PBL4013 PRIVATE INTERNATIONAL LAW

The European Law Students' Association

MALTA

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Private International Law.

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Lecture 1.

- We will start analysing the fundamental interest underlying a plaintiffs motive to start a PIL lawsuit. Up to now we've been handling concepts of PIL in third year, in a way purely academic, by placing concepts into context, so we were mainly academically orientated.

- We will start reorienting, taking new bearings as if sitting in a law office as an intern and the plaintiff in the cases we will be citing comes over to the lawyer and explains the case and the lawyer or you say this is a PIL case, not just a normal civil court case there's a PIL element in it.

- We will shift from the academic showing off of knowledge to serving clients interest. Lawsuits are interest driven, they are not academically driven. There are competing interest now, from the unique interest of the client in the law office, saying a long story and so on and you are asked by the lawyer if you can draft a PIL background, then this will be a lawsuit between 'A' vs 'B' and 'B'will already have received the injunction and they would have gone to the lawyer. The defence lawyer has to start articulating a defence in PIL terms as far as concepts, but now a bit more articulated by bringing relevant articles and judgements in an interest driven case.

- We will need to not only understand, quote judgements but we have to be critical with our thinking of interest driven cases started by a plaintiffs lawyer on behalf of the interest of the client and the interest driven defence on behalf of that client.

- Try and understand the to-ing and fro-ing, and when reading court judgements, take some time to try and scribble not just the whole court judgement that we will abbreviate to put back into the exam, but splitting the narrative of the court judgement by understanding what were the plaintiff's argument and what were the defence's arguments.

- Also make sure you are insured, interest driven not only for the client but also the same lawyer.

  - What we will do in this module is to focus nearly ad nausea on a novel concept in EU PIL law, the concept of habitual residence. As we know habitual residence has been utilised by the law draftsman in the commission in Brussels, to edge

away and nudge away the continental preference for nationality as a personal connecting factor in contrast to the anglo-sphere preference for domicile. In a way, this post Brexit is a non-started but we're lined with it as all the effort was in the 90's coming out with the Brussels I registration in the 90's and Brussels recast in 2015.

- Habitual residence was discovered, created, in order to create a compromise between the anglo-sphere Great Britain, Ireland, Malta, Cyprus members of EU and the rest as in PIL terms you had this struggle as to whether domicile was a more proper connecting factor in PIL or whether nationality was a more proper connecting factor in PIL.

- You will find if you examine papers, that this is a recurring question namely to what extent has habitual residence, (to what extent the question is asking to measure precisely, not asking a yes or no or trying to propose).

- We will be dealing about concepts and interests.

- What the EU legislators tried to do was create a new concept which because of the erosion of the flagship nationality proof which was the passport and so the nationality school always denounced the domicile school by saying personal connecting factors are clear. Certainty of passport has been getting eroded for the past 30 years at least.

- With habitual residence they nudged themselves slowly but surely in, so the question arises, has habitual residence eliminated domicile and nationality from personal connecting factors in EU regulations? But if the question is to what extent has the new concept of habitual residence lobbied for and pushed through the various regulations by the EU draftsman being successful, to what extent, not yes or no now, to what extent has habitual residence nudged domicile and nationality aside, has it nudged domicile more aside or has it nudged nationality more aside?

    - The measures are going to be different that is why a yes or no is not a sufficient answer. As we will see in various regulations in some cases domicile has been pushed more away in other cases nationality has been pushed more away. To what extent is asking us to show what we have understood and the measure of the nudging away of this novel concept of habitual residence vis-a-vis these two contending pillars that we had before, domicile and nationality and in some cases nationality in other domicile have been pushed further.

    - So to what extent is asking us to examine in which cases has domicile been pushed away further or nationality has been pushed away further. So a yes or no is not a good answer. Had it been has habitual residence eliminated nationality and domicile from being personal connecting factors you can say

yes as it's more yes than no but when it's asking to what extent, it's asking to discuss the extent of it.

- What we will be doing, is to go through and do a cut across exercise with the EU regulation because the draftsmen have been quite resilient in pushing habitual residence as the new new personal connecting factor in EU regulations on PIL and so through the whole spectrum of EU regulations starting chronologically with Brussels I and Brussels I Bis etc, you will find habitual residence being mentioned and in each one you will see to what extent habitual residence is nudging or pushing away nationality or domicile.

- What we are going to be carrying out in this module is going through EU regulations see how habitual residence has been introduced and so again watch out when you cite a judgement before an EU regulation was passed, sometimes you will have a lawyer and judge in certain cases referring to an old understanding pre-EU regulation which is totally irrelevant. It is overwhelmed by the new EU regulation, it's useless citing the old judgement in support of utilising domicile as a personal connecting factor.

- This cutting across exercise isn't going to give (a big warning) a singular unique definition of habitual residence applicable in each and every regulation. We don't have a unique and singular and unambiguous definition of habitual residence from the commotion with an EU regulation having immediate and internal binding effect in all member states saying so, and not only do we not have the singular unique and ambiguous definition which would have given us great comfort.

- In each of the different regulations, habitual residence has a different meaning and it has nudged away domicile on the one hand and nationality on the other hand to different extents under each regulation and this is the complexity that Dr. Sceberras Trigona is inviting us to digest and overcome because it's not easy and it is a moving feast. As new judgements are coming through under each of the different regulations readjusting previous judgements of the extent to which habitual residence has pushed away nationality or domicile. If a judge interprets a regulation of only having pushed away nationality slightly and you then rise to the challenge and show that in your particular case the pushing away is not there and you bring nationality to bear then you have done a total paradigm shift of the case by linking nationality as the connecting factor to the case and not habitual residence.

- You can take up a challenge of shifting the very paradigm of a case in a court by shifting away from habitual residence say to nationality by saying he's habitually resident in Belgium but he's a maltese national and it suits you to say maltese law applies not Belgian law applies as perhaps Maltese law is more advantageous in

this case, if you shift this to a different personal connecting factor you get a different law your client gets much more benefits. You have to see in which cases does habitual residence overwhelm nationality? That is the measurable distance, is it in all cases? That would be the black and white case, habitual residence has eliminated domicile or nationality, understand the relevance of the client's success or failure in the lawsuit. If you effect a paradigm shift you are going to bring in a totally different law to apply to the case with a different outcome, either having more damages or not having jurisdiction, a totally different outcome so you are changing the rules of the game by pushing the personal connecting factor from one to another. This is the strength of PIL it is pivotal, it effects a pivotal paradigm shift.

- Not only do we not have a singular unique and unambiguous definition of habitual residence by the commission, an EU regulation applicable to all EU regulations on PIL but there is a particular judgement which we ought to download, it's 523/2007 where it was held by the ECJ, not only in judgement but it put out a warning, in the way the ECJ in interpreting EU regulations zoomed out so to speak and warned readers of ECJ judgements that its own case law on habitual residence in one area cannot be directly transposed in the context of any other.

- Not only do we have a vacant non-definition of habitual residence but a warning from the ECJ that you cannot transpose the ECJ's elaboration in it's caselaw of habitual residence under one's regulation not to be transposed to understanding habitual residence under another regulation. This is why we need to do a cutting across exercise to understand under each as it were vertical regulation as if they were all silos, now we're going to cut across all these regulations horizontally to see under each one how habitual residence is being understood.

- So at law we don't have a definition although in the arguments in a number of ECJ cases (not always speaking about Member State court cases), each lawyer will try to say, in the EU, in EU legislation in EU regulations a concept especially a new concept like habitual residence has an autonomous meaning above member states definitions.

- If you have a definition it will be an autonomous definition separate from the local Member States, but if you don't have an autonomous definition how can you use the leverage that any definition of the EU of any concept for PIL purposes has autonomous understanding and therefore should apply across all regulations but since the EU commission has not bothered or was afraid of to define habitual residence with a unique singular unambiguous definition to cut across all definitions we do not have this stipulated law level, so we move to a secondary level, ECJ interpretation of this lacunae, and the ECJ is warning all of us watch out, do not try to transpose an ECJ understanding and interpretation of habitual

residence under one regulation which suits you and then you transpose it which is the regulation which is the regulation of the case at hand and that is where your opposing lawyer will say you're transposing that definition from a different regulation that doesn't apply here.

- So look at all the claims of the EU legal draftsmen of having introduced a much simpler personal connecting factor than nationality or domicile, not standing up to this criticism that we don't have an autonomous definition, that the ECJ is warning us not to transpose the understanding of habitual residence under one regulation to understanding it under another regulation and perhaps even that understanding is changing over time.

- Have we got an improvement on domicile with all the shifting of the domicile theory or not? That would be another question, to what extent is habitual residence an improvement on domicile and nationality, in theory and in practice. is it an improvement? Do we have an improvement? Now, at the end of this module when we have seen how habitual residence has different meanings under each of the regulations and there are different court judgements, can one sit back and say what have we achieved with this? As in some cases they analyse habitual residence as having a little bit of intent, how can you have a lot of intent? They are trying to dilute the hard aspects of domicile with this peculiar English definition by making it more mandible yet do they still not have to come up with the problem of proof? Proving intent is always slippery, have they succeeded in overcoming the difficulties that domicile gave us and since nationality is now multiple nationality we cannot go to nationality, when they don't push nationality too much and it is close, can a lawyer choose nationality? Habitual residence itself under this regulation says if this doesn't apply then nationality applies and perhaps the person has only one passport, making it easier to say there is a single nationality not three passports holding a triplicate direction.

- Try to understand how this is working a) because of an emptiness of an EU autonomous definition of nationality, the EU says that it gives time constraints and factual constrains and this is why the to what extent is so relevant and this is why 523/07 is so relevant in warning us not to lazily transpose it to the case at hand.

- This is the background that Dr. Sceberras Trigona wants us to start considering because it is a daunting task though very relevant and therefore this first meeting is full of warnings in a way because we need to have these warnings in order for us to understand that we have to watch out, take these warnings to heart and rememberer them

- Download C523/07 and focus on the four questions which the Finnish appellant court mention in their referral to the ECJ. Again, its very important for us to

understand was it the plaintiff's lawyer or the defendant's lawyer who asked for a referral to the ECJ for an authoritative opinion? Who needed to rest the argument? The plaintiff or the defendant.

- When we'll see the four questions which we will go into next time (yet read them beforehand) read the four referrals from the Finnish appellant court to the ECJ, try and understand as when you make a question, you are sort of hinting that you want this answer and not that answer (leading a little bit) try and understand what was being not only illicitly but solicitly in a way from the ECJ.

- The ECJ will understand the body language of what is being asked, they will see that whatever the answer is going to tip the barrels in the case between plaintiff and defendant, it's going to have even because of the prestige and authority of the ECJ it will come down and if it is a very balanced, if it's four answers for this side's favour the balance will go to one way and the judge of the local courts in Finland will say yes we'll refer this to the ECJ, this has come back and then the judge even for his own prestige, safety and honour says I will rely on the ECJ judgement and therefore these four answers are my own and the balance goes that way again, understands the client's level, when is it advantageous to make a referral to the ECJ.

- Can it boomerang because there are some cases where the referral from the ECJ comes back not how one would have desired and you will emerge as a faulty lawyer, why did you make a costly referral. A little bit of tactics here in the court. It's not just academic, let's refer to the ECJ the ECJ doesn't have a stipulated law to go by. If the parties were trying to abuse from a different regulation elements for their won purposes the ECJ did not give comfort so watch out in going to appear brilliant with the client.

- Lets keep this in mind, this year in this module we will concentrate on the utilisation of habitual residence under each and every one of the EU regulations on PIL and so even we can carry out this exercise. It's a very useful area to study and there aren't enough good studies about it, at the EU level they are rather hesitant to admit that they have failed to create a unique, singular, unambiguous definition of habitual residence, they may do it in the future.

- Go to the four questions that case 523/07 received at ECJ level from the appellant court in Helsinki in Finland to understand more about this warning that how habitual residence is understood under one regulation cannot be transposed to understanding habitual residence under another regulation, furthermore, also that whatever you have in your domestic legislation on your habitual residence, if you are abusing an EU regulation as appropriately covering the case at hand then you have to see what that regulation says and not what your domestic regulation says.

Here you have the EU assertion of dominance on local legislation without having to amend it legislatively, the superiority of EU law is self defined. Whatever local constitutional cases you can imagine can develop from that.

- That was a very important intro for us as once we go through these four referrals we will be tackling next week, they are complex and subtle, they are not easy referrals, read them once or twice they could be allusive in part because then we will start seeing how this new concept of habitual residence as a personal connecting factor has been applied in the different regulations.

23rd February 2023

Lecture 2.

- Last week we had to download case 523/07 and to focus on the four questions referred to by the Finnish court to the European Court of Justice.

- By way of studying and learning Dr. Sceberras Trigona thinks that the cases we will be going through see specifically what the questions referred to in the ECJ are about and try to think about how you would answer those questions. (If we were sitting as judges, one day we might on the ECJ, how would one answer the questions referred from the member states to the high courts on the PIL domain).

  - In the first question, basically the court was tackling Mrs. A, the kids were called C, D, E and the step father was called F and so on, (because he was accused of domestic violence). So Mrs. A was challenging the jurisdiction of the Finnish court before the ECJ. (Get to grips with the fundamentals what's the case about it's about jurisdiction). Jurisdiction under Brussels II Bis, regulation 2201/2003.

  - Last week, we were warned because one of the asides (orbiters) in this particular judgement is that the hinge, connecting factor of habitual residence is not to be interpreted in the same way under each of the regulations. Nor should there be any transposition directly from one case adjudicated upon already by the ECJ to another case being brought before it under a different regulation.

  - So instead of boasting as it were, of having a cross cutting definition of habitual residence as a connecting factor right through each regulation, each regulation remains as it was a silo unto itself with its own nuances and definitions of habitual residence and its own caselaw under that particular regulation which we are warned in case 523/07 not to transpose from one silo to the other so we do not have the cross cutting effect. This is a warning not just for academic purposes here but also for practice.

  - The first question that's being referred is that the court felt challenged by Mrs. A, it was saying (the ECJ) we do not agree with the Finnish court, the Finnish court

did not have jurisdiction, one because this does not fall under civil matters, because it is a public law decision making body. Remember from Brussels I the scope of the regulations that when it is an administrative tribunal/administrative law/ a public law tribunal or judgement it its beyond the scope and civil matters has a very restrictive meaning.

- So she was saying that the Finnish court could not have competence (they use the word competence and jurisdiction, these are used interchangeably). Competence is Malta is competence of the Gozitan court vis a vis competence of the Maltese court, the commercial court competence vis a vis the civil courts competence. Jurisdiction is much larger regulated by the COCP.

- So they should have said jurisdiction but she is challenging the competence and jurisdiction of the Finnish courts because she's saying my children have Swedish nationality not Finnish so enter nationality against habitual residence here.

- Last week we were saying to what extent has habitual residence pushed aside nationality and domicile, here you have Mrs. A coming and saying the Finnish court does not have competence/jurisdiction because my children are Swedish nationals, are Swedish citizens, more than that this is a matter of public administration, public law decision making tribunal beyond the competence of this court because it's a public law decision making body so here you have this Mrs. A challenging the jurisdiction of the Finnish court and the Finnish court felt itself in a quandary and referred the whole matter to ECJ to have some comfort.

- Because that is what usually happens, the judge in a local member state's court starts feeling uneasy on to whether to judge this way or that way and since it's a matter of interpretation of EU regulation not of a local legislation. They sent it by referral to the ECJ for an interpretation so then they can say we have a comfort on the ECJ judgement on which to rely as to how which we will proceed and that will rally the two sides to converge and stop the cackling between the two sides.

- On this first point, you have the judgement coming through that where the regulation wanted to speak, ubi lex voluit dixit. It spoke and said that it does not apply to law policy decision making when it is regarding general health and education policy making. So by excluding that specifically the ECJ interpreted that exclusion to be the only exception and therefore all the rest falls under civil matters and therefore the Finnish court was competent and has jurisdiction.

  - Go through this again because it's a bit illusive.

- In the judgement you will find that the court comes down by saying look, where you have a member state issuing public law rules on education, on health etc that is one thing that is being excluded but an administrative tribunals decision on

placing the children in a foster family is not a matter of public law which is excluded by the regulation itself. It then found sucker and comfort in article 1(2)(d) which is the scope and definition of Brussels II Bis which it explicitly says in 1(2)(d) that placement of the child in a foster family or in institutional care.

- Article 1.
- Scope
- **1**. 1. This Regulation shall apply, whatever the nature of the court or tribunal, in civil matters relating to:
- (a) divorce, legal separation or marriage annulment;
- (b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
- 2. The matters referred to in paragraph 1(b) may, in particular, deal with:
- (a) rights of custody and rights of access;
- (b) guardianship, curatorship and similar institutions;
- (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
- (d) the placement of the child in a foster family or in institutional care;
- (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.
- 3. This Regulation shall not apply to:
- (a) the establishment or contesting of a parent-child relationship;
- (b) decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption;
- (c) the name and forenames of the child;
- (d) emancipation;
- (e) maintenance obligations;
- (f) trusts or succession;

- (g) measures taken as a result of criminal offences committed by children

- This definitely cuts all the chattering because although the distinction by saying when it is a general public law polity that is excluded explicitly of the regulation (and therefore open by interpretation all the rest is not excluded so an administrative tribunals decision is included and so the Finnish court has jurisdiction).

- That is little bit precarious as a judgement but then the judgement clings onto 1(2)(d), to have a stronger basis on which to say look the decision to place the children in Finland in a foster family is covered by 1(2)(d) so apart from this general distinction between general policy education and health law decisions, or policy making and administrative decisions, then zooming in they utilised 1(2)(d) to confirm the jurisdiction of the Finnish court in deciding to place the children away from the family and in a foster family's care.

- So, look at this first question, because it's a rather important question about jurisdiction here. Not even as such about habitual residence but about jurisdiction.

- Then we move to the core of the problematic which made the Finnish court to refer to the matter of the ECJ. Which is the definition of habitual residence in article 8(1) of regulation Brussels II Bis.

  - Article 8.

  - General jurisdiction

  - **8**. 1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

  - 2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

- So here we start with what is concerning us in this series of lectures cutting across the regulations and you will find in article 8(1), that you have a general rule over there already giving you the courts of a member state shall have jurisdiction in matters of parental responsibility over a child who is habitually a resident in that member state at the time the court is seized although in 8(2) para (1) shall be subject to the provisions of 9, 10 and 12.

  - Article 9.

  - Continuing jurisdiction of the child's former habitual residence

- 1. Where a child moves lawfully from one Member State to another and acquires a new habitual residence there, the courts of the Member State of the child's former habitual residence shall, by way of exception to Article 8, retain jurisdiction during a three-month period following the move for the purpose of modifying a judgment on access rights issued in that Member State before the child moved, where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child's former habitual residence.

- 2. Paragraph 1 shall not apply if the holder of access rights referred to in paragraph 1 has accepted the jurisdiction of the courts of the Member State of the child's new habitual residence by participating in proceedings before those courts without contesting their jurisdiction.

- Article 10.

- Jurisdiction in cases of child abduction

- **10**. In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and:

- (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention;

- or

- (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:

- (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;

- (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);

- (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7);

- (iv) a judgment on custody that does not entail the return of the child has been issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention.

- Article 11.

- Return of the child

- **11**. 1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 'the 1980 Hague Convention'), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

- 2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

- 3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.

- Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

- 4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

- 5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

- 6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the

- relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

- 7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

- Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

- 8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

• Then by way of default you get to article 13 which says that where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of article 12 (the preceding article 12) the courts of a member state where the child is present shall have jurisdiction.

- Article 12.

- Prorogation of jurisdiction

- **12**. 1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

- (a) at least one of the spouses has parental responsibility in relation to the child;

- and (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental

responsibility, at the time the court is seised, and is in the superior interests of the child.

- 2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

- (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

- (b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

- (c) the proceedings referred to in (a) and (b) have come to an end for another reason.

- 3. The courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:

- (a) the child has a substantial connection with that Member State, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State;

- and

- (b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the court is seised and is in the best interests of the child.

- 4. Where the child has his or her habitual residence in the territory of a third State which is not a contracting party to the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, jurisdiction under this Article shall be deemed to be in the child's interest, in particular if it is found impossible to hold proceedings in the third State in question.

- Article 13.

- Jurisdiction based on the child’s presence

- **13**. 1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.

- 2. Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.

- Look at how here we have this whole problem arising because this was (Dr. Sceberras Trigona is going to refer to the facts) this was a Swedish family that went off in a camper van to Finland for a substantive period of time even applying for public housing in Finland. So originally they had Swedish nationality and permanent residence in Sweden, so permanent residence included habitual residence there.

- The point now is did they generate habitual residence when they were going for holidays to Finland and back? And just staying and applying for social housing in Finland? Look at how habitual residence since it is looser than nationality can be a grey area between the habitual residence in Sweden where they were permanently based to flitting to and from Finland in a camper van generating elements of habitual residence in Finland also, can you have habitual residences? This is why the judgement is very interesting because to cut this ambiguity of double habitual residence (this is how Dr. Sceberras Trigona is putting it forward to us)

- The problem is what if you seem to have in front of you two habitual residences? How do you decide on that? So there is a whole discussion, (it is important if we not only download the case but also what the Attorney General's arguments were in the case because here there is distinction between article 8 and article 13 between habitual residence and presence. Now, presence is a mere fact, so that gives the singularity of nationality in a way had they said presence immediately instead of habitual residence it would be far easier to establis or disestablish jurisdiction.

- Habitual residence with its wider penumbra around presence creates this ambiguity of possibly having two habitual residences but you can't be present at two places unless you have sainthood or properties, or quantum physics which has double presences.

- The debate by the Attorney General was between presence and habitual residence and the Attorney General first of all eliminates other conventions and this is important also by way of legal sources in any case. He says the 1996 Hague Child Convention, the 1961 Protection of Minors Convention, the 1980 European Custody Convention and the 1980 Hague Abduction Convention should become

inferior to Brussels II Bis because Brussels II Bis is regulating jurisdiction explicitly and so Brussels II Bis should take precedence and prevail over the four conventions.

- So that again is also important by way of preliminary readings, because you have the contesting lawyer telling you under this law this is the rule and not Brussels II bis but then he says (this quote is a very quotable quote) habitual residence should be considered by reference to all the relevant circumstances and is to be distinguished from the legalistic concept of domicile.

- Mrs A trying to rely on nationality, the Attorney General quoting the law which starts off with habitual residence in 8 and by default in 13 with presence and you have this articulation of habitual residence having to take into consideration all the circumstances of the case not going to the extent of domicile by giving intention and fact that peculiar English definition.

- There is an excellent spectrum here, from nationality to habitual residence and the default of presence to rejecting domicile with it's double decker definition which we covered last year. What he goes on to show also here and the judgement supports the Attorney General's argument is that he disagrees with Brussels I's theoretical basis, the BORRAS Report in support of Brussels I, in the BORRAS Report supporting Brussel's I's prompting for jurisdiction in those cases vested in the regulation, they mentioned that habitual residence should also include intention, relevant facts and actual residence.

- So the BORRAS report on this spectrum between nationality, habitual residence, presence and domicile was still tending towards domicile by giving intention a large significance, whereas the draftsman for habitat residence, were trying to reduce the importance of domicile especially with its factor which was difficult to prove the intention level of the double decker.

- The fact of residence was a fact, has he lived here for six months? A year? Two years? That's easy but intent are they just coming here in the camper van and moving around different parts of Finland going back to Sweden, coming again? What is the intent over there? How do you gage the intent? So the Attorney General here, and supported by the ECJ judgement in case 523 is holding that look, we are not going to the extreme of the BORRAS report, of giving intention nearly as much importance as the actual record of residence, instead he says look, the elements of intent is appropriate in the context of divorce which Brussels II addresses in the first part, (Brussels II has this first part on divorce, and there there is the element of intention). So again this is a leading quote to support the contention that the interpretation of habitual residence under Brussels II Bis, is different from that under Brussels II, is different from that under Brussels I Recast.

- He also says but the element of intention is not appropriate in determining a child's habitual residence because children often have no intention. A child is just carried. Can you imagine a 7 year old child in a camper van in Sweden driving to Finland, you're driving across the border and you're crossing back, meeting an aunt over here, an uncle over there. it's all one big happy holiday, he's enjoying this there's no intent to making Finland his permanent home. Look at the difficulty to prove intent normally, and now for children, therefore in cases of child abduction and child protection you cannot get children to declare their intent of making a place their permanent home or having left a place for good without any intention of returning to that place.

- So it's the parents in the custody dispute that usually have to show their intent and their intent has to be proven.

- So the Attorney General rejects the commission's reliance on the BORRAS report of giving intention such a high significance nearly exclusively as importance as actual residence and the judgement swings in favour of the Attorney General here, so we have a new enhanced definition through case law in contrast to the jurists (BORRAS) whose study, whose report was the basis of the definition in the regulation.

- The Attorney General rejects the application of intention for habitual residence also under social laws. We will see in a later case waddling later on, because there are a number of cases on social security, unemployment benefit, which can cost money, three months unemployment benefit for someone whose totally unemployed is a do or die matter. We will see over there how far the element of intent is going to be attributed.

- So what the Attorney General is pushing and the judgement is supporting (we will see in the final part of the judgement) is that from the facts of the case, it nearly goes to the American concept now under the restatement (US Secondary Statement) the actual centre of interest of the child, the USPIL (the US Conflict of Law) you have the centre of gravity of the person, the centre of interest of the person concerned to understand where his connections are.

- The Attorney General expounded on these by saying these are divided into two baskets, first the duration and regularity of residence without defining so many weeks, so many months as we have in the divorce habitual residence definition. So it is a elastic aspect but it's not the intention of the BORRAS report to focus on domicile. It's still focusing on residence but bringing in a coloratura of residence (A colouring of residence) the duration and the regularity.

- If you have a regularity of seven months or five months out of a year does it fall one way or another?

- Duration and regularity of residence is one basket, the other basket is the child's familiar and social integration (this is the key word here). So is the child in Finland merely living in the caravan and moving around or has he been as it were adopted by the step father's sister, integrated into the school? Which is different to merely living in the caravan.

- So it's not going to intention because you can't go to the intention of the child, we cannot go to the way to domicile with a double decker intention and fact, we're not going to nationality either, but we are colouring what habitual residence ought to be understood as. And so we have these two baskets, on the one hand duration and regularity of residence, on the other hand the child's familiar and social integrations. Which are matters of fact, intentions are out here. You may abuse an intent but from the fact.

- It's the redefinition, re-enhancement, what does a habitual word mean? The word habitual mean? If it's residence you could say six months residence, you could prove it with a passport, but now he is trying to avoid the intention which takes it to the legalistic, a scorning domicile by calling it legalistic, because of the intentional element not reducing habitual residence to mere presence but in between presence and residence going to habitual and filling up habitual with these two baskets as we will see.

- So first dealing with duration and regulatory of evidence the Attorney General laid out the factors surrounding duration of the residence, the Attorney General emphasised such determination, obviously depends on the facts of each individual case.

- He's not saying 6 and ½ months per annum as a cut off point and you get it automatically, nor is he saying 4 months is sufficient. So on each individual case there is no prescribed time limit but you have to examine the facts of the case to see the duration and regularity. For the case at hand, case 523/07 the Attorney General considered the children's ages (again facts not intention) and their familiar and familial (or family circumstances), and social circumstances.

- Whilst, this is the contention supported by the ECJ judgement at hand. Whilst habitual residence tolerates interruptions, children lose their previous habitual residence when they return to the original place of residence, is not foreseeable. Look at the animus non redeundi here, not foreseeable. A return to the original place of residence is not foreseeable. So it is trying to create a singular centre of gravity for only one habitual residence, when a return to the previous habitual

residence is not foreseeable so it is copying the logic of the domicile very clearly, on a template of the domicile when the previous habitual residence is not foreseeable that you're going back over there, it is not going to survive, so it falls to desuetude and decay, you generalise a new single habitual residence in your new place because of the facts of duration and regularity of residence.

- Yet then, habitual residence by Brussels II Bis, and this is where they find comfort by quoting this handle in the regulation article (a) because there is a three month period, and that is rather interesting because there you have under article 9(1) when a child moves lawfully (so not abduction), when it's moving with the family all together from one member state to another and acquires a new habitual residence there, the court of the member state of the child's former habitual residence shall by way of exception of article 8 retain a jurisdiction during a three month period following the move.

- So look at how now we are getting time limits defined, during a move from one habitual residence to another, there is this presumption that you carry your original habitual residence to use a domicile of origin analogy for three months. So that if you are just going from Sweden to Finland for two weeks you haven't lost your Swedish habitual residence, if you go for more than three months the doubts start coming up. So there is this three month presumption which creates tolerance for movements of people around member states in the EU which happens as a matter of fact but then that is why he emphasises here that in each case it has to be decided on its own merits of each place but then he clings to article 9 as giving it definition with this three month transition.

- We have a rule to rely on and nor merely have to adjudge the facts in a penumbra (in the dark), so if it's still one month that he's away from Sweden he's still in the three months, he's still carrying the first habitual residence with him. Even if when he goes to Finland he is developing a new habitual residence. There is this presumption at law.

- That can be overturned by the facts, and now we will come to the second basket. In the second basket, and before we go into the second basket the parents intention according to the Attorney General and the ECJ, the parents intention it's only important and you can derive the parent's intention by getting them to the witness box and telling them listen when you went to Finland from Sweden you applied for social housing in Finland, so that does show that you wanted if you were granted social housing, you'd have put anchor in Finland. You integrated in the football club, in the sports club, the child was at school there learning Finnish also, so there was a certain degree of integration over there and the duration was developing.

- So the intent of the parents can be brought in but not decisively as with the domicile definition it plays the role manifested by enrolling the child at school, leasing or purchasing property, officially changing the postal address, also because that shows you intend remaining there not letting the post accumulate behind your door in Sweden.

- Now the second basket, on the second basket, mainly the child's familial and social integration, again a matter of fact, mainly he examined factors surrounding the child's familial and social integration and these factors vary with the child's age but contact with the relatives. He had relatives in Finland, or relatives of his step-father but they are relatives because they are family and they were familial. The school, through the school he generated a network of contacts, of friends, enemies or nuisances as happens with children at school. He is integrating into that network of school, coming back, going for outings, school is a great determinant factor as school occupies so much time per day and it has so much social mixing, generating out of school but related to the school. It's not just 9-4 school there are usually extra-curricular activities, social events, they're mixing much more with their school friends and teachers etc.

- Then, other friends, deriving from the parents are meeting, other friends of parents and they're meeting those friends of parents kids and mixing with them making new friends not only at school. This is integration not remaining in a camper van moving from one village to another every week without this social integration.

- Understand it this way, if the family went to Finland and moved from one village to another with a camper van, not enrolling the child at school not mixing with the relatives in Finland, the child not developing a social network there, then that would be different.

- But enrolling at school, mixing with the family, getting new friends and also taking part in leisure and sports activities, so again yet another new network of friends and then the command of the language, if the child is also learning the language of the new member state then that is rather telling you because it's no longer peripatetic (which means you're just flitting from one village to another as a tourist you're keeping your main centre of interest in your camper van), the parents are driving you from one village to another once a week, you go back then you go back to Sweden, then you go to three other villages, and you go back to Sweden.

- Look at how the facts are going to be utilised for habitual residence. Note the intention, or the intention as demonstrated by facts not the intention proving only the intention by declarations of intent.

- So the facts are given this enormous importance, and the ECJ then comes down with this very definitive point that habitual residence is an EU autonomous concept, so don't mix it up with what habitual residence means in greek law, in Portuguese law, or even in Finnish law, domestic law and this is why the ECJ with the Attorney General were elaborating this enhancement of habitual residence which sadly lacked definition till then. No one was quite sure what it included or what it excluded.

- Look at how in the judgement, you have the ECJ coming down with it's assessment and saying in point two of the judgement, point one says what we were saying before that the taking into care of the child, first the authority used to take care of the child and then they placed the child outside his original home in the foster family is covered by the term civil matters and is not excluded because it was an exclusive tribunals public law decision. It's not in the context of public law rules but in the context of a decision. That's point one of the judgement.

- The second point now regarding the habitual residence's enhanced definition, is that this is the judgement "The concept of 'habitual residence 'under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning (so we have a ruling now, this is the ECJ judgement of habitual residence) that it corresponds to the place which reflects some degree of integration by the child in a social and family environment.

- So habitual residence must be interpreted as meaning that it corresponds to the place which reflects some degree (not even a total degree) look at the relaxed way it's given here, some degree of integration by the child in a social and a family environment

- To that end, in particular the duration, look at how they absorbed the Attorney General's arguments and enveloped them into their own judgement. The Attorney General was very successful here from just putting forward legal arguments he now influenced an ECJ Judgement which is now caselaw.

- Here is a list of factors, the duration, regularity, conditions and reasons for the stay on the territory of the other Member State, conditions and reasons, here when we say reasons look at how it slowly becomes grey into intention because a reason is not given by the child. What is the reason that they were establishing themselves in Finland? The parent will have to make a declaration as to the reason, the child can't so there is this slight element of intent but it comes after duration, irregularity and the conditions of the state and then the reasons and then the family's move to that State, the child's nationality also. So after all these factors, look at how habitual residence is struggling to wriggle in between

nationality and intent in habitual residence. It's a fine micro-analysis of how habitual residence is evolving.

- So nationality isn't kicked out, the intent of domicile is still here covered by the reasons but they don't use intention here, although the Attorney General was speaking of intent also of the parents but here the judges stay further back and only saiid the reason here and then the place and conditions of attendance at school, because even attendance at school can be just one day a week, as if to helping him to catch up with lost time in school in Sweden. So if it's a full week at school, then it's much more integrated, so that's why it is some degree of integration. Linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.

- What we were saying in the two baskets as the Attorney General did. The judges here show they accepted the Attorney General's arguments completely and so they plowed for the habitual residence in Finland, but then they declared that they were only setting the rules of how habitual residence has to be assessed, they held back from deciding this particular case by sending the particular case to the national court again telling them we've given you the parameters of how you ought to decide, but we aren't going to decide on the facts because we are the European Court of Justice and you are the ones abased to check regularity in school, the duration of the residence from evidence of neighbours, memberships of clubs, mixing in sports activities. All that you have to do, we can't do this from the ECJ.

- So what the ECJ does here is set up parameters, something which we academics at this level and jurists and lawyers needed, they needed more amplification of just the two words habitual residence which were too pry, we can't just work with habitual residence as is because it's too open to interpretation. At least with this judgement we have a filling up of the flesh on the bones of the two words habitual residence by showing us which factors have to be taken into consideration to check whether habitual residence is generated or is lacking. So it ends by saying it is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.

- Look at the distinction here that the judges are also doing, they're giving legal parameters and creating law because they are legislating here. This is judicial quasi-legislative powers constitutionally speaking. Because they are enhancing what was not enhanced in the definition in Brussels II Bis, can this be dropped down in a future case? It could but it's so amplified that it's going to be difficult to knock it down. You might knock down a particular element, or re-hold/redefine/refine one of the particular elements in this grand display of all the factors where they say all the circumstances and list the circumstances specifically which must be taken into consideration, so a future case may give

some more bias to the reasons following the domicile's intent or not go there but say the duration has to be a longer duration than merely a couple of months.

- You can envisage of how the evolution of ECJ caselaw can develop, it doesn't mean that we've got this judgement and this is for all of eternity. There maybe other little tweaks here and there but Dr. Sceberras Trigona thinks that this is a breakthrough in showing us at least in so far as this particular regulation is concerned on parental responsibility on children what has to be taken into consideration to understand whether jurisdiction can stand on the child's habitual residence or not.

- This is the case, that the courts, this is the challenge of the mother, she said the courts did not have jurisdiction because she said the child was not habitually resident in Finland but was still resident in Sweden and the courts, the ECJ gave all these factors and then sent it back to the Finnish court to assess the facts of the case and place them into these categories that they had legislated upon over here.

- So Dr. Sceberras Trigona thinks that it is important for us to mull over and consider in greater debt. Then the case moved into protective measures because usually with child custody you usually ask for interim/provisional measures in order also to safeguard the child's psychological wellbeing. Because you cannot depend on a final judgement which will be applicable when the child is older and 18 or whatever, you need a provisional measure in case you are claiming that the child is either. Being abused or has psychological instability where he is, so the provisional measures are very important under Brussels II BIs

- The third question covers provisional measures and here the judgement says the measure must be urgent, so there is a crisis of some sort and so for the judges to give a provisional measure there must be urgency in the case and it must be taken respect of the person's in the member states' concerned and it must be provisional so it can be reviewed according to changing circumstances.

- Then there is another aspect, because of this moving habitual residence from one member state to another, should a court like the Finnish court in this case say look I don't have jurisdiction let me pass jurisdiction to the Swedish court, or shall I just absolve myself, wash my hands off this case and leave it up in the air? No. Brussels II Bis puts a great responsibility on the first court seized, that it shouldn't get into this lawyer's game of referring the case to another court. Imagine there's a whole crisis before this child, there's violence because of the step father in the home and you want to put the child in a foster family and the mother wants the child back with the step father whose a violent chap, and you say no let's got to the Swedish court from the Finnish court.

- So the Brussels II Bis wisely advises that the court first seized remains seized and must inform the other court indicated of what it is doing. So it is a practical administrative way of implementing provisional measures, either where it says that it has no jurisdiction at all, or where it say sit has jurisdiction but it was pleaded that another specific court has jurisdiction but it is not required to transfer the case to another court as that would prolong the psychological torture of the child because the child would be feeling that there is a dispute going on with the aunt, with whom they are in Finland and the step father wants them back to go to Sweden there is also this tension, which is not healthy for the child's best interest.

- That is the main objective of Brussels II Bis. In all it's articles, and in all the hearings of the ECJ and the Courts of each Member State seized by a case of child custody, the focus of attention is the best interest of the child. They must look out for safeguarding the best interest of the child. In a way even over and above legalistic niceties, go for the best interest of the child.

- Even if you're a lawyer it would be advisable that you articulate and frame your arguments under this chateau of the best interest of the child, so you're arguing with the other side but what the other side is saying is not in the best interest of the child because of certain reasons, so that is your leaver in your narrative against the other side. So you must get into this spirit of protecting the best interests of the child. Then if you read it through, there is the establishment of authority in each member state and that central authority will be keeping in touch with other central authorities so there is a creation and establishment of an administrative mechanism where the court is asked to refer to the central authority keeping in touch with other central authorities also. Look at what a network has been established over here.

- Look at the swaddling case which is case 90/1997 and basically it's an anglo-french dispute about who ought to be bearing this fellow swaddling's unemployment benefit for three months, the briths are saying the French should have been paying the unemployment benefit, the ECJ comes down in favour of the French saying no you Briths had pay this unemployment benefit being disputed before me but again it hinges on the definition of habitual residence. Where was he habitually a resident in France or in England. You seem to give a different basis to the jurisdiction of the court at hand.

9th March 2023

Lecture 3.

- Today we will tackle a particular case and in each lecture we're referring to a case, we are invited to download the case from the ECJ website because its useful to go

through the meandering parts of how the judge or judges get to the final conclusions and judgement

- In this particular case C90/1997 Swaddling, this is a case concerning primarily the freedom of movement of workers in the EU and incidentally the right to unemployment benefits, extended to social services rights of which even we in Malta are not facing increasing numbers of cases.
- So the parameters within which this type of case was considered and adjudicated upon are going to be interesting for us in particular again how this critical new term being the personal connecting factor of habitual residence is treated in this case at two levels; how habitual residence under the states legislation being the UK at the time pre-Brexit and habitual residence at community law level.
- So what we will be seeing is a large frame within which everything is happening has to be considered within the general right of freedom of movers of workers, although that in the judgement the judges are saying that they are declining whether to enter into the merits of movement of workers was inhibited or not. But you still feel throughout the case that this theological principal at EU community law is still the main frame within which the whole case is being considered.
- Because the ECJ knows it is creating somme kind of precedent, either soft precedent for moral suasion or hundred precedent congruent the cases are different in facts and in law. As far as moral suasion is concerned if you can find an ECJ judgement to fit your case it does help you to liberate your case to start with in front of the national court and also because you will frighten the national court with a referral to the ECJ where you will then be able to argue; look EJC in previous years you have already passed these judgements which are what I am citing in the national court so try to understand how these liberal referrals can be manipulated by the practitioner in order to persuade the local judge to pay attention to your arguments.
- In this particular case the facts are rather simple and it would seem a bit of an exaggeration that for 8 weeks unemployment benefit, the UK Government through it’s social services commissioner, was rejecting to pay unemployment benefit to Mr. Robert Swaddling maintaining that the French government where he used to work before in France ought to be the relevant government who had to pay the unemployment benefits for these 8 weeks.
- So at issue, we don’t have some millionaire kind of case, it’s 8 weeks unemployment benefit but it’s rather instructed because Mr. Swaddling had been working in the tourism business flipping from England to France working in France, coming back, going back to France to work in the tourism business, so the general frame that Dr. Sceberras Trigona has been mentioning of freedom of

movement of workers, he was enjoying because he was paying his national insurance attributions and he also had rights to noncontributory welfare benefits and both France and England had schemes of granting unemployment benefits but of course there would be this clash as to which states treasury had to be depleted of this puny sum of eight weeks unemployment benefit.

- You will see the UK government's attorney struggling with definitions of habitual residence at the national level in contracts to definitions of habitual residence at the EU level, the autonomous definition although we don't have it, and from the last lecture we said we cannot just transpose it easily under one regulation from another regulation but that was what the court then was balancing out. Namely does the UK government have a correct legal argument to base itself on its own national legislation's definition of habitual residence or should it in this case because the conflict is with France also consider EU autonomous definitions of habitual residence?

- Now, in order to enable us to grasp the fundamentals of this case much quicker, let us see how the British social services commissioner, appellant social services tribunal, attorney general, at each level where Mr. Swaddling was requesting unemployment benefit they were putting forward British legislation on habitual residence which (surprise surprise) was very similar to domicile to a certain extent because they were insisting on a) the person having a settled intention of residing in the United Kingdom, and b) completing an appreciable period of residence there.

- Look at how similar it is to the domicile double decker with intent and fact.

- There were various cases before wherefore Brits' coming back to Britain they were holding that it was necessary to have between 3-6 months factual residence in the UK, and that for foreigners, it would be 12 months or more might be required to demonstrate this appreciable period of residence in the UK.

- Now what we have here, is that Mr. Swaddling was claiming the benefits obviously in Britain but he said it is not only British law which applied then pre-Brexit but also community law and there was regulation 1408/71 as subsequent amended many times organising coordination of social security schemes between the member states. So since this was an EU regulation, it's own definition of habitual residence had to prevail over the national legislation inside the UK.

- We want to see the clash between national legislation and the supervening EU legislation and remember in the EU you have an autonomous level of law, an order of law which is autonomous and prevails over domestic legislation wherever there is a conflict either in the law or in its interpretation.

- Under Article 10a(1) and (2) of Regulation No 1408/71:

- `1. Notwithstanding the provisions of Article 10 and Title III, persons to whom this regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.

- 2. The institution of a Member State under whose legislation entitlement to benefits covered by paragraph 1 is subject to the completion of periods of employment, self-employment or residence shall regard, to the extent necessary, periods of employment, self-employment or residence completed in the territory of any other Member State as periods completed in the territory of the first Member State.'

- The ECJ held that under article 10(a), the term habitual reside should be understood as the place where the habitual centres of interest is to be found.

- So look at this different appreciation of the same two words habitual residence between the internal British understanding of habitual residence in their own law because they had then adopted it into their own law being regular members of the EU, but they were still giving it something akin to domicile by introducing two elements only; the settled intent and the appreciable period of time in fact residing there.

- This is very very very close to domicile, as if after 200 years of using domicile as a personal connecting factor they couldn’t get unstuck and so they had a vestige of it though not as hard.

- Yet now look at the EU definition which spans to all circumstances and starts off from a concept which is akin of the American restatements namely the centre of interests, and when you start off from the centre of interests you go into a whole, a multilayered analysis of the whole circumstances where intent becomes less and less and less significant and definitely not intrinsic and the same with facts not being the factual period of time not being intrinsic or fundamental but in spanning out one considers what the employed persons family situation is first, the reasons which led him to move and move again, the length and continuity of his residence overseas and in the returning state, the fact that he is in stable employment and his intention as it appears from all the above circumstances

- So already, if we want to count factors, in contrast to the British definition of the same term habitual residence in their own national legislation where they drag as

it were the old concept of intention and fact into habitual residence, we have only two factors and the two are considered intrinsic, we now move to a totally different paradigm, a paradigm where the central concept is the person's centre of interest and there are at least these five criteria to explain centre of interest.

- Namely the employed person's family situation, the reasons which lead him to move outward from the country and back to the country, the length of continuity overseas and back home, the fact that he is in stable employment over seas and coming back and the intent as it appears from all circumstances.

- You will find this tipping factor because obviously the ECJ was relying much more on its own autonomous definition than on the British definition, in the final judgement the ECJ itself goes on to say that we cannot allow a merely English interpretation of habitual residence under it's own law that eight weeks specifically between the 9th January 1995 to the 3rd March 1995 is not a sufficient or appreciable period of residence in the UK and therefore habitual residence did not start.Following article 10(a) of the regulation 1048/71, in the case of a person who has exercised his freedom of movement to establish himself in another member state of the EU, in which he has worked as we were saying Swaddling was working in the tourism business in France and generated habitual residence there because he was working for a couple of years.

- When he returned to his member state of origin. The UK where his family lives and he lived with his brother in order to seek work and he got work over there, he could not bedewed this employment benefit because he shifted his centre of interests. So try and see how this contracts especially for us having got used to this double decker definition of domicile, it starts becoming a bit more difficult especially in the regulations which don't have an explicit time limit.

- We will be seeing next week in Brussels II Bis, in cases of divorce etc where there are explicit time limits. So again different regulations, different interpretations. But in a number of others we don't have explicit time limits, and so we need guidance as to which factors, which criteria are we going to rely upon in order to assess whether habitual residence has kicked in or cannot be said to be applicable?

- The UK government in this case maintained that Mr. Swaddling should have been able even under the regulation 1408/71, to obtain unemployment benefit from France under French legislation.

- So the Anglo-French traditional rivalry is reflected in this case where the British attorney general is pushing this obligation of paying unemployment benefit onto the French government.

- They are saying even though his employer has not paid a substantial amount of his national insurance contributions. Unemployment benefit was non contributory and so the French government should have been paying ii because he was habitually resident over there and when he left France and went to Britain from the 9th January 1995 till 3rd march 1995 he had not yet generated an appreciable period of residence in the UK.

- So here you have a rather slippery discussion because we're speaking only of 8 weeks, does habitual residence start up immediately because he came back to his country of origin and came back to live with his family? So look at the two perspectives that we are trying to contrast, because there is a contrast.

- First a derivative from the old domicile, the settled intention of residing. But the British Attorney General on behalf of the UK government said yes there was the intention of residing but there was not a factual appreciable period of time of residence, he could have left after 3-4 weeks why should we be paying when he should have applied for the French social services to get his unemployment benefit for these eight weeks he is claiming but in order to fill up the gap in a decided matter the ECJ came down with its concept totally different now by saying habitual residence under the EU regulation (therefore under the EU autonomous definition) concentrates on the person's centre of interest and it is clear from the case that he had shifted his centre of interest back to England, perhaps they could have added if they wanted to be cheeky to the Brits' that if one wanted to follow the old concept of domicile and if one could hold that when Swaddling went to work in France he had adopted a domicile of choice in France, on returning to England according to the old British peculiar doctrine of the rival of domicile of origin his domicile of origin would have sprung up immediately in between domicile of choice and the future domicile of choice. So even there the UK Attorney General in trying to still claim old vestiges from the theory of domicile was on a very week platform, because under domicile you'd say he came back to Britain to his family with a settled intent to remain here and his domicile of origin revives automatically.

