PBL 4013
PRIVATE INTERNATIONAL LAW

The European Law Students' Association

MALTA

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PBL4013:Private International Law

Study Notes LL.B. Hons IV 2021 – Kyra Pullicino

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Introduction

Private international Law (PIL) deals with three principal issues, namely:

1. **Jurisdiction:** In which court can proceedings be brought?

This question is regulated by:

- **Brussels I Recast EU Regulation (Regulation 1215/2012)** which applies with respect to civil and commercial matters, and determined which Courts of the MSs have jurisdiction; and/or
- The **COCP (section 742)** in so far as claims which are not covered by the regulation are concerned. Article 742 COCP deals with whether proceedings can be brought in Malta

2. **Applicable Law**: Which is the applicable law regulating the claim?

Note that the applicable law is separate to jurisdiction, and hence, may also be different to the law of the forum, i.e. to the law of the court which has jurisdiction. With regards to the applicable law, there are another two important EU Instruments:

- **Rome I Regulation** applying to contractual obligations and contractual matters; and
- **Rome II Regulation** applying to non-contractual obligations and matters (i.e. tortuous and succession claims)

3. **Recognition and Enforcement of Foreign Judgements**: Under which circumstances will a foreign judgement be recognised and enforced in the Maltese legal order?

There are rules which provide when a foreign judgement can be enforced in Malta, depending on whether the judgement is coming from another EU member State or a third state (non EU or no EEA):

1. **Brussels I Recast EU Regulation (Regulation 1215/2012)** deals with the enforcement of judgements coming from the EU concerning civil and commercial matters following a system of mutual trust; and
2. **Sections 826 and 827 COCP** deal with the enforcement of judgements coming from Third States i.e. from non-EU/EEA states.

Thus, when faced with cases with a foreign element, these are the three questions which must be asked.

Jurisdiction on Civil and Commercial Matters

When considering jurisdiction in civil and commercial matters, the rules which apply are those under the **Brussels I Recast Regulation (Reg. 1215/2012)** which superseded the **Brussels I Regulation (Reg. 44/2001).**

Article 1 – The Scope of Regulation 1215/2012:

One of the very first issue lawyers must determine when they are going to sue is to see which rules of jurisdiction apply and which rules on the enforcement of foreign judgments apply. But, to know which rules apply, one take into consideration the scope of the Regulations in question. What type of claims? Does it fall within the scope of Brussels I? If it doesn't fall within the scope of Brussels I, then we have to apply another instrument which may possibly be the rules found in the COCP. Therefore, the first question that we ask is, '**does our dispute fall within the domain of the regulation**'?

Article 1 of Brussels I Recast provides us with the scope of the Regulation as it stipulates that:

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).*

According to this provision, the Regulation applies to civil and commercial matters but matters of pubic law i.e. revenue, customs, administrative matters, or where an authority is exercising a public law matter, falls out of its scope. One must be cautious when dealing with cases concerning public authorities, as although many a time they exercise public law powers, in certain instances they do not - for example, in the event that the public authority buys furniture for its offices, it is concluding a normal civil law contract (ultimately, a civil and commercial matter) as any other individual would. So be careful.

Therefore, the first question one must ask when faced with a claim is **which legislative instrument applies**:

3. **if it is concluded that the claim is a civil and commercial matter, then Regulation 1215/2012 applies**.
4. If it is **not a civil and commercial matter**, then the **COCP applies (Article 742).**

Moreover, Article 1(1) uses the phrase "*whatever the nature of the court or tribunal*" which means that the nature of the court/tribunal is irrelevant as long as the court has competence to decide a civil claim, then the regulation applies even though the court might not be a civil court. Thus, if a criminal court in a particular MS can award a civil remedy, then the rules of jurisdiction also apply here and thus the regulation applies, always provided that the court is dealing with a civil and commercial matter.

Defining 'Civil and Commercial Matters'

In order to ensure that Regulation 1215/2921 is applied in the same manner by all MSs, the term 'civil and commercial matters' must be given an autonomous interpretation for the purposes of achieving harmony and uniformity within the EU. In fact, this concept has been the subject of a number of CJEU decisions, in which the court made it clear that the term is to be given an autonomous definition.

Rüffer Case (Case C-814/79):

5. This case involved a Dutch local council which was exercising its powers under an international treaty and acted against a German ship owner in order to recover the cost of removing a sunken vessel from an international waterway.
6. The question was whether this act consisted of a 'civil and commercial matter' or not.
7. The court held that it was not a civil and commercial matter because the authority in question, the Dutch local council, had exercised a public authority power conferred on it by an international treaty.
8. The court laid down the principle which holds that claims involving the exercise of public authority power, are excluded from the scope of the Regulation.
9. The court also maintained that although Regulation 1215/2012 does not generally apply to situations where a public authority is acting in the exercise of its public authority powers, it doesn't mean that in every case which involves a public authority the Regulation does not apply.
10. Moreover, the court made it clear that the concept of 'civil and commercial matter' *"must be regarded as **an independent concept** which must be **construed with reference first to the objectives and scheme of the Convention** and secondly to the **general principles which stem from the corpus of the national legal systems**."*

Sonntag Case (**Case C-172/91):**

- This case concerned a public school teacher who took her students for an outing where one of the students lost his life and the teacher was sued for damages. The teacher was a public school teacher and thus held a public office, so the question arose whether this fell out of the scope of the regulation.
- The court held that the claim was to be considered a civil and commercial matter thus falling within the scope of the regulation, because the teacher was not exercising public law powers since she was not exercising any other right different from those granted to teachers in private schools.
- Note that just because the Maltese court would determine a claim to be a public law claim, it might not be interpreted as such by the CJEU. So, in this judgement the court also affirmed that to decide whether something falls within the scope of the regulation the claim must fall within the autonomous definition of 'civil and commercial mater' as interpreted by the CJEU, and the fact that the local law will characterise it differently is irrelevant.

Steerbergen Case (Case C-271/00):

- This case concerned as a divorced couple who after the divorce went their separate ways; the husband went to live in Belgium, and the wife in the Netherlands. Although the husband was meant to pay maintenance to the wife and child, he did not fulfil his

obligation and so, the Dutch Authority paid the maintenance due, which in turn filed an action for subrogation against the husband to recover the maintenance paid. Was this a civil and commercial matter?

- The court held that insofar as the local authority simply exercised an action which was competent to the wife, and therefore was not exercising powers which go beyond the action which the wife could have instituted against her husband, then action would be considered as a civil and commercial matter, and the Regulation hence applies.
- The court however held that in the event that the public authority could sue for something which does not result from the divorce agreement between the parties, i.e. something which the wife would not have been able to claim from the divorce settlement, the authority would be exercising a public law matter, in which case the Regulation would not apply.
- As stated in paragraph 34 of the judgement, the court held that "in such a case, the legal situation of the public body vis-à-vis the person liable for maintenance is comparable to that of an individual who, having paid on whatever ground another's debt, is subrogated to the rights of the original creditor, or is comparable to the situation of a person who, having suffered loss as a result of an act or omission imputable to a third party, seeks reparation from that party."
- In its conclusion the Court stated that: "*The first paragraph of Article 1 … must be interpreted as meaning that the concept of civil matters encompasses an action under a right of recourse whereby a public body seeks from a person governed by private law recovery of sums paid by it by way of social assistance to the divorced spouse and the child of that person, provided that the basis and the detailed rules relating to the bringing of that action are governed by the rules of the ordinary law in regard to maintenance obligations. Where the action under a right of recourse is founded on provisions by which the legislature conferred on the public body a prerogative of its own, that action cannot be regarded as being brought in 'civil matters'."*

VFK Consumer's Association Case (**Case C-167/00)**

- This case involved proceedings brought by an Austrian Consumers Association to prevent unfair terms in consumer contracts as the Association believed that a German trader was using unfair terms in its dealings with Austrian consumers, and so it filed for an injunction from the court to order the German trader to stop using such unfair terms in consumer contracts.
- The UK Government raised the question whether this was really a civil or commercial matter.
- The Court held that it was a civil and commercial matter since:
    a. the Association was applying the same rules of law applicable between private individuals; and
    b. the Association itself was a private organisation and was not a public authority,

  on which basis the CJEU held that the Regulation applies.
- Moreover, the court held that it "*must be interpreted as meaning that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention*."

Realchemie vs. Bayer (**Case C-406/09):**

- This case dealt with patent infringement concerning the production of certain chemicals. On the basis of such allegations, Bayer brought an action (warrant) prohibiting Realchemie from importing and marketing their chemicals in Germany, which was upheld by the German Courts who held that if Realchemie breached the court order, they would be subject to the payment of a fine.
- Subsequently, Realchemie breached the court order and the court imposed a fine payable to the German State since it was a fine for contempt of court, with the aim of protecting Bayer's rights. Was this a civil and commercial matter?
- The court held that it is a civil and commercial matter despite the fact that the fine is payable to the German state and not a private individual, and that actual recovery is made by the German judicial authorities.
- The court based its reasoning on the belief that the nature of the right protected was a private right i.e. Bayer's right to exploit its patent, and since it was a fine intended to protect a private right, the court considered it to be a civil and commercial matter.
- This is quite a controversial judgement, and Dr.Cachia has his reservations with regards to whether this was a civil and commercial matter. At the end of the day, the fine for breach of court order was payable to the German State, so one can argue that it involved the exercise of an act iuri imperii. However, the court said that it is a civil and commercial matter notwithstanding that the fine was punitive in nature and notwithstanding that it was payable to the German State, because at the end of the day, the court held that the action was intended to protect private rights of Bayer.
- The court states that "the action brought is intended to protect private rights and does not involve the exercise of public powers by one of the parties to the dispute. In other words, the legal relationship between Bayer and Realchemie must be classified as 'a private law relationship' and is therefore covered by the concept of 'civil and commercial matters' within the meaning of Regulation No 44/2001. It is true, as is apparent from the order for reference, that the fine imposed on Realchimie pursuant to Paragraph 890 of the ZPO, by order of the Landgericht Düsseldorf must be paid, when it is enforced, not to a private party but to the German State, that the fine is not recovered by the private party or on its behalf but automatically, and that the actual recovery is made by the German judicial authorities."
- Nonetheless, the court said that this was still a civil and commercial matter, because the court maintained that the determining factor was the fact that nature of the subjective right invoked by filing against Realchemie, was a private right and not involving the exercise of public powers.

Pula Parking Case (Case C-551/15):

- This case concerned a public carpark which was owned by a local council that had entrusted the management of the parking to a company belonging to a State Authority. The defendant, a German national, had used the parking but failed to pay for the service. Thus, Pula Parking brought proceedings against him for payment.
- The question arose as to whether this was a civil and commercial matter.

- The court held that insofar as pula parking was merely collecting payment for the service provided, although it was company belonging to a public authority, it is a civil and commercial matter.
- However, the court held that had it been the case that it was not collecting payment for the service but for example it was collecting a fine because someone didn't park well, it would not be a civil and commercial matter due to its punitive in nature.
- Thus, since the claims are not punitive in nature and represent payment for a service provided, the claim is a civil and commercial matter.
- Moreover, the Court also held that although Pula parking was a public parking and it charged for the service, the normal rules applicable in relation to private individuals apply, and it is therefore considered to be a civil and commercial matter. In fact, this judgement concludes by stating that "*an action for recovering an unpaid debt for parking in a public car park, the operation of which has been delegated to that company by that authority, which are* ***not in any way punitive but merely constitute consideration for a service provided, fall within the scope of that regulation***."

Lechouritou Case (Case C-292/05):

- This case involved an action for damages/compensation against the German state for war crimes, particularly due to the atrocities committed by the German armed forces. In this case, the question was, was this a 'civil and commercial matter'?
- The court held that it is NOT a civil and commercial matter. It based its reasoning on the fact that such operations emanate from the notion of State sovereignty, particularly since they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to the States' foreign and defense policy.
- Therefore, the court here held that this action was excluded from the scope of the Regulation because it concerned the exercise of public powers by one of the parties, in the case of operations conducted by the armed forces during the war.
- This judgment was then considered when revising Regulation 44/2001, and this led to the addition of the previously mentioned phrase, making it clear that the Regulation does not apply to the liability of the State for acts and omissions in the exercise of State authority when it comes to damages against the state in respect of an act jure imperii i.e. involving an act of State sovereignty, that would be excluded from the scope of the Regulation.
    - Thus, the phrase in Article 1(1) stating that the Regulation does not apply "*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)"* was added in consideration of this judgement.

It is also important to note that we have also had number of judgements involving the Maltese Courts which provide examples involving a public authority which was exercising a public authority power:

PMU vs. Zeterf ltd. (Court of Appeal, 9th January 2007)

- This case involved the PMU which was the French monopoly on gaming having an exclusive licence from France to provide services to French consumers, and so they had quite a restrictive regime as it was the only service provider that could operate in

this regard, and Zeterf, which was a Maltese registered gaming company. Zeterf was targeting persons within the French jurisdiction and so, PMU sued them for damages in France on the ground they were infringing its exclusive right/monopoly right to operate sports betting in France.

- The question was whether this French judgement could be recognised in Malta and ultimately, whether the issue is a civil or commercial matter.
- The Court held that in order to determine whether one was dealing with a civil or commercial case (or an administrative matter), one would have to examine closely the exact powers that were exercised. Should these powers be different or otherwise superior to those normally applied between private persons in a private law sphere, then the dispute cannot really be classified as a civil or commercial one.
- For this reason, the court concluded that the proceedings before the French court fell within the sphere of public law, and consequently the French judgement could not be enforced in Malta using the regulation.
- Moreover, the court held that although the PMU was registered as a commercial entity in France, it was evident that French law gave it a monopoly and it had given the PMU functions of a public policy nature to supervise horse betting in France. Therefore, the court said that the PMU was not a normal actor which is similar to a private entity, but in effect it was safeguarding French public policy. Therefore, the court said that once the PMU was enjoying such a role in France, and it was in fact protecting French public policy on gaming, and therefore this was the exercise of a public law power and thus did not fall within the scope of the Regulation (not a civil and commercial matter).

PMU vs. Bell Med ltd. (Court of Appeal, 28th September 2007)

- The same conclusion as the PMU vs. Zaterf case was reached in this subsequent judgement decided by the Maltese courts.
- Here the court re-examined the matter whereby further submissions were made on the part of PMU, however it came to the same conclusion:
- The court held that after having reconsidered the matter, it did not find any reason as to change this previous judgment – thus, although PMU is a private entity, and not strictly speaking a government authority, it was clear that the PMU was regulating French public policy as it had been given a regulatory function by the State to issue licenses for betting organizations.
- the court held that in this function, the PMU considering that its primary objective was to safeguard French public policy on gaming and betting, and it was thus exercising a public law power. Since it was exercising a public law power, then it could not be considered as a civil and commercial matter and therefore the judgement was not enforceable under the Brussels I Regulation.

The conclusion of these cases is that the Regulation does not apply if the action involves the exercise of public power by a public authority or by an organ of the State. So, <u>if the exercise involves powers which goes beyond the ordinary powers between private citizens i.e. the claim is based on an act iure imperii, it is outside the scope of the regulation.</u>

In practice this question continues to arise, and it is quite complicated. With regards to the double decker accident which happened in Malta a few years ago, proceedings have been

brought in different countries, in particular very importantly in England, as the victims severely injured happened to be English and Scottish. Liability has not yet been determined but potentially there could be two persons held liable, the driver and the company providing the service to the tourists. The question on whether TM could be liable because of the fact that there was this tree and the bus collided in the tree also comes in the picture. TM is a public authority, and it has been sued abroad. Is the claim against TM a civil and commercial matter? TM is arguing that when it is in charge of the roads in Malta (by virtue of Chapter 499 of the laws of Malta) it is exercising a public law power, and so not a civil and commercial matter. The counter argument to this is that in relation to the victims, the normal rules of civil liability apply and so Article 1033 of the Civil Law applies. Note that since the accident happened in Malta, Maltese law applies, and so the liability is going to be based using the normal civil liability principles under the civil code.

Exclusions – Article 1(2)

It is clear form a reading of Article 1(1) that it is imperative that an action must be classified as a 'civil and commercial matter' in order to fall within the scope of the Regulation and for its provisions to apply. However, there are certain claims which are considered to be civil or commercial that are nonetheless excluded from the scope of the regulation.

According to Article 1(2) the 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**;- This is very complex. There is a whole framework dealing with it like the New York Convention (1958) and the Arbitration Act of Malta which enforces to Malta the foreign arbitration award i.e. to enforce such an award the Regulation does not apply but you have to look at the appropriate authority. The regulation has nothing to do with arbitration. We do not deal with arbitration in this course as it is too complex.*
(e) ***maintenance obligations** arising from a family relationship, parentage, marriage or affinity;*
(f) ***wills and succession**, including maintenance obligations arising by reason of death.- if you have a case involving the succession of a Maltese living abroad, you need to look at the Cross-Border Succession Regulation.*

Thus, although these are civil and commercial matters, they fall outside the scope of the Regulation and are rather regulated by their own respective regulations.

Furthermore, one must note that the previously mentioned rules of jurisdiction apply in so far as the claim is within the scope of the Regulation. If your claim is not within the scope of the Regulation, then one must see whether the Maltese courts have jurisdiction in accordance with the COCP, unless of course there is a specific regulation e.g. if it's a claim regarding succession, then you would look at the Succession Regulation.

Serving of Documents & Taking of Evidence

One must note, that there are also rules which are very important in practice which deal with the service of documents and the taking of evidence. Usually in Malta, in a purely local context, we serve a court document to the court Marshall (office of the AG), and then the Court Marshall will deliver it to the defendant. In the case where a court Marshall cannot make contact with the defendant, this may eventually lead to publication in the newspapers.

However, if one's defendant is abroad, such defendant would need to be notified in another country. E.g. A files a court case in Malta, and A needs to notify the defendant in France/England/Italy. It must be noted that an EU Regulation concerning the serving of documents (Regulation 1348/2000) in another MS makes this service possible. The document will go from the Maltese authority (AG) to the service authority in the other MS, and then the service authority in the other MS will serve it on the defendant in that country. Then they will then prepare a certificate which will return to Malta, and thus the Maltese courts would know whether the defendant was served or not. The same happens in Malta. I could be sued in England. The English court will pass over the document to an English service authority, it will be sent to Malta and then you will be served in Malta with the document instituting proceedings in England. Therefore, it may be seen that this is an important mechanism in practice for the serving of documents.

One also finds an EU Regulation concerning the taking of evidence which is currently being revised (taking into account technological developments) at EU level and therefore a new Regulation on the taking of evidence shall soon be available. This Regulation applies when one's witnesses are in another MS. E.g. A starts proceedings in Malta, but A's witnesses are not in Malta, but they are in Italy. However, A wants them to testify. In such a case, a procedure is available which would allow A to obtain their evidence even though A's witnesses are in Italy. There are various mechanisms contemplated there. Such mechanisms could include video conferencing in order to allow the court to listen to a witness testifying in front of a camera.

Therefore, these are 2 important instruments available in cross-border litigation which concern the service of documents (notifying the defendant with the court case) and also the taking of evidence.

The concept of Domicile under Regulation 1215/2012

Under the Brussels I recast Regulation, domicile is a very important concept, and in fact, like its predecessors it uses the concept of domicile as the most important connecting factor in its application. For this reason, we must draw a distinction between those defendants domiciled in a MS, and those not domiciled in a MS.

Taking this into consideration, after asking whether the claim is a civil or commercial matter and after it is confirmed that the dispute falls within the scope of Brussels I Recast, then the next question would be concern the domicile of the defendant – i.e. **what is the domicile of the person I want to sue?** Then, if it transpires that the defendant is domiciled in a MS, **where is the case to be instituted?**

What is understood by domicile?

When dealing with the concept of domicile, we must make a distinction between the **domicile of natural persons** and the **domicile of legal persons** In so far as the domicile of companies and other legal persons is concerned, we have an autonomous definition of domicile in the Regulation found under **Article 63** which stipulates that:

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**.*

A company is deemed to be domiciled in either of these places. So, if for e.g. the company is registered in France, then it can be sued in France according to the general rules of jurisdiction, unless there is one of the exceptions stipulated in the Regulation itself which apply. However, in practice a company may be domiciled in more than one MS since although a company may be registered in France, it may have its principal place of business in Italy.

On the other hand, in the case of natural persons, we do not have an autonomous definition of domicile. In fact, **Article 62** provides that

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.*

So in order to determine whether an individual is domiciled in Malta, the Maltese court is to apply the Maltese law on domicile, but if the individual is not domiciled in Malta, to determine if he/she is domiciled in another MS, the court must apply the laws of that MS. Thus, for the

Maltese courts to decide whether the defendant (a natural person) is domiciled in Italy, then the Courts shall refer to and apply Italian Law. For this reason, particularly due to the fact that there is no autonomous definition of Domicile, each MS has its own definition of the concept.

Here Maltese law is defective as although we have developed a notion of domicile in Maltese PIL through case law, we do not have an ad hoc definition of domicile for the purposes of the Regulation developed by the Maltese legislator in the law, as we find in the UK. This is because, prior to Malta joining the EU, the Maltese legislator had prepared an Act of Parliament with the aim of introducing a special definition of domicile for the purposes of the Brussels Convention. This definition concerned habitual residence and was similar to the definition of domicile which was adopted by England for the purposes of jurisdiction which is based on Habitual Residence of a period of 3-6 months. However, the Act was never actually promulgated because by the time Malta acceded to the EU, the Brussels I Regulation was coming into force which meant that there was no real reason for adopting the Act due to the nature of the Regulation – i.e. its direct applicability in Malta as a MS. Thus, till today, we still do not find a special definition of domicile for the purposes of the Regulation.

Since we do not have an ad hoc definition of domicile under our laws, the likelihood is that the Maltese courts will apply the traditional notion of domicile found in Malta, which is that based on British Common Law. This involves both the physical element in the sense that the **physical presence is necessary**, and also the psychological element (animus revertendi) that is the **intention to permanently reside in Malta**. This means that if one is Maltese, there is a presumption that such person will want to come back to Malta unless it is proven that he has the intention to permanently reside abroad. This also means that it is not easy to acquire a Maltese domicile, thus, the application of this traditional definition may ultimately create issues because there could be situations where although persons would have been living in Malta for quite some time they would still not be deemed to be domiciled here (in absence of the psychological element) with the consequence that they cannot be sued here.

This traditional definition adopted by the Courts is not set in stone, and thus, nothing stops a party from raising an argument in court that an ad hoc definition should be adopted for the purposes of the regulation, and that the definition of domicile which was taken from English common law was adopted and applied (only) in the context of the personal law i.e. marriage claims. Therefore, one can possibly argue that for the purposes of jurisdiction, the court should not adopt such a strict definition of domicile, but a more flexible one. Since we already have a definition of domicile formulated by the Maltese courts, it would be tough to challenge this due to the fact that the legislator has not adopted an ad hoc definition of domicile in the law. However, in theory this can still occur since the EU legislator has not prepared an autonomous and harmonised definition of the domicile of natural persons (thus this for sure CANNO be done in the case of companies since the EU has provided a harmonised definition of what constitutes its domicile).

As a general rule, the **domicile of the claimant (i.e. the person who wants to sue) is irrelevant**. So, if an American wants to sue in Malta, **what we need to look at is the domicile of the defendant**, and it does not matter whether or not the claimant is Maltese. There are only certain situations where it is important to look at the domicile of the claimant e.g. in the context of the special rules on consumer contracts, however this shall be analysed later on.

Thus, in general, the claimant need not be domiciled in a MS for the Regulation to apply. This was stated by the CJEU in **Group Josi Case (Case 412/98)** whereby it was held that the domicile of the plaintiff is irrelevant as a general rule and is only relevant were the rule of jurisdiction in question is dependent on the plaintiffs domicile being in a MS. E.g. in the case of consumer disputes, the Regulation speaks of plaintiffs domiciled in a MS. If a consumer is domiciled in a MS, he can sue in the MS even if the supplier is domiciled in a non-MS.

Article 4 – The General Rule of Jurisdiction under Regulation 1215/2012:

Generally, subject to a number of exceptions found in the Regulation itself, the Regulation applies to defendants domiciled in a Member State. In fact, **Recital 13** provides that: ***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.***

In this respect, reference must be made to the general rule of Jurisdiction under Brussels I Recast, which is found under **Article 4**. It provides that:

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****.*

Thus, this general rule of domicile stipulates that:

- Persons domiciled in a MS are sued in courts of the MS of their domicile (whatever their nationality)
- If not nationals, but only domiciliaries, they are still governed by the rules of jurisdiction applicable to nationals of the MS of their domicile. So, you could be domiciled in Malta and be a national of somewhere else, and since you are domiciled in Malta, you will be treated in the same way as a person who is domiciled in Malta and is a Maltese national.

This makes it clear that the most important connecting factor for the Brussels I Recast Regulation is domicile. This is why we must draw a distinction between defendants domiciled in a MS and defendants not domiciled in a MS.

Despite this general rule of domicile, there are exceptions where this Regulation allows one to be sued in a MS where he is not domiciled, and hence, the general rule under Article 4 would not apply. Therefore, the general rule is subject to a number of exceptions. To this end, reference must be made to Recitals 14-16 of the Regulation:

Recital 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.*

Recital 15: *The **rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile**. Jurisdiction should always be available on this ground **save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor**. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.*

Recital 16: *In addition to the defendant's domicile, there should **be alternative grounds of jurisdiction based on a close connection between the court and the action** or in order to **facilitate the sound administration of justice**. The existence of a close connection should **ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen**. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.*

THEREFORE, THE GENERAL RULE OF JURISDICTION: Article 4 - **defendants should be sued in the courts of the country in which such person is domiciled, subject to exceptions.**

Article 5 – Exceptions of Domicile

Article 5 provides exceptions and states that:

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**.*

Therefore, Sections 2-7 of Regulation 1215/2012, i.e. **Articles 7-26** contain the exceptions to the general rule of jurisdiction i.e. the situations where one can sue a person domiciled in a MS within another MS.

Article 6 – Defendant not domiciled in a MS (refer to National Law)

Article 6 provides that:

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**.*

Thus, if one comes to the conclusion the claim is a civil and commercial matter (thus being within the domain of the Regulation) and that our defendant is not domiciled in a MS, the Regulation provides that in order to decide whether the Maltese Courts have jurisdiction (i.e. if we can sue him in Malta or not), we must refer to the relevant provision in the **COCP (Article 742 - i.e. the traditional rule of jurisdiction in Maltese law.).** Therefore, the Regulation itself is telling us to apply Article 742. So, in a scenario where it has been established that the claim falls within the scope of the Regulation i.e. it is a civil and commercial matter, but the

defendant is domiciled outside the EU, the Maltese courts are to apply Article 742 of the COCP as the law of Malta as a MS.

Thus, as a general rule, the rules in the Regulation do not apply to defendants domiciled outside the EU and the law of the MS of the courts is to apply. However, there are a number of important exceptions as to situations where the regulation applies even though the defendant is not domiciled in a MS which are found under **Article 18(1)**, **Article 21(2)**, **Article 24** and **Article 25** as specified by Article 6(1) itself:

- Article 18(1) – Consumer Disputes

Article 18 deals with consumer disputes and provides that:

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.

Thus, the consumer is allowed to sue in the courts of the MS of his own home, where he is domiciled. The rules concerning consumer disputes allowing the consumer to sue at home even though the supplier may be domiciled outside the EU (not domiciled in a MS), is an exception.

- Article 21(2) – Employees

Article 21 deals with disputes concerning employer-employee relationships. It states that:

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**.*

Thus, the employee is allowed to sue his employer in its home i.e. in "the place where or from where the employee habitually carries out his work", even though the employer is not domiciled in a MS.

- Article 24 – Exclusive Jurisdiction

Article 24 provides us with another exception whereby **the specified courts of a MS shall have jurisdiction irrespective of the domicile of the parties depending on the subject matter of the proceedings**.

For example, if the action concerns a right in rem in immovable property, the MS where the property is situated has exclusive jurisdiction irrespective of domicile of the parties. So, in the case that proceedings concern rights in rem over a house in Malta, the Maltese courts have jurisdiction irrespective of the domicile of the parties.

This will be delved into greater detail later on.

- Article 25 – Prorogation of Jurisdiction

Another exception is found in **Article 25** which deals with **jurisdiction agreements.** If two parties conclude a choice of court agreement i.e. they agree that if a dispute between them had to arise, they will bring proceedings in a particular MS, the Courts of the MS specified in the agreement shall have jurisdiction, irrespective of the parties' domicile.

Therefore, the Regulation provides that in certain cases, the rules on jurisdiction found in the Regulation will apply even though our defendant is not domiciled in a MS.

Conclusion of the aforesaid:

A sells their car to B, thus B owes A €5000, however B doesn't pay A, hence A wants to sue B:

1. The first question that we need to ask is; 'Is this a civil and commercial matter'? Yes, it is
2. Then we must ask; 'Where is B domiciled'? There can be 2 answers depending on whether B is domiciled in a MS or in a non-EU MS.
    a. If B is domiciled in a MS, then the rules of jurisdiction under Brussels I Recast apply and thus according to the general rule on jurisdiction (Article 4) B may be sued in the place of his domicile – however note that this is subject to the exceptions found under Articles 7-26.
    b. If B is domiciled in a non-EU MS, as a general rule the Regulation does not apply and article 742 COCP applies. However, there are certain situations where the Regulation applies even though the defendant is domiciled in a third state (outside the EU) and these are article 18(1), article 21(2), article 24 and article 25 which provide exceptions.

So, the Maltese courts have jurisdiction to hear a case against a person domiciled in Malta unless the application of another rule in the Regulation makes the general rule in article 4 inapplicable. The other corollary of what has been said so far, is that the Maltese courts have no jurisdiction to hear a case against a person domiciled in another MS, unless another rule in the Regulation confers jurisdiction on the Maltese courts. This is where sections 2-7 of the Regulation come into play.

Article 7 – Special Jurisdiction

Contractual Obligations, Torts and Delicts, Concurrent Liability & others.

Article 7 of Brussels I Recast deals with **special rules of jurisdiction**, particularly with respect to disputes concerning either contractual disputes, or non-contractual disputes, whereby the Regulation provides us with **an additional forum**. Hence, if it is concluded that the claim concerns a matter which is contractual or non-contractual (i.e. tortuous), then the general rule of jurisdiction under Article 4 applies, however, the claimant also has the option to sue according to the provisions of Article 7 of the Regulation, as will be seen below.

Article 7(1) Contractual Claims – Claims dealing with Contractual Obligations

Article 7(1) Brussels I Recast deals with contractual claims, as it provides that:

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;

This provision is thus based on two limbs:

1. First, the claim must be a matter relating to a contract, hence it must be what is known as a **contractual claim**; and
2. Secondly, one it is confirmed that the claim is a contractual one, then the **courts of the place of performance of the obligation shall have jurisdiction**. Thus, this provision provides us with an additional forum as not only do the courts of domicile have jurisdiction, but also the courts of the place of performance of the obligation in question.

Here we must define the terms "contract" and "contractual obligation/claim", and also the phrase "the place of performance of the obligation". The CJEU has maintained that these terms are to be given an autonomous interpretation to be used in terms of the Regulation, and NOT for purposes of contracts under national law. In this respect, reference must be had to case law:

What is the meaning of a "**contract**" for the purposes of Article 7(1)?

Martin Peters Case (Case C-34/82)

- This case concerned an action brought to enforce the rules of a trade association. The court held this to be a contractual matter as ultimately the trade association is a

contract amongst the traders and hence, its existence is dependent on an agreement between its members (the traders).

- Once it was established that the calm was to enforce this contract between the parties, the claim was to be considered a contractual obligation for the purposes of Regulation1215/2012.
- Here the court also confirmed that the term "**contract**" is to be given an **autonomous meaning**.

Jakob Handte Case (Case C-26/91)

- In this case the Court defined a matter relating to a contract as follows: **a claim can only be contractual for the purposes of the regulation if it involves a situation in which an obligation is freely assumed by one party towards another.** So one needs to see if one party freely assumed an obligation towards another, which is the **essence of a contract**.
- The facts of the case concerned a German manufacturer who had sold equipment to a buyer who in turn sold to a French sub-buyer. The equipment sold did not comply with certain rules of health and safety and the sub-buyer instituted an action directly against the manufacturer on the ground that the equipment bought did not comply with rules of health and safety.
- French law considered the action to be contractual since under French Law the sub-buyer is considered to have stepped into the shoes of the buyer for which reason the action is considered to be contractual - but was this contractual for the purposes of the regulation?
- The Court held, no as the manufacturer had not freely assumed an obligation towards the sub-buyer and thus the action could not be regarded as contractual. This means that there was really no contract between the manufacturer and the sub-buyer.

Réunion Européenne Case (Case C-51/97):

- This case concerned an action for damages filed against the carrier of goods (fruits).
- The plaintiff was expecting goods which were carried by defendant, and when the goods arrived they were found to be defective since there was a problem in the cooling system. Hence, an action for damages was brought.
- In this case, the carrier had not concluded a contract with the buyer but rather with the seller who shipped the goods on the ship of the carrier. Thus, the plaintiff (buyer) had not contractual relationship concerning carriage with the carrier since the transport was not concluded by plaintiff. Was this action contractual in the sense of the Regulation?
- The court held that no, as there was no obligation pre entered into between the plaintiff and defendant.
- The action against the carrier was tortuous/quasi-tortuous, falling within the scope of Article 7(2) of regulation 1215/2012, because no obligation had been voluntary assumed by the carrier towards the plaintiff.

Tacconi Case (Case C-334/00):

- This judgement dealt with an action concerning pre-contractual liability.

- It involved an action for damages for failure to negotiate a contract in good faith. The parties had been negotiating a contract and when they had almost concluded the negotiations, suddenly one of the parties broke off negotiations.
- Was this a matter relating to a contract although a contract had not yet been concluded?
- The CJEU held that a claim for pre contractual liability or an action for failure to negotiate a contract in good faith, is not a matter relating to contract but rather a matter relating to tort delict or quasi delict, thus falling within the scope of Article 7(2) of regulation 1215/2012 dealing with tortuous actions.
- So for the purposes of the regulation pre-contractual lability is a matter relating to tort or delicts so it must be related as such. Pre-contractual lability is also dealt with under Rome II as a non-contractual obligation with specific law dealing with this matter under Rome Ii

VFK Case (Case C-167/00):

- This case concerned an action brought by the Austrian Consumer Association against the German trader to stop him from using unfair terms in consumer contracts when dealing with Austrian consumers. and thus the association was not suing for damages.
- The German trader was concluding contracts with Austrian consumers and these contracts contained unfair terms, and therefore the association brought an injunction for the court to order the German trader to stop using unfair terms in his dealings with consumers.
- So the action was somehow related to contractual obligations since the trader wad concluding contracts with Austrian consumers. BUT, was this a matter relating to contract?
    - The court held that this was not a matter relating to contract, as the association did not have a contractual relation with the German trader, in the sense that it did not involve a situation where one party has freely assumed an obligation towards another party
- Was it tortuous?
    - It was not a claim for damages however, the court held that it is a tortuous action because since the action was intended to stop the trader from using unfair terms in contracts, it was a matter relating and concerning tortuous conducts or a breach of an obligation laid down by law. For this reason, it was a matter classified as tort/delict or quasi-delict.

Therefore, in order for the claim to be considered contractual there must be an obligation freely assumed by one party towards the other. This is not an alien concept to us as it is quite similar to what we understand in contractual obligations in Maltese de jure. Also note that for the purposes of PIL regulations, a claim cannot be both contractual and tortuous.

Once we know that a claim is a matter relating to a contract we must refer to the second question: Which is the **place of performance of the obligation** in question?

This used to be a rather complicated question to answer and so when enacting Council Regulation 44/2001, the Legislator tried to simplify this matter. So, they introduced two special rules here:

a. A rule applying to contracts for the sale of goods; and
b. Another rule applying to contracts for the provision of services.

However, although many contracts relate to the sale of goods or provision of services, there are many other contracts which cannot be characterised as either of these two categories. In such a case, we would need to identify the place of performance of the obligation in question.

Contracts relating to the Sale of Goods:

Article 7(1)(b) of Brussels I Recast provides that:
(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****,*

Therefore, if a contract concerns the sale of goods, the place of performance of the obligation in question is the place where, according to the contract, the goods were delivered or the place where the goods should have been delivered. Therefore, one should look at the contract and ask, where was the seller supposed to deliver the goods? The place of delivery of the goods is the place of performance of the obligation in question, and this, this would be the place where proceedings can be brought.

There are a number of judgements which deal with this particular provision:

Car Trim Case (Case C-381/08) & **Electrosteel Case (Case C-87/10)**

- In these two cases the Court explains how one needs to approach this provision and thus how the place of delivery is to be identified.
- The court tells us, that to identify the place of delivery you must first look at the contract and take into account the terms and clauses of the contract to see if you can deduce where the place of delivery is supposed to be from the contract itself. In fact, the court held that: "In the case of distant selling, the place where the goods where or should have been delivered pursuant to the contract must be determined on the basis of the provisions of that contract."
- Therefore, when looking at the contract, the court seized must take into account all the relevant terms and conditions (clauses) of the contract, including also any incoterms which are generally used, recognized and applied in international trade or commerce, which clauses may be capable of clearly identifying that place.
- In the case that the contract does not refer to the place of delivery and where it is impossible to determine the place of delivery on that basis, the court held that the place of performance of the obligation in question in the context of the sale of goods is the place where the physical transfer of the goods took place or should have taken place, as a result of which the purchaser obtains actual power of disposal over the goods at the final destination of the sales transactions.

Contracts relating to the Provision of Services:

We have a similar provision in the case of services under Article 7(1)(b):

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

Thus, if the contract is a contract for the provision of services, then the place of performance of the obligation in question, is the place where the services were provided or should have been provided, in accordance with the contract itself. Hence, in this case in order to determine the place of performance of the obligation, one must also start by analyzing the terms and conditions, i.e. the clauses, of the contract itself.

De Bloos Case (Case C-14/76):

- This case concerned an exclusive distributorship contract whereby the supplier had breached the exclusivity clause. In fact, it was a Belgian distributor who brought proceedings in the Belgian courts against the French supplier for the dissolution of an exclusive distributorship contract and the payment of damages.
- Therefore, the Belgian distributor wanted to dissolve this distributorship agreement and he also wanted damages and so he alleged that the French supplier infringed the exclusive concession.
- The CJEU held that within the meaning of Article 7(1) of the Brussels I recast regulation the obligation to be taken into account is that which corresponds to **the contractual right on which the plaintiff's action is based** i.e. **the obligation, the non-performance of which was relied upon to support the claim of the plaintiff**. So the obligation in question is the obligation which was allegedly breached by the defendant and which forms the basis of the claim made by the claimant.

Therefore, we would ask: What is the plaintiff alleging? Which obligation is the plaintiff relying upon in order to sue the defendant? That obligation would then amount to the obligation in question. Once one identifies the obligation in question, then one needs to determine in which country was that obligation supposed to be performed.

Effer Case (Case C-38/81)

- In this judgement the CJEU addressed the scenario where a defendant denies the existence of the contract, by a simple statement stating that the contract is invalid for some reason or another.
- The court held that the national court has jurisdiction under Article 7(1) even if the defendants denies the existence of the contract. The Court then held that "if that were not the case, Article 5 of the convention (now Article 7(1) of the Brussels I Recast Regulation) would be in danger of being deprived of its legal effect, since it would be accepted that, in order to defeat the rule contained in that provision it is sufficient for one of the parties to claim that the contract does not exist".
- The court then said that the simple fact that the defendant denies the existence of the contract, doesn't mean that the court loses jurisdiction in terms of Article 7(1) because otherwise it would be very easy for the defendant to escape the jurisdiction of the Court by virtue of this provision, simply saying that the contract does not exist.
- Therefore, the fact that the plaintiff denies the existence of the contract, will not exclude jurisdiction under Article 7(1).

Note that, there may be instances where there would be more than one place where services are provided or where the goods are delivered - or especially where the service/thing is not clearly provided in one MS but in multiple. The following two judgements deal with this scenario:

Wood Floor Solutions case (Case C-19/09) & **Colour Drack Case (Case C-386/05)**

- These two cases deal with situations where the services or goods were provided or delivered to more than one MS.
- In the **Color Drack Case**, the court held that where there is more than one place of delivery, you need to identify the principal place of delivery. On the other hand, when you have the provision of services in more than one MS, you need to identify the place of the main provision of services.
- In the **Wood Floor Solutions Case**, the court said that in the case of a commercial agency contract where the service is to be provided in more than one MS, the place of provision of service by the agent is in principal the place where the commercial agent is established. Here, the court even gave us a rule which applies specifically to commercial agents. Thus, the court which has jurisdiction is the court of the place of the main provision of services, so one needs to identify the place of the main provision of services and it is only that court which has jurisdiction.
- 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.
- Hence, these cases these rules have been interpreted where there is more than one place of delivery or more than one place for the provision of the contract.

