 *Universal Music International Holding v. Schilling and others.* The court held that 'purely financial damage which occurs directly in the applicant's bank account cannot, in itself, be qualified as a "relevant connecting factor", pursuant to [Article 7(2) of the Brussels Ibis Regulation]', and that 'It is only where the other circumstances specific to the case also contribute to attributing jurisdiction to the courts for the place where a purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place.'

Case

Court of Justice of the European Union, 12 May 2021 *Effectenbezitters v. BP* (Case C-709/19)

Facts: following the disaster of the Deep Water Horizon oil spill in the Gulf of Mexico in 2010, the price of the shares in English company British Petroleum ('BP') lost value. A Dutch association brought a claim in a Dutch court on behalf of all persons who had bought or held shares in BP through an investment account in the Netherlands alleging that BP had not correctly informed the shareholders as to security and maintenance programs and the extent of and its responsibility in the oil spill.

Judgment:

30 In this instance, the case in the main proceedings concerns the identification of the place where the damage occurred.

33 The place in which the damage occurred thus identified is in line with the objective of Regulation No 1215/2012, which is to strengthen the legal protection of persons established in the European Union by simultaneously enabling the applicant to identify easily the court in which he or she may sue and the defendant reasonably to foresee in which court he or she may be sued, given that the issuer of a certificate who does not comply with their legal obligations in respect of the prospectus must, when they decide to notify the prospectus relating to that certificate in other Member States, anticipate that inadequately informed operators, domiciled in those Member States, might invest in that certificate and suffer damage (see, to that effect, judgments of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37, paragraph 56, and of 12 September 2018, *Löber*, C-304/17, EU:C:2018:701, paragraph 35).

34 It should be noted that that objective of foreseeability is not ensured in the same way where, in the Member State in which the investment account used for the purchase of securities listed on the stock exchange of another State is situated, the issuer of those securities is not subject to statutory reporting obligations. As the Advocate General noted in point 29 of his Opinion, the criteria relating to the domicile and the place where the shareholders hold their accounts do not enable the issuing company to foresee the courts with international jurisdiction before which it could be sued, which would be contrary to the objective, referred to in recital 16 of Regulation No 1215/2012, of preventing, in order to ensure the principle of legal certainty, the possibility of the defendant being sued before a court of a Member State which he could not reasonably have foreseen.

35 It follows that, in the case of a listed company such as that at issue in the main proceedings, only the jurisdiction of the courts of the Member States in which that company has complied, for the purposes of its listing on the stock exchange, with the statutory reporting obligations can be established on the basis of the place where the damage occurred. It is only in those Member States that such a company can reasonably foresee the existence of an investment market and incur liability.

36 Finally, as regards the extent to which the collective nature of an action such as that brought in the main proceedings allows the domicile of investors to be disregarded, it should be noted that it is apparent from the foregoing considerations that this is not, in itself, decisive in determining the place where the harmful event occurred, in accordance with Article 7(2) of Regulation No 1215/2012.

37 In the light of the foregoing, the answer to the first and second questions is that Article 7(2) of Regulation No 1215/2012 must be interpreted as meaning that the direct occurrence in an investment account of purely financial loss resulting from investment decisions taken as a result of information which is easily accessible worldwide but inaccurate, incomplete or misleading from an international listed company does not allow the attribution of international jurisdiction, on the basis of the place of the occurrence of the damage, to a court of the Member State in which the bank or investment firm where the account is held has its registered office, where that firm was not subject to statutory reporting obligations in that Member State.

NOTES AND QUESTIONS

1. What does the court decide? Do Dutch court have jurisdiction? Does the court rule that the damage occurred in the Netherlands? On which ground?

2. In this case, the plaintiffs had invested in an investment account situated in the Netherlands, and suffered their loss there. What is the difference with *Kolassa* and *Löber*? How does the court explain that the court of the place of the account could retain jurisdiction in these cases?

3. It has been argued that a difference between *Kolassa* and *Löber*, on the one hand, and *Effectenbezitters*, on the other hand, is that, in the former cases, the financial instruments were traded directly to the victims, while in the latter case, they were listed in other Member States, and then bought by the victims (secondary market). Do you think it should make a difference? Does the court suggest that it does?

4. The court insists on the foreseeability, for the defendant, of the court which might retain jurisdiction. Is this a redefinition of the place where the damage was suffered, or a new requirement added to the jurisdiction of the court of the place of the damage (and thus limiting it) under Article 7(2)?

5. In the context of tort committed on the internet, the court has held that it was irrelevant to determine the place of damage whether the defendant had directed its activities towards the relevant Member State (see above 2.2.2, Case C-441/13 *Pez Hejduk*). Why should foreseeability play a more important role in financial cases?

3 Jurisdiction in quasi-contractual matters

There is no special rule in the Brussels Ibis Regulation for quasi-contracts. In contrast, for choice of law purposes, the Rome II Regulation provides two specific rules for determining the applicable law to unjust enrichment, including payment of amounts wrongly received (Art. 10) and *negotiorum gestio* (Art. 11).

Which court should then have jurisdiction to entertain quasi-contractual claims? One first possibility would be to consider that, in the absence of a special rule specifically applicable to them, the general rule should apply. A second possibility would be to consider that quasi-contractual claims fall within the scope of one of the special rules of Art. 7.

Read the following case and explain how the European Court of Justice decided first to address the issue.

CASE

Court of Justice of the European Communities, 27 September 1988 *A. Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst und Co. et alii* (Case 189/87)

Facts: Mr Kalfelis concluded with the bank established in Luxembourg, through the intermediary of the bank established in Frankfurt am Main and with the participation of the latter's joint procuration-holder, a number of spot and futures stock-exchange transactions in silver bullion and for that purpose paid DM 344 868.52 to the bank in Luxembourg. The futures transactions resulted in a total loss. Mr Kalfelis sued the defendants in Germany for an order that the defendants were jointly and severally liable for the debt. His claim was based on contractual liability, tort and unjust enrichment.

Judgment – :
14 The second question submitted by the [German Federal Court of Justice] is intended essentially to ascertain, first, whether the phrase 'matters relating to tort, delict or quasi delict' used in Article 5 (3) of the Convention [now Article 7(2) of the Brussels Ibis Regulation] must be given an independent meaning or be defined in accordance with the applicable national law and, secondly, in the case of an action based concurrently on tortious or delictual liability, breach of contract and unjust enrichment, whether the court having jurisdiction by virtue of [Article 7 (2)] may adjudicate on the action in so far as it is not based on tort or delict.
15 With respect to the first part of the question, it must be observed that the concept of 'matters relating to tort, delict or quasi-delict' serves as a criterion for defining the scope of one of the rules concerning the special jurisdictions available to the plaintiff. As the Court held with respect to the expression 'matters relating to a contract' used in [Article 7 (1)] (see the judgments of 22 March 1983 in Case 34/82 *Peters v ZNAV*[1983] ECR 987, and of 8 March 1988 in Case 9/87 *SPRL Arcado and SA Haviland* [1988] ECR 1539), having regard to the objectives and general scheme of the [Regulation], it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the [Regulation] for the [Member] States and the persons concerned, that concept should not be interpreted simply as referring to the national law of one or other of the States concerned.
16 Accordingly, the concept of matters relating to tort, delict or quasi-delict must be regarded as an autonomous concept which is to be interpreted, for the application of the [Regulation], principally by reference to the scheme and objectives of the [Regulation] in order to ensure that the latter is given full effect.
17 In order to ensure uniformity in all the Member States, it must be recognized that the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability

of a defendant and which are not related to a 'contract' within the meaning of [Article 7 (1)].
18 It must therefore be stated in reply to the first part of the second question that the term 'matters relating to tort, delict or quasi-delict' within the meaning of [Article 7(2) of the Brussels Ibis Regulation] must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of [Article 7 (1)].
19 With respect to the second part of the question, it must be observed, as already indicated above, that the 'special jurisdictions' enumerated in [Articles 7 and 8 of the Brussels Ibis Regulation] constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively. It must therefore be recognized that a court which has jurisdiction under [Article 7 (2)] over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.
20 Whilst it is true that disadvantages arise from different aspects of the same dispute being adjudicated upon by different courts, it must be pointed out, on the one hand, that a plaintiff is always entitled to bring his action in its entirety before the courts for the domicile of the defendant and, on the other, that [Article 29 of the Brussels Ibis Regulation] allows the first court seised, in certain circumstances, to hear the case in its entirety provided that there is a connection between the actions brought before the different courts.
21 In those circumstances, the reply to the second part of the second question must be that a court which has jurisdiction under [Article 7 (2)] over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.