- Even if in a year's time he goes back to France, Germany, the US then we will see if this domicile of choice is affected in a new country. So we will see the contrast between the domicile/definition on the one hand contact now. With this totally new approach of the habitual centre of interests. Where is his centre of interests?

- It's more factual and intent is only given ⅕ meaning and significance, not ½ if you want to quantify it it's gone down to 20% from 50% under domicile, although of course even in domicile it's not just 50% you can add it to another 50% if you're without it you get 0, so even on the numbers you can't quantify it as simply as that

so what the judgement says at the end is that the British social services commissioner could not preclude Mr. Swaddling from being paid his unemployment benefit because under national law, not under EU law, he had not yet generated an appreciable period of time to generate habitual residence under national UK law because the ECJ is holding that under EU law we consider the habitual centre of interest of the person as demonstrated by returning to his member state of origin, living with his family, seeking work there, so all these go into a mix up as it where of both fact and intent not as separate tranches under the old domicile considerations that we were traditionally doing.

- So what the judgement tells us is that they are striking down the judgement from the British appellant court to refuse to pay this British employment benefit and do not go to follow the British appellant courts suggestion that it's the French social services department that should pay as it is entitled to do both under the French law and the regulation.

- So the British Attorney General was also arguing from the perspective of article 69 of the EU regulation that it was the French who should be paying. Now whether the EJC considered that this would be delaying and justice delayed is justice denied, if they had supported the British Attorney General's suggestion that Swaddling should apply under the French, but he was already residing in Britain, so it would mean getting a French lawyer to apply under French social services, wasting more time without basic unemployment benefit when all these considerations played a part it might have had some influence. The fact that they were in England and EU Law should apply here the EU should pay, although the British Attorney General put up a very stiff and remarkably erudite defence of their rejection to pay the unemployment benefit by saying look the French should pay because he was employed there is is unemployed here, the French have a system of unemployment benefit at their national level of law and article 69 also says that the member state that was working should be paying this.

  - <u>Article 69.</u>

  - Conditions and limits for the retention of the right to benefits

  - **69**. 1. An employed or self-employed person who is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the following conditions and within the following limits:

  - (a) Before his departure, he must have been registered as a person seeking work and have remained available to the employment services of the competent

State for at least four weeks after becoming unemployed, However, the competent services or insti- tutions may authorize his departure before such time has expired.

- (b) He must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organized therein. This condition shall be considered satisfied for the period before registration if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions.

- (c) Entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of that State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged.

- 2. If the person concerned returns to the competent State before the expiry of the period during which he is entitled to benefits under the provisions of paragraph 1 (c), he shall continue to be entitled to benefits under the legislation of that State; he shall lose all entitlement to benefits under the legislation of the competent State if he does not return there before the expiry of that period. In exceptional cases, this time limit may be extended by the competent services or institutions.

- 3. The provisions of paragraph 1 may be invoked only once between two periods of employment.

- Look at how closes these cases are, they're not so black and white cases. Dr. Sceberras Trigona would add it could have gone either way it's not as crisp and clear cut saying this is 90% for and 10% against, no there're a number of slippery points as we go along and it would be useful to write for ourselves if we were the lawyer for the British Government or if we were the lawyer for Mr. Swaddling because the British attorney general was arguing from the basis of British national law income support regulations of 18/7 where there is a clear distinction between persons from abroad who are habitually resident and those who are not habitually residents in the UK.

- So by 1987 British law, because of the continued membership of the EU started adopting these definitions coming in from the EU legal draftsmen and so they

have in their own law in the UK this distinction from persons from abroad and persons not from abroad.

- The argument by the EU was that why are you putting Mr. Swaddling into the persons from abroad? This is pre-judgement issue because persons from abroad are not habitually resident in the UK so in a circular argument you are creating a vicious circle pre-determining what you locally are set out to pre-determine. This is rather interesting by way of legal logic.

- When moving to the facts, Mr. Swaddling worked in the tourist industry in France from 80-88' he continued to pay UK national insurance contributions his work entailed frequent visits and stays in France and he only returned to the UK occasionally. So his main centre of interest had moved over to France. When he came back in January 1995 because there was a collapse of his employers' business in France, so it wasn't even out of choice as it were he immediately applied for employment benefits in the UK and the UK rejected his plea at the different layers of application which can be very bureaucratic, time consuming and very expensive. If you need you employment benefit for survival. This is not a case of succession where you or your cousins are going to inherit a lovely fortune and good luck to whoever wins it may he enjoy the fortune, but it's for your survival because you're out of work, your employers business has collapsed in Franc, you are living with your family, and you applied for your legally entitled unemployment benefit and they say no go apply for it in France.

- There is also this aspect that should be kept in mind but the adjudication office for the Social Services in the UK held that in the UK Mr. Swaddling didn't meet the habitual residence requirement prescribed by national legislation as he was classed as a person from abroad. These are the twists of legalisms that we face.

- Now the appeal tribunal because he was going up to the appeals, the appeal tribunal allowed Mr. Swaddling's appeal on the ground that he had shown the necessary intention to establish his habitual residence in the UK on the 9th of January 1995, on the day he applied for unemployment benefit and income support.

- So the more difficult factor, the intention, they accepted but they said on the other hand since intention isn't the only element in habitual residence and we need an appreciable period of residence in the UK, definitely on his arrival of Britain on the 9th of January, in one day he didn't have habitual residence and so the appreciable period of residence was considered as not having been honoured and they also stuck their necks out in a way at the level of the social services tribunal by saying 8 weeks after his return here, from the 3rd March, he would have generated habitual residence but not from the first day.

- So look at the fine pealing of day by day is being exercised here so basically they were saying yes we'll give you unemployment benefit but not from the 8 weeks form the day you will arrive here after that eight weeks will be considered as an appreciable period of time.

- This is why in considering community legislation, the ECJ dismisses the British attorney generals reference to article 69 of the regulation requesting France to pay the unemployment benefit of these eight weeks, and it does a logical tour de force, by saying that the British government, the British department of social services, could not under community legislation preclude the critical word in the judgement is preclude a person who has moved his centre of interest to Britain, from enjoying all his unemployment benefits including these 8 weeks which the British social services commissioner and tribunal and appellant tribunal rejected.

- So the ECJ is saying you cannot preclude it because of your own internal definition of an appreciable period of time apart from the intent, and this was on the referral by Swaddling to the ECJ and as usual (go and check what question was referred to the ECJ that is the most critical key to understanding what the judge's remit was in that judgement, the judges are not going to go arbiter, out of point, they have a reference from a local member state's court with 3 questions and they will answer those questions to the best of their supreme ability but they are not going to be judging the case they are only asked to answer the referred questions. So in trying to understand an EJC judgement go and check first what their referral was about and then see how the judgement answers that question more or less but a lot seem to presume that the ECJ is a kind of an appellant court on the whole case or re-opening the whole case from the beginning, No. It's a much tighter narrow window that the ECJ is considering it's only considering one simple question and usually it's a matter of EU law. One doesn't want to be asked about national law but an EU law and a conflict with a national law.

- The question was, in circumstances, as the question starts opening up to create a generalisation which can be adduced in future cases. In circumstances where a person has worked and been habitually resident in one member state, and has then exercised their EU right to freedom of movement for workers to move to another member state, where the person has worked and become habitually resident, as a British citizen he left Britain to work in France and became habitually resident in France over a number of years and finally returns to the first member state in order to seek work.

- Question; is it compatible with the requirements of article 48 of the Rome Treaty (namely freedom of movement for workers) for the first member state to impose a condition of habitual residence in that state involving the existence of "an appreciable period of residence in that state" for entitlement to a general

noncontributory means tested states benefit with the characteristics of British income support.

- Look at how this starts developing guidance for later cases. Because workers are moving throughout the EU on a daily basis and we've got a lot working here who are starting these cases here also against our departments of social services and so the analogy is in your face and our social services lawyers has to get to know these cases in order to reject dishing out that much money from our budget. As the British were trying to do and shift them onto the French so there's this underlying pushing away obligations of paying unemployment benefit when perhaps they might be frivolous, but we're talking about basic sustenance, income support, this is not as we said before some fantastic inheritance of a fortune which is over and above your daily sustenance, so it has to be much more delicately assessed.

- The judgement says whilst the question concerns the interpretation of article 48 it must first be determined (so it first puts 48 aside but obviously its the main frame of the case, because what it is going to be judging here is going to effect the movement of workers all over). If suddenly they had said no we have to go back to France to get to France other movement of workers, which is one of the four freedoms, apart from the fifth freedom which is the freedom of mobility of judgements of the EU under Private international law, workers would not go and work in other member states because they would feel vulnerable having their boss to return home and not get unemployment benefit for at least for the first 8 weeks like the British attorney general was arguing.

  - Article 48.

  - **48**. 1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.

  - 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

  - 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

  - (a) to accept offers of employment actually made;

  - (b) to move freely within the territory of Member States for this purpose;

- (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

- (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

- 4. The provisions of this Article shall not apply to employment in the public service

- So, this is where then the regulation 1408/71 comes in because it coordinates social security schemes in the various member states. This is where in the ECJ judgement they emphasise the autonomous definition of habitual residence as prevailing over the national member states's own definition.

- If also pigeon holes classifies categorises this particular unemployment benefit and income support by referring to the annex of the regulation 1408/71, referred to in 10(a) the coordination rules because income support is classified there as a special non contributory benefit and it also quotes previous cases where this was acknowledged under the autonomous definition of the EU community law.

- Now, this is where usually the ECJ doesn't come down and clamp as it where national member sates but in this particular case it does because in paragraph 26, it states that although in the UK habitual residence for income support has been interpreted as having a) the settled intention of residing in the UK which is not being disputed and b) has resided there for a appreciate period, it adds that also according to British case law the appreciable period varied according to the circumstances of each individual case.

- This is where then, it comes to habitual residence having community wide meaning pursuant to article 1(h) of regulation 1408/71.

  - Article 1 (10) (15) Definitions

  - For the purpose of this Regulation:

  - (h) residence means habitual residence;

- And expands on this by brining in what we've been talking about a totally different paradigm to characterise habitual residence by introducing the concept of the habitual centre of interests, and subdividing the central concept of habitual centre of interest into

- The employed person's family situation
- The reasons which have lead to move outwards and back
- The length and continuity of his residence
- The fact that he is in stable employment
- His intention as it appears from all the circumstances

- And this is where then it does dismiss the British repeated judgements from the lowest level, to the medium level, to the appellant tribunal level, rejecting Swaddling's request for unemployment benefit by saying the length of residence in the Member State in which payment of the benefit at issue is sought, cannot be regarded as an intrinsic element of the concept of residence within the meaning of article 10(a) of the EU regulation 1408/71
- This is where it is kicking out of the widow, the British construct a la domicile, of saying look we have two factors which are necessary for habitual residence, intent and an appreciable period of time. The ECJ said intent is only one of at least five factors deemed from all circumstances of the case and anyway it cannot be held to be an intrinsic element so by dismissing it as not being an intrinsic element it is free to quash the British judgement by saying he had moved his centre of interests to the UK from the moment he went back to the UK, seeking work, living with his family, with a settled intention of staying there.
- Look at how this what we used to think of as being the easiest part of domicile, the facts, are being diminished to ⅕ and then in the judgement itself in paragraph 30 holding that it is not an intrinsic element it is not a sine qua non. So not only is it diminished to 20 but you can even do without it, it's not 20 but it's absolutely necessary and one has to show it as with domicile where both intent and fact are necessary although they are at 50% say of the proof, you need both at the same time to be applicable.
- So look at how here we have an elaboration of habitual residence, really stretching it in a way to beyond belief. By kicking out our trust wide knowledge of our personal connecting factor of domicile as having facts as an intrinsic element in generating domicile. Here even the facts are being kicked out as not being an intrinsic element in generating habitual residence for the purposes of unemployment benefit.

- Now we will be seeing next week in cases of divorce we want to be seeing how this logic is developed by the ECJ.

16th March 2023

Lecture 4.

- Today we will tackle again this particular personal connecting factor habitual residence.

  - In a regulation, which is super abundant in definitions for a change, look at the contrast with the previous regulations we were considering, now the legislator got bold and legislated with one big caveat (nota bene) that obviously the definitions of habitual residence in this regulation number 2201/2003, are only applicable under this regulation. Brussels II, Brussels II Bis, and this has been recast effective last August, 1st August 2022 as regulation 2019/1111 but the recast doesn't change the focus of today's lecture because the recast is mainly on part two of the regulation concerned with child custody, child abduction, what we were considering two lectures ago.

  - Today we will focus on the first part of Brussels II bis recast. Namely the part on jurisdiction, so focus jurisdiction is what we are using the connecting factor for, for cases of divorce, legal separation or marriage annulment.

  - Dr Sceberras Trigona was saying at the outset that we have a super abundance of semi definitions of habitual residence or qualifications of habitual residence in article 3(1)(a) which gives six headings and (b) gives the seventh heading.

  - Let's consider how these variations of habitual residence are spelled out by the legislation in article 3(1)(a) and (b) of the regulation Brussels II bis recast.

  - In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the member state, in whose territory (a) 1 the spouses were last habitually resident in so far as one of them still resides there. So this is in the case of the spouses are habitually resident, heading (1) or the spouses were last habitually resident in so far as one of them still resides there (1) and (2) and this is the case for joint applications.

  - The respondent under (3), under the third heading is habitually resident, so the actor sues the respondent where the respondent is habitually resident.

  - (4) in the event of a joint application, either of the spouses is habitually resident or (5) the applicant and once we come to applicant remember it should ring a bell, potential forum shopping because if the applicant is given leeway, the defendant/the respondent might not quite know where he is going to be sued. So look at the elbowroom that this gives the applicant to forum shop in which court to start his divorce proceedings, legal annulment proceedings etc.

- So ding get that bell going as soon as you see the applicant can find jurisdiction in that court where he, the applicant is habitually resident, if he or she resided there for at least a year immediately before the application is made, so we have a definition of a year, finally because until today in our previous analysis of the definitions of habitual residence we didn't know how much to stretch the lapse of time, three months, six months, nine months, one year, two years, but here we have that the applicant can sue in the courts of the member state where he is habitually resident if he or she resided there a year immediately before the application was made or the (6) heading for jurisdiction, again for the applicant so again the applicant is given elbowroom to choose the court, and here under (6) the applicant, the courts of the member state where the applicant is habitually resident if he or she resided there for at least 6 months immediately before the application is made, but there is a qualification and he is a national of a member state.

- Remember the original question how has habitual evidence been pushed aside instead of in lear of nationality and domicile as personal connecting factors, so here the shorter period of 6 months is qualified by nationality. Look at this blending that we have here, it's not merely nationality, nationality is now toned down and then before the new recast of last August we had or in the case of the UK and Ireland has his or her domicile there, because of Brexit the reference to domicile was kicked out and the exception was only for UK and Ireland not to Cyprus and Malta, although we still follow domicile to a very great extent now we have been enveloped into this habitual residence without reservation for our domicile bias following English PIL.

- Then 7) much more manifestly because it is under (b), its the only one under (b), the jurisdiction will lie on the courts of a member state with the nationality of both spouses, again nationality is coming to the fore of both spouses, so whether is the nationality of both spouses, irrelevant, totally irrelevant from whether you reside or habitually reside that court will have jurisdiction so look at this now zooming out a little bit, mull over it.

- Has nationality been dumped? Not quite, nationality is still here alive and kicking as a potential personal connecting factor to establish jurisdiction and one point about article 3, is that these seven headings are not in hierarchical order, these seven headings are not in hierarchical order. So the fact that nationality, double nationality is in (1)(b) doesn't mean it's at the bottom after having exhausted all the previous six headings you don't have to go through each of those and exhaust them to ground your lawsuit on the double nationality of the spouses under (1)(b) or under (6) which is (1)(a)(6). Dr Sceberras Trigona is giving the numbers but the law doesn't have numbers, but it is easier to refer to 5th indent and 6th indent under

(1)(a), (1)(a) has six indents and (1)(b) has one indent, so that makes seven headings in all as the basis for jurisdiction.

- The main point about the seven headings again is that they are not hierarchical. So you don't have to, if you pick on jurisdiction under indent (5) you don't have to go through all the previous (4) and say this does not apply, this does not apply, this does not apply for the following reasons, and therefore indent (5) applies. You don't have to exhaust the previous ones you can pick and choose so this makes it easier for the forum shopper therefore, because the forum shopper from indent (5) can jack himself up to indent (1) as it where in a hierarchical order of rounds and not stay waiting until his clever lawyer finds skilful arguments how to exhaust (1), (2), (3), (4), and say ah (5) applies, the courts will have jurisdiction. He can pick on indent (5) ground his jurisdiction on that and submit his application in the registry of the court and start off divorce proceedings with the first come rule of Owusu vs Jackson, (which we were meant to cover last year with all it's complications) we won't go.

- So there is an invitation to forum shoppers because whoever files first, ousts the other and here in divorce proceedings especially which can be quite acrimonious, emotion can be as huge a force as money and it's also tainted with money sometimes but the emotional charge you see in clients in a divorce discussion in front of you in your office, can be as heavy as a businessman's argument on how much money is still owed, and this argument and the other, so whoever goes and files first, if jurisdiction is accepted by that court will stop the other partner/wife from filing in her preferred court because then there is the list alibi pendence, rule that this court has been seized it is first and all the others should stop proceedings or decline proceedings so the race to be first to the court is in fact enabled by the seven headings not having a hierarchy and allowing the forum shopper to pick and choose his preferred court because he knows in that court he is going to get a better chance with his argument and he wants to prevent say his wife from suing from another court, where he would not stand as good a change in presenting his own argument. This is way that goes on in the lawyer's office, it's not just an automatic filing under 7 headings, which is the preferred court? Shall we wait and hold back and let the other party start the proceedings one divorced because we know she is trapped because of her habitual residence there, her nationality there, and those courts are suitable for us so we won't start let her start, or else it's better if we start because only we can go to this court, she can't even use that so let's go to this court because under this court's rules I get more advantages on the evidence, on the fact and because of the precedence on that court so look at the cost benefit analysis of who starts and if it is that they both feel that they should start it is a race to the court, and clearly the clock and the date matter.

- So if you're a lazy lawyer, you can make your client lose the case because the other lawyer will have filed in another jurisdiction before you, if you say no it's Thursday I'll leave it till tomorrow or next week, then you wake up on Monday and you see that the other lawyer has filed in Poland already on Friday, and you're out you cant go against that. What do you tell your client?

- You've got these seven headings of jurisdiction on divorce, legal separation and annulment and it is not a hierarchical set of seven headings and in fact because you have in indent (5) and (6) the applicant, it is giving the applicant the right to sue which is contrary to the general rule of jurisdiction in Brussels I recast, actur sequitur forum rei that you sue in the domicile of the defendant.

- So it's an inversion of the generally established rule and it does create some problems because a defendant will suddenly fined himself or herself sued in a court she never expected to sued in, and obviously she would be rushing to her lawyer to find how best to protect her rights. So look at this turning of the tables in jurisdiction that we have here apart from the personal connecting factor of habitual residence that we'll delve into quite deeply soon, but, look at how the general presumption of actor sequitur forum rei is topsy turvy over here, because it's the actor who has the right to sue in the courts of the member state where he or she are or is habitually resident.

- Now we will shift the attention to a part breaking case based on article 3 which arose in England in the English high court, it's Marinos vs Marinos, 2007, EWHC 2047 family court.

- It was one of the first judgements dealing with habitual residence under Brussels II revised as it was then not recast as it is now, and by the way in the recast of last August, basically on this article 3 the only changes are that they dropped because of Brexit the references to the UK and Ireland domicile in indent 6 and in 7 again in the case of UK and Ireland domicile, so it is an inevitable amendment because of Brexit.

- In Marinos vs Marinos let us see the facts, we have here a case where a husband who was Greek, Marinos was married to an English lady after they met and married in 1992, they had two children, one in 1996 and one in 2000. In 2002 (the time line is important) the parties moved from England to Greece, they enrolled both children in schools in Greece, remember this factor?

- The husband took up a position with a medical centre, a job in Athens and the wife returned to her part time work as cabin crew with British airways, in July 2003, on a 33% contract, 3 weeks working in a 9 week period, so on, off, on, off, she would travel from Athens to London there after from London as her flights were

appropriate in 2006 she increased her contract from 33% to 50% four weeks working in an eight week period for fixed 6 months terms. She was also following a part time law degree, LL.B, which she had started before moving to Greece and then she was informed in 2004 that she couldn't defer the course another year according to regulations so she completed her part time course in Birmingham from 2004 to 2006.

- She kept a room in her mothers' house which she used for studying and for when she visited her parents either when working or also with the children on holiday. The parties separated de facto 31st January 2007, the wife returned to England with the two children who started new schools in England on the 5th February, remember the dates from Swaddling are important, 5th February 2007, the wife and the children lived in a hotel until the 6th of March 2007, when they moved back into the parties London property once the tenants had vacated.

- In 2004 she could not defer her law course, so she competed her course in Birmingham between 2004 and 2006 and some more factors to understand where her centre of interest lies, she had a room kept in her parents home which she used for studying so that's a very restricted intention, when she visited her parents also either for working or also taking the children, though on holiday but the parties did separate de facto on the 31st January 2007 when the wife returned to England with the two children and she enrolled them in schools on England on the 5th of February 2007, they lived in a hotel till the 6th of march 2007 then they moved into the parties London property because the tenants by then had vacated.

- Now here we start with the action, the wife submitted her divorce petition on the 1st February 2007, she submitted it the day after they separated. The husband disputed that the English court, and she submitted her suit for divorce in the English courts, her husband disputed jurisdiction existed and he sought to stay proceedings, he also issued his own divorce proceedings in Greece but later, the wife had issued first in time her petition and therefore hers would take priority if there was jurisdiction so she beat him in the race to courts.

- Now, let's see the basis if the jurisdiction, the court has jurisdiction it had to consider whether it had jurisdiction on the basis of the wife's submission which was grounded on indent number 6 and indent number 6, remember, gave her of the 7 grounds, number 6 gave her, the applicant therefore the forum shopper, the courts will have jurisdiction if the applicant is habitually resident if he or she resided there for at least 6 months immediately before the application was made and is either a national of member state or in the case of UK and Ireland he or she has his or her domicile over there, the husband challenged the jurisdiction on the English court on the basis that (and this is a critical point) that the husband and wife were habitually resident in Greece and she did not have habitual resident

as it required under indent 6 in England, he did not contest domicile, because that was much more slippery, whether they had gone to Greece and she had lost her domicile of origin and she adopted her domicile of choice, he led that because the domicile of origin is so strong that it might not have been quashed and supplanted by a new domicile of choice in Greece but he contested on what appeared to be the softer ground that they had been contested on what appeared to be a softer ground that they were habitually resident in Greece, she had just arrived in England a day before, just one day before, now the judgement amazingly favoured the wife, (we will digress a little bit before going into the arguments in the judgement) because amongst practitioners this is considered as a riklam, as an advert to come for divorce proceedings in England because they will accept jurisdiction on the flimsiest of arguments, so it is an advert for forum shoppers, if they can somehow ground their arguments to give jurisdiction to an English court, welcome it's good for tourism you stay in hotels you engage English always and you might even buy more property over here so there is this general criticism, at first it used to be amongst practitioners but now it is seeping through learned journals, you find comments that this judgement was an attempt to make London the divorce capital of the world, it's good business in other words. Law is also business so we're not digressing too much.

- Let's see the judgement, the judgement is based on four aspects.
  - First aspect, judge Munby that habitual residence is an EU concept and therefore we have to look at the EU autonomous meaning whatever our divorce and matrimonial law proceedings say we have to check what habitual residence in the EU is understood as constituting.
  - Second, a person can only have one habitual residence at any one time for the purposes of the autonomous definition so here we're getting more aspects of the definition of habitual residence being evolved through these judgements.
  - Third, and this is the most explosive part, and we'll go into it, the word resided in the sixth indent means resided, that sounds truistic but it's the pivot on which the whole judgement turns around, resided means resided and it does not mean habitual resided.
  - Fourth in appropriate circumstances, a person can acquire a new habitual residence under the autonomous definition EU very very quickly, and in fact he found for the wife as having acquired habitual residence in 24 hours, how did he come to this conclusion?
- Let's see his zig-zagging reasoning to come to this destination.

- 1) habitual residence the autonomous definition, he cited the ECJ in Hagen vs Einfuhr 49/71, and he quoted this bit of that judgement, “terms used in community law must be uniformly interpreted and implemented throughout the community, except when an express or implied reference is made to national law.” This is upholding the autonomous nature of EU community law phrases, terms, definitions and then he quotes Raiden and Jackson on divorce and family matters “In European Community law habitual residence has a community wide meaning and will be determined by the judgements of European Court of Justice.” So he’s educing one after the other his authority to come after his judgement, then he noted that the autonomous concept of habitual residence had also been considered in English courts and he quotes LK of 2006 where the wife has petitioned for divorce on the basis that both parties were habitually resident in the same jurisdiction and the judge had stated that there is of course no need for the concepts to be the same in domestic law and in EU law. So they can differ and EU law will be prevailing, then he goes back, look at the method, first the autonomous aspect then the judgements as the source, then that they can differ between EU law and domestic law, now he goes to the BORRAS report as the official journals juridical explanation of why when they were preparing Brussels II Dr. Borras had written although the possibility of including a provision determining habitual residence similar to the one in article 52 of the Brussels convention was discussed, in the end it was decided not to insert any specific provision on the matter, so all our efforts at trying to find out the different interpretations of habitual residence in the different applications, has been deliberately forced on us, Borras is revealing that in the discussion amongst the legal draftsmen they were trying to say shall we introduce a uniform habitual residence definition in Brussels II and then carry on in Brussels II, Rome I Rome II Rome III?

  - Article 52.

  - **52**. If a party is not domiciled in the State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Contracting State, the court shall apply the law of that State.

- No they said we did that in the Brussels convention in 1968 copied in 1998 with the Brussels I and then Recast 2005 but now we’re not doing it and now we are saying although not applicable under the 1968 Brussels convention particular account was taken of the definition given on numerous occasions by the ECJ, so again without the report itself giving the definition, without the legal draftsman putting a definition into the regulation as law they keep referring to what the ECJ repeats, and remember what we did that habitual residence is “the place where the person has established on a fixed basis his permanent or habitual centre of interest, the centre of interest approach”, this is the second US restatement, the

centre of interest approach, with all the relevant facts being taken into account for the purpose of determining such residence, and remember from Swaddling, where the fact of the residence is not an intrinsic element, unlike domicile where you need the intent and the facts to be together for an appeasable period of time.

- So it's from the consideration of all the circumstances of the facts without the special waiting for any one of them. Then he says that this is also supported by the Court de Cassation in France, where they held that habitual residence is the place where the party involved has fixed with the wish to vest it with a stable character the permanent centre of interest approach, the centre of interest approach is being pushed.

- The second argument in the judgement Marinos vs Marinos, habitual residence, one country or two? Can you have two habitual residences and he quotes Echini vs Echini from the high court of england in the year 2001 where it was being submitted that you could potentially have two residences if you divided your time merely equally between two countries but the court had come down and held there that it was not possible to have more than one habitual residence at any one moment in time and this is also to add legal certainty which is intended by EU legislators in unifying the internal rules of PIL not to create more uncertainty but to increase uncertainty.

- Three is where the explosion starts, reside or habitually reside over the relevant period? The six month period of residence in indent 6 according to Dicey and Morris no less, look at this judge throws Dicey and Morris out of the window, the judge here in Marinos vs Marinos disagrees completely with Dicey and Morris who held that in the 6 month period which is required before habitual residence starts off the judge interprets that as mere ordinary residence. Dicey and Morris hold that the habitual residence of the applicant is not in itself a sufficient basis for jurisdiction it must be supplemented by the applicant\s habitual residence for at least 6 months but judge Munby says the law doesn't say habitual residence for six months, let's read the law again and see how able this judge is in splitting hairs if you like, in indent 6 it says the courts of that member state will have jurisdiction if the applicant is habitually resident if he or she resided there not habitually resided there.

- Indent 6 is saying the applicant is habitually resident if he or she resided there for at least six months immediately before, not habitually resided there and Dicey and Morris add habitually resided there and Munby says who asked Dicey and Morris to add the word habitually where the legislator himself did not add it so it takes some guts also to dismiss Dicey and Morris in a judgement but it is pinpointing here that look there is no habitual residence during the 6 months which says residence, ordinarily residence, to-ing and fro-ing.

- So here this is showing that as far as Dicey and Morris are concerned, Munby says these statements are totally incorrect at law. Now what he says here is that the regulation means what it says and says what it means, resided means just that, it only refers to mere residence, it does not connote habitual residence, so he's building his whole judgement on the fact that there is only the word resided in indent 6 and so he says the regulation, now the interpretation starts the regulation clearly distinguishes between two concepts of residence and habitual residence and the words habitually reside could very easily have been used again in place of merely reside ubi lex voluit dixit, we usually maintain in the same way that in the very beginning of indent 6 it says the applicant is habitually resident, if he or she resided, they could have repeated if he or she habitually resided so the fact that it is not repeated is deliberate, so who are we as mere judges interpreting the regulation to connote in the second reside that there is a hidden habitually resided when it's not there and it's in the first bit but not the second bit.

- So Munby is building a strong argument here. He is saying that the words habitually reside at the beginning of indent six could very easily have been repeated and used in the place of merely reside, could have written habitually reside again there in order to make this point that the husband was making to show that there was no habitual residence in the UK.

- And so he concludes that therefore in order to satisfy the requirements around the applicant had to show habitual residence on a particular day, the day of submitting the lawsuit. An ordinary residence in the previous six months. Coming and going whether it was for studying, to see her parents, there was this ordinary residence of coming and going and so the residence of the previous six months need not necessarily been habitual during the immediately preceding period, this is the explosive part of the judgement and you can see how it created a lot of chatter throughout the EU because they weren't too sure whether this was really intended to be so and whether this smart English judge found a way of making London the divorce capital instead of all the other 27/28 capitals they were losing business because of this British judge's interpretation and judgement.

- And so when he comes to the fourth element, the lapse of time, it's much more comfortable for him to argue over here because he says look how long is a period of time usually necessary? Is it weeks? Is it months? And he says the lapse of time depends on which regulation you're interpreting it under and you're interpreting it under this regulation and you have to see even what the settled purpose of the applicant is.

- Clearly coming back with the children departing de-facto, submitting a de-jure application for divorce is acquiring habitual residence in 24 hours amazingly enough, and so Munby relies on LK vs K English High Court 2006, where the

judge Singer had also started opening the path towards this judgement by saying and obviously he quotes him that one can in appropriate circumstances establish habitual residence very quickly, in paragraphs 36 and 44 of LK vs K, Singer held the European authorities tend to demonstrate in my judgement far less if any emphasis on the ingredients which English law has developed that there needs to pass an appreciable time before a person can become established as a habitual resident of this country. Adding, although length of time clearly can be a relevant factor it is not a conclusive factor. Nor is there any particular period set down as a minimum. So Munby in Marinos vs Marinos quotes Singer in LK vs K by saying look, even a previous judge has already opened the way that the appreciable period of time can be very very quickly and then he settled with Singer's definition of habitual residence from the BORRAS report "the verb used is established and all relevant factors are to be taken into account but there is nothing beyond any degree of length of time in the words used except as can be ascribed to the word established" and here's the critical sentence, "one can establish something very quickly or it may take time to establish but once a situation is firm it is established, so it might be illusive to look at the difference between habitual residence in intent 6 and the qualification of six months resident without the habitual and acquiring habitual residence in 24 hours when she arrives in London, goes to the court with her lawyer, obviously there's some tactical planning. There must have been correspondence and tactical planning beforehand, but it all goes to show that this was quite a preparation and she succeeded. To join up with last week's lecture, Judge Munby, in Marinos vs Marinos quotes Swaddling, and he says even in Swaddling, the judgement held "the length of residence is not an intrinsic (important) element of the concept of habitual residence, we were emphasising, intrinsic which means that he had kicked it out completely so unlike the domicile, intent and fact here the fact of residence and the appreciable time was kicked out in swaddling again kicked out here by referring to the centre of interest to constitute habitual residence from all the circumstances of the case but the fact of residence for an appreciable time is not a sine qua non. It was kicked out in Swaddling it's been kicked out here and he is giving the wife jurisdiction in the English court on the basis of all the circumstances demonstrating that she was making England her habitual residence in 24 hours of arrival from all the circumstances of the case. Whether she was going to get her quick divorce and go to Argentina in 5 months time it was another matter.

- But go through this judgement because next week we are going to see how other judgements now will try to poke holes in this judgement so it is the start of a larger debate that we're doing here this morning but go through these points as its important to understand how Judge Munby built and constructed his reasoning to establish his judgement and how then in later judgements we will find a contrast

with this judgement leading to ECJ judgements too so we'll be seeing the whole iter of the evolution of judgements on the personal connecting factor of habitual residence under Brussels II bis recast.

23rd March 2023

Lecture 5.

- First of all, what we were discussing last week regarding this rather famous restrictive interpretation of article 3 in this case of Marinos vs Marinos building on swaddling, which we have done and covered weeks before was taking English jurisprudence to a very restrictive interpretation avenue, as we saw the main argument was that where the EU regulation wanted to say habitual residence, it said so but it didn't say so twice and so in the second reference to residence as mere residence, that could not unlike Dicey's interpretation be presumed somehow to also mean habitual residence. This is the nub of the judgement of Marinos vs Marinos.

  - It does have a logical basis as well as a legal basis, because it is showing that habitual residence is one thing in contrast to residence which is another thing. And the main argument is that if the EU legal draftsman had wanted to say so, they would sad habitual residence twice and that's pretty convincing. There's no economy of ink on wasting an extra word of typing habitual residence twice into a regulation and so Judge Munby was quite correct in saying ubi lex voluit dixit, whenever the legislator wanted to say something he said it.

  - And so since there isn't habitual residence twice it opens up space and room for interpretation, why is it in the second instance only (mere) residence and not also habitual residence twice, if we had had habitual residence twice okay then the previous interpretations would have been correct but we have a distinction we have habitual residence in the beginning of indent 5 and indent 6 of article 3 and then the back up qualification is (mere) residence, because there isn't habitual residence that's why we're adding mere to make the distinction a bit clearer.

  - Let's get to grips with this basic distinction, having arrived there in the same year 2007, the English high court had another case which overturned Marinos vs Marinos, and it is Monroe vs Monroe and in this case the judge did not throw Marinos completely overboard, and so, this hesitant reluctant overruling gives us food for thought also.

  - But it did come down and hold that as far as indent six is concerned, the six months antecedent period of residence was held and interpreted to be habitual

centre of interests, habitual residence, but look at this internal contrast in this judgement, whereas regarding the 12 months antecedent residence which also had the domicile as a qualifying factor, the judge in Monroe vs Monroe gave a soft interpretation, interpreting the twelve months receding qualification as mere ordinary residence. This can be criticised as splitting hairs, why does he attribute to the word (mere) residence, habitual residence whereas in indent 5 in the same article the word residence he attributes ordinary residence in the same article 3 of the same regulation now in the same domain, it's not even the same habitual residence in the child custody and child abduction part of the same regulation but regarding divorce and dissolution of matrimonial ties.

- This was how the judge interpreted this case and this is how we have Marinos vs Marinos overturned in so far as its interpretation that ubi lex voluit dixit wherever the legislator wanted to say so he would have said habitual residence twice in both indent 5 and indent 6 twice and twice, whereas in this overturning judgement Monroe vs Marinos it came to be held as the Monroe Marinos debate in learned journals about PIL since 2007, because obviously we have judgments for both interpretations now or at least on indent 6 because on indent 5 it gave the ordinary residence interpretation agreeing with Marinos.

- So it only disagreed with Marinos in its interpretation of indent 6. Which in a way makes it logically rather precarious, unstable. Although it is supported by the fact that one is 12 months and the other is a mere 6 months.

- So here we have this distinction developing and this debate, Marinos vs Monroe was revisited quite a number of years later in 2019, in Pierburge vs Pierburge, again England and Wales Family Court (EWFC) and it was held there that these two indents are fertile ground for the forum shopper. Let's delve now a little bit deeper into motivations and policy interests.

- The opening for the forum shopper is because there is a race to the court for the plaintiff under indent 5 and indent 6 as we saw already with Marinos and so as aspirant practicing lawyers, will want to get into that race because if we're pipped at the post by the adversaries lawyer we're nothing, we're burnt. So consider this concept from the prattika point of view, you have to consider not okay come back in two weeks time and in that interval your client will come back and say listen my husband just lodged a petition in the courts of Paris, so you've lost the case as you're going to be there as a respondent and he's chosen jurisdiction which is more suitable to his purposes already so as soon as you have a case like this keep in mind the race to the court whoever gets there first can stop other proceedings or at least suspend them which puts you at apt with the defences and also because the petitioner, the first one who wins the case to the court is

usually doing that because his choice of court is inspired by precedence in that court giving more advantageous financial outcomes.

- So, let's not only go into the mental academic gymnastics of PIL but also see the practical lay out of the terrain where we're going to be racing if we ignored it it's at our peril because our adversary the other spouse's lawyer may just say let's lodge in Paris you'd get a better financial result from the Parisian court and he files it in Paris and you just told your client you want to take it easy over easter and she says my husband already lodged it in Paris. So wake up to this soft flank where you can be outmanoeuvred very easily this PIL terrain.

- What we have here is that in Pierburge vs Pierburge they reviewed the debate Marinos Monroe, because in the intervening 12 years it had become colloquially known amongst lawyers, jurists and academics as the Marinos Monroe debate.

- Now we'll see how Pierburge is asked to decide on a similar set of facts and we'll come down against Marinos and in support of Monroe although Judge Jackson in V vs V 2011 again EWHC had pronounced himself in favour of the Marinos approach.

- Now what was the background that we have here in Pierburge, the husband was born in Germany in 1945, the wife in Poznan which was then still east Germany in 1949, they met in Dusseldorf west Germany in 1981 married in 1985, the family moves to Switzerland in 1999/2000. They separated in 2017. Now the facts are always very important in a case like this. The wife held that she had moved to England on the 12th of July 2017. The dates become relevant, this was disputed and the husband said that the date of the move was nearer 15th August 2017 so 34 days which can make or break a case. The wife issued a divorce petition in England on the 12th January 2018 asserting she was habitually resident on that date of 12th January 2018 in England and that she was resident in England for six months prior since 12th July 2017. Look at how the dates lock into each other to build a persuasive case.

- She built her case on both poles in the debate Marinos vs Monroe, she said she was also domiciled in England and Wales and she said that on a Marinos interpretation she had indent 6 jurisdiction with her domicile, in the alternative, she also had jurisdiction under a Marinos interpretation of indent 5 based on 12 months residence since at least 12th January 2017 or that England had jurisdiction under a Monroe interpretation of indent 6 saying she had become habitually resident in England on 12th July 2017. The husband asserted that the wife had not become resident let alone habitually resident in England until perhaps the 15th of August 2017.

- Then he dismissed her claim of domicile in England in any event in order to kick away that supporting pillar for indent 6. Now again let us see the material aspect of the conflict between this husband and wife or wife and husband since she was the first in the race to the court.

- The husband was extremely wealthy, he came from a family established in Germany's car industry so not just wealthy, but stinking wealthy, the wife had no money of her own and shortly before her marriage she even signed a marriage contract under German law which left the wife with nothing it was stipulated in the event of a divorce. Not even could she claim that she would be suffering hardship, because this is usually a condition that may the English courts come up with, not so much continental civil law, but there is a sense of clawback that hardship can be brought in even if there is an explicit stipulation dismissing any kind of compensation if there is a divorce but in this case in the marriage contract they said even if there is any hardship there would be no compensation, maintenance etc. so that came under German law and although they started their married life in Germany they had moved to Switzerland for tax reasons but despite this physical move to Switzerland the wife retained pretty strong links with Germany and she returned there regularly, so see this split in the residences which creates the problem at hand.

- We already said that they separated in 2017 when their marriage broke down in that summer of 2017. The wife moved to London to a property owned by the husband in London. Now the clash of debts, the wife claimed she moved on the 12th of July 2017, the husband said she moved to London 15th August 2017, a closer examination of the facts which the judge ordered commendably when we're only speaking of 34 days as a gap found that although she did fly to London on 12th July 2017 she then went back and forth between London and Switzerland until the 15th of August 2017 when she remained in London. So look at the facts as demonstrated by the air ticket, as demonstrated by the residence, utilities, electricity and water, and the flat buying groceries around the place all these facts go to build up the case.

- As soon as she filed her divorce lawsuit in London on 12th January 2018 she had obviously been brooding and consulting her lawyer because she built her case that she was domiciled and habitually resident in England and therefore the court had jurisdiction whereas the husband said no she was never domiciled in England she was always domiciled in Germany and habitually resident in Switzerland because of the number of years they had spent there and therefore the English court did not have jurisdiction.

- So look at how these sharper details of closer focus had to build or destroy a jurisdiction case on divorce. Now the judge had to determine whether indent 5

and indent 6 applied over here, and he referred to the Marinos Monroe debate, extricating himself by saying that although these were previous decisions they were not binding on him because the facts were not precisely the same but they were persuasive. So even in England with the doctrine of precedence, judges do extricate themselves from the automatic doctrine of precedence.

- Then he moved on to say, what he did was very interesting, is that he started asking questions under both Monroe and Marinos, so he asked under the regulation let's try and see question 1) when did the wife become habitually resident in England? Question 2) did she become resident on a different date from what she claimed? Question 3) because it is critical here, not like it was in Marinos where there was no question, was she really domiciled in England? So in a way he is setting himself a remit to answer and he is going to answer it in a way independently from Marinos vs Monroe, let's see the wife's position, she held was supported by Marinos vs Marinos 2007 because although the Judge in Marinos held that habitual residence is required, at the moment at the punctum temporis, the moment, the point in time of the petition 12th January 2018 it is not required for the whole of the six or the twelve months preceding the date of the petition. Instead, she maintained basing herself on Marinos, the relevant requirement was mere residence and she quoted judge Mundy in Marinos saying that the regulation does not say habitually resident twice. Which sounds quite persuasive to build your case in this manner.

- And not only does it not say habitually residence twice but it distinguishes by utilising habitual residence in the first part and then residence in the second part of indent 5 and 6 and so the wife felt that she could comfortably state she was habitually resident on 12th January 2018, when she registered her lawsuit in the court, the date of her divorce petition and that she was resident for either 6 in indent 6 or 12 months under indent 5 before this day and so the court should accept jurisdiction and seize jurisdiction, the husband again let's elaborate the husband's position in contrast, supported by Monroe vs Monroe so the conflict is becoming a real pledatorial conflict now claimed that the regulation required habitual residence for the entire period preceding the date of the submission of the petition and not just on the date itself of the petition.

- Therefore, the husband says that in any case the wife would need to have been habitually resident under the Monroe judgement either from the 12th January 2017 to have a full 12 months till 12th January 2018, if the claim is under indent 5 or from 12th July 2017 if the claim is under indent 6. So look at all this playing with options here, they are utilising 5 and 6 simultaneously and so the judge has more to tackle with in deciding in this case and he says which she was not for a whole year under indent 5 or from 12th July 2017 and so Justice Bennet in Monroe had

relied on the importance given to habitual residence in the old BORRAS report which we had quoted last time.

- Now in Pierburge the judge concluded that he preferred (sounds rather subjective, preferred sounds arbitrary, frivolous). So, he preferred the Monroe argument saying that habitual residence and going beyond Monroe was required for the entire six or twelve month period, so it even went beyond Monroe by introducing habitual residence for a twelve month period whilst in Monroe they gave a soft interpretation to the twelve month period because that was corroborated by the domicile qualification. He stated that this was in line with his own interpretation of the regulation and he was not convinced by the two literal interpretation of the regulation in Marinos, so he's criticising the judge in Marinos as being too literal in saying that habitual residence isn't used twice over there and concluded that his interpretation is superior because otherwise such an interpretation would be the only requirement to prove habitual residence would be mere residence which is what Marinos held. Mere residence for the preceding six or twelve months and then he concludes that in several translation of the regulation and the BORRAS report it is repeated as habitual residence rather than growing a distinction between residence and habitual residence distinction.

- So he comes to answer his three questions, we said the first question is when did the wife became habitually resident in England? Second, did she become an EU resident on a different day? Third was she domiciled in England? The judge found that the wife became habitually resident in England on the 15th august 2017 rather than what she claimed 12th July 2017 and now the accountancy approach of counting the nights spent in England. He noted that between the 12th of July and the 15th of august she spent 12 nights in the UK but 22 away. So it's putting them on scales and there are 22 and 22 is bigger than 12 so 22 wins and 12 loses. He found that there was nothing unique on her trip of the 12th July to trigger habitual residence, for example because he had asked this question during the proceedings she had not brought all the important possessions with her on that date, look at the leading question that is, can you imagine you're in the proceedings you did not bring all your important possessions so there is doubt whether you want to settle, therefore because 15th august 2017 was less than 5 months before 12th January 2018 under the Monroe interpretation she did not meet the test under either indent 5 or indent 6 because it was from 15th August that the significant change occurred.

- So he's tackling both indents 5 and 6 as criteria at the same time because she left it open. He then went on to consider, so he is also considering the Marinos and the Monroe interpretation at the same time under the two indents, look at how

precise this has to be so when considering the Marinos interpretation which would have only required mere residence of 6 to 12 months.

- So he's even examining the wife's application under the softer Marinos criteria, he found that she was not resident in England until 15th August because he found that during the oral proceedings in the court she used the word she visited the party's property in England, quote visited the party's property in England. Despite on the other hand with British charities which she also visited and so held that since she only spent 33 nights in all between 1st January and 15th August 2017 even under the soft Marinos interpretation, she would not qualify to satisfy the residence requirement under either indent 5 or indent 6 and therefore there was no jurisdiction at the time of the petition.

- Then he moves to the third question, was she domiciled in England? He held that she did not meet the test for residence or habitual residence under either interpretation of Marinos as well as Monroe then considering domicile he concluded that she still retained her German domicile which again definitely then knocks out indent 6. Because he found that throughout the parties residence in Switzerland she had remained intimately linked to Germany not only did her family remain in Germany, so the family criterion is a very heavy criterion and they only flitted into Switzerland for tax purposes, and if they only needed 48 days they would just do 48 days and go to Germany on the 49th day to avoid come under Swiss tax law and avoid paying tax under German law.

- But then look at these other factors, she continued to use her German florist to send bouquets here and there, is this a convincing because it's all done by email or phone perhaps, she'll phone a florist, send a bouquet to a wedding/funeral/birth, so she kept on using her German florist, whether physically or by telecommunication but then she kept on using her German beautician because this was definitely in situ, it couldn't have been done electronically, this was a very persuasive argument in the build up of her contract as retaining German domicile and finally German doctors, but again aren't maltese sometimes going to Germany to visit doctors there? So can that be used as evidence that they can be changing there?

- The judge threw out her claim as the judge did not find that the court had jurisdiction. The judge is kicking out Marinos here, it is definitely room for Monroe and Marinos got a big blow on the head but it is arguable also because we saw how meandering the augmentation was, and it was a bit stretched and constructed.