Note that these exceptions to the general rule of jurisdiction create an additional forum giving the claimant an additional place where to sue, rather than providing an exception where the exceptional rule only is to apply in the specified instances (as will be seen later on).

Summary of the above:

- In the case of contracts, there are two very important issues.
- The first question is whether our claim is contractual; the CJEU in the **Jakob Handte Case** held that in order to have a contractual claim, there must be an obligation voluntarily assumed by one party towards the other.
- Once we come to the conclusion that our claim is contractual, then we need to see which is the place of performance of the obligation in question. This depends on which category the contract falls under i.e. whether it is a contract for the sale of goods or rather a contract for the provision of services.
- In the case of sale of goods the place of performance of the obligation in question is the place of delivery.
- In the case of provision of services, the place of performance of the obligation in question is the place where the services were provided or should have been provided.
- If the contract is neither none of the sale of goods nor a contract for the provision of services, we need to identify the place of performance of the primary obligation on the basis of which the claimant brings his action.

- Even if it is a contract for the sale of goods or a contract for the provision of services, there are certain complexities, and there could be situations for example where there is more than one place of delivery or where the service is provided in multiple MSs – In **Wood Floor Solutions case (Case 19/09)** the court held that it is to be the place of provision of service by the agent is in principal the place where the commercial agent is established, and in **Colour Drack Case (Case C-386/05)** the court held that we must identify the principle place of delivery i.e. the place of the main provision of services.
- NOTE THAT THESE ARE **ADDITIONAL FORA** – and so, these are other options for the claimant other than the general rule under Article 4 which is still applicable in such situations.

Another important judgement is that of **Peter Rehder vs. Air Baltic Corporation (Case C-204/08)**:

- This case concerned a claim about an air passenger/transport contract.
- According to the Air Passenger Rights Regulation, where the airline cancels your flight or in situations where there is a delay of more than 3 hours, one is entitled to compensation, in addition to hotel accommodation, melas, and other rights, provided by the airline itself.
- In the case that no compensation or other rights are provided by the Airline, where would you sue?
- The court held that in the context of a contract of carriage by air, the court of special jurisdiction is at the applicants choice – i.e. the court of the place of departure or the court of the place f arrival of the aircraft since they are both equally relevant.
- In fact, in Para. 43 of the judgement the court held that "*both the place of arrival and the place of departure of the aircraft must be* ***considered, in the same respect, as the place of provision of the services which are the subject of an air transport contract***."
- In addition to that, you can also sue in the place of domicile of the company which is operating the service in accordance with the general rule of jurisdiction under article 4 since this is merely an additional forum.

Article 7(2) – Tortuous Claims: Claims dealing with Tortuous/Delictual Obligations

Article 7(2) applies with respect to claims dealing with tortuous or delictual obligations. It provides that:

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;***

If ones comes to the conclusion that the action is a matter relating to tort, then the **court of the place where the harmful event occurred or may occur, has jurisdiction.** This is an additional forum to the suing of the defendant in his domicile and so, the general rule of jurisdiction continues to apply. Hence, if the action concerns a tortuous claim, then one can sue a defendant in his court of domicile, OR he can also sue him in the courts of the place where the harmful event occurred or may have occurred. Thus, it is important to remember that the exceptions found in article 7 create an additional forum so they give the plaintiff an additional place where to sue.

The phrase "May occur" was introduced through an amendment made to cover an action to prevent future damages. In fact, in **Karl Heinz Henkel (2002)** the Court held that this provision applies even if the event has not yet occurred.

Here we need to examine two concepts:

1. What is a matter relating to tort, delict or quasi delict?

Again 'tort' must be given an autonomous interpretation. A number of commentators argue that when one looks at the various language versions, it implies that there must be some liability of wrongdoing.

Kalfelis Case (Case C-189/97)

- Here the court held that the expression "matters relating to tort, delict or quasi-delict" is to be given an autonomous interpretation.
- The court held that Article 7(2) of the Regulation covers all actions which seek to establish the liability of the defendant and are not matters relating to a contract within the meaning of Article 7(1). Thus, it cannot be a matter relating to a contract as if the claim is contractual it would fall within the scope of Article 7(1) thus falling outside the scope of Article 7(2). Hence, there cannot be claims which are both contractual and tortuous – the two are mutually exclusive.

Therefore, one would need to see if the action is one which seeks to establish the liability of the defendant. This gave rise to some discussion, because if the answer to the latter question is positive, and the matter is not contractual, is it automatically tortuous? This was debated and in some of the language versions of the judgements some imply that there must be liability for wrong doing for the claim to be tortuous which is similar to what we find in Malta whereby tortuous liability is found on the notion of tort.

However, judgements have held that not any action is tortuous as the case decided by the House of Lords, of **Leinworth Benson vs Glasgow City Council (1999)**:

- In this case the action concerned a claim for the restitution of money paid under a purported (alleged/claimed to be true) contract which was subsequently accepted by both parties that it was void ab initio.
- The court held that this was not contractual – but, did this mean that it was automatically dealing with tort? The court replied negatively because since it was a claim for restitution it was neither contractual nor tortious but rather it was a sort *of actio de in rem verso*, seeing that there was no valid contract.

Similarly, we find the judgement of **Belmed ltd. vs. PMU (2009)** which concerned an action for declaratory relief i.e. asking the court to declare one not responsible for the happening of an action. Is this covered by Article 7(2)?

- PMU (domiciled in France) was the French monopoly having a right to offer bets, while Belmed was a Maltese company (thus domicile in Malta_ and offered bets online including to consumers in France.
- Belmed sued and sought a declaration from the Maltese court that it was operating legally and was not liable to pay damages to the PMU. Thus, it was an action for a

declaration of non-liability. Belmed brought proceedings in Malta heold ing that there was jurisdiction in the sense of Article 7(2) [at the time article 5(3) of the Convention) since it was a matter related to tort or quasi-tort.

- However, the court held that this matter did not regard a delict, because the defendant was not being asked to make good for damages caused by the conduct of the defendant. For the purposes of 5(3) there must be a claim for damages caused by the conduct of the defendant.
- Thus an action for a negative declaration was not within the scope of Article 5(3).

However, this ruling was not correct, as provide by a subsequent CJEU judgement in the names of **Fischer vs. Ritrama (Case C-133/11)**, whereby the court held that Article 7(2) applies even if it is an action for a negative declaration. Thus, if it is a question for tortuous liability, the simple fact that it is an action for a negative declaration it is still covered by Article 7(2).

The court has interpreted the notion of tort very widely as seen above in **VFK v Karl Henkel (Case C-167/00)** whereby the Court decided that proceedings by a consumers' association to prevent the use of unfair terms in consumer contracts fall within the scope of this Article.

In **Tacconi v Wagner (Case C-334/00, 2002)**, it was held that a claim for damages for the failure to negotiate a contract in good faith (pre-contractual obligations) was a matter relating to tort, delict, or quasi-delict.

2. <u>Which is the place where the harmful event occurred?</u>

Once we determine that the action of tortuous, we need to answer where the place of the harmful event occurred.

Bier Case (Case C-21/76)

- This case concerned an action instituted by a Dutch farmer in the Netherlands whose crops were destroyed after, according to the allegations, a French company had discharged waste (sewage) in the Rhine river in France due to the ensuing pollution allegedly caused damages to the Dutch's plaintiff's property. The question which arose was: where could proceedings be instituted?
  - In France where the event giving rise to damage took place i.e. the throwing of waste illegally into the river; or
  - In the Netherlands as the place of the damage was i.. the place where the crops were destroyed?
- The court established the phrase "the place where the harmful event occurred" refers to both the place where the act giving rise to the damage occurred, and also the place where the damage took effect, and so the court held that both places were relevant.
- In this sense, Article 7(2) confers jurisdiction both to the place giving rise to the damage and the place of the actual damage.
- Thus, in practice that the Dutch farmer could bring proceedings in both MSs on the following basis:
  a. He could sue in France on the basis of Article 4 because the French company was domiciled in France;

b. He could also sue in France on the basis of Article 7(2) since the event of giving rise to damage also took place in France; or
c. He could also sue in the Netherlands as the place of damage, thus he could easily bring proceedings in his home country.

Place of damage - the place where the actual damage is suffered and not the place where the victim may eventually need to incur expenses. E.g. a tourist run over by a bus in Malta, the place of the damage is Malta, if she goes back home and pays money in a hospital in England, it does NOT mean that the place of damage is England. On this point cases relevant;

Marinari Case (Case C-364/93)

- Marinari was Italian and he went to Lloyd's bank in the UK (defendant) with a number of promissory notes which the bank believed to be forged, so he was arrested. It turned out that they were not forged and so Marinari brought an action in Italy for damages.
- Marinari argued that Italy was the place of the damage because his patrimony was based in Italy and it was his patrimony that suffered a loss.
- However, the Court held that the Italian Courts did not have jurisdiction because the place where consequential financial loss is suffered is irrelevant. Thus, the Court made it clear that the "place where the event occurred" is the place where the damage was actually suffered and not where consequential financial loss is felt and so other places where the victim incurs expenses subsequent to the damage are not relevant for the purposes of jurisdiction.
- Ultimately, the "place where the 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.

Dumez France Case (Case C-220/88)

- Dumez was a French company with subsidiaries in Germany, and these subsidiaries went bankrupt as a result of unlawful conduct of German banks.
- Dumez brought proceedings in France because the value of the parent company went down because of the losses suffered by the subsidiaries.
- The CJEU held that the matter could not be decided in Franc because it was only indirectly that the damage was suffered in France – the actual and direct damage rather took place in Germany, and so the German Courts had jurisdiction in this regard.
- So, the damage to the immediate victim is the damage that matters. In this case the immediate victims were the subsidiaries in Germany and not the parent company.

In this regard, for example, if a person is injured in a car accident which took place in a foreign State, he cannot bring an action in Malta on the basis that he suffered medical expenses in Malta consequent to the accident. The direct damage took place in the foreign State, hence, proceedings are to be brough there in light of this provision and these ECJ Judgements.

<u>Cases dealing with Defamation:</u>

The court also applied Article 7(2) to cases of defamation. The situation became quite complicated as in the past, defamation used to take place through magazines and newspapers

however, with advances in technology and the internet, the court had to adjust to instances of online defamation.

Shevill Case (Case C-68/93) (refer to AST's notes)

- This is a case concerning a defamatory article published in a French magazine whereby it was alleged that plaintiff (Shevill) was involved in a drug trafficking network. The magazine was published in France and 200,000 copies were sold also in England, and she brought proceedings in the UK.
- The question which arose was: Which is the place of the event and which is the place where the damage occurred? Was it England or France?
- The court held that the place of the event giving rise to the damage is the place where the publisher of the newspaper is established since this is the place where the harmful event originated. Thus, the courts of this place have jurisdiction to hear the action for damages for all the harm caused by the publication.
- On the other hand, the place where the damage occurred is the place where the event produced its harmful effects on the victim. In this case of defamation, this is the place where the publication is distributed when the victim is known in those places.
- The court held that the court of the member states where the defamatory material is published have jurisdiction only in respect of the harm caused in the MS.
- Thus, she can sue in England because it is the place where the defamatory material caused her harm, but she can only recover damages with respect to the harm caused to her reputation in England on the basis of the copies sold there.
- The Court here also said that the criteria for <u>assessing whether the event in question is harmful</u> and the <u>evidence required of the existence and extent of the harm alleged</u> by the plaintiff in an action in tort, delict or quasi-delict are not governed by the Convention but are **determined in accordance with the substantive law designated by the national conflict of laws rules of the court seised on the basis of the Convention**, provided that the effectiveness of the Convention is not thereby impaired.
- The fact that under the national law applicable to the main proceedings damage is presumed in libel actions, so that the plaintiff does not have to adduce evidence of the existence and extent of that damage, does not therefore preclude the application of Article 5(3) of the Convention (today Article 7(2) of Brussels I Recast).

Thus with respect to the situation of defamation in Shevill, it was quite clear. However, how do we apply this to the context of <u>online defamation</u>? Where can you sue? Since it happens online, it can be seen and accessed from anywhere. Does this mean that proceedings can be brought anywhere in the world? Thus, we must see how the court has interpreted article 7 paragraph 2 in the context of online defamation:

Case 509/09 & Case 161/10 (joint judgement) *Martinez Case* (refer to AST's notes)

- This joint judgement concerned defamatory publications (online) about Martinez (a French actor) who sued for damages on the basis of breach of privacy: In one of the cases there was a story which said that the claimant had a criminal background, and in the other case it was alleged that Martinez was involved in some relationship with kylie Minogue.

- Both stories were published online and thus were accessible by anyone, anywhere. The question that arose was: Which is the place where the harmful event occurred in the case of online defamation?
- Under paragraph 44 of the judgement, the court held that the placing of online content on a website is to be distinguished from printed matter distributed. The court pointed out that the online content can be consulted unlimitedly for which reason, the case of defamation through the internet a new rule of jurisdiction was to be created, hence reexamining Article 7(2).
- Thus the court introduced a new element by saying that the alleged victim could sue in **the place of his centre of interests**. The place where a person has centre of interests **corresponds in general to his habitual residence**.
- This means that in the case of online defamation the victim can sue where he has his centre of interests which is generally the place of habitual residence, however not necessarily. For instance, it could also be the place where you conduct a professional activity.
- Moreover, the court also held that the victim could also sue the publisher in the place where he is established/domiciled for all damages.
- One can alternatively sue in the place where the content was viewed, but only to the extent of the damages suffered in that particular country.

Bolagsupply Svensk Handel Case (Case C-194/16) (refer to AST's notes)

- While this case also concerned online defamation, the action was slightly difference as it was not one for damages, rather it was an action brought for the rectification of wrong information published about the plaintiff.
- So, the interest of the claimant might not always be to just sue for defamation, but he might have an interest in rectifying the wrong information that a publisher has posted about you.
- In this case, the question was, where can such an action for rectification of information published on the internet be brought? Can this type of action be brought in each MS where the content is accessible?
- The court held NO – if a person who alleges that his personality rights have been infringed by the publication of incorrect information concerning him on the internet, one cannot bring an action for rectification of that information in any of the courts where the information is accessible.
- Here the court referred to the judgement of Martinez and held that the **application must be brought in a court which has jurisdiction over the entirety of the application**. So, it can be brought:
    - Either in the **place where the publisher is established** (its/his domicile);
    - Or in the place where the victim has his **centre of interests**.

Look at paragraphs 47,48 and 49 of the judgements.

Meltzer Case (Case C-228/11)

- Here, the Court held that the courts of the place where a harmful event occurred - which is imputed to one of the presumed perpetrators of damage, who is not a party to the dispute - cannot take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised.

Winstersteiger AG v Products 4U (Case C-523/10)

- Products 4U (domiciled in Germany) put an advert on Google.de which was triggered when a certain keyword – which was the name/trademark of the plaintiff company – was searched. Both companies manufactured skiing equipment.
- Plaintiff filed an action for a breach of trademark in Austria, where the applicant was established and where the trademark was registered.
- The Court held that the courts that have jurisdiction are those of the MSs where the trademark is registered (this is deemed to be the place of the damage) or the place of the domicile of the person who has breached your trademark.

Réunion Européenne Case (Case C-51/97)

- The Court held that the place where the consignee, on completion of a transport operation by sea and then by land, merely discovered the existence of the damage to the goods delivered to him cannot serve to determine the place where the harmful event occurred.
- Whilst it is true that the abovementioned concept may cover both the place where the damage occurred and the place of the event giving rise to it, the place where the damage arose can, in the circumstances described, only be the place where the maritime carrier was to deliver the goods.

So, we have seen that the court has been quite generous in the **Bier Case**, **Martinez Case** and the **Shevill Case**, but at the same time the court does not want the exception wider than necessary as it maintained in the **Marinari Case** and the **Dumez France Case**. In fact, as an exception to the general rule, the court has said in numerous cases that exceptions to the general rule of domicile should not be interpreted more widely than necessary. In the Bier case, the court was ready to give a wide interpretation, however **we cannot take article 5(3), today article 7(2) to extremes to confer jurisdiction to any place where someone might allege that he has suffered an indirect damage.**

In practice, one may come across many cases concerning traffic accidents. Let us say a traffic accident occurs in Malta, the victim is run over, after which she is taken to England for medical care and she continues being hospitalized in England. She may have needed to make alterations to her house or incurred medical expenses in England consequent to the accident – would England be considered the place of the damage or no? Would the English court have jurisdiction on the basis of Article 7(2)? No, in accordance with the Marinari case, we are told that the victim would not be able to sue for damages in England for financial loss. There might be a possibility for her to sue in England, if it is a case of motor insurance, but this would not on the basis of Article 7(2), but rather on the basis another special rule (article 13 – FBTO case which will be examined later on). Under Article 7(2), the place of the damage is where she was run over – the place of the accident – i.e. Malta, and not the place where somebody started reconstructing what she lost, otherwise jurisdiction would be completely unpredictable.

Concurrent Liability/Responsibility

There are some MSs where the fact that there is a contractual relationship does not exclude the possibility of filing an action in tort. For example, in England if a doctor is negligent he can face a contractual claim by the patient in performing his duties and providing his services towards the patient, but he can also face a claim in tort for negligence. In the Maltese context, this view was also supported through case law, such as in **Lambert vs. Buttigieg** which concerned a contractual action but also a possible action in tort.

However, what about jurisdiction in this regard? So, if there is a contractual relationship and an action is filed in tort, which rules of jurisdiction are to apply?

- Does **Article 7(1)** apply, dealing with matters concerning contractual obligations; or
- Does **Article 7(2)** apply, dealing with matters concerning tortuous and delictual obligations?

The same question arises when we deal with the applicable law. in such instances, to determine the applicable law:

- Does the **Rome I Regulation** apply, dealing with contractual obligations; or
- Does the **Rome II Regulation** apply, dealing with non-contractual obligations?

On this question, there was a big debate which has now been resolved by the CJEU, but years back this was a question for debate in the English courts and also for English authors who came to different conclusions. In fact, **Briggs and Rees** say that if there is an obligation freely assumed by one party towards another (contractual obligation), then you apply the contractual rules of jurisdiction even though domestic law may grant a remedy in tort and thus may allow you to file an action in tort. **Dicey and Morris** also say that whatever national law might say, EU law is unlikely to allow a particular obligation to be treated alternatively as either contract or tort. It should not be open to the claimant to select a particular rule of applicable law, simply by the manner which enables his claim.

There were also different cases which decided on this point, where the court held that a tortuous claim filed for negligent services, even though filed in tort, it should be considered as contractual for jurisdictional purposes. However, a different conclusion was reached in the case of **Base Metal vs. Shamurin** whereby the English court held that if English law allows you to file an action in tort, the applicable law rules and the jurisdictional law rules relating to tort are to be applied. Therefore, one can see that we have these 2 different approaches

Due to such inconsistencies, authors held that there is the need to utilize autonomous interpretations present in the Regulation, since the fundamental objective of the Regulation is in fact for the same rules to apply across the board. Thus, the CJEU clarified this issue in the judgement of **Brogsitter Case (Case C-548/12 of 2014)**:

- Mr. Brogsitter was a German seller of luxury watches who had concluded a contract with a French watch maker who undertook to develop watch movements for the luxury watches of Mr. Brogsitter. The defendant had also developed in parallel some other watch movements which he marketed and sold in his own name.

- However, Mr Brogsitter considered that the defendant had breached the terms of the contract because according to him, the contract implied that there was an exclusive undertaking to produce watches for him which meant that he was bound to make watch movements only for him and that he couldn't make movements on his own accord.
- So, Mr. Brogsitter filed an action in Germany which was both contractual based on his argument of the "exclusive undertaking", stating that the terms of the contract were breached, and also tortuous on the basis of unfair competition in breach of paragraph 823 German Civil Code.
- The German court had to decide which court had jurisdiction – whether it was France as the place of domicile of the French watch maker or Germany on the basis of a special rule of jurisdiction? So, the question was: Was the Court to apply Article 7(1) on the basis that the claim was contractual or Article 7(2) on the basis that it concerned a matter of tort? Thus, consequent to these questions, the German court made reference to the CJEU to settle this issue.
- The CJEU referred to previous cases decided and held that in order to determine the nature of the civil liability claims brought before the court, it is first important to check whether there are contractual in nature, regardless of their classification under domestic law. Thus, the first thing that must be done by the national court was to refer to the autonomous definition of a "contract" in order to determine whether the matter in question was contractual in nature.
- So – does the matter concern an obligation freely assumed by one party towards another? If the answer would be in the affirmative, then for the purposes of jurisdiction the action must be treated as a contractual one and thus Article 7(1) would apply, even though national law may allow the action to be filed in tort. (Para 29 of judgement)
- Therefore the CJEU held that:
  1. A claim cannot be both contractual and tortuous; and
  2. Where the conduct complained of may be considered to be a breach of the contract, then the action should be classified as contractual (para. 25 of judgement).

Therefore, it would seem that, following the previous example given, if there is an action filed by a patient against a doctor, which at the end of the day is considered to be a contractual relationship and the patient is saying that the doctor is liable in damages because he failed to provide for the patients safety i.e. doctor was negligent in the performance of the contract, the conclusion would be that the action would be regarded as contractual, even though an action could possibly be allowed in tort. At the end of the day, what we would be saying in such a situation is 'negligence' in the performance of a contract.

Other Rules under Article 7:

1. Article 7(3) – Civil claims for damages arising from criminal Proceedings.

The Criminal court may have jurisdiction over Civil Proceedings. In this respect, Article 7(3) provides that:

Article 7. A person domiciled in a Member State may be sued in another Member State:
(3) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, ***in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings****;*

Thus, in cases where a criminal court which has criminal jurisdiction also has jurisdiction to decide a civil claim for damages based on an act which gives rise to a criminal offence, that court has jurisdiction to decide a civil claim for damages. So, in those MS where a criminal court is given jurisdiction not only to try the criminal action but also to give a civil remedy, then since that court is empowered to provide a civil remedy, then it also has jurisdiction under article 7(3).

In the **Sonntag Case** (**Case C-172/91)** the Court held that the fact that it was the criminal court that was hearing the case was immaterial, since the parents had intervened in the criminal case as civil parties asking for damages, and thus the matter was still a civil matter.

2. Article 7(4) – Recovery of a Cultural Object

(4) as regards a civil claim for the recovery, based on ownership, of a cultural object as defined in point 1 of Article 1 of Directive 93/7/EEC initiated by the person claiming the right to recover such an object, in the courts for the place where the cultural object is situated at the time when the court is seised; (civil claim for the recovery of a cultural object - not important)

It is important to note that article 7(4) is one of the additions of Regulation 1215/2012. It deals with a civil claim for the recovery of a cultural object this is not very important for our purposes. However, recital 17 provides explanation:

17. The owner of a cultural object as defined in Article 1(1) of Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (10) should be able under this Regulation to initiate proceedings as regards a civil claim for the recovery, based on ownership, of such a cultural object in the courts for the place where the cultural object is situated at the time the court is seised. Such proceedings should be without prejudice to proceedings initiated under Directive 93/7/EEC.

It is not v. common to have a claim such as this so it is enough to just know about it.

3. Article 7(5) – Branch, Agency or other Establishment

Article 7. A person domiciled in a Member State may be sued in another Member State:
(5) as regards a dispute arising out of the operations of a branch, agency or other establishment, ***in the courts for the place where the branch, agency or other establishment is situated****;*

A company can be sued in the courts of the place of the branch, agency or other establishment if the dispute arises out of the operations of the branch, agency or other establishment.

For example: If a German company has a branch in Malta and one has concluded a contract in that branch, then the courts where the branch agency or other establishment is based has jurisdiction. **The test is whether this branch or other entity is under the control of the defendant.** If the company with whom one transacted business is domiciled in Germany but has an outlet in Malta and one has concluded a contract in Malta, then that outlet is considered to be a branch as long as it is under the control of the German parent company. If however the entity is not under its control, it has autonomy, and thus it does not fall under this Article.

With regards to the meaning of a 'branch, agency or other establishment' reference must be had to the **De Bloos Case (Case C-14/76)** whereby the court held that one of the essential characteristics of a branch agency or other establishment is that it must be linked to the main entity – thus, it must be sufficiently clear that the branch/agency/establishment is under the control of the parent body for an entity to be considered a branch, agency or other establishment for the purposes of article 7(5).

Note that the claim MUST also arise out of the operations of the branch itself. There is no general jurisdiction in Malta just because a company has a branch in Malta, the simple fact that it is has branch is not enough and you must have contracted business directly yourself with the branch. You might also want to look at the **Somafer case (Case 33/78)** in this regard.

Paragraphs 6 and 7 regarding trusts and maritime claims on salvage are <u>not</u> important for this course.

Article 8 – Co-Defendants, Guarantees, Counterclaims and Rights in Rem

Article 8(1) – The Issue of Multiple Co-Defendants

What happens in cases where there are multiple defendants? Here we are dealing with a situation where we want to sue more than one person. For example, a traffic accident with three vehicles involved, and three drivers of different nationalities. It is not certain as to who was responsible and so the victim wants to proceed against the three of them. Let us say one of the defendants is domiciled in Italy, another is domiciled in French and another is domiciled in Malta. Does it mean that just because one defendant is domiciled in Malta, the Maltese courts have jurisdiction against all the other defendants?

The answer to this question is given under **Article 8(1)** which provides that:

*8. **A person domiciled in a Member State** may also be sued:*
*(1) where he is one of a number of defendants, in the **courts for the place where any one of them is domiciled**, provided the **claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings**;*

Thus, according to Article 8(1) one can sue all co-defendants in the Maltese courts, even though they are not all domiciled in Malta, as long as one of the defendants is domiciled in Malta. This provision also stipulates that the claims must be closely connected factually and legally and there must be the risk of a reconcilable judgement if the three defendants are sued separately abroad.

Moreover, in the **Réunion Européenne (Case 51/97)** the court said that it is not always the case that claims against more than one defendant are connected and in fact, paragraph 50 of this case states, '*...that two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected*.' So, the court held that if one action is contractual and the other action is tortuous and they can 'sort of' exist independently, it is not necessarily the case that they are connected for the purposes of article 8(1).

In conclusion therefore, it is possible to sue multiple defendants in one jurisdiction when at least one of the defendants is being sued in the courts of his domicile and provided that the claims between different defendants are connected so as to avoid the risk of irreconcilable judgements.

Reference must be made to the recent judgement decided by the FHCC on 06th March 2019, in the names of **Istituto per le opere della religione (the Vatican Bank) v. Futura Investment Management et** where the court examined Article 8(1) and the extent to which it is possible to rope in defendants who are not domiciled in the MS of the court of the proceedings. In this case there were a number of defendants, whereby one was not domiciled in Malta but he was roped into the proceedings by virtue of article 8. The court stated that:
"Il 36orti wara li kkunsidrat l provi li tressqu quddiemha hija tal fehma li la darba jirrizulta li t tnejn huma entitajiet registrati f'Malta, skond l ligi ta dan l pajjiz li la darba hemm ness car

bejn l kawzali ridotti bejn il konvenuti kollha jirrizulta sodisfatt l-element ta konessjoni bejn il kawzali pronosti mill-attur fil-konfront tal-konvenuti kollha"

The Court said that there was a risk of irreconcilable judgement were the claims against the defendants were connected, and therefore the court held that it had jurisdiction under article 8. It also quoted a number of ECJ judgements which explained article 8.

Article 8(2) – Warranty or Guarantee

*8. **A person domiciled in a Member State** may also be sued:*
*(2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in **the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court** which would be competent in his case;*

When we say "a third party in any action on a warranty or guarantee or in any other third-party proceedings" it means: I sue you and you may have a right on the basis of a warranty or guarantee against somebody else and if national law allows that somebody else to enroll in the proceedings in such types of actions, then there will also be jurisdiction against this other party.

Article 8(2) – Counter Claims

Article 8(3) deals with counter claims and it provides that a person domiciled in a MS may be sued:
(3) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;

In order to understand this, one needs to have a bit of a background on the law of procedure. Let us say that A sells machinery to B and B owes A 20,000 euros. A sues B for 20, 00 euros. B tells A that B will not be paying the 20,000 euros because the machinery sold by A was defective and while B was using it, it exploded and it even caused damage to B's house. So, in the court case, B will not only say that B does not owe A 20,000 euros by way of defense, but B can also file a counter claim in the same proceedings and say that B does not owe A 20,000 euros and A should be condemned in damages towards B to give B the part of the price already paid and also damages as result of the defect in the machine. So, in that case, the law of procedure allows you, as long as the counter claim arises from the same contract or the same facts, to bring a counter claim.

From a jurisdiction point of view, we are saying that the court which has jurisdiction over the original claim also has jurisdiction over the counter claim.

Therefore, the original claim is the first action I filed against you and you could have come to the conclusion that the Maltese courts have jurisdiction. If you file a counter claim based on the same contract or the same facts, the court which has jurisdiction over the original claim will also have jurisdiction over the counter claim. The counter claim is considered to be a separate action being heard in the same case, so we need a special provision to make it clear

that the court hearing the action over the original claim also has jurisdiction over the counter claim.

Article 8(4) – Rights in rem in Immovable Property

Article 8(4) then deals with Rights in rem in immovable property. It stipulates that a person domiciled in a MS may be sued:
(4) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

It an action is placed on a right in rem in immovable property, then jurisdiction vests in the court of the place where the immovable property is situated. What we are saying here is that if there is a contractual action which is combined with an action in rem against the same defendant, the court of the state which has jurisdiction on the action in rem will have jurisdiction, because the property situated there also has jurisdiction in relation to a related contractual action against the same defendant. Article 8(4) is not so important.

Article 9 then relates to shipping and is not necessary to go into for the purposes of his course:

Article 9

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

Jurisdiction insofar as *Weaker Parties* are concerned

Regulation 1215/2012 provides us with specific rules on jurisdiction in relation to insurance contracts, consumer contracts and employment contracts. These provisions are structured with the aim of protecting the weaker party, and thus the Regulation considers the insured/consumer/employee to be weaker parties due to their weaker position by nature.

These special rules of jurisdiction are found under the following sections of the Regulation:

1. Section 3 of the Regulation which starts with Article 10 dealing with **jurisdiction in matters relating to insurance;**
2. Section 4 of the Regulation starting with Article 17 dealing with **jurisdiction regarding consumer contracts**; and
3. Section 5 of the Regulation starting with Article 20 dealing with **jurisdiction over individual contracts of employment**.

It is noteworthy that contrary to the special rules of jurisdiction under Article 7 which provided additional fora to the general rule of jurisdiction under Article 4, the exceptions to the general rule found under Sections 3-5 of the Regulation are to apply instead of the general rule itself. Thus, these are not considered to be additional fora but rather, the exception to the general rule MUST be applied if the conditions laid down by Regulation under these three sections are satisfied.

Hence, under these provisions the weaker parties are given certain jurisdiction privileges, no matter whether their position is as plaintiff or defendant. These jurisdictional privileges can be divided into 3:

1. The first privilege is that **the weaker party can bring proceedings in his home member state**:

Thus, the weaker party may not sue in a foreign court, even though the defendant might not be domiciled in the same MS. So, if the insured wants to file an action against his insurer, he may bring proceedings in his home State, i.e. the MS of his domicile, even though the insurer as defendant, is domiciled in another MS – contrary to the general rule of jurisdiction under Article 4. Similarly, the consumer and the employee have the same privilege and are thus entitled to sue in the courts of their home State.

2. The second privilege is that **if the weaker party is the party being sued, proceedings must be brought in the courts of the MS in which the weaker party, as defendant, is domiciled**:

So, if for example the insurer wants to annul a contract of insurance on the basis that the contract is void ab initio or if for example the supplier is suing the consumer for payment of the price or if it is the employer who is suing the employee, then proceedings have to be brought in the courts of domicile of the defendant who is the weaker party. Thus, proceedings have to be brought in the MS of the insured/consumer/employee as these are considered to be weaker parties and are thus given the privilege of being sued in their home state.

So if the supplier is suing, then the proceedings need to be brought in the member state of domicile of the weaker party so here the weaker party must be sued in the courts of his domicile. The other rules and the other exceptions to the general rule of jurisdiction doesn't apply.

3. The third privilege is that **the Regulation limits the possibility of choice of court agreements** under the Provisions in sections 3-5:

In these cases the Regulation tries to protect the weaker party by limiting the ability of the stronger party from depriving the weaker party of their jurisdictional privileges by means of a jurisdiction or choice of court agreement.

As a general rule, the parties are free to choose by means of a jurisdiction clause, the court were proceedings are going to be brought in cases of disputes between them. Moreover, parties to a contract may also choose the applicable law through a particular clause, which may not necessarily be the law of the courts which have jurisdiction. This is in fact very common in commercial law contracts. However, when it comes to the weaker party, there are limitations on this. This is because otherwise it would be possible for the supplier/insurer/employer to insert a clause in the contract stipulating that proceedings have to be brought in their MS and not in the courts of the MS of the weaker party, depriving the weaker parties from this protection afforded by the Regulation. Thus, with the aim of protecting the consumer/insured/employee, the Regulation provides that jurisdiction agreements which restrict this protection afforded to the weaker parties are invalid and are available only in certain cases. We also have limitations in so far as the applicable law is concerned but this is regulated by Rome I and so it will be analysed further on.

In this respect, Recital 14 of the Regulation provides that:

(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**.*

Section 3, Articles 10-16: Jurisdiction over matters relating to Insurance Contracts

Article 10

*In matters relating to insurance**, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.*

Thus, in matters relating to insurance jurisdiction should be determined by this section without prejudice to article 6 and article 7(5).

- Article 6 deals with defendants who are not domiciled in a member state, in which case that provision would apply.

- Article 7(5) deals with branches, agencies or other establishments which continues to apply. So, if for e.g. the insurer is in Germany but has a branch in Malta and is doing business through that branch, there is jurisdiction also in Malta.

Other than these two provisions, the provisions under Section 3 of the Regulation (Articles 11-16) are to apply in matters concerning insurance contracts.

Where can the insured/policyholder/beneficiary under a contract of insurance bring proceedings?

In this respect reference must be had to Article 11 which provides that:

Article 11

1. *An insurer domiciled in a Member State may be* ***sued****:*
   (a) in the ***courts of the Member State in which he is domiciled****;* – So, if the insurer is domiciled in England, the insured may sue him in England as the State of his domicile.
   (b) in another Member State, in the case of ***actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the claimant is domiciled****; or* – So, where an action is brought by the insured/policy holder/beneficiary, since they are considered to be weaker parties in the sense of the Regulation, proceedings can be brought in the home MS of such weaker parties (i.e. the courts of the MS where the claimant is domiciled).
   (c) if he is a co-insurer, in the ***courts of a Member State in which proceedings are brought against the leading insurer****.* – In insurance, especially when dealing with the Lloyds market where risks are very large, the risks are shared by co-insurers. In fact, in the Lloyds market there will be a number of insurers, all of which paying part of the risk, whereby there would be a lead insurer that usually takes more than half of the risk, accompanied by other insurers all insuring the same risk together. Thus, in such situations there would be a leading insurer and other co-insurers. If the co-insurers are domiciled in different MSs, proceedings can also be brought in the courts of the leading insurer.

2. An insurer who is not domiciled in a Member State but has a ***branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State****.*

In accordance with Article 11(2), if the insurer is domiciled in a third state but has a branch in a MS, then it is deemed to be domiciled in that member state and thus, the rules under Article 11(1) apply. For example, the insurer is Canadian thus not domiciled in a member state, but this Canadian insurance company has a branch in Malta which is carrying on the business of insurance in Malta. The Canadian insurer would be deemed to be domiciled in Malta due to the existence of the branch operating in Malta. Thus, this insurer, although Canadian, may be sued in Malta.

If there is no branch, agency or other establishment in a MS, than the insurer will then be deemed to be **domiciled in a non-MS** and since it is domiciled in a non-MS, **Article 6 applies**

which refers us to **Section 742 of the COCP**, and it will be Maltese law which will determine whether you can sue the Canadian insurer in Malta or not.

Articles 12 and 13: Liability Insurance i.e. insurance covering damage:

Article 12

*In respect of liability insurance or insurance of immovable property, **the insurer may in addition be sued in the courts for the place where the harmful event occurred**. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency.*

So there is an **additional forum** in the case of liability insurance (insurance contract covering damage) in which case proceedings can also be brought in the place where the harmful event occurred.

Thus, Article 12 is also giving another forum in the case that one has insured his immovable property covering damage, and the insured property was damaged, the insured can also bring proceedings **in the courts where the immovable property was damaged/where the harmful event occurred**.

Article 13

*1. In respect of liability insurance, **the insurer may also**, if the law of the court permits it, be **joined in proceedings which the injured party has brought against the insured**.*

*2. **Articles 10, 11 and 12 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted**.*

As a general rule, if one has a claim against another individual, the claim must be brought against such individual, and one cannot sue his insurer. However, there are exceptions to this as where it is permitted, the victim may:

- either choose to **sue the insurer as an additional defendant in proceedings brought against the insured in the sense of Article 13(1)**; or
- choose to **sue the insurer directly by filing a direct action against him** in the sense of **Article 13(2).**

This means that, if the insurance is one for liability and the national law of the court hearing the action allows the insurer to be joint in the proceedings against the insured, then that is possible. Moreover, generally, in insurance one sues the person who caused the damage, and not his insurer – then the defendant would be able to make a claim himself against his insurer. However, there is an exception where such a direct action against the insurer is allowed – this is in the sphere of **motor insurance** in the context accidents and damages caused by motor vehicles.

With respect to motor insurance, we find the **Motor Insurance Codification Directive** (transposed in to Maltese Law under Cap. 104) which brought together 5 previous directives, allowing the injured party to bring a direct action against the insurer. Therefore, in traffic accidents, the victim can sue the insurer directly. The directive wants to make sure that all

the vehicles on the road have insurance, but to make the life of the injured party/victim easier, it provides the victim with the right to sue the insurer of the vehicle which caused the damage to them directly.

Thus, in accordance with Article 13(2) which provides that in cases where a direct action is possible (in the sphere of motor insurance) then the injured party can also bring proceedings in his home state against the Insurer directly. This answers the question with respect to road traffic accidents.

For example, if there is an individual domiciled in Malta involved in a traffic accident in Italy which causes injury to him. So, since the accident took place in Italy, the place of the event causing damage is Italy. Let us say that the driver of the other car which caused the accident/damage to occur is Italian and his insurance company (the insurer) is also Italian. The victim comes back to Malta he wants to bring proceedings. By virtue of Article 13(2) the victim is allowed to bring proceedings in Malta as his home Member State.

This was confirmed by the CJEU in the **FBTO Case (Case C-463/06)**

- in this case the court held that injured party in a road traffic accident may bring an action directly against the insurer of the person responsible for the accident in the courts of the place where that injured party is domiciled.
- Under community law, this right is subject only to the condition that the insurer must be domiciled only in a member state of the European Union and that such a direct action must be permitted under national law.
- Since it is permitted under the motor insurance qualification directive, which is transposed in the law of that MS, it means that the victim can bring proceedings in his home member state.

Therefore, the insurer, where the direct action is possible, also faces the risk of being sued in the home MS of the injured party. This is very important in the sphere of motor insurance.

*3. If the **law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action**, the **same court shall have jurisdiction** over them.*

Article 13(3) then allows one to sue the insured in the same proceedings as the insurer. Thus, if under national law it is also possible to rope in the person who was driving the vehicle that ran you over, then that court which has jurisdiction on the direct action against the insurer, will also have jurisdiction against the insured who was insured by the insurer.

Article 14: What happens if it is the insurer who wants to sue/bring proceedings?

In such instances, reference must be had to Article 14 of the Regulation which provides that:

Article 14

*1. Without prejudice to Article 13(3), an **insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled**, irrespective of whether he is the policyholder, the insured or a beneficiary.*

*2. The **provisions of this Section 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**.*

Therefore, if the insurer wants to bring proceedings (for example for default to payment of the insurance premium, or for non-disclosure or for breach of the terms and conditions of the insurance contract), he must bring proceedings in the MS of the insured/policy holder/beneficiary. Thus, the Regulation is protecting the weaker party (the insured) even in the event where he is being sued by his insurer, which action must be brought before the courts of the insured's domicile.

Then, in the sense of Article 14(2) if the insurer sues the insured in one of the courts which has jurisdiction, and the insurer files a counter claim related to the same facts, that same court will also have jurisdiction to hear the counter claim.

Article 15: Choice of Court/Jurisdiction Agreements

Article 15 reflects the third privilege afforded to weaker parties, concerning choice of court agreements which are only allowed in specific circumstances as specified under article 15 which stipulates that:

Article 15

*15. The **provisions of this Section may be departed from only by an agreement**:*

*(1) which is **entered into after the dispute has arisen**;*

- ⇒ Thus, a jurisdiction agreement would be allowed in insurance contracts if it is decided upon after the dispute arose, and not a priori.
- ⇒ Note however that this is highly unlikely since the purpose of a jurisdiction clause is that the parties reach an agreement before any dispute arises where proceedings are going to be brought.