NOTES AND QUESTIONS

1. Is a claim for unjust enrichment a tort action? Is it an action seeking to establish liability?

2. If a claim for unjust enrichment relates to a contract, does it fall within the scope of Art. 7(1)?

CASE

Court of Justice of the European Union, 9 December 2021, *HRVATSKE ŠUME d.o.o., Zagreb v. BP EUROPA SE* (Case 242/20)

Judgment – :
43. (…) in order to determine whether an action for restitution based on unjust enrichment falls within the scope of matters relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that regulation [*now Article 7(2) of the Brussels Ibis Regulation*], it is necessary to ascertain whether two conditions are satisfied, namely, first, that that action does not concern matters relating to a contract within the meaning of [Article 7(1)(a) of the Brussels Ibis Regulation] and, second, that it seeks to establish the liability of a defendant.
44. As regards the first condition, matters relating to a contract, within the meaning of that article, covers any claim based on an obligation freely consented to by one person towards another (see, to that effect, judgment of 11 November 2020, *Ellmes Property Services*, C-433/19, EU:C:2020:900, paragraph 37 and the case-law cited).
45. It must be observed, as the Advocate General noted in point 45 of his Opinion, that, in a claim for restitution based on unjust enrichment, the restitutionary obligation relied on by the applicant does not generally arise from a voluntary commitment made by the defendant to the applicant but rather arises independently of the defendant's intention. It follows that such a claim for restitution does not, in principle, come within matters relating to a contract within the meaning of [Article 7(1)(a) of the Brussels Ibis Regulation].
46. That interpretation is supported by a joint reading of Article 5(3) of Regulation No 44/2001 and Article 2 of Regulation No 864/2007, which is, in the field of conflict of laws, the counterpart of [Article 7(2)] in the field of conflicts of jurisdiction, bearing in mind that those two regulations must,

so far as possible, be interpreted consistently. Article 2(1) of Regulation No 864/2007 provides that the restitutionary obligation which derives from unjust enrichment is considered to be a non-contractual obligation, falling within the scope of that regulation and being subject, in accordance with Article 10 thereof, to special conflict-of-law rules (see, to that effect, judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic*, C-359/14 and C-475/14, paragraphs 45 and 46).

47. However, in order to give a full answer to the referring court, it should be added that, as the Advocate General observed in points 48 to 52 of his Opinion, a claim for restitution based on unjust enrichment may, in certain circumstances, be closely linked to a contractual relationship between the parties to the dispute and, consequently, be regarded as coming within 'matters relating to a contract' within the meaning of [Article 7(1)(a) of the Brussels Ibis Regulation]. (...)

52. As regards the second condition set out in paragraph 43 above, it must be ascertained whether an action for restitution based on unjust enrichment seeks to establish the liability of a defendant.

53. In that regard, the Court has held that such is the case where a harmful event, within the meaning of [Article 7(2) of the Brussels Ibis Regulation], may be imputed to the defendant, in that he or she is alleged to have committed an act or omission contrary to a duty or prohibition imposed by law. Liability in tort, delict or quasi-delict can only arise provided that a causal connection can be established between the damage and the event in which that damage originates (see, to that effect, judgment of 21 April 2016, *Austro-Mechana*, C-572/14, para 40, 41 and 50 and the case-law cited). (...)

55. A claim for restitution based on unjust enrichment is based on an obligation which does not originate in a harmful event. That obligation arises irrespective of the defendant's conduct, with the result that there is no causal link that can be established between the damage and any unlawful act or omission committed by the defendant.

56. Accordingly, a claim for restitution based on unjust enrichment cannot come within matters relating to tort, delict or quasi-delict, within the meaning of [Article 7(2) of the Brussels Ibis Regulation].

58. It should also be noted that it is possible that a claim for restitution based on unjust enrichment comes neither within matters relating to a contract within the meaning of [Article 7(1)(a) of the Brussels Ibis regulation] nor within matters relating to tort, delict or quasi-delict within the meaning of [Article 7(2) of the Brussels Ibis Regulation]. That is the case where that claim is not closely linked to a pre-existing contractual relationship between the parties to the dispute concerned.

59. In such a situation, a claim for restitution based on unjust enrichment comes within the jurisdiction of the courts of the Member State in which the defendant is domiciled, in accordance with the general rule laid down in [Article 4(1) of the Brussels Ibis Regulation].

NOTES AND QUESTIONS

1. What does the court rule? Can a claim for restitution based on unjust enrichment fall within the scope of Art. 7(1)? Within the scope of Art. 7(2)?

2. Why is a claim for restitution based on unjust enrichment not a tort claim?

3. What is the consequence of this judgment on claims based on other quasi-contracts?

3 Protecting Weaker Parties

Brussels Ibis Regulation (2012)

PREAMBLE

(18) In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.

The Brussels Ibis Regulation identifies three categories of weaker parties who should be protected by favourable rules of jurisdiction. All of them are parties to contracts. They are deemed weaker compared to the other party to the contract, because he has a bigger bargaining power. In the absence of protective rules, the general rules applicable to contracts would have applied (*supra*, 2). The policy decision was thus made to offer to weaker parties jurisdictional more favourable than the rule in Article 7(1) of the Brussels Ibis Regulation.

The protection afforded to weaker parties is twofold. First, the Regulation contains special provisions limiting the enforceability of jurisdiction clauses in contracts involving weaker parties (Art. 19 for consumer contracts and Art. 23 for employment contracts: see Casebook, p. 263). Parties with stronger bargaining power may not, therefore, use their power by providing for the jurisdiction of a court which would disfavour the weaker party.

Secondly, the jurisdictional rules applicable in the absence of choice of court agreement (and which apply often even if the parties have stipulated a choice of court agreement, since the enforceability of such agreements is limited) also favour the weaker party. However, these jurisdictional rules do not offer the same protection to the different kind of weaker parties. In particular, the protection afforded to consumers is different than the protection afforded to employees.

1 Jurisdictional rules over consumer contracts (Art 17-19)

Brussels Ibis Regulation (2012)

Article 18

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled.
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Art 18 offers a remarkable protection to the consumers benefiting from this rule. Pursuant to Art 18(1), the consumer may sue in the courts of the place of his domicile.

Pursuant to Art. 18(2), the consumer may only be sued in the court of his domicile. The consumer is thus entitled to litigate in his home court if s/he so chooses. This is a remarkable advantage in international litigation. In any other context, it would be considered as an exorbitant head of jurisdiction. This explains why the European lawmaker has limited the scope of this protection, by defining consumer contracts restrictively, but also by affording the protection of the rule to certain consumer contracts only.

1.1 Concept of Consumer

Art. 17 (see text below) defines a consumer as a person acting for a purpose which can be regarded as being outside his trade or profession, which necessarily implies that the consumer is a natural person. The European Court of Justice has clarified that the concept of consumer contract also implies that the other party is a professional acting within the scope of his trade (Case C-508/12, *Vapenik*). An issue arises for contracts which are only partly concerned with the trade of a given person. The ECJ has interpreted the scope of Section 4 restrictively and ruled that, unless the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety, such a contract could not benefit from the special rules of Section 4 (Case C-464/01, *Gruber*; Case C- 498/16, *Schrems II*).

1.2 Scope of Protection

Consumers undoubtedly have a lower bargaining power than the professional from whom they buy a given product. Yet, the special rules in the Brussels Ibis Regulation do not protect all consumers, but only some of them.

Brussels Ibis Regulation (2012)

SECTION 4 Jurisdiction over consumer contracts

Article 17

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:
   (a) it is a contract for the sale of goods on instalment credit terms;
   (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or;
   (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.
2. (…).
3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

NOTES AND QUESTIONS

1. The initial version of the provision in the Brussels Convention only referred to the cases covered by subparagraphs (a) and (b) of Article 17(1) of the Brussels Ibis Regulation (Section 4 was labelled 'Jurisdiction in matters relating to instalment sales and loans'). The protection afforded to consumers was thus limited to two categories of contracts. The scope of the protection was gradually extended in 1978 and in 2001 by adding a general clause in subparagraph (c) covering eventually any kind of contract.

2. Consumers are entitled to benefit from the specific jurisdictional rule in Art. 18 where the contract concluded is one of those referred to by Article 17(1)(a) and (b) without any further requirement. In contrast, subparagraph (c) applies upon two conditions. Can you identify what these two conditions are?

3. Note that Article 17(3) excludes certain contracts from Section 4 and thus from the protection afforded to consumers.

4. Art. 18 only applies to consumer contracts. It does not apply to tort actions brought by consumers against traders: see Case C-375/13, *Kolassa*, *supra* p. 34.