- Now, in the 20 years from the regulation and the recast hasn't changed anything in this respect except for striking out the words domicile in Brexit, as it doesn't

apply, England and Wales are out. We only have, these are all England and Wales high court decision and there was no appellant court to resolve the dispute between Marinos and Monroe so the debate kept on developing, but there are two developments.

- One is a new amendment to English law and two is an ECJ judgement in IB vs FA which Dr Sceberras Trigona strongly refers us to read it's case 289/2020 the judgement was in 2021 it was published in 2022 just last year.

- Let us see what happened in England with Brexit as it remains a crowd puller, a magnet an advert for London as the divorce capital of the world. From January 2021, 1st January 2021, the English domicile and matrimonial proceedings act of 1973 the DMPA for short was amended in support of the Marinos judgement. Not in support of Monroe and so there is a policy decision to make London the divorce capital of the world by statute, not merely on the basis of judge made law.

- What did they change? In indent 5 they removed the word if and introduced and and so now in English law, indent 5 reads

  - "The court shall have jurisdiction to entertain proceedings for divorce or judicial separation, if (and only if) […] (d) the applicant is habitually resident in England and Wales and has resided there for at least one year before the application has been made".

- So here there is the word and instead of the if we had in the regulation, the if is taken to the chateau. If and only if is placed outside the brackets of indents one to six whereas in the regulation we have in matters relating to divorce, legal separation or annulment jurisdiction shall lie with the courts of the member state in whose territory indent 5, the applicant is habitually resident if he or she resided there for at least a year, indent 6 the applicant is habitually resident if he or she resided there for six months immediately receding.

- The legislator in Britain found in convenient in order to reassert London as the divorce capital not only to rely on Marinos which was being contested by Monroe and even some other judgements so it was not reliable judge made law so the legislator came in, policy wise over here and introduced the word and instead of if. Now, what exactly are the connotations of the word if in indent 5 and 6 in the regulation in contrast to the and in the DMPA 2021, if has with it, a suggestion of an and but it has in it a sense of an accumulation of two items. Namely habitual residence and 12 months residence.

- So if it is, if the if is interpreted softly, then it suggests mere residence, if the if is interpreted as an and, it tightens because there is an accumulation of the two qualifications. So on the soft approach we have the if soft meaning merely,

because it is an accumulation of and, mere residence, in the hard approach, the if means provided that and provided that becomes much harder, or in so far as, if it could be substituted by provided that or in so far as so the British law maker substituted that if by an and making the two factors independent of each other and meaning what they saiid, in the first case habitual residence and so the and separates the first part totally from the second part and residence, so residence in the second part is mere residence if it is and as the British legislator did it. If you interpret it as a restrictive if, which could have been substituted say there was a revision of the Brussels regulation and instead of if they introduced provided that this residence shall be six months, so it will be referring to the previous habitual residence reference and defining it as six months.

- If there were provided that instead of if or in so far as this residence is six months then you don't need to repeat this habitual residence means six months or twelve months, because you're saying in so far as this residence we started off indent 5 or indent 6 with means six months or twelve months.

- There is a difference between if meaning an and, an accumulation of two distinctly clean factors, habitual residence and (mere) residence or the hard if meaning provided that in so far as this is as such.

- Now, we will see that there is a cross logic in this and this is where what has been happening in both judgements because if you just work with the logic of the if and the ands it doesn't quite get you as far as you would like to.

- Ideally if Brussels want to refine legislation they have to change the word if into provided that or in so far as, so it would be reflecting a meaning on the first use of habitual residence and just become one sentence without this distinct separation of habitual residence in the first part and in the second part resident. It has actually now created a forum shopper's paradise. If your client and they may be foreign clients residing for a little bit in Malta or with confusing background with residence here in England and France and you're choosing which forum you race to you want to check the brit whether you'd qualify under the British and what the financial advantage would be then to contrast with a German court where obviously she was trying to avoid her German court because of her German contract there, so she wanted to go to the briths court from the very beginning.

- Let's move on to the ECJ case in IB vs FA which we can also download and read. So here, let's do it briefly, in C289/2020, the facts were these, a couple it's a divorce case, a French husband and an Irish wife, they lived in Ireland since they had a family house in Ireland and their children in this family house. So first picture manifestly settled in Ireland.

- Now we start with the tricky factors. In May 2007 the husband found a job in France, he worked in Paris during the week and went back to his family in Ireland every weekend, was it a balanced relationship or precarious? He had an apartment in Paris, he was registered with the Social Security office of France, he paid his taxes in France. Let's start seeing his connecting points. At the same time he had his house in Ireland, he had his family there and he met his family there every weekend, it's ambiguous as ambiguous can be. You can't say which way is the more convincing. He also maintained social activities, some sports activities in Ireland (remember in domicile analysis, all these factors go to build a case).

- In December 2018 he filed for divorce in Paris, the wife challenged the French jurisdiction because she said the husband is not habitually resident in France but in Ireland. In 2019 the family court judge in Paris found that it lacked jurisdiction to rule on the divorce of the spouse and the judge's decision was based on the grounds that the husband's choice of employment in France was not sufficient to demonstrate convincingly an intention to establish his habitual residence in France not withstanding the fiscal links and lifestyle habits resulting from that choice. Weekdays in France, were not sufficient.

- One caveat here is with the GDPR regulation 2016/679 we have a new problem with the general data protection regulation, because it's now much more difficult than before this regulation of 2016 to collect elements to make your case on social security and many other personal data which can be refused to you whilst you're building your legal construct.

- Now let's see what happened, there was an appeal to the Court of Appeal in Paris but the Court of Appeal stay proceedings because of this dilemma and ambiguity and it referred a question very poorly drafted to the ECJ because the question only asked the referral question is, as judges restrict themselves to that referral, they don't move sideways at all but they are also politically motivated because they try to imbue their judgement with the teleological aspirations and objectives of the EU, so the question referred was "where it is apparent from the factual circumstances that one of the spouses divides his or her time between two member states as they still were, is it permissible to conclude in accordance with and for the purposes of article 3 of regulation Brussels II Bis, is it permissible to conclude that he or she is habitually resident in two member states? Such that if the conditions listed in article 3 are met in two member states the courts of those two states have equal jurisdiction to rule on the divorce?"

- Now this is the critical question, it's poorly drafted because it doesn't go into the actual consequences of the if as an and or the if as a provided that. Whether the Marinos interpretation of mere residence of six months or twelve months is the correct understanding of article 3 or whether the Monroe and Pierburge

understanding Pierburge much more tightly than Monroe is a correct understanding of indents 5 and 6 as requiring habitual residence throughout the six months and twelve months of indents 5 and 6.

- We will carry on with the ECJ judgement next week, try and download the judgement because it explains a lot but it doesn't explain why it misses the main issue.

30th March 2023

Lecture 6.

- Last week we were considering the ECJ judgement of IB vs FA case 289/2020, it's the first judgement after 20 years of having this regulation and in the meantime we were following what the British courts as we did in this module were judging and the debate that the British courts and finally with Brexit with the new British legislation which we also were exerted to take note of because we have a lot of anglo-maltese cases.

  - That paradigm of jurisdiction clauses under the new amendments post Brexit in the DMPA, domicile and matrimonial proceedings act of 1973 as amended is going to be very interesting especially for forum shoppers, in advising the client one wants to advise the client as to the most advantageous forum for them to start divorce proceedings.

  - Given that now the Brits have legislated upon the judicial uncertainty that they had with Marinos first and then Mundy pronouncing himself and then we were seeing how we had Monroe vs Monroe in a way but not completely because it was about a different matter overriding Marinos, confirmed by Pierburge, but again over there, please note that they don't eclipse each other, there is a debate, they refer to it as a debate but the issues are different because in the latter cases in Monroe and Pierburge the whole issue is how to understand the second part of indent 5 and indent 6 in article 3 in the Brussels regulation whether to consider that if as an and which would loosen it completely or whether it is a titling provided that qualification, which seems to be more in line with EU thinking but the legislator for economic reasons making London the divorce capital has now legislated in the house of commons in Westminster and changed the if into an and reintroducing domicile which is now struck off from article 3 because of Brexit.

  - So go through the amendments of the DMPA and compare them to what we're left with inside the EU article 3 indent 5 and indent 6, with the tight interpretation of the if word as provided that and not and because now we have a legislature that has legislated with an and. It's true it's very recent, it's only 2021 but in a way this is a challenge to the EU legal draftsman, because they know that London has legislated explicitly by softening the qualification and so they went for the Marinos

interpretation, kicking Dicey out of the window more or less. Because in Marinos we had the judgement say if the legislator wanted to say habitual residence twice he would have said it twice and here the legislator in the house of commons is saying it only once with a soft and in the second part so the end is just like a link between two wagons in a train with two separate wagons, whereas the if now the remaining if in the EU legislation is more close to being interpreted as a type provided that and if the EU legislator now in the light of two years of British legislation wants to change it they can change it with an and and compete with London as a divorce capital for economic reasons in the world but it has not been changed. And the longer it takes there is more acquiescence to this divide, to this contrast and London will be reaping the benefits. So there is a lot of economic policy competition for business basically behind all this legislation. We must understand that in order to see where it suits/it's more convenient for your client to go.

- A British judgement on divorce although now it is beyond the freedom of mobility of judgements and Brussels one can easily come under our own 1975 chapter 255 if jurisdiction is based either on nationality or domicile of one of the parties and since indent 5 (now in the British version) speaks of domicile, if that were to be the basis of jurisdiction of the British judgement we would recognise it under our own chapter 255, so look at how our own legislation has now been revived as it were and EU legislation eclipsing Maltese PIL has now been pushed aside by this combination of the amendments to the British divorce jurisdiction pillars which have an overlap with out chapter 255 on jurisdiction with judgements on matrimonial status of spouses which can be based either on nationality or domicile and we would recognise that and immediately insert it in the public registry in the certificate of marriage as divorced by the court of Southampton on the 31st March 2023.

- So keep this sidetrack which for Malta is very important because of the large number of anglo-maltese links still prevailing and so in the fall out possibility of large number of divorces in anglo-maltese marriages and sometimes you'll find strangely enough that the guy male or female with of British passport is of maltese origin so that nationality will give jurisdiction to the British court because of the number of maltese who had gone to Britain and immigrated to Britain and then took on British citizenship even at the very beginning when they had to renounce maltese citizenship, they took on British citizenship, they hardly spoke English, they were very Maltese and so with that nationality you can spring and generate jurisdiction of a British court with a maltese spouse who won't be domiciled or national'ed in Britain, so look at the long history of intermarriages anglo-maltese are a catchment pond for divorce lawsuits arising outside the EU regulations. This is important to keep in mind.

- Also important is that you have the whole question of divorce is not by itself, although the lawsuit will be one for divorce, there is a concatenation to other issues rolling behind it. There will be questions of financial settlements, there will be questions of matrimonial property regimes, and actual property, there will be questions of maintenance, so it's not merely, the annulment of the marriage full stop. There is this, which is merely a matter of status at that level, but then it comes to property, finance, maintenance, assets being divided, so the file starts getting fatter and fatter it's not merely seeking an amendment to a marriage certificate by just adding a line after saying they were married on the 10th January 2005, and now they want to insert a line dissolved by divorce judgement in the Southampton high court. Then there are questions of maintenance and the lawyer would be chasing the maintenance question he would be chasing the question of what we're going to do because they had a community of acquests we're going to dissolve it whose going to take which property and those are much more substantial issues than merely the formal certificate of divorce which is okay for the capacity to remarry but the property issues are those that linger most and are most expensive although the first might be more emotional, property is a business deal basically.

- That is where divorce comes much more consequential to keep in mind as we are going along. So with that caveat to keep that side track, anglo-maltese track in mind if we're giving a case to advise a client, we ought to also advise the client as to this opening, this ramp of and not merely stick to EU jurisdiction conditions. Then obviously it's up to the client and the lawyer to guide him what he can seek and obtain in a British court. And seek and obtain in an italian court if there's a connection with an italian court but this option is normally quite available to a number of maltese with British connections either by way of nationality or domicile.

- We were considering the ECJ which finally after 20 years of this regulation came up with this referral and we were seeing this question which unfortunately was a too restrictive a question that was referred to the ECJ or the ECJ also found the way out and restricted its answers strictly to the remit of the question as we were all expecting much more eloquence and definitive assertions about what on earth does habitual residence amount to? We are still searching a good workable definition and we remember in the BORRAS report that even for Brussels I recast they held back because they didn't want to (deliberately) define it.

- We have the question, when it is apparent because of the case we went over last week and the question referred to the ECJ as well, when it is apparent from the factual circumstances that one of the spouses divides his or her time between two member states and this is usually the case with a cross border issue/dispute on

jurisdiction in divorce, one of the spouses will be flitting to and fro different member states or even beyond, is it permissible to conclude in accordance with and for the purpose of the application of article 3 regulation 2201/2003 that he or she is habitually resident in two member states? This is the new territory being defined by the ECJ because if it were nationality we knew originally the advantage of nationality was that it was one and you had absolute certainty but that started weakening with multiple nationalities which are incontrovertible in fact, if a person has three valid passports, he has three different connecting factors, you can't argue, if the passports are valid they are a valid connecting factors.

- In domicile we have the rules coming down since a hundred years that a person can have one domicile at one moment in time so with habitual residence, the question although it is unfortunate in not having asked for a more elaborate definition of habitual residence is useful in resolving this question of whether you can have two habitual residences and as we saw in the IB case it's a dilemma because for certain purposes, social security, tax and work he's in France, for family connections every weekend he's in Ireland, which prevails or has he got two at the same time habitual residences which he observes nearly religiously going to work for four or five days in Paris coming back for two or three days to Ireland for his family.

- Can you cut this dilemma? can you resolve this dilemma? So the question in that respect of asking whether a person can have two habitual residences was important because of later cases arising and usually as we're saying and we can configure this ourselves, a divorce case in PIL is going to arise because of a spouse having a cross border connection and so there would be the doubt as to which of these two connections should prevail.

- The question is, is he or she habitually resident in two member states? Such that, this is the telling question even policy wise to the EU now, such that if the conditions listed in that article are met in two member states, the courts of those two states have equal jurisdiction to rule on the divorce. This is the biggest challenge in theory, because if this is going to weaken legal certainty in order to uphold freedom of movement which is a holy rule of the EU in the freedom of movements, goods, services and capital, there is this dilemma as a policy matter behind all the judgements on legal voids, they want to uphold the freedom of movement of people inside the EU but at the same time they are legislating for certainty because if they leave two courts open for jurisdiction equally at the same time without creating any hierarchy between the two then this is going a forum shopper's paradise, and you have plaintiffs racing to the first court which is more advantageous and stopping the second court and so legal uncertainty, possibly unfairness also to the defendant and so they had a real dilemma in so far as the

theological, the future understanding of habitual residence is concerned, where they ready to come down as with domicile that you can only have one domicile at one moment in time? Or was that going to be too assertive when you had two equal? As the question is loaded with the word equal, equal in Dr Sceberras Trigona doesn't think mathematically it can be equally but pressa poco, approximately, and it creates a bit of a doubt as to where the real jurisdiction lies.

- Now, the ECJ in this judgement was inspired by the Haddadi case, case 168/08. However nota bene, and don't just go and do it in short hand, Haddadi was about dual nationality, which exists and how do you resolve that question of double nationality and dual nationality issues are not comparable to dual habitual residence issues. Only the word dual is comparable but nationality is one thing and habitual residence is another thing so it's a little bit of a logical misnomer to say that the answer to the question should be based on the Haddadi case 168/2008 because there it was sought to assert that with dual nationality you had the question of multiple jurisdiction because of multiple nationality.

- Here the court came out with five arguments and this is a totally new pillar of judge made law, we have judge made law in the EU about this question. We don't only have the final operative part of the judgement but we have the five arguments of the judgement so we have the rational that is very useful over here, so in the first instance, they put forward the textual argument.

- Look at how they argued this on the basis of a literal interpretation of the text of article 3, they held that the regulation in no place, refers to the concept of habitual residence in the plural and so, undeniably they hold since habitual residence is always referred to in the singular, this is a bit tenuous because it's so literal you can immediately see where it doesn't stretch completely but this is what the judges gave us. Since it is always referred to in the singular and the regulation never says that the person's spouse or child may have more than one habitual residence, the singularity is established on the basis of this analysis of the text of the regulation.

- Mind you, usually we argue that where the regulations, where the law speaks about the singular it can also be extended to plural unless explicitly rejected, but here this argument was overturned topsy turvy like in its logic and they held that it always refers to habitual residence in the singular, never in the plural (see paragraph 40 of the judgement for a closer identification of this argument) and that it never says that a person's spouse or child may have more than one habitual residence.

- So the plurality of habitual residences they argue is not textually supported. They're not basing everything on the textual interpretation but they are starting

arguments one by one, so on a textual analysis in paragraph 40 they are removing the multiplicity of habitual residences. Then they move to the second, and this Dr. Sceberras Trigona thinks is much more important because in the second argument they are in a way mirroring the domicile theory about the acquisition of a domicile of choice.

- In the domicile theory, in order to acquire a domicile of choice, you needed to have both the intention to make the new place your permanent home, apart from the additional intention required by the English peculiar definition of the animus non redeundi, also have an intention of not wanting to return to the domicile of origin or to your previous domicile of choice, together with apart from intention that you are establishing yourself in the new territory.

- What are they saying here? They are saying that habitual, the concept of habitual reflects a permanence or regularity, which emerges much more clearly in the case of a transfer of a person's habitual residence to another member state.

- So they are saying, when you transfer from one state to another, we have to examine the intention of the person to establish in the latter state a permanent centre of his interest, is this as close to domicile of choice? In a way here it is cut and paste from the domicile theory, and that his interest should be demonstrated by incontrovertible facts, and so since this should be the autonomous EU definition of habitual residence, that in order to transfer a habitual residence you have to have the clear intention to make that second residence your permanent centre of interest and make it also in fact, then on this second argument they say and conclude that therefore you cannot have two habitual residences because they are saying and that enunciating here, this is potent judge made law.

- When you are moving to acquire a new habitual residence you are going to have that intention to move there and therefore you are dropping the previous one and therefore you have one at every single moment in time. Very similar to domicile without however the animus non redeundi, an English twist, just like an Australian or a US understanding of domicile and the acquisition of a domicile of choice, perhaps the intention for a permanent centre of interest is slightly lighter than to make it your permanent home because your centre of interest can be business, sports, culturally, you're making that place your permanent centre of interest you're developing your links over there and you're then moving on to a third or fourth habitual residence. But without the animus non redeundi it becomes very close to the old domicile.

- So look at this, so the judges are using our argumentation from domicile in order to conclude the singularity of habitual residence, which is useful for us and later cases. Because instead of following Haddidi with the multiple jurisdictions at least

here we identify one habitual residence and we settle for one habitual residence don't get mixed up with double or triple habitual residences.

- The third argument and we were referring to this already before is the argument of policy, and we can say isn't it strange that the judges are going into the motivation of policy in the EU yes but the ECJ is a court, an institution of the EU you would have found the same kind of reasonings if you read old judgements of the privy council for the whole British empire. The reasonings although legal would have political, geo-political rational which sometimes even shook the very legal argumentation on the basis of which a plaintiff would have gone right up to appeal from our Court of Appeal to the Privy Council in London.

- So here the third argument is the policy argument and they say look, the objectives laid out in article 3 in Brussels II Bis, so the objectives, now it's true you can deduce the objectives even from the preamble which is very elaborate so you don't need to go to the policy recommendations at the time when the EU commission was charging the legal draftsman to start preparing a law on divorce and annulment of marriage the preamble gives us stuff to chew on and the judges are saying the objectives of article 3, where to strike a balance between the freedom of movement of persons within the EU and legal certainty. But which way is the balance going to come down on? Is it going to give more favour to legal certainty or freedom of movement? And this is where they are showing that this motivation, this objective is illustrated by having six indents and the seventh pillar, so it is offering all these moving workers all over the EU an abundance of pillars of jurisdiction and not merely one very tight and narrow pillar of jurisdiction in order to facilitate the possibility of the petitioner to sue for divorce.

- Look at this argument, again its an interpretative argument and so they say, haven't the legal draftsmen given to all these workers and plaintiffs seeking to go for divorce already seven heads of jurisdiction? Why introduce multiple habitual residences which would only then give us legal uncertainty? Again the arguments are a bit stretched but see how they are building them up. So they are saying look, the objective of facilitating a petitioner enjoying freedom of moment of work in this member state or that member state to find a convenient basis for jurisdiction for divorce and not having to go to his original place of residence or where his wife is living now they are giving already seven potential grounds for jurisdiction so why give two habitual residences which will then create the problem of which prevails over the other? And in order to buttress their argument here, they say and the seven grounds of jurisdiction are without hierarchy, in order to show how much wider and more generous the draftsmen have been with potential plaintiffs wanting to sue for divorce in the EU.

- They didn't create a cascade effect where you had to exhaust one to go to two, exhaust two to go to three, exhaust three to go to four. So that would have been a very narrow basis of jurisdiction. So look at how they are infusing their argument into the structure of the regulation by saying there is no hierarchy here, every worker has freedom to pick and choose any of these seven grounds of jurisdiction but then this is where they draw the line seven is enough they say (Dr Sceberras Trigona adds arbitrarily in brackets) but they say then if we introduce multiple habitual residences that starts introducing leal uncertainty and that is what the EU doesn't want, in fact the grounds of jurisdiction are stitched up in a way to increase legal certainty and not decrease legal certainty. Whereas if we have two habitual residences at the same time the question referred to the ECJ that will obviously increase legal uncertainty because then the plaintiff can sue in either of his habitual residences.

- Then in the fourth argument, they say what we were referring to earlier this morning, that the determination of jurisdiction based on article 3 has material consequences. What are these material consequences? Because there are usually ancillary matters being either simultaneously brought before the court or immediately after the divorce is granted. Namely, first maintenance, maintenance is basic, a wife who is not of working age suddenly finds herself with a divorce, which is adjudged against her, how does she survive? And she doesn't have money of her own so maintenance is survival it's not an issue of dividing of an inheritance of 28 immoveables, maintenance is for surviving the 24 hour survival from one day to the next.

- Usually the plea for maintenance is put in the second part of the divorce in order to influence the judge that this has to be considered morally, ethically, and then also apart from maintenance the partition of matrimonial property because the divorce by itself its like the old separation amnesia and toro from the conjugal table and from the conjugal bed, it is not necessarily partition, so the partition of the matrimonial property, of the assets, is hugely consequential and that also is usually attached to the lawsuit on the divorce and there are many many cases on this question.

- So the jurisdiction has to be established on a very strong ground, and therefore look at how now they go a full circle to come to the original conclusion which they had already set out and therefore we need one habitual residence and not more, in order that the ground of jurisdiction will be strong. So look at how they circle an argument and go round and then come back to prove what they had already in a way concluded.

- They also come out very strongly, distancing themselves in IB from the Haddadi case by saying the obvious that habitual residence and nationality are quite

different and the usual that the decisions adopted in the first case, in Haddadi cannot be automatically transposed to habitual residence. Now what this therefore gives us with these five arguments which are useful for the judgement is this underlining of the concept of permanent centre of interest.

- This is modelled closer to the US centre of gravity, centre of interests, permanent centre of interests and it is like the old remember that member state with which the person has the most meaningful connection.

- So look at how this case has finally given us five arguments although it is limited to this case as usual caselaw is not easily law because the case is only discussion the question referred in a particular factual circumstance of the case and even to transpose it to another case on habitual residence is not that easy but by this obiter of five arguments at least we have a judgement on habitual residence only being one a the same moment in time, that is definite because that is the question and the tight single answer.

    - If you want to do it in a straight one line question, one line answer, can a person have two habitual residences and both equal for jurisdiction in any member state? No. Only one habitual residence at only one moment in time and therefore no two jurisdictions at the same time on the basis of habitual residence.

- That is the summary on this case and it does give us a breath of fresh air because all this to-ing and fro-ing between whether one habitual residence or two habitual residences can co-exist at the same time can confuse you when you are discussing with your client where you are going to submit your lawsuit. Because if you are going to be confused as to your client having two habitual residence and then you are going to take responsibility because it is a legal matter, and you tell the client no let’s sue in Paris instead of in Naples and then you lose in Paris, remember these are costs. So these aren’t academic decisions any longer. We will be directing clients allocation of his moneys and we’re going to be defending his case.

- So at least here we have one habitual residence when we are going to be saying from these facts mentioned this is the one habitual residence that you have although there might be a dilemma as we are seeing in IB between Paris and Ireland, which is th real habitual residence? With these 4 days here, 2-3 days there, it is so ambitious basically, no one can just say this is it definitely except for a judge whose word is final.

- What we have got out of this judgement is the first point clearly that there is a singular habitual residence at any one moment in time and so we can build on

that yes this is what has been delivered and this is useful, it does give us legal certainty. But then it has secondly elaborated this concept of permanent centre of interests as a working definition of habitual residence. Both with the intention when coming to transfer from one habitual residence to another analogous to the domicile of choice acquisition and so we have material now to enlarge upon this definition we're looking for of habitual residence.

- Also the reiteration again trailing from the old domicile, of the split between the intent and the fact. No where have we had this so clearly put out. So the intention to establish the habitual centre of your interest in your member state ands secondly the presence which is sufficiently stable in that member state are giving us working definitions for the future, quotable definitions from an ECJ judgement at last. Not having to rely on that in your face definition by Marinos and in Swaddling and then calmed down by Monroe and Pierburge because Marinos and Swaddling were rather eccentric which just 24 hours habitual residence.

- So here notice that they are saying that there is the intention to make the place your permanent centre and that the facts are showing that you are factually with a sufficiently stable habitual residence there. So this is hinting that a 24 hour fact is not a sufficiently stable fact. How long is necessary is another matter, but the 24 hour in Swaddling and in Marinos is not being considered as acceptable.

- What is interesting also is that in paragraph 39, all these points are declared as part of the judge's efforts to interpret the objectives of the regulation in order to constitute "that habitual residence has to be given an autonomous and uniform interpretation taking into account the context of the provisions referring to that concept and the objectives of that regulation.

- This is as though they put on the special mantle to become legislators or quasi judicial legislation, and they are pronouncing themselves as defining autonomous law they are in a way stamping what they're saying as a contribution to autonomous EU law leading to uniform interpretation.

- Possibly this is why it might have taken so long for this to have come through, 20 years. But the fact that the judges themselves are making themselves legislators by saying that they are interpreting the provisions in the light of the objectives of the regulation in order to define habitual residence as an autonomous piece of EU law for uniform interpretation, it couldn't be more difficult than that it is a piece of legislation therefore. They are asserting legislative power in a way, that they are creating autonomous EU law for uniform interpretation and this is why they opt for the single habitual residence also there is this policy commitment that they are following over here a number of jurists have commented that they should have enlarged on this but one can understand that with all the differences in the seven

heads, six months, twelve months what else could they have said that there months is enough or nine months? There are already the indents with different time levels but there has been a lot of criticism that judges refrain from enlarging and this criticism is not fair because it was not in the question referred, so whatever they would have answered in a way would have been obitered. The main question was can you have double habitual residence of equal importance with two jurisdictions generated? No only one, that is the simple answer.

- They also for good measure because it's recent took into consideration the succession regulation, which Dr Sceberras Trigona wants us to keep in mind regulation 650 of 2012 which has shocked a number of maltese practitioners and judges because it introduced habitual residence there instead of the traditional English division which we practiced with our eyes closed mainly in cases of moveables in succession we apply the lex domicili of the dicujus, in cases of immoveables we apply the lex situs of the immovables, it was as simple as A, B, C many cases always repeating that very simple distinction now supplanted in 2012 by this esoteric introduction of habitual residence both for moveables and immoveables and the only saving grace is the new bureaucratic introduction of the European Certificate of Succession which gives therefore mobility of recognition throughout the EU when you present the EU certificate of succession for money in a bank in Germany for a house in Spain so with the European Certificate of Succession its making up for the simple PIL rule we had before dividing moveables to be regulated by the lex domicili and immoveables to be regulated by the lex situs.

- Now the Brits have gone back to this all over again because they extricated themselves from EU succession law so again we have that anglo-maltese side ramp to keep in mind, but look at what we have over here in this judgement. In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise in particular where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes even for a long time. But (and here is the but) had maintained a close and stable connection with his state of origin.

- So he's gone to work there for economic reasons, he's gone from Malta to work in Northern Italy for economic reasons, he's found a good job in Milan, he's working there for eight years and dies there. What would he have said under domicile? That he lost his domicile of origin and took a domicile of choice? No because he went there merely to work and kept coming back here to his family, to his property, to his football club etc, and he just went there to make money like the maltese emigrant cases, they wen to Australia to make money and come back, and have a huge house and put an Australian or Canadian flag up etc.

- So, here in this judgement it's already creating some space for this double habitual residence in a way. But saying that if he kept a stable and close connection to his state of origin, he did not change his habitual residence to this new place he went to for succession reasons also because enforceability is usually much easier in the state of origin where he would have had immoveables than in the place where he's working and not buying houses there etc, he'd have much more of his stuff in his stable connection to his state of origin.

- Look at what the ECJ goes onto say over here, in paragraph 24, "in such a case, the deceased could (again qualifying) depending on the circumstances of the case be considered to still have his habitual residence in his state of origin in which the centre of interest of his family and his social life was located." So this is again interesting because we are stretching now the definition of habitual residence to the succession regulations interpretation. Where since it is now a unified connecting factor of habitual residence for both moveables and immoveables it's leading us to many troubled waters, and this has been a new lease of life in a way that we could start distinguishing his place of work for economic reasons from his country of origin if it is the centre of his family life not of his life because his life has moved to the place of work and he stayed there he's not coming back like in the IB case, four days there, two days here, five days there, two days here. He's gone there for eight years in Milan, comes back in Christmas and in summer that's totally different that's why the IB case was more pressing because it divided every week, the dilemma was every week.

- Here in succession, normally until now since 2012, Dr Sceberras Trigona would say most practicing legal officials would say that if he spent 8 years in Milan and only kept a link over here it's not a stable and closed connection Milan is his habitual residence and therefore we should adjudge by the law of Italy and not by the law of Malta.

- With this judgement retaining more importance on the country of origin, we have an eye opener, a new lease of life, a new breath of fresh air that one can distinguish between a deceased who went overseas for work for economic reasons but kept what he is saying here in this judgement a close but stable connection with his country of origin, what will amount to a close and stable connection? Just coming back for Christmas and in Santa Maria in August is enough? Or does he have to come back at least once a month if he sold his house to get a money to buy a house in Milan does it show that he has abandoned and therefore doesn't have a close and stable connection?

- The analogy with domicile is getting tighter and tighter. This is the whole argument therefore because you have to analyse now and compare the narrative in domicile, that we went through last year with this unfolding narrative we are seeing

over here. And so the original question we started this module with whether habitual residence has pushed aside both nationality and domicile, if you dig under the word domicile and go through its narrative we find that we are still quite close. Nationality yes, it's been pushed aside much more. But habitual residence is giving us much more of a factual connection with intention which comes under the old English proper law definition of connecting factors being the connecting factor which leads you to the most real and substantial jurisdiction that you can demonstrate. The most real and substantial connection, instead of those words now we have the permanent centre of interests with the intention also, so what's new? And that is an important question now.

20th April 2023

Lecture 7.

- Dr. Sceberras Trigona will start by drawing our attention to how this critical connection factor, this personal connecting factor has been utilised in cases before the ECJ, concerning contracts of employment.

  - From our studies last year, that under Brussels I Recast, there was this very famous introduction of granting special jurisdiction to the weaker parties, be they consumers, be insured, the employee. This is quite a dramatic breakthrough in legislation, we don't have it in our own domestic legislation otherwise, who is the weaker party in a civil/commercial court case normally?but here we have the introduction of a new concept so it's interesting to see how the ECJ, considered the whole question of jurisdiction in the case of Ryanair, since we have Ryanair employees in Malta and similarly with other foreign airline companies, if the judgement stays and doesn't get refined, amended or changed as the years go by.

  - Let us see what this Ryanair case was all about. It was case 168/16 and case 169/16 because they are two joint cases by the members of the crew one was Sandra Noguyera and others vs another airline CrewLink Limited (CrewLink promotes the search), and the other was Miguel Jose Moreno Osacar vs Ryanair.

  - We have Ryanair, and CrewLink, are companies established in Ireland for tax purposes usually. Ryanair is active in the international passenger air transport service as we know even from Malta and CrewLink is specialised in recurrent and training of cabin crew for airlines.

  - Between 2009 and 2011, employees of Portuguese, Spanish, Belgian nationalities where hired by Ryanair or CrewLink, first by CrewLink in the recruitment and training phase and then deployed by Ryanair as cabin crew, air hostesses, bursars, stewards, the lot.

- Now let's start with what the lawyers of Ryanair thought they had designed as an iron clad employment contract. Put yourself in the shoes of a lawyer in Ryanair, what is to be advised from our PIL knowledge in designing the contract of cabin crew, what did they do?

- It's early days, so they constructed employment contracts in English, so there is the first question for the Portuguese and Spanish it's not their language, but in English, subject to Irish law, so choice of law is explicit in the contract of Irish law and a jurisdiction clause providing that the Irish courts had jurisdiction.

- Now we know that the statue of justice is usually a lady, blindfolded, we never know whether she can see a little bit under that blindfold and why would they choose the Irish courts, obviously because they thought they had an advantage if the case arose in an Irish court instead of any other court in the world where Ryanair was operating.

- Then, they added in order to make it even more iron clad, this is a consensual contractual choice of Irish law and choice of court for jurisdiction purposes. That is already very very strong to have the two together in an employment contract. Then they added that the word of the employees concerned was to be deemed as being carried out in Ireland. Clearly, they would be travelling all over the world if we have cabin crew travelling from Ireland to Malta, going to Italy, going to Latvia, wherever. To deem that it's all taking place in Ireland is a bit of a stretch of one's legal imagination but what did they do to corroborate this part of the iron cladding?

- They said, since the planes are registered in Ireland, it is going to be the nationality of the planes that determines their connection to be stronger to Irish law and Irish jurisdiction, choice of law, choice of court. So look at how hard these lawyers were working on behalf of Ryanair to put any potential contestation/dispute over to the Irish courts. Then the old boy school network, we were at school together, and a phone call here and a phone call there might influence the judge to sway in favour of Ryanair, putting all that in brackets but why are they choosing Irish? Also perhaps less expenses than having to be sued all over the European Continent and not knowing what the other laws have in them whereas with Irish law they were on more reliable ground.

- Now, in these contracts nevertheless, they designated the Belgian airport of Charleroi, because they don't operate in the normal airport, as usual they find airports outside the main airport, as the employees 'home-base' (this will have some consequence) and as a matter of fact the employees started and ended their working day at Charleroi Airport. So Charleroi was the hub and they were also contractually obliged to reside within one hour of their 'home-base;, so just

in case they were required in three hours' time, within one hours' travel they would be called in and taking another flight. This change of flights, roster, rotation that you have with cabin crews. Now, these members of the crew were rather dissatisfied with their conditions of work as they were unfolding, and they sought to sue Ryanair and CrewLink in the Belgian Courts. (You think that a lawyer trying to tell them let's try the Belgian Court instead of the Irish Court would have a very steep uphill case to articulate). So start thinking of these cases in this way, who obviously has a greater advantage? Ryanair with its iron clad on track with choice of law, choice of port, jurisdiction and the argument of the nationality of the aircraft deeming that all the work took place over there, despite of the fact that in the same contract there was the 'home-base' within one hour of Charleroi, or the other hand now let's see what the Crew's lawyers articulated to try and overrule this apparently iron clad set of clauses in their contract.

- They asked the court to accept jurisdiction. To adjudicate on their claims and six employees brought proceedings before the Belgian courts. The lower courts had to ascertain whether to have jurisdiction and they decided to ask the Court of Justice how to interpret (the link, a very tight remit that a local member states' court will be making a referral to the ECJ, its a very specific remit not an open ended remit). It asked the ECJ to interpret in the eu regulation in civil and commercial matters the concept of place where the employee habitually carries out their work. So now we have the word habitual associated to work not with residence because this is the weaker party clause protecting employees.

- In contrast to the general rule that you assume to the defendant in his place of domicile this is giving the weaker party, the employee to sue in the place where he habitually has his place of work.

- So this is directly aimed at not going to Ireland, but transferring jurisdiction if it is found to have strength to the Belgian court because that is where they habitually had their work, but this went against the contract; choice of law, choice of court and deeming to be doing all their work in the place of the nationality of the aircraft, so look at how tight this case was. It isn't a clear cut case where you say this will win, I'll bet on this would you have placed your bet on cabin crews or Ryanairs case? Think about the odds because that is what we will be thinking when we start having cases.

- So, in the specific context of the air navigation sector, whether that concept can be treated in the same was as that as 'home-base' because there was another regulation but we won't go into it. The council regulation 3922/91 on the harmonisation of technical requirements and administrative procedure in the aviation sector but let's not go into that. But there are other definitions in another EU Regulation, so there's another regulation against an EU Regulation.

- Now, the court pointed out in its judgement in September 2017, that as regards to disputes concerned with employment contracts, the EU rules are aimed at protecting the weaker party in this case the employee, and so they said that is the teleological augmentation that prevails even over the other regulation on administrative technical requirements.

- So, given that the EU law in Brussels I Recast is aimed at giving the employee the possibility of suing in the courts which is closest to his interests and not of the domicile of his employer, they felt bound to give this relatively more weight than following the EU regulation.

- Then the court delved deeper and this is where the court came out quite honourably Dr. Sceberras Trigona thinks, because it said considering the contract we cannot accept a contract that is aimed at preventing an employee from brining proceedings in the place where he habitually works, this is very courageous of the court. The contract is the contract and the contract, and the court normally has to abide by contracts first and not start imputing intentions etc. But it delved deeper and found that the contract was removing the protections that Brussels I Recast gave the weaker party, that it aimed to thwart the very concept of aiding the weaker party, and then it referred to indicia, or criteria bar referring also to the EU Regulation on the aviation sector and it said to determine the place of work where the employee habitually preforms his work in the air transport sector there are four special criteria to then be laboured the point by coming out of a definition of future reference.

- First it said the place from which the employees are to be carried out the transport related tasks, that is the place where he habitually works, second the place where he returns after his tasks, and where he receives instructions concerning his tasks and organises his work, third the place where his work tools uniforms etc are to be found, his daily apparel, you know cabin crew have their uniforms, books, laptops, related to work forms to fill in, where are these in Ireland or in Charleroi? Fourth, where the aircraft aboard which the work is habitually performed is stationed so the introducing different criteria to the nationality of the aircraft, where is the aircraft stationed normally? So all this goes to identify the place where the employee habitually works.

- In this way they said look this even brings us to qualify ‘homebase’ under the other EU regulation as being the same so we don’t even have a conflict with home base. They therefore condemned the strategies employed to circumvent Brussels I Recast because both on Brussels I Recast the place where the employee habitually performs his work as well as Homebase under the aviator sector it was clear that the Belgian court had jurisdiction.

- There they also introduced their caveat that had it been the case that Homebase was different from where the employee habitually performs his work because that would happen also, there could be a Homebase say in the Netherlands and in Brussels they are departing and returning to Brussels and they go over to the Netherlands for filling in changing their uniforms or something of this sort.
- The relevance of that other base, would have to be weighed, against where the employee habitually carries out his work but it would be difficult for that Homebase to undermine the place where the employee habitually carries out his work.
- Then finally they s aid absolutely it cannot be accepted that the Ryanair lawyers try to introduce the concept of the nationality of the aircraft to justify the choice of law and choice of court jurisdiction.
- They found this to be a circumventing strategy, which could not prevail on what Brussels I Recast gave the weaker party to be able to sue in the court of the member state where he habitually performs his work. So look here at how this habitual performance of work comes in and because of the protection of the weaker party, the court bends over backwards to uphold this principle and dismisses a contractual choice of jurisdiction based on consensual choice but also based on this argumentation, very nice and very clever from the Ryanair lawyers that they are always in Irish territory because the aircraft has an Irish flag, its registered in Ireland and they even consented to a clause which was obviously just pushed in front of them to get the job and they just sang without obviously reading the fine print.
- They had said it is going to be deemed that they are workers, so they could realise that the crew could use the weaker party protection of Brussels I Recast these lawyers from Ryanair and to make Ryanair even more protected to getting to the Irish courts with jurisdiction, they made each of the employees signed that their work was deemed to be taking place in Ireland because of the flag of their aircraft and this the ECJ condemned was a way of circumventing the protection that EU regulation Brussels I Recast gave the employee.
- So look at how these weaker party concessions, and protections in Brussels I Recast have been given in this case prevalence even over a contract. Now, they were effectively saying look, the consent of the employee to sign that contract was dubious at worst vitiated, because they obviously just signed to get the job, so they’re in and they’re operating and so they didn’t give much weight to the contract but for a court to not give much weight to a contract is a hefty piece of judicial work.

- Moving on to another area of jurisdiction in cases of damages created by toxic material on the internet against a particular person.

- We will remember, that we had the classic Potasse d'Alsace, Bier case 1976, where it was held that in cases of damages non contractual tort, quasi-tort and delict, it could be either, jurisdiction could lie either with the place where the event giving rise to the damages took place, or the place where the damages ensued later. 'Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA.'

- There there was this famous reference to the forum delicti commissi, the place where the delict was committed, or the forum damni infecti and the year Potasse d'Alsace, the case was of the chemical toxic affluence from a factory in d'Alsace in France but this toxic affluence went into a river which ended up in Holland in the Netherlands and it contaminated a whole plantation of tulips which all died because of too much chemical toxic substance still being in the river having flown all the way from France so where does jurisdiction lie? In the place where the delict was committed in France or in the place where the damage ensured in the Netherlands, and obviously under the two different jurisdictions there would be different damages and different consequences so it would be a material issue at stake.

- Remember the case with this illustration because it's a very clear, it's the facts of the case you have toxic chemicals coming out of this factory in d'Alsace ending up devastating a whole tulip plantation in the Netherlands. So, which court has jurisdiction? So it's either or and its at the option of the victim to choose so he can choose the better/more convenient jurisdiction.

- Taking this forward from the Bier case, moving on from here you have the Shevill case, where in the Shevill case, which is a case of defamation on a newspaper, the analysis was that 'look, let us see in which member state this newspaper was distributed, and how many newspapers were sold in order to come to some quantification of the damages' so if in one member state they sold 30,000 copies whereas in another member state they only sold 300 copies they established what was called the mosaic theory, the mosaic principle, a whole mosaic of the damage ensuing in different member states with different calibrations/measurements so it wasn't a kind of one size fits al and it followed the territoriality principle.

- Now, fast forward to the technological breakthrough of the internet and you'll see the difficulties now with defamation on the Internet because the internet is ubiquitous, you can't say in Latvia they received only 30 of my pictures which were creating harm to my profile whereas in Malta there were 30,000 so I'm going to have damages of 30,000 in Malta and 30 in Latvia by strict analogy with the newspapers so you have here, a new development.

- In contrast with Bier and Shevill, where you have three courts which the victims could choose, and which were these three courts under Bier and Shevill? Remember Shevill is times down to physical newspaper distribution, under the old Bier rules, the victim could always follow article 4 and sue in the defendant's domicile, obviously that might not be convenient because the defendant might live in Sweden and you don't want to stay going to Sweden to sue in Sweden.

  - Article 4.

  - Counterclaim

  - **4**. The court in which proceedings are pending on the basis of Article 3 shall also have jurisdiction to examine a counterclaim, insofar as the latter comes within the scope of this Regulation.

- But then by default you come to article 7(2), where you can following Bier either sue in the place of the illegal conduct giving rise to the damage, so it's the place of publication, and in those days of a printing press there would be a huge italic printing press locating only in one physical site so that would be very easily identified at the time where newspapers were printed. And there you could sue for the full amount of damages as you could sue for the full amount of damages if you followed article 4 and sued the defendant in his place of domicile. In the third case you could also sue in the place where the actual damage ensues, that is in the state where there is the distribution of the newspaper, and where the victim claims he has or his reputation has suffered, territorially limited to the amount of damages in each territory but, can you imagine the confusion that if you were the lawyer for the particular victim you'd be starting 10 lawsuits in different Member states to get damages for 30,000 news papers distributed in that state, 20,000 in the other, 15,000 in the other, 10,000 in the other and what if the different courts calculate them differently?because they wouldn't be following the same rule there isn't a particular rule on this. So, can you see what confusion this mosaic principle was leading to? Even as it was with the hardcopy newspaper.

- Now by 2011, this was becoming more and more unweaving as a talisman as a background for defamation on the internet. In 2011 we have the e-date case, and in the e-date case the ECJ created a new jurisdictional pillar. It created a new pillar because in e-date we're taking now of damages being done to one's reputation on the internet and so apart from 1) suing the defendant, the publisher in his place of domicile for the full amount of damages, 2) the victim could also sue in the place where the illegal conduct emanated from again for the full amount of damages, 3) he could on the mosaic principle sue in each member state where his reputation suffered damages, for the damages in that particular member state and 4) the ECJ created judge made law. This is why this is so much of a

breakthrough, this is not a regulation in fact we're waiting for the EU draftsmen to update the regulation instead of relying merely on judge made law.

- They said look, the mosaic principle cannot apply to the internet which is ubiquitous, and they wanted to protect the fundamental rights and freedoms of movement, of people, goods, services and capital. The basic four freedoms of the EU and so they created a new jurisdictional pillar, the centre of interest of the victim. The centre of interest of the victim will usually be in the member state of his domicile however it could also be the state of his habitual residence and it could also be the place where he pursues a professional activity or is professionally established. So look at how much wider suddenly we have this jurisdictional pillar than the mere d'Alsace, de Potasse, either in the place where the delict is committed or in the place where the delicts consequences are felt or the first one in the domicile of the defendant.

- This is introducing the habitual residence of the victim, of the claimant and sconces in the larger centre of interest, so the centre of interests, may or may not only be his habitual residence but his professional centre of activities is also considered and where he is established is also considered but it's giving a personal connecting factor now instead of the place where the damage started from or the place where the damage was felt.

- So it's introducing a personal connecting factor instead of a locus and so this therefore gives you four possibilities here following e-date, namely a) under article 4 you can sue the defendant in his place of domicile but that may and is usually inconvenient for the victim and then b) following Bier and Shevill and now e-date but basically Bier that is the foundation stone either in the place where the legal conduct giving rise to the damage the place of publication took place, or that article 7(2) again the mosaic principle in each member state for the amount of damage in the member state but that was coming too difficult to pursue because with the internet then to get the full amount of damages if you couldn't find where the damage was started from and you wanted to say where you were receiving the damage you would have to go to all 28 member states, your bill would be larger than the actual damage that you reputation suffered so basically again here the ECJ stretched out to give the claimant, the victim a possibility of suing in the place of his own centre of interests and this way he could sue for the full amount of damages in the place of his centre of interest, which he could not do on the mosaic principle which was restricted to the damage of his reputation in each member stat following Shevill with the news paper model how much he suffered in each member state which became a bit of a medieval metaphysical exercis, can you calibrate how much you reputation suffers if in one country 30,000

newspapers are sold and in the other country only 30 newspapers are sold how are you going to calculate this?

- And then with the internet how are you going to be able to do this with each country?