*(2) which **allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section**;*

- ⇒ So if the purpose of the jurisdiction clause is to give an additional option to the weaker party, it is allowed. This is because the agreement is providing that there is jurisdiction in the specified court as an additional option for the weaker party.
- ⇒ Thus, this is allowed as long as you are giving the policy holder/insured/beneficiary an option which goes beyond the rules granted to the insured (weaker party).

*(3) which is **concluded between a policyholder and an insurer**, both of whom are at the time of conclusion of the contract **domiciled or habitually resident in the same Member State**, and which has the **effect of conferring jurisdiction on the courts of that Member State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that Member State**;*

- ⇒ Thus, if the insured is domiciled or habitually resident in Malta and his insurer is also domiciled or habitually resident in Malta, since both of them are domiciled in the same MS at the time of conclusion the contract, it is possible for the insurance contract to

state that the courts of Malta have jurisdiction, even if the harmful event occurs abroad.

⇒ So, if BOTH the insured and insurer are habitually resident or domiciled in the same MS upon the moment of conclusion of the contract, it is possible to limit jurisdiction to that MS.

⇒ This is also allowed provided that such an agreement is not contrary to the law of the MS.

*(4) which is **concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State**; or*

*(5) which relates to a **contract of insurance in so far as it covers one or more of the risks set out in Article 16**.*

- Article 16 then provides another exception which applies with respect to the risks referred to under Article 15(5), however, such provision is very specific and it is not very relevant for our purposes of the course.

Thus, in accordance with Article 15, choice of court agreements and jurisdiction clauses are not allowed except in very limited situations stipulated in its provisions.

Note that these provisions on insurance contracts do not apply to reinsurance contracts as confirmed by the CJEU in the **Group Josi Reinsurance Company Case** (**Case C-412/98).** Here the court held that these rules do not apply to reinsurance contracts, because both the insurer and the reinsurer are professionals, so none of them are in a weak position and therefore the court held that it does not apply in cases of reinsurance contracts.

Section 4, Articles 17-19: Jurisdiction over matters relating to Consumer Contracts

The consumer is deemed to be the weaker party in proceedings against the supplier/service provider. However, there are exceptions to this as not all consumer contracts are covered – rather, only those consumer situations which fall within the scope of Article 17(1)(a),(b) and (c) are given protection as weaker parties. To this end, Article 17(1) provides that:

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:*

- *it is a contract for the sale of goods on instalment credit terms;*
- *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*
- *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.*

Ultimately, the objective here is the protection of the consumer as a weaker party, which has a number of requirements in itself for it to be afforded:

a. First, the **individual must be a consumer**:

Therefore, we need to understand who is a consumer. According to Article 17(1), one must have entered into a so called "consumer contract", which is concluded for a purposes which can be regarded as **outside the party's trade or profession**. Moreover, the CJEU has held that it must be "'a contract which in general **secures the needs of an individual in terms of private consumption**".

This means that one can be a consumer for certain transactions and a non-consumer for certain other transactions and thus, these rules do not apply to all consumer contracts as certain conditions must be satisfied. For example, there must be a **direction of activities in the consumer's member state**. If for example you go abroad to Germany where you go shopping and you buy something from a small shop. That doesn't mean that you can sue the store in Malta if when you come to Malta it transpires that the thing bought was defective. This is because in that situation, the store wasn't directing activities to Malta. As shall be seen, these rules on consumer contracts apply primarily where it is **the supplier that is directing activities to a consumer in his member state**.

This question of who is a consumer and who benefits from such rules has been the subject of many CJEU judgements as seen in:

Shearson Lehman Hutton Case (Case C-89/91)

- In this case, a German consumer had assigned his rights to a company, so as consumer he had a claim but her sold/assigned his claim to the company.
- Could the company (as assignee) benefit from the same jurisdictional privileges which are allowed to the consumer?
- The CJEU held that no, it is the individual consumer who is being given these privileges and they do not apply to a company who has bought the rights of the consumer as assignee.
- Ultimately, although the individual consumer assigned his rights to the company, for the company to make transactions in its name on his behalf, **the company will not be considered to be a consumer. It is merely an assignee of the consumer's right**.
- The court pointed out that the special system in Section 4 is inspired by the conception of the consumer who is the economically weaker party and who is less experienced in legal matters than the other party of the contract. If the consumer had assigned his rights to a non-consumer, then the assignee cannot rely on the rules contained in Section 4.
- Therefore, the CJEU decided that since the purpose of what the consumer had done by assigning his rights to a non-consumer which was a company, then that assignee i.e. the company would no longer be entitled to the protection of the weaker party under Brussels I Recast

Jana Petruchova vs. FIBO Holdings Limited (Case C-208/18) – AST

- In this case we have Ms. Petruchova residing in the Czech Republic and Fibo Group holding established in Cyprus. The former entered into a contract in which there was a clause on the express choice of jurisdiction in Cyprus. The purposes of the framework agreement was to enable her to make transaction on the foreign exchange market, which Fibo would carry out in its online trading platform. In the context of the agreement, Ms. Petruchova placed an order in October 2014 but Fibo holdings executed the order with some delay which is proven because of the exchange of messages and emails with the timings of the emails causing claimant to suffer significant loss due to the fluctuation of the exchange rate later.
- The main point under Article 17(1) is that the three conditions are met:
    1. First a party to a contract is a consumer who is acting in a context which can be regarded as being outside his trade or profession. So again the centre of gravity is being underlined as a university student and with this heavy centre of gravity, all the other exercises are outside her 'profession' or rather her main activity because she is mainly a student and she is only doing this for her personal satisfaction/means;
    2. Secondly the contract between such a consumer and a professional has actually been concluded. There is no doubt about the contract having been concluded and none of the parties actually raised this;
    3. Thirdly, the contract falls within one of the categories listed under Article 17(1)(a)-(c) of the Regulation.
- Insofar as these three conditions are concerned, there seems to be no issue. However, the main question was whether the forum selection agreement with the consumer was valid insofar as it met the conditions under Article 19 but there is the nagging problem of MIFID which provides this protection of the investor in the case of financial services.
- Then the killer argument of the CJEU to dismiss MIFID was that the MIFID protection of the investor (and the various categories of investors) also covers legal persons, not only individuals and so since it also covers legal persons, this was a no-no for consumer protection. This is because consumer protection is by definition the protection of the weaker party and not a multinational company (who is not exactly the weaker party).
- In fact, under Directive 2004/39, **on a company basis** (importance on this basis as this is what the court utilises the push away MIFID), the company would be presumed to be a profession it if met two of the following three requirements, namely:
    - That its balance sheet had a total of a minimum of €20 Million;
    - That its net turnover was €40 million; and
    - That its fines amounted to a minimum of €2 million.
- Petrochova usually traded in amounts of 100k Dollars (equivalent to around 80k EUR) so even if she were a company, she would not even meet two of these requirements. So there was both a formal pushing away by the judges of MIFID in the sense of its protection over legal persons which went against the consumer protection of Brussels I, and also in substance these amounts gave a different profile to the MIFID Directive than what was being projected by FIBO Holdings in order to protect themselves
- The judges concluded that the sole determining factor should be whether the act falls within the profession or trade activity of the person concerned. So, this is where the judges place their centre of gravity (try always to look for the centre of gravity of a

judgement when considering these cases). the Court therefore held that these factors are irrelevant in the qualification of a person as a consumer (para. 59 of judgement). Thus, the Court came to this conclusion because it is not the subject character of the person but the objective characterisation of the person is material.

Romana Ang vs. Reliant co investments ltd 2019 EWHC 879 – AST

- In Reliant Co we have an even stronger character participating on the foreign exchange. The defendant was a Cypriot company offering financial products and services through its online trading platform UFX. The claimant was a person of **substantial wealth,** who invested in bitcoin futures on a liverish basis through the UFX platform.
- Ms. Ang started proceedings as a consumer in the sense of Article 17-19 (i.e. the weaker party) in England as the place of her domicile in the face of an exclusive jurisdiction clause in favour of the courts of Cyprus where Reliant Co was registered and operating.
- The strength of the proof of her being a consumer must be much stronger than merely claiming that she is the weaker party to start proceedings against Reliant Co. Were it not for the exclusive jurisdiction clause in the contract, this would not have been necessarily required to be so strong to persuade the court.
- Ms. Ang was not at the relevant time employed, or earning in any self-employed trade or profession, save that there was an issue between the parties whether her activity with Reliant Co was to be classified as such. So, the fact of repeated intervention in the forex market, how many interventions make her a trader?
- the repeated interventions by Ms. Ang into the forex market to Reliant, and the amounts given make it more difficult for her to prove that she is a consumer deserving protection, because her character is being transformed slowly into a trader making it prima face look much more difficult to defend against the exclusive jurisdiction contract against her claim not to be a trader and to be a mere consumer. She claimed that the UK courts had jurisdiction since she was domiciled there, but Reliant Co contested the jurisdiction in the English courts relying on the exclusive jurisdiction clause under Article 25 of Brussels I (Exclusive jurisdiction)
- However, Ms. Ang held that the jurisdiction clause was not incorporated into her contract with Reliant Co as to satisfy the requirements under Article 25. She said that she received hyperlinks to Reliant Co's terms and conditions, that include the exclusive jurisdiction clause, but they did not work and each time she tried they took her to an error page.
- Here the court referred to the previous judgements of Shearson, Benincasa, and Apostolakis. It concluded that when Ms. Ang opened her account with Reliant Co, she in no way represented that she was opening her account for business purposes. In a way she is even admitting that she hid her intention that she was really doing it for business purposes and only did it for her personal consumption. So, the judge agreed with the decision in the English Apostolakis case that wealth and having some knowledge does not preclude an individual from being a consumer.
- The judge also mentioned Petruchova, which case had not yet been decided but it was at the time of the decision in proceedings before the court. The judge thus held that regarding Petruchova, it is examining whether it applies to an individual who engages in trade on the international currency exchange market through a third party

professionally engaged in that trade (ergo Shearman – remember Assignor to Assignee i.e. through a third party). So the individua does not remain the individual consumer but becomes a third party actively engaged n that trade nad deifntiely no longer the consumer entitled to the protection of the weaker party.

Benincasa Case (Case C-269/95

- Benincasa was an Italian who wanted to start a business in Germany, so he concluded a franchise contract to start this business there but he never actually started trading.
- Things eventually did not go well for him and he brought proceedings in Italy.
- This Franchise contract contained a jurisdiction clause, which held that proceedings could only be brought in Germany, so Benincasa was trying to find some exception which would allow him to sue in his home State (Italy). He held that he was a consumer because he never actually started to trade, and could thus sue in Italy by benefitting from the rules applicable to consumer contracts.
- However, the court did not accept this and rejected his argument as it her that the franchise contract was not a consumer contract since it was concluded by Benincasa for a purpose related to his trade or profession, even though the activity might have only planned for the future. Hence, the question that he had not started trading yet, did not mean that the franchise contract was to be considered a consumer contract since the purpose for contracting was linked to his trade or profession – the business.
- Thus, the court concluded that once he concluded the franchise contract for a purpose related to trade, then he is not a consumer even though he had not actually started to trade, but if the contract was concluded for a trade or professional purpose, than one is not a consumer.

Gruber Case (Case C-464/01)

- This concerned mixed contracts – for example, what happens if one buys a laptop which is partly used for his job (as part of his trade or profession) and partly used for fun? In this case, is the individual considered to be a consumer or not? This was discussed in this judgement.
- Gruber was an Austrian farmer in Austria where he had a farm with animals, and where he conducted his trade (business) as a farmer. However, he also lived on the same farm and thus it was also used for purposes out of his trade/profession as farmer. Mr. Gruber needed some tiles for the roof of his farm, which he bought from Germany, however the tiles were defective for which reason he brought an action against the German supplier.
- The question arose on the concept of a mixed purpose contract, and was Mr. Gruber to be considered as a consumer?
- According to the **Schlosser and Gerard Report** which was a commentary that accompanied the Brussels Convention, a strict test had to be applied, as the report held that one must look at the **predominant purpose of the contract**.
- However, the court did not follow this approach but rather, it held that the rules on consumer contracts can only be benefitted from if the link between the contract and trade was so slight as to be merely marginal.
- In this case, the Court held that Mr. Gruber was not to be considered a consumer because one could not say that the link between the contract and his position was slight as to be nearly marginal since his farm operated from that particular building.

Going back to the previous example regarding the laptop, in the case that a lawyer buys a laptop/computer to use it for work purposes but also use it for personal purposes, then obviously the link to his profession as a lawyer is not just marginal and even though you use it privately, there could be an issue that you are not a consumer, and therefore you won't benefit from these jurisdictional rules. In this case, the provisions under Section 4 of the Regulation do not apply, but rather one must then apply the general rule concerning contractual obligations under Article 7(1).

VFK Consumer's Association Case (Case C-167/2000)

- This concerned proceedings brought by an Austrian's consumer association against a German trader. Could the consumer association rely on the consumer rules in section 4?
- The court said no because the action was not in relation to a consumer contract. The consumer Association was acting in the general interest of consumers by bringing an action to prevent the use of unfair terms, generally via traders in consumer contracts, however, it was not acting in relation to a consumer contact per se. Thus, since it was also not a consumer itself, the Consumer Association could not benefit from these rules in Section 4.

Thus, it is clear that the first requirement in order to benefit from these rules is that one must be a consumer.

b. Secondly, **the contract must fall under one of the categories indicated under Article 17(1)**

Once one is classified as a consumer, then we need to see if the circumstances in question are considered to be situations where the consumer can benefit from these jurisdictional rules? Article 17(1) provides us with three types of consumer contracts where this jurisdictional rule may be availed of, namely:

1. If it is "***a contract for the sale of goods on instalment credit terms***" i.e. when you buy something on instalment terms (e.g. paying a sum of the total payment monthly).
2. If it is "***a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods***" – i.e. for example, if one borrows money to finance the purchase of a consumer good, then he is also covered.
3. If it is "*in* ***all other cases*** (in case of contracts were you are not buying on credit i.e. paying immediately/directly*), 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."*
    - So, if a French trader comes to Malta to pursue commercial activities here, for instance, to sell tiles to Maltese consumers, the Maltese consumers would be able to sue in Malta as their home state on the basis of this provision.

- However, the second phrase in this provision which stipulates "by any means, directs such activities to that MS or to several States including that MS", refers to distance selling techniques, including the use of the internet (via online transactions), generally known as direction of activities.
- The provision of Article 17(1)(c) was one of the most important amendments made by Regulation 44/2001 when compared with its predecessor, the Brussels Convention of 1968, mainly because the marketing reality changed with the intervention of the Internet at the time. Hence, this provision was amended in order to safeguard the rights of the consumer, in whichever MS he may be domiciled in the event that trade or consumer contracts are carried out over the internet.

However, after the Regulation was enacted, some issues arose because of the fact that the internet is rather ubiquitous, and it is quite impossible to have a website or any online platform be directed towards the consumers in a particular MS. So, would the simple fact that the website is accessible from the MS of the consumer's domicile enough? Very often, the scenario concerning a direction of activities would be quite obvious as if a Maltese individual purchased something from a German company online, and the German trader sent the product to the Maltese consumer in Malta, then it is clear that the trader/supplier directed his activities towards Malta, however, this is not always the case. Cases are not always that straight forward, and there was **a big question with regards to when a website should be deemed to be directed to the consumers state, or more generally what was meant by the concept of direction of activity.**

The CJEU put this issue to rest in a joint case in the names of **Peter Pammer & Hotel Alpenhof (Case 585/08 & Case 144/09).** These two cases concerned similar questions, for which reason the court heard them together and gave one preliminary ruling for both.

- Peter Pammer had booked a cruise online and was promised certain things according to the advertising on the website and the facilities offered and promoted. However, when he went on the cruise, it transpired that it was not at all what he expected, and he decided to sue for a refund of the balance he had paid.
- In the case of Hotel Alpenhof, the claimant went to a hotel, the hotel was not what was advertised on the internet and he left without paying the hotel and so the hotel sued him for payment of the price.

In this case, the court also looked at why the legislator had changed the wording from the previous provision under Regulation 44/2001, and pointed out that the conditions which the consumer context must fulfill are now worded more generally than they were in order to ensure better protection of consumers with regard to new means of communication and the development of electronic comments. The court also held that the European Union removed the condition requiring the trader to address specific invitations to the consumer advertised in the consumer state and that the wording of Article 15 (now Article 17) wad to be changed accordingly. So, court said that the intention of new wording is to have a more general wording to capture electronic commerce.

However, is the simple fact that the website is accessible in the consumer state sufficient to give rise to the jurisdiction of the consumer state? The court said that the simple fact that the website is accessible is not enough to mean that the trader is directing activities to the

consumers' MS. This is because in principle, all websites are technically accessible from all MSs, but the fact that the website is accessible does not automatically mean that the trader is directing a claim to the MS in question. In fact, in paragraph 69 of the judgment the court held *"It does not follow, however, that the words 'directs such activities to' must be interpreted as relating to a website's merely being accessible in Member States other than that in which the trader concerned is established."*

However the court said that if it is evident from the website that the trader was minded to do business with consumers in that particular member state then the rules in Section 4 apply. Thus, the test that the courts should follow, as stipulated under Paragaph 75 of the judgement was that *"in order for Article 15(1)(c) of Regulation No 44/2001 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****."*

Furthermore, Paragraph 76 states that *"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****."*

So, one would need to ask, was the website minded to conclude business with you? If the trader sold and sent the product to you in Malta then it is obvious that he was minded to conclude business with you. In order to figure out whether the website was minded to concluding business with you, one must take a look at the website itself whereby there are various factors to be taken into consideration as stipulated by the Court. Thus court held for instance, that one must check if the website contained various languages, international telephone numbers which consumer could use, emails for contact, and the availability of delivery to your home MS, etc. Therefore, the simple fact that there is a website is not enough, but, for example, if there is a German website which allows a Maltese citizen to make an order to be shipped to Malta, then it is willing to do business with the Maltese citizen in Malta and it is thus obvious that the website is directing activities towards Malta. In such a case therefore, the consumer would be protected by means of these provisions and can thus sue in the MS of his domicile.

After this judgement was delivered, some other cases still arose, namely:

Yusufi Case (Case C-190/11)

- In this case, the question concerned a situation where although the trader was directing activities to consumer's MS, the consumer decided to go to the premises himself and buy the product from the trader directly. In this case, would the consumer be protected under Article 17 (despite the lack of distance)?
- Yusufi was a German trader who sold second hand cars. An Austrian consumer came across Yusfi's website after which she crossed the border to go see the cars at Yusufi's showroom in Germany personally. She bought a car from Yusufi directly from the showroom and thus the contract was concluded there, but after a while she found the

car had hidden defects. So, she brought an action for the recession of the contract of sale, refund of the purchase price and a claim for damages.

- The contract was not concluded at a distance, so, was Article 17 still applicable? In other words, must the consumer contract be concluded at a distance for Article 17 to apply and be availed of by the consumer?
- The court said that the consumer rule still applied, so it is not a requirement the contract be concluded at a distance. Under paragraph 35 of the judgement the Court held that "*Article 15(1)(c) of the Brussels I Regulation (now Article 17(1)(c) of the Brussels I Recast Regulation – Reg. 1215/2012) does not expressly make its application conditional on the fact that the contracts falling within its scope have been concluded at a distance."*
- The court concluded that what is important is that there is a direction of activities in the sense that the trader must have directed his activities, and if there is a direction of activities it would not matter if the consumer crossed the border or not as it would be sufficient enough for the rules to apply.

Emrek Case (Case C-218/12)

- This case dealt with a scenario whereby for instance, a foreign trader has a website through which he is directing his activities to Malta, but the consumer does not find out about the trader through his website, rather the consumer is given a recommendation by friend to go to this trader's shop abroad. Then, the Maltese consumer goes to this trader personally to buy the product there where the contract is concluded (thus the contract is not concluded online), but after a while, the consumer finds out that the product he bought was defective. Would the rule under Article 17 still apply?
- This situation was dealt with in this judgement, whereby the question asked was <u>whether a causal link (link of causation) is required between the direct action of activity and the conclusion of the contract</u> between the trader and the individual consumer.
- Once again, this case involve the sale of a second hand car, this time concerning the French and German borders. A French consumer had crossed the border to go to the seller's showroom in Germany personally, after being given a recommendation. However, the case was defective, and so, the consumer brought an action in France.
- So, was the fact that the German seller directing activities to France enough to sue in France, even though Emrek had not found out about the existence of the seller through the website but through someone else's recommendation?
- The court said that *"A.15(1)(c) of Regulation 44/2001 (now article 17(1)(c) of Brussels I Recast) does not require the existence of a causal link between means employed to direct the commercial or professional activity to the Member State of the consumer's domicile…"*
- Therefore, **no causal link is required since such a requirement would actually go contrary to the aim of Section 4 of the Regulation, which is in fact to protect consumers**.
- Although it is not required, the existence of such a causal link constitutes strong evidence of the connection between the contract and such activity, which is to be taken into consideration by the national courts as proof of the existence of a direction

of activity towards Malta in order to determine whether the activities are in fact directed to the MS of the consumer's domicile.

- However, even if there is no causal link a Maltese consumer would still be able to sue in Malta however, upon proving to the court that the trader was minded to conclude business with consumers in Malta in the sense that the trader was directing his activities towards Malta. Ultimately, once a trader is directing his activities towards a particular country, he is prone to being sued in that country even though the consumer might not have concluded his contract through those means.

In conclusion, for the rules under Article 17(1) to apply, one must first be a consumer, and secondly, the contract must be one of the types of contracts listed under the provisions. With respect to Article 17(1)(c), which is not so direct, there must generally be either the actual pursuing of commercial activities in the consumer state, or else that there is direction of activities, i.e. that the trader must have directed his activities to the consumer State. Moreover, Article 17(1)(c) 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 provisional activity member state of the consumer's domicile, mainly an Internet website 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.

Article 17(2) then provides that:

Article 17

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

We saw a similar rule to this under the provisions dealing with contracts of insurance. Thus, similarly, if the supplier is domicile the United states which is a non-MS, but has a branch, agency or other establishment in a MS, then is deemed to be domiciled in that member state and thus its consumers are to enjoy the rights afforded under this section.

Article 17(3) then provides that:

Article 17

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.

Thus, Section 4 does not apply in instances where only an air transport contract in concluded but rather it applies to package travel contracts. These are contracts which provides consumers with travel and accommodation services combined. Thus, there must be a combination of services and if the package falls within the regulation, then the individual would be considered a consumer and is hence covered by the provisions of Section 4.

<u>Article 18 – The Rules of Jurisdiction under Section 4:</u>

Prior to the enactment of the Brussels I Recast (Regulation 1215/2012), for Section 4 to apply, BOTH the consumer and the trader had to be domiciled or deemed to be domiciled in a MS. However, this was changed and today for section 4 to apply, it is no longer a requirement that the trader must be domiciled and in a MS.

In fact, Article 18 stipulates that:

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.

In the sense of Article 18(1), the domicile of the supplier is irrelevant as it states "regardless of the domicile of the other party". Thus, Article 18(1) applies by way of exception even if supplier is not domiciled or not deemed to be domiciled in a MS. For example, you buy something over the internet from an American Corporation, which is not domiciled in Malta but in a third state and it also does not have a branch, agency or establishment in a MS in the sense of Article 17(2), and so it cannot be deemed to be domiciled in MS. Due to the provision of Article 18(1), the consumer can still bring proceedings in the MS of his domicile. This was one of the amendments made and brought into effect by Regulation 1215/2012 , by virtue of which the domicile of the supplier is irrelevant if the consumer is domiciled in a member state, which is sufficient enough for him to be able to avail of these rules protecting him as consumer to sue in his MS of domicile.

Note that, Article 18 applies only insofar as jurisdiction is concerned, and not with respect to the applicable law. This is because, once the judgement is delivered against the American Corporation in Malta, can it be enforced in the USA if the company has no assets in Malta? In this case, we need to look at the law of the USA however, with respect to jurisdiction, Article 18 stands.

Therefore, Article 18(1) provides us with one of the exceptions where the Regulation applies even where the defendant is not domiciled in a MS, contrary to the general rule which provides that the Regulation applies if the defendant is domiciled in a member state.

Furthermore, according to Article 18(2), if it is the consumer which is being sued and so proceedings are brought by the supplier against the consumer, the supplier has to bring proceedings in the court of domicile of the consumer.

Article 18(3) continues by stating that "*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.*" The court which has jurisdiction over the original claim also has jurisdiction over a counter claim which is arising from the same contract of the same act.

Article 19: limitations on the ability of the supplier to impose jurisidiction clauses:

Article 19

The provisions of this Section may be departed from only by an agreement:

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

Article 19 once again limits the possibility of jurisdiction agreement clauses which are generally invalid since the consumer cannot be deprived of the protection afforded by these provisions. Thus, Article 19 merely allows choice of jurisdiction agreements in very limited circumstances namely:

1. that the choice of court agreement can only be entered into after the dispute has arisen, whereby the parties agreeing on going to a particular court; or
2. that the choice of court agreement gives the consumer an additional option allowing the consumer to bring proceedings in courts other than those indicated in this section; or
3. that the choice of court agreement is entered into limiting jurisdiction to the courts of both parties' domicile if both the consumer and supplier are domiciled in the same MS.

Section 5, Articles 20-22: Jurisdiction over individual contracts of Employment

Under Section 5 of the regulation we are faced with situations concerning contracts of employment, and rules set up with the aim of protecting the employee, as the weaker party in the employment relationship.

Article 20

*1. In matters relating to individual contracts of employment**, jurisdiction shall be determined by this Section, without prejudice to Article 6, point 5 of Article 7 and, in the case of proceedings brought against an employer, point 1 of Article 8**.*

Remember that Article 6 deals with defendants who are not domiciled in a member state; Article 7(5) deals with branches, agencies or other establishments domiciled in a MS, which continues to apply; and Article 8(1) deals with the situation of multiple defendants (who may be domiciled in more than one MS). Such provisions continue to apply irrespective of the provisions under Section 5 (Articles 20-22)

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.

Once again this provision states that if the employer is domiciled in a third country but has a branch, agency or other establishment in a member state through which the employee is contracted to work, the employer can be sued in the courts of the MS where the branch/agency/other establishment is established as though it is domiciled there.

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**.*

So, the employee can sue the employer in the courts of the place where he habitually carries out his work but if the employee hasn't habitually carried out his work in any one MS and is always moving from one place to the other, the employer may be sued in the place where the business is 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.

This provisions provides another exception to the general rule that the regulation applies to defendants domiciled in a member state. Here, if the employer is not domiciled in a MS the employee is given the right to sue in the place where he habitually carries out his work. thus, in instances of employment contracts, the Regulation applies even if the employer is not domiciled in a MS as the employee may sue the employer in the courts of the MS in which he habitually carries out his work.

For example, if the employee was employed by a Japanese company, the employee can bring proceedings against the Japanese company even though the Japanese company is not domiciled in a MS, in the courts or the place where the employee habitually carries out his work. So, the employees are given protection as they are allowed to sue in the place where they habitually carry out their work and even employers who are not domiciled in a MS.

This was an addition introduced by Regulation 1215/2012 and it was not found under its predecessor (Regulation 44/2001) and so if there was an employer not domiciled in a MS, the regulation did not apply but Section 742 of the COCP applied with respect to the jurisdiction issue. Therefore the national rules of jurisdiction would determine whether you could sue an employer not domiciled or not deemed to be domiciled in a MS. But one of the changes made by Regulation 1215/2012 when compared to Regulation 44/2001 is that the rules on consumer contracts and the rules on employment contracts also apply to suppliers and employers not domiciled in a MS.

What happens if the employer wants to sue the employee i.e. suing the weaker party?

Article 22

*1. An **employer may bring proceedings only in the courts of the Member State in which the employee is domiciled**.*
2. The provisions of this Section 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.

Thus, in accordance with Article 22, if the employer wants to sue his employee, he must bring proceedings in the court of domicile of the employee, however, the rules on counterclaim continue to apply irrespective of this rule.

What about Choice of Court/Jurisdiction Agreements?

Article 23

The provisions of this Section may be departed from only by an agreement:
(1) which is entered into after the dispute has arisen; or
(2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

Generally, if in an employment contract there is a provision which stipulates a choice of court agreement, it is basically depriving the employee of his rights and so it would not be permitted. However, in accordance with Article 23, this is allowed in two instances:

1. if the agreement is entered into between the parties after the dispute has already arisen (thus not a priori); or
2. of it is conferring an added forum to the employee.

Article 24 – Exclusive Jurisdiction

Article 24 which deals with **exclusive jurisdiction**, irrespective of domicile. Under this provision we find another important exception to the general rule of domicile by virtue of which proceedings concern certain particular claims have to be brought in a particular MS. Therefore, here the claimants cannot choose where to start their proceedings, but rather the legislator is hereby imposing the courts of a particular MS on the basis of a link which exists between the dispute and the particular court. Hence, this provision does not provide us with an additional forum, but rather with the particular forum which must be adhered to by the claimant.

In fact, Article 24 states that according to the object of the proceedings in question, the courts of a particular MS would have exclusive jurisdiction, regardless of the domicile of the parties. Thus, for the purpose of Article 24 the domicile of the parties is irrelevant, thus we are not interested in whether the claimant or defendant are domiciled in in an EU member state or not and neither are we interested in where the defendant is domiciled. Rather, one must look at the **claim** and **if the claim relates to any of the objects stipulated in this Article**, then it is the courts of the MS mentioned in the provision which have jurisdiction.

Note that the term "**exclusive**" here means that proceedings must be brought before the courts of the MSs, and not before any other court of another MS. Article 24 is mandatory in nature in the sense that the parties also cannot contract out of it and so, it is not possible for the parties to enter into a choice of court/jurisdiction agreement giving jurisdiction to another court, if the circumstances relate to any of the objects listed under Article 24. Thus, in the case of a breach of Article 24, the judgement decided in a MS not in accordance with the provision, will be deprived of recognition in terms of the regulation, and consequently would also lead to issues for the enforcement of the judgment in other MSs.

1. Proceedings which have as their object **rights in rem in immovable property** or **tenancies of immovable property, the courts of the Member State in which the property is situated has jurisdiction.**

By virtue of this provision, if the object of the claim relates to a **right in rem** i.e. real right in immovable property in Malta or to a **right in rem** i.e. real right over a tenancy of immovable property in Malta then the Maltese courts have exclusive jurisdiction, irrespective of the domicile of the parties. The same situation would arise if the property is situated in France and the dispute relates to a right in rem in immovable property situated in France, then the French courts have exclusive jurisdiction.

However, not all proceedings involving immovable property are caught by the rule. Thus, the simple fact that there is a case which concerns immovable property, doesn't automatically mean that the dispute is caught by Article 24. The determining factor is that the claim must be based on a right in rem in immovable property, that is it must concern a REAL RIGHT. Hence, one must make a distinction between rights in rem (real rights) and rights in personam (personal rights):

- A right in rem is a right which can be exercised erga omnes i.e. it is a real right – for example, a right in rem under the law of property is the Actio Rei Vindicatoria,

which is the action where the owner seeks to recover possession from somebody else. This is a right based on ownership and the type of action instituted by the owner can be instituted against any person who takes possession of his property, so it is clearly right in rem and that would be an example of a claim which falls within the scope of article 24.

- A right in personam is a right which can be exercised only against one particular party, thus it is a personal right – for example, a tenancy or a lease agreement gives rise to personal rights and not real rights.

On this particular point one can refer to the following judgments of the CJEU:

Gaillard vs. Chekili (Case C-518/99)

- This case concerned the question: what is a right in rem in an immovable property?
- In France, similar to Malta, first the parties sign the preliminary agreement i.e. the promise of sale, and then they subsequently sign the final deed of sale. In Malta if the buyer does not appear for the final deed of sale, the seller can either seek specific performance i.e. sue purchaser and make him appear on the final deed of sale, or else the seller could also possibly sue the buyer for damages.
- In this case, the parties had entered into a preliminary agreement and the purchaser did not appear on the final deed of sale, so the seller brought proceedings for rescission of the contract of sale stating that he was no longer bound and he also claimed damages. Was this a right in personam or was this action based on a right in rem?
- The CJEU laid down certain important principles as it held that the phrase "proceedings which have as their object rights in rem in immovable property" must be given a community meaning in the sense that the terms of the regulation must be interpreted in an autonomous manner. Moreover, since Article 24 is an exception to the general rule of jurisdiction, it must not be given a wider interpretation than necessary.
- More importantly, the Court held that for Article 24 to apply (previously Article 22) it is not sufficient that the action has a link with the immovable property. In fact, the court held that the action must be based on a right in rem and not a right in personam, except in the case of a tenancy of immovable property.
- The Court noted that it is clear from the **Schlosser Reports** (the report which accompanied the Brussels Convention) that the difference between a right in rem and a right in personam is that the former has erga omnes effect which means that it can be exercised against anybody, whereas the latter can only be claimed against the debtor since it is based on an obligation which one would have contracted with a particular person.
- The Court further held that although there was a link with the immovable property, the action was not a right in rem, but rather it was an action in personam based on the contract which was entered into by the parties. Thus, it was not a right in rem because it was an action which could only be exercised against Chekili. Therefore, it was not caught by article 24.

Webb vs. Webb (Case C-294/92):

- The court came to a similar conclusion in this judgement which dealt with a reference from the English courts concerning a resulting trust, a situation similar to what we refer to in Malta as a *mandatarju prestanomine*[1].
- In this case the parties were father and son, whereby the son had bought property for his father, and the father brought an action against the son for the transfer of the property in his name.
- The Court once again held that this was an action in personam and therefore not caught by Article 24. As held previously, the Court maintained that a right in rem is an action which can be exercised erga omnes – in this particular case the father and could obviously proceed against his son only and not against anyone else, hence, it was not a claim based on a right in rem of immovable property.
- The Court held that an action for a declaration that a person holds the immovable property as a trustee and for an order requiring that person to execute such documents as should be required to vest legal ownership in the plaintiff, does not constitute an action or a right in rem. This means that the father did not have a claim which was exercisable erga omnes, but it was a personal right and so he could merely assert his claim against his son, falling out of the scope of Article 24.

Therefore, as seen from these two judgements the Court gives Article 24 quite a restrictive interpretation and it is not enough that the case is linked to immovable property but it must be based on a right in rem and a right in personam. Article 24 has been interpreted strictly, because it is an exception to the general rule of domicile that we have in the Regulation.

Moreover, generally, proceedings which involve rights in personam, although they may relate to immovable property, are not caught under the provision simply by reason of the fact that they are rights in personam. Despite this, Article 24(1) further states that:

"However, in proceedings which have as their object ***tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months****, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;"*

A lease agreement/tenancy gives rise to a right in personam and not a right in rem, nevertheless, if the dispute concerns a lease agreement over an immovable property for a maximum period of 6 months and if the tenant and the landlord are domiciled in the same MS, it is still caught by Article 24 meaning that proceedings need to be brought in the court of the member state in which the property is situated. This is an exception where Article 24 applies to a right in personam.

[1] For more context on this: when I give another the order and money to go and buy an immovable property for me, in his own name. Nothing is said upon the purchase that it is being carried out for me, but in truth in his relation with me, he was my mandatory. Then, there is the mandatarju prestanomine action by which the property is transferred to me.

So, if it's a tenancy for temporary private use for a maximum period of 6 months and the parties have the same domicile, one can always bring proceedings in the court where the immovable property is situated, but if it is a tenancy which is exceeds the six month period, and so is not for temporary private use, and the parties are not domiciled in the same MS, then proceedings can be brought in the courts where the defendant is domiciled as the general rule would apply.

But, what do we mean by a dispute concerning tenancies of immovable property?

There are various types of disputes concerning tenancies of immovable property. To this end, in the **Rösler Case (Case C-241/83)** the court held that any dispute concerning:

- The existence and validity of a lease agreement;
- The interpretation of the terms or clauses thereof;
- The duration of the lease;
- The giving up of possession to the landlord;
- The repairing of damage caused by the tenant; or
- The recovery of rent and of incidental charges payable by the tenant such as charges for the consumption of water, gas and electricity, etc.

"falls within the exclusive jurisdiction conferred by Article 16 (1) of the Convention on the courts of the State in which the property is situated." – today Article 24. Thus, any type of dispute related to the lease agreement falls within the scope of Article 24.

In the **Saunders Case** the court affirmed the disputes which fall under the scope of Article 24(1) concerning tenancies of immovable property. It also further explained that there is an exception in the proviso, were the rent stipulated in the rental agreement is for a period not exceeding 6 consecutive months and the tenant and the landlord are domiciled in the same MS.

In the **Dansommer Case** The court ruled that article 16 of the Brussels Convention (today article 24) is applicable to an action for damages for taking poor care of premises and causing damage to accommodation.

Hacker Case (1992):

- In this case the court held that a package holiday contract, which is not a tenancy contract, does not fall within the scope of Article 24(1). Package travel contracts involve an agreement on accommodation and transportation (e.g. flights, transfers, etc.).
- Even though there is an accommodation element in a package travel contract, this form of "tenancy" is only a minor part of a more complex contract such as an all-inclusive contract, and so it falls out of the scope of Article 24.
- Therefore, a contact between a travel organizer and a consumer providing various services in relation to travel, including arrangements for the lease of holiday accommodation, falls outside the scope of the tenancy agreement within the meaning of Article 24, even though there could have been the provision of accommodation.

It is important to point out that the court can also raise the fact that it has no jurisdiction ex officio, so if an action is brought for a right in rem on immovable property in France which is brought in Malta, the judge can also ex officio decline jurisdiction. In fact, Article 27 provides that:

Article 27

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, it shall declare of its own motion that it has no jurisdiction.

Thus, if the court realizes that the action is an action in rem in respect of property in another MS, the court can on its own motion ex officio i.e. without a plea raised by the parties, it shall declare that it has no jurisdiction.

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

In these types of actions, proceedings must be brought in the court of MS where the company is registered. So for example, if you bring an action seeking the nullity of a Maltese company or the nullity of a decision of the board of directors or a nullity of the shareholders meeting etc. for a company registered in Malta, then proceedings have to be brought in the court of the MS where the company is registered hence, in accordance with this example the proceedings have to be brought in Malta.

3. In proceedings which have as their **object the validity of entries in public registers**, the courts of the Member State in which the register is kept;

In proceedings which have as their object the validity of an entry in the public registry, the proceedings must be brought in the MS were the register is kept. Thus, if you are bringing proceedings to annul some entry in a public register such as the public register of Malta or the Maltese Land Registry, proceedings are to be brought in the courts of the MS where the registry is situated, in this case Malta.

4. In proceedings concerned with the **registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered**, irrespective of whether the issue is raised by way of an action or as a defence, **the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place**.

   Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings

concerned with the registration or validity of any European patent granted for that Member State;

Here we have another specific rule relating to proceedings concerning the registration or validity of patents, trademarks, designs and similar rights and in such an action must be brought in the courts of the MS which the deposit of the registration of the patents, trademarks etc. was registered or applied for. Therefore, similar to the previous provision, these type of proceedings have to be brought in the court of the member state where the where the intellectual property is registered.

5. In proceedings concerned with the **enforcement of judgments**, the courts of the Member State in which the judgment has been or is to be enforced.

This will be dealt in further detail when we deal with the recognition of foreign judgments. However, this provision is saying that if you want to enforce a judgment in Malta, then obviously one must go to the Maltese courts, which will then decide whether the judgment is enforceable In Malta. If you want to enforce a judgment in Italy then you have to go to the Italian courts in order to seek enforcement of a particular judgment in Italy.

Articles 25-26 – Prorogation of Jurisdiction

Article 25: Jurisdiction Clauses and Choice of Court Agreements

In principle, parties to a contract may agree upon the court which ought to have jurisdiction in the event of a dispute. These types of clauses/agreements are very important and common in the commercial world. In fact, in most commercial agreements there are clauses which state that in the event of a dispute between the parties, the courts of a particular MS are to have exclusive jurisdiction.

Side note: Sometimes, in addition to the jurisdiction clause, we also find clauses on the applicable law, in which case we apply Rome Regulation (as so see note on this later on). However, it is important to note that very often, but not necessarily, one finds both the choice of law and choice of court clauses in the same contract. If they agree on both, something similar to the following will be found as a clause under the agreement, for instance: "In the event of a dispute between the parties the Italian Courts shall have exclusive jurisdiction and any disputes shall be governed by Italian law." However, note that the courts which have jurisdiction and the choice of law need not necessarily be the same. For example, jurisdiction may be vested in the Maltese Courts, but English law then would regulate the dispute between the parties, according to the choice of court and choice of law agreements. So, it is not always necessary that the law of the chosen court will apply. From a practical point of view, many times it makes sense choosing the same law of the court, Thus, in practice it would make sense to have the same choice of law and choice of courts, but this is not mandatory and it is also not always possible.