The most important provision in Art. 17 is obviously Art. 17(1)(c), which covers a wide range of contracts. The rationale of the provision is that a distinction should be made between consumer contracts concluded with professionals who made efforts to sell their products or provide services in the State of the domicile of the consumer and professionals who did not.

Where a professional made no efforts to market his products or services in the Member State of the domicile of the consumer, it means that the consumer contract was concluded because either the consumer actively searched better opportunities in other Member States (for instance, s/he compared the prices of cars or furniture and found better deals abroad), or travelled to another Member State for another reason and decided to buy a product during this trip. These consumers were not deemed worthy of receiving any particular protection. Section 4 does not apply. Art. 7(1) and 25 do.

In contrast, where a professional has specifically targeted other Member States, consumers domiciled in those States might have responded positively to these efforts and travelled to his shop or premises as a consequence of the professional targeting their Member States. Consumers were thus essentially passive, at least initially. They are protected by Section 4, and will be able to litigate in their home State.

Before the rise of the internet, the predecessor of Art. 17 restricted the scope of the general clause (which was still restricted to two – broad – categories of contracts at the time) as follows:

1968 Brussels Convention (as amended in 1978)

Article 13

In proceedings concerning a [consumer] contract (…), jurisdiction shall be determined by this Section, (…), if it is:

(…)

3. any other contract for the supply of goods or a contract for the supply of services, and

(a) in the State of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and

(b) the consumer took in that State the steps necessary for the conclusion of the contract.

The commercial practice contemplated by the European lawmaker was essentially that of the sending of advertising and specific invitations by post. Today, however, most professionals would direct their activity to other Member States through their website. How does the rule operate in the context of the internet?

CASE

Court of Justice of the European Union, 7 December 2010, *Pammer* and *Hotel Alpenhof* (Cases C-585/08 and C-144/09)

Facts – : Mr Heller, who resided In Germany, found about Austrian hotel Alpenhof on the Internet, and booked several rooms by email. Mr Heller was unhappy with the service and left without paying his bill. Hotel Alpenhof sued Mr Heller in an Austrian court for payment of € 5,000.

Judgment – :
61 The wording of Article 15(1)(c) [*now Article 17(1)(c)*] must be considered to encompass and replace the previous concepts of a 'specific invitation addressed' to the consumer and 'advertising', covering, as the words 'by any means' indicate, a wider range of activities.

62. This change, which strengthens consumer protection, was made because of the development of internet communication, which makes it more difficult to determine the place where the steps necessary for the conclusion of the contract are taken and at the same time increases the vulnerability of consumers with regard to traders' offers.

63 It is not clear, however, from [Article 17(1)(c) of the Brussels Ibis Regulation] whether the words 'directs such activities to' refer to the trader's intention to turn towards one or more other Member States or whether they relate simply to an activity turned *de facto* towards them, irrespective of such an intention.

64. The question which this raises is whether intention on the part of the trader to target one or more other Member States is required and, if so, in what form such an intention must manifest itself.

65. That intention is implicit in certain methods of advertising.

66 The Court has held that 'advertising' and 'specific invitation addressed' within the meaning of Article 13 of the Brussels Convention cover all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman (Case C-96/00, *Gabriel*, paragraph 44).

67 The classic forms of advertising expressly referred to in the previous paragraph involve the outlay of, sometimes significant, expenditure by the trader in order to make itself known in other Member States and they demonstrate, on that very basis, an intention of the trader to direct its activity towards those States.

68 That intention is not, on the other hand, always present in the case of advertising by means of the internet. Since this method of communication inherently has a worldwide reach, advertising on a website by a trader is in principle accessible in all States, and, therefore, throughout the European Union, without any need to incur additional expenditure and irrespective of the intention or otherwise of the trader to target consumers outside the territory of the State in which it is established. (…)

72 Whilst seeking to confer further protection on consumers, the European Union legislature did not go as far as to lay down that mere use of a website, which has become a customary means of engaging in trade, whatever the territory targeted, amounts to an activity 'directed to' other Member States which triggers application of the protective rule of jurisdiction referred to in [Article 17(1)(c) of the Brussels Ibis Regulation]. (…)

75 (…) it must be held that, in order for [Article 17(1)(c) of the Brussels Ibis Regulation] to be applicable, the trader must have manifested its intention to establish commercial relations with consumers from one or more other Member States, including that of the consumer's domicile.

76 It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with those consumers.

77 Such evidence does not include mention on a website of the trader's email address or geographical address, or of its telephone number without an international code. Mention of such information does not indicate that the trader is directing its activity to one or more other Member States, since that type of information is, in any event, necessary to enable a consumer domiciled in the Member State in which the trader is established to make contact with it. (…)

80 Among the evidence establishing whether an activity is 'directed to' the Member State of the consumer's domicile are all clear expressions of the intention to solicit the custom of that State's consumers. (…)

83 Other items of evidence, possibly in combination with one another, are capable of demonstrating the existence of an activity 'directed to' the Member State of the consumer's domicile. In cases such as those in the main proceedings, the following features, which have been invoked before the Court and the list of which is not exhaustive, would, subject to the relevant national court ascertaining that they are present, constitute evidence of an activity 'directed to' one or more other Member States within the meaning of [Article 17(1)(c) of the Brussels Ibis Regulation]: the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.

84 So far as concerns the language or the currency used, the joint declaration of the Council and the Commission mentioned in paragraph 11 of the present judgment and reproduced in recital 24 in the preamble to Regulation No 593/2008 states that they do not constitute relevant factors for the purpose of determining whether an activity is directed to one or more other Member States. That is indeed true where they correspond to the languages generally used in the Member State from which the trader pursues its activity and to the currency of that Member State. If, on the other hand, the website permits consumers to use a different language or a different currency, the language and/or currency can be taken into consideration and constitute evidence from which it may be concluded that the trader's activity is directed to other Member States. (…)

92 In view of the foregoing considerations, the answer to be given to the referring court is that, in order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of [Article 17(1)(c) of the Brussels Ibis Regulation], 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.

93 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, 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.

NOTES AND QUESTIONS

1. Article 17(1)(c) of the Brussels Ibis Regulation does not mention anymore classic forms of advertising. Does it still encompass them?

2. Does the operation of Article 17(1)(c) of the Brussels Ibis Regulation require that the professional intended to direct his activities towards other Member States? How does such intention manifest itself for classic forms of advertising such as sending such materials by post?

3. When advertising through the internet, how does such intention manifest itself? Is it enough that the website is accessible in the country of the domicile of the consumer? Which factors are relevant for ascertaining such intention? Is the currency used a relevant factor? Is language a relevant factor? Was language relevant in the *Alpenhof* case?

4. The initial draft of the Brussels I Regulation required that the trader had 'purposefully directed his activity in a substantial way' to other Member States, including the Member State of the consumer's domicile. This was rejected by the Parliament as the consumer would have been required to prove the extent of the intention of the trader's intention to develop his activity. Such wording would have considerably weakened consumer protection.

CASE

Court of Justice of the European Union, 17 October 2013, *Emrek v. Sabranovic* (Case C-218/12)

Facts – : Mr Emrek, who was domiciled in Germany was looking for a second-hand motor vehicle. Mr Sabranovic operated a business selling second-hand motor vehicles in a French town close to the German border. At the material time, he had an Internet site which contained the contact details for his business, including French telephone numbers and a German mobile telephone number, together with the respective international codes. However, Emrek heard about the business of Sabranovic through acquaintances, and not through the website. He went to France and bought a car. After a dispute arose, Emrek sued Sabranovic in Germany.

Judgment – :
19 As a preliminary point, it must be stated that, in its judgment in Case C-190/11 *Mühlleitner* [2012] ECR, the Court has already answered the second question referred by the national court in the present case, holding that Article 15(1)(c) of Regulation No 44/2001 [*now Article 17(1)(c) of the Brussels Ibis Regulation*] must be interpreted as meaning that it does not require the contract between the consumer and the trader to be concluded at a distance.

20 Therefore, it is appropriate to examine only the first question, by which that court asks essentially whether [Article 17(1)(c) of the Brussels Ibis Regulation] must be interpreted as meaning that it requires the existence of a causal link between the means used to direct the commercial or professional activity to the Member State in which the consumer is domiciled, namely an Internet site, and the conclusion of the contract with that consumer.

21 In that connection, it must be observed, in the first place, that, under [Article 17(1)(c) of the Brussels Ibis Regulation], its application is not expressly subject to the existence of such a causal link.