- In fact, there is more of a honing of this in Bolag Supply Sningen, which is interesting because this case now goes into the distinction between asking for damages merely and asking for rectification and removal of the toxic content. That is in a way if you just take damages once in January in 2023 because of an internet publication and your reputation is going to go on being tarnished in February, March, April when does your claim for damages stop with the Internet? With the physical distribution of newspapers it was a once of delicti commissi and infecti, the ensuing consequence but the internet remaining there blurring the lawyers for the victim wanted to either get a correction accepted on that website or the total removal of the toxic material because that was going to carry on month by month by month so we are in a new technological era beyond the newspaper model of Shevill, so go and read Bolag Supply Sningen because that's going to be rather important because it has changed now these four jurisdictional rules on the Internet.

- In which way? To sum it up neatly, now we have first the victim can sue in the defendant's domicile, usually where the website is registered if it is traceable because that is also another difficulty on the internet where you have a lot of mirror websites and you wont be sure which mirror is the final mirror but 1) article 4 remains article 4 you sue the defendant's domicile for the full amount of damages for rectification 2) and 3) for removal of content placed online.

- The second jurisdictional option is to sue in the place of the illegal conduct giving rise so the first is the defendant's domicile, if you can know who the author is, the defendant, the one who is in charge of the the website and sometimes they are pretty anonymous or in a Russian doll matryoshka one in another, in another, in another and you don't know who the ultimate owner of the website creating the toxic material is.

- So both regarding the first when you're suing the defendant it's difficult to find who the defendant really is and in the second case to sue in the place where the illegal conduct arose where did it arise?

- It could also be somewhere completely outside the EU because with mirror websites, you can even place it outside the EU again so that makes the second jurisdictional option rather difficult.

- Three, we come to the old mosaic principle, that if you can show that there is actual damage say in Germany because a lot of newspapers are speaking about what has appeared online and your reputation is manifestly being tarnished in Germany you can sue territorially for the damages.

- So, that is open for the damages not for rectification or for removal of content so the mosaic principle still gives the victim of defamation the possibility of banking on the mosaic principle saying two states, in Germany and France there have been discussions in the newspapers about how your reputation has been tarnished so you sue there for damages but even if you win damages on the next day after the judgement let's say online toxic tarnishing of your reputation its going to still be there. What do you do? You go again and re launch but they say it's res judicata it's final but your reputation is still being tarnished and this is where then with the introduction of the centre of interest so its shifting the centre of gravity basically from the defendant to the place where the damage started from, second, third to the place where the damage was felt, ensued, fourth to the centre of interests of the victim and here you can go for the full amount of damages throughout the EU, as well as for rectification and removal of content.

- So, look at how Dr Sceberras Trigona has tried to quickly take us through this slow evolution from merely the concept of physical damages, to reputational damages in a newspaper, to reputational damages online.

- Interestingly, there's a case, GTFLIX TV, it's case 251/2020 and in this case the question that was sent was must article 7(2) of regulation 1215/2012 which is Brussels I Recast be interpreted as meaning that a person who considers that his or her rights have been infringed by the dissemination of disparaging comments on the internet bring proceedings not only for 1) rectification of the data, 2) removal of the content but also for 3) compensation for resulting non-material and economic damage before the courts of each member state? So, following the territorial principle of the mosaic theory in the territory of each the court of the member state to the territory of which content published online is or was accessible in accordance with the judgements of 25th October 2011 'E-Date Advertising and Others case 509/09. Case 509/09 is E-date and case 161/10 because there were two joint cases also because of the Martines case or so are we going to follow e-date or are we going to follow pursuing to Bolag Supply Sningeg which is case 194/16 this is the question referred. The person, the victim must make the application for compensation only with the court which has jurisdiction to order rectification of the information and the removal of the disparaging content.

- We will see here that in GETFLIX, we have the court coming to its conclusion first that it is following the e-date judgement validating the mosaic theory, although, or

the more learned amongst us this was heavily criticised by Attorney General Bobek in Bolag Supply Sningeg.

- So to look at criticism of this validation of the mosaic principle, even in the new technological era of the internet, we still have in 2021, a validation of the mosaic principle, second it validates the GETFLIX judgement, validates the Bolag Supply judgement that the rectification and the removal of content online constitutes a single and indivisible application, and it must be asked to the court where the published has its establishment (sometimes a very difficult question) or to the court where the alleged victim has its centre of interests. This is the new jurisdictional pillar enabling this weaker party, the victim of defamation on the Internet. The third conclusion in this judgement is that the plaintiff may regarding compensation for damage resulting from that toxic stuff on the internet sued the defendant before the courts of each member state in which those comments are or where accessible and then questions of language come in if it wasn't finished and if it's accessible in Malta, physically, does it mean that it is recognisably accessibly, are you going to read Finnish, are you going to do a google translate of a Finnish article? Probably not. So the accessibility gets weaker if it is in a peripheral language not English or French even German in Malta, is everyone going to be reading an online German article about John Bugeja in Malta? If it's then reproduced in the Maltese press with an adequate translation than yes, it's showing accessibility and its becoming more damaging to your reputation.

- So in this case where there is this accessibility, the courts shall be competent to decide on the damage suffered in the member state of the court seized and then there is a reference to a final argument which is a little bit esoteric, the court which it rejected anyhow was the direction of activities. Was the online mention of your name and reputation done in an honest way in good faith or was it to really damage you? This is where you move into mens rea and how do you calculate the mens rea of a publisher on the internet? You do it from the resulting toxic stuff, is it merely a list of persons and you're one of those or is it special and its really damaging and you have no way out of responding to it but the court rejected this and it said that this is in Brussels I Bis merely for consumer contracts not for damages arising out of this.

4th May 2023

Lecture 8.

- Today we will start tackling a couple of cases, but the main one is Jana Petruchová v FIBO, case 208/2018.

  - This is of particular interest to those who have an interest in working at offices for financial services Malta, it is a question of jurisdiction and the contest is again as

we had with the Ryanair cases where the company involved makes the client, the customer sign an exclusive jurisdiction clause. This is becoming all the more regular because lawyers of companies think that they can get away with it. They feel that having given their employer (to the company as employers) this advice of inserting an exclusive jurisdiction clause, this clause will prevail against any other defences and so now immediately to our minds we should start thinking of what the potential defences could be in cases like these.

- So first, let's go to the facts of the case. We have Jana Petruchová, she had (now there are some technical terms), she had concluded a contract for difference. This is a contract speculating on the international money markets, and she was claiming that since the company FIBO Group Holdings Limited based in Cyprus took an inordinately long time to process her orders of buying and selling currencies, she lost around €3,000,000.

- An inordinate claim of time when counted amounted to 16 seconds. Now, the whole cases revolved because Petruchová, a Cheque national domiciled in the Cheque Republic, defined the exclusive jurisdiction clause she had in her contract with FIBO in Cyprus by suing FIBO in the Cheque courts and so the Cheque courts immediately had a challenge in front of them whether to allow the contractually stipulated exclusive jurisdiction clause or to grant Petruchová, jurisdiction in the court of Cyprus under Brussels Recast with the clause in article 17 for the protection of the consumer.

  - <u>Article 17.</u>

  - **17**. 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.

  - 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.

- 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.

- You have prima facie, a case where there is a contractual stipulation of exclusive jurisdiction for the courts of Cyprus, in a contract which this customer of FIBO concluded. She is suing them in her own court because of Brussels recast having this historical breakthrough granting the weaker party, the consumer, the insured, the employee and for environmental reasons jurisdiction in their own place of domicile and she didn't have to go to Cyprus, employing a Cypriot lawyer, usually the Greeks are works than Cyprus also employ a translator and interpreter from Greek which no one can read. So that entails to an additional cost in having to submit to a Greek jurisdiction in Cyprus in English there's that option but it is an expense from somebody from the Cheque Republic to stay going to Cyprus and she got the cheaper version and it's important to underline this benefit of the weaker party protection, it's less expenses. It's off-putting if you have to go sue someone in Sweden or in Cyprus, to stay employing local lawyers and playing local courts and you don't know whether things are normal or you're getting shabby treatment. So suing indoor own court you're familiar with the judicial ecosystem cheaply because there's the usual gossip network and you ask is this happening where and without having to pay for this light advice so the protection for the weaker parties is something very, very, very strong in Brussels regulations but at law the first strength is the contractually stipulated exclusive jurisdiction clause in the contract which Jana Petruchová had with the FIBO Group Holdings.

- The question under article 17(1) of the Brussels regulation, pivoted on how do you define a consumer? Especially in the context of financial investments. This isn't a consumer of goods transported, but of financial investments.

- So the question referred to the ECJ/CJEU was whether 17(1) of Brussels recast should be interpreted as meaning that a person who engages in the trade of the foreign currency exchange, is truly a consumer, or whether the individuals 1) financial knowledge, 2) expertise, 3) the complex nature of the contract, 4) the risks involved, 5) determined that he is not truly a consumer.

  - It is different to buying a scarf, you don't have to be an expert in scarfs to be a consumer of a product you buy on e-bay or wherever.

- But here, this wasn't just asking for an exchange of €50 euros into Japanese Yen it was flitting around from US dollars to Japanese Yen back to Euros, so there is a whole gamut of financial experience, financial knowledge, knowledge of contracts, knowledge of the markets and why is this critical? Because article 17 puts a very important caveat, not in defining the consumer but in excluding who is not a consumer which is as close to a definition as we can gladly accept, and it says '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'.

- So here FIBO wanted to show that she was not a member consumer of having asked for 100 dollars in Japanese Yen and they send it over to her, just a consumer of exchange services but she was was involved in financial investments and therefore involved in financial investments you're taking risks, you know the market you have expertise it's different to being merely a consumer in exchange of currency service and if they could manage to dislodge this under article 17's caveat, she would no longer be a consumer and therefore the Cheque court will lose jurisdiction and she'd have to fall back on exclusive jurisdiction clause regarding the Cipriot courts.

- So look at where the precise focus of the lawyers is aimed at in this case. She has to prove that she is a sheer consumer, and they tried to dislodge that focus by showing that she is an expert in financial investments, she takes risks with capital investments here and there, she knows the trade, has done this trade before and so it's a purpose which can be regarded as being inside her trade or profession not outside her trade or profession as is stipulated in 17.

- So 17, does give the consumer protection but doesn't give the trader protection and there is a gray area between he or she who is a consumer purely and he or she who is a trader, to start with there's the gray area of how does one from being a mere consumer graduate to become a trader, there will be an intervening period of time where this person has indulged perhaps in one experimental investment in January this year, another experimental investment in June this year and another one in December, has she become a trader with three investments over a period of twelve months?

- So it's not as sharp black and white in 17 as to distinguish between the consumer on one hand and the trader or profession on the other hand, there will be gray areas so watch out in the future if you're called upon by financial services companies in Malta who are all following this kind of advice of saying exclusive jurisdiction to the maltese courts because again it suits the financial services companies based in Malta, but we are going to be facing this type of case where we will have consumers challenging the financial services companies in Malta in their respective jurisdiction where they are domiciled because it is cheaper for

them, they know the lawyers, they know the courts, they know how to handle them from there.

- Whereas if they have to stay coming here they have to pay for hotels, flights, get the lawyers, not being familiar with the local customs etc, understand this as a background. that's the practical background but the legal background is the consumer does not remain a consumer if what he is doing is for a purpose which can be regarded as being outside his trade or profession.

- Here, the tipping factor it would seem, the key was that Jana Petruchová was a university student. The fact that she was a university student weighed a lot in building up her profile as a consumer not doing these foreign exchange investments as her trade or profession because she was a full time university student, so this was already swaying the case.

- Again to take us to the very end of the case, read the operative part of the judgement at the very bottom around paragraphs 79/80 of the judgement, we should see the pleas to be assessed too. In the judgement, the final paragraph, the ECJ held and this was a first because at the same time there were other cases in other european countries even in England post Brexit saying we are waiting for Petruchová to be decided on, so look at how much of a landmark this decision is.

- The final judgement says, 'In the light of all the above considerations, the answer to the question referred is that Article 17(1) of Regulation No 1215/2012 must be interpreted as meaning that a natural person who, under a contract such as a CfD concluded with a brokerage company, carries out transactions on the FOREX market through that company, must be classified as a 'consumer 'within the meaning of that provision if the conclusion of that contract does not fall within the scope of that person's professional activity, which it is for the national court to ascertain as a matter of fact.

- Here the EJC is only giving us the legal parameters, the ECJ is closer to interpreting Article 17(1) from Brussels Recast and then leaving it to the national Court in the Cheque Republic to see whether she fits more or less. But now the ECJ gives us two arguments in the judgments, dismissing the arguments of FIBO.

- For the purpose of that classification, on the one hand, factors such as the value of transactions carried out under contracts such as CfDs, the extent of the risks of financial loss associated with the conclusion of such contracts, any knowledge or expertise that person has in the field of financial instruments or his or her active conduct in the context of such transactions are, as such, in principle irrelevant, and, on the other, the fact that the financial instruments do not fall within the scope of Article 6 of the Rome I Regulation or that that person is a 'retail client 'within the meaning of Article 4(1)(12) of Directive 2004/39 is, as such, in principle

irrelevant'. That is point one the value because the argument of FIBO wasn't a mere student investing €100, three times in a year and gained €20 each time because she claimed them in the foreign exchange market intelligently between euros and yen and made €20 each time so made €60 in a year, but it was millions. So the value was used as a critical argument to shift a definition from being a mere consumer to being a trader by way of profession because of amount, the volume does matter.

- So the first point the ECJ is dismissing is the argument of the value of the transactions.

- Two, the extent of the risks of financial loss associated with the conclusion of such contracts, because there is a risk. Placing a million euros in the hope that the Yen will increase substantially and it falls, you'd be losing €20,000 so the risks are substantial. They are not consumer type of risk, if you you play €100 and you lose €2, you'd say ok, €2 are €2, but the risk isn't going to be consequential for your lifestyle, so a consumer playing €100 in order to win €2 or lose €2 is definitely not a trader but a consumer playing €1,000,000 in order to win €3,000,000 or lose €3,000,000 here it doesn't remain a consumer. So the extent of the risks is the second argument being dismissed by the ECJ.

- Then, any Knowledge or Expertise that that person has in the field of financial instruments. To play the market you can't just be a stupid arbiter gambler, you cannot be blindfolded you must be informed and do an informed investment otherwise you will be losing all your savings and your wealth in no time, most study the market seriously on days and weeks on ends and pounce when they see the moment, so they develop knowledge and expertise in the market, so they are not merely consumers. Look at how strong this third argument is you're not a mere consumer buying a scarf, and the scarf is defective and there are issues of product liability, that is different. Here, it's so close to being a trader because the very nature of financial investment requires knowledge and expertise and this third argument also is being dissed by the ECJ.

- Also his or her active conduct in the contract of such transactions

- to play.You must be informed as you would loose your saving in no time. Most of these guys study the area to then play and then try not to loose. Here it is so close to being a trader as the very nature of this transaction need expertise. So not only twice in a whole year, but forty two times in a whole year. The active conduct again characterises whether the person is a consumer or a trader. How many scarves can you buy in a year? As a consumer, maybe one for Christmas and another one for your birthday? you're not buying one every month unless you're super rich but if you do 42 financial investments in a year, alright you're a

university student but FIBO must have been very frustrated by this judgement because they thought they had all the logical arguments apart from the first argument that was contractually stipulated.

- All these factors are as such said to be principally irrelevant (daqqa ta ħarta kbira because they to tend to make sense) BUT On the other hand, the fact that the finical instruments do not fall under article 6 of another regulation on the law of contractual obligation under Rome I (because it is under Rome 1 where there is choice of law or choice of habitual residence) or that the person is a retail under MIFID (another regulation) are in principle irrelevant.

- So in this next paragraph it collects the legal arguments (not the factual ones) and this is dismissing as irrelevant.

- So look how this judgment because it is giving priory to the protection of the weaker party. Look at how strong the court felt that it had to uphold the priority of the weaker party in Brussels I Recast, and FIBO made a remarkable set of persuasive arguments above the prima facia argument that they also had an exclusive jurisdiction clause.

- Notice, what the court is trying to do is to uphold under Brussels Reacts the objective character of the consumer and not the subject character of consumer. This is because the court is trying to built a series of judgments defining ‘consumer’.

- So it is on the one hand trying to honour Brussels I and Brussels Recasts attachment to protecting the consumer (this is the general paradigm) but then in trying to do that they must protect who the consumer is. It can’t just say we will protect the weaker party, which consumer and article 17 tells us that if he is trading then he is not a consumer

- Now, there’s a cross reference, the court even refers to Schrems case in data protection

- What is interesting is that there is another important more complicated legal battle this is because there was also citation of another directive being the MIFID Directive, ‘The Market in Financial Investment Directive’. (This doesn’t have a force of law as a regulation)

- Here you will find that under MIFID, this MIFID provides a much more nuanced protection for weaker parties for financial services, than Brussels I Bis Recast. Here it does not only distinguish between three different categories of investors namely;

  - Retail Investors.

- Professional Investors.
- Eligible Counter Parties.

- So MIFID creates legal categories into which Petruchová could be placed and this becomes hot water for her. This is because it is not as simple as consumer so long as it is not her trade or profession, this is creating an in-between area for financial investors where they will be recognised as traders and investors.
- So citing this directive was useful again for FIBO. It uses different criteria to determine the investors' level of sophistication. This is where they got there arguments from which the court said was irrelevant.
- Amongst these criteria are
  - The client's wealth
  - The number trade per annum (she has previously executed)
  - Any experience you might haven the financial industry
- The investor under MIFID can choose to either upgrade or down grade his classification because it involves different risks and liabilities. So FIBO cited tis to trap Petruchová, because it found a piece of quasi-law which classified her. So they weren't so off the mark when they used this criteria in this directive but the court did not accept that because it was giving full priority to Brussels Recast protection of the consumer and it held that the knowledge and information that a person possesses in a certain field do not matter for the purposes of determining whether that person requires consumer protection or not.
- Look at the dilemma the court was placed with. Should they not give consumer protection if a particular consumer is knowledgeable in a field? Should the not give consumer protection if a consumer is wealthy? Move off from financial investments, this is the risk and the court was saying it had to avoid, otherwise it would have to be reducing the amount off consumer protection that the law explicitly gave (we read it all in the preamble of Brussels Recast, we know it's not only for the consumers but it's also for the insured, for the employee, for the environment). So it is a big trust of new law, can the court ignore this big trusts of new law of Brussels first and Brussels Recast?
- Here is were they showed their reasoning. The judges held that they were seeking to emphasise the need for consistency of EU law.
- They are bound in a way as administrators also, as administrators of this general protection of the weaker party and if they start giving many exceptions there won't

be a consistency of EU law on who is the consumer so they are shying away from denting that uniformity and strength of defining the consumer inconsistently and they also dismisses the MIFID directive, because they said that this MIFID does not appeal to them (Dr. Sceberras Trigona found it arbitrary). Yet then they put in an important point, the killer argument was that the definition under MIFID also covers legal persons and so they weren't as frivolous as at first because since it also covers legal persons and they are they putting legal and natural persons they are mixing protection.There's no consumer protection for legal persons and to that extent therefore the ECJ is right in dismissing MIFID, because MIFID bunches legal persons and natural persons That's a killer argument. It's a no no for consumer protection. A commercial company is set up to make trade by definition, why is it a commercial company, it's not philanthropic, you don't have a limited liability company which is philanthropic in its purposes. It's there, it's set up to make trade and commerce so by definition it's excluded from the protections of 17(1)

- So by MIFID bunching legal persons, commercial companies with natural persons, that is the killer argument that MIFID is irrelevant. So the judges where right legally now in pushing away the trap that the lawyers for FIBO tried to place by creating a space between the black and white (white pure consumer, black if she's indulging in trade as a part of her profession).
- They also tried to use the MIFID's three categories and say look she's in here also but she's an actual person and then that removed the relevance of MIFID so look at how fine these legal arguments are (even for us in the future)
- The ECJ also dismissed at a legal level the relevance of ROME I.
  - <u>Article 6.</u>
  - Consumer contracts
  - **6**. 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.

- 3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

- 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;

- (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);

- (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;

- (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).

• This is because under ROME I, the regulation, in 6(4), first of all they said Rome I and Brussels Recast are totally different. Brussels Recast is all about jurisdiction and Rome I is about choice of law. That’s correct and that is something to remember. Keep distinguishing what you're talking about and writing about. So FIBO bringing in Rome I in order to show how contracts were regulated under Rome I was for a different purpose it wasn’t for jurisdiction purposes it was for

choice of law purposes, so the ECJ was very comfortable here in saying that they where mixing things up.

- There is a basic point underling this that under article 6(4) (remember it's for choice of law) of Rome I it excludes rights and obligations which constitute a financial instrument only in so far as these activities do not constitute a provision of a financial service but FIBO had rendered a financial service to Ms Petruchová, so there was an element on which they could have brought in Rome I for eligibility but that would have been for choice of law but not for jurisdiction.

- Now, above all, there is the question, even though the ECJ dismissed MIFID, forget the protection of the weaker party, why should an investor even as a company under MIFID not be expected to honour an exclusive jurisdiction clause? Let's go back to the beginning, as here we've been trying to follow Petruchová's defences, out of this and sue the company by saying she was a mere consumer but why should MIFID legal companies as investors without any protection of the weaker party following Petruchová, be given some kind of encouragement by the Petruchová judgement that they couldn't care less in the future about jurisdiction clauses in a contract that they had concluded? This remains the recurring question. This is where not honouring a contractual choice of jurisdiction is a major sin in PIL. It has to be very reasonably argued, so basically what we have in this ECJ judgement is the court threw out a contractual stipulation of choice of jurisdiction, in order to protect a consumer because of Brussels recast's general theological commitment to protect the weaker parties.

- Now in a concurrent case, that was taking place in the British High Courts, Romana Ang vs Reliant Co. Investment Limited in Cyprus again, this is 2019 England and Wales High Court. The defendant Reliant Co was again a Cypriot company offering financial products and services through an online trading platform. Mrs Ang was a person of substantial wealth who invested in bitcoin futures on a leverage basis. Forget the technicality of financial investment, she was not employed or earning in any self employed trade or profession, now because of article 17(1) look at what we are checking) save that she was such a regular consumer of Reliant Co, through their online UFX platform, trading platform that she could be classified as a trader because of her regularity of trade even with Reliant Co itself (we don't know if she traded on other trading platforms).

- She had no education or training in crypto currency either in crypto currency investment or in crypto currency trading. However her husband, had amassed a large cash of Bitcoin through his early investment in Bitcoin mining and he identifies himself on his website publicly as the inventor or co-inventor of Bitcoin. Mr. Wright but the judge was not required to enter into the question, so by association different surname he's her husband

- In 2017 January, she opened an account with Reliant Co to invest circa 300,000 US Dollar form her personal funds, being the sale of a former home in Australia and her interest in next generation banking business.

- At the time of opening the account (this is where it is also relevant with what we were doing last time regarding the Internet) she was required to click a button to accept Reliant Co's term and conditions. That click is the offer and acceptance at law. (So watch out with your clients on that click) and amongst those clauses was an exclusive jurisdiction clause in favour of the Courts of Cyprus Can you say that consent was vitiated, consent was not fulsome? You are asked to click if you accept he terms and conditions and one of the clauses is you are accepting the exclusive jurisdiction of the courts of Cyprus. So it's one thing writing a contract in a office with a legal adviser and you are signing to a clause number 19 which says all questions regarding this contract including it's implications shall be decided upon exclusively by the courts of Cyprus and Cypriot law as the chosen law between the parties and it's read out and you sign it, that's more organic but the click you probably didn't even scroll down. If you didn't scroll down what happens? So if you don't do that are you presumed to have read clauses you have not even seen? This is fine but it can be the make or break of a substantially legal case.

- Her claim against Reliant Co investment was that they blocked access to her account in August 2017 to January 2017, where they entitled to do this? Could they do this? they brought accepts, and they refused to allow her to withdraw funds from the platform. Look at how complex it becomes, it's not only a question of asking for damages because of loss of profits as Petruchová was claiming. Now the company blocked access and didn't allow her to withdraw her own funds so she's blocked she has at least €200,000 and she's blocked she can't use them so obviously she starts her suit at least to get back her own money, never mind for suing for damages for profit loss.

- She said that between January and August 2017, she alleged that Reliant Co should compensate her for the loss of her open bitcoin positions which she claimed that in August 2017 equated circa €1,000,000 and at the time of commencing the legal proceedings had been in excess of €3,000,000 now it's becoming substantial.

- So she started her proceedings in England her country of domicile, Reliant Co challenged the jurisdiction of the English courts on the basis of the exclusive jurisdiction clause contractually stipulated (let's presume that that click was contractually stipulated).

- Mrs Ang claimed (look at her counter argument of the click) that the exclusive jurisdiction clause was ineffective and that it did not require her to bring the claim in Cyprus either because she was only a consumer within the meaning of article 17 of Brussels Recast, or because the jurisdiction clause was not incorporated in her contract with Reliant Co in such a way as to satisfy the requirements of article 25 namely after the dispute started and she claimed that she received hyperlinked to Reliant Co's terms and conditions that included the exclusive jurisdiction clause but that they did not work such that they took her to an error page. Now if she can show that each of these hyperlinks sent to her and she pressed them they sent her to an error page, then this becomes technically relevant.

- It's not only this argument that you haven't actually read that you only saw the first three articles and there were thirty five and you clicked for the only three she saw now the hyperlinks that were given to them when she pressed them, something wrong in her computer or in the website sent her to the error page. Can this be proven? (This is where computer expects come give expert advise).

- She also claimed that under the Data Protection Act 1998 and GDPR from EU seeking an order for rectification, distraction, erager, or blocking of her personal data by Reliant Co.

- What the court did was to reject the exclusive jurisdiction clause by Reliant Co, again they said that as in Petruchová but it hadn't been decided this was not a business activity but a private consumption need.

- Look at how bigger and bigger private consumption has become €1,000,000, €2,000,000, €3,000,000. So look at how wider and wider the protection of the consumer has become. What is interesting is that in this English court case, they gave a cross reference to three other cases

  - Shearson Laimain Hutton Incorporated vs TVB, Case C-89/91 (the case of the Laimain brothers)

  - Benincasa SRL vs Dentalkit Case C-269/1995

  - Standard Bank Limited vs Apostolakis (these are English) 2002

  - Standard Bank London vs Apostolakis 2003

  - And Jana Petruchová v FIBO, case 208/2018.

- Which we were discussing earlier, read the Apostolakis case also as it's rather interesting to see how problems of evidence can affect PIL evidence. But here you have another case now, from Britain again following the EU's protection of a

consumer with a massive wealth client/consumer, not a simple student putting a €100 once every year in order to gain €20 or lose €20. So look at the importance of the protection of the weaker party.

30th May 2023

Lecture 9.

- What we've been trying to develop through the semester is the central question on how habitual residence in various EU regulations has supplanted the debate over the last two centuries between whether domicile is a more appropriate personal connecting factor in contrast to nationality's original claim of certainty.

  - Nationality used to claim that they are better than domicile as it provides certainty. Domicile provides great uncertainty, especially because it gives importance to intention, which is hard to prove, especially of a dead man. So one would be lost in conjecture as to what the wants of the dead man was in trying to establish his domicile. This is because domicile has two requirements; the facts of the case (which can be easily established through the time spent in one jurisdiction) and the intention not only the animo manendi, therefore to make this place his permanent home, but also on the peculiar English definition of animo non redeundi. The animo non redeundi is the intention never to return.

  - Worst still, for purposes of proof, we follow the English peculiarity of the tenacity of the domicile of origin as seen in its variation with the doctrine of the revival of the domicile of origin, in between domiciles of choice. There English had various reform proposals and Lord Denning was absolutely against any reform, so they have not joined the US, Canada etc, into the theory of the continuing of domicile of choice which eases the problem of the doctrine of revival of the domicile of choice but not completely.

  - A Maltese person could go to England, marries an English girl, has a good job, but after 10 years he moves to California and has a new family over there. The problem with the revival of the domicile of origin, when he goes to California, does he immediately, on getting the facts, take over a domicile of American choice, or does it require some years for him to show that he is intending to make California his permanent home and also to quash any idea of returning to either to his English domicile of choice or to his Maltese domicile of origin?

  - This is where the English theory becomes very difficult. It is at this point in the stage of proof. It starts opening up, it becomes murky and one can easily trip up during the proving stage. In Grech vs Busutil, (1953), there was a very clear case holding

- “Mhux biżżejjed it-tibdil tar-residenza (it is not enough to show a change of residence) iżda meħtieġa wkoll hija l-volonta ’u l- intenzjoni li jiġi abbandunat id-domiċilju tal-oriġini (animu non redeundi) biex jiġi assunt domiċilju f’pajjiż ieħor b’mod li lanqas l-immigrant ma jitlef id-domiċilju tal-oriġini tiegħu jekk huwa żamm il-ħsieb li jerġa jirritorna f’pajjiżna”. U “it-tibdil tad-domicilju ghandu jigi invokat u mhux provogat” It also stated that the onus probandi is on whoever is invoking a change of domicile.

- So those in favour of nationality where criticising domicile because of these complications. Instead of leading to legal certainty and less expenses for clients, this was leading to legal uncertainly more and more hearing, bringing in more experts, more appeals and ultimately more expenses.

- Nationality had a heyday when a person only had one passport, but enter double citizenship. So is this a good connecting factor when one can have 4 connections? So whereas when nationality was unique it had a major winning card against this confusion of domicile with the revival and non-adoption of the American definition of domicile. Even this other definition would posses problem as when does the other domicile arise? As soon as he left? As soon as he signed his lease agreement? Or does it require a few years there so till this time he still carried with him the domicile of choice? So this only solves the revival of the domicile of origin.

- The question with nationality has lost its superiority as with multiple citizenships, one is not being connected either with jurisdiction or with choice of law to one court or one law. So domicile was stated as being better than nationality is because British citizenship only got one to the shores of Britain, but whether one penetrated English or Scottish jurisdiction. So this was the advantage of domicile as it took one closer as to the jurisdiction. And with nationality one has to try and zoom out to see which is the most real and meaningful connection that this person has.

- So at this point one has to examine facts.

  - For example he has one passport for the Bahamas just for tax purposes, he does not have any property there and he is only there a month per year as that is what is required by the law.

  - He has got an Italian passport because he is regularly there, he is there for all the big football message, he is participating in clubs etc. Additionally his family and children are also there. He had an English passport just because his mother had one and therefore he kept it just in case.

- So from the proof of the facts one has gone beyond the nationality to go to where the EU is however with its interests. This would be the habitual residence.
- In order to understand habitual residence one must understand this larger canvas of the debate. Habitual residence is brought in as an improvement hopefully.
- This topic started with the general caveat of case 523/07, that the interpretation of habitual residence by the ECJ. as the ultimate arbiter of this newly coined connecting factor, under, cannot be legally transplanted from one regulation to any other regulation. In this respect the EU has failed in giving a uniform definition of habitual residence, cutting across all the regulations where habitual residence is resorted to in lieu of domicile and in lieu of nationality.
- So first there is the question of how much has habitual residence created more justice in the case which were analysed than if domicile was used or nationality. Can one delineate any improvements that we have gotten with the adoption of habitual residence in the regulations? Has the EU improved in providing a better connecting factor than either nationality or domicile? Is it a defect that we do not have a definition cutting across? Or is it better that it is customised to each of the regulations? Had it been better if we had one uniform definition for natural persons and legal persons running right through all the Brussels and Rome conventions? Or is it better still that it is customised?
- It has been shown that in these various judgments, on a number of occasions it was first shown that if habitual residence would not be used, there would be a reference to domicile as an alternative or even to nationality. Although the EU legal draftsman have pushed habitual residence, this has not been at the total expense of domicile and nationality. So it is not as simple as a synthesis, they still linger in a number of regulations in default of habitual residence. So it has only been a nudge aside, not a deletion of nationality and domicile as personal connecting factors.

- The draftsman have been calibrating and drafting a slightly heftier importance to habitual residence but they did not totally exclude nationality and domicile. So one has to look at all the regulations and see how far habitual residence is in the hierarchy of other personal connecting factors.
  - One also finds that there is certain commonality, but not always in the various judgments, which try to delve a little deeper under the words of habitual residence to go to the centre of interests. And so one can say why did they have to refer to the centre of interests in order to explain habitual residence better. Is centre of interest a better personal connecting factor since it gives us more facts and intention as one of the facts? After all this is the advantage of habitual residence

as it reduces the high importance of the English double decker use of intent by making intent merely one of the factors in centre of interests. This is also not a conclusive one as was seen in Swaddling. Does centre of interest show us the way? Or is it more because of the US jurists development of a centre of interests that EU jurists are looking at in order to narrow the gap in cross-boarder cases between the EU and the US by coming to a common ground?

- So centre of interests showed that it was giving us an answer in Swaddling, where the intent in habitual residence is reduced and in the 523/07 (A vs. B). However, in contrast, when one goes into the whole debate of matrimonial proceedings, and delve into the legislative draftsmanship of the British, post-Brexit which introduces in contrast to the EU regulation by solving the question if ‘if ’means provided that or if it means and. Here there is a determined British legislative resolution of a debate in British court about an EU regulation by taking one side of this debate, which was the original Marinos case, in-spite of it being overruled in Monroe and in Pierburg.

- So legislatively, the Brits came out with a legislative amendment pro the Marions judgment. And so it is important for one to contrast this as in England is attracting more and more case for the commercial benefit of London. This was done by delving into more on the definition of residence and habitual residence. So this debate is holding habitual residence on the day when the petition is registered on the court. But there previous months, depending on which indent has been only residence.

- So habitual residence and residence are still vying their way in EU regulations. And now with the UK law, there is surely gonna be more EU cases trying to cite Marinos in order to try and interpret that if under the UK legislation. Therefore this debate is kindled even further as there is an English law one side of the debate. This is interesting as it opens up a whole spectrum of cases on habitual residence and residence.

- In fact Lord Garmin had asked what does habitual add to residence? It does not add anything at all in his opinion or else one would be going of residence with the hard intent. Additionally there were these cases about if one can have more than one habitual residence. Is there a rule about how much time one has to spend in each residence? So the facts are facts of the residence, but the habitual bit is questionable.

- Then there is this judgment which states that it there is only one habitual residence, otherwise we will come back to the problem of multiplicity of nationality. This is very important to keep in mind, as even in the very beginning when they started introducing habitual residence, there were problems with multiplicity of

habitual residence. Also what amount of intent was required? This was legislated upon but it was without a definition at first. In fact there is a gap between Brussels I and Brussels II bis when there is the periods of time.

- However, under Marions, the periods of time were dismissed and only regarded having habitual residence on the previous months. So habitual residence and residence are still competing. Under national law there is also a number of residences, especially for tax purposes. So residence has a number of qualifying objectives to it which can make it either richer or more confusing.

- So it is important to keep in mind that it is not always habitual residence in all the EU regulations, there was residence which was coming in.

- Additionally as was seen with the cases on the internet, one has to see the possibilities of suing for defamation and to get the correction. Here there were four possibilities. Here there is a centre of interest which is coming and it starts becoming more interesting as a connecting factor because of the various factors that go to show it. This is after all not that new, it is not because of the development of the internet, because even in the case of 523/07, there was the number of criteria that were being brought to bear.

- “The concept of ‘habitual residence ’under Article 8(1) of Regulation No 2201/2003 must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case”. So here there is still in-numerous criteria. Here there is also the downgrading of nationality as merely one of the factors in centre of interest.

- From this case one is now delving under as to what used to be called the proper law about 35 years ago. This was a movement from English jurists to replace domicile, as a compromise with nationality with the proper of law, for jurisdiction purposes and for choice of law. The proper law would be that law or proper court with which the person has the more real and meaningful connection. Therefore it is more expanded than just the phrase of habitual residence which is a synthesis between domicile and nationality. The jurists are striving to find something stronger than the declining use of nationality, the fuzzy utility of domicile, therefore habitual residence but giving it various factors under each regulation. Here we are moving the centre of gravity/interest in US case law.

- Habitual residence has not stopped as a mere label, the ECJ has constantly evolved the phrase habitual residence with a multifaceted definition of factors which are underlying habitual residence. So by building more underneath habitual residence they have stuffed more aspects to be tallied. So one can have habitual residence according to the plaintiffs lawyer and habitual residence according to the defence lawyer, with a different assessment of the aspects underlying that same phrase of habitual residence. This way they give each other more criteria for lawyers to beat each other.

- In conclusion one can have different interpretations of habitual residence because of the way that one infuses meaning into the factors going into habitual residence. So one lawyer would give more important to different factors making up habitual residence than other lawyers. So there will be a conflict of definitions of habitual residence as understood by these lawyers. So the ECJ judgments are delving beneath habitual residence and are going into the factors making up habitual residence.

- For the question do not simply start speaking on habitual residence under the specific regulations, but one has to expand and show that they are familiar with what habitual residence was brought in to do. One has to prove that it is an improvement on both domicile and nationality as is now.

- Exam question; ‘To what extent has habitual residence adopted so gingerly by EU legal draftsman in a number of EU regulations improved connections for purposes of (a) jurisdiction and (b) choice of law in the various regulations’.

- Remember that the Brussels regulations are more concerned with the jurisdiction while the Rome regulations are more concerned with the choice of law. Provide a one the hand and on the other hand for - Has the EU improved in providing a better connecting factor than either nationality or domicile? Is it a defect that we do not have a definition cutting across? Or is it better that it is customised to each of the regulations?

- It has been shown that in these various judgments, on a number of occasions it was first shown that if habitual residence would not be used, there would be a reference to domicile as an alternative or even to nationality. This is useful to point out under each regulation. In the essay show whether it would be advisable to replace habitual residence with centre of interests as applicable to jurisdiction, recognition and enforcement of a foreign judgment, divorce, personal separation, children’s custody etc.

- Do not follow the essay of simply explaining of firstly having domicile, then nationality which became fashionable and then the EU cleverly introduced habitual residence.
- For the exam prepare a simple compare and contrast on the different rules and interpretations of habitual residence in the EU regulations on PIL. This can be compared and contrasted with domicile, nationality, centre of interest etc.
- The question would be an essay.

Private International Law.

Dr. Joseph Bugeja.

14th February 2023

Lecture 1.

- Brussels 1
- Recast
- part 1

- We will be lectured on Brussels Recast Directive, Brussels Recast I, on jurisdiction and recognition and enforcement of foreign judgements, followed by Rome I on contractual obligations and we will conclude with Rome II with respect to torts, delicts and quasi delicts. These are all EU instruments on Private International law. As it is EU law it prevails over any national conflicting law. This is the part of EU law on Private International Law but within the public law department.
  - Jurisdiction for civil and commercial matters in courts of the EU MS is subject to:
  - Regulation 1215/0212 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters
  - Its predecessor with the same name was regulation 44/2001
  - The precursor to Brussels I regulation was the Brussels convention with the same name, of 27 September 1968- outside the EEC Treaty.

- The regulation in question, the Brussels recast is regulation 1215/2012 which deals only with civil and commercial matters not with other areas of law such as public law, on jurisdiction, recognition and enforcement of judgements.
- The Brussels recast, was preceded by another regulation, regulation 44/2011, today it is defunct and an earlier version of this directive was in the form of a convention, the Brussels convention of 1968. This Brussels convention is not EU law but within the remit of international law, but we have to concentrate on this regulation 1215. This is just a historical note.
  - Brussels I precedence

- By its nature, the Brussels Recast takes precedence over national law, including procedural law on locus standi, interest to bring case, a potential application for summary judgement etc.

- A national court therefore must first decide whether it has jurisdiction to hear the case under the Regulation.

- As we said Brussels I recast takes precedence over national law, including procedural law on locus tandi, juridical interest and so on and when a national court is faced with a case which involves a private international law element, the judge presiding that court, has to see whether it has jurisdiction to hear that case given that there is a foreign Private International Law element.

- Under UK law Private International Law is referred to as conflict of laws but under the continental system we use Private international law

  - What is private international law

  - Private International law:

  - 1) a body of rules

  - 2) used to assess and solve legal disputes between private individuals.

  - 3) which disputes would have a foreign element

  - Where a dispute arises between two, or more, parties in different countries with different legal systems, private international law's body of rules will assist a court to determine which country's substantive law shall be adopted to determine and solve the matter before the court.

- What is private international law?

- There are the three elements of private international law, a body of rules of norms, use to assess and solve legal disputes between private individuals, with an emphasis on private, it is not public international law where only states have locus tandi but private individuals, use to assess and solve legal disputes between private individuals and which disputes would have a foreign element.

  - An example is I am a maltese emigrated in Australia, I have made a will in Australia whereby I have bequeathed my estate to my children and in that estate there are moveables (in Australia) and immoveables (in Malta). I am going to buy, I died in Australia with a will according to Australian law, my children are my heirs and they are going to sell my home in Malta, they are going to sell it to you, what are you going to do? Which law applies? You are

going to the notary, first the notary has to ask for what is referred to as a probate from an Australian lawyer which confirms that the Australian will is valid first and foremost and that the heirs are valid in terms of Australian law. What next? Once that this is confirmed that the will is valid according to Australian law and the heirs are valid heirs? What is the next step? You will ask which law applies because the property is situated in Malta, and what is the principle of Private International Law in this case, the lex situs, the place where the property is situated, Maltese law so although the will is an Australian will the maltese notary is going to publish the contract of acquisition in terms of maltese law because the property is in Malta.

- 3 pillars of Private International Law
- 1. Jurisdiction: the rules which define whether the which has jurisdiction to hear the claim , whether national or foreign court. Brussels I Recast and the COCP regulate jurisdiction.
- 2. Applicable law: once determining jurisdiction, one must consider which is the applicable law. Even though one court has jurisdiction, it does not mean that its law will apply, the applicable law may be foreign law.
- Rome I regulation determines the applicable law in contracts
- Rome II regulations determines the applicable law in tort
- 3. Recognition and enforcement of foreign judgements: the rules which determine whether a foreign judgement may be recognised in the national legal order (Malta).
- The Brussels I Recast Regulation refers to recognition and enforcement in relation to judgements done in the EU, and the COCP for enforcement of judgements of third countries

- It is important when dealing with a Private International Law matter, these are not common cases, but they arise. You have to keep in mind three points or elements.
- First is jurisdiction, so which court has jurisdiction over the case whether it is the national court or a foreign court, first we have to establish the jurisdiction in a Private International Law case where a Private International Law element is involved. Does the court has jurisdiction? And who raises the plea of jurisdiction in the court? The defendant. So the plea of jurisdiction is raised by the defendant preliminarily as a preliminary plea in limite litis and the court will first before going into the merits deal with the issue of the preliminary plea on jurisdiction.

- The second is usually a partial sentence/decision is given before going into the merits because if the court does not have jurisdiction it is useless to hear the merits/facts of the case before dealing with the issue of whether the court has jurisdiction or otherwise. If the court finds that it has jurisdiction, then it will look into the matter on what is the applicable law. Why because for instance in a bilateral contract between two parties the parties may decide that jurisdiction shall vest in the maltese court but English law should apply. We have made a reference to Rome I regulation concerning contracts and Rome II concerning courts.

- The third pillar or element of Private International Law, the recognition and enforcement of a foreign judgement.

  - A client visits you, tells you I have a judgement from an Italian court and I want to enforce it in Malta because the debtor has property or moneys in Malta.

- The Brussels recast also speaks on the procedure on how to recognise and enforce a foreign judgement in this case if we are in Malta in Malta, you have to fill in the form Annex I you have to attach an authentic copy of the judgement delivered by the Italian court and then we shall see later there are also grounds even though there is a judgement where the defendant can oppose that judgement of the italian court, there are a few grounds that we need to be aware of if a client comes tells you I received this judicial letter that the plaintiff is enforcing an Italian judgement on me in Malta, can we oppose it on some grounds

  - Example was it properly notified? There are limited grounds on how to oppose a judgement, is it res judicata.

- The Brussels recast applies to the recognition and enforcement of judgement within the internal market between the Member States and we have also provisions in our code of organisation and civil procedure concerning the enforcement of judgments of third countries, a judgement delivered in Morocco and your client wants to enforce it in Malta, a maintenance judgement and he wants to enforce it in Malta, then the COCP has to be looked into.

  - Introduction

  - Malta never had a codified law on PIL

  - The EU also lacked the legal competence to legislate on PIL, in fact the Brussels regulation was first introduced as a convention entered into by the different parties.

  - Eventually, when the EU acquired competence, the convention was then converted into a regulation applicable to all MS.

- The regulation was then amended into the Brussels I Recast Regulation making it easier to enforce foreign judgements of the EU.
- There is also the 1988 Lugano Convention which is the same as the Brussels I Recast regulation which governs issues of jurisdiction between the EU MSs and Iceland, Switzerland and Norway.
- The Brussels Regulation applies to all States except Denmark, however it still accepts said regulations.

- By way of introduction, Malta never had a code of Private International Law, and as we know, since our accession to the EU our Private International Law has been unabridged through EU law on Private International Law, jurisdiction, contracts, torts, maintenance, separations there are specific regulations, succession.
- The convention on Private International Law today has been transformed into this Brussels recast. There is also the 1988 Lugano conveniton which is an international law instrument not an EU law instrument. Which again is similar to the Brussels recast, we are not going to enter into this but we need to know that this applies and although similar to the Brussels recast applies to the EU and the EFTA countries (Iceland, Switzerland, Norway etc) regarding Private International Law.
- For some reason Denmark did not sign the Brussels regulation, there was a derogation however in spirit it still accepts the regulation.
  - International Dimension
  - There is also the international dimension in PIL apart from the EU dimension.
  - The EU is negotiating conventions with third countries and thus in the future these conventions will apply as international conventions on PIL rules.
  - There is also the choice of court convention which seeks to ensure that the eventual judgement chosen by the court is enforced.
- The EU, we said the Brussels recast remit is for EU Member States, however the EU is also negotiating conventions with third countries in order to achieve more visibility on Private International Law rules.
- The EU vis-a-vis third countries, there is a process of negotiation of conventions with third countries.

- There is also the choice of court convention which seeks to ensure that the eventual judgement chosen by the court is enforced because it is useless having a judgement and you cannot enforce it.
- How does one enforce a judgement in the local courts? Iggib sentenza u tghatni €10,000 how am I going to enforce jekk ma jridux ihalsuni?
- What are warrants? Mandati, in the case if someone doesn't pay what warrants can I use? Garnishee order, judicial sale, mandat ta' qbid jekk naf li ghandu karozza, dawk huma enforcement actions, il-mandati, the warrants.
  - Under the old regulation, a judgement was not automatically enforceable, there was a long procedure to enforce a judgement.
  - The new Regulation removed the procedure, making the judgement automatically enforceable, with certain exceptions.
- Under the old regulation, the one prior to the Brussels recast a judgement was not automatically enforceable, and there was a long procedure on how to enforce a judgement however the Brussels recast streamlined the procedure. It made it automatically enforceable. Still there is a procedure, as we said one has to send the judicial letter where you are going to enforce it, fill in the annex I, bring an authentic copy of the judgement brought by the court.
  - Step 1 - Civil and Commercial Matter
  - Scope of application - subject matter
  - The Brussels regulation deals with jurisdiction in civil and commercial matters
  - If the matter is not civil nor commercial, one must refer to the COCP.
  - However if the regulation applies, there is the principle of autonomous interpretation, that the terms must be interpreted according to the Regulation and not by national law, Maltese law does not have supremacy with regards to interpretation of said terms.
  - The Regulation does not define what is a civil and commercial matter, therefore it is up to the ECJ interpretation.
- The scope of application of the Brussels recast. It applies only to civil and commercial matters. So if it is a public law issue, it will not apply, you have to check whether it is a civil and commercial matter first. If it is not a civil or commercial matter, we have to look at the COCP, at the Private International Law

rules in the COCP. The principle of autonomy is interpretation. We are checking the steps, do we have jurisdiction yes because it is a civil or a commercial matter.