Article 25

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

⇒ **"Regardless of their domicile"**

The first point to make here that **Article 25 applies regardless of the parties' domicile**. This was one of the important amendments made in the promulgation of Regulation 1215/2012 when compared to its predecessor, Regulation 44/2001 under which it was provided that at least one of the parties had to be domiciled in a MS. Contrary to this, in accordance with Article 25 as it stands today, the domicile of the parties in question is disregarded completely. Thus, this is another exception where contrary to the general rule of Jurisdiction under article 4, we are not interested in the domicile of the defendant. So, if the dispute concerns a civil and commercial matter, meaning that the Regulation applies, and the parties have agreed that the court of a particular MS has jurisdiction, then that court will have jurisdiction by virtue of the jurisdiction clause on the contract (also known as the choice of court agreement). Thus, it is the jurisdiction clause/choice of court agreement which gives the court jurisdiction.

Noteworthy is that the Brussels Regulation (Reg. 1215/2012) applies only to EU MSs, meaning that it only applies to the courts of MSs. For this reason, the parties cannot choose to decide disputes in an American Court in the jurisdiction clause on the basis of this prevision, as the American Court would not apply Regulation 1215/2012 but rather it would apply its own law on jurisdiction. However, if the two parties concerned, wherever they are domiciled (be it in an EU MS, or not), decide that the Maltese courts have jurisdiction over a particular civil and commercial matter, then the Maltese Courts have jurisdiction by virtue of the choice of court agreement in the sense Article 25.

⇒ **"Such Jurisdiction shall be exclusive unless the parties have agreed otherwise"**

Generally, choice of court agreements specify that a court has exclusive jurisdiction hence, they are referred to as **exclusive jurisdiction clauses**. So, if for example the jurisdiction clause states that the Maltese Courts have exclusive jurisdiction, it shows that the parties have chosen the Maltese Courts to have jurisdiction, thus, proceedings can only be brought in Malta. Therefore, if the parties choose a court by virtue of a jurisdiction clause, it means that one cannot sue in the court of his domicile, because there was an agreement on the court which has jurisdiction in the case that any dispute arises.

This consequently means that we cannot sue on the basis of article 7(1), and we cannot go to the court of the place of performance of the obligation in question, because we have agreed on a particular court to have jurisdiction. So, when this rule applies, the general rule of domicile doesn't apply and neither does the rule under Article 7.

However, it is not necessarily always the case. In fact, Article 25 stipulates that "*Such jurisdiction shall be exclusive unless the parties have agreed otherwise."* Therefore, although a specific court is given jurisdiction in accordance with the jurisdiction clause, it does not prevent the parties from bringing proceedings in another court which would otherwise have jurisdiction if they agree otherwise. For example, if the parties simply mention that the Maltese courts have jurisdiction, then the regulation provides that the chosen jurisdiction (Malta) shall be exclusive, unless the parties agree otherwise.

Moreover, it is possible to draft the clause differently by saying that the Maltese courts shall have non-exclusive jurisdiction whereby proceedings can be brought in Malta or in any other court. These are generally known as **'non-exclusive jurisdiction clauses'**.

This means that upon drafting such agreements, the parties must be very careful as to what they truly want because if they want to proceedings to be brought in the agreed MS only, then they must make this clear by using the word "exclusive". In fact, for this reason, such clauses/agreements are generally very clear, specifying that for example, the Maltese courts shall have exclusive jurisdiction.

⇒ **The Scope of the Jurisdiction Clause**

In practice, the scope of the jurisdiction clause is very important, in the sense of what the jurisdiction clause covers. Thus, upon drafting or interpreting the jurisdiction clause, one must see which disputes the parties intended to take before chosen court. Generally, the

jurisdiction clause applies only to the types of disputes which are contemplated in the jurisdiction clause. For this reason, courts sometimes need to interpret the jurisdiction clause to see which disputes are covered by the clause i.e. to see whether the dispute before them falls within the scope of the jurisdiction clause agreed to or not.

In practice disputes arise on what is covered by the jurisdiction clause i.e. which claims are covered and on this point there are some important cases:

Chemimart ltd v. Reckitt Benckiser Healthcare International ltd (Case 475/2011, FHCC 2012)

- This case concerned a distributorship agreement concluded between Chemimart and the defendant company which was the owner of the brand 'Boots'/ After a number of years, defendant company terminated the distributorship agreement with Chemimart, and so Chemimart brought an action against the defendant company in Malta, on the basis of three types of claims:
  1. A claim for culpa in contraendo: Chemimart held that certain promises were made by defendant company (e.g. that it was going to be its distributor in Malta, etc.), namely giving the impression that the contract was going to be one of a lasting relationship between the parties, and those promises were breached.
  2. A claim for unjustified enrichment for the benefit which the defendant company was going to make through the Chemimart's investment in the brand in Malta;
  3. A claim for breach of contract for damages: Chemimart argued that defendant company was not supplying products and the agreed quantities on time throughout the duration of the contract and also that it was not delivering in accordance with the distribution agreement.
- The distribution contract contained a jurisdiction clause which held that: "*This agreement shall be in all respects interpreted in accordance with the Laws of England and any dispute or difference shall be determined by the English Courts*", so any dispute or difference shall be determined by the English courts. The question which arose was: were these claims covered by the jurisdiction clause?
- The Court held that the contractual claim for breach of contract is covered by the jurisdiction clause, but since the other two claims are not contractual (culpa in contraendo and claim for unjustified enrichment) then they are not covered by the jurisdiction clause. The court held that the first claim relates to conduct prior to the conclusion of the contract and that the other one is strictly speaking a claim for unjustified enrichment and it is not a contractual claim. Thus, the court maintained that insofar as the contractual claim is concerned, the jurisdiction clause applies and the Maltese courts do not have jurisdiction, however, the other two claims which are not contractual are not caught by the jurisdiction clause and thus may be decided by the Maltese courts.
- Dr. Cachia has his reservations on this because it seems that when the parties drafted the clause they drafted it in quite a wide manner since it states that "*any dispute or difference will be determined by the English courts"* and it doesn't seem that the parties were making this distinction between contractual claims and non-contractual claims.
- In this respect, it is interesting to note that Article 25 does not limit its application to contractual obligations, but rather speaks more generally about a legal relationship between the parties.

- Although technically the other claims were not contractual (unjustified enrichment and culpa in contraendo) they were still related to the distribution agreement because for instance, the claim for unjustified enrichment could only be raised on the basis that the distributorship agreement was terminated. This goes to show how important the wording of the clause is in order to determine whether the claim falls within the scope of the jurisdiction agreement or not.
- Therefore, Dr. Cachia does not agree with the judgment of the FHCC, but this is what the court decided. There was an appeal from the judgment, but they didn't deposit the guarantee on time and therefore the appeal was declared deserted (law of procedure).

Michael Peresso ltd vs. Upim Case 208/2013 (FHCC 07/10/2015 & COA 03/09/2016)

- This case concerned a franchise agreement entered into between Michael Peresso ltd and UPIM. During the negotiating stage, UPIM was giving plaintiff company the impression that it was quite a strong and healthy business and it was also telling them to invest in three shops in key locations in Malta, thus the Maltese company had undergone substantial expenses to rent these outlets. However, soon after concluding the contract it resulted that UPIM was on the verge of bankruptcy for which reason Upim was supplying old stock.
- Thus, the Maltese company brought at action for damages against Upim for culpa in contrahendo. The Maltese company argued that Upim was negotiating in bad faith and let them incur expenses for the shops when they knew they were in a state of bankruptcy and that they would not be able to deliver these goods on a regular basis, and therefore they were liable in damages. Thus, Upim concealed certain material information which shod have been disclosed to plaintiff prior to the conclusion of the contract, as a result of which the Maltese company suffered damages.
- The question arose as to whether this dispute fell within the scope of the jurisdiction clause found in the franchise agreement. The jurisdiction clause in question held that: "***Any dispute concerning the interpretation, validity, performance and termination of this agreement and of the single supplies of products by the franchisor to the franchisee shall be subject to the exclusive jurisdiction of the courts of Milan***". So, here the jurisdiction clause was very specific as it held that the courts of Milan in Italy had exclusive jurisdiction for any dispute over claims concerning the interpretation, validity, performance and termination of the agreement.
- The Court found that the dispute was not covered by the jurisdiction clause because the claim was based on culpa in contraendo and the jurisdiction clause applied to disputes concerning the franchise agreement itself. Thus, since this was not a dispute concerning the franchise agreement, but an action for damage on the basis of bad faith shown by defendant company, the jurisdiction clause did not apply.
- The COA also confirmed this judgement.
- This judgement was also less controversial than the previous judgment. In fact, Dr. Cachia does not believe that this judgment is controversial because the jurisdiction clause was drafted in a much more limited way when compared to the jurisdiction clause found in the **Chemimart ltd v. Reckitt Benckiser Healthcare International ltd case**.

⇒ **Formal Validity and Substantial Validity**

Formal Validity and Substantial Validity are requirements as to form must to be satisfied upon drafting jurisdiction agreements. Since the effect of a jurisdiction agreement is that proceedings have to be brought in the courts designated there, the parties must make sure that the agreement is valid for it to have effect.

Formal Validity:

Article 25(1) provides that:

The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Therefore, with respect to its formal validity, the jurisdiction clause must be made **in writing** or **evidenced in writing** or it could also **conform to a practice which is established in the particular trade.** Here, one must refer to the following judgements:

Elefanten Schuh GmbH v Jacqmain (Case C-150/80)

- Here the court held that the validity of a jurisdiction clause as to form depends only on whether it complies with the requirements of Article 23 (Now Article 25) and the MSs cannot impose any additional formal requirements.
- Thus, the regulation regulates the matter in the sense that the agreement must be in writing or evidenced in writing or it can also be evidences by electronic means, or in a form which acquired the practices which the parties have established between themselves. Consequently, it is not possible for the MSs to impose any additional requirements.
- In this case the national law provided that the jurisdiction clause must be in the national language under pain of nullity, so, the court held that the MS cannot impose that the agreement has to be made in a particular language since it is not a requirement under the regulation.

The Salotti Case (Case C-24/76)

- Here the court also held that the requirement of having the agreement done in writing is important to ascertain whether there was consent, thus the requirement of having the agreement in writing is to make sure that the parties have consented to the jurisdiction clause.
- Salotti concerned general conditions of sale which were printed at the back of the contract in which there was a jurisdiction clause.

- The court held that where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties printed at the back of a contract, **the requirement of writing is fulfilled only if the contract signed by both parties contains an express reference to the general conditions**.

Article 25(2) is also important with regards to the contracts formal validity as it provides that: *2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'*

So, for instance if the parties agree on the choice of court via emails, then it is also equivalent to an agreement in writing. Thus, the agreement need not be concluded in physical writing, but communications by electronic means (email) are allowed so long as there is durable record of the agreement.

In this regard, reference must be had to the **CarsOnTheWeb Case (Case C-322/14):**

- This case dealt with a jurisdiction agreement which concerned clicking to accept the terms and conditions on a website. Thus, it had to be determined whether this type of agreement was formally valid.
- The scenario of the case concerned the sale of a car over the internet between 2 car dealers, via a commercial transaction since both of the parties were traders. However, after they concluded the contract the seller cancelled the sale and stated that he could not deliver the car due to some problems it had. Therefore, plaintiff brought an action for the enforcement of the contract of sale and an action for the court to order the seller to execute the contract.
- Since the car was bought on the website, the buyer had to accept the terms and conditions with a click, after which he could also save such terms. The question was, was this valid?
- The court said YES, this was a valid jurisdiction agreement, as long as the parties can have a DURABLE RECORD of agreement. The court here referred to article 25(2) and maintained that as long as you can either save it or print it, then the agreement is formally valid.
- The court also stated that: "*it is not disputed that click-wrapping makes printing and saving the text of the general terms and conditions in question possible before the conclusion of the contract. Therefore, the fact that the webpage containing that information does not open automatically on registration on the website and during each purchase cannot call into question the validity of the agreement conferring jurisdiction*." Therefore, the fact that you can read the terms and conditions and save/print them to have a durable record, means that the agreement is formally valid in the sense of article 25(2).
- The court said that the TEST of whether the formal requirement in that provision is met is "**whether it is possible to create a durable record of an electronic communication by printing it out or saving it to a backup tape or disk or storing it in some other way**", and that that is the case "even if no such durable record has actually been made", meaning that "the record is not required as a condition of the formal validity or existence of the clause"

Substantive Validity:

The matter of **Substantive Validity** was very complicated prior to the coming into force of Regulation 1215/2012 which deals with substantive validity under Article 25(1) ("unless the agreement is null and void as to its substantive validity under the law of that Member State"). This is because in so far as substantive validity is concerned, there was no rule under Regulation 44/2001, so it was debated as to what should happen in the event that one of the parties states that their consent is vitiated because they did not agree to the jurisdictional clause.

The answer to this question was not clear, and a number of solutions had been provided, but the generally accepted view under Regulation 44/2001 was the one supported by Briggs and Rees who held that one could also give an autonomous interpretation to the word 'agreement' which is ultimately a subject of consensus. To that end, the court could investigate whether as a matter of fact the parties did or did not consent to the agreement or whether their consent was vitiated. In fact, case law shows that the Court has always emphasized the importance of consent. n the **Salotti case (Case C-24/76),** the court pointed out that the court hearing the dispute must ascertain whether the clause conferring jurisdiction was the subject of consensus between the parties.

However, this was not exactly the solution chosen in Regulation 1215/2012 which provides that the dispute as to the substantive validity of the agreement would be determined by **applying the law of the court designated in the choice of court agreement**. So, this was a change made by Regulation 1215/2012. So, if the Italian courts have jurisdiction on the basis of the jurisdiction clause, and there is allegation of substantive validity, then the issue will be determined by the law of the chosen court, i.e. Italian law.

Another important point is found under **Article 25(5)** which states that:

25.(5) An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

This means that although the jurisdiction clause/choice of court agreement, is enclosed in a contract, it is treated as a separate agreement independent of the other terms of the contract. This provision, further holds that the validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid. So, for example we conclude a complex agreement which contains a jurisdiction clause but there is an issue regarding the validity of the main agreement which renders it invalid. In such a case, the simple fact that the main agreement is invalid does not automatically mean that the jurisdiction clause is also invalid because in accordance with this provision, this part of the contract dealing with the choice of court "shall be treated as an agreement independent of the other terms of the contract". Moreover, the validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

This provision under Article 25(5) was legislated as a reflection of the ruling of the CJEU in **Benincasa (Case C-269/95):**

- This case concerned franchise agreement which contained a jurisdiction clause conferring jurisdiction to the Courts of Florence. Benincasa brought an action saying that the main contract (i.e. the franchise agreement) was null and void. Thus, the question which arose was, since the franchise agreement was allegedly null and void, does it mean that Benincasa can bring such an action before another court?
- The Court held that no, because while the jurisdiction clause is governed by the provisions of the Brussels Convention, the substantive provisions of the main contract in which that clause is incorporated and any dispute as to the validity of that contract is governed by the lex causa determined by the PIL of the court having jurisdiction.
- The agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, so even though the contract can be null in substance, that doesn't mean that we didn't agree on which court has jurisdiction to decide any issues. Thus, insofar as the jurisdiction clause is concerned, it is independent from any other terms of the contract and so the dispute on the validity of the contract will still be determined by the court which has jurisdiction.
- The reasoning in this judgement was then transposed under Article 25(5) of Regulation 1215/2012 which also provides that also tells us that the validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

Therefore:

- To determine the formal validity of the jurisdiction agreement we apply Article 25(1), and if it is formally valid then it applies.
- And, the jurisdiction clause continues to validly apply even when one alleges that the contract as a whole is null and void, on the basis of Article 25(5) which renders the jurisdiction clause/choice of court agreement as independent from the main contract.

Also important is the **Gasser Case (Case C-116/2002)** with dealt with the situation where proceedings are brought another MS in breach of the jurisdiction agreement – so for example, the parties A and B agreed to bring proceedings in Malta in case of dispute by virtue of a jurisdiction clause, but B brings proceedings against A in France, breaching the jurisdiction agreement. So, then A brings proceedings against B in Malta in accordance with the jurisdiction agreement. The rules on lis alibi pendens (Which will be dealt with under Articles 29-32) provide that when there are proceedings involving the same subject matter in more than one MS, the court seized first will decide whether it has jurisdiction and the court seized second must wait until the courts seized first decides the matter on the basis of jurisdiction.

Under Regulation 44/2001 the provisions on lis alibi pendens also applied when there was a choice of court agreement, which meant that the court chosen by the parties had to wait until the court first seized declines jurisdiction. This was what happened in Gasser whereby there was a choice of court agreement in favor of the Austrian courts, a party brought proceedings in the Italian courts in breach of the jurisdiction agreement, so proceedings were then brought in Austria and the Austrian court raised the question as to whether it had jurisdiction in line with the jurisdiction clause or whether it had to wait until the Italian courts decided

whether they had jurisdiction or not. Here the CJEU held that one must wait until the Italian court decline jurisdiction, even in the case of a breach of jurisdiction clause. This judgment then led to a lot of academic commentary and many were of the opinion that this was very unfair because it means that proceedings can be brought in bad faith in another MS simply to delay matters by bringing proceedings in the wrong court, court proceedings would be slow, and then one cannot bring proceedings before the right court in accordance with the jurisdiction agreement.

This was changed insofar as jurisdiction agreements are concerned by virtue of **Article 31 (2)** and **Recital 22** of Regulation 1215/2012. In accordance with these provisions, in the event there is a jurisdiction agreement it is the court designated by the jurisdiction agreement which will first decide whether it has jurisdiction or not and not the court seized first. In fact, Recital 22 states that:

"… in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings."

So, in accordance with this, if there is an exclusive jurisdiction agreement and proceedings are brought in another member state, it is the court chosen in the exclusive jurisdiction agreement which must first decide whether it has jurisdiction. Thus, even if proceedings were brought in another member state it is the court designated in the agreement which will decide first whether the dispute falls within its exclusive jurisdiction by virtue of the jurisdiction agreement.

Ultimately we must remember that although jurisdiction agreements are important, if there is a weaker party involved (i.e. consumers, insured, and employees), the choice of court agreement cannot deprive the weaker party of the jurisdiction privileges given to him by the Regulation. We have also seen that in certain cases such as an action concerning a right in rem in immovable property, it is not possible for the parties to use article 25 and choose another court.

Article 26: Submission

Article 26(1) provides that:

1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

This provision is very important in practice. It stipulates that if a court does not have jurisdiction under the regulation, meaning that there is no provision under the regulation which gives the court jurisdiction, but the defendant submits to the jurisdiction meaning that he defends the case on the merits, without contesting the jurisdiction, then that submission will give the court jurisdiction even though it did not otherwise have jurisdiction.

So, if the defendant does not contest jurisdiction **in limine litis** i.e. if he does not raise a plea of lack of jurisdiction first, but just files his reply in defence on the merits of the case, the lawyer would have basically screwed his client. This is because this would ultimately mean that the court will have jurisdiction by virtue of the submission even though it did not otherwise have jurisdiction and after that, it would be too late to bring to the fore the issue of jurisdiction later on during the proceedings. Therefore, by defending the case, the lawyer would have given the court jurisdiction as the provision states that: "*Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction*." **Hence, the submission itself under Article 26 will give the court jurisdiction.**

Therefore, when one submits by filling a defence on the merits without contesting the plea of jurisdiction, it means that you have accepted the court's jurisdiction, and even if it did not have jurisdiction, the court will now have jurisdiction by virtue of article 26.

The provisions further states that "*This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.*" So, for example, if you believe that proceedings should not have been brought against you in Spain, as defendant you must raise the defence of lack of jurisdiction. Hence, the first plea of the defence must be that the Spanish court does not have jurisdiction, and not a defence on the merits as that would automatically give the court jurisdiction, by submission, wherever sued. Thus, if the defence intends to contest jurisdiction then, the first defence MUST be the plea for the lack of jurisdiction of the courts the case is brought before.

Note that many times it is not clear whether there is jurisdiction or not due to a number of pleas that can be brought and fought out, so the defence can raise the defense of jurisdiction on the lack of jurisdiction and then without prejudice to that the defence can also raise the defences on the merits of the case, because obviously one would not know whether they will be successful or not. So, the defence would state:

1. First, there is lack of jurisdiction of the Maltese courts,
2. Secondly, without prejudice to that and subordinately, the defence is unfounded and then the defence would proceed to state why it is unfounded.

On this particular point there are two cases which must be referred to:

The Rohr Case (Case C-27/81):

- Here the Court held that it "*permits a defendant who contests the jurisdiction of the court before which an application has been brought to submit at the same time in the alternative a defence on the substance of the action without thereby losing his right to raise an objection of lack of jurisdiction."*
- Thus, if the defendant contests the jurisdiction of the court at the first opportunity, he may also submit at the same time and in the alternative, a defense on the substance of the action without losing his rights to raise an objection of lack of jurisdiction.
- Thus, as long as the defence on the lack of jurisdiction is raised on the first opportunity, then it is possible in the alternative to also raise a defence on the substance of the action.

Elefanten Schuh (Case C-150/80):

- Here the Court held that the defendant is not deemed to have submitted if he not only contests the jurisdiction but also raises the defense on the substance of the action.
- However, the Court held that the challenge to jurisdiction cannot be made after the making of submissions which under national procedural law are considered to be the first defense of the action.
- So the challenge to jurisdiction cannot be made after the making of submissions which under national procedural law are considered to be the first defense to the action.

Thus, if the defendant first files his defence to contest jurisdiction there is no problem, but one needs to keep in mind that there is one exception - if the court has exclusive jurisdiction under article 24 (e.g. proceedings in rem relating to immovable property) - here submission does not apply. If my action concerned a right in rem in immovable property in France, but I sue in Malta, the fact that the defendant submits in Malta, does not give the Maltese courts jurisdiction. **By way of exception, article 24 prevails over article 26.**

In fact, Article 26(2) states that:

2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the ***defendant****, the* ***court*** *shall, before assuming jurisdiction under paragraph 1,* ***ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance****.*

Before Article 26(2) was provisioned, there was a judgment of the CJEU (**the Bilas Judgement Case C-111/09**) which provided that if the consumer submits the court has jurisdiction, even if the consumer is a weaker party, the court would have jurisdiction. In order to safeguard the weaker party Article 26(2) however provides that before assuming jurisdiction, if the defendant is a weaker party in the sense of the Regulation, the court shall "*ensure that the defendant is informed of his rights to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance*."

Articles 27-28 – Examination as to the Jurisdiction and Admissibility

Articles 27 and 28 are not rules providing for additional grounds of jurisdiction, but rather, they tell us how these rules on jurisidciton are supposed to apply.

In fact, Article 27 provides that:

Article 27

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 24, it ***shall declare of its own motion that it has no jurisdiction****.*

We already mentioned that Article 24 is mandatory, so if one sues in Malta and the Maltese Court is convinced that another court has exclusive jurisdiction by virtue of Article 24, the Maltese court shall decline jurisdiction on its own motion, even though there was no plea of lack of jurisdiction. In such a case, the Maltese court would then decline jurisdiction ex officio.

So, if the court sees that the case concerns rights in rem or a tenancy agreement in respect of immovable property in France, the court will of its own motion (ex officio) say that it has no jurisdiction. In this case, even though the defendant may have submitted a defence, that will not give the court jurisdiction.

Article 28 then provides that:

Article 28

1. Where a ***defendant*** *domiciled in one Member State is sued in a court of another Member State and* ***does not enter an appearance****, the* ***court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation****.*

This provision is referring to a situation where the defendant is contumacious i.e. when the defendant does not file a reply. Here two scenarios must be considered because after the defendant is notified of the case, he may either:

(a) File a reply; or
(b) remain contumacious (not replying to the notification)

If the defendant files a reply, he has two options:

1. He can either contest jurisdiction if he believes that he was sued in the wrong court in which case the court has to decide whether it has jurisdiction or not; or
2. He can also not contest jurisdiction, thus file a defence on the merits without contesting jurisdiction. In this case, by virtue of the submission the court also has jurisdiction irrespective of whether it had jurisdiction or not under Article 26 the Regulation. So the issue does not even arise because of the defendant's submission, even though really and truly if he plead for a lack of jurisdiction, the court would not have jurisdiction.

There is also a situation where the defendant remains contumacious – so the defendant was notified and did not file a reply for some reason or another - in this case, Article 28 provides that the court will examine whether he did not enter an appeal (did not file a reply), and if it

transpires that the defendant remained contumacious, "*the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation."* Hence, in the case that the defendant remains contumacious, the court will see whether it has jurisdiction by looking at Articles 4, 7, 24, etc. and if it considers that it doesn't have jurisdiction, then the court will decline jurisdiction of its own motion.

Article 28(2) then provides that:

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

Therefore, the first thing that the Court must do is to check whether the court case was notified on the defendant. When a court case is filed, it needs to be served while a *notifika* is paid, and the court case must be notified to the defendant. Irrespective of cross border cases, generally, the first thing that the judge must do is open the court file to ensure that the defendant was notified of the case. Thus, the Regulation is simply confirming this, by stating that the first thing that needs to be done by the Court is to check whether the defendant has been served. In the case that the defendant has not yet been served, the where the court is not sure whether the defendant actually received the document, the court must wait, and adjourn the case to another hearing to ensure that in the meantime, the defendant is served.

How do you carry out service if the defendant is domiciled in another member state? In such cases there is **Regulation (EC) No. 1393/2007** on the service and the member states of judicial and extrajudicial documents, which is referred to in **Article 28(3),** providing the procedure which needs to be followed in order to serve a defendant in another member state. Basically, the procedure is as follows:

a. First the claimant files an application (a rikors) and informs the court that the defendant is not domiciled in Malta and that he wants to notify him in terms of Regulation 1393/2007.
b. Then there is a procedure to the Office of the State Advocate which is the authority in Malta which will send the document to the respective authority in the other MS o the defendant's domicile, whereby the authority of that MS will serve the defendant there.
c. Then the authority would refer back to Malta a certificate confirming whether it served the defendant on a particular date or not.

3. ***Article 19 of Regulation (EC) No 1393/2007*** *of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (15) shall apply instead of paragraph 2 of this Article* ***if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to that Regulation.***

4. Where Regulation (EC) No 1393/2007 is not applicable, ***Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil***

***or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted abroad pursuant to that Convention**.*

So, there is the Regulation for the Member States but there is also a Convention which applies to certain countries which are parties to it. Thus, we can also use this Convention to serve a defendant who happens to be in one of these other countries.

Articles 29-34 – Lis Alibi Pendens and Related Actions – Section 9 of the Regulation

Lis alibi pendens amongst Member States – Articles 29-32

The term *'lis alibi pendens'* refers to the situation where there are proceedings involving the same cause of action in more than one MS. Thus, these provisions attempt to avoid a situation where more than one judgement is delivered by different courts in different MSs on the same matter, with different and contrasting conclusions – thus consequently resulting in **conflicting/incompatible judgements**.

Incompatible judgments between the same parties are a ground for refusal or recognition and enforcement, and thus they cause an impediment to the **free movement of judgements** which means that judgements cannot be circulated freely and be enforced in other MSs. Hence, the regulation wants to make sure that situations where a court in one MS comes to one conclusion, whilst another court on the same matter between the same parties comes to a different conclusion, is avoided so as to maintain the free flow of judgements. This is ensured through a procedure provided for in the Regulation which controls **parallel litigation**.

In this respect, **Article 29** of the Regulation states that:

1. Without prejudice to Article 31(2), ***where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.***

Therefore, the court seized second must stay proceedings until the court seized first decides whether it has jurisdiction or not. For example, a court case is first filed in Malta but after the same parties file the same cause of action in the Italian courts. The Italian courts must stay proceedings until the court seized first i.e. the Maltese court, decides whether it has jurisdiction or not.

The 'same cause of action' requirement

There are a number of concepts that we need to understand with regards to what is meant by the term "**proceedings involving the same cause of action**". Does it mean the proceeding must be identical? What happens if A is suing B for the payment of a debt and B brings proceedings against A in another MS for the rescission of the contract - So, one party is suing for the performance of the contract while the other suing for rescission of that same contract – Would this also amount to a situation of *lis alibi pendens?*

The Court answered this question in the **Gubish Case (Case C-114/86):**

- Here the court held that the concept of *lis alibi pendens* is to be given an autonomous interpretation, while it further held that the concept of lis alibi pendens cannot be restricted to a situation where the two claims are entirely identical since this rule is designed to avoid irreconcilable judgements.

- The court held that in a situation where one action seeks to enforce the contract, and the other action seeks its rescission, or the discharge of the defendant, that should also be considered as a situation of lis alibi pendens. Why? Because in truth, the second action is like a defence to the first action.
- Thus, since it is to be considered as a lis alibi pendens, the courts seised second would have to wait until the court seised first decides whether it has jurisdiction

Tatry Case (Case C-406/92):

- In this case the CJEU maintained that provided that the parties are identical, it does not matter if the plaintiff in the first action is the defendant in the second action and vice versa.
- Thus, an action seeking to have the defendant declared liable for causing loss ordered to pay damages and an action brought in the other MS seeking a declaration that the defendant is not liable for that loss, have the same cause of action and the same object. Therefore, the rule of lis alibi pendens applies.

Overseas Union Insurance Case (Case C-351/89):

- In this case the CJEU held that the court seized second is not entitled to investigate whether the court seised first was correct in concluding that it has jurisdiction.
- The court further held that that the Brussels Convention is based on a system of trust, and thus the courts of the MSs must be considered to be equally competent to decide jurisdiction.
- Therefore, in the event that the court seised first concludes that it has jurisdiction, the rule under Article 29 applies and thus, the court seised second would have to decline jurisdiction in favour of the first court.

Turner Case (Case C-159/2002)

- This case concerned a reference from House of Lords. In England, if one of the parties breaches a choice of court agreement and brings proceedings in another Ms, it is possible to bring an action referred to as an "anti suit injunction" to stop that party from suing in the wrong court.
- The question which arose here was: Could the anti-suit injunction be used where proceedings are brought in the wrong MS with respect to the Brussels Regulation?
- The CJEU held that one <u>cannot</u> bring an anti suit injunction in the context of the Brussels Convention because the Convention is based on trust as contracting states accord to each other's courts. Thus, if a person sues in a wrong MS, the defendant may plead that the court does not have jurisdiction and merely trust the courts of that MS to decline jurisdiction.

<u>Lis Alibi Pendens and Exclusive Jurisdiction Clauses:</u>

This provision also starts by making reference to **Article 31(2),** which states that:

Article 31

2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seized, any court of another Member

State shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement.

Therefore, this article reverses the rule in Article 29 and gives priority to the court chosen by the parties under the jurisdiction agreement. Thus in the event that the court chosen under the jurisdiction agreement is seized second, any other court, even if seized first, must wait until the court chosen in the contract decides whether it has jurisdiction or not. Then, **Article 31(3)** continues to provide that:

Article 31

*3. Where the **court designated in the agreement has established jurisdiction in accordance with the agreement**, any court of another Member State shall **decline jurisdiction in favour of that court**.*

Thus, once the court nominated by the parties in the jurisdiction clause decides that it has jurisdiction, any other court seized of the same dispute must decline jurisdiction in favour of the court nominated in the agreement.

The provision of **Article 31(4)** then provides that:

Article 31

4. Paragraphs 2 and 3 shall not apply to matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the claimant and the agreement is not valid under a provision contained within those Sections.

As mentioned above, choice of court agreements are limited to very specific circumstances where weaker parties are concerned, not to deprive them of the protection afforded by Sections 3, 4 and 5 of the Regulation. Thus, according to Article 31(4), the provisions of Article 31(2) and (3) do not apply where the claimant is the weaker party (insured/consumer/employee) and where the agreement is not valid under the rules in those sections, as a further safeguard for the weaker party. Ultimately, the weaker party cannot be prejudiced by means of a choice of court agreement, and so, in such cases priority to the chosen court is not given.

In this respect, reference must be made to the **Gasser Case (Case C-116/02):**

- This case concerned a breach of a choice of court agreement in favor of the Austrian courts as one of the parties brought proceedings in the Italian courts.
- Thus, proceedings were then brought in Austria and the Austrian court raised the question as to whether it had jurisdiction in line with the jurisdiction clause or whether it had to wait until the Italian courts decided whether they had jurisdiction or not in accordance with Article 29. Thus, did the rule of lis alibi pendens prevail over the jurisdiction agreement entered into by the parties?
- Here the CJEU held that the rule under article 29 applies and thus the Austrian court had to stay proceedings until the Italian court, as the first court seised, declined jurisdiction, even though this concerned a breach of jurisdiction clause. Therefore, even though the Italian court did not have jurisdiction on the basis of the jurisdiction

clause, it had to first decline hearing the case as the court first seized in order for the Austrian court to have jurisdiction.

- This judgment then led to a lot of academic commentary and criticisms. In fact, many were of the opinion that this was very unfair because it meant that parties could bring proceedings in bad faith in the wrong court, simply to delay matters.

The legislators took this judgement and such criticisms into consideration upon drafting the Brussels I Recast, and so we find this exception under Article 31(1) by virtue of which in the event of choice of court agreements, it is the court chosen by the parties which must first deicede whether it has jurisdiction or not, and not the court first seised. In fact, Article 31(1) provides that:

1. Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Here reference must also be had to **Recital 22** of the Regulation, which provides that

(22) …in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is ***to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it****. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.*

Going back to **Article 29,** it contains the general rule that the court seized second must stay proceedings until the first court decides whether it has jurisdiction or not. However, the article contains another 2 provisions:

- **Article 29(2):**

Article 29(2) provides that the court seised of a dispute may ask the other court to inform it on the date when it was seised. If the court has some doubt when the other court was seized of the dispute, it can ask the court to tell it when it was first seized:

2. In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32.

It is important to know when a court is first seised since the rule depends on which court had the case first before it. This provision makes a reference to Article 32 which provides when a court is deemed to be seised.

- **Article 29(3):**

3. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Therefore, if the court first seised holds that it has jurisdiction, then the court seised second shall decline jurisdiction in favour of the court seized first.

This provision was introduced by Regulation 1215/2012, as a reaction to the **Gasser Judgement (Case C-116/02)**.

This rule in Article 29 is without prejudice to Article 31(2) which contains a new rule introduced in Council Regulation 1215/2012; it did not exist in Regulation 44/2001. This rule was a reaction to the **Gusser Judgement** – which has a choice of court agreement, and there was a JC where they decided that in the case of a dispute the Austrian courts had jurisdiction. Notwithstanding the choice of Austria, one of the parties brought proceedings in the Italians courts. the Italian courts were first seized. The question arose, were the Austrian courts as the courts second seized bound to stay proceedings? Did this *lis alibi pendends* rule apply also where the second court was the court nominated by the parties under a choice of court agreement? in the Gusser Case Case 116/02 the court said that yes, the court seized second must wait for the first court to decide whether it has jurisdiction so it cannot automatically hear the case because the rule of lis pendens applied also in such a situation. therefore, the Austrian court could not hear the case, but it had to wait for a decision by the Italian courts in order to decide whether they had jurisdiction or not.

This judgement delivered in 2003, lead to a lot of academic commentary. The court was right in that it applied the provisions correctly, but many articles were written where it was argued that this rule frustrated choice of court agreements – people enter into these agreements because they want fast access to justice, and clarity, but if you allow a party to file proceedings in the wrong court, a court which does not have jurisdiction under the agreement, and the court chosen by the parties until that court decides whether it has jurisdiction, this frustrates the efficiency of the choice of court agreement. there was a lot of criticism of the situation at law as spelt out in the **Eric Gusser judgement** and when the time came to revise the regulation, the EU legislator decided to make an exception to article 29. There is one particular exception which is Article 31(2). This is why Article 29 starts off that this starts off by saying it is without prejudice to **Article 31(2)** which states;

<u>When is a court deemed to be seized? – Article 32</u>

The date when a court is deemed to be seised is of great importance in instnces of lis alibi pendens. This is because, according to Article 29, priority is given to the court that was seized first and cross-border disputes may involve a party rushing to one court before the other party sues him in another court.

In this regard, we must refer to Article 32 of the Regulation which provides us with two ways of determining the date on which a court is deemed to be seised, depending on the law of procedure the MS of the courts in question, since different MSs may have different procedures.

Article 32

1. For the purposes of this Section, a court shall be deemed to be seised:

(a) ***at the time when the document instituting the proceedings or an equivalent document is lodged with the court****, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or*

In accordance with Article 32(1)(a), the court is seized as soon as the sworn application is filed in court, and stamped by the court registrar. In fact, this is when a Maltese court is deemed to be seized of a dispute according to our law of procedure.

(b) ***if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service****, provided that the claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.*

The authority responsible for service referred to in point (b) shall be the first authority receiving the documents to be served.

2. The court, or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served.

There are certain MS where one must first effect service of the action, i.e. notify the defendant, before filing the act in Court. Such countries thus follow a different procedure to Malta since in Malta one must first file the act, which is then notified. In those MSswhere service needs to be affected first, paragraph 1(b) is relevant.

Related Actions – Article 30

Article 30 deals with related actions and stipulates that:

Article 30

1. Where related actions are pending in the courts of different Member States, any court ***other than the court first seised may stay its proceedings****.*
2. Where the action in the court first seised is pending at first instance, any other court ***may*** *also, on the application of one of the parties,* ***decline jurisdiction if the court first seised has jurisdiction over the actions in question*** *and its law permits the consolidation thereof.*
*3. For the purposes of this Article****, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings****.*

Related actions are actions which fall out of the scope of Article 29, on the basis that they do not constitute a lis alibi pendens. This is because the cause of action is not the same but, the actions are merely related. Article 30(3) defined which actions are deemed to be related – they are those actions which are so closely connected determining them together would be more efficient, and also "avoids the risk" of having "irreconcilable judgements".

What is important to note with respect to the provisions of Article 30 is the use of the word "**may**" in the phrase "**may stay its proceedings**", which contrasts with the word "**shall**" used in Article 29 with respect to lis alibi pendens situations whereby the second court seised "**shall stay its proceedings**". Thus, while under Article 29 it is mandatory, under Article 30, if the situation concerns a related action, then the court has the discretion to decide whether to stay its proceedings if it is in the interests of justice.

Here we can also refer to the **Tatry Judgement (Case C-406/92)**:

- The court held that the concept of related actions must be given an independent interpretation and it must be interpreted widely to cover all cases where there is a risk of conflicting decisions, even if the judgements can be separately enforced and if their legal consequences are not mutually exclusive.
- The actions have to be related but not necessarily irreconcilable, and thus, for the purposes of Article 30, it is not a requirement that the jugdements are absolutely irreconcilable.
- In this case there was a ship owner carrying cargo for a number of persons, the cargo was damaged, and proceedings were brought by various claimants in various Member states against the same defendant. The cargo was of separate individuals, but the facts were the same since it was the same ship owner carrying the cargo which was damaged.
- The court held that this was not a case of lis alibi pendens, but rather these were related actions because they are all determining the liability of the ship which was carrying the cargo, and they could possibly give rise to different judgements in the sense that one court may find liability, and another might find something else.

Article 30(2) then states that if the court first seized also has jurisdiction to hear the related action, the court seized second may decline jurisdiction in favour of the court first seized.

Lis alibi pendens concerning a third state – Articles 33-34

The rules discussed above under the provisions of Articles 29-32 refer to a situation where there are proceedings in more than one MS. However, what happens if proceedings between the same parties and concerning the same cause of action are brought in the courts of a MS and also in a foreign court of a non-contracting stateThis is dealt with under the provisions of Articles 33 and 34, which were introduced by Regulation 1215/2012 and were thus not found in its predecessor.