22 It is clear from the wording of that provision that it applies where two specific conditions are satisfied. It is necessary, first, that the trader pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State and, secondly, that the contract at issue falls within the scope of such activities. (…)

24 In the second place, as regards the teleological interpretation of [Article 17(1)(c) of the Brussels Ibis Regulation], it must be observed that the addition of the unwritten condition concerning the existence of a causal link such as that mentioned in paragraph 20 of the present judgment would be contrary to the objective pursued by that provision, that is the aim of protecting consumers, who are regarded as the weaker parties to contracts concluded between them and a trader.

25 As the European Commission submits and the Advocate General observes in point 25 of his Opinion, it must be held that the requirement of prior consultation of the Internet site by the consumer could give rise to problems of proof, in particular in cases where the contract was not concluded at a distance through that site, as in the main proceedings. In such a situation, difficulties related to proof of the existence of a causal link between the means used to direct the activity, that is an Internet site, and the conclusion of a contract, would tend to dissuade consumers from bringing actions before the national courts under [Articles 17 and 18 of the Brussels Ibis Regulation] and would weaken the protection of consumers which those provisions seek to achieve.

26 However, as the Advocate General also stated in point 26 of his Opinion, although the causal link is not an unwritten condition to which the application of [Article 17(1)(c)] is subject, the fact remains that it may constitute strong evidence which may be taken into consideration by the national court when determining whether the activity is in fact directed to the Member State in which the consumer is domiciled.

28 (…), in *Mühlleitner*, although it held that the application of [Article 17(1)(c)] is not subject to the conclusion of a consumer contract at a distance, in paragraph 44 of that judgment, the Court added to the non-exhaustive list other factors concerning, in particular, the 'establishment of contract at a distance' and the 'conclusion of a consumer contract at a distance', which are of such a nature as to establish that the contract relates to an activity directed to the Member State of the consumer's domicile.

29 To avoid an extension of the scope of [Article 17(1)(c) of the Brussels Ibis Regulation], it must be held that the causal link which is the subject matter of the first question must be regarded as constituting evidence of 'directed activity' in the same way as the establishment of contract at a distance, which gives rise to the consumer being contractually bound at a distance.

30 Furthermore, as the Advocate General observed in points 33 to 38 of his Opinion, the fact that a trader, as in the main proceedings, is established in one Member State close to the border of another Member State, in an urban area extending on both sides of the border, and that he uses a telephone number allocated by the other Member State, by making it available to potential clients domiciled in that other State to save them the cost of an international call, may also constitute evidence that his activity is 'directed to' that other Member State. (…)

32 Having regard to the foregoing considerations, the answer to the first question is that [Article 17(1)(c) of the Brussels Ibis Regulation] must be interpreted as meaning that it does not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile, namely an internet site, and the conclusion of the contract with that consumer. However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity.

NOTES AND QUESTIONS

1. Does the protection of consumers afforded by Section 4 only apply to contracts concluded as a consequence of the efforts of the professional to direct his activities towards the state where the consumer is domiciled? In this case, is Mr Emrek protected by Section 4 and Art. 18?

2. How important is it that Mr Emrek did not conclude his contract on the internet, but went to the business of Sabranovic and concluded the contract there?

3. What is relevant to determine the application of Section 4: is it the conduct of the professional, or the conduct of the customer? In this case, was Mr Emrek a passive or an active consumer? Does it matter?

FURTHER REFERENCES

M. Wilderspin , 'Consumer contracts', in *Encyclopedia of Private International Law* (Edward Elgar 2017).

2 Jurisdiction over contracts of employment (Art 20-22)

CASE

Court of Justice of the European Communities, 15 January 1987 *Shenavai v. Kreischer* (Case 266/85)

Judgment:

16. In that connection it should first be observed that contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts — even those for the provision of services — by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements. It is on account of those particularities that the court of the place in which the characteristic obligation of such contracts is to be performed is considered best suited to resolving the disputes to which one or more obligations under such contracts may give rise.

NOTES AND QUESTIONS

1. The 1968 Brussels Convention did not contain any specific rule for disputes arising out of individual employment contract. It is the European Court of Justice which identified the need for a special regime. At the time, jurisdiction in contractual matters was based on the place of performance of the obligation in question. Instead, the ECJ established that the default rule for employment contract would be based on the characteristic obligation of the contract, namely the place where the work was carried out. This regime was then codified by the European legislator in the Brussels I and later the Brussels Ibis Regulations.

2. As already pointed out (*supra*, p. 42), the Preamble of the Brussels Ibis Regulation asserts that employees are weaker parties, and that special rules protecting them are necessary. Yet, the protection is quite different from the protection afforded to consumers: employees may not sue in the courts of their domicile, but rather in the courts of the place where they habitually carry out their work. Is this rule protective for employees? Isn't the place of performance of the contract an objective factor? See *infra Mulox*, para. 19.

3. In truth, the real danger with contracts involving weaker parties is that one party could impose unfair terms on the other. The issue is addressed by limiting the enforceability of jurisdiction clauses in such contracts: see Art. 23 (Casebook, p. 263).

4. Section 5 also favours employees by granting them more options than employers: *infra*, 2.2.

2.1 Material scope: concept of contract of employment

CASE

Court of Justice of the European Union, 11 April 2019 *Bosworth and Hurley v. Arcadia Petroleum Limited and Others* (Case 603/17)

Judgment:

23. In order to determine whether the provisions of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention are applicable to a situation such as that at issue in the main proceedings, it is necessary to consider whether Mr Bosworth and Mr Hurley can be regarded as having been party to an 'individual contract of employment', within the meaning of Article 18(1) of that convention, with one of the companies in the Arcadia Group, and whether they can therefore be classified as 'employees', within the meaning of Article 18(2) of that convention (…).

24. In that regard, it should be pointed out that that any such classification cannot be determined on the basis of national law (judgment of 10 September 2015, *Holterman Ferho Exploitatie and Others*, C-47/14, paragraph 36) and that, in order to ensure that the Lugano II Convention, in particular Article 18 thereof, is fully effective, the legal concepts it uses must be given an independent interpretation common to all the contracting parties (…).

25. As regards the concept of 'employee', it must also be recalled that, as the Court has consistently held, that concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration (see, in particular, judgment of 20 September 2007, *Kiiski*, C-116/06, paragraph 25 and the case-law cited).

26. It follows that an employment relationship implies the existence of a hierarchical relationship between the worker and his employer, and that the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties (judgments of 10 September 2015, *Holterman Ferho*, C-47/14, para. 46, and of 20 November 2018, *Sindicatul Familia Constanţa and Others*, C-147/17, para. 42).

27. It should, moreover, be noted that, according to the wording of the provisions of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention, the conclusion of a contract is not a condition for the application of the rules of special jurisdiction laid down in those provisions, and therefore that, as the Advocate General, in essence, indicated in points 34 to 36 of his Opinion, the absence of any formal contract does not preclude the existence of an employment relationship that falls within the concept of 'individual contract of employment' within the meaning of those provisions.

28. However, such a relationship can be treated as an 'individual contract of employment' within the meaning of the provisions of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention only if there is a relationship of subordination between the company and the director concerned.

29. In the present case, it should be noted that, according to the information provided by the referring court, Mr Bosworth and Mr Hurley were, respectively, chief executive officer and chief financial officer of the Arcadia Group, that they were directors of Arcadia London, Arcadia Singapore and Arcadia Switzerland, that they were each party to a contract of employment with one of those companies drafted by themselves or at their direction and that they acted at all material times on behalf of all Arcadia Group companies.

30. It is also apparent from the order for reference that Mr Bosworth and Mr Hurley exercised control over by whom, where and on what terms they were employed.

31. In the circumstances, it appears that Mr Bosworth and Mr Hurley had an ability to influence Arcadia that was not negligible and that, therefore, it must be concluded that there was no relationship of subordination (see, to that effect, judgment of 10 September 2015, *Holterman Ferho*, C-47/14, paragraph 47), irrespective of whether or not they held part of the share capital of Arcadia.

32. The fact that Mr Bosworth and Mr Hurley were answerable to the Arcadia Group's shareholders who, through Farahead Holdings, had the power to 'hire and fire' them, is irrelevant in that regard.

33. As the Advocate General noted in point 46 of his Opinion, neither the general directives which a director may be given by the shareholders of the company he directs for the orientation of that company's business nor the legal mechanisms for control by shareholders point, in themselves, to the existence of a relationship of subordination, and therefore the mere fact that the shareholders have the power to revoke a directorship is not sufficient for the conclusion to be drawn that such a relationship exists.