- How do we interpret what is civil and commercial because we may not be sure whether it falls within a civil competence or a commercial competence or it may be verging on a public law element. We have to interpret what is civil or commercial not in terms of national law, not in terms of domestic law but in terms of the regulation, the Brussels recast and the jurisprudence of the Court of Justice of the European Union, that's why we referred to the word autonomous interpretation we cannot interpret what is civil or commercial in terms of local/domestic law but autonomously in terms of the regulation.

- As we said, Maltese law does not have supremacy because in this case it is EU law on Private International law.

- We do not have a definition in the regulation of what is civil and/or commercial. Therefore possibly also if a national court is seized with an issue of private international law on whether it is a civil or commercial matter, and the national court is hesitant on how to interpret civil and commercial it can file a preliminary reference on the matter to the Court of Justice. In this case it will be a preliminary reference on a Private International Law matter.

  - What is meant by 'civil and commercial'

  - In light of the CoJ insistence on concepts in the Regulation requiring an autonomous 'European' meaning, there has to be one approach rather than reliance on national law.

  - Common perception has it that the qualification 'civil and commercial' implicitly harbours a distinction between 'civil and commercial' law on the one hand, and 'public law' on the other.

- The idea of having an autonomous interpretation is to as much as possible that we have a common approach and uniformity on the case.

- Certainly, public law cases are not within the remit of the regulation and we shall see cases where even though a public authority was involved the case was still a civil matter for instance.

  - Article 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).

- If it falls beyond the scope, then Art 742 COCP applies. Article 1 therefore makes the following points:

- Article 1.

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

- Whether a court or tribunal, this is not the case so whether its a court or tribunal or any other name what we have to look into first is whether its a civil or commercial matter independently whether its in front of a court or tribunal.

- So the format of the forum is not important in this case what is important is that it is a civil or commercial matter.

- Point II, these areas are carved out from the regulation they do not apply they are excluded, revenue for instance issues on revenue government revenue, taxes, VAT, customs duties, administrative matters and state liability. Acta iure imperii, state liability.

- Now the third bullet, if the case falls beyond the scope of civil or commercial then article 742 of the COCP the national article on Private International Law applies

  - Public law: Public law matters are not applicable under the Regulation, even if the dispute is a civil or commercial matter.

  - If a public officer/civil servant is acting on behalf of the govern exercising public authority/powers, it is considered to be a public matter ie Regulation is not applicable.

  - But if the public authority is not exercising a public power, and falls under a civil/commercial matter, then the Regulation may apply.

  - Eg Case 29/76 LTU/Eurocontrol [1976] ECR 1541 - CIEU held that the Convention (and now by extension the Regulation), applies to disputes between a public authority and a private individual, where the former has not acted in the exercise of its public powers

- Point I, public law cases do not fall within the remit of Brussels I recast.

- Point II, if a public officer who is acting on behalf of a department or authority it is considered to be a public law matter and therefore the regulation is not applicable.
- Point III there may be a case where a public authority, a corporation or an agency of government who is not exercising a public power but in this case it falls under a civil or commercial matter then the regulation may apply because the public authority is not exercising a public power but a civil power.
- Case 29/76 LTU, it was a case which preceded the Brussels recast where the court ruled that the convention to the regulation applies to disputes between a public authority and a private individual, where the former, public authority, agency or corporation has not acted in the exercise of public powers.
- So, if the public authority is not acting in a public authority, the regulation will apply but if it is acting in an official public capacity the regulation will not apply because it is not civil and commercial matters.
    - Ruffer case (1980): A sunken vessel was removed from the international waterway by the Dutch local council by virtue of its public powers.
    - The court stated that a public authority may carry out transactions which fall under the definition of civil and commercial matters.
    - It said that the phrase "ervil and pommercial matter" must be given an autonomous interpretation.
    - The Local Council however was exercising a public power, therefore it was not a civil and commercial matter thus not within the scope of the Regulation.
    - http://curia.europa.eu/juris/showPdf.jsf;jsessionid=05556E82AB49BF530BAC989531B88ECC?text=&docid=90722&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1251041
- The Ruffer case, 1980; a sunken vessel was removed from the international waterway by the Dutch local council, the court said that a public authority in this case the local council may carry out transactions which fall under the definition of civil and commercial matters. In this case as we are noting the court said that civil and commercial matters should be given an autonomous interpretation.
- Given that the local council was exercising a public power through law, then the local council was not acting in a civil or commercial matter because it was acting under public law and therefore this case did not fall within the remit of the Brussels recast.
    - Sonnntag case (1993)

- A German teacher took students on an outing and one of the students died.
- An action was brought against the teacher, who is a public servant, however the court held that the claim was of a civil of commercial nature as the teacher was not acting in a public law powers when the student died, it was a personal action.
- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97909&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1251061

- Sonntag case; here we have a German teacher who took his students for an outings and one of his students unfortunately died. An action was brought against the teacher in this case the teacher was a public servant because it was a public school, the teacher argued that he when he was at the outing with the students he was acting with public capacity however the court did not agree and attributed a personal action to the teacher.
- So the Brussels recast regulation in this case appleid because even though the teacher was a public officer the incident which occurred in that case the teacher was acting in a personal capacity and therefore the Brussels recast could be applied with respect to this case as it was deemed to be a civil case not a public case.
  - VFK case (2002)
  - Involved proceedings brought by an Austrian consumer association VFK against German traders to stop using unfair terms in their dealings.
  - The court held that it was a civil or commercial matter as the association was relying on the normal rules applicable between traders and consumers and was not exercising any public law power:
  - http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47727&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1257127
- VFK case; this was a case brought by an Austrian consumer association. VFK, and in this case the Austrian consumer association filed a case against German traders saying that some German traders were using unfair terms in consumer contracts.
- The court held that this case was of a civil/commercial nature because the consumer association was relying on the rules applicable to consumers and traders and in this case the consumer association was not wearing the hat of a public authority even though it was a consumer association it was not within the

remit of public law it was defending the rights of consumers vis-a-vis traders and therefore it was a civil action.

- These cases give ideas on how the courts have interpreted what is civil or commercial and what is not. It has to be interpreted on a case by case basis.
- Lue Baten case (2002)
- Baten was resident in Belgium and had divorced and was obliged to pay maintenance to his spouse and child.
- The spouse had gone to live in the Netherlands and the state was paying the maintenance itself and claimed a right for recourse against Baten.
- The court held that insofar as the claim is one where the State is exercising an action by virtue of subrogation competent to the wife, then it is a civil matter.
- However if the state was going beyond normal relations applicable between private individuals, then it is not a civil or commercial matter.
- https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62000CJ0271&from=EN

- Baten case; Baten was a resident in Belgium, he divorced and had to pay maintenance to both his spouse and child. The spouse went to live in the Netherlands, Baten was not paying her the maintenance and so his ex-wife had to rely on the social security system of the Netherlands for maintenance.
- A right for application (rikors) for the unpaid maintenance was filed against Baten. The court held that in so far as the claim is one where the State is exercising an action by virtue of subrogation competent to the wife, then it is a civil matter.
- What is a subrogation? The insurance I make a claim to the insurance the insurance gives me €1,000 and then I subrogate the insurance in my rights and the insurance will have the right of action instead of me, this is subrogation.
- The state was paying maintenance to the ex-wife and the state filed an action against the ex husband in order to recuperate back the maintenance paid by the state which should have been paid by the husband and the court said that even though here we have the state that s filing the action but the state is filing the action in order (on behalf of her) to retreat a civil debt and therefore it is a civil action within the remit of the Brussels recast, however if the state was going beyond normal relations applicable between private individuals it is not a civil/commercial matters.

- Realchemie v Bayer (2011)
- Proceedings were instituted for patent infringement and distribution of fines.
- The German court had decided against Realchemic but the company breached the court order and they were fined an amount payable to the German state.
- Bayer attempted to enforce these orders in the Netherlands. The court held that since the order in question was intended to protect a private right of Bayer's patent, it should be considered as a civil and commercial matter.
- The action does not involve the public powers of the state and thus it falls under the Regulation.
- https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0406:EN:HTML

- Realchemie v Bayer case; proceedings were instituted for patent infringement and distribution of fines, the German court found against Realchemie, the company breached the courts order and they were fined. Bayer the defendant attempted to enforce these orders in the Netherlands and the court in the Netherlands said that the order given that the order was intended to protect a private right of Bayer's patent it should be considered as a civil and commercial matter even though a fine was involved and therefore it fell within the remit of the Brussels recast.
  - PMUN ZEturf (2007). PMU v Bellmed (2007)
  - They were 2 French cases on Maltese gaming companies who were offering betting services in France but under French law only the company PMU (which exercised public powers) was granted a licence for betting services.
  - PMU filed a case against such companies in Malta.
  - Court held that the case was not a civil or commercial matter as the French PMU was evercising a public law power.
  - https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=43528
- These two cases involving PMU v ZEturf and PMU v Bellmed; they were two French cases on maltese gaming companies who were offering betting services in France but only PMU which had public powers was granting a license for betting services. PMU filed a case against the Maltese companies in Malta and the court held that preliminarily because these are discussed preliminary in court that there

was no civil or commercial matter involved because PMU, the French PMU was exercising a public law power and therefore given that there was no civil/commercial matter the Brussels recast did not apply.

- Pula Parking case
- Involved a claim for the payment of a parking fee in a car park and the question was whether it was a civil or commercial parking.
- The parking belonged to the state, but there was a payment for the parking service, thus falling under a civil and commercial matter, however if there is a penalty added to it, then it does not fall under the civil and commercial matter.
- As long as it was an action to recover an unpaid debt, it is a civil or commercial matter.
- http://curia.europa.eu/juris/document/document.jsf?text=&docid=188749&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1251470

- Pula Parking case; the claim was the payment of a parking fee in a carpark and the question arose on whether this was a civil or commercial parking. It was established that the parking belonged to the state. However there was a system for payment for the parking service. Therefore even though the parking belonged to the state, there was a commercial private transaction so the regulation applied.
- The second part of the sentence, however if there is a penalty added to it because the only the state can issue penalties, then it will no longer be a civil and commercial matter because then it would be a public law issue because there is a penalty imposed by the state and in that case therefore the regulation will not apply. We have to look into these variables when we interpret what is civil or commercial matters and there is a fine line with public law.
- As long as it was an action to recover an unpaid debt it is a civil or commercial matter.
  - Kuhn case
  - This was an action brought by Austrian claimants against Greece.
  - They bought bonds issued by the Greek state, there was a crisis and Greece passed a legislation which replaced the bonds with ones of a lower value.
  - The claimants brought a case for compensation against the Greek state. A

- Court held that the bond issue is a civil and commercial matter but the question involved an act iure imperii to reduce the bond value.
- The act in question involved the exercise of a public power and went beyond the scope of Brussels I.
- http://curia.europa.eu/juris/document/document.jsf?text=&docid=208637&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1251492

- Kuhn case; you had the claimants were Austrian who brought a claim against Greece as a state. The claimants had purchased bonds of the Greek government, sovereign bonds as we know as a result of the financial crisis, Greece, the Greek government had devalued the bonds, stocks etc, some of them were junk bonds and the Austrian claimants held that they had a right for compensation from the Greek government for the devaluation of the bonds.
- The court held that the bond issue prima facie is a civil and commercial matter, a private person who has bought bonds of the state. However the action of Greece to devalue the bonds was an act iure imperii, a sovereign act, a state act, to reduce the bond value because of the financial and economic crisis of Greece at that point in time and the court held that Greece action to devalue the bonds was an acte iure imperii, so public law, and therefore it was outside the remit of the regulation of the Brussels recast.
  - The Actio iure imperii phrase was added in the amendment of the Brussels I Regulation due to the Lechouriton case which involved a claim for compensation of financial loss suffered during WWII.
  - The question was whether it fell under the scope or not.
  - The Court held it did not fall under the scope as the conduct of the armed forces was not a civil matter, it as a public matter relating to the war.
  - http://curia.europa.eu/juris/showPdf.jsf?text=&docid=63636&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1251526
- The actio iure imperii own its origins to the Lechouritou case which involved a claim for financial compensation suffered during world war II and the court in this case held that the state was acting iure imperii and therefore it was not a civil matter because it was a matter relating to war, so it was a public matter.
  - Court/tribunal.
  - A criminal court can provide civil damages.

- As long as the matter is civil or commercial, the fact that the court may not usually tackle such matters, it does not matter as there are several MSs eg a criminal court which could be dealing with not only a criminal aspect but also for a civil aspect (damages).

- Whether a court or tribunal, what we have to ask is not whether it is a court or tribunal but whether it is a civil or commercial matter irrespective of the court of the form of the court, tribunal etc. Why? Because even a criminal court can provide civil damages such as in cases of domestic violence jew fil-qorti tal-magistrati meta taghmel kawza ghal danni ragunati mhux bilfors meta taghmel ir-reat, hemm kawza fuq hruq tan-nar tal-festa waqa harqu s-serrer etc, ghand il-magistrati, fejn qed jintalbu danni iktar milli multa. A court of magistrates can give damages. This is why we have to ask whether it is a civil or commercial matter independent of the court which is hearing the case. Il-qorti tal-magistrati limitati ghall-15,000.

  - Art 1(2) states that the Regulation shall not apply in cases of:

  - (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 we have comparable effects to marriage.

  - Article 1(2).

  - **2**. This Regulation shall not apply to:

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

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

  - (c) social security;

  - (d) arbitration;

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

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

- We find also a number of exclusions in the Brussels recast I. Let us see the first exclusions one by one.
- The status or legal capacity of natural persons, this is excluded from the regulation. Issues dealing with the status or legal capacity of natural persons is excluded. What is legal capacity? I have for instance a case of interdiction or incapacitation, where i am interdicted or not whether I am capable or not, incapacitated or not these do not fall under the Brussels recast, they are excluded. Rights in a 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. These are excluded from the remit of the recast.
  - Exclusions
  - (b) bankrupts, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.
  - In NK v BNP an action for damages was brought by the liquidator against a Belgian bank as it caused harm towards the creditors of the debtor.
  - The court held that said action could have been brought by any other creditor, was not insolvency proceedings, ie the Regulation applied.
  - https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0535&from=GA
  - (c) social security.
- Bankruptcy proceedings, relating to the winding up of insolvent companies or other legal persons, company en nom collectif, en commandite, juridical arrangements, compositions and analogous proceedings.
- In NK vs BNP; an action for damages was brought by the liquidator against a Belgian bank as it caused harm towards the creditors of the debtor. The court held that the said action could have been brought by any other creditor and therefore the procedure was not insolvency and therefore the Brussels recast applied.
- This is the second type of exclusion, bankruptcy liquidations etc, they do not fall within the remit of Brussels I recast, if a client comes and says they have an issue of bankruptcy you have to read the case properly.
- Another exclusion is social security issues.
  - Exclusions

- (d) arbitration; Recital 12 states Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitrations from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

- (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity; - in the previous regulation, this did apply however now there is the Rome Regulation.

- (f) wills and succession, including maintenance obligations arising by reason of death - There is a specific Regulation which relates to this matter.

- Fourth is arbitration, it does not fall within the remit of Brussels recast have a look at recital 12 of the regulation.

- Fifth exclusion, maintenance obligations arising from a family relationship, parentage marriage or affinity. What is affinity and why is it under maintenance? In the civil code, right of maintenance anke lejn il-membri familjari. We also have li suppost hemm right of maintenance anke lill-antenati taghna, missierek, ommok, huk. Servigi meta tati servizz lil xi hadd, miet u tista taghmel kawza ta servigi, u anke lill-eredi ghal-hames snin ta' servizz li inti tajtu, it is proof based.

- The sixth, wills and succession, including maintenance obligations arising by reasons of death.

  - Step 2 - Domicile of Defendant - Ratione Personae

  - If the claim falls under a civil and commercial matter, one has to look as to whether the defendant in the dispute is domiciled in a Member State or not:

  - The Regulation applies to defendants domiciled in a Member State - domicile of the defendant in the EU remains a core jurisdictional claim of the Regulation.

  - Where the defendant is not domiciled, then it is the national law which applies.

  - Article 4 - Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality be sued in the courts of that Member State.

  - Article 4.

  - **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.

- We saw the first regulations, we saw the exclusions. Now we will move another step forward, the domicile of the defendant. In Private International Law, we have connecting factors, (every case is different), what do we use, domicile or habitual residence. We use domicile because of the English influence given by common law. What is the point that there is a difference between domicile and habitual residence? The intention, in domicile we have more of an intention; I live in Malta but I always say that I want to die in Australia, what is my intention/my domicile? The intention is more in Australia. In domicile you have intention, habitual residence is more connected to where you live and not the intention.

- If the claim falls under a civil or commercial matter one has to look as to whether the defendant in the dispute is domiciled in a Member State or not. The Brussels recast one says search for the domicile of the person. The regulation uses more the concept of domicile. It applies to defendants, domiciled in a Member State. Domicile of the defendant in the EU remains a core jurisdictional claim of the Regulation.

- If the defendant, where the defendant is not domiciled then it is the national law which applies. If one looks at article 4 of Brussels recast persons domiciled in a Member State shall, whatever their nationality, (nationality is not a criterium, domicile is the criterium) 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.

  - If a person is domiciled in one MS, then proceedings must be brought in that MS. If the defendant is not domiciled in a MS, under Article 6, the national rules apply, which in our case is Art 742 COCP

  - There are exceptions however for defendants domiciled in nonMember States, found under Article 18, 21(2), 24, 25.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.

  - <u>Article 18.</u>

  - **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 counterclaim in the court in which, in accordance with this Section, the original claim is pending.

- Article 21(2)

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

- Article 24.

- **24**. The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

- (1) in 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. 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;

- (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;

- (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; L 351/10 Official Journal of the European Union 20.12.2012 EN

- (4) in proceedings concerned with the registration or validity of patents, trade marks, 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;

- (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.

- Article 25.

- **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, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. 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.

- 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.

- 3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

- 4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

- 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.

- Another principle, if a person is domiciled in one Member State, then proceedings must be brought in that Member State. If the defendant is not domiciled in a Member State, under Article 6, the national rules apply, which in our case is Art 742 COCP

  - Article 6.

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

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

  - Article 742.

  - **742**. (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;

  - (b) any person as long as he is either domiciled or resident or present in Malta;

  - (c) any person, in matters relating to property situate or existing in Malta;

  - (d) 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;

  - (e) 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;

- (f) 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;

- (g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

- (2) The jurisdiction of the courts of ciil 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.

- (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.

- (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.

- 5) A precautionary act issued in terms of the preceding sub- article shall be rescinded:

- (a) if the party against whom it is issued makes such deposit or gives such security sufficient to secure the rights or claims stated in the act; or

- (b) if the applicant fails to bring forward his claim, whether before the arbitrator or before the court, within the said time limit of twenty days; or

- (c) on the expiration of the duration, original or extended, of the particular act in terms of this Code; or

- (d) for just cause on the application of the debtor as the court may deem proper in the circumstances.

- There are also a number of exceptions where the defendants are domiciled in non Member States which are found in article 18, 21(2), 24 and 25.
    - The purpose for jurisdiction is because defendant is deemed to be in a weaker position and so he should be sued in the court of his domicile.
    - The plaintiff's domicile is irrelevant, it is only relevant in the case of consumer contracts (as held in the UGIC Case).
- The purpose for jurisdiction stems from the fact that the defendant in a judicial process is deemed to be the weaker party so the defendant should be sued in the court of his domicile.
- So if we are going to file a case which has a foreign element, a foreign defendant we have to look at the domicile of the defendant as the domicile as a plaintiff is irrelevant. It is only relevant in particular cases such as consumer contracts which are regulated under the Brussels recast by specific provisions of law.
- Consumers contracts, employment contracts and insurance contracts are regulated by specific provisions in the Brussels recast which apply specifically to them.
    - The Regulation deals with domicile as the most important connecting factor
    - It makes a distinction between the domicile of legal and natural persons.
    - In the case of legal persons, there is an autonomous definition of domicile.
    - Art 63 states for the purpeses of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has is.
    - (a) setutory seat, - place of registration incorporation
    - (b) central administration; or
    - (c) principal place of business.
    - It is possible to have 2 domiciles in this case
- Notion of domicile of legal persons, as we said the Brussels recast deals with domicile as the most important connecting factor to the case. The Brussels recast also differentiates between the domicile of a natural person and the domicile of a legal person.

- Article 63, with respect to legal persons states that the domicile of a legal person (a company and so on) is either where it has its statutory seat (fejn hi registrata il-kumpanija) or the central place of administration of the company or the principle place of business. In the case of legal persons it is also possible to have two domiciles, where it is registered and where it has more business.

  - Article 63

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

  - (a) statutory seat;

  - (b) central administration; or

  - (c) principal place of business.

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

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

  - Notion of domicile - Natural persons

  - In the case of natural persons however, there is no one definition of domicile applicable as there is no harmonisation.

  - In Art 62 In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter the court shall apply is internal law.

  - In Malta, one looks at the English version which looks at the physical residence and the intention to remain in that country indefinitely.

  - This is such as Malta never defined domicile for jurisdiction.

  - Other countries divided domicile in 2 types, one for choice of law and one for the purpose of' jurisdiction, however Malta does not have a definition for jurisdiction therefore it is up to the court to decide.

  - Article 62.

- **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

- Domicile for natural persons, here we do not have one definition because there is no harmonisation of the definition of domicile of a natural person within the EU, there is no directive which establishes a definition of domicile. So every Member State has its own definition of domicile.

- Ergo, therefore, given that there is no harmonisation of the definition of domicile for one to determine whether a party (the defendant) is domiciled in the Member State, whose courts are seized of a matter, the court shall apply its internal law.

- If the defendant says that they're not domiciled in that place, the judge giving the sentence has to look at the definition of domicile in terms of the domestic law.

- In our case, our definition of domicile stems from English law. Where there are two elements, the intention, the physical residence that I remain in that country indefinitely because our notion of residence of domicile stems from UK law, because in our case Malta we never had a definition of domicile of jurisdiction.

- Some countries divide domicile in two types, one for choice of law, purposes and one for the purpose of jurisdiction. Therefore, the final word is the word of the court on whether a person is domiciled in Malta or otherwise.

- So general jurisdiction is that it is the court where the defendant is domiciled that has jurisdiction if the dispute fall under a civil commercial matter.

- Step 3 - Special Jurisdiction

- There are Exceptions to the general rule on jurisdiction, meaning that it may not be necessary that the court where the defendant is domiciled would have jurisdiction, there would be other options under Art 7 entitled Special Jurisdiction.

- See Presentation Part II

- <u>Article 7.</u>

- **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;

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

- (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;

- (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;

- (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;

- (6) as regards a dispute brought against a settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

- (7) as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

- (a) has been arrested to secure such payment; or

- (b) could have been so arrested, but bail or other security has been given; provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

- We said we have to look whether the issue is civil or commercial, we have to look for domicile, the third step, the law, the Brussels recast also refers to what it terms as special jurisdiction.
- Article 7, (study these well) article 7, article 8, article 9.
- Special jurisdiction are exceptions to the general rule of jurisdiction, which in effect means that it may not be necessary that the national court where the defendant is domiciled would have jurisdiction, why because there are instances either defined by the law, article 7 referred to a special jurisdiction which prevail over the general jurisdiction of the regulation.

- We will deal with special jurisdiction in the next lecture.
  - To give some examples of special jurisdiction these include matters relating to contract, in cases relating to contract, the courts for the place of the performance of the obligation can be seized. This is then divided in goods and services, we will see that in the next lecture.
  - Another example dealing with special jurisdiction is matters relating to torts, delicts or quasi delicts.
    - Step 4 - co-defendants
    - Vide Presentation Part II
  - Step 4, we will see it in the next lecture we will see what happens when there are co-defendants, someone who can be domiciled in one place and the other in another place.
    - Rules of jurisdiction designed to protect the weaker party.
  - Rules of jurisdiction designed to protect the weaker party, we referred to these as employment contracts, consumer contracts and insurance contracts, these are dealt with specific provisions in the Brussels recast.
    - Exclusive jurisdiction.
  - Step 6 is the exclusive jurisdiction.
- Next week we will start special jurisdiction.

21st February 2023

Lecture 2.

- Jurisdiction - Exceptions to the General rule

- Special Jurisdiction

- Let's do a recapitulation of last week, Brussels I is on jurisdiction and recognition and enforcement of foreign judgements. Ghaliex ghedna tapplika? Ghal civil u commercial matters. We said that general jurisdiction is vested (according to article 4) subject to circulation, persons domiciled in a Member State shall whatever their nationality be sued in the courts of that Member State. So general jurisdiction, where a person is domiciled in a Member State are the domicile of that person, that is the general jurisdiction but we also said we said that we will view other areas of jurisdiction were a person domiciled in a Member State may also be sued in another Member State.

  • Nista nfittcu in the national court where he's domiciled or in these instances under special jurisdiction (article 7 and article 8) there are seven instances fejn ghandi option ohra li nfittcu, niftahlu l-kwaza mhux bazata fuq id-domicile fejn qieghed, jekk qieghed domiciled f'Malta imma japplika l-kaz taht special jurisdiction nista niftaha ukoll qorti li qieghda f'pajjiz iehor.

- Another important article is article 6, before going into special jurisdiction, article 6 states if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, be determined by the law of that Member State.

- So, if the defendant is not domiciled in the Member State, the Private International Law, private international law of the national court applies, and article 6 sub-paragraph (1) has a proviso with respect to the three special relationships of consumer contracts, we mentioned this last time, consumer contracts, employment contracts and exclusive jurisdiction these have their own rules under the regulation.

- Today we will dedicate the lecture to special jurisdiction.

  - The basic principle and general rule of jurisdiction is that the defendant who is domiciled in a MS shall, whatever his nationality, be sued in the courts of that State.

  - Regulation 1215/2012 Chapter II Section I 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'

  - A defendant has this privilege of being sued in his home state. We said that the basic principle on general jurisdiction is that the defendant is sued in the Member State where he has his domicile, independently of his nationality.

  - <u>Article 4.</u>

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

- 2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

- Article 4(1), why because the regulation gives the privilege to the defendant to be sued in his home state, given that he is the weaker party in a lawsuit.

  - Special Jurisdiction arts.7-9

  - Article 5 in fact provides that persons domiciled in a MS may be sued in the courts of another MS only by Virtue of the rules set out in Section 2 (article 7 to 9)

- Special jurisdiction, the articles pertaining to special jurisdiction are 7 to 9 of the regulation, and we said that article 7 on special jurisdiction, it is not mandatory because the article refers to the word may a person domiciled in a Member State even though for instance he is domiciled in Malta, in the special instances of article 7 may be sued in another Member State if one of the criteria of article 7 subsists. (there are some 7 instances)

  - The regulation provides that, in particular, the rules of national jurisdiction of which the Member States are to notify the commission pursuant to point (a) of article76(1)(3) shall not be applicable as against the persons referred to in paragraph 1.

  - In the case of Malta the rules one is to refer to can be found in Chapter 12 the code of organisation and civil procedure.

  - Regulation 1215/2012 Chapter VIII Article 76(1) ‘The Member States shall notify the commission of: (a) the rules of jurisdiction referred to in articles 5(2) and 6(2); (b) the rules on third-party notice referred to in article 65; and (c) the conventions referred to in article 69.’

- The regulation also (before going into the seven circumstances) provides that the members state need to notify the commission with respect to their own national law on private international law. In our case, the rules on jurisdiction (our own rules on jurisdiction) are found in the articles of the code of organisation and civil procedure. We’ll have time to look into these also. Take note of article 76

  - <u>Article 76.</u>

- **76**. 1. The Member States shall notify the Commission of:

- (a) the rules of jurisdiction referred to in Articles 5(2) and 6(2); (b) the rules on third-party notice referred to in Article 65; and (c) the conventions referred to in Article 69.

- 2. The Commission shall, on the basis of the notifications by the Member States referred to in paragraph 1, establish the corresponding lists.

- 3. The Member States shall notify the Commission of any subsequent amendments required to be made to those lists. The Commission shall amend those lists accordingly.

- 4. The Commission shall publish the lists and any subsequent amendments made to them in the Official Journal of the European Union.

- 5. The Commission shall make all information notified pursuant to paragraphs 1 and 3 publicly available through any other appropriate means, in particular through the European Judicial Network.

- Preamble 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.'

- You can have a look at the regulation,

  - Preamble 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.'

- Bullet two for instance, a person may also be sued in a place where there is a close connection with the jurisdiction in question, we remember over the past year the Private International Law on the connecting factors etc, which connect the case with a particular jurisdiction.

- In fact we mentioned preamble 16 of the regulation which gives other grounds of jurisdiction besides domicile, including the special jurisdiction that we will be looking into today, preamble 6, the premise states that there should be alternative grounds to domicile and these grounds have to be based on the link, the close relationship between the court and the action to be filed. The merit of the action.
- So first is proximity of the court with the action, the second consideration is where it merits so for the sound and expediteness of the administration of justice (where it is easier to hold the case) (fejn issir iktar facli l-kawza
  - Special Jurisdiction
  - Articles 7 and 8 provide for circumstances in which a court other than that of the defendant's domicile, shall have jurisdiction.
  - Therefore a plaintiff may elect to sue the defendant in another MS, in which case the jurisdiction of the court of the defendant's domicile is then ousted.
  - This special circumstance where a plaintiff has a choice of jurisdiction is referred to as 'special jurisdiction'
- This is a reproduction of preamble 6.
  - Article 7.
  - **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;
  - (2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

- (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;

- (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;

- (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;

- (6) as regards a dispute brought against a settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;

- (7) as regards a dispute concerning the payment of remun eration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:

- (a) has been arrested to secure such payment; or

- (b) could have been so arrested, but bail or other security has been given;

- provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

- Special jurisdiction- contract

- Article 7(1) provides that a person domiciled in a Member State may, in another Member State, be sued, in matters relating to a contract, in the courts for the place of performance of the obligation in question.

- This means that in matters related to contract, it is possible to sue a defendant domiciled in MS not only in the courts were he is domiciled (by virtue of article 4), but also in the courts for the place of the performance of the obligation in question.

- This we said already, special jurisdiction are those instances in the law in article 7 where jurisdiction may be exercised in other fora, namely the fora which are not the fora of the defendants domicile.
    - Special Jurisdiction- Matters related to contract
    - The ECJ decided that there must be an autonomous meaning of the term ‘contract’- therefore the meaning given by a particular national law is irrelevant
- Article 7(1), a person domiciled in a Member State may be sued in another Member State (we will see the first instance) citing the law, article 7(1)(a) in matters relating to a contract, in the courts for the place of the performance of the obligation. This is one of the grounds of special jurisdiction.
- Let’s take a practical case, we said there’s special jurisdiction the first is where there are contracts, if I have a contract, with an italian person (supplying work) , u ghandi kwistjoni mieghu and the Italian is domiciled in Malta, how do you start tackling the issue? We have general jurisdiction as the italian is domiciled in Malta, but the merit is the contract for the supply in woods. X’qed tghid il-ligi qed tghid li apparti li nista nfittxu Malta, ghax he is domiciled in Malta, imma tista tficcu ukoll fejn ghadu jsir il-performance tal-kuntratt. Then you have two grounds, either general fejn ghandu domicile inkella ha mmur infittex fil-qorti fejn ha jsir il-performance tal-kuntratt.
    - Special Jurisdiction- Matters related to contract
    - The ECJ decided that there must be an autonomous meaning of the term ‘contract’- therefore the meaning given by a particular national law is irrelevant
- Again here we are seeing again the word autonomous, when you have a client in front of you, he tells you I have a contract you have to look into whether it’s a contract or not, fejn ha naghmel il-kawza? Kuntratt qed itini dan jew bicca karta?
- What is a contract for the purpose of the regulation? In the regulation we have to look at an autonomous meaning of a contract, so mhux the definition of a contact in terms of national law, but in terms of the regulation. What is meant to be a contract, we have to give it an autonomous meaning ghax inkella kull pajjizz se jaghtii l-interpretazzjoni ta kuntratt skint il-pajjiz tieghu we have to transcend the national law and define contract or the interpretation of contract depending on the regulation.
- These are issues li ha jqumu fil-qorti, id-defendant se jghid dan mhux kuntratt, int trid tirribatti, hemm l-elementi tal kuntratt skont ir-regulation etc, u se naraw Xî case law ukoll.

- Martin Peters Bauuntermehmug GMBH v Zuid Nederlandse Aannemers Vereninging (1983) Case 34/82

- Plaintiff was a german construction company which had succeeded in being awarded a contract.

- It was being sued in the Netherlands by an association which had a legal personality and had its registered office in the Netherlands.

- https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61982CJ0034&from=en

- Martin Peters case, dawn huma ftit kazistika fuq x'interpretat il-qorti x'inhu kuntratt jew x'mhux kuntratt.

- Plaintiff was a German construction company which had succeeded in being awarded a contract. Din il-kumpanija germaniza rebhet kuntratt. It was being sued in the Netherlands by an association which was registered in the Netherlands. The defendant was the German company

  - The matter revolved around the payment of a sum of money by way of compensation to others members of the association who had not succeeded in winning the contract- this was a binding rule of the association.

  - Plaintiff argued that it should be sued in the court of their domicile, while the association said that the matter related to a contract and thus it could sue in the Netherlands.

- What were the merits of the case? The merits of the case were a payment of a sum of money by means of compensation to other members of association who had not succeeded in winning the contract and the defendant argued that it should be sued in the courts of the domicile, whilst the association said that the matter related to the contract and thus it could be sued in the Netherlands. L-association qed tghid li la hu kuntratt suppost tfittixni in the Netherlands minhabba l-ispecial jurisdiction, the place of the performance of the contract.

  - The ECJ held that an obligation to pay money arising from the relationship between an association and its members involved close links of the same kind as are created between parties to a contract.

  - Contract is to be given an autonomous meaning, and therefore, even though the claim was not considered contractual under Dutch law, it still fell under article 5(1) (today article 7(1)).

- The court held that a contract has to be given an autonomous meaning, and even though the claim was not considered contractual under Dutch law, it still fell under article 5, today it is article 7(1) although Dutch law did not consider the relationship as contractual it still fell under article 7(1) therefore it was a contract in terms of the regulation.
- This case shows that the word contract has to be given (this is important in this case) an autonomous meaning not a definition in terms of contract as per each Member State's domestic law.
    - The term 'matters related to contract 'should not be interpreted simply as referring to the national law of one or other of the Member States concerned, but should be regarded as an independent concept which, for the purposes of the application of the regulation, must be interpreted by reference chiefly to the system and objectives of the regulation, in order to ensure that it is fully effective
- It should be regarded as an independent concept, within the meaning/objectives/preamble of the regulation, we have to look at the preamble, the articles.
    - SPRL Arcado v. SA Haviland (1988) Case 9/87
    - The court held that claims for commission under a commercial agency agreement, were both matters relating to contract.
- Arcado case. This case concerned a commercial agency agreement, specifically a claim for damages for the early termination of the agency agreement. Kellek agency agreement mieghi u tterminajtulek qabel iz-zmien. And the court heard that a commercial agency agreement is deemed to be a contract in terms of the regulation (this is what is important in this case), like distributorship agreement etc.
    - Jakob Handte & Co. GMBH v. Traitments Mecano-chimiques des Surfaces SA (TMCS) (1992) Case 26/91, ECR 1992 p.I-03967
    - This was a landmark judgement where a German manufacturer had sold equipment to a buyer and the buyer sold it again to another buyer (sub-buyer)
    - The sub-buyer considered that the equipment was in breach of certain safety regulation and brought an action against the manufacturer.
    - http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97769&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1251702

- Jakob Handte. Dan il-kaz ha jorina ir-relazzjoni bejn seller, buyer u sub-buyer, is it a contract or not? A German manufacturer sold equipment to a buyer, biehli ultrasound, equipment, and I sold it again to another buyer. The sub-buyer said that the equipment had issues with safety regulations etc, and filed an action against the seller, the seller is the manufacturer in this case. So the seller sold me an ultrasound machine, I sold it again to the sub-buyer the sub-buyer did not sue me but he sued the manufacturer, the original seller.
    - French law considered the matter to be contractual because the sub-buyer is considered to be assigned the rights of the buyer.
    - The court held that the phrase ‘matters relating to a contract ’can only be understood to cover a situation in which an obligation is freely assumed by one party towards another.
- French law considered the matter, French domestic law not EU law, French law considered the matter to be contractual, why? Because the sub-buyer has been assigned the rights of the buyer. In terms of French law, there is a contractual relationship because French law considers that the sub-buyer has been assigned my rights.
    - Cont.
    - A claim brought by a sub-buyer against a manufacturer is not contractual for the purposes of the regulation, even though it was regarded as contractual by French law, since the manufacturer did not freely assume any obligation towards the sub-buyer.
    - The court also said that the claim cannot be both contractual and tortuous at the same time.
- The court, interpreted the phrase matters related to a contract, il-frazi li nsibu f’article 7(1)(a). French law considered the matters relating to a contract can only be understood/interpreted to cover a situation in which an obligation is freely assumed by one party towards another, that makes a contract, the free will that I enter into an agreement with another party or parties.
- And in this case it was held that the claim that was filed by the sub-buyer against the manufacturer, (original seller) is not contractual, it is not a contract in terms of the regulation, even though it was deemed to be a contract in terms of French domestic law.
- Therefore the court (The European Court) gave an autonomous interpretation which transcends the domestic law of the word contract. Since the manufacturer

did not freely assume any obligation towards the sub buyer. The court held that a claim cannot be both contractual and also tortuous at the same time, either you are going to claim damages arising from a breach of contract, or you are going to base your claim on a tort.

- What are torts under maltese law? An obligation arising outside of a contract where damage is caused such as unjustified enrichment.
    - Reunion Europeenne SA and Others and. Spliethoff's bevrachtingskantoor BV, and the Master of the vessel Alblasgracht V002 (1998)
    - Case C-51/97
    - An action for damages was brought by nine insurance companies seeking compensation for damage to a cargo during the carriage of defendant's goods.
    - The carrier had not been contracted by the owner of the goods, but by the seller.
- Reunion Européenne, nine insurance companies, sought compensation for damage to a cargo during the carriage of the defendant's goods. The carrier/vessel, had been contracted not by the owner of the goods but by the seller.
    - The court referred again to the Jacob Handte case and held that there was no obligation freely assumed between the parties.
    - There was no contract between the claimant and the seller and thus it did not fall under article 5(1) (today article 7(1)) but instead under 5(3) (today article7(2)) (tort).
- The court referred to the case Jakob Handte and it said that there was no obligation which was freely assumed between the parties. Therefore there was no contract between the claimant and the seller, therefore there was no contract under article 7(1)(a) but it was a case pertaining to tort under article 7(2) which pertains to torts.
- Article 7 has two limbs, the first is contracts and the second is torts
    - Tacconi SpA v Heinrich Wagner Sinto Maschinefabrik GmbH (2002) Case C-334/00
    - Court decided that a claim for damages for the failure to negotiate a contract in good faith (pre-contractual liability) was not a matter relating to a contract, but instead fell under Article 5(3) (tort).

- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=47666&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1251751

- Tacconi case, the Tacconi case dealt with pre-contractual liability.
- What is pre-contractual liability? I am negotiating a contract, I am not negotiating in good faith, and I spend 6 months negotiating, the other party has incurred expenses during the negotiations, I am not negotiating in good faith and I drop out and the injured party files a case for pre-contractual liability, for damage caused to him because I was not negotiating in good faith.
- It is difficult to prove under maltese law, this pre-contractual liability because we do not have any conditions in our civil code on pre-contractual liability so you have to base your claim on proof. In the case of pre contractual liability for the terms of the regulation pre contractual liability is not a matter of contact, so it is carved out of article 7(1). However one can sue for pre-contractual liability under article 7(2) pertaining to torts.
    - Cont.
    - The obligation to make good the damage allegedly caused by the unjustified breaking off of negotiations could derive only from breach of rules of law, in particular the rule which requires the parties to act in good faith in negotiations with a view to the formation of a contract
    - In those circumstances, it is clear that any liability which may follow from the failure to conclude the contract referred to in the main proceedings cannot be contractual.
- Pre-contractual liability is not a contract but you can file an action under tort.
    - Verein fur Konsumenteninformation (VFK) v Karl Heinz Henkel (2002) Case C-167/00
    - Court held that the rules on jurisdiction laid down in the Brussels convention 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
    - The consumer protection organisation and the trader were in no way linked by any contractual relationship.

- Karl Heinz case, this predates the regulation that a mention is made of the Brussels convention which we said was prior to the regulation, and this case concerned a consumer association which are prevalent in other Member States, they are very active consumer associations and they filed a case concerning an unfair term in a contract.
- Namely to prevent a trader from using unfair terms in consumer contracts. The consumer association however and the trader were not in a contractual relationship, the consumer association was just defending the rights of consumers against unfair terms in contracts but the consumer association itself was not in a contract with this particular trader.
    - Place of performance
    - Article 7(1)(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’
- The place of performance. We are still on article 7 (1).
- Article 7(1) we said in matters relating to the contracts for the place of performance of the obligation. If we look at 7(1)(b), the regulation defines or describes the place of performance. Where is the place of performance of the obligation. It distinguishes between goods and a supply of services, in the case of goods the place were the goods are to be delivered or should have been delivered (forsi qatt ma waslu, gherqu) where the goods were delivered or should have been delivered, that is considered the place of performance of the obligation, in the case of goods, supply of goods.
- We have a contract we said, we have to distinguish between goods and services and trace the place of performance, in goods the place where the goods were delivered or were intended to be delivered. Setghu qatt ma waslu imma xorta ghandek jurisdiction
- With respect to services the place in a Member State where under the contract the services were provided or should have been provided. L-istess il-place of performance tas-servizz fejn se jinghata is-servizz.

- In the case of other contracts, Article 7(1)(c) provides that the defendant may be sued in the courts for the place of the obligation in question which has been held to be the place of performance of the primary obligation on the basis of which the claimant brings his claim.

- The law also provides another category besides goods and services, and it states in the case of other contracts, the defendant, jekk ma nafux hux goods jew services jew tahlita tat-tnejn, goods bis-servizz, bghatlek l-equipment u tghitek after sales fejn hemm diffikulta the defendant may be sued in the courts for the place of the obligation in question which is the place of performance of the primary obligation.

- Jekk ghamiltlek a supply of equipment plus maghha after sale services il-place of obligation huwa fejn ghamiltlek is-supply, is-servizz jigi sekondarju.

- What makes a primary obligation, a primary obligation? What's the difference between the two? There's no definition, it's a case by case basis. Imma trid tara l-buyer, jekk l-ewwel ma jtik is-supply of goods imbghad hija ancillary li jtik after sales goods, trid tara x'kien l-oggett tal-kuntratt, l-att principali.

  - De Bloos v Bouyer (1976) case 14/76

  - A Belgian distributor sought redress from a French manufacturer in the Belgian courts.

  - The matter involved exclusive distribution rights- the French supplier had infringed the exclusive concession by selling goods to others in Belgium.

  - The distributor also requested the payment of damages on the ground of the supplier's wrongful conduct.

  - http://curia.europa.eu/juris/showPdf.jsf?text=&docid=89287&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=817458

- De Bloos case, here we have a Belgian distributor who sought redress from a French manufacturer, in the Belgian courts. The Belgian distributor had exclusive distribution rights, from a French manufacturer. There was an infringement of these distribution rights by the French manufacturer because the French manufacturer was selling the goods to other sellers in Belgium.

- There was an infringement of the exclusivity agreement and the distributor also sought compensation in damages against the French manufacturer because the French manufacturer was infringing the exclusivity clause.

- The ECJ held that the obligation in question refers to the obligation which constitutes the basis of the legal proceedings, namely the contractual obligation of the grantor which corresponds to the contractual right relied upon by the grantee in support of the application.

- For the purposes of determining the place of performance, the obligation to be taken into account was the obligation relied upon by the plaintiff: the contractual obligation of the French supplier.

- The court held that the contractual obligation of the grantor (the French manufacturer giving exclusivity) which corresponds to the contractual rights relied upon by the grantee in support of the application. The grantee is who has the exclusivity, the grantor, the grantee, and the court said that in order to determine the place of performance the obligation to be taken into account was the obligation relied upon by the plaintiff. The contractual obligation of the French supplier.

  - Effer SpA v Hans- Joachim Kantner (1982) Case 38/81

  - The court said that it had jurisdiction under Article5(1) (today art 7) even if the defendant denied the existence of the contract.

  - If that were not the case, article 5(1) 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 did not exist.

  - https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0038&from=EN

- Hans Kantner, in this case the defendant denied the existence of a contract, and the court said that there was a contract and therefore it had jurisdiction under article 7.

- And the court said that if this was not the case, article 7 (article 5 l-antik) would be in danger of being deprived of it's 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 the lawsuit, to the claim that the contract did not exist.

  - Problems related to services

  - Peter Reder v Air Bolt Corporation (2009), Case 204/08

  - RE. the passenger rights regulation which protects passengers when there is, amongst others, a delay.

- What happens when a Maltese person travels with a foreign airline, can you sue in Malta?
- What is the place where the services have been provided?
- If one boarded in Malta but then landed in London, for example, where would one sue?

- Some problems related to contracts of services.
- Peter Reder, this concerned the passenger rights regulation which as we know safeguards passengers in cases of delay etc. What happens when a maltese person travels with a foreign airline? Can you sue Malta? What is the place of the provision of the service? Where is the place of the provision of the service? If a passenger boarded in Malta and landed in Italy or London, where can that passenger file his lawsuit?
  - Peter Reder v Air Baltics Corporation (2009), Case 204/08
  - The court held that both the place of boarding and the place of arrival have jurisdiction and are both equally relevant and both places are considered to be the place where the services have been provided or should have been provided under article 7(1)(b).
  - The court thus redefined the relevant provision in the context of an air travel contract.
  - https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62008CJ0204&from=EN
- So, the court held that both the place of boarding and the place of arrival have jurisdiction. We are here in the remit of services contracts now now supply contracts and are both to be considered as relevant places where the services have been furnished, supplied.
- In terms of article 7(1)(b), the place of the provision of services, in terms of the regulation can be interpreted to be both as the place of boarding and the place of arrival so jurisdiction subsists in both states given that this is an air travel agreement. The word contract is more used in public contracts, between private parties we use more agreements. We use contract when something is registered by a notary, or public contract but between private parties in a commercial transaction the word agreement is preferred.
  - In Leathertex Divisione Sintetice SpA vs. Bodetex BVBA (1999) Case C-420/97

- The claimant was seeking damages for wrongful termination for agency agreement.

- The matter concerned an agency contract where the agent was an agent to a supplier in more than one MS.

- Leathertex Divisione Sintetice, we mentioned already a case concerning agency agreement, the claimant was seeking damages in this case it was not an early termination of an agreement but a wrongful termination of the agency agreement.

- In this case, the agent, the claimant was an agent to a supplier, the matter concerned an agency contract where the claimant was an agent to a supplier in one or more Member State, kellu agenzija mhux ghal Malta biss, imma ezempju ghall-Italja ukoll.

  - The court held that the same court does not have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract when, according to the conflict rules of the State where that court is situated, one of those obligations is to be performed in that State and the other in another Contracting State.