Before analysing these provisions, it is worth analysing a 2005 judgment of the CJEU; **Andrew Owusu vs Jackson (Case 281/02)**:

- This case involved the notion of *forum non conveniens* under English law. Under the traditional rules of jurisdiction in England, the principle of *forum non conveniens* which was laid down in an important English judgement decided by the House of Lords in the names of **Spiliada Maritime Corp v Cansulex Ltd n [1987 AC 460].**
- According to the doctrine of *forum non conveniens* as it is understood in English law, an English court may decline to exercise jurisdiction if it is of the view that the court of another country is objectively a more suitable/appropriate forum for the trial of the action i.e. if the court feels that the foreign court is better suited in the interest of justice to hear the action, it can stay proceedings.
- Proceedings can then continue in the English Courts if the foreign forum decides that it has no jurisdiction. However, if the English courts feel that they cannot deliver effective justice, even though it may have jurisdiction, it can decide to stay proceedings in favour of the jurisdiction of a foreign court.
- Owusu was a British individual who had rented a holiday villa with a private beach from the defendant, also British, in Jamaica. Owusu went on holiday, where he dove into the water, he hit his head against the bottom and ended up paralysed. Thus, he brought an action against Jackson (who was British) and also against several Jamaican companies which were involved in the operation of the beach and complex where he was staying. The accident had happened in Jamaica and so evidence was also there.
- Thus, the question which arose was: since Jackson was domiciled in England, did the English courts have jurisdiction against him by virtue of the general rule of jurisdiction under Article 4, or could the courts apply the doctrine of *forum non conveniens* within the context of the Brussels I Regulation and stay its proceedings, despite Article 4?
- The first point that the CJEU decided upon was whether the Brussels I Regulation applies in such a situation. This question arose because Jackson the defendant was English and Owusu was also English, and there was no connection with another MS – the only connection with another State was with Jamaica, a non-MS, and the Jamaican defendants. The court held that the Regulation still applied, as it maintained that it is insufficient that there is an international element, the international element doesn't have to be a creation to adjourn the case in the court of another MS.
- Then the CJEU had to determine whether Article 4 is mandatory or whether the English Courts could stay proceedings in favour of a third state court (Jamaica). The court held that the doctrine of *forum non conveniens* does not apply under the Regulation and so the English courts was precluded from applying the doctrine of *forum non conveniens*. The court affirmed that Article 4 of Regulation 1215/2012 is mandatory in nature and there can be no derogation from it except for the cases expressly provided for in the Regulation itself. Thus it was impossible for a court to decline jurisdiction in the sense of Article 4, by applying the doctrine of *forum non conveniens* since such a doctrine undermines the basis of legal certainty of the Regulation. (Para. 38 of the judgement)

This was quite a big blow for English Private International law rules, because the English were very proud of the doctrine of *forum non conveniens*. However, this judgement means that they could no longer apply it where English courts had jurisdiction under the provisions of the regulation.

Article 33 of the Regulation, which was not in force at the time that the Owusu judgement was decided, provides us with a similar but limited possibility to the doctrine of *forum non conveniens* by virtue of which the court of a MS may stay proceedings if there are proceedings already pending in the courts of a third (non-member) state. Therefore, it is not identical to *forum non conveniens* but there is a limited possibility for a court of a MS to stay proceedings. Note therefore that Article 33 only applies when there are proceedings which have already commenced in third states.

Under article 33 the court has discretion to stay proceedings under a number of strict conditions which must be satisfied. Article 33 provides that:

Article 33

*1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and **proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties** as the proceedings in the court of the third State, **the court of the Member State may stay the proceedings** if:*

*(a) it is **expected that the court of the third State will give a judgment capable of recognition** and, where applicable, of **enforcement** in that Member State; and*

*(b) the court of the Member State is satisfied that a **stay is necessary for the proper administration of justice**.*

Thus, The MS **may** stay proceedings if it sees that the 3rd state can give a judgement which can be recognized and enforced in the court of the MS, and if it is satisfied that staying would be necessary for the proper enforcement of justice. Therefore, the court will take into account various factors including the system of justice in the 3rd state concerned to decide whether it should stay proceedings on account of the fact that there are proceedings already taking place in the court of a third state. Note that the stay of proceedings is thus not automatic.

One can look at **Recital 23** of the Regulation which further explains what article 33 purports to do. It states that:

*(23) This Regulation should **provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States**, considering in particular whether a judgment of a third State will be **capable of recognition and enforcement in the Member State concerned** under the law of that Member State and the **proper administration of justice**.*

Recital 24 of the Regulation then provides the factors which the courts should take into account in determining whether this is required for the proper administration of justice. It provides that:

*(24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include **connections between the facts of the case and the parties and the third State** concerned, the **stage to which the proceedings in the third State have progressed** by the time*

proceedings are initiated in the court of the Member State and ***whether or not the court of the third State can be expected to give a judgment within a reasonable time****.*

*That assessment may also include consi****deration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction****.*

Article 33(2) then provides that the court also has discretion to continue proceedings if it sees that something is not going on well within the 3rd MS:

2. The court of the Member State may continue the proceedings at any time if:
(a) the ***proceedings in the court of the third State are themselves stayed or discontinued****;*
(b) it appears to the court of the Member State that the proceedings in the court of the third State are ***unlikely to be concluded within a reasonable time****; or*
(c) the continuation of the proceedings is ***required for the proper administration of justice****.*

We should not forget that there isn't the same level of trust with courts of 3rd state countries as there is with courts within the EU so the courts can always decide to continue hearing the case. Moreover, **Article 33(3)** further states that:

3. The court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

If proceedings were stayed and the third state has now decided that case and the judgement is capable of enforcement, then the court of the MS will dismiss proceedings. This Article 33 is discretionary and not obligatory on the court to stay proceedings but it is a flexible mechanism which may be availed of by the courts of the MSs if it is in the interests of justice.

A similar provision is found under **Article 34** which deals with related actions where proceedings are brought in a MS court but there were related proceedings already pending before the courts of a third state. Article 34 states;

Article 34

1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an ***action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State****, the court of the Member State* ***may stay the proceedings if****:*
(a) it is ***expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments*** *resulting from separate proceedings;*
(b) it is ***expected that the court of the third State will give a judgment capable of recognition*** *and, where applicable, of* ***enforcement*** *in that Member State; and*
(c) the court of the Member State is satisfied that a ***stay is necessary for the proper administration of justice****.*

2. The court of the Member State may continue the proceedings at any time if:
(a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;
(b) the proceedings in the court of the third State are themselves stayed or discontinued;
(c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
(d) the continuation of the proceedings is required for the proper administration of justice.

3. The court of the Member State may dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State.

4. The court of the Member State shall apply this Article on the application of one of the parties or, where possible under national law, of its own motion.

Article 35: Provisional and Protective Measures

Article 35 deals with '**provisional, including protective measures'**. In order to understand this provision a background on procedural law is necessary. When filing a court case, you might fear that the defendant will dissipate his assets and withdraw money at the bank, sell immovable property etc. So the COCP allows the plaintiff to file a precautionary warrant. which is intended to freeze the assets of the defendants so that eventually when the court decides the claim there would be assets on which to execute the judgement.

In the cross-border context, there may be a situation where proceedings may have been brought in Italy, but the relevant assets are found in another MS, such as Malta. In this regard, **Article 35** states that:

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.

From a jurisdictional point of view, by virtue of article 35, a court which does not have jurisdiction on the merits, has the power to issue protective measures as long as they are only provisional and non-determinative measures. So, in accordance with this article, even though the courts of another MS have jurisdiction as to the substance of the matter in question, an application may be made under Art 35 to the courts of another MS to issue a precautionary warrant to safeguard the action (of substance) in the first MS.

For example, let us say that we come to the conclusion that the Italian courts have jurisdiction over an action for damages. So, they have jurisdiction in substance over the action, but there are some assets in Malta. By virtue of article 35, the Maltese courts have jurisdiction to issue precautionary warrants in order to safeguard the proceedings on merits in Italy. So, despite the fact that the Maltese courts do not have jurisdiction over the actions of the case, they still have jurisdiction to freeze assets to assist the merits of a case within another MS. This means that a plaintiff in Italy can come to Malta and request that certain assets which are found in Malta and are owned by the defendant, to be frozen by the Maltese courts via a garnishee order, and the Maltese Courts have jurisdiction to carry this out despite them not having jurisdiction over the actions of the case. Such measures however cannot be determinative i.e. does not give a final decision over the issue.

The terms "provisional and protective measures" have been defined by the CJEU as "*measures which do not definitely conclude the issue between the parties*".

One can also look at recital 25 in relation to this article which stipulates that:

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.

Jurisdiction under the Code of Organisation and Civil Procedure

Jurisdiction is **the legal power of a court to take cognisance of and decide a dispute between 2 or more parties**. As we have seen the basis of jurisdiction under the Brussels I Recast Regulation (1215/2012), now, we need to see the basis of jurisdiction of the Maltese courts are regulated under the COCP.

Insofar as the COCP is concerned, reference must first be made to **Article 741** which deals with the plea of jurisdiction and the plea of competence:

- The Plea of Jurisdiction refers to instances where the **action is not within the jurisdiction of the Courts of Malta but it is within the jurisdiction of a foreign court**;
- The Plea of Competence refers to instances where the **action is within the jurisdiction of the Courts of Malta, but such an action would be brought before the wrong Court in Malta**. For example, the action is brought before of the First Hall Civil Court which would not be the competent court to hear the action because it was meant to be filed before the Court of Magistrates as the competent court. So although the court was wrong, the action still fell within the jurisdiction of Malta.

In this regard, **Section 741** distinguishes between these two pleas as it provides that:

741. It shall be lawful to plead to the jurisdiction of the court –

(a) ***when the action is not one within the jurisdiction of the courts of Malta;*** (plea of jurisdiction)

(b) ***when the action, although one within the jurisdiction of the courts of Malta, is brought before a court different from that by which such action is cognizable****;* (plea of competence)

(c) ***when the privilege of being sued in a particular court is granted to the defendant****.* (plea of competence)

(d) *Any reference to a "**court**" in the first sentence and in paragraph (b) of this article shall be deemed to **include a reference to a Board or Tribunal established by law**, so however that when a cause is commenced before a Board or Tribunal it may also be transferred for hearing before a court in accordance with the provisions of paragraph (b) of this article. …* (plea of competence)

The plea of competence which is covered by paragraphs (b), (c) and (d) concerns a matter relating to the Law of procedure. For example in accordance with paragraph (b), proceedings for the payment of rent are to be brought before the Rent Regulation Board, but such a plea is raised before the FHCC. In such a case, the plea of competence may be raised as such plea should have been brought before the Rent Regulation Board. Paragraph (c) which is also an issue of competence refers for example to the privilege given to Gozitans to be sued in the courts of Gozo as the particular court. Thus, this is not so relevant within the context of PIL.

Rather, in PIL we are concerned with **Section 741(a)** – ***when the action is not one within the jurisdiction of the courts of Malta***, since it concerns a matter of international jurisdiction of the Maltese Courts when one feels that an action should not have been raised in Malta.

The traditional rules of jurisdiction are found under **Article 742 of the COCP**, which sets out a number of grounds for jurisdiction. Such grounds all refer to paragraph 6 of the Article which deals with the principle of supremacy of the EU regulations which prevail over national laws as it provides that:

742*. (6) Where provision is made under any other law, or, in any regulation of the European Union making provision different from that contained in this article, the provisions of this article shall not apply with regard to the matters covered by such other provision and shall only apply to matters to which such other provision does not apply.*

Therefore, in accordance with this provision, Article 742 applies in two instances where the EU Regulations do not apply (The Brussels I Recast and Brussels II Bis dealing with matrimonial matters and matters of parental responsibility):

1. In all matters which do not fall within the scope of one of the EU instruments; and
2. In matters which fall within the scope of the regulations but where the Regulations themselves tell us to apply the rules of national law, such as:
    a. **Article 6 Brussels I Recast**: if defendant is not domiciled in a MS the jurisdiction of the courts of each MS is determined by the law of that MS [subject to exceptions]
    b. **Article 7(1) Brussels I Recast** also demonstrates certain instances where we must apply the rules of the COCP as it states that: *where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State.*

Thus, such a paragraph serves as a blanket provision which basically states that should any of these grounds for jurisdiction be regulated by any kind of European regulation, then such European regulation shall be prioritized over the COCP in accordance to the doctrine of supremacy. This would be countered only if the European regulation would redirect you to local regulations once again.

These grounds of jurisdiction under Maltese law are found under **Section 742(1) of the COCP** which deals with the persons who are subject to the jurisdiction of the courts of Malta i.e. those who can be sued in Malta. As in the case of the Brussels I Regulation, **the plea of jurisdiction needs to be raised *in limine litis***. Thus, it must be the defendant's first plea at the start of his defence. If the plea is not raised *in limine litis* and pleas on the merits of the case are raised instead, then the defendant would be deemed to have submitted to the jurisdiction of the Maltese court and the Maltese court would in turn assume jurisdiction by virtue of the defendant's submission. On this point we can refer to the following cases:

George Said vs Joseph Ellul Sullivan nomine (FHCC, 3rd October 2003):

- Here the court held '*eccezzjoni bhal din jehtigilia titqaajjem in limine litis…*'.
- Thus, the court is saying that if you don't raise the plea of jurisdiction in limine litits you are deemed to have renounced to the plea and therefore the court will assume jurisdiction by virtue of your submission.

Calleja vs Pace (COA 31st January 1996)

- The same principle that the plea of jurisdiction must be raised in limine litis, as otherwise the defendant is deemed to have renounced to this plea, was stated.

However, in certain cases the plea of jurisdiction can be raised by the court **ex officio**. This is only when the defendant has not filed a statement of defence (i.e. has not filed a reply) or if he is absent and the defence is represented by curators. Thus in the situation where the defendant does not file a statement of defense so he is contumacious, or is an absent defendant and is represented by curators, the court may decide if it has jurisdiciton ex officio, BUT, if the defendant files a response/defense on the basis of the merits of the case, and does not raise the plea of jurisdiction, then he is deemed to have renounced to it and thus the court will not deal with such a plea, even if it is raised later on in the proceedings.

In fact, Article 774(a) of the COCP provides that the court can raise the plea *ex officio* either when;

- Defendant was contumacious i.e. has not defended the claim
- Defendant is absent from Malta and is defended by curator (who will be appointed to represent his interests since the defended is absent from Malta)

To this end, **Article 774(a)** states;
774*. In the absence of any plea to the jurisdiction, the court shall, of its own motion, declare that it has no jurisdiction -*

1. *where the action is not one within the jurisdiction of the courts of civil jurisdiction of Malta and the defendant has either made default in filing the statement of defence or is an absent defendant represented in the proceedings by curators appointed in terms of article 929;*

The different grounds of Jurisdiction Under Article 742 COCP:

When are the Maltese courts empowered to hear a case? **Article 742(1)** provides a list of persons who are subject to the jurisdiction of the Maltese courts, and thus against whom an action can be brought in Malta. Article 742(1) in fact provides:

(1) Save as otherwise expressly provided by law, ***the civil courts of Malta shall have jurisdiction to try and determine all actions****, without any distinction or privilege,* ***concerning the persons hereinafter mentioned****:*

(a) ***citizens of Malta****,* ***provided they have not fixed their domicile elsewhere****;*

This means that a citizen of Malta can always be sued in Malta as long as he has not fixed his domicile in another country. Reference must be made to **Chapter 188** of Laws of Malta, which is the **Maltese Citizenship Act** which provides with who is considered to be a citizen of Malta.

If one is considered to be a maltese citizen in accordance with Chapter 188, then he can be sued in Malta, and the simple fact that he resides abroad does not mean that the Maltese courts lose jurisdiction. Thus if one is a Maltese citizen and merely resides abroad, the Maltese courts have jurisdiction, unless the Maltese citizen can show that he has established his domicile in another country. This is because there is a rebuttable presumption that citizens of

Malta are domiciled in Malta, and then it would be up to the citizen of Malta to prove that he had fixed his domicile in another country. In fact, in the case of **Calleja vs Pace (COA 31/01/1996**) the court held that:

*"**Cittadin Malti huwa prezunt li ghandu domicilju tieghu f'Malta** w allura cittadin Malti jkun konvenut illi **jipprova li jkun stabilixxa d-domicilju tieghu f'banda ohra sabiex jehles mill-gurisdizzjoni tal-qrati Maltin** u mhux l-attur li jkun harku quddiemu."*

Thus, Maltese citizens are presumed to be domiciled in Malta, and if a Maltese citizen is sued in the Maltese courts, he is automatically presumed to be domiciled in Malta and it would be up to him to prove he has established his domicile elsewhere.

In order to prove one's domicile, the Maltese courts have interpreted the notion of domicile by reference to the principles of British Common law by virtue of which the simple fact that one resides in another country would not be sufficient for that person to be considered to be domiciled there. In order to show that he fixed his domicile elsewhere, he must also prove the **intention to reside permanently** in the foreign country and thus that he has no intention to return back and reside in Malta, in order to acquire domicile of choice in that country.

2. ***any person*** *as long as he is either **domiciled** or **resident** or **present** in Malta;*

Anyone who is domiciled/resident/present in Malta can be sued in Malta. Therefore, it is enough that one is simply present or resident in Malta for the courts to have jurisdiction over him, and if one is domiciled in Malta but is not present when the action filed, the Maltese courts would still have jurisdiction.

This is an alternative ground to that found under Article 742(1)(a) as by virtue of Article 742(1)(b), persons who are not citizens of Malta can be sued in Malta as long as they are domiciled, resident or present in Malta. Noteworthy is an important distinction between these two paragraphs – while under paragraph (a) the onus of proof lies on the defendant who must prove that he has established his domicile in another country despite being a citizen of Malta, under paragraph (b) the onus of proof lies on the plaintiff who must show that the defendant is domiciled, resident or present in Malta. Thus, under Article 742(1)(b) there is no presumption that foreigners are domiciled in Malta but the plaintiff would have to prove to the court that it has jurisdiction on the basis that the defendant is either domiciled, or resident, or present in Malta. This was affirmed by the court in the COA judgement of **Calleja vs Pace** whereby the court held that:
*"Ic-cittadin Malti huwa prezunt li ghandu domicilju tieghu f'Malta, dak ghall-kuntrarju tas-subinciz B li jeradika l-kompetenza fir-rigward ta' kull persuna li independement mic-cittadinanza sakemm ghandha d-domicilju taghha f'Malta. **F'kazijiet bhal dawn, huwa l-attur li jrid jipprova li l-persuna citata ma kinitx ta cittadinanza Maltija izda kellha d-domicilju taghha f'Malta**."*

It is interesting to note that the wording of para b was changed in 1995 through important amendments to the COCP. Prior to those amendments, paragraph (b) only referred to domicile, and did not consider residence or presence in Malta. This was problematic as although Article 742 was modelled on Italian law, i.e. continental law, which meant that it

was possible to interpret domicile in the continental sense, the Maltese courts adopted the British common law definition of domicile nonetheless. In line with the English notion of domicile, it could mean that although a foreign was residing in Mala, he may not be deemed to be domiciled in Malta due to the intentional element of permanent residence which must be proven, and so, Maltese courts would not have jurisdiction. Hence, this had a very restrictive effect on Article 742(1)(b) and so it was felt necessary to widen paragraph (b) by including the notion of residence and presence in Malta.

Harvey vs Caruana Galizia (Court of Appeal, 18th January 2003)

- This case concerned an action for personal separation brought by the wife, how was Maltese, against her English husband in Malta. The husband was an English national who was domiciled in England and worked in Libya. The husband raised the plea of lack of jurisdiction as he maintained that he is neither domiciled nor resident in Malta, and so the Maltese courts did not have jurisdiction.
- However, the court rejected his plea as although he was working in Libya, he often came to reside in Malta within the couple's matrimonial home and so, the court confirmed that he was indeed a resident of Malta and thus fell under the court's jurisdiction in the sense of Article 742(1)(b). The court further held that if he was not a resident, he was at least present in Malta.

Note that presence is a common law notion as it grants jurisdiction to the English courts if there is presence in England. Thus presence is enough to establish jurisdiction in England, which widens the applicability of this provision quite substantially. However, the English Courts also have the discretion to apply the doctrine of *forum non conveniens* on the basis of which they may stay proceedings if a foreign court is more suited to hear the action. Under the COCP, we find a similar rule in Article **Article 742(2)** which allows the court to decide to stay proceedings in certain cases. However, it is not the same because it is much more restrictive than the British *forum non conveniens* doctrine. It states that:

742. *(2) The jurisdiction of the courts of civil jurisdiction is not excluded by the fact that a foreign court is seized with the same cause or with a cause connected with it. Where a foreign court has a concurrent jurisdiction, the* ***courts may in their discretion, declare defendant to be non-suited or stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust to the defendant.***

What is meant by "concurrent jurisdiction"? The court answered this question in the case of **Arrigo ltd. vs. Cilia** where it gave an interpretation of Article 742(2) and it held that it applies where proceedings are already pending within a foreign court.

Another question which arises in respect of article 742(1)(b) is whether the law is referring to defendant or plaintiff, since the article merely states "any person hereafter mentioned". This point was discussed in 2 judgements:

- First in **Calleja vs. Pace (1996)** where the court held that the court shall have jurisdiction should the plaintiff satisfy the required under article 742;
- Secondly in **Harvey vs Caruana Galizia (2003)** where the court clarified that in using the phrase 'any person' Article 742 is referring to the defendant, and so it is the

defendant who must be either domicile, resident or present in Malta for Jurisdiction to apply. Thus, having a claimant who is present in Malta is not enough.

These two judgements give contrasting decision and interpretations, however, the correct approach was the more recent one delivered in the **Harvey vs Caruana Galizia case**. In fact, here the court held that:

"Din il-qorti bil-maqlub ta' dak li gie ritenut mill-ewwel qorti meta tirritjeni lil kapitlu 742 paragrafu 2, fejn il-ligi tirreferi ghal "kull persuna" u tabbinah fost ohrajn mal-mera prezenza, qeghda necessarjament tirreferi ghal prezenza tal-parti konvenuta fuq l-principju ta "ubi te in venjo ibi de convenio" diversament l-kuntest hawn ifisser kif tajjeb argumenta l-appellant li tkun mizzejda l-parti tal-attrici jekk tkun tista tigi Malta u tharrek l'min trid indipendentement minn kull kunsiderazzjoni ohra rigwardant l-parti konvenuta."

So, it's important to note that **Article 742 is referring to the defendant, not the plaintiff**, otherwise, the plaintiff would be able to sue whoever it feels like wherever he is present. Note also that the relevant point in time is always the **time when proceedings are instituted**.

3. ***any person**, in matters relating to property situated or existing in Malta;*

This ground of jurisdiction confers jurisdiction over any person, irrespective of the nationality or domicile of the defendant, as long as the action relates to property situated or existing in Malta. The property, which must be the object of the action for this ground of jurisdiction to subsist, can be either movable or immovable. On this provision we can refer to a number of cases;

Manduca vs Chetcuti (Commercial Court 25th February 1993)

- The court confirmed that this provision also applies to **movable** property. However, it is crucial that the property, must be situated in Malta, must be itself the object of the dispute.
- In fact it held that: "*Jista jkun mobbli, izda jehtieg li dak l-oggett jkun jinstab f'Malta*"

Scicluna vs Carbone 1884.

- Here the court held that the property can also be of an **intangible nature**, for example a good will or a right to a credit.

Koca Mehmet Serdar noe vs Dr Simon Micallef Stafrace et noe (COA 2012)

- This was an important case which emphasised the fact that to have jurisdiction under paragraph (c) the action must relate to the property itself which is situated in Malta.
- This case involved a Turkish company and Turkish Nationals as plaintiffs and defendants, and it concerned a claim of misappropriation of funds which were situated in Malta. The question was: did the Maltese court have jurisdiction?
- The COA revoked the first judgement of the first court and held that in order to have jurisdiction under paragraph (c), it had to be proved that the object of the action concerned the property which was situated in Malta. Therefore, the simple fact that the money was situated in Malta was not enough, but it had to be proved in this particular case that the money in Malta was the actual money which had been misappropriated and thus forming the object of the action.

- On this basis, the Court held that it could not exercise jurisdiction.
- Therefore, in order to rely on paragraph (c) it must be proven that not only is the property situated in Malta but one must also prove that the action itself concerns that particular property which is in Malta.
- The court here in fact held:
  "Illi ghalhekk il-Qorti, bla dubju, tista` tezercita l-gurisdizzjoni ai termini tal-Artikolu hawn imsemmi ghaliex hija ghandha taccerta ruhha jekk il-hwejjeg – jigifieri l-flus depozitati li in effett huma l-`bone of contention` jinsabux f`Malta jew le. Allura dak li jrid jigi stabbilit huwa jekk il-flus li qed jintalbu jintraddu lis-socjeta` attrici humiex hwejjeg li qeghdin jew li jinsabu Malta."

Margret Attard vs Dr Ian Spiteri Bailey nominee (COA 15th March 2004)

- This case concerned an action asking the court to order the defendant to give all information about the assets of the testator, Anthony Castle. The defendant was English residing in England and most of the estate was in England but the testator had a bank account in Malta.
- The court held that since the inheritance is one whole thing and since there was part of the estate here in Malta, then the Maltese court had jurisdiction on the basis of paragraph (c) of Article 742(1).

Sberbank vs Palmali International (FHCC, 18th March 2021)

- In this case, plaintiff held that the Maltese courts had jurisdiction on the basis of Article 742(1)(c) since the action concerns the transfer of assets owned by the defendant companies which are registered in Malta, and thus domiciled in Malta, which transfer also was carried out in Malta.
- The court referred to a number of judgements to affirm that company assets, as movables, may also form the object of the dispute for Article 742(1)(c) to apply. Moreover, the court held that company assets are expressly defined under Article 315(a) of the Civil Code as movable property, and also as reaffirmed by the FHCC in **Dr Anne Fenech noe v. Dr Louis Cassar Pullicino noe (2004):**
  - In this case, the parties were foreigners and were not domiciled in Malta and the dispute concerned an agreement on the transfer of shares in companies registered in Malta.
  - Here the court considered the fact that once a company is registered in Malta, it would fall under the scrutiny of the Maltese competent authorities and when the obligation refers to shares/assets held by that company registered in Malta, then the obligation refers to an object situated in Malta.
  - For this reason, the court held that it had jurisdiction as the assets were held to be objects present in Malta in the sense of Article 742(1)(c).
- The court held that the substance of the case concerns a transfer of assets of the defendant companies, registered in Malta, to the detriment of plaintiff. The court continued:
  "*L- ilment tal-attrici jolqot il-buon ordni fi hdan kumpannija u jestendi ghall-agir u ghad-decizjonijiet li hadu d-diretturi, l-azzjonisti jew il-beneficjarji ta` dawk is-socjetajiet registrati Malta. Dawn il-materji huma koperti mill-Art 742(c) tal-Kap 12 u jestendi l-gurisdizzjoni ta` din il-qorti mhux biss fir-rigward tas-socjetajiet registrati*

Malta izda wkoll fir-rigward taz- zewg socjetajiet registrati fit-Turkija, li favur wahda minnhom sar it- trasferiment, u favur ukoll Mansimov in kwantu kull decizjoni li bhala beneficjarji, azzjonisti jew diretturi setghu hadu fir-rigward tas-socjetajiet registrati Malta u specifikament dwar it-trasferiment tal-ishma."

- On this basis, the court held that it had jurisdiction to hear the case by virtue of Article 742(1)(c).

4. ***any person*** *who has* ***contracted any obligation in Malta****, but* ***only in regard to actions touching such obligation*** *and* ***provided such person is present in Malta****;*

The term 'obligation' under article 742 has been interpreted to include obligations arising from; contract, quasi-contract, tort, and quasi-tort. In practice, this provision is not so important due to the extension that we saw in para b of section 742 which confers jurisdiction over persons merely present in Malta. Since paragraph (d) speaks about persons who have contracted an obligation in Malta, provided that the defendant is present in Malta, paragraph (b) would also apply in this regard.

5. ***any person*** *who, having* ***contracted an obligation in some other country****,* ***has nevertheless agreed to carry out such obligation in Malta****, or who has contracted any obligation which* ***must necessarily be carried into effect in Malta****, provided in either case such person is present in Malta;*

This ground confers jurisdiction over persons who are present in Malta and who have contracted an obligation in another country but must be carried into effect in Malta. the fundamental element is therefore; performance of the obligation in Malta coupled with the presence of the defendant in Malta.

Dr Mark Fenech nominee vs Gene Clark (Court of Appeal, 6th April 1992)

- This judgement concerned a case between 2 English nationals who made an agreement in England for the sale of shares in a Maltese company. The plaintiff brought an action in the Maltese courts against the English defendant, who was present in Malta.
- The court noted that there was jurisdiction on the basis of paragraph (e) because the action was for the transfer of shares in a Maltese company. Since the transfer had to be registered in Malta, the place of performance of the obligation in question was Malta. Moreover, the defendant was also present in Malta. So, the Maltese courts had jurisdiction.
- Thus, the court confirmed that for the purposes of paragraph (e), presence in Malta and performance of the obligation in Malta is sufficient to grant the court jurisdiction to hear the case.

6. ***any person****, in regard to* ***any obligation contracted in favour of a citizen or resident of Malta*** *or of a body having a distinct legal personality or association of persons* ***incorporated or operating in Malta****, if the judgment can be enforced in Malta;*

This sub-article is very important. Under this ground the Maltese courts have jurisdiction over any person, irrespective as to whether the defendant is domiciled, resident, or present in

Malta, when the action concerns an obligation contracted in favour of a citizen of Malta or a legal person registered in Malta, as long as it **can be proved that the judgement can be enforced in Malta.** Thus, this provision allows foreigners to be sued in Malta only if the judgement can be enforced here in Malta.

Wells vs Borg Olivier nominee (FHCC 25th October 1955)

- In this case the court held that for the court to have jurisdiction under paragraph (f) one must prove that there are assets in Malta over which the judgement can be enforced, totally or at least in part.
- The court pointed out that term "obligations" includes not only contractual obligations, but also tortuous and quasi-tortuous claims.
- This was a case of personal separation concerning an action for maintenance whereby the wife brought an action against her husband, who was an English national domiciled and living in England and so, the Maltese courts had no jurisdiction under paragraphs (a) or (b). However, since the wife was Maltese she based her action on paragraph (f) in order to establish the jurisdiction of the Maltese courts.
- The court held that there is no jurisdiction in favour of the Maltese courts because the defendant did not have any assets in Malta which is a requirement under paragraph (f). The court said that the simple fact that the judgement could be registered in the public registry was not sufficient.
- Thus, the court here affirmed that the defendant must have assets within Malta in order for judgement to be enforced.

7. ***any person*** *who* ***expressly or tacitly, voluntarily*** ***submits or has agreed to submit to the jurisdiction of the court****.*

Here we are dealing with concept of submission which can be either tacit or express.

- Tacit submission; if the defendant raises a plea on the merits of the case without first raising a plea on lack of jurisdiction, he is deemed to have renounced the right to this plea tacitly. Thus, the courts would have jurisdiction on the basis on th e defendant's submission.
- Express submission: if the party agrees expressly with a choice of court agreement whereby you agree that the Maltese courts have jurisdiction.

Counter Claims

Article 743 deals with counter claims;

743*. (1) The party against whom the defendant in an action brought by such party sets up a counter-claim shall also be subject to the jurisdiction of the courts of civil jurisdiction.*
(2) The provision of this article shall also apply in the cases referred to in article 402.

We have already seen a similar rule under the Brussels I Recast. A counter-claim is arises if for instance, you sue me and I raise a counter claim against you. In such cases, the court will also have jurisdiction to hear the counter claim.

Arbitration

(not very important)

Article 742(3)-(5) touches upon arbitration, together with the Arbitration act. Rather than going to court, the parties can choose to settle the dispute through arbitration, whereby the dispute would be decided by the arbiter. The idea of arbitration is that the parties should be given the option not to litigate in court, and are entitled to have their own resolution mechanism (arbitration being one of them). The issue is what happens if you decide to go to arbitration and there is an arbitration clause?

***742**. (3) The jurisdiction of the courts of civil jurisdiction is not excluded by the fact that there exists among the parties any arbitration agreement, whether the arbitration proceedings have commenced or not, in which case the court, saving the provisions of any law governing arbitration, shall stay proceedings without prejudice to the provisions of sub-article (4) and to the right of the court to give any order of direction.*

If the court comes to the conclusion that the dispute is covered by an arbitration clause and the parties must go to arbitration, the court will stay proceedings so that the parties go to arbitration. Thus, the court always keeps residual jurisdiction in case one of the parties doesn't cooperate. The court can also issue precautionary warrants when parties have agreed to go to arbitration in order to secure the claim being decided by arbitration, however, note that an arbiter cannot issue a precautionary warrant:

***742**. (4) On the demand by any person being a party to an arbitration agreement, the courts may issue any precautionary act, in which case, if such party has not yet brought forward his claim before an arbitrator, the time limits prescribed in this Code for bringing the action in respect of the claim shall be twenty days from the date of issue of the precautionary act.*

Article 742(5) then gives the court the power to revoke the warrant in certain situations. This deals with law of procedure and not PIL as such.

Recognition and Enforcement of Foreign Judgements under Regulation 1215/2012

The notion of recognition and enforcement of foreign judgements is one of the 3 principal branches of PIL. Here we deal with the situation when a foreign judgement (delivered by a foreign court) can be recognised and enforced in the courts of another MS.

In this respect, we find two different sets of rules which apply. The first set of rules which will be analysed here applies to the recognition and enforcement of judgements coming from the EU concerning civil and commercial matters, and thus the rules under Regulation 1215/2012 apply. The second set of rules then applies to EU judgements which do not concern civil and commercial matters and thus fall out of the scope of Regulation 1215/2012, or to judgements coming from third states, which are regulated by the provisions of the COCP, namely Articles 826 and 827.

Worthy of mention is that as a general rule, a foreign judgement has no direct effect in Malta, but it must be declared enforceable in Malta.

What do we mean by Recognition and Enforcement of a judgement?

The recognition of a judgement means treating the claim which was adjudicated as having been determined once and for all, meaning that the judgement is to be considered a res judicata, for which reason it must be given the same effect as it has in the State of origin.

This was affirmed by the CJEU in the **Hoffman Case (Case C-145/86):**

- The CJEU maintained that 'recognition' is to give a judgement the same effect that it has in the State of origin, i.e. in the state where it was delivered.
- Thus, a judgment which has been recognized must in principle have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given.

The recognition of a judgement has two important purposes/consequences:

1. It can either pave the way for enforcement as it allows the claimant who was successful in a foreign court to enforce the judgement in another State; or
2. If the defendant was successful in the foreign court, it will allow the defendant to rely on the judgement to impede a subsequent action from being brought by the unsuccessful claimant on the basis that the recognition of a judgement means that the claim is treated as a res judicata (i.e. determined once and for all).

Thus the recognition of a foreign judgement may be in the interest of both parties, either plaintiff or defendant since while it paves the way for the enforcement of a foreign judgement which may be beneficial for the claimant if the case was decided in his favour, it also means that the claimant will not be able to sue the defendant on the same merits again in another State. Then, once the judgement is recognized, one can proceed with the enforcement of the judgement.

Here we can refer to the **Hoffman Case** again whereby the court held that while the EU Regulation recognizes the procedure for recognition and enforcement of foreign judgements, it does not deal with the execution of the judgement itself. This is because the manner in which a foreign judgement is executed is in fact a matter of procedure, and thus is different for each MS which has its own executive warrants contained in the MS's national law. These executive warrants are precautionary warrants, such as the executive garnishee and judicial sale by auction. Note that executive warrants are not important for this course, but what is relevant is the procedure of recognizing and enforcing a foreign judgement which will be dealt with further on.

Note that the Brussels I Recast Regulation applies in civil and commercial matters. This means that for the rules on the recognition and enforcement of judgements of the Regulation to apply, it is not enough that the foreign judgement is delivered by a court of a MS, but the judgement must also concern a claim on a civil or commercial matter. Therefore, all the cases examined on what is meant by 'civil and commercial matter' are also relevant here. One particular case is the **PMU vs. Bell Med case** where the question was whether it was civil or commercial so that the provisions of the regulation could be applied. The consequence of the court finding that the claim was not civil and commercial, was that the COCP applied and under the COCP the French judgement was not enforceable in Malta. The first requirement is that therefore the judgement must be on a claim on a civil and commercial matter.

Once our judgement is on a claim of a civil or commercial matter, it is irrelevant whether it was given against someone not domiciled in a MS. The Regulation itself sometimes tells us to apply rules of national law (article 6) and therefore, just because the national court applied rules of national law, it does not mean that the judgement is not enforceable under Regulation 1215/2012. In fact, Recital 27 of the Regulation provides that:

For the purposes of the free circulation of judgments, a judgment given in a Member State should be recognised and enforced in another Member State even if it is given against a person not domiciled in a Member State." Therefore, a judgement where jurisdiction was based on article 6 of the Regulation is still enforceable under the regulation.

As a general rule, it is also irrelevant whether the court was wrong in assuming jurisdiction. At this stage of recognition and enforcement, one cannot argue that the foreign court which delivered the judgement was wrong in assuming jurisdiction. However, there are some exceptions to this: for example, if there is a breach of mandatory jurisdiction on the rule of domicile, it is acceptable for one to argue that the court was wrong in assuming jurisdiction at the enforcement stage.

The Procedural steps for the Recognition and Enforcement of Foreign Judgements

Regulation 1215/2012 made a number of changes when compared to Regulation 44/2001 with respect to the provisions dealing with the procedure for the recognition and enforcement of a foreign judgement. In fact, this was one of the principal reasons why the EU legislator decided to enact a new Regulation, i.e. Brussels I Recast, rather than amend Brussels I (Regulation 44/2001).

Regulation 44/2001 contained rules on what was known as **the exequatur** by virtue of which in order for a foreign judgement to be recognized and enforced in another MS, one had to first obtain a declaration of enforceability. This was an intermediate step which made the procedure more complicated and lengthy. So, for example, let's say the foreign judgement was delivered by the French courts, according to the procedure under Regulation 44/2001:

- One has to first present the judgement (after being received) to the FHCC, which would then examine all the documents presented;
- Then, if the court considers that all formal requirements have been satisfied, it would issue a declaration of enforceability which would then be notified on the defendant;
- The defendant would then have the possibility of bringing a procedure before the CoA on the basis of one of the grounds stipulated in the Regulation as to why the French (foreign) judgement was not to be enforceable in Malta.

The exequatur was thus considered to be an extra step and an obstacle to the freedom of movement of judgements within EU MSs.

Hence, the new regulation (1215/2012) abolished this intermediate step of the exequatur for the recognition and enforcement of judgements in order to make the free circulation of judgements easier. In fact, **Recital 26** of Brussels I Recast provides that:

*"**Mutual trust in the administration of justice** in the Union **justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure**. In addition, **the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed**. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed."*

Furthermore, **Article 39** also stipulates that:

Article 39

*A judgment given in a Member State which is enforceable in that Member State shall be **enforceable in the other Member States without any declaration of enforceability being required**.*

Therefore, contrary to Regulation 44/2001, under Regulation 1215/2012 the requirement to obtain a declaration of enforceability has been abolished that thus one need not obtain such declaration for the foreign judgement to enforced. In fact, the regulation goes on provide under **Article 40** that:

Article 40

*An enforceable judgment shall carry with it by operation of law **the power to proceed to any protective measures which exist under the law of the Member State addressed**.*

So, the judgement is enforceable in the other MS and it brings within the power to issue executive warrants. **Article 41** then further clarifies that:

Article 41

1. Subject to the provisions of this Section, ***the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed****. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.*

There is no need to get a declaration of enforceability to enforce a foreign judgement in the MS addressed. This is because in the sense of Article 41, the foreign judgement is immediately enforceable in the MS addressed in accordance with the procedural law of the MS of the court address. This is because the manner in which a foreign judgement is enforced/executed is a matter of procedure, and thus is different for each MS which has its own executive warrants contained in the MS's national law. Therefore, a foreign judgement may be enforced or rather executed in Malta by any of the executive warrants found under the COCP, generally known as precautionary warrants, such as the executive garnishee and judicial sale by auction.

So, how is the foreign judgement enforced in the MS addressed?

Article 42 of the Regulation provides that:

Article 42

1. For the purposes of enforcement in a Member State of a judgment given in another Member State, the ***applicant shall provide the competent enforcement authority with****:*

(a) ***a copy of the judgment which satisfies the conditions*** *necessary to establish its authenticity; and*

(b) the ***certificate issued pursuant to Article 53, certifying that the judgment is enforceable*** *and containing an* ***extract of the judgment*** *as well as, where appropriate,* ***relevant information on the recoverable costs of the proceedings*** *and the* ***calculation of interest****.*

Thus what is required for the court of the MS addressed to enforce the judgement is:

1. a copy of the judgement; and
2. a certificate issued in accordance with Article 53 of the Regulation certifying that the judgement is enforceable.

Note that a translation of the judgement is only required in certain cases.

An important provision in this regard is Article 43(1) which provides that:

Article 43

1. Where enforcement is sought of a judgment given in another Member State, ***the certificate issued pursuant to Article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure****. The certificate shall be accompanied by the judgment, if not already served on that person.*

Thus, the certificate issued in terms of Article 53 and the copy of the judgement must be served upon the judgement debtor. Then, once this is done you can proceed with the first enforcement measure i.e. issue an executive warrant (for example, a garnishee order, judicial

sale by auction, etc.). Then it would be up to the judgement debtor to stop the enforcement of the judgement against him by filing an application in accordance with **Article 46** which states that:

Article 46

On the application of the person against whom enforcement is sought, ***the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist****.*

Therefore, once the judgement debtor receives the certificate for enforcement, a copy of the judgement and an executive warrant, he **can file an application in terms of Article 46 to halt the enforcement on the basis of one of the grounds of defence to the enforcement of a foreign judgement found under Article 45**.