34. It follows from this that a contract concluded between a company and the director of that company does not constitute, in circumstances such as those at issue in the main proceedings, an 'individual contract of employment' within the meaning of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention.

NOTES AND QUESTIONS

1. This is a case about the 2007 Lugano Convention (Lugano II), which applies in disputes between parties domiciled in Switzerland, Norway, Iceland and the EU. Its provisions mirror closely those of the Brussels I Regulation. When they are the same, the CJEU interprets them in the same manner as the relevant Brussels Regulation, including by relying on cases interpreting the Brussels Regulation.

2. How does the ECJ define an employment contract? What are its essential features? Is it relevant whether the applicable national law characterizes the contract as a contract of employment?

3. Is the manager of a company an employee in the meaning of Section 5 of the Brussels Ibis Regulation? Why?

4. Suppose the manager of a company also holds 70% of the shares of the company. Under the applicable national law, he may conclude a contract of employment with the company, in order to receive certain social security benefits. Is the manager an employee in the meaning of the Brussels Ibis Regulation?

2.2 The Jurisdictional Rules

Brussels Ibis Regulation (2012)

SECTION 5 Jurisdiction over individual contracts of employment

Article 21

1. An employer domiciled in a Member State may be sued:
(a) in the courts of the Member State in which he is domiciled; or
(b) in another Member State:
(i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
(ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.

Article 22
1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled. (…)

NOTES AND QUESTIONS

1. In which courts may employees sue employers? Do employers have the same option?

2. The ECJ has ruled in *Glaxosmithkline* (Case 462/06) that the provisions of Section 5 'are not only specific but also exhaustive'. What does this mean?

3. Read Art. 21(1)(b). Doesn't the language of the provision suggest that the court of the habitual place of work only has jurisdiction when the employee carried out his work in a single country? This would mean that all employees working across Europe (and beyond) would only have the possibility to sue, in addition to the court of the domicile of the employer, in the court of the place where they were hired. Often, this will be the same place. And if it is not, it could give jurisdiction to the courts of a country where you met with your employer for the first time for reasons of convenience. Read the following case and assess how the ECJ addressed the issue.

CASE

Court of Justice of the European Union, 13 July 1993 *Mulox v. Geels* (Case 125/92)

Judgment:

18. Furthermore, in *Ivenel* and *Six Constructions*, the Court took the view that, in interpreting that provision of the Convention [*now Art. 21 of the Brussels Ibis Regulation*], account must be taken of the concern to afford proper protection to the party to the contract who is the weaker from the social point of view, in this case the employee.

19. Proper protection of that kind is best assured if disputes relating to a contract of employment fall within the jurisdiction of the courts of the place where the employee discharges his obligations towards his employer. That is the place where it is least expensive for the employee to commence, or defend himself against, court proceedings.

20. It follows that in relation to contracts of employment, the place of performance of the relevant obligation must be interpreted as meaning, for the purposes of [Article 21(1) of the Regulation], the place where the employee actually performs the work covered by the contract with his employer. (…)

22. In that connection, the Court has held that, where various obligations derive from the same contract and form the basis of the plaintiff's action, it is the principal obligation which must be relied on in order to determine jurisdiction (*Shenavai*, paragraph 19).

23. It follows that [Article 21(1) of the Regulation] cannot be interpreted as conferring concurrent jurisdiction on the courts of each Contracting State in whose territory the employee performs part of his work.

24. Where the work entrusted to the employee is performed in the territory of more than one Contracting State, it is important to define the place of performance of the contractual obligation, within the meaning of [Article 21(1) of the Regulation], as being the place where or from which the employee principally discharges his obligations towards his employer.

NOTES AND QUESTIONS

1. If an employee carries out his work on the territory of several Member States, does the court of the place of the business which engaged the employee have jurisdiction?

2. If the contract of employment provides that the work should be performed in one state, but the employee has actually been performing it elsewhere, where is the habitual place of work?

3. Which Member State has jurisdiction when the employment contract was never performed? The Court of Justice recently ruled that the intention of the parties as to the place of performance is the only element which makes it possible to establish a habitual place of work, this interpretation allowing a high degree of predictability. The competent court would thus be that of the Member State in which the employee was required to discharge the essential part of his obligations pursuant to the employment contract (see *BU v. Markt24 GmbH*, Case 804/19).

2.2.1 Plurality of Member States of performance with an effective centre of activities

CASE

Court of Justice of the European Union, 9 January 1997 *Rutten* (Case 383/95)

Facts: a Dutch citizen worked for an English company in the Netherlands but also, for a third of his working time, in the UK, in Belgium, in Germany and in the USA. He works from an office established at his domicile to which he returned to after each business trip. When his employer terminated the contract, he brought proceedings before a Dutch court. The Hoge Raad substantially asked the Court of Justice what criteria should determine the habitual place of work when an employee carries out his work in more than one country.

Judgment:

23. Having regard to the requirements set out in the previous paragraph, where a contract of employment is performed in several Contracting States, Article 5(1) of the Convention, as amended by the San Sebastian Convention [*now Art. 21 of the Brussels Ibis Regulation*], must be understood to refer to the place where the employee has established the effective centre of his working activities and where, or from which, he in fact performs the essential part of his duties vis-à-vis his employer.

25. When identifying that place in the particular case, which is a matter for the national court in the light of the facts before it, the fact that the employee carried out almost two-thirds of his work in one Contracting State — the remainder of his work being performed in several other States — and that he has an office in that Contracting State where he organized his work for his employer and to which he returned after each business trip abroad, as was the case in the main proceedings, is relevant.

26. In a situation such as that at issue in the main proceedings, that is the place where the employee established the effective centre of his activities under the contract of employment concluded with his employer. That place must, therefore, be deemed, for the purposes of the application of [Article 21(1) of the Regulation], to be the place where the employee habitually carries out his work.

27. Accordingly, [Article 21(1) of the Regulation] must be interpreted as meaning that where, in the performance of a contract of employment an employee carries out his work in several Contracting States, the place where he habitually carries out his work, within the meaning of that provision, is the place where he has established the effective centre of his working activities. When identifying that place, it is necessary to take into account the fact that the employee spends most of his working time

in one of the Contracting States in which he has an office where he organizes his work for his employer and to which he returns after each business trip abroad.

NOTES AND QUESTIONS

1. How does the court identify the place where the employee habitually carries out his work? What are the relevant factors to be considered?

2. Is the scope of the ruling limited to certain employees working on the territory of several States?

3. Article 19 of the Brussels I Regulation referred to 'the place where the employee habitually carries out his work'. The Brussels Ibis Regulation was amended, however, and Article 21 refers 'the place where or from where the employee habitually carries out his work'. How has the rule evolved? Does the current rule in the Brussels Ibis Regulation codify the rulings in *Mulox* and *Rutten*, or depart from them?

2.2.2 Plurality of Member States of performance without an effective centre of activities

2.2.2.1. Working at sea

CASE

Court of Justice of the European Communities, 27 February 2002 *Weber v. Universal Ogden Services Ltd* (Case 37/00)

Facts: Mr Weber worked as a cook on mining vessels or installations stationed in the Netherlands continental shelf, then in others stationed in Danish territorial waters. He started proceedings in the Netherlands for wrongful termination of his contract. But were the Netherlands the country where Mr Weber habitually worked?

Judgment:

48. Furthermore, unlike the employees in *Mulox IB C* and *Rutten*, Mr Weber did not have an office in a Contracting State that constituted the effective centre of his working activities or from which he performed the essential part of his duties vis-à-vis his employer. (…)

50. That being so, in a case such as that in the main proceedings, the relevant criterion for establishing an employee's habitual place of work, for the purposes of Article 5(1) of the Brussels Convention [*now Art. 21 of the Brussels Ibis Regulation*], is, in principle, the place where he spends most of his working time engaged on his employer's business.

51. In a case such as that in the main proceedings, in which the employee continuously performed the same job for his employer, namely that of cook, throughout the entire period of employment in question, any qualitative criteria relating to the nature and importance of work done in various places within the Contracting States are irrelevant.

52. The logical implication of the temporal criterion mentioned in paragraph 50 of the present judgment, which is based on the relative duration of periods of time spent working in the various Contracting States in question, is that all of an employee's term of employment must be taken into account in establishing the place where he carries out the most significant part of his work and where, in such a case, his contractual relationship with his employer is centred.

53. It would only be if, taking account of the facts of the present case, the subject-matter of the dispute were more closely connected with a different place of work that the principle set out in the preceding paragraph would fail to apply.