  - While there are disadvantages in having different courts ruling on different aspects of the same dispute, the plaintiff always had the option, under article 2 of the convention, of bringing his entire claim before the courts for the place where the defendant is domiciled.

- The court held that the same court does not have jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract, when according tot he conflict rules of the state where that court is situated one of those obligation is to be performed in that state and the other in another contracting state.

- The court said, I have an agency for Italy and Slovakia, jekk se nfittex, mhux se se nfitttex go qorti wahda imma skont fejn ghandi l-agenzija, ghandi l-option infittex fil-qrati fejn sehh l-infringement jew graw id-damages, mhux qorti tal-italja tiggudika x'gara ukoll l-islovakja.

  - In Wood floor Solutions v Silva Trade SA (2010), Case C-10/09

  - Where services are provided in several Member States, the court which has jurisdiction to hear and determine all the claims arising from the contract is the court in whose jurisdiction the place of the main provision of services is situated.

- Wood floor, l-istess, fuq services imma, where services are provided in several Member States, the court that has jurisdiction, the court that can be seized is the court where the main/primary provision of services is situated. So fejn il-persuna ghandu l-aktar koncentrazzjoni tal-attivita ekonomika tieghu f'dal każ servizz.
  - The main place of performance is:
  - …… either declared in the contract or
  - …… is inferred.
  - If determining either of these is not possible, it is the place where the service provider is domiciled.
- Where is this main place of performance? It is either declared in the contract itself, in the services agreement, if you see a service agreement most of them you will find a clause whereby the parties agree that the place of performance is for instance Malta or Italy. If there is no specific laws you have to infer it from the agreement itself, you have to read the agreement and through the other clauses of agreement you will infer what is the place of performance of agreement.
- If this too is not possible, first we have to look at the agreement is there a clause on the performance of the contract, yes it's clear, there's no clause we go to an inferior, for interpretation to where the place of performance should be. If this too is not possible it is the place where the agent/service supplier is domicile. We will fall on domicile.
  - Problems related to sale
  - Car trim GmbH v KeySafety Systems Srl (2010)- Case C-381/09
  - In the case of distance selling the place where the goods were or should have been delivered must be determined by the provision of the contract.
  - Thus one must look at whether the contract specifies a place of delivery.
  - http://curia.europa.eu/juris/document/document.jsf?text=&docid=72407&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1251949
- Some problems that relate to sale, we are still under the first instance, contract, some problems relating to sale.
- Car trim, this concerned distance selling (tip iehor ta kif nista nbiegh). In the case of distance selling the place of the goods were or should have been delivered must be determined by the provisions of the contract. A distance selling

agreement will tell you where the goods should be delivered and in this case of distance selling, the claimant has to first look into the distance selling agreement and check whether the agreement itself specifies a place of delivery.

- Car trim GmbH v KeySafety Systems Srl (2010)- Case C-381/09

- The court held that one must also take into account all the terms and clauses of the contract of the contract including terms used in international trade and commerce (INCO terms for example – which are standard phrases used in commercial contracts).

- If it is impossible to determine the place of delivery under the contract, then the place of delivery is the place where the purchases actually acquired physical possession of the goods.

- This case held that in the impossibility to determine the place of delivery under the contract, mela there is no mention of the place of delivery in the contract, there is no clause, we cannot infer it from the contract, then the place of delivery is the place where there is the physical transfer of the goods and where I have acquired the possession. Jekk ordnajt part min fuq l-internet u giet Malta, l-part qed nikkunsma Malta, jien ghandi l-physical possession and the place of performance of the contract is Malta. I can file a lawsuit in Malta.

- Hemm sistema ta' consumer arbitration online fuq affarijeit online tal-EU, hemm platform tal-affarijiet zghar tal-konsumatur li jigu trashed.

  - Electrosteel Europe SA v Edil Centro SpA (2011), Case 87/10

  - Court held that the place where the goods were or should have been delivered pursuat to the contract must be determined on the basis of the provisions of that contract.

- Electrosteel, again in this case the court held that the place of delivery of the goods has to be determined on the basis of the provisions of that contract, it depends on what the contract states.

  - The court must take into account all the relevant terms and clauses of that contract which are capable of clearly identifying that place, including terms and clauses which are generally recognised and applied through the usages of international trade or commerce.

  - If it is impossible to determine the place of delivery on that basis, without referring to the substantive law applicable to the contract, the place of delivery is the place where the physical transfer of the goods took place, as a result of

which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

- We said this already, if one is impossible to determine the place of delivery, the place of delivery should be understood to be the place where there is the physical transfer of the goods.

  - Special Jurisdiction- Tort, Delict or Quasi-Delict

  - Article 7(2) provides that in matters relating to tort, delict or quai-delict, the defendant domiciled in a Member State may also be sued in the courts for the place where the harmful event occurred, or may occur.

  - 'May occur 'was an amendment made to cover an action to prevent future damages. In fact, in Karl Heinz Henkel (2002) the court held that 7(2) applies even if the event has not yet occurred.

- Nghaddu ghas-second instance tas-special jurisdiction. Article 7(1)(2) a person domiciled in a Member State may be sued in another Member State, mela avolja domiciled Malta li hija l-general juursidiciton nista nficcu f'qorti/forum ohra abbazi tal-ispecial jurisdiction. In matters relating to tort, delict or quasi-delict.

- What is delict or quasi delict? The liability of a hotel owner, the liability of the owner of an animal. Articles 1029 to 1050 of the civil code are delicts or quasi delicts.

- In the courts for the place, where the harmful event occurred, fejn saret il-hsara/damage or may occur.

- Kif qed naraw, il-Karl Heinz case the court said that article 7(2) applies even if the event has not yet occurred.

  - Matter relating to tort, delict, 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 or wrongdoing.

- Again, the same as in contracts, the definition of tort which is not defined in the regulation does not take the definition of domestic law but it has to take an autonomous definition, interpretation of the regulation.

  - Anthansios Kalfelis v Bankhaus Schroder & other (1988)

  - Court held that the expression 'matters relating to tort, delict, or quasi-delict 'is an autonomous concept

- Article 7(2) covers all actions which seek to establish the liability of the defendant and are not matter relating to a contract within the meaning of article 7(1).

- Thus if a claim falls within the scope of article 7(1), it falls outside the scope of article 7(2).

- Thus there cannot be claims which are both tortuous and contractual. The two are mutually exclusive

- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=95311&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=821797

- Anthansios Kalfelis case, which held that the matters relating to tort etc have to be given an autonomous concept/definition.

- Article 7(2) refers to all lawsuits/actions, where the plaintiff seeks for compensation in damages, arising from a liability which are not matters of contract, arising out of a contract.

- The third point obviously if a claim falls under article 7(1) it's a contract and not a tort and we already said that claims can be either a tort or a contract you cannot be awarded both for contract and tort as the contract will specify the damages, the penalties etc.

  - In fact, in Leinwort Benson v Glasgow City Council (1999), the house of Lords held that a claim for restitution of money paid under a purported contract subsequently accepted by both parties as being void ab initio is not a matter relating to tort or delict.

  - This was thus a sort of actio de in rem verso (unjustified enrichment), seeing that there was no valid contract.

- Benson case, the House of Lords held that a claim for restitution of money paid under a purported contract subsequently accepted by both parties as being void ab initio is not a matter relating to tort, why? Because both party accepted that is was void ab initio the contract.

  - The same was held in Belmed Ltd v PMU (2009)

  - PMU was the French monopoly having a right to offer bets, while Belmed was a Maltese company 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

- It was an action for a declaration of non-liability.

- Belmed case, we've mentioned this case already in the first lecture. PMU was a French company, a monopoly which held aright to offer gaming services, Belmed was a maltese company which offered online bets to consumers including consumers in France. Belmed filed an action and it was declared by the maltese courts that it was operating legally in Malta, and was not liable to pay any damages to PMU. And in this case this action was an action for the court to declare non liability not damages, to seek a declaration that I'm not liable.

  - The PMU was domiciled in France.

  - Belmed said that there was jurisdiction under 7(2) since it was a matter related to tort or quasi-tort.

  - 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 7(2) 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 7(2).

- PMU was domiciled in France, Belmed said that there was jurisdiction under article 7(2) and Belmed said that it was a case in damages so (2) applied, torts.

- The court held that in this case, the 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 and the court reiterated that for a claim under paragraph 2 to subsist (torts) there must be a claim for damages due by the defendant and therefore an action for a negative declaration is not within article 7(2) il-kumpanija maltija Belmed fist tablet ma talbitx damages hija tablet li ma tkunx liable, allura la ma talbitx ghal damages ma kienitx taqa' taht article 7(2), ghax kull ma talbet li jkollha declaration li m'hix liable, u mhux ghal damages allura ma taqax taht sub-article 2.

  - However in Case 133/11 Fischer v Ritrama, the court of justice said that an action for a negative declaration does in fact fall under article 7(2).

  - In VFK v Karl Henkel (2002) 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.

- Fischer case, an action for a negative declaration (hawnhekk qalbitha l-qorti), does in fact fall under article 7(2).
- VFK v Karl Henkel, this was a consumer association, which filed proceedings to prevent (rajnih dan il-kas qabel) the use of unfair terms in consumer agreement f'dal kaz il-qorti qalet l-azzjoni tal-consumer association falls within the scope of article 7(2) ma taqax taht il-1, taht contracts kif rajna qabel imma taqa' taht an action for damages arising from the use of of unfair contract nowadays under the consumer affairs act
- Tacconi, semmejnieh ga, pre-contractual obligations was a matter relating to tort. It is not a matter pertaining to contracts.
  - Place where the harmful event occurred or may occur
  - In Bier v Mines de Potasse d'Alsace (1978), the court established that the place where the harmful event occurred referred to both the place where the act which gave rise to the damage occurred, as well as the place where the damage took effect.
  - In this case, the French defendant was alleged to have poured sewage into the Rhine in France and the ensuing pollution was alleged to have damaged the Dutch plaintiff's property in the Netherlands. The event thus took place in France, but the damage took place in the Netherlands.
  - The plaintiff thus had a choice to sue in either of these
  - http://curia.europa.eu/juris/showPdf.jsf;jsessionid=25DDF917CF4F9ACCF0C3DDFDE4931D2B?text=&docid=89372&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=782516
- Bier case, in this case the cour held that the place of the harmful event (fejn saru d-danni) referred both to the place where the act which gave rise to the damage occurred, mil-post fejn beda d-damage) as well (so there are two instances) as were the damage actually occurred. Il-post fejn ebda u l-post fejn filfat sar, u kkonkluda ruhu d-damage.
- Kas fejn Franza where a French company was alleged to have poured sewage into the Rhine, and as a result, beda min hemm id-damage fi franza the damage cumulated in the Netherlands, it damaged the property of the plaintiff in the Netherlands and therefore in this case the Dutch plaintiff had a choice to sue in either of these courts.
  - Place where the harmful event occurred or may occur

- Antonio Marinari v Lyoyds Bank (1995)
- Marinari was italian and he went to Lloyd's bank in the UK with a number of promissory notes, and the bank believed them to be forged.
- He was arrested.
- It turned out that they were not forged.
- He 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.
- The court held that the Italian court did not have jurisdiction
- http://curia.europa.eu/juris/showPdf.jsf;jsessionid=98938A90C7E5ED62150EB9BD68CFCCE6?text=&docid=99280&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=787231

- The place where the harmful event occurred or may occur, Antonio Marinari, was an Italian he worked with Lloyds bank in the UK with a number of promissory notes. Lloyds bank deemed these to be forged, he was arrested and it turned out that the promissory notes were not forged and he brought an action for damages in Italy. Why he filed in Italy? Because he argued that his assets/his patrimony was in Italy and as a result of this mistake etc, his patrimony suffered a loss.
- The court held that the Italian court did not have jurisdiction. Why? Because the harmful event took place in the UK not in Italy so he had to seek damages in a UK court.
  - The place where the consequential financial loss is suffered is irrelevant.
  - 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.
- The court said that in fact the place where consequential financial loss is suffered is irrelevant, 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 everywhere. Il-post fejn sar id-damage kontrieh kien l-Ingilterra fejn kien hemm il-Lloyds mhux gol-Italja, article 7(2)
  - Place where the harmful event occurred or may occur

- Dumez France (1990)
- 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.
- https://eur-lex.europa.eu/resource.html?uri=cellar:31cbe7ff-909e-488b-b1d3-8c7cdf7d1d16.0002.03/DOC_1&format=PDF

- Ezempju ta' kaz iehor ta' where the place of the damage occurred.
- Dumez case. Dumez was a French company it had subsidiaries in Germany, and these subsidiaries were bankrupt as a result of the German banks. Dumez French company kellha subsidiaries fil-Germanja u sarilha dannu, Dumez filed proceedings in France. Arguing that it filed proceedings in France because the value of the parent company, parent company qieghda Franzaa subsidiary Germanja imma effect tat-subsidiaries inhass mil-parent company kienet Franza u ghalhekk fethu lawsuit for damages in France.
  - Cont.
  - The ECJ said that the matter could not be decided in France because it was only indirectly that the damage was suffered in France- the actual and direct damage took place in Germany.
  - 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.
- The court differed and said that the direct immediate damage took place in Germany and therefore the plaintiff should have filed his action in tort in Germany another case of article 7(2) concerning torts.
  - In this regard, where a person is injured in a car accident in a foreign State, he cannot bring an action in Malta on the grounds that he suffered medical expenses in Malta.
  - The direct damage took place in the foreign State.
- Give an example where a person is injured in a car accident in a foreign state, he cannot bring an action in Malta on the grounds that he suffered medical expenses

in Malta because the direct and immediate damage took place in a foreign state and he has to open his case in that state.

- In Fiona Shevill v Press Alliance (1995), the matter revolved around defamatory article which had alleged that she was involved in drug trafficking.

- The court held that the place of the event giving rise to the damage is the place where the publisher of the newspaper in question is established since this is the place where the harmful event originated.

- The courts of this place have jurisdiction to hear the action for damages for all the harm caused by the publication.

- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=98911&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=782612

- This case, Fiona Shevill, is on defamation, the plaintiff brought this lawsuit on the grounds of an article which stated that she was involved in drug trafficking. The court, held that the place of the event is the place of establishment of the publisher of the newspaper. That is the place of event, fejn sar id-damage, fejn il-publisher ippulbika dan ir-rapport falz fuqha li hi involuta fi drug trafficking. The courts of the place of establishment of the publisher of the news paper, have jurisdiction to hear an action in damages filed by the plaintiff.

  - On the 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.

- Please note this is the place of the event, fejn harget il-publikazzjoni, issa ha nararr x'qalet il-qorti fuq il-place where the damage occurred, fejn meta d-damage. On the other hadn't, the place where the damage occurred, is the place where the event produced ghamlet danni, il-publisher huwa established Malta. Pero' mxew il-gazzetti, Marru l-Italja allura id-dannu infirex f'pajjiizi ohra. Ejja niehdu l-financial times, il-post of publication u l-post fejn tinbiegh il-financial times. In the case of defamation, this is the place where the publication is distributed when the victim is known in those places.

  - The courts of each MS where the defamatory material is published have jurisdiction but only in respect of the harm caused in the State of the Court seized.

- Thus in this case, since 230,000 copies were sold in the UK, the courts in the UK had jurisdiction with respect to the harm caused by these copies only.

- Jekk il-gazetta tinbiegh f'ghaxar pajjizi, the courts of each Member States have jurisdiction only in respect of the harm caused in the state of the court seized. How do you establish this allegation? It can be that the financial times is sold this many times, iktar m'ghandha circulation gazzetta, iktar naghmillek hsara. This on this case since 23,00,00 copies were sold in UK the courts in the UK had jurisdiction with respect to the harm by these copies only, skont il-hsara li saret f'kull pajjiz.

  - The court here also said that the criteria for assessing whether the event in question is harmful and the evidence required of th existence and extent of the harm alleged 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 seized on the basis on the Convention, provided that the effectiveness of the Convention is not thereby impaired.

- The court here also said that the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the plaintiff are not governed by the convention (today the regulation) but are determined in accordance with substantive law designated by national court rules.

- Jekk inti ftaht 4 kawzi f'4 pajjizi id-damages se tohodom skont il-law of damages of domestic law of law of the court seized. Fejn se tithol il-law of damages se tapplika id-domestic law. In the law of damages there is no harmonisation, the loss of profit, the loss of trust etc.

28th February 2023

Lecture 3.

- During the last lecture we covered exclusive jurisdiction. What are the grounds of exclusive jurisdiction, where the Member State court has exclusive jurisdiction of a case? Immovable property, issues relating to the memorandum and articles, the public register, special jurisdiction, contracts, torts, delicts and quasi-delicts

  - Martinez and Martinez v MGN Limited (2010) (two joint cases)

  - Daily Mirror (UK) published a story that said that Martinez was in a relationship with Kyle Minogue.

- In the other case there was an Austrian newspaper that had published some defamatory article on the internet.
- The ECJ said that in the case of defamation on the internet it had to re-examine Article 7(2).
- http://curia.europa.eu/juris/document/document.jsf?text=&docid=111742&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=782543

- Martinez, we are still under torts, delicts and quasi delicts. This was a case involving daily mirror which published a particular story, and another case involving an Austrian news paper which had published a defamatory article on the internet. In this case the court said that defamation over the internet falls within the remit of article 7(2) (taht torts, delicts u quasi-delicts) here we have an affirmation of the previous case that defamation falls within the remit of article 7(2), this is the first point. The court established some other principles, one has to ask was it relevant to the centre of the victim's interest.
  - What is relevant is the centre of the victim's interests.
  - The victim can bring proceedings for damages:
  - 1) in the MS where he has the centre of interest (usually the place of his habitual residence or domicile, or the place where one works), OR
  - 2) in the place where the publisher of the content is established with respect to all damages suffered worldwide; OR
  - 3) Alternatively sue in the place whee the content was viewed, but only to the extent of the damages suffered in that particular country.
- The court said that we are in defamation (because we are in the area of defamation), he can file proceedings in the members state where he has the centre of interest, what is the centre of interest? It can be the place of habitual residence for those countries, Member States, or domicile, or his place of work. Centre of interest has to be seen on case by case basis, can be residence, domicile or works. He can also file proceedings in the place, in the country where the publisher of the contract is established, he's established in Italy for example I can file for damages in Italy, and the third option I can file proceedings in the country where the content has been seen, if it has been seen in Malta, in Slovenia, depending on the extent of the damage and you have to prove the damage. It is proof based.
  - Winstersteiger AG v Products 4U Case C523/10

- Products 4U 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.

- Winstersteiger case kontra products 4U. Products 4U put an advert on google which was triggered to a particular keyword, obviously it was misleading and this particular keyword was the main trademark of the plaintiff. Both companies, both the plaintiff and defendant were in the same line of companies, skiing equipment,

  - Plaintiff filed an action for a breach of trademark in Austria, where the applicant was established and where the trademark was registered.

  - Defendant company was domiciled in Germany.

  - The Court held that the courts that have jurisdiction are:

  - 1) Either those of the MSs where the trademark is registered (this is deemed to be the place of the damage) or

  - 2) the place of the domicile of the person who has breached your trademark.

- In this case some principles on trademarks were established. Plaintiff filed an action in Austria, where he was established and where the trademark was registered, defendant was domiciled in Germany. In this case the court held that there are two legal basis for jurisdiction, first the courts where the trademark is registered in this case the plaintiff had his trademark registered in Austria on skiing equipment etc, or the place of the person who has breached your trademark, in this case it was Germany because the seat of the company was domiciled in Germany. You have two legal bases for jurisdiction.

  - Reunion Europenne and Others (1998)

  - The seller had shipped the goods and the goods were destroyed.

  - An action was brought against the carrier.

  - The place where the damage arose can, in the circumstances described, only be the place where the maritime carrier was to deliver the goods.

- Reunion Europeanne, the seller shipped goods, which were destroyed these goods, and the seller was faced with an action. This principle was established in this case, 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 the

place for damages purposes was the place where goods were delivered. we have seen already this principle and we also applied it to services.

- Special Jurisdiction: other exceptions to the general rule
- Civil Claims for Damages arising from Criminal Proceedings
- Article 7(3) provides that a person domiciled in a MS may, in another MS, be sued 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.

- This is the third head of special jurisdiction, mela, contracts, torts, quasi-torts etc, third head of special jurisdiction. Article 7(3). We are still on article 7. Civil claims for damages arising from criminal proceedings. A person we said besides general jurisdiction on article 4 can evade himself of special jurisdiction, he has an option and in the case of civil claims for damages arising from a criminal offence he can avail himself of this article.
- A person domiciled in a Member State may, in another Member State, be sued 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.
- Have a look at article 7(3)
  - Art.7 (4)
  - Civil claim for the recovery, based on ownership, of a cultural object 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.
- The fourth base or head of special jurisdiction is article 7(4) concerning cultural objects. Fejn tidhol serq jew haduhuli ta cultural object hija triggered il-court ta fejn serquli l-cultural object. Mela jiena noqghod Malta, serquli lil Caravaggio, qieghed l-italja, the court seized is the italian court, the place where the cultural object is situated. As long as I am the owner of the cultural object.
  - Branch, agency, or other establishment
  - Article 7(5) provides that as regards a dispute arising out of the operations of a branch, agency, or other establishment, the defendant domiciled in a MS can be sued in the courts for the place in which the branch, agency, or other establishment is situated.

- The fifth head of special jurisdiction, it concerns branches, agencies or other establishments.
- In the case of operations of a branch, agency, or other establishment again other establishment is not defined by the regulation we have to interpret it on a case by case basis. The defendant domiciled in a Member State can be sued in the courts for the place in which the branch agency or other establishment is situated. Nista naghmel proceedings fejn hemm dik il-branch jew agency.
  - Branch, agency, or other establishment
  - 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.
  - By way of example if a German company has a branch in Malta and I have concluded a contract in that branch, I can sue in the courts where that branch is established, where it is based, the court of jurisdiction is the court where the branch agency etc is based.
- The second bullet, the test which is applied by the court, is the branch established in Malta or is another entity under control of the defendant? The test to be made, is by asking the question whether the branch or other entity (agency, establishment) is under the control of the defendant. If it is under the control of the defendant I can sue in the place where the branch is established.
- Jekk id-defendant huwa, ghandu 80% shareholding ta dik il-branch jew huwa sole director, hemmhekk hemm ir-rabta tieghu, il-connecting factor ma dak il branch ma dak il-pajjiiz, you have to ask whether that branch is under the control over the defendant. Does the defendant have control over the branch in the management? In the shareholding? Or not. U naraw jekk hemmx rabta.
  - Branch, agency, or other establishment
  - 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.

- Another example, if the company with whom one transacted business is domiciled in Germany, but has an outlet in Malta, and one has conducted or concluded a contract in Malta, then that branch is considered to be a branch as long as it is under the control of the parent company which is established in Germany.

- We have to ask again whether that outlet branch whether it is under the control of the German company or whether it is autonomous from it in order to clarify whether we have jurisdiction under this subparagraph or not which is (5) head 5 of the special jurisdiction.
  - Branch, agency, or other establishment
  - De Bloos v Boer (1976)
  - The Court held that the appointment of an 'exclusive distributor' in Belgium did not amount to the setting-up of a branch or agency or other establishment.
  - The applicable test is whether the branch or agency is subject to the defendant's direction or control.
- De Bloos case, now we have a separate case of an exclusive distributor, in Belgium, and the court said (qed ninterpretaw x'inhi branch jew le) fil-kaz ta' exclusive distributer, it's not a branch ghax ghandu distributorship agreement, hija relazzjoni kuntrattwali aktar milli branch. Il-qorti did not amount to the setting-up of a branch or agency or other establishment.
- Again it applied the test whether the branch or agency is subject to the defendant's direct control or otherwise.
  - Branch, agency, or other establishment
  - Blanckaert & Williams v Trost (1981)
  - The Court decided that a 'branch' must appear as 'an easily discernible extension of the parent body:
  - New Hampshire Insurance Co. v Strabag Bau (1990)
  - The court also emphasized that the branch etc must be a branch of the defendant; the plaintiff's position in that respect is irrelevant.
- Blanckaert case, again here the court attempted to define what is a branch and in this case it held that a branch must appear as 'an easily discernible extension of

the parent body, otherwise it is not a branch. Mela il-management, huwa involut mal-parent company tal-branch? Hemm shareholding? Hemm subsidiary?

- New Hampshire insurance, the court in this case said that the branch must be a branch of the defendant, that the defendant is operating in that branch because we are going to file proceedings in the place where the branch is situated, the branch of the defendant always. And the plaintiff's position here is irrelevant because we are seeking the defendant, place of jurisdiction
  - Trusts and shipping
  - Article 7(6) deals with disputes concerning trusts.
  - "as regards a dispute brought against a settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the MS in which the trust is domiciled"
- The sixth head of special jurisdiction are trusts, disputes concerning trusts. Issa ir-regolament ma jsemmix foundations, ma naff jekk trust tistax tigi interpretata bhala foundation. As regards a dispute brought against a settlor, tat-trust, the trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, ovja jrid ikun hemm written instrument bin-nutar, bhall dik ta foundation, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled.
- Jekk jiena se nfittex fuq trust the place of jurisdiction is the place where the trust is registered, bhal isha l-istess tas-seat ta kumpanija, fejn kumpanija ghandha s-seat, il-post fejn hija irregistrata.
- Fejn jidhlu trusts I have jurisdiction in the place where the trust is domiciled/registered.
  - Art 7(7) salvage of cargo or freight
  - Article 7(7) deals with disputes concerning the payment of remuneration claimed in respect of the salvage of cargo or freight.
  - "as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:
  - a) Has been arrested to secure such payment; or
  - b) Could have been so arrested, but bail or other security has been given;

- Provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage".

- The seventh head of jurisdiction, salvage of cargo or freight. Li huwa article 7(7). These concern disputes, on payment of renumeration with respects to salvage of cargo etc.

- In this case, the jurisdiction is established in the court under the authority of which the cargo in question, ghandna two options fejn jidhol cargo, either the place where the cargo has been arrested to secure such payment. X'qed nghidu hawn arrested? Sar arrest tal-vessel, tal-vapur, mandat, a) huwa mandat, warrant or could have been so arrested skont il-port fejn dahal dan il-vapur but bail or other security has been given.

- X'nista naghmel jiena biex innehhi mandat? Taghmel kontro mandat, imma ha niffirmah jekk ma hallastnix? Trid tipprezenta receipts, il-kaz tieghi u tieghek ghadu ma nqatax il-qorti u inti ghamiltli mandat ta sekwestru fuq il-banek ghax ghandi stik €20,000. mela ghamiltli sekwestru u l-banek sabuli l-flus u iffrizawli €20,000. issa jien qed iddejjaqni din tal- €20,000 frizati l-bank x'nista naghmel biex tnehhili l-mandat sakemm jinqata l-kaz. Jien nista naghmel garanzija, jekk ghandi ntik €20,000, xorta ghandha pretenzjoni, naghmel garanzija fil-qorti l-file imur ghand l-imhallef japponta l-kontromandat u jnehhili l-mandat lili ghax jaf li l-garanzija qieghda frizata l-qorti sakemm jinqata l-kaz. Din hi security, sakemm tinqata l-kawza, jekk tkun favorija ha nizbanka l-kawza ghal ghandi.

- Issa hemm proviso ukoll, provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

  - Article 8(1) Co-defendants

  - Article 8(1) provides that a person domiciled in a MS may also be sued, where he is one of a number defendants, in the courts for the place where any 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 result in from separate proceedings.

- Ha mmorru fuq article 8, mela, rajna il-heads of special jurisdiction, li huwa article 7. Issa se naraw ukoll, il-ligi ma tghidiliex special jurisdiction pero hija xorta a form of special jurisdiction, x'se jigri per ezempju fejn hemm co-defendants. Dejjem qed nitkellmu fuq jurisdiction.

  - <u>Article 8.</u>

- **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;

- (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;

- (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;

- (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.

- Article 8(1) fuq co-defendants, a person domiciled in a Member State may also be sued, where he is one of a number defendants, in the courts for the place where any of them is domiciled. Jekk jiena qieghed co-defendant ma xi hadd, u bdew kaz kontrija malta, il-co defendant l-iehor tista tingieb azzjoni ukoll f'malta kontrih ghax ahna co-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 result in from separate proceedings.

- X'inhu l-principju li naghmlu proceduri kontra co-defendant, idejalment il-codefendant l-iehor ghandek tfitxu l-istess post biex ma jkollokx judgements differenti fuq l-istess suggett min qrati differenti tal-member states. Jekk jiena malti u int taljan u l-kaz l-ewwel beda kontrik jien ha ningibed l-italja mieghek biex inwiegeb biex ma jkunx hemm zewg judgements

  - Co-defendants

  - This deals with a situation of co-defendants, such as for example a car accident involving more than two cars.

  - If one is suing one of the defendants in the courts of his domicile, then another defendant can be sued in the same court.

- Therefore at least one of the defendants is being sued in the courts of his domicile.

- Hawn tajt ezempju a car accident involving more than two cars. If one is suing one of the defendants in the courts of is domicile, then another defendant can be sued in the same court.

- Il-jurisdiction, il-plea of jurisdiction inti meta ha taghmel kawza ghandek preliminary pleas u pleas fil-mertu. Jien ghandi ntik €1,000 u ha taghmilli l-kawza, x'se titlob fil-kawza kontrija? Biex ittini l-flus. Jiena se naghmel ghal dik il-kawza wara 20 gurnata? Risposta, ghandi 20 days from date of notification. Jien nista nghid, naghmel pleas ta natura preliminary, u pleas ta natura fil-mertu. Pleas ta natura preliminarji huma per ezempju nghid preskrizzjoni ta 5 snin per ezempju, mela mhux dovuti, dik hija preliminary plea, li nqajjem fil-bidu. Issa l-imhallef, (bhal jurisdiction hija plea). Imma min ha jqajjimhom? Id-defendant sia prescription u sia jurisdiction. Issa imhallef jista, jekk il-kaz jara li hu provat sew jista jaghtii sentenza parzjali, flok jidhol fil-mertu lill-avukati tal-giex partijiet jghidilhom hawn hawn kwistjoni ta jurisdiction jekk ghandix nisma l-kaz jew le, inutli nidhol fil-vertu u nahli sentejn. Ejja niddeciedu l-preliminary plea tal-jurisdiction u ovvjament il-plaintiff se jghid ghaliex il-qorti ghandha jurisdiction u tinghata sentenza, issa jekk il-qorti tghid m'ghandiex jurisdiction ovjament ha taqa' il-kawza. Preliminary pleas u pleas fil-mertu.

- Il-principju f'co-defendants huwa li at least one of the defendants has to be sued in the court of his domicile.

  - Co-defendants - Reunion Europenne and Others (1998)

  - It was held that Art 8(1) can only be used if one of the defendants is being sued in the courts of the place where he is domiciled.

  - The claims must also be closely connected to avoid the risks of irreconcilable judgments.

- Reunion Europenne and others, semmejnih ukoll dan. Stabilixxa l-istess principju, article 8(1) can only be used if one of the defendants is being sued in the courts of the place where he is domiciled. The claims must also be closely connected to avoid the risks of irreconcilable judgments. Judgements li m'humiex fuq l-istess suggett imma li marru f'toroq differenti ghax mhux qed tismahhom il-qorti mela marru ghal interpretation differenti.

  - Co-defendants

  - Istituto per le opere della religione v Futura funds (2019- Maltese case)

- There were 6 defendants, 2 of which were domiciled in Malta. This case concerned an investment by the plaintiff and there was an allegation of fraud and breach of fiduciary duties.

- The court held that Art 8 applied as at least one of the defendants were domiciled in Malta.

- https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61997CJ0051_SUM&from=SV

- Istituto per le opere della religione, l-istess fuq co-defendants wiehed mil-banek tal-vatikan, kontra futura funds. Dan il-bank investa xi flus f'futura funds, there were six defendants, two of which were domiciled in Malta.

- Il-kaz jikkoncerna investment li ghamel il-plaintiff f'dawn il-funds, dawn il-funds marru hazin and the istituto claimed there was fraud and breach of fiduciary duties. Il-qorti qalet, li japplika article 8(1) fuq co-defendants ghax ghandek at least one of the defendants, f'futura kien hemm tmienja u tnejn domiciled in Malta, la kienu domiciled in Malta, at least one setghu infethu l-proceduri f'malta mela l-qorti maltija ghandha jurisdiction.

  - Art8(2) third parties

  - Article 8(2) provides that a person domiciled in a MS may also be sued, 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.

- Kaz iehor ghalkemm ma jaqax strettament taht jurisdiction, semmejna l-co-defendans, araw ftit ukoll article 8(2) regarding third parties. Dak li nghidulu il-kjamat fil-kawza jew joiner.

- A person domiciled in a Member State may also be sued, 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. And then there is a proviso, x'qed nghidu, a third party in an action on a warranty or guarantee, so the action has to be specific based on a warranty or guarantee, a guarantee is a hypothec, general or special, pledge, privileges, special privileges and so on.

- A third party in an action on a warranty or a guaranty, mela specific, li rridu nsaqsu hu is it a warranty or a guarantee? If it is not this article will not apply, or in any other third party proceedings in the court seised of the original proceedings.

- Ha nispjegaw, here we have a situation where one sues another and in his defence, the defendant says that he is not liable, because someone else is liable. Mela fittixtu lili, the defendant, jien issa jien m'ghandix x'naqsam ma din, third party 'C' ghandu x'jaqsam u allura se jigi kjamat fil-kawza it-third party 'C'.
- Jien m'ghandix x'naqsam, mela ha jidhol fil-kawza jigi kjamat, joinder, a third party as a defendant. Kjamat fil-kawza huwa xi hadd li jissejjah fil-kawza bhala defendant u l-judgement jista jsir ukoll fuqu, allavolja dahal bhala kjamat, jista jinstab hati daqs the original defendant jew ma jinstabx hati. Mhux bhal interventu fil-kawza, dak huwa xi haga ohra, xi hadd li jintervjeni fil-kawza ghax ghandu interess, pero l-judgement m'ghandux shah fuqu, ha jintervjeni biss
  - Third parties
  - This is a situation where one sues another and in his defence the defendant says that he is not liable because there is someone else who is liable (in Malta we have something similar: kjamat in kawza, when someone wants to call somebody else into the suit).
  - The law here is saying that the court has jurisdiction as long as the original proceedings were not instituted precisely to rope in the additional defendant.
- Article 8(3), ghandna special legal bases of jurisdiction fejn jidhlu counter-claims, kontro-talba.
  - Article 8(3) Counter-claims
  - A person domiciled in a MS may also be sued, on inter-claim arising from the same contract or fact which the original claim was based, in the court in which the original claim is pending.
- A person domiciled in a Member state may also be sued on a counter-claim arising from a contract or facts, on which the original claim was based. In the court in which the original claim is pending, mela jekk jiena intavolajt kawza, ovjament jekk ha ssir kontro-talba mid-defendant trid issir dil-post fejn saree ga l-kawza, dik hija l-legal claim tal-jurisdiction ghax diga nfethet hemm il-kawza mela l-kontro-kawza se ssir fl-istess qorti fejn infethet il-kawza, il-claim il-plea of judicial demand.
- Kontro talba trid issir mar-reply stess, mela, ghamiltuli kawza ha naghmel reply ghal kawza, nista niddeciedi li naghmel ukoll kontro-talba, jigifieri kawza glida ma dik ir-reply, ikunu hemm parti reply u t-tieni bicca kontro talba, jigifieri kawza gdida ma dik ir-reply ikun hemm parti reply u imbghad t-tieni bicca hija l-kontro talba, il-

kawza gdida kontrikom, u x'se naghmlu ahna metą nircievu l-kontro talba, se naghmlu reply ohra u l-qorti tismaghhom flimkien.

- Ezempju ta' kontra talba meta ssir hu, meta jiena qed nissepara, ghamlitli kawza l-mara, li jiena abbandunajt id-dar bil-legal base li ghamlet, separation Joe Bugejja abbanduna d-dar jiena ghamilt reply ghal dik il-kawza u se nghid mhux vera. Anzi il-mara tieghi hatja ta' adulterju, mela l-counter-claim hija legal base ohra li huwa l-adultery, ovjament biex naghmel counter claim irid ikolli bazi u allura l-qorti f'dak il-kaz se tisma kemm il-bazi tal- abandonment li jien tlaqt mid-dar li qed taghmel il-claim hi u ha tisma ukoll il-legal base tieghi li hu l-adulterju. U x'se taghmel fis-sentenza l-qorti? Ha taghti decizjoni fuq it-tnejn sia fuq abandonment u sia fuq adultery. Irid ikun hemm sentenza wahda fejn ikun hemm counter claim li tiddijlja kemm mal-kawza originali u kemm mal-counter claim.

- Counter-claims

- A counterclaim is a situation where one not only claims that he is not liable, but concurrently claims that the plaintiff owes him.

- In such a situation the court which has jurisdiction over the original claim also has jurisdiction over the counterclaim.

- A counterclaim is a situation where one not only claims that he is not liable, but concurrently claims that the plaintiff owes him for instance if it is a case of a debt collection. U allura the court which has jurisdiction over the claim has also jurisdiction over the counter claim. Ma nistawx immorru x'imkien iehor ghax ga hemm il-claim quddiem dik il-qorti. Anke fil-counter-claim il-kliem jinbidel, konvenut u jikkonvenzjonah, mhux rikorrent u intimat.

  - Article 8(4) rights in rem

  - A person domiciled in a MS may also be sued, 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 MS in which the property is situated. (Lex situs)

  - If there is a contract where there is an action in rem, the courts would have jurisdiction if it has jurisdiction over the actual thing

- Ir-raba jurisdiction under article 8 qieghdin issa, semmejna co-defendents, counter-claim, issa rights in rem. A person domiciled in a Member States may also be sued, 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 fejn tidhol

immoveable property, in the court of the Member States in which the property is situated. Il-principju tal-Lex situs. The place of jurisdiction usually is the place where the immoveable property is situated.

- If there is a contract where there is an action in rem the courts would have jurisdiction, if it has jurisdiction over the actual thing.
  - Art. 9
  - Establishes another principle of special jurisdiction:
  - "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 MS, shall also have jurisdiction over claims for limitation of liability.
- Article 9, again it establishes another principle of special jurisdiction. Where it concerns liability from the use or operation of a ship. So this legal base concerns ship, liability from the use or operation of a ship.
  - Article 24- exclusive jurisdiction
  - Under Article 24, however, five circumstances are provided for in which courts other than those of defendant's domicile have exclusive jurisdiction.
  - In such circumstances the jurisdiction of the courts of defendant's domicile is ousted:
  - it is therefore not a matter of concurrent jurisdiction as in the case of 'special jurisdiction';
  - rather there is simply the replacement of one jurisdiction by another, irrespective of the defendant's domicile and/or the plaintiff's preferred choice of law.
- Article 24 provides for exclusive jurisdiction, not special jurisdiction, exclusive jurisdiction, which means that in this case the word itself is saying it, exclusive so more then special, ghax fl-ispecial ghandna l-ghazla bejn general jurisdiction u l-ispecial issa ghandna l-exclusive jurisdiction.
- The court of a member state has exclusive jurisdiction in five instances, which we will see later/ look into, regardless of the domicile of the parties. Din id-darba taht dawn il-hames caps of jurisdiction, li huma exclusive, mhux se nharsu lejn il-principju tad-domicile tad-defendant ghax hija an exclusive jurisdiction tal-qorti dawn il-hames instances, regardless of the domicile of the parties. So we can say

in these five instances the jurisdiction of the courts of defendants domicile is ousted. Mhux se naghmlu referenza ghal jurisdiction tad-domilice tad-defendant.

- Therefore the third bullet (which is important) in the case of exclusive jurisdiction, we don't have concurrent jurisdiction because it is exclusive. Mela, in special jurisdiction it is concurrent ghax ghedna jista jmur general jurisdiction jew ghandi l-ghazla mmur special jurisdiction f'dan il-kaz m'ghandix ghazla it is exclusive u rrid nimxi mal-ligi. It is mandatory in five instances. U ghallura l-conclusion tar-tar-raba point rather there is simply the replacement of one jurisdiction by another, irrespective of the defendant's domicile.
  - Article 24 - exclusive jurisdiction
  - The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties
  - (1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the court of the Member State in which the property is situated. Lex situs
  - 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;
  - (2) in proceedings which have as their object the validity of the constitution, the nuility 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;
- Article 24(1)-(5). Ha naraw daqxejn x'inhuma dawn il-five instances.
  - Article 24.
  - **24**. The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:
  - (1) in 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.

- 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;

- (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;

- (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;

- (4) in proceedings concerned with the registration or validity of patents, trade marks, 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;

- (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.

- The first, in proceedings which have a their objects rights in rem (real rights, ownership, possession, usufruct, emphyteusis, u ezempju ta’ personal right huwa pleas, per ezempju.

- Objects in rem in immoveable property or tenancies of immoveable property, mela anke kirjiet. X’inhu l-principju? Lex situs, the law where the property is situated. Mela, malli ghandna propjeta, normalement, immobbli, dejjem se mmorru fuq il-post fejn hemm il-propjeta ghax hemm il-principju ta exclusive jurisdiction f’article 24(1) li huwa l-lex situs.

- Article 24(2) another ground of exclusive jurisdiction, ma nhaltuhomx mas-special. Special huma article 7.

- It-tieni instance, fejn jidhlu legal persons, fejn tidhol the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons. Ejja narawha bilmod, mela. In proceedings which cap as their object the validity of the constitution. Constitution huwa l-istat tal-kumpanija, jekk naghmlu kumpanija u namluha 50%-50%shareholding x'jirregolana? Il-memorandum and articles, l-istatut. Il-constitution dak huwa mhux il-constitution of Malta. Validity of the constitution, tajjeb dan l-istatut jew le? The nullity or the dissolution of companies, mela qed naghmlu likwidazzjoni ta' kumpanija or other legal persons (ezempju ta' legal person huma koperattivi, kooperattiva hija legal person stabilita bil-ligi jew foundation semmejniha m'ilux, jew trust ghalkemm trust regolat min special legislation. or associations of natural or legal persons or the validity of the decisions of the organs. X'inhuma d-decisions of the organs ta' kumpanija jew legal person? Il-board of directors, shareholders meetings meta jkun hemm. Mela fejn jidhlu dawn l-affarijiet specifici, il-ligi qed tispecifika liem huma u ghandna kwistjoni, mhux se naraw id-domicile imma se naraw the seat of the company.

- What is the seat of the company? The place where the company is registered. L-MBR per ezempju mela s-seat tal-kumpanija qieghed Malta ghanda jurisdiction il-qorti Malta, specifikament f'dawn l-areas tal-istatut, liquidation etc, ta li semmejna.

  - Cont

  - (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;

  - (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 on 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;

  - (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.'

- It-tielet ground of exclusive jurisdiction, fejn jidhlu the validity of entries in public registers.
    - Ezempju a deed of sale, fejn jien mizzewweg, fejn huwa rregistrat iz-zwieg tieghi tieghi fejn jien registrat li twelidt, kollha huma public registers.
- Jekk hemm issue, kien hemm wiehed barrani, twieled fit-20th February hadu zball u ried jigi 19th fil-qorti tar-revizjoni, mela validity of entry in public registry. Ezatt habit dan il-kaz, x'jista jaghmel? Barrani, il-mara tieghu weldet hawn u hemm zball fir-registru. Fejn jista jikkoregih dak l-izball? Fil-qorti ta malta ghax ir-registru hawnhekk qieghed ghalhekk hemm exclusive juridiction.
- Ir-raba' ground ta' exclusive jurisdiction fejn jidhlu patents, trademarks, design, li nghidulha att fuqhom, patents trademarks designs, or other civil rights that are required to be deposited or registered. Again, fejn jidhlu dawn l-IPR rules etc, huwa the place where the trademark has been deposited or registered.
- Ir-raba ground t'exclusive jurisdiction huma fejn jidhlu patents, trademarks designs, u other similar rights li jigu registered, jekk jien se naghmel kawza, irrid namilha fil-post fejn it-trademark huwa registrat. Mela jekk jien xi hadd seraqli t-trademark, u t-trademark registrata Malta se namilha Malta kontrih. (Jekk ikollok european trademark registered under the EUIBO jiddependi jekk hix irregistrata taht ir-registru tal-EU, if it is infringed in another country it's in that country where we need to do proceedings).
- The fifth ground of exclusive jurisdiction fejn hemm enforcement of judgement. Din ovja, jekk jiena gibt judgement mill-Italja, irid jigi infurzat fil-post where the judgement has been or is to be enforced. Imbghad nghalqu l-lectures fuq Brussels Recast b'enforcement.
- Dawk huma l-five instances ta exclusive jurisdiction.
    - Art 25- prorogation of jurisdiction
    - 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 that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. 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.

- Article 25, which is a stand alone article in the regulation.

  - Article 25.

  - **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, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. 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.

  - 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.

  - 3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

  - 4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

- 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.

- Refers to what is referred to technically as prorogation of jurisdiction.

- Prorogation of jurisdiction, if the parties, regardless of their domicile, mela again domicile m'huwiex importanti hawnhekk, have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction unless the agreement is nulled.

- Jekk party 'A' and party 'B' have agreed in a contract for instance that in the case of a dispute, mela party 'A' is from Malta, party 'B' is from England, who have signed the contract they inflate influence of jurisdiction voluntarily, mela 'A' u 'B' wiehed domiciled Malta u wiehed domiciled l-italja pero they have agreed that in the case of a dispute the Maltese courts of justice for instance will have jurisdiction. If the parties agree the jurisdiction mela that contract prevails over the general jurisdiction etc. because we have agreed in the contract, so the court which has jurisdiction is the court which will have chosen as the court to have jurisdiction in our bilateral agreement between us, prorogation of jurisdiction ghax iddecidejna ahna mmhux se jkunu regolati fil-ligi azilniha ahna l-qorti jekk tinqala xi kwistjoni fejn se mmorru. L-istess ukoll f'kuntratt, there might be a choice of law clause mhux choice of jurisdiction biss.

- Hawnhekk ghandna instances, fejn il-partijiet iddecidew b'idejhom, bejniethom x'ghandha tkun il-qorti and this prevails over the law. Hemmhekk hemm proviso unless the agreement is null and void as to its substantive validity under the law of that Member State. Mela, substantive law, mela jmur kontra public policy. Fthemna jien u int li ha niffrodaw il-gvern, mela kontra public policy mela dik il-klawzola ma tghoddx ghax tmur kontra public policy, substantive validity under the law of that member state. Public law of that member state.

- Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either in writing or evidenced in writing, the criterion l-elements that need to subsist. In a form which accords with practices which the parties have established between themselves, 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. Fejn jidhol international commerce, fejn jidhlu l- incoterms etc.

- Art 26 - jurisdiction by appearance
- 1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant ent on 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.
- 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 informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.
- Article 26.
- **26**. 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 juris diction by virtue of Article 24.
- 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.

- Another article, again another standalone article on jurisdiction by appearance. 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. Mela, volontarjament hawnhekk id-defendant he entered in appearance, there, ippartecipa fil-kawza allura there is a voluntary submission to jurisdiction, ghalhekk ghedna jurisdiction by appearance, mela voluntarily din id-darba independentament mid-domicile jew mhux ippartecepa fil-kawza id-defendant.

- This rule shall not apply where appearance was entered to contest the jurisdiction, ovvjament, f'dan il-kaz ma tapplikax din it-tip ta jurisdiction jekk jiena dhalt fil-kawza ghax qed nikkontesta l-jurisdiction.