The judgement debtor can also raise the plea of jurisdiction at this stage, as one for the very limited circumstances where it is allowed at a stage other than *in limine litis*. As mentioned earlier, as a general rule, it is not possible to say at the enforcement stage that the court which gave judgment was wrong in assuming jurisdiction however, this can only be raised in limited circumstances. In fact, in accordance with Article 45(e), if the court which gave judgement breached sections 3, 4 or 5 of chapter II or section 6 of chapter 2 on mandatory jurisdiction irrespective of domicile, it is possible to raise a defence at the recognition and enforcement stage.

Here note that it is worth keeping in mind Article 821 of the COCP which provides us with the grounds on which an executive warrant may be revoked (this will be delved into further detail later on) whereby the concept is similar.

Moreover, in the sense of Article 49, the judgement debtor also enjoys a right of appeal after a decision on the application he filed has been reached, as it states that:

Article 49

1. The decision on the application for refusal of enforcement may be appealed against by either party.
2. The appeal is to be lodged with the court which the Member State concerned has communicated to the Commission pursuant to point (b) of Article 75 as the court with which such an appeal is to be lodged.

The procedure for refusal of enforcement shall be governed by the law of the MS addressed as per **Article 47**, which states that:

Article 47

1. The application for refusal of enforcement shall be submitted to the court which the Member State concerned has communicated to the Commission pursuant to point (a) of Article 75 as the court to which the application is to be submitted.
2. The procedure for refusal of enforcement shall, in so far as it is not covered by this Regulation, be governed by the law of the Member State addressed.

Moreover, the Regulation also makes it clear that under no circumstance may a judgement given in a MS be reviewed as to its substance in the MS addressed. In fact Article 52 makes it

clear that one cannot reopen the merits of the case meaning that one cannot raise defences on the merits of the case at the recognition and enforcement stage. One must always defence his case the moment he is sued only. In fact, Article 52 provides that:

Article 52

Under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed.

Thus, one can only raise the grounds of defence to the recognition and enforcement of foreign judgements found under Article 45 (which will be analysed below).

Article 54 is also worth mentioning as it provides that
1. If a judgment contains a measure or an order which is not known in the law of the Member State addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests.

Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

The remedy granted by the foreign court may not exist in exactly the same way under Maltese law (or generically, in the law of the MS addressed), but if a similar remedy exists, then the regulation requires that the measure be adapted to a measure which has similar effects in the MS addressed.

What do we understand by 'judgement'?

Article 2 of the Brussels I Recast defines the term 'judgment' for the purposes of the Regulation as:

"*any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court*.

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;"

So, the word 'judgement' is defined very broadly and includes not only judgements in the strict sense, but also includes decrees, other decisions given by a court of a MS and it also includes the determination of the costs or expenses by an officer of the court. In Malta for example, after a case is decided, the court issues a taxed bill of judicial costs and that taxed bill of judicial costs is also enforceable in the same way as a judgement.

A court which does not have jurisdiction on the merits, may still issue precautionary warrants (prohibitive measures)
Provisional measures, or rather precautionary warrants issued by a court which has jurisdiction on the substance of the merits is also are also enforceable in other MSs. These must be distinguished from those provisional measures given by a court which does not have jurisdiction on the substance since they are only effective in the territory of the court which ordered the measure. So while the court which gave the provisional measure has jurisdiction as to the substance then the protective measure can also circulate to other MSs under the Regulation, provided it is served on the defendant prior to enforcement, the court which has no jurisdiction on the merits but issues a protective measure cannot circulate to other MSs under the Regulation.

Avukat Hugh Peralta nomine vs Zet Ltd. (COA, 2011):

- This judgement dealt with the notion of "judgement" and concerned a demand for the enforcement of a '*decreto injuntivo'* (an Italian decree).
- This italian decree was a procedure in Italy where one can present his claim if he is owed money and if the court sees that it is prima facie founded, it will issue the *decreto injuntivo*. If the other party doesn't contest this decree within the period of time stipulated, then it will become executive i.e. equivalent to a judgement (this is similar to what we find under Maltese law in Article 166A of the COCP).
- The question which arose was therefore whether a decreto injuntivo fell within the notion of judgement. The court of appeal overturned the FHCC judgement and held that the decreto injuntivo falls within the definition of judgement and is thus capable of being recognized and enforced in Malta.
- The court held that: *"jidher bic-car illi d-digriet Inguntiv huwa "judgment capable of recognition and enforcement" u ghalhekk il-konsiderazzjoni tal-ewwel Qorti illi "id-digriet tat-13 ta' Ottubru 2005 kien ghad jonqos in-notifika", u ghalhekk ma setax jigi ikkonsidrat bhala "sentenza" ai termini tar- Regolament huwa zbaljat."*
- Reference was also made to when the ECJ held that this decreto qualified as a judgement for the purposes of the regulation and was therefore enforceable.

Moreover, the judgement must not be impeachable for procedural or substantive reasons for it to be enforceable.

Article 45 – The Grounds of Defence to the Recognition and Enforcement of a Foreign Judgement

Here, the defences here are very limited because the idea of the Regulation is that judgements must circulate freely amongst MSs. In fact Article 45 provides us with 4 defences which may be raised by the judgement debtor in this regard, namely:

1. Public Policy
2. (a) Where the judgement was given in default of appearance
   (b) Where insufficient time was provided to prepare a defence
3. Judgement is irreconcilable with a judgement given in a dispute between the same parties in the MS where recognition is sought
4. Judgement given is irreconcilable with an earlier judgement given in another MS/third state (same cause of action)

Therefore, from this article we can sum up the following defences:

1) **Public policy**

Article 45(1)(a) provides that:

On the application of any interested party, the recognition of a judgment shall be refused: (a) if ***such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed****;*

Public policy is a matter determined by each MS independently, and so it is a matter regulated by national law. To this end, what we consider to be public policy in Malta need not be identical to what another MS considers to be public policy and therefore to a certain extent, public policy has a national character.

Despite this, the MSs are not free to classify any rule as a rule of public policy. In fact, the ECJ has basically given guidance on what is meant by public policy and when the defence of public policy can be relied upon in the following two judgements:

Krombach Case (Case C-7/98)

- In this judgement the court made it clear that the public policy exception can only apply within the limits defined by the CJEU.
- The court held that in order for a rule to be classified as a rule of public policy, there must be **a manifest breach of a rule of law which is regarded as essential in the legal order of the State** in which enforcement is sought **or a right recognized as fundamental within the legal order of the MS addresss.** Thus, recourse to public policy may only be envisaged in exceptional circumstances where the recognition for enforcement of a judgement in a foreign state infringes a fundamental or essential principle.
- The court further held that a breach of the right of fair hearing (protected by article 6 ECHR) could also amount to a breach of public policy and therefore the recognition and enforcement of the judgement can be refused in this regard.

Maxicar Case (Case C-38/98)

- The question in this case was whether an error of EU competition law is a ground for denying recognition on the basis of public policy. So, if the foreign law applies EU law wrongly, can one say that the judgement is in breach of public policy?
- The court said that this would not be a question of public policy and it is thus not possible to refuse recognition on the ground that the court of origin misapplies community law.
- In fact, the court pointed out that according to the regulation, the court cannot reopen the merits/investigate the findings of law or fact made by the court of origin. So basically, if you believed that the court got it wrong abroad, you should have appealed in the court of origin and if the court gets it wrong it is not possible to raise at this point of recognition and enforcement stage.
- article 34 can only be applied if there is a manifest breach of an essential rule of law. The court held that recognition or enforcement could not be withheld if the court

made a mistake in applying community law on competition law. This was not a breach of public policy.

So, public policy is an important defense, but it is not any rule of law which is considered to be a rule of public policy. For example, the rule of interest in Malta which is 8%, is no longer considered to be a rule of public policy. Before we had situations even under Maltese law where we have interests running at a higher rate. Certain provisions of the Commercial Code which transposed from the Late Payments Directive stating that there could be situations were interest exceeds 8% and once we accept those situations, then we cannot then say that a judgement coming from Germany giving 9% is in breach of Maltese public policy.

Elf Aquitane v. Andre Guelfi (CoA, Case 1084/2005)

- This was a Maltese judgement delivered by the Maltese courts on the concept of public policy under Regulation 44/2001, which is also applicable to Regulation 1215/2012.
- In this case there was a French judgement given by a criminal court (note that the fact that the judgement is given by a criminal court does not stop it from being within the scope of the Regulation, provided it deals with a civil and commercial matter), awarded compensation to the claimant company against Andre Guelfi. Thus, procedure was brought in Malta to enforce the French judgement.
- Defendant raised the defence of public policy as he held that under Maltese law, the civil action and the criminal action are distinct/separate and so it is against public policy to enforce a judgement given by a criminal court.
- The court refused this argument and explained what public policy is (look at page 6 of the judgement) – "*Xi haga tkun manifestament kontra l-"public policy" ta' Malta jekk tkun tikkozza ma xi principju ta' dritt tant fondamentali, jew ma' xi principju morali, li ghandu necessarjament iwassal lillqorti – f'dan il-kaz lill-qorti Maltija – li tirrifjuta li tirrikonoxxi dik is-sentenza barranija*."
- Here the court affirmed the **Krombach** Case whereby it was held that: "Recourse to the clause on public policy in Article [34(1)] can be envisaged only where the recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle."
- The court therefore held that the simple fact that under Maltese law we have the general rule that the criminal act is distinct from the civil action, doesn't make the French judgement in breach of Maltese public policy. Hence, the criminal court awarding a civil remedy was not a question of public policy.

2) <u>(a) Where the judgement was given in default of appearance</u>

Article 45(1)(b) provides that:

On the application of any interested party, the recognition of a judgment shall be refused: ***where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document*** *in sufficient time and in such a way as to enable him to arrange for his defence, unless the*

defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

Therefore, in the event where the judgement was served while the defendant was contumacious, as he failed to appear, the defendant's right to affair hearing is considered ot be prejudiced, and thus he has a right to oppose the recognition and enforcement of the foreign judgement on this basis.

One may remain contumacious for a number of reasons, such as if the defendant did not file a statement of defence, or the defendant was not notified of the proceedings, the court did not realise that the defendant was not notified, and it proceeded to give judgement in default of appearance. However, this defence may not always be raised in any instance where judgement is delivered in kontumacja. If the defendant is notified and he just did not file a defence then the judgment would still be enforceable against him and the defense may not be raised. However, in the event that the defendant was not notified, and the courts did not realized that a defendant was not notified but still served the judgement, since in such a case the defendant would not have had the opportunity to defend himself in the foreign court (as he was not notified of the proceedings), then this defense may be raised.

(b) Where there is insufficient time to prepare defence

Article 45(1)(b) also provides that:

On the application of any interested party, the recognition of a judgment shall be refused: where the judgment was given in default of appearance, ***if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence****, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;*

So, in this regard, although the defendant would have been notified, he would not have had sufficient time in order to prepare his defence. In such a case, the defendant can also oppose the recognition and enforcement of a judgement by virtue of this defense. This is related to the right to a fair hearing in accordance with Article 6 ECHR, which is in turn also protected by Article 39 of the Constitution of Malta.

The Regulation further provides that "…*unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so".* So, if the defendant had a remedy which he could have utilised before the foreign court to challenge that judgement on grounds that he was not notified or that he was not given due time to prepare his defence, then this defense may not be raised. This proviso was an amendment made by Regulation 1215/2012 by virtue of which therefore, one can only bring a defence if he did not have the opportunity to challenge the judgement in the foreign court, on the basis that he was not notified.

Hendrikman Case (Case C-78/95)

- Here the court held that the notion of the judgement given in default of appearance is to be given an autonomous interpretation.
- In this case, a claim was made against Mr. and Mrs. Hendrikman, who were not notified. Nevertheless, a lawyer appeared to defend their case on their behalf without being authorized by defendants themselves, and the judgement was given against them. So, while it wasn't exactly a judgement given in default of appearance since a lawyer appeared to defend their case, the lawyer was never instructed by Mr. and Mrs. Hendrikman to defend their case as they were not notified of the proceedings.
- The court said that even though this was not a judgement given in default of appearance, it was still considered to be a judgement given in default of appearance due to the fact that a lawyer purported to represent the defendant in a situation where the defendant was not served or notified with the documents instituted in the proceedings.

Klomps Case (Case 166/80)

- In this judgement the court held that the regulation (at the time the convention) still requires the court to examine whether service was affected in sufficient time to enable the defendant to arrange for a defense.
- The court held that the court of the state in which enforcement is sought may refuse to grant recognition and enforcement of a judgement if the conditions of article 27(2) of the Brussels Convention (today Article 45(1) Brussels I Recast) are satisfied even though the court of origin had come to the conclusion that the defendant had an opportunity to receive service in sufficient time to enable him to make arrangements for his defense.
- The requested court (court where you want to enforce the judgement) has itself the power to decide that you did not have sufficient time to defend yourself even though the foreign court may have said that you are validly served.

Pendy Case (Case C-228/81)

- Similarly, in this case the court held that the provisions of the Convention are designed to ensure that the defendant's rights are protected.
- The court held that the court of the MS where enforcement is sought may refuse to grant recognition and enforcement, even though the court of origin had come to the conclusion that the defendant had sufficient opportunity to receive service and file his defence.
- The court in which enforcement is sought has the right to determine whether you were served in the foreign court and whether you had sufficient time to file your defence.

3) <u>Judgement is irreconcilable with a judgement given in a dispute between the same parties in the MS where recognition is sought</u>

Article 45(1)(c) provides that:

*On the application of any interested party, the recognition of a judgment shall be refused: (c) if the **judgment is <u>irreconcilable</u> with a judgment given between the same parties in the Member State addressed**;*

Strictly speaking, if the provisions of the regulation are applied well, we should never come to such a situation since lis alibi pendens provisions are designed to eliminate situations where courts of different MSs come to conflicting judgements. However, if somehow the rules of lis alibi pendens are not applied correctly, and we end up with 2 conflicting judgements, then this would be an obstacle to the enforcement of the foreign judgement and this ground of defense may be invoked.

For example, there is a judgement is coming from France which says that I have pay you 50,000 euros, but there is another judgement between the same parties and on the same cause of action from the Maltese courts saying that I have to pay you 10,000 euros or saying that I have to pay you nothing at all. In such a situation, if there is a judgement between the same parties which is irreconcilable with a judgment in the MS in which recognition was sought either before or after, that is an obstacle to recognition and enforcement and that is the reason why we have rules on lis alibi pendens, in order to avoid the situation we have in article 45(1)(c).

Gubisch Case (Case 144/86):

- This case concerned a question on lis alibi pendens, whereby one judgement sought the performance of the obligation, and another sought discharge from the contractual obligations.
- What is important to remember here is that a judgement deeming a contract to be lawfully rescinded is irreconcilable with an order that damages are to be paid for breach of the same contract.

4) Judgement given is irreconcilable with an earlier judgement given in another MS/third state (same cause of action)

Article 45(1)(d) provides that:

*On the application of any interested party, the recognition of a judgment shall be refused: (d) if the **judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties**, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed;*

So, there could be also an earlier judgement coming from somewhere else. Let us say you want to enforce a judgement coming from Italy, but there were proceedings on the same merits in the USA. If that judgment in the USA is recognized and enforceable in Malta through the COCP, then we have a conflict between the judgement coming from the third state and the judgement coming from Italy and even that will be an obstacle.

The Plea of Jurisdiction – a possible other defence in very limited circumstances

As already mentioned, as a general rule, it is not possible to raise a plea of jurisdiction at enforcement stage and you cannot say that the court was wrong in assuming jurisdiction. However, we have an exception to this under Article 45(1)(e) which provides that:

On the application of any interested party, the recognition of a judgment shall be refused: (e) if the judgment conflicts with:
(i) Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant; or
(ii) Section 6 of Chapter II.

So, by way of exception, you can say that the court which gave judgement breached the jurisdictional rules in section 3,4, 5 or 6. These rules related to the breach of the consumer contract provisions, breach of the insurance contract provisions, breach of the employment contract provisions - so the rules designed to protect the weaker party - or breach of section 6 dealing with exclusive jurisdiction irrespective of domicile. These are the only limited situations where one can raise a plea of jurisdiction at enforcement stage. This is because, since those rules are designed to protect the weaker party, if those rules are breached, the judgement will not be enforced.

So, these rules were intended to protect ONLY the weaker party and if the weaker party was sued in the wrong court in breach of the mandatory rules of jurisdiction designed to protect the weaker parties, that is an exception.

Section 6 is also an exception that deals with mandatory jurisdiction irrespective of domicile - remember we already saw rights in rem concerning immovable property. We said that there is exclusive jurisdiction in the court where the property is situated, if that rule is breached then you can also raise a defense at the recognition and enforcement stage. But, in all the other cases, if you feel that the court does not have jurisdiction against you, you have to fight the case when you are sued.

As we can see there are these very limited defenses which can be raised and include; public policy, lack of service, incompatible judgements and exceptionally a plea of jurisdiction but only if there is a breach of the rules designed to protect the weaker parties or of section 6 dealing with mandatory jurisdiction irrespective of domicile.

Moreover, that one cannot raise issues at the recognition and enforcement stage which should have been raised before the court gave judgement. In fact, article 45 (2) and (3) state that:

"*2. In its examination of the grounds of jurisdiction referred to in point (e) of paragraph 1, the court to which the application was submitted shall be bound by the findings of fact on which the court of origin based its jurisdiction.*

3. Without prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction."

Recognition and Enforcement of Foreign Judgements under the COCP

When it comes to the recognition and enforcement of foreign judgments, one must distinguish between those coming from EU MSs, and others delivered by the courts of third states. With regards to the recognition and enforcement of foreign judgements coming from EU MSs, we have already mentioned that the Brussels I Recast Regulation applies. In this case, the Regulation aimed to facilitate the free movement/circulation of judgments amongst MSs by simplifying the procedure of recognition and enforcement in abolishing the exequatur requirement (declaration of enforceability no longer required), and limiting the extent that one can raise defences at recognition and enforcement stage to the grounds of defence listed under Article 45 only. Ultimately, as already mentioned, this was done as an attempt to facilitate cross-border movement of judgements based on the idea that in the context of the EU, MSs trust each other's legal systems as all MSs have certain basic guarantees which are in place and are also all members of the ECHR. So, within the EU there is the concept of mutual trust which is the foundation of the Regulation.

However, the same cannot be said when dealing with the recognition and enforcement of third state judgements (for example judgements decided by the courts of the USA, China, Libya, etc.), as there is no principle of mutual trust and no guarantee of the level of protection and the rights afforded, more importantly the right to a fair hearing, in these foreign states. Moreover, there is no system of mutual recognition whereby one may ask, why should Malta enforce a judgement coming from the USA if the USA does not enforce our judgements; and there is also no principle of reciprocity where the states agree to enforce each other's judgments.

Therefore, we find a another regime for the recognition and enforcement of foreign judgements under the COCP, whereby if the foreign judgement is:

1. Either coming from a **third State (non-EU MS and non-Lugano State)**;
2. Or if the **judgement does not concern a civil and commercial matter**, falling out of the scope of the Brussels I Recast Regulation and **thus there is no EU instrument which applies**,

Then the provisions of the COCP apply.

Noteworthy is that the mechanism of recognition and enforcement under the COCP differs from that under the EU Regulations. We shall see that if one would like to enforce a judgement, he must first make a judicial demand before the courts of Malta, asking the courts to declare the foreign judgement to be enforced against another. Moreover, there are more defences which can be raised under the COCP, unlike under the Regulation whereby the defences are very limited, and there are only certain circumstances in which the courts decided to enforce a foreign judgements. Another point of consideration under the COCP is recognize the judgement in question. So, the basic principles underlying the regime of the enforcement of foreign judgements is not found here.

Therefore, if the judgement is not coming from the courts of an EU MS/Lugano State or if the judgement was not given on a civil or commercial matter and so none of the other regulations apply, we must refer to the provisions of the **COCP**, particularly **Articles 825A, 826, 827.**

Article 825A of the COCP

Article 825A of the COCP provides that:

***825A**. Where regulations of the European Union provide, with regard to the matters regulated under this title, in any manner different than in this title, the said regulations shall prevail, and the provisions of this Title shall only apply where they are not inconsistent with the provisions of such regulations or in matters not falling within the ambit of such regulations.*

This provision is a reflection of the doctrine of supremacy of EU law by virtue of which if the Brussels I Recast Regulation or any other EU Regulation apply, the rules of such EU instrument are to apply and not those under the COCP. Thus, the COCP is only applied if there is no EU Regulation which is applicable.

Therefore, Article 825A starts by preserving the application of the EU Regulations. So the first provision (825A) says if you're within the domain of a Regulation, then you apply the Regulation and not the COCP as the COCP only applies when absolutely no EU Regulation applies.

Article 826 of the COCP

Article 826 of the COCP then provides that:

***826**. Saving the provisions of the British Judgments (Reciprocal Enforcement) Act, any judgment **delivered by a competent court outside Malta** and constituting **a res judicata** may be **enforced by the competent court in Malta, in the same manner as judgments delivered in Malta,** upon an **application containing a demand that the enforcement of such judgment be ordered**.*

In the sense of this provision, the basic scheme under the COCP is that the recognition and enforcement of a foreign judgement will only be granted if it was delivered by a court outside Malta which is considered by Maltese PIL to have international jurisdiction to hear the case, if the judgement has become a res judicata and there must be no defense that can be raised against the enforcement of the judgement.

Note that this does not happen automatically, and whoever is desirous of having a foreign judgement enforced in Malta must file an application containing the demand to order such enforcement. In fact, in the case of a judgement coming from a third state the procedure under the COCP is completely different from that under the Regulation. For example, a judgement was delivered by the Canadian Courts. First, the court case must be received by the Applicant in Malta, who must then file an application to the Maltese courts containing the demand to declare the judgement enforceable in Malta. Once the applicant has a successful judgement from the Maltese court saying that the Canadian judgement is enforceable in Mlta, then he can proceed to enforce the judgement. Thus here, the procedure is much longer than the procedure found under the regulation, as ultimately, the principles of free movement of judgments and mutual trust do not apply re judgements coming from third states outside the EU.

So there are **3 requirements/requisites** for judgement to be enforceable by the Maltese Courts under COCP:

1. **Whether foreign court had international jurisdiction in accordance with Maltese PIL**. So here one must ask: Did the foreign court exercise a type of jurisdiction which Maltese PIL considers sufficient to be able to enforce the judgement in Malta? For example, proceedings are instituted in USA and the US Court applies its own rules of procedure to determine whether it has jurisdiction. The simple fact that US court decides that it has jurisdiction doesn't necessarily mean that the Maltese courts must enforce that judgement, but the judgement will only be enforced if the jurisdiction of the foreign court was based on **domicile** in the State of the court, **residence** in the State of the court, or on the basis of **submission**. Therefore, one must consider the grounds of jurisdiction of the foreign court which will determine whether the foreign judgement is recognizable and enforceable in Malta or not.
2. **The judgement must be a res judicata**, meaning that it must be a final, determinate judgement.
3. **There must be no defence which can be raised against the enforcement of the judgement**. The COCP affords a wide array of defences to oppose the recognition in Malta of a foreign judgment. In fact, as already mentioned, the grounds to oppose the enforcement of a foreign judgment under COCP are much wider than the limited grounds under the Brussels I Recast Regulation since the principles of free movement of judgments and mutual trust do not apply re judgements coming from outside the EU.

This provision also makes reference to **Chapter 52 Laws of Malta**, the British Judgments (Reciprocal Enforcement) Act which deals with the enforcement of judgements coming from the UK, and which lost some relevance upon the enactment of the Brussels I Recast Regulation. However, this act might again acquire importance because consequent to Brexit, the UK is no longer an EU MS.

The Requirements for Enforcement of a foreign judgement under the COCP

1. **The foreign judgement must be delivered by a competent court outside Malta**

So, one would ask: According to our rules of PIL did the foreign court have international jurisdiction to hear the case? The answer to this question is found under **Article 827(2) COCP** which provides that:

827. *(2) For the purposes of this article, the **plea to the jurisdiction** of the court by which the judgment was delivered, may be raised in terms of article 811(d), even though that court may have adjudged upon a plea to its jurisdiction, in the case of any action brought against any person not subject to the jurisdiction of that court by reason of **domicile** or **residence**, unless such person had **voluntarily submitted to the jurisdiction** thereof.*

Thus, this provision is saying that a foreign judgement will be recognised in accordance with Article 826 if it was given against a defendant who was either **domiciled** in the State of the foreign court or **resident** in that State, or if he **voluntarily submitted to the jurisdiction of the foreign court.**

This means that a court outside Malta will only be considered to be competent to give a judgment capable of enforcement in Malta if the judgment was given against a person subject to the jurisdiction of the foreign court by reason of domicile or residence or if that person has voluntarily submitted to the jurisdiction of the court. Therefore, **in order to enforce a foreign judgement under the COCP the jurisdiction of the foreign court must have been founded on domicile, residence, or submission to jurisdiction:**

- Domicile: Here the Maltese court would apply the Maltese notion of domicile in PIL, which is based on the same notion under British Common Law. So domicile is established when there is both the physical element in the sense that the **physical presence in the State is necessary**, and also the psychological element (animus revertendi) that is the **intention to permanently reside in that State**.
- Residence: if one is **merely residing in the state of the foreign court which delivered the judgement against him**, then the foreign court would be deemed to have international jurisdiction to decide a judgement that is capable of recognition and enforcement here in Malta.
- Submission: If one submits to the jurisdiction of a foreign court, then that court is capable of giving a judgement which is capable of being recognized and enforced in Malta. Submission can take place in two ways:
    a. Tacit Submission – for example one is sued in the USA Courts, after which he files a defense on the merits of the case without first pleading jurisdiction. Here the respondent would have tacitly submitted to the court's jurisdiction and such a judgement would hence be enforceable in Malta. This was confirmed in the judgement of **Debono vs Zammit (Court of Appeal, 21st February 1930).**
    b. Express Submission – for example, one is sued in the USA Courts again after having signed a choice of court agreement stating that he submits to the exclusive jurisdiction of the Courts of the USA.

Avukat Dr Christian Farrugia vs Peter Blond International Ltd (FHCC 22nd June 2006 Case 916/2003):

- Here the court held that submission can take place be by means of a choice of court agreement, whereby submission would be express. However, submission may also be tacit.
- The Court also pointed out that the person requesting he recognition and enforcement of the foreign judgment under Article 826 COCP must prove that the foreign court had jurisdiction by bringing the required proof that the person concerned was either domiciled or resident in the state of the foreign court which pronounce judgement, or that such person submitted to jurisdiction of the foreign court.
- However, the proof of domicile, residence or submission will then be interpreted in accordance with Maltese Law/doctrine, and so If the foreign court decided one was resident, it does not mean that the Maltese court will also decide the same. So the three are to be interpreted in terms of Maltese law.

Note that the system that we have here is similar to the position under English common Law. Under English PIL, a foreign court has international jurisdiction in terms of English PIL if the

party against whom the judgement was given submitted to the jurisdiction of the foreign court or if he was present or resident within the jurisdiction of the foreign court where the proceedings were instituted. Two judgements which can be referred to in this regard are **Adam vs Kape Industries (House of Lords 1990)** and **State Bank of India vs Muriani (1991).** In Adam vs. Kape Industries the HoLs held that if the defendant was present within the territorial jurisdiction of the foreign court on the date on which the proceedings were commenced, he is considered to be subject to its international jurisdiction. So, under English PIL presence also suffices for a judgement to be rendered capable of being enforced. On the other hand, in Malta this is based on domicile or residence in the foreign state, or submission to the court, and not presence.

Article 872(2) also states; "*even though that court may have adjudged upon a plea to its jurisdiction*". Therefore even if the foreign court may have decided that It has jurisdiction, it does not stop you from raising the plea of jurisdiction in Malta at recognition and enforcement stage.

2. **The judgement must be a Res Judicata**

This means that the judgement must be final and conclusive, thus, it may not be altered in later proceedings between the same parties.

To determine whether a judgement is a res judicata, hence final and conclusive, one must look at the law of the foreign court to see whether there is the possibility of appeal. So if the judgement has been appealed from, or if the judgement has not yet been appealed but the period within which an appeal may be lodged has not yet passed, then the judgement is not final and conclusive.

Assuming these requirements are satisfied, then one must see whether the defendant can raise any defences found under the COCP. In fact, **Article 827** also makes applicable the so called **grounds of retrial** which apply as **defences** for contesting the recognition and enforcement of a judgement and which may be raised in exceptional cases, even if a judgement is considered to be res judicata. These grounds for retrial apply mutatis mutandis here, which means that they are also defenses/grounds which can be raised against the enforcement of a foreign judgement. **Article 827** provides that:

***827**. (1) The provisions of the last preceding article shall not have effect:*
*(a) **if the judgment sought to be enforced may be set aside on any of the grounds mentioned in article 811**;*

Thus, these grounds for retrial, which also act as defences to the recognition and enforcement of a foreign judgement are found under **Article 811** which provides that:

***811**. A **new trial of a cause decided by a judgment** given insecond instance or by the Civil Court, First Hall, in its Constitutional Jurisdiction, **may be demanded by any of the parties concerned, such judgment being first set aside, in any of the following cases**:*

a. Article 811(a) COCP – Fraud

811. *(a) where the judgment was obtained by fraud on the part of any of the parties to the prejudice of the other party;*

So if one can prove that the judgement was obtained by fraud, then that would serve as a ground against the recognition and enforcement of a foreign judgement. In the context of retrial, the Maltese courts have held that the fraud must be of such a nature as to prevent a party from adequately defending himself, to the extent that he ends up becoming the party cast in the lawsuit, meaning that he lost the case because the fraud that took place.

The same ground of fraud also exists under English common law whereby enforcement will not be ordered if there is a credible allegation that the foreign judgement was obtained by fraud. Under English law fraud has been held to encompass **any misleading of the foreign court such as advancing a claim known to be false, fabrication of evidence and intimidation of witnesses**. The claimant will be thus generally be found guilty of fraud if he **made use of improper means to defeat justice and prevail over the defendant**.

Jet Holdings vs. Patel (1990):

- This is an English judgement concerning fraud, where the English court pointed out that the defendant need not show that he discovered new evidence which he couldn't have put forward at the time of trial. Thus, the defendant may use evidence already brought before foreign court but which didn't persuade the foreign court.
- So, if the defendant then persuades the English Court that there was fraud and the use of improper means to defend justice, then the defence of fraud would be upheld.

b. Article 811(b) COCP – Sworn application not served

811. *(b) where the sworn application was not served on the party cast, provided that, notwithstanding such omission, such party shall not have entered an appearance at the trial;*

For this defence to be raised, the defendant must have not been served with the proceedings with the consequence that he could not defend himself before the court, as long as the defendant remained contumacious. So, this defence would not apply and be upheld if the defendant knew about the case, even though he might not have been served, and nonetheless appeared before the court and presented his defence. This is because even though the defendant was not properly served, he still defended his case before the court.

c. Article 811(c) COCP – Legal disability to sue or be sued

811. *(c) where any of the parties to the suit was under legal disability to sue or be sued, provided no plea thereanent had been raised and determined;*

Under civil law, certain persons are under a legal disability to sue or be sued e.g. minors who must be represented by their parents, or persons interdicted or incapacitated who must be represented by a tutor/curator. So, if for instance an interdicted defendant is sued in a foreign

court and is not represented by his curator, then that would be considered a valid ground for the non-enforcement of the judgement.

d. Article 811(d) COCP – No Jurisdiction under Article 741(a)

811. *(d) where the judgment was delivered by a court having no jurisdiction in terms of article 741(a), provided no plea thereanent had been raised and determined;*

This can be ignored as it has been re-worded by Article 827(2) in this particular context on the recognition and enforcement of foreign judgements.

e. Article 811(e) COCP – Wrong application of the law

811. *(e) where the judgment contains a wrong application of the law; For the purposes of this paragraph there shall be deemed to be a wrong application of the law only where the decision, assuming the fact to be as established in the judgment which it is sought to [be] set aside, is not in accordance with the law, provided the issue was not in reference to an interpretation of the law expressly dealt with in the judgment;*

So, the wrong application of the law would serve as a ground to halt the recognition and enforcement of a foreign judgement. However, this must be distinguished from a 'wrong interpretation of the law'.

On this ground there are many judgements within the context of retrial whereby the action for retrial is based on a wrong interpretation (rather than application) of the law. However, the wrong interpretation of the law is not a ground for retrial, and neither is it a ground of defense with respect to the recognition and enforcement of foreign judgements. **It is only the wrong application of the law must be proved and not the wrongful interpretation of it, for a judgement not to be enforced in Malta.**

Thus, this ground requires proof that the court was bound to apply one provision (for example Article 1145 of the Civil Code) and instead it applied a completely different provision (for example Article 1148 of the Civil Code). And, the claim that a correct provision was misapplied is not considered to be a ground for retrial

In **Hicklin v Agius 14/11/1997** the difference between application of the law and interpretation of the law was presented by the Court. Here the court held for retrial to be granted, it must be established that a decision sought to be impugned …"applikat il-ligi l hazina ghall-kaz u mhux applikat il-ligi t-tajba b'mod hazin." So if the court applies the law but interprets it wrongly that's not a ground, but it must have applied wrong law to the dispute for the ground to subsist.

f. Article 811(f) COCP – Extra Petita

811. *(f) where judgment was given on any matter not included in the demand;*

g. Article 811(g) COCP – Ultra Petita

811. *(g) where judgment was given in excess of the demand;*

These last two sub-articles refer to the concepts of ultra petita and extra petita:

- Ultra Petita is when court awards more than what you asked for, i.e. in excess of the demand (court went beyond the demand). For example, You file a court case for €100,000, but the court gives you €1 million. In that case, the court went beyond the judicial demand and the judgment is ultra petita which is a ground for non-recognition; and
- Extra Petita is when the judgement concerns any matter not included in the demand. For example, You ask the court for €100,000 in damages caused in a traffic accident, but the court gives you 100,000 euros for a completely different cause of action and has nothing to do with what you had asked.

h. Article 811(h) COCP – Conflicting with a judgement on the same subject matter between the same parties, which is a res judicata

811. *(h) where the judgment is conflicting with a previous judgment given in a suit on the same subject-matter and between the same parties, and constituting a res judicata, provided no plea of res judicata had been raised and determined;*

So, there is a judgement coming from a foreign court but it is conflicting with another judgment given on same subject matter between the same parties. We have already seen a similar ground under Regulation 1215/2012 where there's a previous judgement between same parties on same the subject matter which is in contradiction with the judgement you want to enforce.

i. Article 811(i) COCP – Contradictory dispositions

811. *(i) where the judgment contains contradictory dispositions;*

So, It could be a judgement which says you're liable in one instance then not liable in another instance, and therefore it contains a contradictory disposition in which case, the judgement would not be enforceable.

j. Article 811(j) COCP – Evidence was declared false

811. *(j) where the judgment was based on evidence which, in a subsequent judgment, was declared to be false or which was so declared in a previous judgment but the party cast was not aware of such fact;*

So, the judgement was based on evidence which was later discovered to be false. There was perjury, false evidence, so in that case the judgement would not be enforceable.

k. Article 811(k) COCP – Conclusive Documents

811. *(k) where, after the judgment, some conclusive document was obtained, of which the party producing it had no knowledge, or which, with the means provided by law, he could not have produced, before the judgment;*

So, after the judgement we find out that there were conclusive documents which the party didn't know about. For example, someone dies and no-one knows the deceased had made a will so everyone believs he died intestate and a judgment is given saying A, B, and C are heirs. However, later it transpires that the testator had made a will and left everything to one particular person. This would be considered to be a conclusive document which the party had no knowledge of in the first set of proceedings.

l. Article 811(l) COCP – Effect of an error

811. *(l) where the judgment was the effect of an error resulting from the proceedings or documents of the cause. For the purposes of this paragraph there shall be deemed to be such error only where the decision is based on the supposition of some fact the truth whereof is incontestably excluded, or on the supposition of the non-existence of some fact the truth whereof is positively established, provided that, in either case, the fact was not a disputed issue determined by the judgment.*

So, there was an error resulting from the proceedings of the documents of the cause. For example, the courts said that the defendant had admitted the demand, but this was not true as there was no note of admission, so the court got it wrong and it mixed one thing with another. Since there was such an error, the judgement would not be enforceable.

There are also other grounds of defence under Article 827(1) of the COCP:

⇒ **Article 827(1)(b)** provides that *the provisions of Article 826 shall not have effect: in the case of a* ***judgment by default*** ***if the parties were not contumacious according to foreign law****;*

Note that a defendant is held to be contumacious when, despite having 20 days to file a response, he did not file a reply. However, in the case of a judgment by default, the party was not contumacious, meaning that he would have filed a reply/defense or the judgement would have been delivered before the time period allowed to file a defense lapsed. This is therefore held to be another ground for non-recognition and non-enforcement of the default judgement.

⇒ **Article 827(1)(c)** provides that *the provisions of Article 826 shall not have effect: if the* ***judgment contains any disposition contrary to public policy or to the internal public law of Malta****.*

So, if the foreign judgement is contrary to public policy or to the internal public law of Malta, that is also a ground for non-recognition and non-enforcement of the judgement under the COCP.

We have already seen a similar provision in the Brussels I Recast Regulation and as we saw in the context of the Regulation, rules of public policy are only those which are essential and fundamental to society. Therefore, it is not any rule of Maltese law which is considered to be rule of public policy.

Moreover, we have seen a change in the rules of Maltese public policy over the years, both in the context of personal law for instance with the legalization of divorce, and also in the context of civil and commercial matters, for example, the rule that interest cannot exceed 8%, which used to be considered as a rule of public policy, is no longer a rule of public policy. In this regard, reference must be had to **Renato Cefai nominee vs Valletta Freight Services Ltd.** whereby the court held that the simple fact that interest exceeded 8% was not considered to be a breach of public policy. So, rules of public policy may also change over time with changes to the society.

Noteworthy is how different MSs have different rules of public policy. So, the simple fact that a foreign court grants moral damages does not mean that it breaches Maltese public policy since the Maltese courts do not generally grant such damages. However, there have been instances where moral damages were awarded.

However, it would be a different situation with respect to punitive damages, which is when compensation is granted by the foreign court not to compensate you for the damage caused, but rather to punish the defendant. For instance, in the US they have punitive damages; they can also make defendant pay huge amounts of money as damages.In Malta, this considered to be in breach of Maltese public policy because our civil law is based on the compensatory model of damages, meaning that we award damages as compensation and not as punishment.

This provision also makes reference to the **internal public law of Malta**. This seems to echo a distinction in French law between *ordre public* (public policy) and *lois de police* (mandatory domestic rules). Public policy intervenes where the enforcement of the foreign judgment is incompatible with a fundamental policy of the forum. However, the *lois de police* are the mandatory rules of the forum which must be applied irrespective of the otherwise applicable law. In fact, there are some mandatory provisions of law which are applicable notwithstanding the otherwise applicable law.

Under English Common Law there is an important principle which is also discussed in detail by **Dicey and Morris** as their Rule 3. This rule is that **English Courts will refuse to enforce a foreign judgement if it constitutes the enforcement directly or indirectly of a foreign, penal, revenue or other public law**. In fact, **Dicey and Morris** state that it is a well-established and almost universal principal that **the courts of one country will not enforce the penal and revenue laws of another country**. They further provide those laws which a foreign state may seek to enforce solely as an exercise of **sovereignty** and which by the law of nations are exclusively **assigned to their domestic forum**. Where a foreign law falls within the categories of those laws which the English courts will not enforce is a matter of English law, thus whether the foreign law regards the law in question as penal, revenue or public law, is irrelevant.

Briggs and Rees also point out that the rule under examination may be regarded as a particularized aspect of public policy. The argument would therefore be that it is against Maltese public policy to grant effect to penal, revenue or other public law of a foreign state.

- What is Penal law? Penal laws are laws which have punitive effects. Briggs and Rees in fact held that a penal law in the present context certainly refers to a law which imposes or requires a payment to the State or by a state authority.
- What is Revenue law? According to Briggs and Rees, revenue laws refer to a law which imposes or requires a payment to State Authorities, such as tax payment. So, this includes charges which must be paid to the state directly or indirectly and which cannot be avoided by purporting to renounce to the benefit. So one cannot say "I don't want to pay social security contributions and not get pension". The social benefit cannot be renounced and so, it is considered to be a revenue law.

Huntington vs. Attrill (Privy Council, 1893)

- In this case the court explained what is meant by this rule.
- The court pointed out that all breaches of public law "punishable by pecuniary mulct or otherwise at the instance of the state government, or of someone representing the public" are caught by this rule.
- The Court further held that "all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws" are covered by this rule.

With reference to the judgement of **Huntington vs. Attrill**, **Dicey and Morris** maintained that for the purposes of this rule, penal law is a law which punishes or prevents an offence, and to fall under this principle, the law does not have to depart from the criminal code of the foreign country. What is important is that the penalty is exigible by the state or by a state authority.