NOTES AND QUESTIONS

1. How does the court define the habitual place of work of Mr Weber? Is it important how much time he worked in each country? Is it important how much he earned in each country?

2. Are there cases where the habitual place of work will be defined differently (para. 53)? Could you imagine one?

3. Does *Weber* overrule or complement *Rutten*?

4. The Brussels Ibis Regulation contains a subsidiary rule of jurisdiction at Article 21(2)(b), which provides that if the employee does not habitually carry out his work in the same country, the competent courts are those where the business which engaged the employee is or was situated. After *Rutten* and *Weber*, do you think that this rule remains relevant? Are there cases where it could be applied?

2.2.2.2. International transports

CASE

Court of Justice of the European Union, 15 March 2011 *Koelzsch v. État du Grand-Duché de Luxembourg* (Case 29/10)

Facts: Mr Koelzsch is a German heavy goods vehicle driver working for Gasa, the subsidiary of a Danish company. The employment contract refers to Luxembourg employment law and a clause confers exclusive jurisdiction to Luxembourg courts. Mr Koelzsch sues Gasa before Luxembourg courts for unfair dismissal and compensation. Although the question referred to the CJEU related to the determination of the applicable law, the Court interpreted the concept of habitual place of work.

Judgment:

33. Moreover, such an interpretation must not disregard that relating to the criteria set out in Article 5(1) of the Brussels Convention where they lay down the rules for determining jurisdiction for the same matters and set out similar concepts. It follows from the preamble to the Rome Convention that it was concluded in order to continue, in the field of private international law, the work of unification of law set in motion by the adoption of the Brussels Convention (…).

42. (…) in so far as the objective of Article 6 of the Rome Convention is to guarantee adequate protection for the employee, that provision must be understood as guaranteeing the applicability of the law of the State in which he carries out his working activities rather than that of the State in which the employer is established. It is in the former State that the employee performs his economic and social duties and, as was noted by the Advocate General in point 50 of her Opinion, it is there that the business and political environment affects employment activities. Therefore, compliance with the employment protection rules provided for by the law of that country must, so far as is possible, be guaranteed.

48. Accordingly, in the light of the nature of work in the international transport sector, such as that at issue in the main proceedings, the referring court must, as proposed by the Advocate General in points 93 to 96 of her Opinion, take account of all the factors which characterize the activity of the employee.

49. It must, in particular, determine in which State is situated the place from which the employee carries out his transport tasks, receives instructions concerning his tasks and character his work, and the place where his work tools are situated. It must also determine the places where the transport is principally carried out, where the goods are unloaded and the place to which the employee returns after completion of his tasks.

50. In those circumstances, the answer to the question referred is that Article 6(2)(a) of the Rome Convention must be interpreted as meaning that, in a situation in which an employee carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterize that activity, the employee performs the greater part of his obligations towards his employer.

NOTES AND QUESTIONS

1. Why does the Court underline 'the nature of work in the international transport sector'? Why would it deserve a specific jurisdictional rule?

2. What factors should national courts use to determine the place of habitual performance in the context of international transport?

CASE

Court of Justice of the European Union, 14 September 2017, *Nogeira e.a.* (Cases 168/16 and 169/16)

Facts: Mr Moreno concluded an employment contract in Spain with Ryanair, an airline having its head office in Ireland. The contract of Mr Moreno provided for the jurisdiction of Irish courts, that his work was regarded as being carried out in Ireland, that his home base would be a Belgian airport and that he should live near this airport. Mr Moreno brought proceedings against his employer in Belgium for payment of various heads of compensation.

Ms Nogeira and others concluded an employment contract with an Irish company which seconded them to the same airline. After being dismissed, they also sued their employer in Belgium.

Judgment:

58. As regards an employment contract performed in the territory of several Contracting States and where there is no effective centre of professional activities from which an employee performs the essential part of his duties vis-à-vis his employer, the Court has held that Article 5(1) of the Brussels Convention must — in view of the need to establish the place with which the dispute has the most significant link, so that it is possible to identify the courts best placed to decide the case in order to afford proper protection to the employee as the weaker party to the contract and to avoid multiplication of the courts having jurisdiction — be interpreted as referring to the place where, or from which, the employee actually performs the essential part of his duties vis-à-vis his employer. That is the place where it is least expensive for the employee to commence proceedings against his employer or to defend such proceedings and where the courts best suited to resolving disputes relating to the contract of employment are situated (see, to that effect, judgment of 27 February 2002, *Weber*, C-37/00, paragraph 49 and the case-law cited).

59. Thus, in such circumstances, the concept of 'place where the employee habitually carries out his work' enshrined in Article 19(2)(a) of the Brussels I Regulation [*now Art. 21(1)(b) of the Brussels Ibis*

Regulation] must be interpreted as referring to the place where, or from which, the employee in fact performs the essential part of his duties vis-à-vis his employer.

60. In the present case, the disputes in the main proceedings concern employees employed as members of the air crew of an airline or assigned to the latter. Thus, the court of a Member State seised of such disputes, when it is not able to determine with certainty the 'place where the employee habitually carries out his work', must, in order to assess whether it has jurisdiction, identify 'the place from which' that employee principally discharged his obligations towards his employer. (…)

62. That circumstantial method makes it possible not only to reflect the true nature of legal relationships, in that it must take account of all the factors which characterise the activity of the employee (see, by analogy, judgment of 15 March 2011, *Koelzsch*, C-29/10, para. 48), but also to prevent a concept such as that of 'place where, or from which, the employee habitually performs his work' from being exploited or contributing to the achievement of circumvention strategies (see, by analogy, judgment of 27 October 2016, *D'Oultremont and Others*, C-290/15, para. 48 and the case-law cited).

63. As observed by the Advocate General in point 85 of his Opinion, as regards work relationships in the transport sector, the Court, in the judgments of 15 March 2011, *Koelzsch* (C-29/10, paragraph 49), and of 15 December 2011, *Voogsgeerd* (C-384/10, paragraphs 38 to 41), mentioned several indicia that might be taken into consideration by the national courts. Those courts must, in particular, determine in which Member State is situated (i) the place from which the employee carries out his transport-related tasks, (ii) the place where he returns after his tasks, receives instructions concerning his tasks and organises his work, and (iii) the place where his work tools are to be found.

64. In that regard, in circumstances such as those at issue in the main proceedings, and as pointed out by the Advocate General in point 102 of his Opinion, the place where the aircraft aboard which the work is habitually performed are stationed must also be taken into account.

65. Consequently, the concept of 'place where, or from which, the employee habitually performs his work' cannot be equated with any concept referred to in another act of EU law.

66. As regards the air crew, assigned to or employed by an airline, that concept cannot be equated with the concept of 'home base', within the meaning of Annex III to Regulation No 3922/91. Indeed, the Brussels I Regulation does not refer to Regulation No 3922/91, nor does it have the same objectives, the latter regulation aiming to harmonise technical requirements and administrative procedures in the field of civil aviation safety.

67. The fact that the concept of 'place where the employee habitually carries out his work', within the meaning of [Article 21(1)(b) of the Brussels Ibis Regulation], cannot be equated with that of 'home base', within the meaning of Annex III to Regulation No 3922/91, does not however mean, as stated by the Advocate General in point 115 of his Opinion, that that latter concept is irrelevant in order to determine, in circumstances such as those at issue in the cases in the main proceedings, the place from which an employee habitually carries out his work. (…)

69. (…) the concept of 'home base' amounts to a factor likely to play a significant role in the identification of the indicia, referred to in paragraphs 63 to 64 of the present judgment, making it possible, in circumstances such as those at issue in the main proceedings, to determine the place from which employees habitually carry out their work and, consequently, whether a court is likely to have jurisdiction over an action brought by those employees, in accordance with [Article 21(1)(b) of the Brussels Ibis Regulation].

NOTES AND QUESTIONS

1. How does the court define the habitual place of work of aircrew? Are the destinations where they fly relevant?

2. Does the Court assimilate the concept of home base to the habitual place of work? Why? Is the home base relevant to define the habitual place of work, however?

3. How relevant were the following contractual provisions: a) that Irish courts had exclusive jurisdiction, b) that the work was carried out in Ireland, c) that the home base was in Belgium?

FURTHER REFERENCES

M. Fornasier, 'Employment contracts, Jurisdiction', in *Encyclopedia of Private International Law* (Edward Elgar 2017).

3 Territorial scope

Pursuant to Articles 5 and 6, the general rule is that the jurisdictional rules of the Regulation apply when the defendant is domiciled in the territory of a Member State. For the purposes of the Regulation, the concept of domicile includes the place of the statutory seat, the central administration or the principal place of business of legal persons (*supra*, Ch. 1 Scope of European Regime).