- The court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance, mela jekk xi hadd qieghed iwiegeb ghal kawza u jaccetta l-jurisdiction, il-qorti se tammonih u tghidlek ghandek dritt biex tikkontesta l-jurisdiction li qed tapplika ghaliha. (Entering an appearance bhal kjamant, jaf li nfethu proceduri u relatat, u ghalkemm m'ghandux domicile xorta ddecida li jippartecipa)

  - Art 27 - Examination as to jurisdiction and admissibility

  - 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.

  - <u>Article 27.</u>

  - **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.

- Article 27 examination as to jurisdiction and admissibility. 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, article 24 huma dawk il-hames instances ta exclusive juridiction, mela jien iffajljajt kas fuq public register, taz-zwieg per ezempju li m'huwiex fil-qorti fejn hemm ir-registru, public register il-kawza trid issir fejn hemm il-public register, pero jiena il-public register qieghed malta u ffajljajt il-kawza l-italja. Kif il-qorti tinduna li dan huwa kaz ta exclusive jurisdiction, ma tistax tisimghu il-kaz ghax hemm exclusive juridiction fil-qorti maltija ghax il-public register qieghed malta. Mela f'dak il-kaz il-qorti taljana of its own motion, sua sponde, ex officio, hija mandatorja 'shall' shall declare of its own motion that it has no jurisdiction.

- Jekk jiena ffajljajt, kawza fuq public register fuq id-data tat-twelid tieghi li hemm zball f'qorti taljana, issa jew bizball jew le ma nafx, il-qorti se tghidlek li l-public register qieghed Malta, sa tghid li m'ghandiex juridiction u ha tarmiha l-kawza, u tghidlek biex tiftaha malta ghax il-public register qieghed Malta. dan irridu narawh

article 27, in combination ma article 24 on exclusive jurisdiction, marbut maghha. Fejn qieghed jaghti l-poter il-qorti li jekk hemm issue ta exclusive jurisdiction u hi m'ghandiex exclusive juridiction ghandha tarmi l-kawza u ma tismahhiex, mela l-kawza trid tinfetah fil-qorti fejn hemm l-exclusive jurisdiction, dawk il hames instances ta exclusive juridiction taht article 24.

- Darbohra se nibdew it-tlett tipi ta' cirkustanzi fejn ghedna employment, insurance u consumer, fejn ghandhom regal ghalihom tal- Private International Law taht ir-recast ukoll imbghad nibqghu ghaddejjin ghal enforcement ta' foreign judgements biex nikkonkludu r-recast.

7th March 2023

Lecture 4.

- Brussels I
- Part III

- During the last lecture we ended up with exclusive jurisdiction. What are the ground of exclusive jurisdiction where the Member State court has exclusive jurisdiction of a case. Immoveable property is one of the grounds, issues relating to the memorandum and articles, companies in the public registry because they are naturally deposited in a particular Member States, marriage registers, bird registers, patents, trademarks.
- So in these instances article 24 of the regulation, the court of the Member State shall have exclusive jurisdiction irrespective of the domicile, so the connecting factor of the domicile does not operate because the Member States court have exclusive jurisdiction in these particular. The other head is the enforcement of judgements.
  - Step 5- Rules of jurisdiction designed to protect the weaker party
  - Under the Regulation one must look at the specific rules designed to protect the:
  - Policy holder in an insurance contract
  - Consumer and
  - Employee

  • Today we're going a step factor, with respect to three areas which are insurance contracts, the consumer consumer and the employment contracts. There are three particular legal relationships, which according to the regulation they have their own particular rules. They are not exclusive jurisdiction, they are not special

jurisdiction but there are ad hoc rules for three types of legal relationships, which are insurance contracts, consumer contracts and employment contracts.

- These three areas have ad hoc rules in view that the law considers the employee, the consumer and the policy holder as the weaker party in a legal contractual relationship because underlying these three areas we are speaking of contract law. An insurance contract, consumer contract and employment contract.
  - Recital 18 of the Regulation refers to the weaker party, whereby In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.
  - Therefore, the Regulation provides for certain protections to the weaker party in these 3 scenarios.
  - In any of these 3 scenarios, the Regulation states:
  - 1. The weaker party can bring proceedings in his home state
  - 2. The stronger party needs to bring proceedings in the courts of domicile of the weaker party.
  - 3. Court restricts the possibility on choice of court agreements - the weaker party cannot be deprived of the choice of jurisdiction by the contract clause.
  - Recital 18.
  - **18**. In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules
- If you look at recital 18 of the recast regulation, the one of the preambles it specifically mentions the weaker party. The weaker party should be protected by rules of jurisdiction more favourable to his interest than the general rules. This is the motivation, legal rational why we have specific rules on these three contractual relationships. These special relations in these three areas is characterise by these three points.
- First, the weaker party can bring proceedings in his home state, the consumer, the policy holder, the employee, the weaker party can bring proceedings in his home state.

- Secondly (these are the principles), the stronger party in this case the employer, the ensurer and the trader in case of consumer contracts, the stronger party needs to bring proceedings in the courts of domicile of the weaker party.
- Jekk mill-banda l-oħra l-employer se jfittex lill-employee (se jfittxu xorta), still he is the weaker party the employee, obligat li jfittxu in the courts of domicile of the weaker party because the employee is considered as a weaker party in terms of the regulation.
- Thirdly, the court restricts the possibility on choice of contract of court agreements, which in effect means that the weaker party cannot be deprived of the choice of jurisdiction by the contract clause. So if there's a clause in a consumer contract which has been agreed where jurisdiction has been agreed still the law prevails over that contract clause.
    - Insurance
    - Art 10 states In matters relating to insurance, jurisdiction shall he determined by this Section, without prejudice to Article 6 and point 5 of Article 7
    - Therefore, an insurer domiciled in a Member State may be sued:
    - (a) in the courts of the Member State in which he is domiciled;
    - (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
    - (c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.

- Let's go to insurance.
    - The pertinent articles in the regulations are article 10 to article 16 (have a look at them).
        - <u>Article 10.</u>
        - **10**. In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7.
        - <u>Article 11.</u>
        - **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;
- (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
- (c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against 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.

- If you look at article 11, it is reproduced in this slide, an insurer domiciled in a Member State, may be sued in the courts of the Member State in which he is domiciled, he can also be sued in another Member State in the case of actions brought by the policy holder, the insured or a beneficiary in the courts for the place where the claimant is domiciled. The insured can file proceedings depending on the place where he is domiciled, and the third possibility in the case of a co-insurer, (an insurance which insures another insurance), in the courts of a Member State in which proceedings are brought against the leading insurer. These are established principles found in article 11 of the regulation.
  - Insurance
  - An insurer not domiciled in a MS but has a branch, agency or other establishment in one of the MS shall in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that MS.
  - However, if the defendant is not domiciled in a MS, one has to apply national law rules.
- In the case of branches, agencies, etc, pertaining to insurance. An insurer who is not domiciled in a Member State but is represented through a branch, agency or another form (always in another Member State in the internal market), an insurer who has a branch, an Italian insurance with a branch in Malta, shall in disputes arising out of that branch be deemed to be domiciled in that Member State.
  - If I have a dispute against an insurance who has a branch in Malta but the mother company is in Italy I can file proceedings in Malta because I am the weaker (the insured) the weaker party.

- It apples also to beneficiaries, a beneficiary can be someone who has inherited an insurance, the spouse of a husband who has died his the place of work etc. So, it also applies not just to insure but also to any form of beneficiary, the insurer.

- However if the defendant is not domiciled in a Member State one has to apply national laws of Private International Law (ir-regoli li kull pajjiż għandu meta ma japplikax ir-regolament, tagħna qiegħdin fil-Code of Organisation and Civil Procedure, jekk taqa' taħt ir-recast, as EU law prevails over national law.

  - Insurance

  - The question arose, can the victim sue in his home state or also in the MS of the insured?

  - The ECJ in FBTO Schadeverzekeringen held that the victim has a right to bring proceedings in the court of his own MS.

  - The injured party in a road traffic accident may bring an action directly against the insurer of the person responsible before the courts of the place where that injured party is domiciled.

  - The only condition is that the insurer must be domiciled in a MS of the EU.

  - http://curia.europa.eu/juris/document/document.jsf?text=&docid=71718&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1252473

- The question may be asked can the victim of an insurance file in his home state or also in the Member State of the insured where the insured has his registered company etc?

- Here we have the case FBTO where the victim has a right to bring proceedings in the court of his own Member State. This is referring presumably to article 11(1)(a). We established the principles. The injured party in a road traffic accident may bring an action directly against the insurer before the courts of place where the injured party is domiciled because he is considered to be the weaker party. The accident happened in Malta I can file proceedings against the insurance in Malta.

- However there is the precondition the insurer must be domiciled in the Member State of the EU otherwise domestic law will be applied.

  - Insurance

- Furthermore, under Art 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.

- Art 13 - 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 against the insured

- Art 14: 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.

- Therefore, if it is the insurer who institutes the action, he can only institute it in the courts of domicile of the defendant (insured)

- Article 12.

- **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.

- Article 12, refers to liability insurance or insurance on immovable property. In this case, there are two instances; in respect of liability insurance, or insurance of immoveable property. The insurer may in addition be sued in the courts for the place where the harmful event occurred. So if I insure my house in Slovenia, and there is an accidental fire, the house is in Slovenia I can sue the insurer to pay me in the courts of Slovenia as long as we are speaking of a Member State.

  - Article 13.

  - **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.

  - 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, with respect to 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.
  - Article 14.
  - **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.
- Article 14, an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled. We have already seen this irrespective whether he is the policy holder, the insured or the beneficiary.
  - Insurance
  - Article 15 limits the effect of choice of court agreements.
  - It states that the weaker party cannot be restricted from applying the provisions granting him rights of jurisdiction in cases where he has entered a choice of court agreement.
  - In the case of the weaker party, one can only make a choice of court agreement according to the list mentioned under Art 15.
  - One way in which a choice of court agreement is allowed is if it is entered into after a dispute to decide on a choice of court to hear the case.
  - 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;
  - (2) which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section;
  - (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;

- (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 15, limits the effects of choice of court agreements. In the sense that the weaker party/the insured cannot be restricted from applying the provisions which grant him jurisdiction in cases where he has entered a choice of court agreement. Mela meta the insured, f'agreement t'insurance ftiehem fil-jurisdiction jista japplika dik il jurisdiction li ftiehem fuqha li ħarġet mill-agreement.

- In the case of the weaker party (the insured) one can only make a choice of court agreement according to the list provided in article 15.

  - <u>Article 16.</u>

  - **16**. The following are the risks referred to in point 5 of Article 15:

  - (1) any loss of or damage to:

  - (a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;

  - (b) goods in transit other than passengers 'baggage where the transit consists of or includes carriage by such ships or aircraft;

  - (2) any liability, other than for bodily injury to passengers or loss of or damage to their baggage:

  - (a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;

  - (b) for loss or damage caused by goods in transit as described in point 1(b);

  - (3) any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;

  - (4) any risk or interest connected with any of those referred to in points 1 to 3;

- (5) notwithstanding points 1 to 4, all ‘large risks ’as defined in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (1).
- Insurance
- Group Josi Reinsurance Company SA vs. UGIC (2000)
- It was decided that the provisions designed to protect the weaker party do not apply to reinsurance contracts.
- Reinsurance is insurance that an insurance company purchases from another insurance company to insulate itself (at least in part) from the risk of a major claims event
- The Brussels Convention is in principle applicable when the defendant is domiciled in a Member State, even if the claimant is domiciled in a non-member country.
- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=45099&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1252569

• Group Josi Reinsurance Company, this case held that the provisions in the regulation which are intended to protect the weaker party do not apply to reinsurance contracts so we can say that the regulation, the provisions of the regulation do not apply to reinsurance. They apply only to the relationship arising out of an insurance contract not reinsurance. Reinsurance meta insurance żgħira tagħmel insurance ma’ insurance ikbar minnha għar-riskju tagħha. Insurance qed tagħmel insurance lill-insurance ohra.

• The Brussels convention is in principle applicable when the defendant is domiciled in a Member State even if the claimant is domiciled in a non member country.

- Consumer Contracts
- The protections granted to consumers are:
- 1. The consumer may bring proceedings in his home state
- 2. The consumer can only be sued in the consumer state
- 3. It is not possible to deprive the consumer of these jurisdictional benefits except in situations under Art 19.

- However, these protections are not granted in every scenario:
- first there must be a contract,
- it must be determined what is a consumer and
- what type of contracts fall under consumer contracts.
- Article 17.
- **17**. 1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:
- (a) it is a contract for the sale of goods on instalment credit terms;
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods;
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.
- 2. 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.
- 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.
- Article 18.
- **18**. 1. A consumer may bring proceedings agains 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.

- Article 19.

- **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.

- Consumer contracts issa, articles 17 to 19. We have three possibilities, whereby the consumer may bring proceedings in his home state, an action against a consumer by the trader, (by the trader against the consumer) can only be filed in the consumer state where the good or service has been consumed and furthermore it is not possible to deprive the consumer of this ground of jurisdiction except in the circumstances outlined in article 19.

- Article 19 stipulates that these principles of jurisdiction that the consumer has to respond in his Member State, these general principles on the consumer relationship with the trader may only be departed from by an agreement. Mela trader with the consumer and article 19 of the regulation also defines what is expected of this trader consumer agreement.

- The first criterium is that the agreement between them has to be entered, after the dispute is arisen, so prior to the dispute there should be an agreement. Second, the agreement should allow the consumer to bring proceedings in courts other than those indicated in this section and thirdly, the agreement between the trader and the consumer both of them are at the time of conclusion of the contract domiciled or habitually resident in the Member State.

- As we are noting, the law is using both domicile and also the concept of habitual residence given that the Member States have disparities, some use domicile

some use habitual residence. The law continues 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. Provided that the agreement which is entered between the trader and the consumer is not against the public policy. In short, there must be a contract it must be determined what is a consumer, and the type of contract which fall under consumer contracts.

- Consumer Contracts
- Article 17 - In matters relating to a contract concluded by a person, the consumer for a purpose which can he regarded as being outside his trade or profession.
- Therefore, the Regulation defines consumer as a person entering a contract for a purpose which can be regarded as being outside his trade or profession.

- In matters relating to contract concluded by a person the consumer for a purpose which can be regarded as being outside his trade or profession. Here the law is attempting to define and this has to be done by the courts on a case by case basis. First one has to identify whether it is, whether the matter concerns a consumer or otherwise.
- Therefore if the matter is something which concerns his trade or profession it is not deemed to be a consumer issue and therefore it will not fall within the remit of regulation it has to be, the consumption of a good or a service and consumer is defined as a person entering a contract for a purpose which is regarded to be outside his trade or profession, Article 17(1).
  - What Constitutes a Consumer?
  - Hutton case
  - A consumer claim was instituted by a consumer, however he assigned his rights to a company, therefore it was the company who was going to litigate with the defendant supplier.
  - The question was whether the company could enjoy the protections afforded by Art 17 since it was a consumer claim.
  - Court held that the provisions were designed to protect the weaker party who is deemed to be in an economically weaker party and since section 4 is an exception to the general rule of jurisdiction then it should not be given a wide interpretation but interpreted restrictively.

- Therefore, the provisions do not apply where the consumer has assigned his rights to a company.

- https://eur-lex.europa.eu/resource.html?uri=cellar:ce34d16f-d531-461b-9a02-eda796e7bc78.0002.06/DOC_1&format=PDF

- Hutton case, again this case attempted to define who is a consumer. In this case you had a consumer who made a claim against a trader, however the consumer had assigned his rights to a company, we have an assignment of rights so the consumer through a legal instrument has assigned his rights he no longer has rights in that plane and therefore the company, the assignee, the consumer is the assignor the company is the assignee has taken the consumer's rights and therefore the lawsuit against the trader.

- The issue arose, on whether the company assignee enjoyed the rights under article 17. Is the company the weaker party? Considering that this is a consumer claim. At least it started as a consumer claim.

- The ruling of the court was that the regulation was designed to protect the weaker party (the consumer in this case) who is economically weaker than the trader and therefore since section 4 (jurisdiction over consumer contracts) is an exception to the general rule of jurisdiction, section 4 should be interpreted narrowly/restrictively.

- So the court said one has to look into the matter and see whether there is a consumer or otherwise in this case the court said that given that the consumer had assigned his rights to a company the dispositions of section 4 on consumer contracts do not apply. So the company was not deemed to be a consumer even though it had the claim to the assignment.

  - Benincasa case

  - The court held that a consumer contract is one which secures the needs of an individual in terms of private consumption.

  - The plaintiff was domiciled in Germany and wanted to open a business in Germany.

  - He concluded a franchise agreement with an Italian company but he never started trading.

  - He brought proceedings in Germany against the Italian company, but the question was whether the German court had jurisdiction. He argued he was a consumer since he had not started trading, yet it was not the case.

- The court said he was not a consumer, that if the purpose of the contract is trade or professional activity then it cannot be a consumer contract even though the activity is only planned for the future and he hadn't vet started trading.

- http://curia.europa.eu/juris/showPdf.jsf;jsessionid=8C6C873F5ADB8D9CCBC7A96ADFF5BC84?text=&docid=43682&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=684884

- Benincasa case, on consumer contracts. The court in this case held that a consumer contract is deemed to be a consumer contract because it relates to a private consumption. In this case plaintiff was domiciled in Germany, and wanted to open a business in Germany. He signed a franchise agreement with an Italian company, but he never started trading. What is a franchise agreement? License to use a brand; McDonalds taghti liċenzja lill kumpanija lokali biex tuża l-brand name etc, Costa Cafe, Hilton. But he never started trading, he brought proceedings in Germany against the italian company and the question arose in court whether the German court had jurisdiction. The claimant argued that for the fact that he never started trading, he was deemed to be a consumer and the court said that he was not a consumer, and it established this principle. If the purpose of the contract is trade or professional activity then it cannot be a consumer contract. Even though no trade had yet taken place. But still the intention was that of a franchise to trade etc. therefore it was not a consumer issue in terms of the regulation.

  - Gruber case

  - An Austrian farmer who lived on a farm, used the farm as both his residence and his workplace as a farm.

  - He bought tiles for his roof from a German supplier, which tiles were defective and he brought proceedings in Austria.

  - The case was therefore concerned a contract for a mixed purpose.

  - Court held that Gruber was not a consumer, the rules on consumer contracts apply only if the link between the contract and the trade or profession is so slight as to be marginal.

  - http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49857&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=685155

  - Brought proceedings in Germany not Austria

- Gruber case, here we have an Austrian farmer, who lived on the same farm where he operated, and so the farm was both used as his residence and his workplace also. He bought tiles for his roof, from a German supplier and it turned out that the tiles were defective. He brought proceedings in Austria. In this case the court held that Gruber was not a consumer and that the rules on consumer contracts apply only if the link between the contract and the trade/profession is so slight as to be marginal. The issue is that the predominant factor here was the workplace not his residence so it was not deemed to be an issue of a consumer nature and therefore he couldn't benefit from the provisions of the regulation because the court deemed that the supply of tiles was not an issue of consumer affairs, he was living there secondarily his predominance was as a place of work not a place of residence.

  - Peter Pammer case

  - This case which took place prior to the Recast Regulation, related to a voyager contract.

  - It was decided that it is a consumer contract if the private purpose is more predominant, so if the private purpose is stronger when compared to the professional service one then you are a consumer.

  - However, the court said these provisions have to be given a restrictive interpretation.

  - Therefore, it will only be a consumer contract if the link between the contract or trade or profession is so slight as to be merely marginal, as stated in the Gruber case.

  - http://curia.europa.eu/juris/document/document.jsf?text=&docid=83437&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1252666

- Pammer case, this concerned the case of a voyager contract and in this case the court held that a contract is deemed to be a consumer contract if the private consumption purpose is more predominant. Therefore if the private purpose is stronger and more predominant vis a vis the provisional service then you are deemed to be a consumer. The court also said that one has to interpret this restrictively. Thus it will only be a consumer contract if the link between the contract or trade/profession is so slight as to be merely marginal as also held in Gruber case.

  - What Constitutes a Consumer Contract?

- Furthermore, the contract must fall within one of the categories in Art 17. The categories are:

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

- 2. 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

- 3. 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.

- What constitutes the elements that constitute a consumer contract? We are referring to article 17(1)(a),(b) and (c).

- To be a consumer contract, first it has to be a contract for the sale of goods on instalment credit terms.

- Secondly, it can also be a contract for a loan, xtrajt karozza bl-installments, repayable by instalments or for any other form of credit made to finance the sale of goods. Tista tkun loan, tista tkun bills of exchange, kambjali imma l-financial legal instrument qieghed hemm biex jiffinaliżża a sale of a good, karozza, għamara.

- In all other cases, the contract has been concluded, jekk xorta ma nistgħux narfuh it-tip ta' kuntratt huwiex consumer contract, ħa naqgħu fuq it-tielet legal base li hi iktar wiesa. The contact has been concluded with a person/trader who peruses commercial or professional activities in the Member State of the consumers domicile, jista jkun commercial, trader, kumpanija, etc, jew a professional, avukat, tabib, perit 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. Jista jkun established f'pajjiz wiehed tal-EU jew iktar.

  - The precise wording of Art 17(1)(c) was adapted through the Recast Regulation to include contracts in an e-commerce context.

  - In fact, the list is worded more generally in order to ensure better protection for consumers with regard to various means of communication.

  - In relation to websites, there was a question whether there should be a distinction between an active or passive website.

- In the Peter Pammer case which involved a consumer who bought a cruise and when he boarded the ship it was completely different from what was advertised, the contract was concluded online.

- The question was if Art 17 was applicable.

- Article 17(1)(c), this was adapted to include also e-commerce contracts (li jsiru fuq l-internet etc).

- The second bullet, the list is worded in general language in order to capture all instances of consumer relations with the ultimate aim being the protection of the consumer.

- An issue arose for instance with respect to websites, whether one should distinguish between an active or a passive website. Here we are referring to the Pammer case. In this case the consumer bought a cruise holiday, and when he boarded he realised that the cruise was completely different than what was advertised, from the advert on the website, in this case the contract was concluded online. The issue arose in court whether article 17 was applicable.

- Is that advert on the website a consumer contract in terms of article 17(1)(c)?

  - The Court held that the simple fact that a website is accessible do not mean it is subject to the jurisdiction of each Member State, however if it is promoting activities in a particular Member State/s, then jurisdiction is applicable in those Member States.

  - The court held the simple fact of a website is not sufficient, the ac test is if the trader minded to do business with consumers in other Member States.

- The simple fact that a website is accessible does not mean that it is subject to the jurisdiction of each Member State f'dan is-sens active jew passive. However if it is promoting activities (it is active) in a particular Member State/states then jurisdiction is applicable in those Member States. Dawk il-Member States li jiena stajt nixtri l-holiday it is considered to be an active website f'dil il-Member State minfejn xtrajt il-cruise holiday u għallura jurisdiction is applicable in the Member State where I have brought my holiday through my active website.

- Website li nista nieħu servizz min fuqha u website li nista nara biss. F'dak is-sens active jew passive.

- The second bullet, il-punt hu the concept of a website is not sufficient the actual test is if the trader had the intention to do business through that website of he's advertising etc, with consumers in other Member States. Jekk website nista nixtri

xi ħaġa min fuqha, jiena l'm being a consumer u jekk jinqala issue nista nfittex it-trader f'pajjiżi min fejn xtrajt min dik il-website. Il-point of sale huwa l-post min fejn ordnajt fuq dik il-website, jekk ordnajt spare part ta karozza min hawn, min malta nista nagħmel claim hawnhekk.

- Yusufi case
- A further question arose as to whether contracts must be concluded at a distance.
- In this case the Austrian plaintiff bought a car from a website.
- After coming across an offer on the Internet, she went to Germany to sign the contract of sale and to take delivery of the vehicle.
- However, on her return to Austria, she discovered that the vehicle was defective.
- http://curia.europa.eu/juris/document/document.jsf?text=&docid=126428&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1252768

- Yusufi case, a further question arose whether contracts must be concluded at a distance (long distance contracts). This concerned an Austrian plaintiff who bought a car from a website. She went to Germany to sign the contract and collect the car, she signed the contract and returned to Austria and she discovered that the car had defects.
  - Since Yusuf refused to repair the vehicle, the plaintiff brought proceedings in the Austrian courts for rescission of the sale contract.
  - The question was whether the consumer contract provisions were applicable since she had crossed the border.
  - The Court held it is not a requisite that the contract be concluded at a distance, this Austrian consumer was still covered because there was the direction of activities in the website.
  - http://curia.europa.eu/juris/document/document.jsf?text=&docid=126428&pageIndex=0&doclang=en&mode=Ist&dir=&occ=first&part=1&cid=1252768
- The claimant chose not to repair the car and instituted an action in the Austrian courts, where she was based/domiciled as a consumer for the recision/termination of the contract.

- Here another issue arose, is it a consumer contract when considering that to take the delivery of the car she had to cross the border? And the court held that it is not a requisite that the contract be concluded at a distance. In this case, this Austrian consumer was still covered because there was the direction of activities in the website. So she was deemed to be a consumer and she could file an action in the place where she was resident or domicile Austria against the German supplier of the car.

  - In the Emrek case, on distant contracts, the question was whether it is a requirement that the consumer was tempted to buy through the website or not?

  - This case was on a sale of a car between a French consumer and German supplier.

  - The consumer was referred to by one of his friends, not through a website ie he had not been triggered to conclude the contract through the website.

  - The court held that Art 17 does not expressly subject its application to the existence of a causal link, ie one needs no causal link to conclude the contract. If one can prove that the trader directed his activities in another Member State, then the court can have jurisdiction.

  - However it held that if there was this causal link, then obviously there was the direction of the activity.

  - http://curia.europa.eu/juris/document/document.jsf?text=&docid=143184&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1252836

- Emrek case, on distant contracts also namely whether it is a requirement that a consumer was tempted to buy in this case a car through a website. A French consumer who bought a car from a German supplier. He was triggered through his friends to buy this car and the court held that article 17 does not expressly subject its application to the existence of a causal link. Namely that there is no need of a causal link to conclude the consumer contract.

- The importance is the proof that the trader directed his commercial activities in another Member State. So would there be a causal link or not as long as one can prove that a trader is advertising his goods over the internet as in the case of distant contracts then the court can have jurisdiction.

- If a causal link is established then the better because it is a proof that there was the direction of the businessman/trader to another market, he’s offering his goods to the EU market and therefore the consumer is deemed to be covered under article 17 of the regulation.

- Art 17(2) states Where a consumer enters into a contract with a party who is no domiciled in a Member State but has a branch, agency or other establishment in one o the Member States, that party shall, in disputes arising out of the operations of this branch, agency or establishment, be deemed to be domiciled in that Member State.

- Even if the supplier is domiciled in a 3rd state but if has a branch in one of the MS, h will be deemed to be domiciled in the MS where he has a branch.

- Art 17(3) states 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.

- If one buys a flight on its own, it does not apply under Art 17, however if it is in a package deal then it can falf under Art 17. The Pammer case provides an interpretation to Art 17(3).

- 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 another establishment in another member state, that party shall disputes arising out of the operations of the branch agency etc, be deemed to be domiciled by the Member State din li rajna fil-bidu, jekk il-mother company qieghda l-Italja imma ghandha branch hawn then I can sue that branch in Malta because it is seen to be domiciled in the Member State where it is situated.

- This also applies the second bullet if the supplier/trader is domiciled in a third state, the US, but has a branch in one of the Member States. Again the principle is that he is domiciled in the Member State where he has the branch even though his company is formed in America.

- Article 17(3), this section so we have this carving out of a derogation for contracts of transport. This section shall not apply, the section of jurisdiction on consumer contracts shall not apply, it is mandatory to a contract of transport other than a contract which for an inclusive price provides for a combination of travel and accommodation.

- Jekk jien xtrajt over the internet, air ticket bl-accomodation tapplika r-regulation, provides for a combination of travel and accommodation, jekk xtrajt biss ta travel, ma tapplikax, shall not apply, it is mandatory to a contract of transport other than a contract which for an inclusive price provides for a combination of travel and accommodation. Presumably ma tapplikax ghax hemm direttivi jirregolaw l-air transport.

- If one buys a flight on its own it doesn’t apply under article 17 however if it is in a package deal it can fall under article 17.
    - Art 18 confirms that whilst the consumer can sue in his Member State of domicile, on the other hand where the consumer is the defendant he has to be sued in his own Member State.
    - The provisions also apply to defendants which are domiciled in 3rd states. If the supplier therefore is not domiciled in a Member State and is a 3rd state, he may still fall under the provisions of the regulation.
- Article 18, states that a consumer can file proceedings against the trader, supplier, in the Member State of domicile of the consumer, however where the consumer is the defendant in cases where a claim has been filed against the consumer by the trader, the consumer can only be sued in his own Member State where he is domiciled. These provisions apply also to defendants who are domiciled in third states.
    - Employment Contracts
    - Art 20 - 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.
    - If the employer is a 3rd country domicile, but he has a branch in the MS, which dispute arising out of the operations of the branch then that MS has jurisdiction. An employer can be sued not only in the courts of the employer's domicile but he can be sued in other courts.
- Employment contracts, the third category of the regulations whereby employees are considered to be the weaker party. We have seen the insured, the policy holders, the consumers, the third pillar is employment contracts. Articles 20 to 23.
    - <u>Article 20.</u>
    - **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.
    - 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.

- Article 21.
- **21**. 1. An employer domiciled in a Member State may be sued:
- (a) in the courts of the Member State in which he is domiciled; or
- (b) in another Member State:
- (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
- (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.
- 2. An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1.
- Article 22.
- **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.
- Article 23.
- **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.

- In the case of an employer, who is domiciled in a third country (so not in a Member State) but he has a branch in a Member State of the EU, and the dispute arises out of the operations of the branch which is established in a Member State then the Member State of the branch has jurisdiction even though the employer is domiciled in a third country outside the EU third country, in that sense. An employer can be sued not only in the courts of the employers domicile, to continue

with this case if he is domiciled in a third country and I am an employee I can sue him there, but he can also be sued in other courts depending where he has branches. Jekk jiena impjegat ta' kumpanija mil-US li ghandha branch Malta nista nfittixha kemm fil-US u kemm f'Malta fejn ghandha l-branch jekk ghandha branch ukoll Slovakia nista nfittixha jekk jiena qieghed based hemm bħala employee fl-islovakja. Mela fejn qiegħda ibbażata l-kumpanija, u fejn għandha l-branch ghandi option fejn nista nfittixha.

- Art 21 states 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.

- Article 21, an employer may be sued in the courts of the Member States in which he is domiciled, mela hawnhekk qed nitkellmu issa meta l-employer qieghed fil-member state, mhuwiex f'third country, jew f'qorti f'Member State fejn qieghed domiciled, mela jekk jiena qieghed impjegat ma employer Taljan nista nfitxu fl-italja or in another Member State depending where fejn qieghed nahdem mieghu jien jekk il-branch qieghda f'Malta nista nfittxu Malta ukoll.
- In another member state, ghandna żewġ options in the courts where or from where the employee habitually carries out his work or in the court of the last place where he did so
- Jekk jiena mpjegat ta taljan, nista nfittxu fejn qiegħed domiciled, l-Italja, nista nfittxu ukoll go Member State iehor, fejn ghandi għażla jew fejn jiena qed naħdem ma dat-taljan nista nfitxu malta mela, inkella kif qed tara fil-(i) in the courts for the last place where he did so. Jew inkella fejn għamiltlu l-aħħar xogħol, per eżempju l-aħħar xogħol, kont il-Greċja u għamiltlu x-xogħol hemm lill-employer Taljan tiegħi. Nista nfittxu mela fil-qorti tal-Grecja, or if the employee does not or if the employee does not or did not habitually carry out his work in any one country, mela qed niċċaqlaq jien, I am an independent employee, jekk qed jimpjegani taljan pero qed intih servizz bħala engineer, qed jibgħatni l-Greċja, power station, daqqa jibghatni l-islovenia, mela impjegat ta taljan jien pero qed niccaqlaq min pajjiz ghall-iehor fejn qed jibghatni biex naghti s-servizz, in the courts for the place

where the business which engaged the employee is or was situated. Mela fil-post f'kull post fejn jiena tajtu s-servizz nista nfitcu.

- Employment Contracts
- There must be a contract and an employee. An employee is defined through the COJ, where the relevant factors are:
- 1. The creation of a lasting bond which brings the employee to the employer in the business and
- 2. Relationship of subordination of the employee to the employer

- For there to be jurisdiction under article 20 there should be a valid employment contract between an employer and an employee. An employee has been defined through court of justice jurisprudence as a person who satisfied two criteria first the creation of a lasting bond which brings the employee to the employer in the business and, the relationship of subordination because the employee is subordinated to the employer. He follows his instructions hemm an element of subordination.
  - Employment Contracts
  - In the Bosworth case 603/17, the court held that a person who was appointed as a director of a company is not an employee
  - There is a question in the case of self-employment, since in a contract of employment one is not really free, it is likely that the employment contract provisions will apply nonetheless.
  - http://curia.europa.eu/juris/document/document.jsf?text=&docid=212908&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1252898
- Bosworth case in this case a person who was appointed as a director of a company (per eżempju non executive director) he is not deemed to be an employee, fil-fatt jekk naraw anke l-ligi tat-taxxa min ikun direttur ta' kumpanija non executive ma jkunx meqjus għat-taxxa bhala employee, hemm credit apposta ghal persuni li huma diretturi ta kumpanija but they are not deemed to be as such as employees.
- There is also a question in the case of a self employed person since in a contract of employment one is not really free because there is a relationship ma tistax taqbad tiehu leave meta trid per ezempju because there is, you are a subordinate

of the employer which is likely that the employment contract provisions will apply none the less.

- Rutten case
- The plaintiff spent 2/3 of his time working in the Netherlands and the other 1/3 in England.
- He brought proceedings in the Netherlands and the court held even though he spent only 2/3rd of his time in the Netherlands, it was where he habitually carried out his work.
- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=100700&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1252940

- Rutten case, the plaintiff spent ⅔ of his time working in the Netherlands and ⅓ of his working time in England. Kien maqsum bejn żewg pajjiżi. ⅔ roughly in the Netherlands and ⅓ in England. He brought proceedings in the Netherlands, and the court interpreted this saying that even though he spent ⅔ of his working time in the Netherlands not the whole 40 hours a week he could bring the case in the Netherlands because it was the place where the employee habitually carried out his work for the employer.
  - Step 6: Exclusive Jurisdiction
  - Art 24 provides for cases of exclusive jurisdiction in certain cases, whereby regardless of where the defendant is domiciled, the only jurisdiction applicable is that listed under Art 24.
  - It is a mandatory rule ie the general rule does not apply and it is not possible for the parties to contract out of it.
  - A breach of Art 24 will mean that a judgement delivered by a court who doesn't have jurisdiction will not be recognised or enforced in another Member State.

- Let’s go back to exclusive jurisdiction that we did in the last lecture.
  - Exclusive jurisdiction ghedna hemm hames instances under article 24, ma nhaltux Excessive jurisdiction ma special jurisdiction. Special jurisdiction ghedna huma dawk il-kazijiet fejn jista jkolli general jurisdiction u jista jkolli special, u nagħżel il-jurisdiction jiena. Exclusive jurisdiction hija mandatorja, dik id-differenza bejn special u exclusive primarja, fl-exclusive m’ghandix ghazla it is mandatory in terms of the law in these five instances.

- Mela we can say, regardless of where the defendant is domiciled, mhux se jidhol id-domiċilju taht l-exclusive hija mandatorja qed tghidli l-ligi fejn irrid infittex bilfors. The only jurisdiction applicable li tghidli l-ligi under article 24.

- Mandatory mela, u m'ghandhomx ghazla l-partijiet la l-plaintiff u lanqas id-defendant ghax hija exclusive, il-ligi qed tippreskribili liema qorti ghandha juridciton.

- Ergo if there is a breach, jekk qorti breaches article 25, mela m'ghandiex jurisdiction qorti beda jinstema kaz, il-judge qabzitlu qed jisma kaz li mhux suppost jisma ghax hemm exclusive jurisdiction. A judgement delivered by a court who doesn't have jurisdiction will not be recognised or enforced in another member state.

  - An example would be, ejja nghidu qieghdin f'qorti fil-first hall hux hekk u hemm kaz ghaddej ta marriage certificate, per ezempju hux tajjeb jew le xi kaz ta xi bigamija u beda l-kaz. Public register x'inhu? X'jurisdiction hemm fuqu? Exclusive. Il-qorti ma ndunatx, jew l-imhallef ma ndunax jew il-partijiet ma qajmuhiex, u l-public register li qed nitkellmu fuqu l-plaintiff u d-defendant, u iz-zwieg li qed nitkellmu fuqu c-certifikat ma sarx hawn sar l-italja per ezempju, pero corta baqghet ghaddejja u inghata judgement, il-plaintiff gie biex jaghmel enforcement ta din il-judgement go member state iehor, hawn qed nghidu, li jekk dik il-qorti maltija minkejja li hemm exclusive jurisdiction fuq public register xorta taghat sentenza, dik is-sentenza ma tiswiex imbghad in terms ta enforcement go pajjiz iehor tista topponiha, wiehed mid-defences li tista tqajjem hija li dik kien hemm exclusive jurisdiction mela mhix enforsabbli, ghamlet zball il-qorti li baqghet tisma l-kawza.

  - Art 24 applies in:

  - 1. rights in rem: in 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.

  - The court has stated that a link with immovable property is not enough for this provision to apply.

  - Right in rem refers to actions which seek to determine the extent, content, ownership or possession of immovable property

- Ha nergghu nduru ftit il-heads ta' exclusive jurisdiction rights in rem driittijiet fuq il-propjeta li tapplika l-lex situs the place where the property is situated, min ghandu exclusive jurisdiction fejn hemm il-propjeta? Il-qorti tal-pajjiz fejn qieghda situated il-propjeta, l-immoveable property.

- Right in rem, right over a real right, refers to actions which seek to determine the extent, content, ownership or possession of immovable property, mhux biss jigifieri ownership jista jkun kawza fuq lease agreement, ha namilha il-qorti fejn hemm il-propjeta, mela l-propjeta qieghda malta, ha namilha biex nizgombra lil xi hadd fejn ha namilha? Fir-rent regulation board.
- Jekk m'hemmx kuntratt ta lease fir-rent regulation board namilha ukoll? Le. Namilha fic-civil court first hall, inkella ir-rent regulation board tarmiha ghax m'hemmx kuntratt.
  - Gaillard case
  - Court held that for Art 24 to apply, it is not sufficient that the action has a link with immovable property.
  - It must be based on a right in rem not a right in personam.
  - The difference is that a right in rem has an erga ones effect while the latter can only be claimed against the debtor.
  - However, in the case of a tenancy, even though it may give rise to personal obligations, proceedings are to be brought where the immovable property was situated.
  - In this case, court held that the action based on the actio pauliana did not fall under Art 24.
  - http://curia.europa.eu/juris/showPdf.jsf?text=&docid=46298&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1252986
- Gaillard case, for article 24, mela exclusive jurisdiction to apply, it is not sufficient that the action has a link with immovable property. Mela mhux just a link, there has to be a right over the immoveable property not a personal right. Pero ovjament fejn hemm kirja, tenancy even though it is strictly speaking a personal rights proceedings have to take place where the immoveable property is being leased.
- In this case the court held that an action based on the actio pauliana did not fall under article 24.
- What is an actio pauliana? Meta naghmel an act to defraud the creditor. Mela ghandi nhallas, €100,000 in VAT, ghandi dar, tajtha by donation lit-tfal to defraud the VAT commissioner, il-VAT commissioner jista jaghmilli kaz ta' Actio Pauliana ghax I defrauded him as a creditor.
  - Webb v Webb

- There was a dispute between a father and son, the son bought property but he was appearing on behalf of the father and an action was brought by the father against the son to declare that the son was holding the land on trust, and an order for conveyance to transfer the land back to him.
- The court held that the action was not based on a right in rem of an immovable property.
- The Court held that it is not sufficient that there is a link with immovable property but the action must be based on a right in rem itself and not a right in personam.
- https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61992CJ0294&from=EN

- Webb case, a dispute between a father and a son. The son bought property, but he was appearing on behalf of the father and an action was brought by the father against the son to declare that the son was holding the land on trust and an order for conveyance to transfer the land back to him.
- The court held that the action was not based on a right rem over an immovable property stating that it is not sufficient that there is a link with immovable property but the action must be based on a right in rem itself and not a right in personam. Dawn kienu l-missier qed jidher ghall-iben ghalkemm it-transaction kienet over an immoveable there was still no real right over the immoveable, kienet tranzazzjoni ta bejniethom
  - Rösler v. Rottwinkel Case
  - If the dispute relates to a tenancy/lease agreement, it is caught by Art 24.
  - It held that all disputes concerning the obligations of the landlord/tenant, including repairing damage, charges etc fall under Art 24.
  - However, disputes which are only indirectly related to the use of the property let, such as those concerning loss of enjoyment and travel expenses, do not fall within Art 24.
  - http://curia.europa.eu/juris/showPdf.jsf?text=&docid=92914&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1253056
- Rosler case, which confirmed that disputes concerning leased agreement over an immoveable property are captured by article 24. Mela exclusive jurisdiction. This includes all actions, disputes concerning damage over the immoveable property etc.

- Imma b'differenza kif jidher fl-ahhar bullet, disputes which are only indirectly related to the use of the property let, such as those concerning loss of enjoyment and travel expenses, do not fall within Art 24. Mela jekk kriehieli xi hadd u sibt lil xi hadd iehor f'dik id-dar hemmhekk ma taqax taht article 24, mela m'hemmx exclusive jurisdiction u nista nfittxu taht postijiet ohra.
- Kriehieli xi hadd u sibt in-nies fid-dar m'ghandix l-enjoyment liberu il-partitiku possess tal-propjeta, hemmhekk mhemmx mandatory jurisdiction tal-exclusive jurisdiction according to this case.
  - Hacker case
  - The court held that if the contract is not of lease but is a package holiday, the rule does not apply as it is not a tenancy agreement.
  - http://curia.europa.eu/juris/showPdf.jsf?text=&docid=97473&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1253107
- Hacker case, if the contract is not of lease but is a package holiday, the rule does not apply as it is not a tenancy agreement. Mela jekk jiena parti mil-package kien gimgha flat, appartament it is not deemed to be a lease agreement mela ma jaqax taht exclusive jurisdiction. It's not a proper lease agreement imma a package holiday deal, it's not strictly a lease agreement,
- Jekk jiena mort holiday, krewli flat f'Ruma u kien mahmug ma nistax naqa taht exclusive jurisdiction ta' article 24 ghax huwa deal ta package holiday mhuwiex a proper lease agreement.
  - Dansommer A/S v Gotz Case
  - The court held that the cost of damages for taking poor care of premises falls within the article Art 24.
  - http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30db904e8aca631543a0a6cab3f97d1ccfd4.e34KaxiLc3qMb40Rch0SaxuLc390?text=&docid=101650&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=980976
- Dansommer case, pero stabbiliixxa li damages for taking poor care of premises falls within the article Article 24. Li tfisser li nista nfittex lis-sid fil-post li krieli l-propjeta.
  - 1. Companies: in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or

association 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 the Hassett case, Court held that this provision must be interpreted as covering only disputes where the person is challenging the decision of the organ of the company within the functioning of its organs as laid down in its articles of association.

- http://curia.europa.eu/juris/document/document.jsf?text=&docid=68909&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1253149

- Companies the second head of exclusive jurisdiction. Dawn semmejnihom diga. Ghedna, issues relating to the validity of the constitution of a company, mela l-memorandum and articles of association tal-kumpanija, the nullity or the dissolution of a company, u forom ohra ta' associations ta legal persons, koperattivi etc, trusts, foundations.

- Biex niddeterminaw is-sit ta kumpanija. Where a company is seated, look at the Hassett case where the person is challenging the decision of the organ of the company within the functioning of its organs as laid down in the articles of association of a company. Ghandek il-memorandum li huma shareholders, x'inhuma l-aims tal-kumpanija, min huma d-diretturi, min ghandu l-legal representation il-judicial, imbghad ghandek il-legal articles mal-memorandum. Kif jinbidlu diretturi x'jigri jekk jinbiehaw is-shares, dawk huma l-articles of association

  - 1. Public Registers: 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;

  - 2. Patents: in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, ..., the courts of the Member State in which the deposit or registration has been applied for, has taken place shall have jurisdiction.

  - 3. Foreign Judgements: 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.

- Public registers, rajnihom diga. Mela jekk ghandi issue fuq ghandi zball fir-registru tat-twelid, irrid infittex fejn hemm ir-registru tat-twelid deposited, patents l-istess, trademarks designs etc. Il-ħames kategorija hija l-foreign judgements 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.

- Therefore, under these 5 headings, Art 24 is supreme over any other law or agreement, the only jurisdiction applicable would be that under Art 24.

- Furthermore, if a case is brought in a court which does not have exclusive jurisdiction, Art 27 states 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.

- The court in its own motion, without any action from the defendant, could declare that it has no jurisdiction.

- In all other cases, it is the defendant who must object to jurisdiction.

• U allura qed nghidu article 24 fuq exclusive jurisdiction is supreme, mandatory over any other law or agreement ghaliex huwa an exclusive jurisdiction.

• Din importanți, if a case is brought in a court which does not have exclusive jurisdiction irridu naraw 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. L-ezempju li gibna, qorti maltija per ezempju, a domestic court baqghet tisma issue ta' exclusive jurisdiction fejn suppost waqfet, u rreferiet il-kaz fejn hemm il-forum ta exclusive jurisdiction.

• It shall declare of its own motion that it has no jurisdiction, mela anke jekk bdiet il-kawza, u l-partijiet jew l-imhallef indunaw fil-bidu li mhemmx jurisdiction l-imhallef obligat jieqaf min dik is-smiegh tal kawza u jghid il-qorti m'ghandiex jurisdiction morru fitxxu fejn hemm l-exclusive jurisdiction tal-kaz, fir-fir-registru pubbliku, tal-istatut tal-kumpanija tal-immoveable property, mela f'dal kaz il-qorti stess l-imhallef stess jista sua sponde jwaqqafha din il-kawza, jghid jiena m'ghandix jurisdiction ghaliex hemm exclusive jurisdiction x'imkien iehor.

• F'kazijiet ohra fejn ma jamiliex l-imhallef, jista jqajjem l-issue id-defendant jghid din il-qorti m'ghandiex exclusive jurisdiction f'din il-kawza, sta ghad-defendant li jqajjem l-issue tal-jurisdiction biex jipprova jwaqqafha l-kawza fl-interess tieghu ghax qed issir kontrih.

- Il-Gimgha d-diehla nibdew il-legal base taht id-domestic law taghna li huwa l-Code of Organisation and Civil Procedure, mela meta ma japplikax ir-regolament, meta tapplika il-ligi domestika tal-PIL? Wara din il-lecture imbghad naghlqu l-Brussels

Recast Bir-recognition and enforcement of foreign judgements imbghad nghaddu ghar-Rome I u ghar-Rome II.

14th March 2023

Lecture 5.

- COCP jurisdiction

- In our last lecture we reviewed the three instances in the Brussels recast, where there is not a special jurisdiction nor an exclusive jurisdiction but there are three special instances, consumer contracts, insurances, where there are special rules to protect the weaker party.