Dicey and Morris also point out that besides judgements ordering the payment of penalties and judgements ordering the payment of taxes which fall under penal law and revenue law respectively, there is also a third category which concerns 'other public law'. According to **Dicey and Morris**, this category of 'other public law' refers to all those rules which are enforced that it has an assertion of the authority of central or local government.

On this point, one can refer to **USA v. Inkley**:

- In this case the English court of appeal accepted that 'other public law' is a third residual category of foreign public law which the court will not enforce. So, if the foreign judgement is enforcing a foreign public law i.e. if the law in question is an assertion of state authority, then that would be caught by this rule.

a revenue, penal or other public law, and this rule is considered to be part of the rule of public policy. The same rule will also apply here in Malta. We apply English common law where we do not have any particular enactment, so this particular rule which we are going to discuss briefly, also finds application in Malta. The Maltese courts will not enforce a foreign revenue law (tax law), a foreign penal (criminal) law or a foreign public law. For example, if there is a judgement coming from Canada ordering the defendant to pay €100,000 in income tax, that would be decided on the basis of a foreign revenue law, and thus that judgement would not

be enforceable in Malta. It is an act of the state, fiscal legislation, tax law, which is ultimately not enforceable in Malta. Neither would we enforce a judgement which is of a penal nature, for example a judgement for a fine payable to a public authority. Those judgements will be caught by this particular rule and therefore would not be enforceable here in Malta.

Even here, when dealing with enforcement of judgments coming from outside the EU, the courts cannot reopen the merits of the case. The court will have to see whether it was given by a court which had international jurisdiction and whether the judgement was res judicata and whether there is any one of these defences, but it will not re-examine the merits itself.

Zammit McKeon vs. Laferla Insurance Agency Ltd (CoA)

- Here the court held that he simple fact that the foreign court applied different legal notions to those under Maltese law is not enough to render the judgement not enforceable, but there must be a breach of Maltese public policy.
- Therefore, the fact that Maltese law is different from foreign law does not automatically mean that those norms in Malta are norms of public policy. In fact this is very common since all MSs different laws and different rules of public policy.

Currently there is also in motion the **Hague Judgements Convention** which is not yet finalised. However, once finalised, the EU intends to ratify it since it will provide us with specific rules for the enforcement of judgements coming from contracting States to the convention, and so it would have exclusive competence here. This means that there will be an additional complication re judgments from third states since we would have to make a distinction between judgments coming from EU and judgments coming from contracting state of the Convention where there are specific rules on when to enforce a judgement coming from a contracting state to the convention or not.

The Issue of Applicable Law

Once we determine which court has jurisdiction, then we need to determine which is the applicable law. For instance it has been determined that the Maltese courts have jurisdiction and so, proceedings can be brought in Malta, but, what is the applicable law? Just because the Maltese law has jurisdiction does not mean that the Maltese law has to be the applicable law and see we need to see which law is the applicable law. This is important because different applicable laws would give different outcomes to the dispute, for instance different rules on the quantification of damages may be different, heads of damages may be different, some foreign laws might award morel damages but others might not, etc. Therefore, the applicable law may not necessarily be law of the court which has jurisdiction, however the applicable must be determined independently by analysing the rules on the applicable law

There is no harmonization on the substantive law of tort or contract, so each MS has its own legal provision on civil liability both regarding tortious and contractual claims, however, we have harmonization of the PIL rules on applicable law. We have two Regulations in this regard:

1. The **Rome I Regulation (Regulation 593/2008) dealing with contractual claims;** and
2. The **Rome II Regulation (Regulation 864/2007) dealing with non-contractual claims**.

By harmonizing the PUL rules on applicable law, the courts of the MS should come to the same conclusion on which is the applicable law, irrespective of where proceedings may be brought. So if the courts apply the same rules of international law, then the applicable law should be the same.

Prior to the Rome I Regulation there was the **1980 Rome Convention on the law applicable to contractual obligations**. This was drafted as a convention and not a regulation because at the time the EU did not have competence in the sphere of PIL as competence in this regard was added by the Amsterdam Treaty. So, in 1980, the MS had concluded the Rome Convention.

Subsequently, the EU acquired competence to legislate in the sphere of PIL and the **Rome II Regulation (Regulation 864/2007)** dealing with **torts, quasi torts and quasi contracts** was enacted. After a while, the Rome Convention was converted into an EU regulation thus becoming the **Rome I Regulation (Regulation 593/2008)**, and also **amended**. So, the Rome Convention was not only changed with respect to form (i.e. from a Convention to a Regulation), but it was also changed with regards to amendments made to a number of provisions. Note that as Regulations, they are directly applicable to all MSs, and hence, do not need to be transposed.

Recital 6 of both Regulations (Rome I and II) provides us with the object of the Regulation, as it states that:

*(6) The proper functioning of the internal market creates a need, **in order to improve the predictability of the outcome of litigation**, **certainty as to the law applicable** and the **free movement of judgments**, for the **conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought**.*

In accordance with the Brussels I Regulation, there can be situations where more than one court has jurisdiction. For example, if a claim concerns a matter relating to tort, delict or quasi delict, one can sue either at the courts of domicile of the defendant, or in the courts of the place where the harmful event occurred. In this respect, the place of the harmful event includes both the place of the event giving rise to the damage and also the place where the damage is felt. So, the result can be that proceedings can be instituted in more than one MS. However, when it comes to the applicable law, it can only be one as if you apply the same applicable law, whichever court may have jurisdiction, the outcome would be the same. This is why it is important to have harmonized PIL rules on the applicable law which will point any court to one legal system which would give the applicable law.

This is why it was felt necessary to have **harmonized rules on the applicable law** for the courts to come to the same conclusion on the applicable law. this is crucial because due to these harmonized rules, **a foreign court should come to the same conclusion as if proceedings had been brought in Malta.**

As an aside, it is worthy of mention that in Malta, **proof of foreign law is a question of fact and not of law**. So, **one would need to prove the content of foreign law**. For example, a case is being heard in Malta because the Maltese courts have jurisdiction, but, one of the parties holds the applicable law to the dispute is Italian law. The Maltese courts don't know what Italian law is, and they will not delve into the content of Italian law themselves. So, the claimant must bring proof on the content of Italian law as the foreign law being applied by the Maltese courts, since it is considered to be a question of fact. Therefore, the content of foreign law has to be proved in the same way as you prove any other fact, which is done by bringing an expert on the foreign law to prove what the content of foreign law is. On this point we follow English common law. There are other countries in Europe which have different systems. In some countries, the judge will have his own investigations on what the content of foreign law is. However, this is not the system we follow, and foreign law before the Maltese courts is considered to be a question of fact which means that the content of the foreign law must be proven as is any other fact.

Applicable Law under Rome II – Non-Contractual Obligations

The Rome II Regulation (Reg. 864/2007) was enacted in 2007 and concerns the law applicable to non-contractual obligations. It applies to accidents which happened after January 2009. There was quite some confusion on the date of entry into force and the date of application for which there was a reference to the CJEU in the **Homawoo vs GMF Assurances case (Case C-412/10)** whereby the court had determined that what is important is the date of the accident, i.e. the date when the claim arose, and the regulation applies only to events giving rise to damage occurring after the 11th of January 2009. This is not that important anymore as it was only important when the Rome II Regulation was enacted. Now, the regulation applies to any accident which occurs and which falls under its scope.

Before Rome II, in Malta we did not have any enactment dealing with applicable law in the context of torts or any non-contractual obligation and the general rule was that the Maltese Courts would refer to the position under British common law. in fact, on the applicable law the rule was to refer to and apply the rules of British common law, even in contract. However, upon Malta's accession to the EU and the enactment of both Rome I and Rome II the Maltese courts refer to the EU Regulations.

A Historical Overview

In England they applied rules of common law but they had also passed a law in 1995 which is known as the **PIL Miscellaneous Provisions Act** where the legislator had introduced rules on the applicable law in the context of tort. However, the 1995 Act never applied to Malta as it was British statute law which does not apply to Malta because what applies was British common law. Before this Act of 1995, the English courts had determined these rules as part of English Common Law under which a distinction was made between English torts and foreign tort. Thus, the first question that the English courts would ask was: where did the tort occur i.e. where did the substance of the cause of action arise? In the event that the accident took place in England and so the cause of action arose in England, then English law used to apply, but if the cause of action arose abroad, i.e. it was a foreign tort, then the **double actionability rule** used to apply. Here one must refer to the judgement of **Boys vs Chaplin** (House of Lords):

- In the case of foreign tort, the court decided this actionability rule needs to be satisfied:
  1. The Act had to be a tort according to English law and thus the act in question had to be actionable as tort under English Law; and
  2. The Act also had to be actionable as tort according to the law of the country where it was done
- So, in the case of a foreign tort the claimant had to show that he would not only succeed according to English law but he would also succeed under foreign law.
- However, this was subject to a **flexibility exception** where a particular issue could be governed by the law of another country with which the tort has the most significant relationship with the occurrence and the party.
- This case concerned two British servicemen who were in Malta and were involved in a traffic accident and the question was whether Maltese law or English law applied. The claimant under Maltese law could get 53 pounds since Maltese law only awarded

money for pecuniary damages, but under English law the claimant was entitled to recover a higher amount.

- The court laid down the double actionability rule subject to the flexibility exception. The court concluded that the English law was applicable due to the flexibility exception and since both plaintiff and claimant were British, the court held that it was only fair to apply English law and not Maltese law.

So this was the position under English common law which also held that when it comes to the assessment and quantification of damages then English law applies on the quantification of damages. However, in 1995 this Act had passed which was then superseded by the Rome II regulation in England (As at the time it was MS). The 1995 Act adopted a different approach, it discarded the double actionability rule and went for the **lex loci delicti** and the general rule under the 1995 Act was that the applicable law was the law of the country where the events constituting the tort or delict in question occurred.

A question under the 1995 act was whether the heads of damages and their quantification were regulated by foreign law or English law. There was an important judgement of the HOL **Harding vs Weelands** where the HOL held that even though the applicable law under the 1995 Act would be foreign law, the foreign law regulated the liability but did not regulate the assessment and quantification of damages since it is a procedural issue, and so English Law applies. This was held because In PIL we make a difference between substance and procedure. If the issue is one of substance then the lex causae applies i.e. the applicable law, and but if the issue is one of procedure then lex fori applies as it regulates issues of procedure. Thus the English courts held that the assessment and quantification of damages is a procedural issue and therefore, once it is procedural English law shall apply even though foreign law regulates the claim. So liability would be decided on the basis of foreign law, but then when we come to the actual quantification of damages, the English courts were to apply English Law.

This changed with the Rome II Regulation because under Article 15 of the Regulation, both the issue of liability and the issue of heads of damages and their quantification is regulated by the applicable law. So if under Rome II we come to the conclusion that French law regulates the claim, then French law will regulate the claim not only to determine liability, but also to determent who the claimants are i.e. who can sue for damages, and also the quantification and the assessment of damages. To this end, the English courts could not continue to say that the heads of damage and their quantification was an issue of procedure governed by English law any longer.

In Malta we had no Maltese rules of a PIL nature on the applicable law for tortious claims but from the date of application of Rome II then we had rules. before that, in absence of rules, the source of Maltese PIL law was British common law (and the 1995 Act had no application in Malta).

Brussels Recast and Rome II intertwining nature

A lot of the concepts in the Rome II Regulation are similar to those used in the Brussels I and they must be given the same interpretation. In fact, Recital 7 states that

(7) *The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the instruments dealing with the law applicable to contractual obligations.*

So, the definition terms of the Rome II Regulation, must be interpreted in accordance with the interpretation given to them for the purposes of the Brussels I Regulation.

The Scope of the Rome II Regulation (Regulation 864/2007)

Rome II tries to harmonise the rules on applicable law insofar as non-contractual obligations are concerned. It does not only deal with tort but it also deals with other non-contractual obligations such as pre-contractual liability, culpa in contrahendo, and quasi-contracts e.g. a provision on unjustified enrichment (Art. 10), and on negatorium gestio (Art. 11). So, Rome II is quite wide in scope.

In this respect we may refer once again to the **Tacconi case** whereby the court held that a claim for failure to negotiate a contract in good faith (pre-contractual liability) i.e. culpa in contrahendo, was not covered by article 5(1) but it was a matter covered by article 5(3), today article 7(2) of the Brussels I Recast. So, it is not surprising that when enacting the Rome II Regulation, pre-contractual liability (culpa in contrahendo) was included in Rome II and not in Rome I.

The tort legislation in the MSs is different, meaning that the substantive law on tort is different in each MS. However Rome II harmonises the PIL rules which helps the courts determine the applicable law.

So what is the test which Rome II applies in order to determine the applicable law?

To answer this question we must look at Recital 17 of the Regulation which provides that:

*(17) The **law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur**. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be **the country where the injury was sustained or the property was damaged respectively.***

Therefore, Rome II adopts the **lex damni** i.e. the **law of the place where damage cocurs regardless of country/ies where the conseuqences of the tort or delict are felt**.

When does Rome II apply?

Article 1 of the Rome II Regulation provides us with a similar provision to what we saw in the context of Brussels I Recast, as it states that:

Article 1

This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, 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).

So, the Rome II Regulation applies to claims which concern:

1. A **civil and commercial matter**; and
2. **Non-contractual obligations**

However, similar to Brussels I Recast it **does <u>not</u> apply to revenue, customs and administrative matters** i.e. the exercise of a public authority power or to matters concerning the liability of the state in the exercise of state authority.

So here there are two terms which must be clearly defined. First there is the concept of a 'civil and commercial matter' which has been given an autonomous interpretation in a number of CJEU judgements in the context of Brussels I, whereby the courts came to the conclusion that the Regulation doesn't apply to revenue, customs or administrative law matters where the state exercises a public law power (acts iure imperii). However, the Rome II Regulation further clarified how the Regulation also does not apply to the liability of State for acts and omissions in the exercise of state authority. This was already determined by the CJEU in the **Lechouritou case**, but now it is clarified even further as it is mentioned expressly in the regulation. So, if one is suing for damages caused by an act jure imperii, then the Rome II Regulation does not apply as it does not concern a civil and commercial matter.

Once it is determined that the action concerns a civil and commercial matter, the next step would be to determine whether it concerns a contractual or non-contractual obligation/claim. This is important because if the claim is contractual then the court must apply Rome I, but if the claim is non-contractual, then Rome II must be applied. So, one must make sure to apply the correct instrument. Recital 11 of Rome II provides that:

*(11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation n**on-contractual obligation should be understood as an autonomous concept**. The conflict-of- law rules set out in this Regulation should also cover non-contractual obligations arising out of strict liability.*

Here once again we must refer to the jurisdiction of the CJEU referred in the context of Brussels I Recast, specifically in the **Jakob Handte case**, the **Réunion Européenne case**, the **Kalfelis case** whereby the CJEU held that if the **obligation was not voluntarily assumed by one person towards another, then it is a non-contractual obligation.** So, once it is then determined that the claim/obligation in question is non-contractual, then Rome II is to apply. However, then we need to see whether the non-contractual obligation is tortious, delictual/quasi-delictual or quasi-contractual.

Also, relevant here is the discussion that we had previously on **'concurrent liability'**. For instance, there could be a **claim against a doctor both in tort and also in contract,** what happens with respect to the applicable law? Would this be a non-contractual obligation or a contractual obligation? We already dealt with a judgment which deals with concurrent liability in the context of Brussels I where the court held that if one comes to the conclusion that there was a contract between the parties and an obligation was voluntarily assumed, then the **claim is contractual and you should regard it as a contractual matter**. So, the same

discussion that we had when we were dealing with Brussels I, whether to apply **article 7(1) on contract** or to apply **article 7(2) on tort**, is also relevant here because in this case, you need to decide whether to apply the **Rome I Regulation with respect to contractual obligations** or the **Rome II Regulation with respect to non-contractual oblgiations**. So, if we come to the conclusion that the claim against the doctor was one were the doctor had concluded a contract with his patient and agreed to treat him but then he was negligent in the performance of the contract, then the **case is contractual, and therefore the rules under the Rome I Regulation** apply, even though under the law of a particular country, it may be possible to file an action against the doctor in tort. Therefore, for the purposes of PIL, in such a situation the claim would be considered to be contractual.

Moreover, **Article 1(3)** provides that :
3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

That is why it is important to characterize rules as to whether they are rules of substance or rules of procedure, because if you come to the conclusion that a particular rule is procedural, then the Regulation doesn't apply. In fact, Article 1(3) provides that the Regulation does not apply to matters of **evidence and procedure** whereby the **lex fori** i.e. the law of the forum (law of the court hearing the action), applies. This rule was also referred to **Harding vs. Wealands**.

Article 1(2) – Exclusions

Article 1(2) of Rome II provides a list of exclusions as it states that:

Article 1

2. The following shall be excluded from the scope of this Regulation:

- *(a) non-contractual **obligations arising out of family relationships** and relationships deemed by the law applicable to such relationships to have comparable effects including **maintenance obligations**;*
- *(b) non-contractual obligations arising out of **matrimonial property regimes**, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and **wills and succession**;*
- *(c) non-contractual obligations **arising under bills of exchange, cheques and promissory notes and other negotiable instruments** to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;*
- *(d) non-contractual obligations **arising out of the law of companies** and other bodies corporate or unincorporated **regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies** and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;*
- *(e) non-contractual obligations **arising out of the relations between the settlors, trustees and beneficiaries of a trust** created voluntarily;*
- *(f) non-contractual obligations **arising out of nuclear damage**;*

*(g) non-contractual obligations **arising out of violations of privacy and rights relating to personality, including defamation**.'*

Article 1(2)(g) is the most important paragraph in this provision as it provides that defamation is excluded from Rome II, however, it falls within the scope of Brussels I Recast under Article 7(2). In fact in the context of Brussels I we referred to judgements such as the **Shevill Case** and **Martinez Case** which concerned a case of cross border defamation whereby it was affirmed that Brussels I Recast applies in order to determine which court has jurisdiction. So while we have rules applicable to determine the jurisdiction, in so far as the applicable law is concerned we do not have any rules. The reason for this exclusion in the Rome II Regulation is that the Council could not agree on what the rule should be. Defamation is a very delicate subject which is regulated differently in each MS, some giving more freedom to the journalists, while others are more protective of the privacy of the individual. There was no agreement on defamation and in order to finalize Rome II, they decided to exclude defamation from the scope of Rome II. Consequently, there are no harmonised rules on applicable law relating to violation of privacy and rights on defamation

Article 30(2) notes that the Commission was supposed to submit a study on the law applicable to non-contractual obligations arising out of violations of privacy and related issued. However, till now we have no EU instrument re defamation claims.

This means that if there is a case on cross border defamation, while Brussels I Recast applies in order to determine whether Maltese courts have jurisdiction, with respect to the applicable law the MS's own traditional conflict of law rules are to apply. in the case of Malta, we have to apply the traditional rules of PIL under the common law because these were the rules which we applied prior to the Rome II Regulation and on that point there is the **Boys v. Chaplin** case which spells out the rules of the common law in relation to tort claims.

Article 2 – Non-Contractual Obligations

Article 2

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, negotiorum gestio or culpa in contrahendo.

The concept of a non-contractual obligation here is wider than tort as we deal with quasi-contracts and culpa in contrahendo.

Article 2(2) then provides that an action to prevent damage is also covered by Rome II as it states that: *This Regulation shall apply also to non-contractual obligations that are likely to arise.* This is also a reflection of the **VFK Case** mentioned in the context of Brussels I Recast whereby the court held that Article 5(3), now Article 7(2) of Regulation 1215/2012 applies also if the action is to prevent damage. The same concept applies here under Article 2(2). Furthermore, Article 2(3) then states that:

3. Any reference in this Regulation to:
*(a) an event giving rise to damage shall include events giving rise to damage that **are likely to occur**; and*

*(b) damage shall include damage that is **likely to occur**.*

Article 3 – Universal Application

Article 3 is very important and deals with universal application, it provides that:

Article 3

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

Therefore, the Rome II Regulation can lead to the **application of the law of a country which is not a MS of the EU**. So, when applying the rules of the Rome II Regulation we can come to the conclusion that the applicable law is ex. the law of Israel or USA and does not necessarily point to a law of a MS. But, the Rome II Regulation is only applied by the courts of a MS when a dispute arises. Ex. Israel is not going to apply the Rome II Regulation, Israel applies its own rules on PIL, same for US.

What triggers the application of Rome II is the application to a court of a MS. Thus, **we apply the Rome II Regulation in the EU, when the court of a MS is faced with a cross border dispute,** and the court will not care if the claimant is domiciled in a non-MSs or of the defendant is a third country national **such court will apply the Rome II Regulation. But the result of applying the Rome II Regulation can lead to the application of the law of a country which is not in the EU.**

For example, if the accident happened in Israel, we can see that there could be a situation where the applicable law will be the law of Israel.

Article 4 – the General Rule: Lex Loci Damni

Article 4 is the general rule which provides that the applicable law is the **lex loci damni** with some exceptions also found under article 4.

Prior to the Rome II Regulation, the MS had their own rules on the applicable law in the case of tort. One of the most common principle was the principle of the ***lex loci delicti commissi*** (the place where the tort was committed) and this was the basic solution for non-contractual obligations in virtually most of the MS. But, when we came to the **Rome II Regulation it** was decided that the **applicable law** should be the **LEX LOCI DAMNI (law of the place of the direct damage**).

So, it is the law of the country where the direct damage occurs irrespective of the country where the event giving rise to the damage took place. In fact, **Recital 17** states that: '***The law applicable should be determined on the basis of where the damage occurs**, **regardless of the country or countries in which the indirect consequences could occur**. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively*.'

Article 4

1. Unless otherwise provided for in this Regulation, ***the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occur****s irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*

So, in accordance with Article 4(1) of Rome II, the **applicable law is the lex loci damni** i.e. **the law of the country where the damage occurs** and NOT the law of the country in which the event giving rise to damage took place and **NOT** the law of the country in which the indirect consequences of that event were felt.
An important case referred to in the context of Brussels I Recast with respect to tort was the Bier Case, which is also very relevant here.

Bier Case (Case C-21/76)

- This case concerned an action instituted by a Dutch farmer in the Netherlands whose crops were destroyed after, according to the allegations, a French company had discharged waste (sewage) in the Rhine river in France due to the ensuing pollution allegedly caused damages to the Dutch's plaintiff's property.
- In so far as **JURISDICTION** is concerned, the **court said that it is either the place of the event which caused the damage or the place of the damage which have jurisdiction – and so BOTH courts would have jurisdiction**. So, with regards to the facts of Bier the court case could either be filed in France, because the dumping, the event giving rise to damage took place in France, or in the Netherlands, because the damage was suffered in the Netherlands. Therefore, insofar as jurisdiction was concerned, there is a choice.
- So, assuming proceedings are brought in France or in the Netherlands, the next question is, **which is the applicable law**? In accordance with Article 4 of the Rome II is the applicable law is the lex loci damni i.e. the law of the country where the damage occurred and not the law of the country in which the event giving rise to damage took place, nor is it the country in which the indirect consequences of that event occur. So, in view of the facts of the Bier case, the applicable law must be Dutch law only, since it is the lex loci damni i.e. the law of the place where the damage occurred.
- So, while both the courts of France or the Netherlands had jurisdiction in accordance with Brussels I Recast, **applicable law would always be Dutch law, because the lex loci damni -** law of the place of the damage is Dutch law as the damage took place in the Netherlands.

Article 4(1) also provides that **the country in which the indirect consequences of that event occurred should also be ignored**. For instance, a British tourist was hit by a bus in Malta, she goes back home and receives hospital treatment in England. In this case, the applicable law is Maltese law because the damage occured in Malta. The fact that she was later on hospitalized in England is considered as an indirect consequence of the eventwhich gave rise to the damage, and in accordance with the Rome II Regulation, the law of this place is to be ignored as the applicable law is the law of the place of the direct damage, i.e. the place where she was hit and harmed by a bus.

Therefore, as a general rule, Article 4(1) provides that the applicable law in the case of a tort claim is the lex loci damni, Article 4(2) then provides that:

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the ***law of that country shall apply****.*

Thus, Article 4(1) is subject to Article 4(2) which provides that if the victim and the tort feasor are habitually resident in the same country at the time when the damage occurs, the applicable law is the law of their country.
For example, two individuals are both habitually resident in Malta and they go on a trip to Sicily. One was driving in Sicily and lost control of the car while the other individual who was passenger got injured. In accordance with the general rule under the Rome II Regulation the applicable law would be Italian law since the damage took place in Sicily. However, in accordance with Article 4(2), by way of exception, since both the victim and the tort feasor were habitually resident in the same country (Malta), then the law of that country applies.

Both **Article 4(1)** and **Article 4(2)** are then subject to **Article 4(3)** which states that:

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

In this regard, **Recital 18** provides that:

(18) The general rule in this Regulation should be the lex loci damni provided for ***in Article 4(1). Article 4(2)*** *should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country.* ***Article 4(3)*** *should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.*

Therefore, from this paragraph in the preamble to the Regulation it can be held that:

- Article 4(1): General rule – applicable law is the lex loci damni
- Article 4(2): Exception to the general rule where both the victim and the tortfeasor have the same habitual residence – applicable law is the law of their habitual residence
- Article 4(3): Exception to previous two provisions – applicable law is the law of the country which the tort/delict is mostly connected to from the circumstances.

Thus, Article 4(1) or Article 4(2) will ordinarily be applied and it is only in extreme and exceptional situations that a court will find the possible application of Article 4(3).

Two judgements where the English Courts applied Article 4(3) were: **High Court of Judgement Queen's Bench division [2015] [EWHC 3421 (QB)] Gillian Marshall vs Motor insurance Bureau** and **Christopher Pickard vs Motor Insurance Bureau.**

- These were English claimants involved in an accident in France and if there is a problem with insurance cover, the legislation allows you to sue the guarantee fund. The MIB was an English entity so the claimant was arguing English law applies by virtue of 4(2), by way of exception to the general rule under 4(1) by virtue of which the applicable law was French law as accident took place in France.
- However, the court did not apply Article 4(2) and instead applied Article 4(3) holding the applicable law to be French law which was already the applicable law under 4(1). This was because all the circumstances of the case pointed towards France: accident happened in France, tort feasor was French and all connecting factors pointed towards France. The court used 4(3) in order not to apply 4(2) but to re-apply 4(1).
- Interesting is the observation of the court on article 4(3) in Paragraph 20 of the judgement: '*It is also common ground that article 4(3) imposes a "high hurdle" in the path of a party seeking to displace the law indicated by articles 4(1) or 4(2), and that it is necessary to show that the "centre of gravity" of the case is with the suggested applicable law. In this case there are a number of circumstances which, in the judgment of the court, make it clear that the tort/delict is manifestly more closely connected with France than England and Wales. These are: first that both Mr Marshall and Mr Pickard were hit by the French car driven by Ms Bivard, a national of France, on a French motorway. Any claims made by Mr Marshall and Mr Pickard against Ms Bivard, her insurers (or the FdG as she had no insurers) are governed by the laws of France; secondly the collision by Ms Bivard with Mr Marshall and Mr Pickard was, as a matter of fact and regardless of issues of fault or applicable law, the cause of the accident, the injuries suffered by Mr Marshall and Mr Pickard and the subsequent collisions; and thirdly any claims that Mr Marshall and Mr Pickard have against Generali, as insurers of the vehicle recovery truck, are also governed by the laws of France.'*

Iorin Lazar v. Allianz SpA case (Case 350/14):

- This case concerned a Romanian national living in Italy and was killed in a traffic accident in Italy. The victim's family was situated in Romania and Italian law granted non-material damages (moral damages) for pain and suffering.
- The question in this case was, where did the damage occur? She was killed in Italy, but the pain and suffering was suffered by the family members (who became the victims themselves upon the actual victim's death) who were residing in Romania. So which is the lex damni, Romanian law or Italian law?
- **The court held that in a case of a death claim, even though the members of the family might have suffered non-material damages themselves in Romania as the place where they passed through all the pain, suffering and anguish, what we are concerned with under Article 4 is the place of the direct damage and the court pointed out that this is to be the place where the victim was killed - Italy.**
- **Paragraph 17** of the judgment provides that '*under Italian law, the damage resulting from the death of a family member is treated as having been suffered directly by the family member and, in particular, is deemed to amount to an infringement of his personal rights. Accordingly, in the dispute in the main proceedings, the applicant relies on damage which, on the basis of that national law, must be regarded as personal to him and as representing the material consequence of the death of his family member. In other European legal systems, however, that type of damage is not recognised in the same way.'*

- In **Paragraph 24** the court pointed out that '*in the event of physical injuries caused to a person or the damage caused to goods, the EU legislature stated, in recital 17 in the preamble to the Rome II Regulation, decided that the country of the place where the direct damage occurs is the country of the place where the injuries were suffered or the goods were damaged.'* So, it is clear that personal injury is the place where the injuries where suffered or the place where the goods were damaged.
- Furthermore, **Paragraph 25** states that *'it follows that,* ***where it is possible to identify the occurrence of direct damage, which is usually the case with a road traffic accident, the place where the direct damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of that accident****. In the present case, the damage is constituted by the injuries which led to the death of Mr. Lazar's daughter, which, according to the referring court, occurred in Italy.* ***The damage sustained by the close relatives of the deceased, must be regarded as indirect consequences of the accident at issue in the main proceedings, within the meaning of Article 4(1) of the Rome II Regulation.***
- **Paragraph 26** then states *'that interpretation is confirmed by Article 15(f) of that regulation which confers on the applicable law the task of determining which are the persons entitled to claim damages, and which covers the situation, at issue in the main proceedings, of damage sustained by close relatives of the victim.'*
- The **conclusion of this case** is that the ECJ is maintaining that in the case of a 'death claim', even though the victims (grieving family members) are in other countries, the **place of the damage is the place where the victim was killed** (place of the road traffic accident). So, it is not the place where some family member may have endured pain and suffering or other damages as a result of the accident. That means, that the **applicable law would be the place of the accident, in this case it was Italian law**, and it is Italian law which will regulate who is entitled to claim.

Determining this question was important for insurance purposes, as if applicable law were Romanian, the damages owed would differ from those owed under Italian law, as the damages in Italy are much higher than non-patrimonial damage awarded in Romania.

Article 15 – Scope of the Law Applicable

Article 4 is the most important provision on tort. Also, very important is article 15 on the scope of the applicable law as it provides us with a list of what the Applicable law will determine.

In fact, in accordance with provision, the applicable law does not only regulate **liability** but it also regulates the **heads of damage**, the **quantification of the heads of damage**, and also **who is entitled to make a claim**. This is important because under Rome II, the quantification of damages is regulated by the applicable law (cross reference to previous UK system mentioned earlier and Harding vs Wealands) contrary to the situation before where there was no harmonization on the rules governing the applicable law.

For example, there was an accident in Spain and the victim died, and so we are faced with a death claim. Who can bring a claim? Under Maltese law, **Article 1046** states that the heirs can claim under lucrum cessans in Malta (future losses in terms of financial aid), however, this is

obviously not the same in all countries/systems as each MS has its own law of obligations. Under other systems, the dependents may have a claim, close relatives, or others, and not necessarily for lucrum cessans. Thus, the applicable law also regulates this issue and it will determine who has a claim. So, if we conclude that Maltese law is the applicable law by virtue of art 4(1) or (2), Maltese law, particularly article 1046 will then provide us with who can bring/make a claim. This point of who can claim is therefore regulated by the applicable law.

In fact, **Article 15** provides that:

Article 15

*The **law applicable to non-contractual obligations** under this Regulation **shall govern in particular**:*

*(a) the **basis and extent of liability**, including the **determination of persons who may be held liable** for acts performed by them;*

*(b) the **grounds for exemption from liability**, any **limitation of liability** and any **division of liability**;*

(c) *the **existence**, the **nature** and the **assessment of damage** or the **remedy** claimed;* - Therefore, the remedies which court can grant are also subject to the applicable law

*(d) within the limits of powers conferred on the court by its procedural law, the **measures which a court may take to prevent or terminate injury or damage** or to ensure the provision of compensation;*

*(e) the **question whether a right to claim damages or a remedy may be transferred**, including by inheritance;*

*(f) **persons entitled to compensation for damage** sustained personally;* - who can claim?

*(g) **liability for the acts of another person**;*

Under the law of obligations we saw whether the parents can be held liable for the acts of a minor or whether the tutor/curator can be held liable for the acts of an interdicted person. We also so a situation where the employer can be liable for the acts of the employee. These types of questions of **whether a person can be held liable for the acts of another person are also regulated by the applicable law.**

(h) the **manner in which an obligation may be extinguished** and **rules of prescription and limitation**, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation

This last provision concerns the time-limit within which you can bring an action. Therefore, this too is regulated by the applicable law. If the applicable law is Maltese law, the prescriptive period is 2 years under Article 2153 of the Civil Code, unless it is a criminal offence, then the prescription of a criminal offence applies as per Article 2154. If the applicable law is French law, the prescription is determined by French law, etc.

<u>So, what happens in practice?</u>

1. First you have to determine the applicable law in accordance with Article 4.
2. Article 4(1) is the general rule (lex loci damni). Article 4(2) is an exception to article 4(1) where both the claimant and the defendant are habitually resident in the same

country. Both article 4(1) and articles 4(2) are subject to article 4(3) which tells us that the court may apply the law of another country if the case is manifestly more closely connected to that other country.

3. Once you know the applicable law, then you will know who is entitled to claim compensation in case of a claim in tort, in accordance with Article 15(f) of the Regulation.

Overriding Mandatory Provisions, Public Policy, Exclusion of Renvoi

Article 16 – Overriding Mandatory Provisions under the Law of the Forum

Article 16 deals with overriding mandatory provisions. This is another important concept found under Rome II and also under Rome I, but it is more important under Rome I as there are more overriding mandatory provisions in Rome I.

Under Rome II **Article 16** provides that: ***Nothing in this Regulation shall restrict the application of the provisions of the law of the forum*** *in a situation where they are* ***mandatory*** *irrespective of the law otherwise applicable to the non-contractual obligation.*

So, if there is a mandatory rule of the forum, i.e. the law of the court, which is mandatorily applicable irrespective of the applicable law, that rule will be superimposed on the applicable law.

Article 17 – Rules of Safety and Conduct

Article 17 of Rome II provides that: *In assessing the conduct of the person who claims to be liable, account should be taken as a matter of fact and in so far as is appropriate to the* ***rules of safety and conduct which were in force at the place and time of the event giving rise to liability****.*

For example, if you are assessing liability for an accident in Italy, and the applicable law is determined to be Maltese law because both tort feasor and victim are maltese (Article 4(2)), in assessing whether the driver was negligent we must necessarily take into consideration the rules of safety and conduct in relation to driving under Italian Law, by virtue of Article 17 of Rome II.

Article 24 – Exclusion of Renvoi

Article 24 deals with the exclusion of Renvoi as it provides that: *The application of the law of any country specified by this Regulation means* ***the application of the rules of law in force in that country other than its rules of private international law****.*

Renvoi finds NO application under both Rome I and Rome II. So, if the Regulation says that the applicable law is Italian law, we apply Italian law, and we don't carry out the other exercise of seeing what an Italian judge would have done if the case was brought in Italy. So, we apply Italian law, but not its rules of PIL.

Article 26 – Public Policy of the Forum:

Public policy is also important in the context of the applicable law. Public policy refers to rules which are essential and fundamental to a State's legal order and society. In this respect, **Article 26** of Rome II applies, which provides that:

*The **application of a provision of the law of any country specified by this Regulation may be refused** only if such application is **manifestly incompatible with the public policy (ordre public) of the forum**.*

So, if we come to the conclusion that Maltese courts have jurisdiction and the applicable law is Italian law, Italian law applies. However, if some particular provision of Italian law violates/offends Maltese public policy, then that particular rule of Italian Law is knocked out and the Maltese public policy rule applied. So, the court would still apply Italian law, but that particular rule which is in breach of Maltese public policy would not be applied.

Another example is for instance if the courts come to the conclusion that the applicable law is the law of Texas because the accident took place in Texas, but the law of the USA awards punitive damages, that particular rule which awards punitive damages under US Law would be considered to be in breach of Maltese public policy and therefore that specific rule will not be applied. So, the court will apply the law of Texas on liability and grant compensatory damages as awarded by that law, but on the notion of punitive damages which are in breach of Maltese public policy, the court will not apply the particular rule by virtue of the public policy exception.

In an article titled 'Overriding mandatory provisions as a vehicle for weaker party protection – European PIL' it is explained and the function of the public policy exception is to negate foreign law, which is manifestly incompatible with fundamental principles of the forum. Overriding mandatory rules are superimposed on the law applicable to the contract to protect an interest that is regarded as fundamental by the forum state.

So, in these instances, although the applicable law would still apply, but if there is a specific rule under the applicable law which goes against the State's public policy rules, then the applicable law would not apply in that regard. Similarly, in the case of an overriding mandatory provision of the law of the court which has jurisdiction (law of the forum) then that law is to apply irrespective of the otherwise applicable law.

Articles 5-12 – Specific Torts

As already mentioned, the Regulation does not only deal with tort, but Rome II generally deals with non-contractual obligations and therefore it is broader in scope. Articles 5-12 of the Regulation provide us with a number of specific torts. So while Article 4 is the general rule and applies to torts in general, then there are particular torts to which special rules apply.

In fact, **Recital 19** states that: ***Specific rules should be laid down for special torts or delicts** where the general rule doesn't allow a reasonable balance to be struck between the interests at stake.*

Article 5 – Product Liability

If your claim is one for product liability, then the applicable provision under Rome II is **Article 5** and not Article 4. **Article 5** in fact provides that:

1. Without prejudice to Article 4(2), ***the law applicable to a non-contractual obligation arising out of damage caused by a product*** *shall be:*
(a) the ***law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country****; or, failing that,*
(b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
(c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, ***the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident*** *if* ***he or she could <u>not</u> reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c)****.*

So for example, a claim of product liability could refer to a situation where damage is caused by a defect in the product, e.g. you are using a toaster normally, it explodes and it burns your face. In such case the applicable law would be determined by applying Article 5, which consists of a cascade system of various rules which need to be applied cumulatively one after the other. Thus, according to Article 5:

1. First one must check if the product was marketed in the law of the country in which the person who suffered the damage was habitually resident when the damage occurred. The law of the place of the HR would then apply.
2. If the first rule fails, then one must check if the product was marketed in the country in which the product was purchased/acquired, then the law of that country is to apply.
3. If the second rule fails, then one must check if the product was marketed in the country where the damage occurred, then the law of that country would apply.

All this subject to the provision under Article 5(2) which provides that:
2. Where it is ***clear from all the circumstances of the case that the tort/delict is <u>manifestly more closely connected with a country other than that indicated in paragraph 1</u>, the law of that other country shall apply****. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.*

One must also keep in mind that this article shall always be applied without prejudice to article 4(2) which means that if the plaintiff and the defendant are habitually resident in the same country, we apply the law of that country by virtue of article 4(2).

Noteworthy is that there is also an EU minimum harmonization directive (Directive 85/374) on product liability. So, the law of the MSs is only harmonized to a certain extent, and so, it is

not the same everywhere, as there are are still differences, particularly as the directive on this matter is merely a minimum harmonization directive.

Ultimately, it is important to know what product liability is because if the claim in question is a claim for product liability, then Article 5 applies, and not Article 4.

The rationale of Article 5 is found under Recital 20 which provides that:
(20) The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undis- torted competition and facilitating trade. Creation of a cas- cade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a mani- festly closer connection to another country.

Article 6 – Unfair Competition and Acts Restricting Free Competition

Another specific rule is provided in **Article 6** of Rome II which deals with unfair competition and acts restricting free competition. Here we find 2 concepts:

1. a rule which prohibits an abuse of a dominant position; and
2. a rule which prohibits collusion between market players for certain practices.

It is important to note that from a competition law point of view we have both public enforcement and private enforcement. In the case of public enforcement, if there is a breach of the rules of competition and there is the enforcement of the public authority which can impose fines, however there is also the possibility of private enforcement by virtue of which a person can sue for damages suffered as a result of a breach of competition law. Here we can refer to the judgement of **Courage ltd vs. Crehan (Case C-453/99)** whereby the court held that if there is a breach of competition law, it is possible to sue for damages. By these rule the EU law was to enhance the private enforcement of competition, which is very important for the IM.

So, we find these special rules here as the European legislator also wants to facilitate the private enforcement of competition law and these rules under Article 6 also take this aim of the EU into account. So, for instance, there is a breach of competition law and one of the parties sues the other for damages, and so there is an abuse of a dominant position and as a result of that abuse one of the parties suffers damages and he sues the other. There has been a concerted practice, as a result of which damage has been suffered and there is an action for damages.

Besides acts in breach of competition law, Article 6 also deals with acts of unfair competition. Traders have certain obligations and they should not engage in acts of unfair competition as if they do commit such acts, including those in the commercial code (and there is an action for damages), again we have rules here under Article 6.

Article 7 – Environmental Damage

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or prop- erty as a result of such damage shall be the law determined pur- suant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the coun- try in which the event giving rise to the damage occurred.