The European lawmaker has extended the territorial scope of the rule defining the jurisdiction to sue employers or professionals by adopting two new rules. First, the scope of the protective rules was extended to cases where the defendant is domiciled outside of the EU. For employment contracts, the scope of the rule providing for the jurisdiction of the habitual place of the work requirement was extended to cases where the employer is domiciled outside of the EU: see *supra* Art. 21(2). For consumer contracts, the scope of the rule allowing consumers to sue in the courts of their domicile was extended to cases where the other party (i.e. the professional) was domiciled outside to the EU: see Art. 18(1).

Second, the required connection between the employer and the EU was relaxed.

Brussels Ibis Regulation (2012)

Article 20
(…)

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

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NOTES AND QUESTIONS

1. The same rule is found in Art. 17(2) in the context of consumer contracts.

2. Under Art. 21(1)(a) (*supra,* 2.2), employees may also sue employers in the courts of their domicile. Why is Art. 20(2) extending the jurisdiction of the courts of Member States under the Brussels Ibis Regulation?

3. An employee signed an individual contract of employment with the Luxembourg branch of a Canadian company. He lives in France and works in Luxembourg but happens to take business trips in other Member States. Before which courts is he allowed to initiate proceedings against his employer? Which one seems the most appropriate to further his interests? Can the employer start proceedings against his employee in Luxembourg? Why?

4 Protective Measures

Litigation takes time. It often takes years to obtain a final judgment. In the meantime, many legal systems allow plaintiffs to seek a variety of provisional measures. Some of these measures aim at ensuring that the defendant does not frustrate the judicial process by concealing his assets or destroying evidence. Others aim at maintaining the status quo. Finally, certain measures anticipate the outcome of the main proceedings by granting provisionally satisfaction to the plaintiff, for instance if he can demonstrate that the likelihood that he will prevail on the merits is high.

Which court should have jurisdiction to grant such measures?

1 Jurisdiction to grant provisional, including protective measures (Art 35)

Brussels Ibis Regulation (2012)

Section 10 Provisional, including protective, measures

Article 35
Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.

Since 1968, the European law of jurisdiction has only included one provision concerned with provisional measures, which was never amended. Its meaning was only clarified in 1998 in the *Van Uden* case.

CASE

Court of Justice of the European Communities, 17 November 1998 *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line* (Case C-391/95)

Facts: A contractual dispute arose between Dutch company Van Uden and German company Firma Deco-Line. Although Dutch courts did not have jurisdiction on the merits, Van Uden applied to a Dutch court for an order against Deco-Line requiring provisional payment of four invoices. Deco-Line challenged the jurisdiction of the Dutch court.

Judgment – :
19 The first point to be made, as regards the jurisdiction of a court hearing an application for interim relief, is that it is accepted that a court having jurisdiction as to the substance of a case in accordance with [Articles 4 and 7 to 26 of the Regulation] also has jurisdiction to order any provisional or protective measures which may prove necessary.

20 In addition, [Article 35, in Section 10 of the Regulation], adds a rule of jurisdiction falling outside the system set out in [Articles 4 and 7 to 27], whereby a court may order provisional or protective

measures even if it does not have jurisdiction as to the substance of the case. Under that provision, the measures available are those provided for by the law of the State of the court to which application is made.

21 [Article 7, point 1, of the Regulation] provides that in matters relating to a contract a defendant may be sued, in a [Member State] other than that in which he is domiciled, in the courts for the place of performance of the obligation in question.

22 Thus, the court having jurisdiction as to the substance of a case under one of the heads of jurisdiction laid down in the [Regulation] also has jurisdiction to order provisional or protective measures, without that jurisdiction being subject to any further conditions (…).

37 (…) [as regards the conditions set out in the Regulation for the grant of an application under Article 35], it must be remembered that the expression 'provisional, including protective, measures' within the meaning of [Article 35 of the Regulation] is to be understood as referring to measures which, in matters within the scope of the [Regulation], are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case (Case C-261/90, *Reichert and Kockler*, paragraph 34).

38 The granting of this type of measure requires particular care on the part of the court in question and detailed knowledge of the actual circumstances in which the measures sought are to take effect. Depending on each case and commercial practices in particular, the court must be able to place a time-limit on its order or, as regards the nature of the assets or goods subject to the measures contemplated, require bank guarantees or nominate a sequestrator and generally make its authorisation subject to all conditions guaranteeing the provisional or protective character of the measure ordered (Case 125/79 *Denilauler v Couchet Frères*, paragraph 15).

39 In that regard, the Court held at paragraph 16 of *Denilauler* that the courts of the place – or, in any event, of the Member State – where the assets subject to the measures sought are located are those best able to assess the circumstances which may lead to the grant or refusal of the measures sought or to the laying down of procedures and conditions which the plaintiff must observe in order to guarantee the provisional and protective character of the measures authorised.

40 It follows that the granting of provisional or protective measures on the basis of [Article 35] is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Member State of the court before which those measures are sought.

41 It further follows that a court ordering measures on the basis of [Article 35] must take into consideration the need to impose conditions or stipulations such as to guarantee their provisional or protective character.

42 With regard more particularly to the fact that the national court has in this instance based its jurisdiction on one of the [prohibited rules of exorbitant jurisdiction], it must be borne in mind that, in accordance with the first paragraph of that article, 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 6 of Title II, that is to say [Articles 7 to 26], of the Regulation. Consequently, the prohibition (…) of reliance on rules of exorbitant jurisdiction does not apply to the special regime provided for by [Article 35].

43/45 Finally, with regard to the question whether an interim order requiring payment of a contractual consideration may be classified as a provisional measure within the meaning of [Article 35 of the Regulation], (…) it must be noted that it is not possible to rule out in advance, in a general and abstract manner, that interim payment of a contractual consideration, even in an amount corresponding to that sought as principal relief, may be necessary in order to ensure the practical effect of the decision on the substance of the case and may, in certain cases, appear justified with regard to the interests involved (…).

46 However, an order for interim payment of a sum of money is, by its very nature, such that it may preempt the decision on the substance of the case. If, moreover, the plaintiff were entitled to secure

interim payment of a contractual consideration before the courts of the place where he is himself domiciled, where those courts have no jurisdiction over the substance of the case under Articles [4 to 26 of the Regulation], and thereafter to have the order in question recognised and enforced in the defendant's State, the rules of jurisdiction laid down by the Regulation could be circumvented.

47 Consequently, interim payment of a contractual consideration does not constitute a provisional measure within the meaning of Article 35 unless, first, repayment to the defendant of the sum awarded is guaranteed if the plaintiff is unsuccessful as regards the substance of his claim and, second, the measure sought relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction of the court to which application is made.

NOTES AND QUESTIONS

1 The *Van Uden* judgment clarified that there are two sets of courts which have jurisdiction to grant provisional measures under the Brussels Ibis Regulation. Can you identify which ones, and the provision(s) of the Regulation which grants them jurisdiction?

2 Are there specific conditions limiting the availability of the jurisdictional rule in Art. 35? Which ones?

3 Do these conditions constrain courts having jurisdiction on the merits?

4 Is it important to define the concept of 'provisional measures' for determining the jurisdiction under Art. 35? Under Art. 7?

5 This case was concerned with a provisional measure which was not meant to maintain the status quo, but rather to grant provisional satisfaction to the plaintiff. Are measures anticipating the outcome of the main proceedings and granting provisional satisfaction to the plaintiff provisional measures in the meaning of Art. 35?

6 What does the requirement that there be a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction mean in the context of a provisional payment order? a provisional attachment?

7 In the common law tradition, many provisional measures are equitable injunctions. Such injunctions act *in personam*: this means that they do not affect assets, but rather order persons to do or to refrain from doing certain acts concerning assets (for instance, freezing injunctions order debtors to refrain from disposing of their assets). What is the subject matter of such interim injunctions? How is the existence of the real connecting link to be assessed?

2 Definition of provisional, including protective, measures

After *Van Uden*, the Brussels Ibis Regulation added the following definition of a 'Judgment' and the following recital:

Brussels Ibis Regulation (2012)

PREAMBLE

(33) Where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under this Regulation. However, provisional, including protective, measures which were ordered by such a court without the defendant being summoned to appear should not be recognised and enforced under this Regulation unless the judgment containing the measure is served on the defendant prior to enforcement. This should not preclude the recognition and enforcement of such measures under national law. Where provisional, including protective, measures are ordered by a court of a Member State not having jurisdiction as to the substance of the matter, the effect of such measures should be confined, under this Regulation, to the territory of that Member State.