Article 8 – Infringement of Intellectual Property Rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.
2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.
3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Article 9 – Industrial Action

Without prejudice to Article 4(2), the law applicable to a non- contractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

N.B.: we do NOT need to know how these rules work, we just need to know that they exist as rules on specific torts, whereby the general rule under Article 4 is not applied, and such provisions are applied instead. They are NOT important for exam as they are not very common in Practice.

Quasi Contracts – Unjust Enrichment, Negotiorum Gestio & Culpa in Contrahendo

The Rome II Regulation is wide in scope and it not only covers torts and quasi torts but is also covers quasi contracts. If one looks at chapter 3 of the Regulation, we have a title dealing with Unjust Enrichment, Negotiorum Gestio and Culpa In Contrahendo (pre-contractual liability). We also have rules on these with respect to the applicable law.

For exam purposes, Article 10 (unjust enrichment) and Article 11 (negotiorum gestio) are not important but they state the following:

Article 10 – Unjust Enrichment

1. If a non-contractual obligation arising out of unjust enrich- ment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one

arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that gov- erns that relationship.
2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrich- ment occurs, the law of that country shall apply.
3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.
4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 11 – Negotiorum Gestio

1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.
2. Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the dam- age occurs, the law of that country shall apply.
3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.
4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

Article 12 – Culpa in Contrahendo (pre-contractual liability)

Article 12 deals with culpa in contrahendo. We dealt with culpa in contrahendo when we looked at jurisdiction. One may recall that we referred to the **Tacconi Case**:

- Here the court had to decide whether an action for failure to negotiate a contract in good faith is a matter relating to a contract within the scope of article 5(1) of Regulation 44/2001, today article 7(1) of Regulation 1215/2012 or whether it is a matter relating to tort delict or quasi delict covered by article 7(2) previously article 5(3).
- Here the CJEU had concluded that culpa in contrahendo i.e. failure to negotiate a contract in good faith in so far as jurisdiction is concerned is to be regarded as a matter related to tort delict or quasi delict and thus Article 7(2) of Brussels I Recast applies.

However when we come to the applicable law we have a specific rule under Article 12. So, when faced with a claim on culpa in contrahendo we do not apply Article 4, but we apply Article 12. So for jurisdiction, we apply the **Tacconi Case** by virtue of which Article 7(2) Brussels I Recast applies, but then on the applicable law we must look at Article 12 (NOT article 4) and Recital 30 which provides that:

(*30*) ***Culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law****. It should include the* ***violation of the duty of disclosure and the breakdown of contractual negotiations****. Article 12 covers only* ***non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract****. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.*

These concepts are autonomous, both under Brussels I Recast and under Rome II, and so the concept of culpa in contrahendo must be looked at autonomously. So, in accordance with this autonomous definition under the preamble, culpa in contrahendo includes breaking negotiations in bad faith, and also violations of the duty of disclosure. So, we might be negotiating and we agree keep everything subject to a duty of disclosure i.e. that we would not reveal information exchanged, and one of the parties breaches that obligation.

Thus, if we have a case study dealing with pre contractual liability (i.e. someone who is negotiating a contract, but then he terminated negotiations in bad faith and then there is a claim for damages against him) in so far as jurisdiction is concerned, we apply Tacconi, so we apply article 7(2), meaning the courts having jurisdiction are either the courts of the defendants domicile, in terms of the general rule under article 4, or else the courts of the place where the harmful event occurred in terms of article 7(2) – this is in so far as jurisdiction is concerned. But, in so far as the applicable law is concerned, we have to apply article 12

Article 12 provides that: *1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.'*

So here, Rome II is really referring us to Rome I because it is stipulating that the applicable law will be the law which would have applied had the contract been concluded. So, we need to ask, had the contract been concluded, what would the applicable law be? Since Rome I deals with contractual obligations, then in that regard we must refer to Rome I.

However, **Article 12(2)** states that:

Article 12 – *2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:*
(a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or (similar to article 4(1))
(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or (similar to article 4(2))
(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country. (similar to article 4(3))

So, culpa in contrahendo, the first rule is to ask: had the contract been concluded, which is the applicable law? So, you must presume that the contract was concluded and refer to Rome I. Then if it is impossible to ask that because maybe it was still quite far from the conclusion of the contract and so one cannot determine this, then Article 12(2) would apply which has rules similar to Article 4 Rome II.

Article 14 – Freedom of Choice

The last provision that we need to mention is Article 14 dealing with freedom of choice. In the case of tortuous obligations, it is not very common, and it is very unlikely that we would have agreed on the applicable law. But there could be situations where the parties agree from before e.g. a big construction project is going on and there could be various contractors working on it, and the various contractors can regulate before and decide that if something happens (accident), the law of State A should act at the applicable law. This is an exceptional situation.

Article 14

1. The parties may agree to submit non-contractual obligations to the law of their choice:
(a) ***by an agreement entered into after the event giving rise to the damage occurred****; or*
(b) where ***all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage*** *occurred.*

Thus, the choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when ***the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen****, the* ***choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement****.*

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement. (not very important for exam).

Article 23 - Habitual Residence

In the context of the Rome II regulation we use **the connecting factor of habitual residence**. Under Brussels I Recast we speak about domicile, but in Rome I and II the personal connecting factor applicable is habitual residence.

Article 23

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch,

agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

We also have a rule on branches, agencies and establishments. Article 23(2) goes on to say that:
2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

If it is a natural person not acting in the course of business, trade or profession, we do not have a definition of its habitual residence i.e. national law shall apply.

Summary of Rome II Regulation – Most Imp Points

- We saw what was the situation prior to the Rome II Regulation. We saw what the Rome II Regulation did.
- For Rome II to apply we say that the matter must be civil and commercial and it must concern a non-contractual claim/obligation. Defamation is out of Rome II.
- We saw how Rome II regulates the applicable law in the case of tort claims i.e. how the applicable law is to be determined (article 4 – 3 limbs of article 4). It is very important that article 15 is read in conjunction with article 4 as it provides which aspects the applicable law is to cover. So, once you determine the applicable law (**Article 4**), you need to know what the applicable law will regulate (**Article 15**).
- We also looked at the horizontal rules (public policy knocks out a rule of foreign law which is in breach of Maltese public policy).
- We also saw the difference between procedural and substantive law whereby the lex causae regulates substantive issues, and procedural issues are always regulated by the lex fori. (Refer to Harding v. Wealands)
- Then we saw that we have specific torts which have specific rules. For our purposes, it is important to know **product liability** and the specific rule on **culpa in contrahendo**.
- We also said that there are rules on the quasi contracts (not relevant for exam purposes). Remember the **Lazar case** which is important for the Rome II Regulation.

Applicable Law under Rome I – Contractual Obligations

The Rome I Regulation (Regulation 593/2008) deals with contractual obligation. Prior to Rome I there was the **Rome Convention of 1980**. In fact, the **Article 24** of the Regulation provides that: *This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299.*

To this end, Rome I replaces the Convention which is used as a basis of the regulation. However, Rome I was not just a simple re-enactment of the Convention in the form of a regulation. In fact, the regulation also made a number of amendments to the provisions of the convention, introducing certain changes, in particular the most important changes were made to the prevision of Article 4 which deals with the applicable law in the absence of choice made by the party (i.e. if the parties do not include a choice of law agreement in the contract in question).

The Position in Malta:

When Rome I was enacted in 2008, Malta was already a MS of the EU. However, prior to Rome I although we had our law on contract, we had no rules of a Maltese law nature on the applicable law relative to the law of contract. So, the Maltese courts used to apply British common law whereby the rules were quite similar to what we find under Rome I – individual had the option to enter into a choice of law agreement and thus agree on which applicable law regulated the contract between them, and also provided rules in the case that the parties did not agree on the choice of law applicable. The same happens today under the Rome I Regulation.

When Malta was undergoing preparations for its accession to the EU, the Maltese parliament enacted **Chapter 498 of the Laws of Malta** in order to ratify the Rome Convention and incorporate it into Maltese law. However, this Act was never brought in force as at the time, the EU Commission had already made a proposal to start drafting Rome I (in 2005) and so there was little sense for Chapter 498 to be enforced since the regulation, Rome I, was about to be enacted. Therefore, then once the Rome I Regulation was enacted, since it was directly applicable by its nature as a Regulation, we immediately started applying it with respect to the applicable law in the context of contractual obligations.

The Regulation applies to all the MSs with the exception of Denmark as it is not part of that pillar of the Treaty dealing with Justice and Home Affairs. Moreover, Ireland and the UK had an opt-out, but they decided to opt-in. In fact, the UK also applied the Regulation in the case of intra-UK conflicts (i.e. on issues between Scotland, Ireland, etc.).

As regard to the temporal scope, in accordance with **Article 28**, the Rome I Regulation entered into force on the 17th December 2009, and so it applies to to contracts concluded after the 17th December 2009 in the sense of **Article 29**:

Article 28

This Regulation shall apply to contracts concluded after 17 December 2009.

Article 29

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union. It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.

Nikiforidis case (Case 135/2015):

- In this case, the question arose as to what would happen if a contract was concluded prior to 17th December 2009, but it was subsequently amended – would the Regulation apply?
- The CJEU held that the simple fact that you amend an old agreement does not put the agreement within the scope of Rome I as if it had been concluded before the 17th December 2009. However, if you conclude a new agreement which replaces the old one, i.e. there is a novation by signing a new agreement replacing the old one, then the Rome I Regulation will apply.
- So, minor amendments to an existing contract will not put the contract within the scope of Rome I. thus, if the matter is out of the scope of Rome I, then the national law of the forum would apply.

How does the Regulation work?

The Rome I regulation makes a distinction between the situation where parties have chosen the applicable law and the situation where parties have NOT chosen the applicable law. As a general rule, according to **Article 3** of Rome I, the parties are free to choose the applicable law. This is done through a **CHOICE OF LAW CLAUSE**. These are similar to the already analyzed jurisdiction clauses/choice of court agreements, but with the difference that here we are dealing with a choice of law clause and therefore the choice of the parties concerns the applicable law.

So, a contract can contain a jurisdiction clause on the choice of court, and no choice of law clause, it can contain both clauses, or it can also contain neither clause. In commercial contracts however it is very common for the parties to choose the applicable law through a clause in the contract itself, unlike in the case of tort as we saw under Rome II. This is because, in commercial contracts parties want certainty as much as possible, in fact, the parties generally employ lawyers to negotiate the contract, and very often the parties choose BOTH the court which has jurisdiction and the applicable law via the respective clauses.

For example, a contract would read as follows: “In the event of a dispute, the courts of Milan shall have exclusive jurisdiction and the applicable law shall be the law of Italy.” You can also have different choices for jursidiciton and applicable law, for example: In the event of a dispute, the courts of London shall have exclusive jurisdiction and the applicable law shall be the law of Malta.” So, the choice of law and choice of court agreements do not necessarily go hand in hand, hence, they need not correspond.

To this end, the most important principle in the contract of contractual obligations is the freedom of will, i.e. the freedom of choice of the parties, by virtue of which in contracts the parties may enter into an agreement on the choice of law applicable as they desire. However a broad distinction must be made between:

- ⇒ **Article 3** on the one hand where a freedom of choice occurs since the parties can choose the applicable law, subject to exceptions stipulated in the provision itself; and
- ⇒ **Article 4** on the other hand which provides us with what the appliable law would be in the absence of choice.

Note that similar to the rules under the Brussels I Recast Regulation, we find some provisions that aim to safeguard the protection of the weaker parties to a contract (consumers, insured persons and employees). So, although there can be a choice of law agreement in a consumer contract, there are certain safeguards for the consumer in this regard. We shall see all of this in the following analysis:

Article 1 – Material Scope

Article 1 of Rome I provides is with the scope of the Regulation as it states that: *"This Regulation shall apply, in **situations involving a conflict of laws**, to **contractual obligations in civil and commercial matters.** It shall not apply, in particular, to revenue, customs or administrative matters."*

So, for Rome I to apply, the claim must:

1. Concern a **civil and commercial matter** – here we must refer back to the judgements which dealt with the autonomous meaning of '*civil and commercial matters*' in the context of Brussels I Recast; and
2. Relate to a **contractual obligation** – here we must also refer back to the CJEU judgements on the autonomous interpretation of '*contractual obligations*' in the context of Article 7(1) of Brussels I Recast

In this regard we must also note that, as we have already seen, when there a claim in tort but there also exists a contractual relationship between the parties (concurrent liability), then that would be considered to be a contractual obligation and so Article 7(1) Brussels I Recast applies to determine which court has jurisdiction, and Rome I is to apply in order to determine the Applicable Law, even though national law may also contemplate an action in tort. So, in cases of concurrent liability, the contractual relationship prevails and thus Rome I is to apply and not Rome II, and the simple fact that national law may allow you to sue in tort does not mean that it is tortuous for the purposes of determining the applicable law.

Article 1 also provides that the Rome I Regulation should NOT apply to revenue, customs or administrative matters. Once again, we have already seen this in the context of Brussels I Recast. Similarly, the Rome I Regulation does not apply in general where a public authority is exercising a public law power.

Moreover, even within the scope of contractual obligations, we have certain exclusions under article 1(2) which we have seen before such as questions relating to obligations arising out of family relationships, matrimonial property regimes, bills of exchange, promissory notes,

questions relating to the law of companies, etc. which are all excluded from the scope and application of Rome I. in fact, Article 1(2) states that

2. *The following shall be excluded from the scope of this Regulation:*
   (a) *questions involving the status or legal capacity of natural persons, without prejudice to Article 13;*
   (b) *obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;*
   (c) *obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;*
   (d) *obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;*
   (e) *arbitration agreements and agreements on the choice of court;*
   (f) *questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;*
   (g) *the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;*
   (h) *the constitution of trusts and the relationship between settlors, trustees and beneficiaries;*
   (i) *obligations arising out of dealings prior to the conclusion of a contract – This is because Rome II applies. As mentioned above, Article 12 of Rome II deals with culpa in contrahendo i.e. pre-contractual liability and thus, issues which arise in the negotiation stage prior to the conclusion of a contract are dealt with under Rome II.)*
   (j) *insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (14) the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.*

Look at the preamble – para 7:

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (5) (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (6).

(10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation. - thus it if it is a claim dealing with culpa in contrahendo Rome II art .12 is to apply and not Rome I (PCL)

Article 1(3) is also a very important provision here, and similar to what was held in respect to Rome II, as it provides that:

*3. This **Regulation shall not apply to evidence and procedure**, without prejudice to Article 18.*

This is because we must distinguish between rules of substance and rules of procedure. This is because if we come tp the conclusion that the issue is one of substance, then the lex causa applies i.e. the applicable law, but if the issue concerns procedure, then the lex forii applies i.e. the law of the forum – the law of the court which has jurisdiction. For example, as we mentioned in the context of the Rome II Regulation we also saw that an issue of quantitative damages falls within the scope of the applicable law since it is a question of substance and NOT procedure. So, the fact that quantitative damages are substantive runs contrary to what the House of Lords had decided in **Harding v. Weadlands** (Rome II).

4. In this Regulation, the term 'Member State' shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

Article 2 – Universal application

Article 2

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

This is similar to what we mentioned under Rome II. Due to the Regulation's universal application, it is possible to choose the law of a non-MS as the applicable law, which is why it is universally applicable. However, this does not mean that a court in Israel will apply Rome I as it is not MS. So, universal application means that a court in a MS may choose to apply the law of a third State if the rules of Rome I come to the conclusion or the parties agree that the applicable law is the law of a third state is to apply.

Article 3 – Freedom of choice

One of the most important provisions of Rome I is Article 3, which concerns the freedom of choice. It states that:

Article 3

1. *A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.*

Thus, the parties to a contract are free to select the law applicable to the whole or only to part of the contract. For instance, if the parties agree that the applicable law is to be Italian law, then the law regulating a claim relating to the contract in question would be Italian law.

A choice can be either express, or inferred:

- An express choice is when there is a choice of law clause in the contract, through which the parties specifically state that the law regulating the contract is the particular law stated;
- An inferred choice is where, by looking at the terms of the contract or the circumstances of the case, even though it is not expressly stated in the contract, the court can determine that the parties intended the law of a particular country to apply. However, this takes place in particular situations.

In this regard we must refer **Recitals 11 and 12 of the Regulation** which state that:

(*11) The **parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations**.*
*(12) An **agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes** under the contract should be **one of the factors to be taken into account** in determining whether a choice of law has been clearly demonstrated.*

Thus, Recital 12 gives us an indication of one of the circumstances where the choice of law of the parties can be inferred. So, the court can infer the choice of law from a choice of jurisdiction clause in the event that the choice of law clause is absent from the contract. however, there are other scenarios where the court can infer the choice of law.

In fact, here we must refer to the **Giuliano and La Garde Report** in which we find a number of such circumstances which give rise to an inferred choice of law. Giuliano and La Garde were two scholars on international law who wrote the memorandum accompanying the Rome Convention (similar to the Schlosser Report in connection with the Brussels Convention). The concept under Article 3 that a choice of law can be either express or inferred was also found under the Rome Convention and so, Giuliano and La Garde give us some examples of where the parties' choice of law can be demonstrated with reasonable certainty. One of these examples is where there are references to provisions of the law of a particular country, thus, for example, references to specific articles of the French Civil Court may leave the court with no doubt that the parties have deliberately chosen French law although this wasn't expressly stated in the contract.

Another example which they give is where the contract is in a standard form which is known in the trade as being governed by a particular system of law. So, for example, if the parties have used an English standard form contract which everybody knows is the form used in England or some particular area of commerce, that could be a reason which will allow the court to infer that the parties wanted the English law to apply.

Another important circumstance which can lead the Court to the conclusion that the parties intended to choose a law is, a choice of forum. It is so when the parties make an agreement

on jurisdiction via a jurisdiction clause or an exclusive jurisdiction clause in favour of the courts of a particular country which may be an important factor which the court takes into account in seeing whether the parties intended the law of that particular country to apply. This is the same with an arbitration clause, so for example if the parties chose arbitration in London, there may be a reasoning that if the parties intended the trial to take place in London, then they may have also intended the English law to apply to their dispute.

As mentioned under **Recital 12,** the **Giuliano and La Garde Report** also states that any instance which arises from a jurisdiction clause however must always be subject to the terms of the contract and all the circumstances of the case. So, although the choice of court/jurisdiction agreement is a weighty indication of the inferred choice of law, it is not a hard rule in the sense that the court has to see it with respect to the whole context. However, in general, if there is a choice of court, that choice may bring the court to the conclusion that the parties also wanted the law of the chosen court to apply even though they did not expressly say so in the contract.

Egon Oldendorff vs. Liberia Corporation Queen's Bench Division(Commercial Court) 1995:

- In this case, plaintiffs were German and defendants were Japanese, who agreed to go to arbitration in London through an Arbitration clause. However, the contract contained no choice of law agreement. Thus, the question which arose was: what is the applicable law?
- Here the court affirmed that the place of arbitration was a weighty indication that the parties intended the law of the forum to govern the contract.
- In fact, Lord Clarke held that the selection of a place of arbitration was a strong indication that the parties intended the law of that place to govern the contract. Thus, the court came to the conclusion that yes, there was an inferred choice and English law was the applicable law.
- The court said that although the plaintiffs were German and the defendants were Japanese, they chose a neutral forum. Therefore the court held that they also intended a neutral law to apply and thus English law was the applicable law. This would therefore be a choice of law, though not expressed, but an inferred choice.

On the use of a standard form another judgement of the English courts was that of **Amir Rasheed Shipping vs Kuwait insurance (House of Laws 1983)**:

- In this case the court held that the parties had used a standard Lloyd's form which is well known under English law regulating Insurance (Lloyd's is an insurance undertaking in England which is very well known).
- Therefore, the court held that it could infer with reasonable certainty that the parties wanted English law to apply.

Article 3(2) then provides that:

2. *The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation.* ***Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity*** *under Article 11 or adversely affect the rights of third parties.*

So, nothing stops the parties from deciding on changing the applicable law originally indicated in the contract, or, if the parties did not choose a law upon entering into the conract and the law was chosen by the Regulation in the sense of Article 4, they may later decide to choose the applicable law themselves by amending the contract, upon coming to an agreement on the applicable law. Then, if the parties change the applicable law it does not mean that what was previously valid under the old law suddenly becomes invalid, so that it is being safeguarded by article 3(2).

However, although the parties are free to choose, their choice is subject to article 3(3) and article 4(3) where article 3(3) holds that:

3. *Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the **choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement**.*

Here we have the first situation where we start seeing that there could be the application of some other law over and above the law which the parties have chosen. This refers to **MANDATORY LAWS which cannot be contracted out of by the parties through a choice of la agreement.** So, in the case that all the relevant connecting factors are located in a particular country but the parties still choose the law of another country as the applicable law in the case of a dispute, that choice does not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement – i.e. it does not prejudice the application of the mandatory laws of that country.

Thus, for example there are two companies that want to come to an agreement which is somehow restrictive of competition law. Competition law in Malta is mandatory and it cannot be opted out. Thus, in such a case, the two companies cannot decide that the agreement is to be subject to the law of Singapore on the basis that in Singapore they do not have competition law. So, given that all the factors are connected to a particular law here we still cannot opt out from the mandatory provisions.

In this regard, there are a number of mandatory provisions, which will be dealt with further on, some of which being designed to preserve the economic or fabric of society. So, for instance they may have an economic importance for the state or a public importance for the state such as in the case of competition law which is there for public order. We also have rules which are mandatory provisions designed to protect weaker parties against unfair terms. So, there are different types of rules of a mandatory nature which are those rules that the parties cannot derogate from by agreement.

Article 3(4) similarly states that:

4. *Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, **the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law**, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.*

Similar to how Article 3(3) is designed to protect mandatory rules of national law, Article 3(4) is designed to protect the mandatory rules at an EU level, such as Competition law and many other rules.

Then, **Article 3(5)** provides that:

5. *The **existence and validity of the consent of the parties** as to the choice of the applicable law shall be **determined in accordance with the provisions of Articles 10, 11 and 13**.*

As you will recall, when dealing with Brussels I, we said what happens if one of the parties states that he did not consent to the jurisdiction clause? If one of the parties states that his consent to the jurisdiction clause is vitiated how do we regulate that dispute? And we said that there is a new provision in the Brussels I Regulation which caters for that in the Recast and we also have a rule here in the Rome I Regulation, where one of the parties states that he never consented to for example Maltese law being the applicable law. How do you resolve a dispute like that? Article 3(5) refers us to articles 10, 11 and 13.

Article 10 in fact deals with consent and material validity, and it provides that:
1. *The **existence and validity of a contract**, or of any term of a contract, shall be **determined by the law which would govern it under this Regulation if the contract or term were valid**.*

So here we find a rebuttable presumption that the contract is valid, on which basis the existence and validity of the contract is to be determined by the law chosen by the parties to govern the contract. However, this can be problematic because if one of the parties is claiming that his consent was vitiated or that he never gave his consent for the chosen law to apply, then how do you resolve the dispute on valid consent by making reference to applicable law chosen? It would be unfair to resolve that dispute by reference to a law which was not consented to by both parties. So, we find a safeguard to this issue under **Article 10(2)** which provides that:

2. *Nevertheless, **a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence** if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.*

So, according to the circumstances of the case, if one of the parties is claiming that he did not consent or that his consent was vitiated, it is not fair to decide whether he contested or not by applying the law which he is contesting. Thus, the court can apply the law of the **habitual residence** of the party claiming that he did not consent to the choice of law agreement.

This shows that the **personal connecting factor relevant under Rome I is Habitual Residence**, as under Rome II.

Article 4 – Applicable law in the absence of choice

In the event that there is no express choice of law agreement in the contract, and if the choice of law cannot be inferred from the terms of the contract or the circumstance of the case, then the Regulation provides us with the applicable law in the sense of **Article 4**, which states that:

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

This provision provides us with a list of contracts where the legislator determines the applicable law in each case. Thus, one must see in which category his contract fall – is it a contract for the sale of goods? Is it a contract for the transfer of a right in rem for immovable property? Is it a distribution contract? Etc.

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

So if the contract in question is a contract for the sale of goods or the provision of services, Article 4(a) and (b) provides that the governing law shall be the law of the country where the seller or service provider has his habitual residence. So, it is not the place of delivery of the goods as in the case of jurisdiction as held under brussels I Recast, but it is the place where the seller has his habitual residence.

Recital 17 provides that: *As far as the applicable law in the absence of choice is concerned, the concept of 'provision of services' and 'sale of goods' should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.*

In fact, we have specific rules for franchise agreements and distribution contracts under article 4(1)(e) and (f).

(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

Here we find an exception related to tenancies, similar to the exception found under Brussels I Recast. So, if for example I am Maltese and a resident of Malta and I have a villa in Sicily which I rent to another Maltese individual who also resides in Malta, for 1 month. In this case,

since both parties are habitually resident in Malta, and since the lease agreement is for a temporary period of less than 6 months, then the Maltese law will apply.

(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law

There may be contracts which do not fall within any one of the above categories as some contacts may be very particular. In such a case, Article 4(2) would apply which provides that:

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

So, if we come to the conclusion that the contract in question does not fall within one of the categories under Article 4(2), then we need to d**etermine who the characteristic performer of the contract is**. Then, once the characteristic performer of the contract is determined, the **applicable law would be the law of the country where the characteristic performer of the contract is habitually resident**.

Who is the CHARACTERSITIC PERFORMER? Who is the party that is providing the characteristic performance of the contract? The characteristic performer is the party who is carrying out the obligation to the contract i.e. the party who is affecting the characteristic performance of the contract.

Both Articles 4(1) and Articles 4(2) are subject to **Article 4(3)** which provides that:

*3. Where it is **clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply**.*

This is known as a **DISPLACEMENT RULE** which also similarly applies under the Rome II Regulation whereby the court can say that by looking at all the other connecting factors, the law of some other country can apply as the applicable law. The same rule applies here. So, the court can say, the parties have made a choice of law and the contract falls under one of the categories under Article 4(1), but the contract is more closely connected to another country.

For example, there could be multiple contracts which are part of the same deed/transaction as the situation at hand would be rather complicated. So, there would be one main contract and a number of related contracts and the parties choice the applicable law in the main contract. In such a situation the court could say that since these are related transactions to the main contract then the applicable law should be the same for all of them even though they might be contracts which fall under the categories listed under article 4(1). Therefore, this is one example where article 4(3) could kick in.

On the other hand, where the law applicable cannot be determined with respect to Article 4(1) and Article 4(2), meaning that the contract does NOT fall within any of those categories, or that the contract does not have a characteristic performer (e.g. none of us are paying the other, but it could be that we are exchanging services or things under the contract, then **Article 4(4)** applies which states that:

*4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the **contract shall be governed by the law of the country with which it is most closely connected**.*

So even here, the court will have to see what are the connections and we have to come to a conclusion on which is the country most closely connected to the contract.

Article 5 – Contracts of Carriage

We also have a provision dealing with contracts of carriage i.e. the carriage of goods or carriage of passengers. This therefore can be a contract of transport or else simply a contract for the transport of goods from one country to another. Dr. Cachia does not expect us to know the rules of article 5 for exam purposes so we just need to know that there is a provision dealing specifically with contracts of carriage.

Article 6 – Consumer Contracts

With respect to consumer contracts, we have already gone into great detail in the discussion under the Brussels I Recast Regulation. Here, the same requirements exist under the Rome I Regulation. We saw that the simple fact that one is a consumer is not enough, but the contract must also fall within one of the categories stipulated under the regulation and we looked in detail at what it means when we say that the supplier was directing activities to the consumer state or what it means when we say that the supplier pursued activities in the consumer state. We also saw very important with the development of the internet and the concept of directing activities to the consumers MS in which case we referred to the **Peter Pammer judgment** which is very important on when websites are directed to the consumer's MS.

So for example, if I go on holiday in London and decide to go shopping on Oxford Street, that doesn't mean that I am protected as consumer, because I must show that somehow the supplier had directed activities towards Malta. But if for example I was online, I found a website which shipped its goods to Malta, then not only am I a consumer, but my activity also fell within one of those categories above and therefore I am entitled to protection under the EU Regulations. Thus, if we are consumers and we have a consumer contract, we have specific rules over here too.

In fact **Article 6** of Rome I provides that:

1. Without prejudice to Articles 5 and 7, ***a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession*** *(the consumer) with* ***another person acting in the exercise of his trade or profession*** *(the professional) shall be* ***governed by the law of the country where the consumer has his habitual residence****, provided that the professional:*

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

Article 6(1) tells us that the consumer contract will be governed by the law of the country where the consumer has his habitual residence. However, according to **Article 6(2)** the parties to a consumer contract (the consumer and the professional) may also choose the applicable law to the contract, as long as that choice cannot deprive the consumer of the protection afforded to him under the law of his habitual residence. We already saw examples and that there are **provisions of a mandatory nature** where the consumer is protected, in which case it would not be possible for the consumer to lose the protection by means of a choice of law clause.

Article 6(3) then provides that: *3. If the requirements in points (a) and (b) of paragraph 1 are not fulfilled, so there is no choice, the applicable law in a contract shall be determined in accordance with paragraphs 3 and 4.*

So, if there was no direction of activities to the MS where the consumer has his HR, because the consumer went shopping in London in a small store and there was no direction of activities towards Malta, the applicable law is determined in accordance with Articles 3 and 4. This means that if he parties have made a choice in Article 3 we apply that choice of law, whereas if parties haven't made a choice, we have to see what the nature of the contract is and apply Article 4 to determine the applicable law.

Article 6(4) then provides a list of exceptions whereby Articles 6(1) and (2) i.e. the protective rules designed to protect the consumer shall not apply. it states that:

4. Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the ***services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence****;*

This doesn't apply in the context of Brussels I Recast and so you will still have jurisdiction in Malta. However, with regards to the applicable law, this will not be covered by Article 6 of the Rome I Regulation.

For example, you receive a flyer in your letterbox which promotes a clinic in Sicily that does plastic surgeries. So, you decide to go to Sicily to enhance your lips, you have the service performed, you come back to Malta and you find that your lips have lost all sensation, so, you decide to sue the Sicilian service provider who gave you this service:

- The first question to ask is: Do the Maltese courts have jurisdiction? Yes, there is jurisdiction in Malta in terms of Article 17 of Brussels I Recast (jurisdiction over consumer contracts) on the basis that there was a direction of activities to Malta since the flyer was specifically sent by post to many people's letterboxes s
- The next question is: What is the applicable law? Let's say you refrained from signing anything, and thus there was no written contract. However, this does not mean that there was no actual contract because the service was provided which you accepted, and so you tacitly agreed. Thus Rome I would still apply because, as maintained by the CJEU in the **Jakob Handte case** there is a voluntarily/freely assumed obligation by one party towards the other making the claim contractual so, Rome I should apply. Moreover, in the case of concurrent liability the CJEU also held that a claim is to be considered contractual as well. So it is established that Rome I applies.
- But, which is the applicable law? Here, the exclusion that paragraphs 1 and 2 shall not apply where the services are to be supplied to the consumer exclusively in a country other than that where he has his habitual residence applies. So, even though there was 'the direction of activities' as required under Rome I and even though there was a consumer, due to the fact that you crossed the border and received the service in Italy, Rome I article 6 won't apply and in that case we apply the normal rules under Article 3 or Article 4. So, what would the applicable law be under Article 4? The **applicable law will be the country of the service provider so it will be Italian law**.

(b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (15);

Contracts of carriage are also excluded. We saw article 5 dealing with contracts of carriage other than a contract relating to a travel package contract. With regard to travel package contracts we saw something similar under the Brussels Regulation and they are within the scope.

(c) a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

Time share contracts fall within the scope of Article 6 but other contracts relating to rights of immovable property or tenancies of immovable property are excluded (because they are determined by the applicable law of the lex situs).

(d) *rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;*

(e) *a contract concluded within the type of system falling within the scope of Article 4(1)(h).*

So basically, if we don't apply article 6 then we have to apply the general rules, Article 3 or Article 4 – first we have to see if there was a choice of law (expressed or implied) to see if Article 3 applies, and if there is no choice of law clause, then we need to see whether any of the rules under Article 4 apply.

Article 7 – Insurance Contracts

This is not important for exam, however, we have dealt with insurance contracts insofar as jurisdiction is concerned in the context of Brussels I Recast whereby we mentioned cases such as the **FBTO case for jurisdiction**, but this is very technical for the applicable law and we don't have to cover it.

Article 8 – Contracts of Employment

Here we find a similar provision to what we find under Brussels I Recast. **Article 8** states that:

*1. An **individual employment contract shall be governed by the law chosen by the parties** in accordance with Article 3. **Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice**, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.*
2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

So, the parties can choose the applicable law, so long as that choice does not deprive the employee, as the weaker party, from the protection afforded to him by the mandatory provisions of the law of the country where he habitually carries out work from. However, in the absence of choice the applicable law is **the law of the country where the employee habitually carries out his work in performance of the contract**.

If you cannot apply that particular law because the employee doesn't habitually carry out his work anywhere, because he might have been travelling a lot for work for instance, **Article 8(3)** applies which states that:

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

Therefore, the contract shall be governed by the law of the country where the place of business in which the employee was engaged in was situated. Once again, **Article 8(4)** is the displacement rule which states that:

*4. Where it appears from the circumstances as a whole that the **contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.***

Article 9 – Overriding Mandatory Provisions of the law of the country where the contract is to be performed

Article 9 deals with overriding mandatory provisions of the law of the country where the contract is to be performed (not the law of the forum). So here we need to look at the place of performance of the contract and effect can be given to the overriding mandatory provisions of the country of performance of the contract. As explained within the context of the Rome II Regulation, overriding mandatory provisions on are superimposed on the applicable law. In fact, an article titled 'Overriding mandatory provisions as a vehicle for weaker party protection – European PIL' has stated that overriding mandatory rules are superimposed on the law applicable to the contract to protect an interest that is regarded as fundamental by the forum state.

Overriding mandatory provisions are defined in the Regulation in **Article 9(1)** which states that:
*1. Overriding mandatory provisions are provisions the respect for which is **regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation**, to such an extent that they are **applicable to any situation falling within their scope**, irrespective of the law otherwise applicable to the contract under this Regulation.*

This definition was taken from the CJEU **Arblade joint judgment (Case C-396/96 and C-376/96)** whereby the court held that "*the **term must be understood as applying to national provisions** compliance with which has been deemed to be so **crucial for the protection of the economic, social or political order in the MS concerned** as to regard compliance there by all persons present on the national territory of that MS and all legal relationships within that state."*

Article 9(2) is important as it provides that:
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

So, article 9(2) safeguards the overriding mandatory provisions of the forum. So if proceedings are held in Malta, the Maltese courts would apply the applicable law but nothing prevents the application of overriding mandatory provisions of Maltese law. On the other hand, **Article 9(3)** then provides that:

3. ***Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed****, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.*

So, the overriding mandatory provisions of the place of performance can also be given effect. For example, the performance of the contract is considered to be illegal in the country of performance. In such a case, the court is to give effect to the overriding mandatory provisions of the country of the place of performance under the contract, and thus, the contract would be held to be invalid as it is based on an illegal cause.

Nikiforidis Case (Case C-135/15):

- This case concerned the question whether effect could be given to the overriding mandatory provisions of the law of another country. So, under Article 9, is it only possible to apply the mandatory provisions of the forum or the mandatory provisions of the place of performance? Is it limited to just that?
- a school run by the Greek State situated in Germany and a Greek teacher who was habitually resident in Germany since the school was located there. However, the teachers' employer was the Greek state.
- When there was the banking crisis in Greece, in order to renew public debt, the Greek government had slashed the wages of public officials. Thus, the Greek State employer reduced the wage of Nikiforidis by the % established in the Greek Law.
- The Greek teacher didn't accept this and stated that his contract was not regulated by Greek law but rather by German law as it was the applicable law according to article 4 since he was working in Germany. Therefore, his contract of employment ought to be recognized under German law and not Greek law. Consequently, he also claimed that there was no wage reduction to be given under Germany law and that this was only a matter of Greek law. Thus Nikiforidis contested the reduction.
- So, the question was whether the German court would give effect to these overriding mandatory provisions of Greek law. In this case, the Greek law was not the law of the forum as the forum was Germany (Nikiforidis used Brussels I to sue his employer in Germany) and so the Greek law could not be applied in the sense of Article 9(2).
- However, in accordance with Article 9(3), overriding provisions could be given to the place of performance. Therefore, since the contract of employment was performed in Germany as that was where Nikiforidis was giving his services as a teacher, the place of performance was not Greece either.
- The court held that Article 9(2) and Article 9(3) are exhaustive and should not be given a restrictive interpretation. The court further held that Article 9(3) of the Rome I Regulation "*must be interpreted as precluding (prevent from happening) overriding mandatory provisions other than those of the State of the forum or of the State where the obligations arising out of the contract have to be or have been performed*."
- Consequently, since Nikiforidis' contract was performed in Germany and the referring court is German, the latter cannot in this instance apply directly or indirectly the Greek overriding mandatory provisions which sets out for a predatory rule.

Article 10 – Consent and Material Validity

We dealt with this already when dealing with material validity issues where one of the parties claims he did not consent.

Article 11 – Formal Validity

Article 11 deals with formal validity as the Regulation tries to safeguard the validity of contracts by trying to make sure that contracts are formally valid as much as possible. So, Rome I provides a number of options on how to safeguard the formal validity of the contract.

Article 11

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

Article 11(2) deals with a situation where the parties are in different countries and states that there are a number of options including the law of the country where either of the parties has his habitual residence. If it follows the above, then the contract is deemed to be formally valid.

However, **Article 11(4)** tells us that when dealing with consumer contracts, if your contract falls within article 6, the form of the contract shall be governed by the law of the country where the consumer has his habitual residence. This is another way how the consumer is protected and the contract must be formally valid in accordance with the country where the consumer has his habitual residence. So, if for example the law provides that the consumer contract must contain a warning to the consumer on certain consequences for instance, then the consumer would be able to apply the protection valid to him.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

(a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and

(b) those requirements cannot be derogated from by agreement.

Article 11(5) then deals with contracts, the subject matter of which are contracts of rights in rem in immovable property or tenancy of immovable property where the requirements of formalities of the country are governed by the law of the country where the property is situated. So, for example if you are dealing with a transfer of immovable property in Malta, to be formally valid, it must be done by a public deed in front of a notary, etc. i.e. following the requirements of Maltese law on transferring immovable property.

Article 12 – Scope of the Law Applicable

Article 12 deals with the scope of the applicable law and is very similar to Article 15 of the Rome II Regulation. So, similar to Article 15 of Rome II, article 12 of Rome I specifically tells us what the applicable law chosen will regulate. In fact Article 12 provides a whole list of things which the applicable law regulates in terms of contractual claims/obligations, such as the interpretation of the contract and the performance.

For example, the contract doesn't say where delivery is to take place – when we determine the applicable law it will tell us whether the delivery is to take place at the place of the debtor or the creditor.

1. *The **law applicable to a contract by virtue of this Regulation shall govern** in particular:*
   *(a) **interpretation**;*
   *(b) **performance**;*
   *(c) within the limits of the powers conferred on the court by its procedural law, the **consequences of a total or partial breach of obligations**, including the assessment of damages in so far as it is governed by rules of law;*

So, if one of the parties breaches the contract, the applicable law will determine what your remedies are, i.e. under which heads of damages you can sue, under which liability and also the quantification of damages. We discussed this in greater detail under Rome II and reference can be made to **Harding v. Weadlands** where the situation changed with regard to the quantification of damages as a matter of procedural or substantive law and these have now become recoverable as part of the applicable law.

   *(d) the **various ways of extinguishing obligations**, and **prescription** and **limitation of actions**;* - For example, that the obligation may be extinguished by payment, novation, etc.
   *(e) the **consequences of nullity of the contract**.*

So, these are all questions which will be determined by the applicable law.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

Other provisions (not important)

Article 19 – habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.
The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

With regard to habitual residence as we have a similar provision under Rome II however important here is article 19(3) which tells us that 'for the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.' So, when you're seeing someone's habitual residence, you have to look at the time when the conclusion of contract took place and not the time when he is filing the court case. Remember under Rome I and Rome II that the relevant connecting factor is habitual residence but under Brussels I it is domicile.

Article 20 – Exclusion of Renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

If we come to the conclusion that the applicable law is the law of Israel, on the substantive law is to be applied and not the procedural law of Israel. Renvoi is out.

Article 21- Public Policy of the Forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Therefore, the foreign law can be applied other than those provisions which go against the public policy of the law of the country of the court which has jurisdiction.
We also know what public policy is and we have seen judgments under Brussels I on the meaning of public policy which will also apply here and the effect of article 21 is the same as the corresponding provision in Rome II.

Article 22 – States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.
2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

So, States with more than one legal system. We have various countries (like the UK) which have more than one legal system and so we have an ad hoc rule over here.