Article 2 (a)
(…)
For the purposes of Chapter III, 'judgment' includes provisional, including protective, measures ordered by a court or tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement;

NOTES AND QUESTIONS

1 Are these new recital and provision codifying *Van Uden* or amending it?

2 The requirement that only provisional measures granted in the presence of the defendant may circulate was laid down in the *Denilauler* case in 1979 (Case 125/79). The European Commission proposed to abolish it, but it was eventually codified in 2012. The rule significantly impairs the efficiency of protective measures which typically need to be granted without warning the defendant (for instance, provisional attachments).

The definition of provisional measures is critical, as it defines the material scope of the jurisdictional rule laid down by Article 35.

CASE

Court of Justice of the European Communities, 28 April 2005 *Saint Paul Dairy Industries BV v Unibel Exser BVBA* (Case C-104/03)

Facts: In a dispute between two companies established in Belgium, one applied to a Dutch court for a provisional order to hear a witness residing in the Netherlands. The other party challenged the jurisdiction of the Dutch court.

Judgment – :

9 The questions posed by the national court, which can be examined together, ask essentially whether an application for a witness to be heard before the proceedings on the substance are initiated, with the aim of enabling the applicant to decide whether to bring a case, falls within the scope of application of the [Regulation] as being a provisional or protective measure as provided for in [Article 35] thereof. (…)

11 [Article 35 of the Regulation] authorises a court of a [Member State] to rule on an application for a provisional or protective measure even though it does not have jurisdiction to hear the substance of the case. That provision thus lays down an exception to the system of jurisdiction set up by the Regulation and must therefore be interpreted strictly.

12 The jurisdiction laid down by way of derogation by [Article 35 of the Regulation] is intended to avoid causing loss to the parties as a result of the long delays inherent in any international proceedings.

13 In accordance with that aim, the expression 'provisional, including protective, measures' within the meaning of [Article 35 of the Regulation] is to be understood as referring to measures which, in matters within the scope of the [Regulation], are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case (see Case C-261/90 *Reichert and Kockler*, paragraph 34, and *Van Uden*, cited above, paragraph 37).

14 The granting of this type of measure requires on the part of the court, in addition to particular care, detailed knowledge of the actual circumstances in which the measures are to take effect. Generally, the court must be able to make its authorisation subject to all conditions guaranteeing the provisional

or protective character of the measure ordered (see Case 125/79 *Denilauler*, paragraph 15, and *Van Uden*, paragraph 38).

15 In the main proceedings, the measure sought, namely the hearing, before a court of a [Member] State, of a witness resident in the territory of that State, is intended to establish facts on which the resolution of future proceedings could depend and in respect of which a court in another [Member] State has jurisdiction.

16 It is clear from the order for reference that that measure, the grant of which, according to the law of the [Member] State in question, is not subject to any particular conditions, is intended to enable the applicant to decide whether to bring a case, determine whether it would be well founded and assess the relevance of evidence which might be adduced in that regard.

17 In the absence of any justification other than the interest of the applicant in deciding whether to bring proceedings on the substance, clearly the measure sought in the main proceedings does not pursue the aim of [Article 35 of the Regulation] as set out in paragraphs 12 and 13 of the present judgment.

18 It should be noted that the grant of such a measure could easily be used to circumvent, at the stage of preparatory inquiries, the jurisdictional rules set out in [Articles 4 and 7 to 26 of the Regulation].

NOTES AND QUESTIONS

1 Was the order to hear a witness a provisional measure in the meaning of Art 35 in this case? Why? What was the consequence in jurisdictional terms?

2 Can certain orders to hear witnesses be provisional measures, or is it excluded?

Brussels Ibis Regulation (2012)

PREAMBLE

(25) The notion of provisional, including protective, measures should include, for example, protective orders aimed at obtaining information or preserving evidence as referred to in Articles 6 and 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. It should not include measures which are not of a protective nature, such as measures ordering the hearing of a witness. This should be without prejudice to the application of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Does this new recital amend or codify *St Paul Dairy*? To which measures does Article 35 apply now: provisional, including protective measures, or only protective measures?

The taking of evidence varies a great deal among Member States. In certain Member States, it is essentially concerned with hearing witnesses. In others, witnesses are rarely heard in civil and commercial proceedings, but courts routinely appoint judicial experts to make determination of facts. Is the appointment of such experts a provisional measure in the meaning of Art. 35? Read the two following cases and explain why they differ.

CASE

French *Cour de cassation*, 4 May 2011, *Ceia Spa*[2]

On the sole argument, taken in its first limb:

On the ground of Article 31 of the Brussels I Regulation [now Article 35 Brussels Ibis Regulation];

Whereas Mr X..., who manages a business [*fonds de commerce*] in France, concluded in 1997, 2001 and 2004, various exclusive concession contracts with Italian company Ceia spa and its subsidiary in France Ceia international; on 28 April 2009, Mr. X brought proceedings against these companies before the commercial court of Pontoise on the ground of alleged contractual breaches and sought the appointment of a judicial expert on the basis of Art. 145 of the French Code of Civil Procedure; as the parties had agreed on the jurisdiction of the court of Arezzo (Italy), the [French] court dismissed the application under [Article 35 of the Brussels Ibis Regulation] as interpreted by the CJEU.

Whereas, to allow the appeal lodged against the judgment and appoint the judicial expert, the court of appeal found that the requested measure falls within the scope of [Article 35 of the Brussels Ibis Regulation], since the required connection between the requested measure and the French court exists;

By ruling as it did, without inquiring whether the measure was intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case by safeguarding evidence which was in danger of disappearing, the court of appeal failed to assess whether all the requirements for applying [Article 35 of the Brussels Ibis Regulation] were met;

For these reasons: quashes and sets aside the judgment of the Court of appeal of 6 January 2010.

CASE

French *Cour de cassation*, 14 March 2018, *Soc. Haras des Coudrettes*[3]

Facts: During an equestrian competition in Switzerland, a stallion owned by a Swiss company entered into the box of a mare and injured it. The owner of the mare, French company Soc. Haras des Coudrettes, applied to a French court for the appointment of a judicial expert.

Held – :

On the ground of articles 31 de la Convention de Lugano du 30 octobre 2007 and 145 of the French code of civil procedure;

Whereas a measure of expertise intended to keep or establish the evidence of facts which could be material for the resolution of the dispute, ordered before the initiation of proceedings under the second of these provisions, is a provisional measure in the meaning of the first of them, which may be sought even If, under this Convention, the court of another Contracting State has jurisdiction as to the substance of the matter; the president of the court within the jurisdiction of which it must be performed, even partially, has jurisdiction to grant it;

Whereas, in support of its decision to decline jurisdiction in favour of the Swiss court, the court of appeal ruled that the place where the damage occurred was Switzerland, that the defendant was domiciled in that State, and that French courts do not have jurisdiction on the merits;

[2] Civ. 1ère, 4 May 2011, case no. 10-13.712.

[3] Civ. 1ère, 14 March 2018, case no. 16-27.913.

By ruling as it did, although the requested measure was intended, inter alia, to examine the mare which was located in France, the court of appeal, which failed to draw the appropriate legal consequences of its own findings, violated the above mentioned provisions;

For these reasons : quashes and sets aside the judgment of the Court of appeal of 25 October 2016.

NOTES AND QUESTIONS

1 In the *Ceia Spa* case, what does the court rule? Was it enough that the measure was to be performed in France?

2 In the *Haras des Coudrettes* case, what does the court rule? Was it enough that the measure was to be performed in France?

3 In *Haras des Coudrettes*, the court rules that not only measures intended to keep the evidence of facts, but also to establish it, fall within the scope of Article 35. Do you think this is consistent with the definition of provisional, including protective, measures under the Brussels Ibis Regulation?

4 Under the case law of the CJEU, what is the role of the place of performance of the requested measure? Is it relevant to define provisional, including protective, measures?

5 In each of these cases, French courts did not have jurisdiction on the merits. The purpose of appointing a judicial expert for establishing facts is to assist the court to decide the dispute. Will this be a French court? If not, do you think courts in other Member States have procedures to establish facts? Do you think they would prefer to have the report of a French expert, written in French, or the report of an expert of their own jurisdiction, written in their own language and following their own standards?

6 Is it possible for a foreign court to appoint a judicial expert to conduct operations in France? In *ProRail BV v. Xpedys NV* (Case 332/11), the CJEU ruled that courts of Member States need not use the Evidence Regulation[4] for that purpose, and may freely appoint judicial experts to conduct operations in other Member States if their own procedural law so allows.

[4] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.