- Today we will look into the provisions on private international law as they emanate from our code of organisation and civil procedure, and in our next lecture we will look into the recognition and enforcement of foreign judgements in terms of the regulation.

  - Malta has been heavily influenced by EU law, so much so that under Art 742(6) COCP

  - "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 provision 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."

- As we know Malta has been influenced by EU law with respect to PIL to the extent that we find a provision in our COCP, Article 742(6), which states as follows

- 'Where provision is made under any other law, or, in any regulation of the Union, (one of them is the Brussels recast, the Rome I, Rome II and other legislation in the field of PIL), making provision different from that contained in this article, the provisions of this article shall not apply, mela EU law with respect to Private International Law prevails over domestic law. Have a look at article 742(6) of the COCP.

- We can say that that EU law is supreme, has primacy over Maltese law in cases where the Brussels Recast Regulation applies.

  - Thus EU law is supreme over Maltese law in cases where the Brussels Regulation applies. The rules of the COCP apply in 2 cases:

  - 1. In all matter which do not fall within the scope of one of the European instruments

- 2. In matters which fall within the scope of the regulation but where the regulations themselves state that it is the traditional rules of Maltese law which must apply. Eg Art 6.

- We can sum up, that the rules contained in the COCP, apply in two cases.
- First in all issues/matters/disputes which don't fall under EU PIL laws, not just the Brussels Recast, any EU law. By exclusion jekk ma tapplikax EU Law fuq PIL ha mmorru fuq ir-regoli ta COCP taghna.
- And secondly instance in matters which fall within the scope of the regulation, jista jkun li t-tieni instance hija, id-dispute ikun jaqa' within the scope of the regulation, qed nagħtu l-eżempju tal-Brussels Recast but the Brussels Recast itself in this case because we are taking the example the Bruussels recast it could be any other EU law in PIL, but where any other regulation itself states that it is the traditional rules of Maltese law which must apply, meta r-regolament stess titfana' lura fuq domestic law so these are the two instances where the COCP rules apply.
    - Under the COCP there are two relevant principles related to procedure (Art 741):
    - 1. Plea of jurisdiction: plea made to the Maltese court stating that it does not have jurisdiction and thus it is a plea that it is the foreign court which has jurisdiction.
    - 2. Plea of competence: plea where the Maltese court does have jurisdiction but the action is brought before the wrong court in Malta.
- Jekk taraw artiklu 741 ta' COCP, it establishes two principles of PIL law. Article 741 qiegħed taħt il-pleas of jurisdiction, dawk li nghidulhom preliminary pleas li jitqajmu fil-bidu tal-kawza, l-ewwel waħda hija l-plea of jurisdiction, min għedna jista jqajjem l-issue ta' jurisdiction meta l-qorti m'għandiex jurisdiction? Id-defendant, ircieva l-kawza qajjem plea ta' jurisdiction li l-qorti m'għandiex jurizdizzjoni imma hija l-qorti l-oħra li għandha jurizdizzjoni, a foreign court or a foreign arbitration and secondly the plea of competence which is different from jurisdiction. Mela l-qorti għandha jurisdiction imma m'għandiex kompetenza, mela il-kawza saret quddiem qorti hazina riedet issir ezempjuu quddiem l-industrial tribunal u saret ezempju quddiem il-qorti tal-magistrati, il-qorti tal-magistrati m'ghandiex kompetenza f'dak il-kaz, jurisdiction u competence huma zewg pleas li jistghu jitqajmu mid-defendant
    - Pleading jurisdiction

- The plea of jurisdiction is simply a plea raised to contest the jurisdiction of the Maltese court over a particular matter, and/or that a foreign court has jurisdiction instead.
- The plea of competence on the other hand is a plea that the matter was brought before the wrong court.

- This is mainly a repetition of what we said.
  - Art 741 COCP
  - 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;
  - (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,
  - (c) When the privilege of being sued in a particular court is granted to the defendant
- Article 741, 'it shall be lawful to plead too the jurisdiction of the court' and you have three instances, id-defendant jista jqajjem l-issue ta jurisdiction, irid jgħid ghaliex, u jimmotiva, secondly, it's brought in front of a court which is not competent, mhux il-qorti kompitenti, ghandha jurisdiction imma mhux kompitenti, and c) he is a Gozitan he should file a case against him in the Gozo courts.
  - Art 741 COCP
  - Article 741 COCP provides that 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. This is the plea of jurisdiction.
- Hawnhekk qed nerga nispjega l-(a) xinhi, il-jurisdiction.
  - Art 741 COCP
  - 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. This is the plea of competence. Eg The industrial Tribunal and not the Court of Magistrates.

- c) When the privilege of being sued in a particular court is granted the defendant.
- This refers to Gozitan individuals who have the privilege of being sued in Gozitan courts.

- B qed tirreferi l-ligi ghal-plea of competence, and (c) refers for instance to Gozitan individuals who have the privilege of being sued in the Gozitan courts.
- Art 742 (6) COCP
- Where provision is made under any other law, or in any regulation of the EU 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.

- Araw ftit article 742(6) ukoll tac-COCP. Where the provision is made under any other law, or in any regulation of the EU making provision different form that contained in this article, the provisions of this article shall not apply with regard to the matters covered by such other provision. Mela jekk hemm EU law on PIL it prevails over domestic law on PIL over the COCP in this case.
- Prevalence of EU Law over Domestic Law
- EU law thus is supreme (primacy) and takes precedence over any other Maltese law.
- It is only in matters which do not fall within the scope of an EU instrument – such as the Brussels Recast Regulation 1215/2012 dealing with jurisdiction – that article 742 COCP applies.

- It-tieni bullet semmejniha diga jekk tapplika l-brussels recast ghandha tipprevali l-brussels recast jekk le taqa' fuq ic-COCP, article 742. Namely persons who are subject to the jurisdiction of the courts of Malta.
- In fact Article 6 of the Brussels Recast Regulation 1215/2012 says that 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) , Articles 24 exclusive jurisdiction and 25 [prorogation of jurisdiction], be determined by the law of that Member State'.

- Issa, in this connection we have to look at article 6 of the recast, which states that if the defendant is not domiciled in a Member State, the jurisdiction of the courts

of each Member state shall, (dejjem fuq il-courts tal-member state) Article 18(1) , Article 21(2) , Articles 24 exclusive jurisdiction and 25 fuq propagation of jurisdiction, meta jifthemu l-partijiet of jurisdiction f'agreement), be determined by the law of that Member State'

- Mela anke ir-recast article 6 jgħidilna meta ma tapplikax ir-recast allura trid thares lejn l-individual domestic law of each member state.
  - In situations where the matter is not a civil and commercial matter, and
  - In situations where the defendant is not domiciled in a MS (subject to Article 18(1), Article 21(2), Article 24 [exclusive jurisdiction] and 25 [prorogation of jurisdiction]), article 742 applies.
- U allura nistghu nghidu li f'issues li mhumiex civil jew commercial ghax tidhol ir-recast, civil jew commercial hija l-underlying jurisdiction tar-recast, u fis-siitwazzjonijiet fejn id-defendant mhumiex domiciled in a Member State, hemmhekk se tapplika ic-COCP fil-kaz taghna.
  - Plea of Jurisdiction
  - The plea of jurisdiction must be raised by the defendant in limine litis (at the commencement of the proceedings; at the first opportunity), otherwise he is deemed to have renounced to the plea.
- Ovjament f'prorogation of jurisdiction jekk 'A' u 'B' ftiehemu li l-qorti hekk jinqala' dispute ghandha tkun qorti maltija ghandu japplika dak il-ftehim li ghamlu fil-kuntratt. Allura awtomatikament il-qorti maltija se tapplika mhux ir-recast. Għax hemm ftehim f'kuntratt fuq il-head of jurisdiction li hija l-qorti maltija per ezempju jew il-qorti taljana.
- Ahna għedna li l-pleas mhux il pleas of jurisdiction biss anke of competence, iridu jitqajmu fil-bidu mid-defendant, ircieva l-kawza kontrih u mhux bilkers taghmel preliminary plea jiddependii hemmx tista twiegeb ghal mertu, imma jekk hemm pleas fuq jurisdiction, competence legittimu tradittur per ezempju ghamluli kawza lili u mhux jiien ghandi nwiiegeb ghaliha iimma hija, allura dik se nqajjimha fil-preliminary plea, li mhux jien imma hija ghandu x'jaqsam. Dawn huma preliminary pleas li jigu trattati fil-bisu tal-kawza pero hawnhekk nillimtaw ruhna ghal jurisdiction.
- Preliminary pleas include pleas of jurisdiction trid tkun in limite litis (fil-bidu), kif se jkun hemm il-first hearing quddiem l-imhallef id-deffendant jghid isma ghandi eccesjoni preliminari li din il-qorti m'ghandiex jurisdiction, trid tkun in limite litis, fil-bidu qabel ma jigi trattat il-mertu u s-sustanza.

- Jekk din l-issue ma tqumx fil-bidu jew ma ssemmihiex fin-nota tal-eccezjonijieit tieghek ishek irrinuncjajtha lejhom u qed taccetta li l-qorti ghandha jurisdiction.
- Preliminary plea ohra hija, ghedna jurisdiction, competence, lis ali dipendence, (hemm xi kawza miftuha fuq l-istess punt quddiem qorti ohra). Il-prescription ukoll tqum bhala preliminary plea, qed jitolbuni dejn ghaddew hames snin, qajjimt preliminary plea li d-dejn huwa preskritt bil-five years.
    - Plea of Jurisdiction
    - This was confirmed in George Said nomine v Joseph Ellul Sullivan nominee (2003), were the Court held that the clause which prorogates jurisdiction may be renounced by the person in whose favour it is stipulated, and if that person does not raise the plea of jurisdiction in question in limine litis, he is to be deemed to have renounced, in which case there will be ordinary jurisdiction.
- Il-kas George Said nomine vs Joseph Ellul Sullivan, in this case the court held that the clause which proregates jurisdiction may be renounced by the person in whose favour it is stipulated, jista jirrinuncja għaliha, ovjament favur min tkun and if that person does not raise the plea of jurisdiction at the beginning, in limine litis, he is to be deemed to have renounced to the preliminary plea. Dan il-kaz juri li jurisdiction trid titqajjem fil-bidu tal-kawza.
    - Plea of Jurisdiction
    - Similarly, in Raymond Calleja v Raymond Pace (1996), the court held that if the defendant does not raise this plea in limine litis, it is deemed that he has submitted himself to the jurisdiction of the court if he chooses to contest the claims and make other pleas on the merits.
- Ray Calleja vs Ray Pace, again we have a reiteration here by the court which said that if the plea of jurisdiction is not raised in limite litis, the defendant would be deemed to have accepted the jurisdiction of that court. Obviously in this case it went a step forward and the courts saiid that the fact that the defendant started his pleadings on the merit automatically he renounced the plea of jurisdiction ghax kien insists li tigi deciza l-issue tae-jurisdiction l-ewwel il-qorti qabel tidhol fil-mertu imma l-fatt li accetta li jibda jiddiskuti l-mertu dik il-qorti partikolari tfisser li rrinunzja ghal jurisdiction u ghalhekk accetta l-qorti li gie mharrek quddiema.
    - There is a similar rule under Article 26 of the Brussels Recast Regulation 1215/2012 which deals with voluntary submission before a court.

- As per article 774(a), the plea of jurisdiction may also be raised by the court ex officio, but only if the defendant has not filed a statement of defence or is an absent defendant represented by curators.

- A similar rule is found under article 26 of the Recast, which deals with voluntary submission before a court. Jigifieri, jiena nista bhala defendant qalli l-avukat li m'ghandiex jurisdiction dik il-qorti imma jien xorta qed naccetta li nkomplu quddiem dik il-qorti, voluntary submission

  - Art 774 COCP

  - There is a similar rule under Article 26 of the Brussels Recast Regulation 1215/2012 which deals with voluntary submission before a court.

  - As per article 774(a), the plea of jurisdiction may also be raised by the court ex officio, but only if the defendant has not filed a statement of defence or is an absent defendant represented by curators.

- Take a note of article 774, fejn il-qorti tista tqajjem l-issue hi stess, l-imhallef jista jqajjem l-issue hu stess li hemm issue ta jurisdiction u jsaqsi l-partijiet kif se jimxu, normalment itihom cans il-partijiet jitrattaw kemm l-attur u d-defendant jitrettaw (jaghmlu oral submissions) fuq il-jurisdiction, imbghad jaghti sentenza parzjali, jghid hemm jurisdiction jew m'hemmx, ha titkompla jew le.

- Il-qorti hija kwalifikata taht 774(a), tista tqajjem il-plea of jurisdiction ex-officio, imma jekk id-defendant has not filed a statement of defence. Għaddew it-twenty days u m'ghamilx risposta, jew inkella id-defendant huwa absent from Malta, u hawn reprezentant il-kuratur.

- Jekk il-qorti, saret kawza, ma saritx risposta għal raguni jew oħra, u għaddew it-twenty days jew inkella id-defendant ma nstabx u qed jirraprezentah kuratur mahtur mil-qorti, hemmekk il-qorti tista (mhux bilfors) l-imhallef jista jghid li hemm issue ta jurisdiction.

  - <u>Article 774.</u>

  - **774**. In the absence of any plea to the jurisdiction, the court shall, of its own motion, declare that it has no jurisdiction -

  - (a) 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; or

- (b) where by reason of the subject matter of the claim or of the value of the thing in issue, the action is not within the jurisdiction of the court; or
- (c) where in actions touching the recovery of deposits, the monies or other things are deposited under the authority of another court:
- Provided that in the cases referred to in paragraph (b) pleas to the jurisdiction may not be pleaded nor raised ex officio in an appellate court.

- Article 929 huwa fuq l-appointment tal-kuraturi li hemm procedura shiha ta kif issir l-appointment ta kuratur.
  - Grounds to contest jurisdiction.
  - Article 742 contains a number of grounds whereby a person can contest jurisdiction of the Maltese courts.
  - The amendments of 1995 broadened the scope of the provision.
  - Article 742(1) provides that 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:
- Article 742, contains a number of grounds whereby a person can contest jurisdiction of the Maltese courts. These grounds were broadened in their scope by the amendments of 1995, and they were further amended in 2004.
- Article 742(1) states that as otherwise provided by law, jekk tapplika EU law, the civil courts of Malta shall have jurisdiction to try and determine all actions, concerning the persons u se ttina lista ta sebgha cirkustanzi fejn il-qorti ghandha jurisdiction sakemm il-qorti maltija ma tapplikax EU PIL law.
  - a)Citizens of Malta, provided they have not fixed their domicile elsewhere
  - A citizen of Malta, wherever he may be, even if working or residing abroad, may be sued before the Maltese courts, in any matter whatsoever, as long as their domicile is not fixed somewhere else.
  - One must refer to the Maltese Citizenship Act which defines a Maltese Citizen.
- Ha naraw l-ewwel cirkustanza, 742(1)(a), il-qorti ta’ Malta ghandha gurizdizzjoni fuq The citizens of Malta, provided they have not fixed their domicile elsewhere.

- Mela, a citizen of Malta, wherever he may be residing not just in the EU, even in a third country. May be sued before the maltese courts in any matter whatsoever, m'hemmx limitu ghat-tip ta action li hemm kuntrih, suggett tal-azzjoni as long as one's domiciled is in Malta, as long as his domicile is not fixed in another country.
  - Citizens of Malta are thus juris tantum presumed to be domiciled in Malta – it is up to them to rebut the presumption by proving that they have been domiciled somewhere else (i.e. that they have a domicile of choice).
- Citizenship, narawha mic-citizenship act, xi tfisser a Maltese citizen allura we have a juris tantum presumption that citizens of Malta are domiciled in Malta. Allura se taqa' fuq il-persuna to rebut li hu mhux a citizen of malta jew li m'ghandux domicile f'Malta u li biddel id-domicile u mar x'imkien iehor id-dimicile tieghu. It is up to the defendant who has to prove that he is not domiciled in malta but he is domiciled elsewhere. His domicile of birth is in malta imma jekk biddilha, ghandu domicile of choice irid igib prova li m'ghadux malta d-domicile, ghax inkella il-ligi awtomatikament se tghid la inti malti allura id-domicile tieghek huwa malti, juris tantum presumption.
  - Raymond Calleja v Raymond Pace (1996)
  - Court confirmed that the Maltese citizen is presumed to be domiciled in Malta; in order to free himself from the jurisdiction of Maltese courts, he must prove that he has acquired a domicile of choice.
  - The burden of proof is thus on the citizen of Malta to prove that his domicile is elsewhere.
- Nergaw naraw il-kaz Ray Calleja vs Ray Pace. Li spjega dan, a Maltese citizen is presumed to be domiciled in Malta, and to free himself from the jurisdiction of Maltese courts, he has prove that he has a domicile of choice, Italy, so he has the onus of proof, ovjament fil-kawza, fil-qorti, tghid jien tlaqt nghix l-italja, ghandi d-dar hemm, il-familja hemm
  - Raymond Calleja v Raymond Pace (1996)
  - The court found that the defendant had failed to prove the acquisition of a domicile different from that of the plaintiff.
  - The court also said that it was very difficult to abandon a domicile of choice – he who alleges a change in the domicile of choice (the acquired domicile) must present all proof which conclusively establishes the acquisition of the domicile.

- In this case, the court, Calleja case, the court found that the defendant had failed to prove the acquisition of a different domicile. U reggħet, it reiterated that the burden of proof is upon the defendant to prove that he has changed the domicile. Il-ligi ingliza taghme tlett tipi ta' domicile, domicile of birth, domicile of choice and legal domicile (ta' xi hadd li ghandu kuratur)

  - Although article 742 of the COCP is based on Italian law, our courts have interpreted the term domicile in accordance with English Common law, as a result of British influence.

  - Under Italian law 'domicile 'is basically equivalent to 'residence', but under English law there must be the intention to reside permanently in a particular country.

- Article 742, mela, the person subject to the jurisdiction of the Maltese courts, article 742 huwa based fuq il-ligi taljana, and as we know, our courts interpret the elements of domicile in terms of UK common law. Id-differenza ghedna fejn hemm domicile hemm anke the intention where to reside not just the residence in itself but also the intention to reside. Tidhol link ghal persuni li jiccaqalqu bejn pajjiz u iehor. The intention where to reside. Filwaqt li fil-ligi taljana u fil-kontinent iktar ghandna milli l-element ta' domicile huwa ta residence. Mela id-domicile tieghi fejn ghandi r-residenza tieghi. Pero under English law it is the intention where to reside permanently which characterises your domicile.

  - Residence is not sufficient, even if for a long period of time.

  - It must be shown that there is no intention of returning back to the domicile of origin.

  - One is thus always presumed to have the animus rivertendi (the intention to return to the domicile of origin).

- Mela allura, by implication, ahna qed nghidu, a) qed nghidu, citizens of Malta provided it is not fixed their domicile elsewhere, mela id-domicile trid tipprova mhux residence ghax il-ligi taghna titkellem fuq domicile, il-prova li trid iggib il-qorti li jiena m'ghandix domicile f'Malta m'hix biss ta residenza imma anke tal-intenzjoni tieghi li ma gnkunx domiciled in Malta, ghax il-ligi taghna imxi bid-domicile u mhux bir-residenza. Residence is not sufficient even for a long period of time, I have to prove domicile and where is my domicile.

- It-tieni bullet, jekk jiena se naghmel claim li d-domicile of birth tieghi m'ghadux malta ghax iccaqlaq x'imkien iehor, I have to prove my intention of not returning back to Malta. I have to prove that I have changed my domicile, mela issa ghandi

domicile of choice, sejjer l-italy u se nibqa hemm u l-intenzjoni li ma nergax immur lura ffid-domicile of origin, li hija malta.

- The third bullet, there is the presumption that one has the intention to return back, ghalhekk irrid naghmel il-prova tlaqtu d-domicile of birth ghax il-presumption fil-ligi hija l-animus riverendi, li nirritorna lura. Mort sena universita barra ma jfissirx li bdilt id-domicile ghax behsiebni nerga nigi lura, ghalhekk l-istress hija fuq intention, il-fatt li mort sena f'universita barra, jew sentejn nahdem barra ma jfissirx li bdilt id-domicile of birth ghax l-intenzjoni tieghi hi li nerga lura. Animus rivertendi.

  - b) Any person as long as he is either domiciled or resident or present in Malta
  - There grounds are alternative rather than cumulative.
  - Unlike in paragraph (a), all Maltese citizens are presumed to b e domiciled in Malta, and it is then up to them to prove that they are domiciled elsewhere;
  - But in this case the Maltese courts have jurisdiction over 'any person 'as long as the plaintiff proves that the non-Maltese national is domiciled or resident or present in Malta.

- Issa, it-tieni head, Article 742(1)(b). Qed nghidu persons subject to the jurisdiction of the Maltese courts, ghandna a second category, any person, as long as he is either domiciled mela kif qed naraw id-definition hija wiesa iktar issa, mhix ibbazata biss fuq domicile. Any person as long as he is either domiciled, mela ghandna kuncett ta' domicile, or resident kuncett ta residence, or presence in Malta, even a mere presence il-qorti maltija under (b) ghandhom gurizdizzjoni fuq il-persuni li huma domiciljati, domicile taqa' ukoll taht (a) pero hija miftuha ghal any person mhux citizens of Malta biss, kull persuna li tinzerta malta, sia li hija domiciljata, jew residenti, jew presence mhumiex kumulattivi.

- In this case, the plaintiff has the burden of proof, mela jekk ftaht il-kawza jiena I have to prove that the person is either domiciled, resident or present in malta in that case the court will have jurisdiction.

- Differenza, wahda mid-differenzi min parragraph (a) hija li filwaqt li f'paragraph (a) all maltese citizens are presumed to be domiciled in Malta, sakemm ma jiprovawx il-kuntrarju it is then up to them to prove that they are domiciled elsewhere. Imma f'dan il-kas il-legal base fil-(b) huwa miftuh aktar, mhux maltese citizens and in this case the burden of proof is on the plaintiff. Li jrid jipprova li d-defendant huwa domiciled, resident jew present in Malta.

- In Calleja v Pace, the court held that the Maltese citizen is presumed to be domiciled in Malta, and the defendant must prove that he is domiciled elsewhere.

- Calleja vs Pace huwa a case in point li stabbilixxa din. Maltese citizen is presumed to be domiciled in Malta sakemm hu jgib prova kuntrarja.
  - It is thus up to him to prove that he is domiciled elsewhere.
  - On the other hand, under paragraph (b), Maltese courts have jurisdiction over any person – independently of citizenship – as long as the person is domiciled [or resident or present] here.
  - Therefore in this case it is up to the plaintiff to prove that the non-Maltese defendant is domiciled, [resident, or present], in Malta.
  - This provision was amended in 1995.
- Din repetition ta li ghedna diga.
  - The Law Reform Commission had suggested introducing the notion of presence and residence because, the Maltese courts had been interpreting the notion of domicile very restrictively (as in English Common law).
  - Thus there was a move away from Italian (which interprets domicile in a very lenient manner) to English law (which uses presence and residence as well).
- Din, il-broader legal base hija rizultat tal-law reform commission, which was studying the jurisdiction of Maltese courts and stated that there was a need for a boarder notion, such as presence and residence in Malta. The reason was that the courts were interpreting this because of the influence of common law the notion of domicile in a very restrictive way, allura kien hemm bzonn li tidhol residence u presence.
  - The notion of presence is an English law concept.
  - However under English law there is the principle of forum non conveniens (an inconvenient forum) to balance this out.
  - The principle allows an English court not to exercise jurisdiction if there is a more appropriate forum.
  - A leading House of Lords decision is that of Spiliada Maritime Corp v Cansulex ltd (1986).

- The idea of presence is an English law concept, but you can find also the principle of forum non conveniens, where the issue can arise that the court is the not the proper court to hear the case. The principle of forum non conveniens is used by the English courts to determine what is the appropriate forum, by looking into the connecting factors of the case at hand etc and it will decide whether it has jurisdiction or otherwise.
    - Spiliada case
    - Prior to this case, an application for a stay or dismissal of proceedings falling within the proper jurisdiction of the court could only be granted on very narrow grounds: if the suit was:
    - Oppressive,
    - Vexatious, or
    - An abuse of process, and
    - That the stay would not cause an injustice to the plaintiff.
    - Spiliada case
    - However in this case, the House of Lords decided that a court may decline to take a case where there is another jurisdiction that is more suitable for the parties.
    - However, the burden is on the claimant to establish that the foreign forum is clearly or distinctly better.
- Spiliada case, before the Spiliada case, the law was more strict. Depending if it was oppressive, vexatious etc jekk kas timxix fuq dik il-jurisdiction jew le. In this case the court also confirmed the case of forum non conveniens where the court can effectively say that there is a court which is more appropriate to listen to the case. This could be for example as the persons would be living in other states or it is related to the delivery of goods or services.
- In the case where a forum non conveniens is raised, that there is a court more adapted to listen to the case, it rests on the claimant to raise this. The claimant has to claim establish that there is another foreign court which is better to hear the case.
    - “Natural forum”
    - Many factors can be considered to determine the “natural forum” including:

- The availability of witnesses,
- The applicable law of the matter,
- The parties ’residence or place of business, and
- The possibility for the plaintiff to obtain justice in the foreign jurisdiction.
- “natural forum”
- If a party makes out a claim for a natural forum the opposing side may rebut the claim by showing that justice requires the matter to be heard in the domestic court, otherwise justice would not be done.

- The concept of natural form, what are the elements to establish what is the natural forum, jekk se nuzaw il-forum non conveniens, mela mhux din il-qorti imma qorti ohra. Ghaliex? What are the connecting factors that other courts make as a natural forum, the witnesses are in another country for example, taghmel sens li toqgħod iggibhom kollha hawn?. The applicable law of the matter, the parties’ residence, jew place of busienss, and the possibility for plaintiff to obtain justice in the foreign jurisdiction. Of course the defendant may rebut the claim that that particular court is the natural forum. Imbghad sta’ dik il-qorti li tisma l-kaz li tiddecidi on a case by case basis wara li jqajjem il-prova. So the plaintiff iqajjem dan l-issue tel-forum non conveniens u d-defendant he can rebut this.
  - However, as confirmed in Arrigo v Cilia (2003), the Maltese position differs, because article 742(2) says that 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.
- Arrigo vs. Cilia, in this case the court said that the position of the Maltese court is different and it based its self on Article 742(2). Which states that the jurisdiction of the courts of civil jurisdiction, (we are talking about civil or commercial jurisdiction not criminal) is not excluded by the fact that a foreign court is seized with a cause or a clause connected to it. Our law is different, this law is saying that the fact that a case was started in front of another court (foreign court) this does not mean that automatically it is excluding the jurisdiction of the Maltese court. Jekk kawza nbdiet quddiem a foreign court, ma jfissirx li b’daqsekk il-qorti maltija m’ghandiex jurisdiction.
  - The law continues: 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.

- 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.
- If there are going be two concurrent lawsuits on the same subject (for example one in Malta and one in Italy), the Maltese court can make a stay of proceedings or state that it has jurisdiction. It can also say that it does not have jurisdiction, non suited as there would be a better suited court which is listening to the case. Stay proceedings means that it stops the case until the other proceedings are finished.
    - Catherina Harvey v Peter Caruana Galizia (2003)
    - The plaintiff brought separation proceedings before a Maltese court against her husband, who raised the plea of jurisdiction on the grounds that he was not a Maltese citizen, worked in Libya and was domiciled in England.
    - Catherina Harvey v Peter Caruana Galizia (2003)
    - The court however noted that he was resident in Malta and had bought a matrimonial home with his wife in Malta – the fact that he was resident meant that Maltese courts had jurisdiction.
    - In any case, there was also presence, which was sufficient.
- In the Harvery vs. Caruana Galizia, Caruana Galizia was present as deputy curator for someone who was absent (kuratur in nomine, kuratur deputat ghal xi hadd assenti).
- He was considered to be resident since he had bought a matrimonial home in Malta with his wife. The court said that he was not only a residence because he has a matrimonial home but his mere presence was sufficient to establish the jurisdiction of the Maltese court. The court in this case, looked into article 742(b) which we said jurisdiction which is based any person based on his domicile or residence or presence. The case arose whether these grounds apply both to the defendant and to the plaintiff. Why? Because there were a number of conflicting judgements/decisions of the courts which said that was enough that the plaintiff was a citizen, resident or domiciled in Malta.
    - Catherina Harvey v Peter Caruana Galizia (2003)
    - The question that has arisen in the context of article 742(b) is whether the grounds of article 742 apply both to the defendant and plaintiff. There were a

number of conflicting judgments, with some saying that it was enough if the plaintiff was a citizen, resident, domiciled, or present in Malta.

- In Harvey v Caruana Galizia. Plaintiff argues that the fact that she was resident in Malta was sufficient.

- Catherina Harvey v Peter Caruana Galizia (2003)

- The First Hall agreed, but the Court of Appeal considered that article 742 only referred to defendants and that any other interpretation would be unreasonable since it would render it possible for virtually any person to bring an action in Malta by simply flying Malta and thereby being “present”.

- Ultimately article 742 consist of pleas, which are always raised by a defendant, and thus the notions must be understood to refer to defendants.

- In this case, the plaintiff, the wife argued that the fact that she was resident in Malta was sufficient for the Maltese court to hear the case. The first hall agreed, so in first instance the first hall agreed, however the court of appeal said that article 742 only referred to defendants and that any other interpretation would be unreasonable since it would render it possible for virtually any person to bring an action in Malta by simply flying in Malta and thereby being present. The court further said that article 742 refers to pleas which can only be raised by the defendant to appose the claim and therefore the notions are to be understood to refer to the defendants.

  - The court also said that with respect to the notion of presence, one must see whether the defendant was present when the writ was served upon him.

  - This had also been confirmed in Busuttil v Hass (1979). This is despite the fact that in Malta an action is deemed to have commenced when it is filed and not when it is served.

- The court of appeal went also a step further with respect to the notion of presence, and it said that presence will be interpreted in a way mainly when writ of summons is the application was served upon the defendant whether he was present, when the application (before it was a writ of summons today it is a rikors).

- This thinking is also found in Busuttil vs Hass

  - Under both paragraphs (a) and (b), the nature of the dispute is irrelevant.

  - There is only one limitation as per sub-article (2), which speaks of situations where another court is seized on the matter.

- Schembri v Galea Debono (2013), Jarvey v Harvey (2003), Busuttil v Haas (1979)
- Harvey: https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=14804

- Under article 742(1) (a) and (b) the nature of the dispute is irrelevant, hu x'inhu s-suggett tal-kawza, l-issue hija l-(a) hija domicile, citizen of Malta domiciled in Malta, u il (b) huwa any person, a third country national who is either domiciled, resident or present independently of the nature of the dispute jekk hux separation jew debt collection jew contractual lawsuit.
- Have a look at these judgements of Schembri vs. Galea Debono, Jarvey vs. Harvey and Busuttil vs. Hass.
  - c) Any person, in matters relating to property situate or existing in Malta
  - Therefore here the domicile, nationality residence, or presence of the defendant is immaterial.
- It-tielet cirkustanza (c), Article 742(1)(c). Any person, pero qed tispecifika l-ligi relating to matters or property situated in Malta, marbuta mal-propjeta, therefore the lex situs. So ground (c) mhux marbuta ma domicile jew residence jew presence pero marbuta ma fejn hemm il-propjeta'.
  - Manduca v Chetcuti (1993)
  - The court confirmed that the property can also be a movable, as long as it is situated in Malta and that the property is the subject of the dispute.
  - The court case must thus refer specifically to that property and the nature of the dispute must affect real rights inherent in the property.
- Manduca vs Chetcuti, dal-kaz interpreta l-kelma property and it established that it can also be a movable (such as a car) property. Sakemm qieghda Malta and the property is the subject of the dispute, sakemm qieghda Malta. So it established two elements it has to be a property whether moveable or immoveable and the nature of the dispute must impute a real right in favour of that property, ownership, emphyteusis, real right li hemm fuq dik il-propjeta. This case established two principles;
  - There must be a property in question and

- It must affect a real right (such as ownership, emphyteusis, usufruct, use, habitation etc) which there is on such property.

- The court in Scicluna v Carbone (1884) also confirmed that the provision also applies to movable of an intangible nature (a credit, goodwill, etc).

- Scicluna vs Carbone, again ikkonferma li tapplika anke ghal moveables of an intangible nature. Jista jkun a credit, goodwill ta negozju, tapplika ghalih ukoll (c) huma meqjusin tip ta properja ukoll.

  - In Ian Vella Galea v Alistair Robert Clifford Tullik (2013) the court held that the simple fact that there was some link with Maltese shares in a company was not sufficient, since the action was one for damages.

- Vella Galea v Alistair Robert Clifford Tullik, it had shares in a company, it was stated that an action for damages does not fall under (c) it has nothing to do with property, because it is an action for compensation in damages.

  - Margaret Attard v Ian Spiteri Bailey (2004)

  - Plaintiff requested the court to demand that the defendant reveal all assets belonging to a testator; some assets were in Malta, while the majority were in England.

  - The court held that an inheritance is a universitas rerum (a whole collection of things), and therefore even though only a few assets were in Malta, the inheritance is still considered as being – in its totality – in Malta.

  - Margaret Attard v Ian Spiteri Bailey (2004)

  - The court thus had jurisdiction.

  - The court however observed that its decision was a formal (legal) solution and it is thus not excluded that practical problems may arise with respect to the assets located in other states.

- In the Attard vs Spiteri Bailey case (jista jkun kien kuratur hawn) in this case the platiintif doing the proceedings requested the court to ask a defendant to produce a list of all the assets belonging to the testator. Some hereditary assets were in Malta however the majority was in England. And in this case, the court held that an inheritance is a universitas rerum, (a collection of things - matrimonju, ma tistax taqsamhom) even though only a few assets were in Malta the inheritance is still considered as being in its totality in Malta. F’dan il-kaz il-qorti hades it-triq li la

parti mill-eredita hija malta, u hija property allura il-qrati maltin kellhom gurizdizzjonia.

- The court however observed that its decision was a formal (legal) solution and thus it not excluded that practical problems may arise with respect to the assets located in other states. Setghet ukoll infethet kawza quddiem il-ligi Ingliza imbghad wiehed jaqa' kif ghedna fuq il-legal base li l-qorti tiddeciedi jekk tkomplix tisma l-kaz jew le jekk ikun hemm two conflicting concurrent cases.
  - Mehmed Sertar v Simon Micallef Stafrace (2012)
  - A Turkish company was suing Turkish nationals for misappropriation of funds.
  - It was argued that the funds were misappropriated and transferred to another defendant who had a bank account in Malta.
  - A garnishee order was attached to that money. The court laid down a number of important principles.
- Sertar vs Simon Micallef Stafrace, a Turkish company was suing Turkish nationals for misappropriation of funds. It was argued that the funds were misappropriated and transferred to another defendant who had a bank account in Malta. A garnishee order (mandat ta sekwestru) was attached to that money. The court laid established a number of principles.
- Fist the court said that article 742(1)(c) applied also to moveables, as long as the moveable is in Malta and it is the subject matter of the case, in this case the misappropriated funds.
  - Mehmed Sertar v Simon Micallef Stafrace (2012)
  - The court confirmed that the ground applies also to movables and that the thing situated in Malta must in itself be the subject-matter/merits of the case.
  - The Court of Appeal revoked the First Hall judgment because the plaintiff company had failed to prove that the money in the bank account was in fact the money which was misappropriated.
  - Therefore there was no proof that that money is Malta formed the merits of the court case.
  - Manduca:
  - https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=14804

- Mehmet:
- https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=77502
- Attard:
- https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=23363

- However in this case the court of appeal overturned the judgement of the first hall, because the plaintiff Turkish company did not prove that the money deposited in the Maltese bank account was in fact the money which was misappropriated. U allura la ma kienx hemm proof ma kienux mertu taptal-courtcourt case u allura ma kienx hemm jurisdiction taht article 742(c)
- These are other cases which are related to this circumstance.
  - d) 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 courts have interpreted “obligation” to mean contractual as well as quasi-contractual, tortuous, and quasi-tortuous obligations.
  - However this provision is not so important due to the wide application of the 2nd ground.
- 742(1)(d), any person bhal (b) and (c). xi hadd mil-marokk ghamel kuntratt Malta. Any person, il-kelma obligation in Malta, therefore contract, but there is a qualification only in regard to actions which are touching such obligation and provided such person is present in Malta. Qed naraw nergaw il-kelma presence, mhux any person, provided such person is present in Malta, jrid ikun prezenti, m’ghandux ghalfejn ikun joqghod Malta. Il-kelma obligation, hija interpreted iktar wiesa, mhux kuntratt biss imma jista jkun quasi contract, quasi tort jew tort.
  - e) 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.
  - Paragraph (d) and (e) have effectively become redundant because they deal with situations where the defendant must be present in Malta. As already seen, through the 1995 amendments, presence is already specifically catered for under paragraph (b).

- (e), 742(1)(e), any person mhux a citizen in Malta. In this case the contract was signed in another country. Here as well we have the concept of presence. Kull persuna li contracted an obligation in favour of a citizen or resident in Malta, This obligation however has to happen in Malta or the due to the nature of the obligation it has to happen in Malta. Circumstances (d) and (e) have become redundant because they deal with situations where the defendant has to be present in Malta, bl-amendi tan-1995 this is already catered for under the legal base of paragraph (b).
  - Mark Fenech v Jean Clark (1992)
  - Two English nationals had transferred shares to each other.
  - The prince was not paid and an action was brought.
  - The court held that the court had jurisdiction under (e) because the defendant was present in Malta and the place of performance was Malta, since the shares were of a Maltese company and the shares had to be registered in Malta.
- Mark Fenech v Jean Clark, the court said that it had jurisdiction under legal base (e) because the defendant was present in Malta and the place of performance is Malta since the shares were of a Maltese company and the shares had to be registered in Malta, transfer of shares. Irid jigi registrat mal-Malta business registry.
  - f) 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;
  - The provision is intended to protect Maltese citizens, residents, and companies who have contracted obligations with foreigners.
  - However this is subject to condition that the eventual judgment is enforceable in Malta, which means that assets must exist in Malta over which the judgment can be enforced.
  - The Maltese courts have jurisdiction over any person, it is irrelevant whether the defendant is domiciled, present or resident in Malta, what is important is that it must be proved that the judgement can be enforced in Malta.
  - It allows foreigners to be sued in Malta therefore, but only if the judgment can be enforced in Malta.

- Legal base (f), any person, li ffirma any obligation in favour of either a citizen of Malta or a resident of Malta, mela a moroccan resident in Malta mhux biss a maltese citizen or of a body having a distinct legal personality, a legal entity in Malta. This legal base is intended to protect Maltese citizens, residents of Malta anke jekk mhumiex residents and legal entities who have contracted obligations with foreigners however this is subject to the proviso that the judgement is enforceable in Malta. Which in effect means that the assets must exist in Malta, otherwise the judgement cannot be enforced.

- In this case we can say that this head of jurisdiction is over any person and it is irrelevant whether the defendant is domiciled present or resident in Malta what is important is that the judgement can be enforced.

  - In Angiolina Wells v Borg Olivier (1995), the court held that the term ‘obligation ’ is to be interpreted widely to include tortuous and quasi-tortuous and quasi-contractual obligations, as well as legal obligations (such as providing maintenance).

  - However located or present in Malta there must necessarily be things over which the judgment can be enforced either totally or partially.

  - The plaintiff was the wife, and she had been abandoned in Malta by her husband, who left back to England.

- Angiolina Wells vs Borg Olivier, once again this case interpreted obligation to include quasi-torts and quasi-contracts and also other legal obligations bhal l-obligu li thallas il-manteniment li johrog min kuntratt jew sentenza.

  - He was not domiciled or resident or present in Malta. Thus there was no jurisdiction under the previous paragraphs.

  - She brought an action for separation and maintenance.

  - The court said that since her husband owned no assets in Malta, there was nothing which allowed the judgment to be enforceable, and thus it had no jurisdiction.

  - Any other form of enforceability/execution is not sufficient; thus the fact that the judgment of separation could be registered in the Public Registry was not sufficient to satisfy this ground of jurisdiction.

- On the proviso of legal base (f) it stated that it applies if the judgment can be enforced in Malta. Therefore there must be assets on which the judgment can be enforced either totally or at least partially. In this case the facts concerned the

wife, the plaintiff she was abandoned by her husband who left back to England, the husband was neither domiciled nor resident nor present in Malta, and therefore there was no jurisdiction under the previous heads of jurisdiction so she filed the case under article 742(1)(f) and the action was one of a personal separation. In this case the court said that since the husband had no assets in Malta, there was nothing which allowed the judgement to be enforceable and there was no head of jurisdiction. Il-qorti qalet lil mara tfittex fejn dan ghandu assets, fil-qorti ingliza.

- g) Any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.
- This ground was inserted in 1995.
- It covers both express and tacit submission.
- Express submission is where the parties enter into a choice of court agreement, whether conferring exclusive jurisdiction or otherwise.
- Tacit submission on the other hand is where there is no jurisdiction but the defendant nevertheless raises please on the merits in Malta without raising the plea of jurisdiction.
- Such submission is an acceptance of jurisdiction of Maltese courts.
- This is similar to Article 24 [exclusive jurisdiction] and 25 [prorogation of jurisdiction] in the Brussels Recast Regulation 1215/2012.

- Legal base (g), again any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court, so in our case to the Maltese courts of justice. This ground has been included in the amendments of 1995. It includes both express and tacit submissions to the courts of Malta, express submission meta l-partijiet jaqblu li l-qorti maltija ghandha jurisdiction. Tacit submission on the other hand is where there is no jurisdiction but the defendant nevertheless raises pleas on the merits in Malta without raising the plea of jurisdiction, if the defendant voluntarily does not raise the issue of jurisdiction as a preliminary pleas he has voluntarily/directly/tacitly submitted himself to the Maltese court. He would be accepting that the Maltese court has jurisdiction and that it can hear the merits of the case.
- Such submission is an acceptance of the jurisdiction of the Maltese courts and we can compare this voluntary submission under article 742(1)(g) of the COCP we can compare this ground to article 24 of the Recast (Exclusive jurisdiction) article 25 which (court ex officio jurisdiction), il-jurisdiciton tal-qorti f'kay ta dispute.

- Plea of Jurisdiction raised by the court ex officio
- Court may also raise the Please ex officio.
- Article 774 was also amended in 1995 and provided that in the absence of any plea to the jurisdiction, the court shall, of its own motion, declare that it has no jurisdiction. S62

- Plea of ex officio, article 774, we've already done in the beginning of the mention.
  - a) Where the action is not 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; or
  - b) Where by reason of the subject matter of the claim or of the value of the thing in issue, the action is not within the jurisdiction of the court;
  - Or
  - c) Where in actions touching the recovery of deposits, the monies or other things are deposited under the authority of another court;
  - Provided that in the cases referred to in paragraph (b) pleas to the jurisdiction may not be pleaded nor raised ex officio in an appellate court.
  - Counter-claim
  - Article 743(1) provides that 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
  - Sub-article (2) says that the provision of this article shall also apply in the cases referred to in article 402
  - Example: a person sues for payment of the price, and the defendant makes a counter-claim to the effect that the price is not due but rather damages are due by the plaintiff to defendant because the contract of works was not carried out well.
  - If the Maltese Courts have jurisdiction over the original action, they have jurisdiction to hear the counter-claim.
- Counter claim rajnihom fil Brussels Recast ukoll, issa se naraw il-kontro talba taht ic-COCP, article 743.

- Article 743.

- **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.

- These are also present in the Brussels Recast.

- a person by way of example sues for the payment of the price and the defendant made a counter-claim and said that the price is not given (dovut). In the counter-claim the defendant said that not only does he not have to give him the price but that the plaintiff has to give him a sum.

- F'dan il-kaz if the maltese courts have jurisdiction over the original claim they also have jurisdiction over the counter claim l-istess bhar-recast.

- In Arrigo Ltd v Dr Cilia nom court interpreted Art 742(2) to apply to a situation where proceedings in a foreign court are already pending, it is not sufficient that a foreign court could potentially have jurisdiction, it must already have pending proceedings.

- https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=86327

- Arrigo vs Dr Cilia, the court interpreted article 742(2), to apply to a situation where proceedings in a foreign court are already pending. It is not sufficient taht a foreign court could potentially have jurisdiction it must already have pending proceedings. this principle was tackled.

21st March 2023

Lecture 6.

- Se nikkonkludu the rules of jurisdiction under the Code of Organisation and Civil Procedure.

- Foreign Court Seized

- Article 742 (2) says that 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.

- With respect to the foreign court seized when there is a foreign court has already been seized and therefore there is concurrent jurisdiction, the courts may in their discretion either declare that the defendant is not suited for the proceedings or state the proceedings on the ground that if the action where to continue to be carried out in Malta, it will be vexatious, oppressive and unjust to the defendant. This is the case when a foreign court has been seized

  - Arbitration

  - Article 742 (3) provides that 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

- With respect to arbitration we have a reference to article 742(3) which states that the civil courts still had jurisdiction even though there is an arbitration agreement between the parties and whether the arbitration proceedings have commenced or not, in that case, the court shall state the proceedings.

- So if there is an arbitration going on on the same subject, the civil court has to stay the proceedings until there is an outcome of that arbitration. The pertinent article is article 742.

  - Arbitration

  - Art 742 (3):

  - It is possible for the parties to agree on a court to have jurisdiction but it is also possible that the parties agree to go to arbitration in cases of disputes.

  - It could be domestic or international arbitration

  - The idea is that the parties should be given the option of having their own resolution mechanism and arbitration is one of them.

  - Parties can also choose the arbitrators.

- Arbitration can be domestic or international arbitration. London, the arbitration centre in London is a case in point, especially to deal with commercial agreements. The parties are free to decide in a contract that if there is a dispute they will go to arbitration, whether local or international instead of resolving that dispute in a court of law.
- In an arbitration, the parties here are also free if there is an agreement between them to choose the arbitrator who will hear the case if there is an agreement between them, otherwise the centre for arbitration will choose the arbitrators. There can be one arbitrator, three, five, depending on the particular rules of the arbitration.
- As a side note, arbitration in Malta there are three instances where it is mandatory;
  - In case of car collisions, jekk xi hadd imut jew wegga, mhux se tkun arbitration ha tmur il-qorti first hall imma the ordinary collisions imorru bilkers mandatorily l-arbitragg mhux il-qorti
  - Kazijiet fejn tidhol il-condominium act, kwistjonijiet fejn il-kondomini ta' bkock flats,
  - Thirdly there is mandatory arbitration f'issues fejn ghandhom x'jaqsum utilities, bghatuli kont gholi tad-dawl nista nikkontestah billi naghmel arbitration kontra ARMS limited
- F'dawn it three instances there is mandatory arbitration.
  - Arbitration
  - Thus, there may be an arbitration agreement, but if one of the parties for example does not cooperate to appoint an arbitrator, the court still has jurisdiction to hear the court case.
  - Therefore if the dispute is covered by an arbitration clause, the court will stay proceedings but it will keep residual jurisdiction just in case the arbitration proceedings fail.
  - Finally in issues which are related to utilities, one can contest a high bill by making an arbitration against ARMS limited.
- There may be instances where the parties do not agree on the arbitrator. Usually it is, the arbitration rules will tell you that that that centre will appoint an independent arbitrator, but there may be also jurisdiction of the court. The bilateral agreement between the parties may state that if the parties for instance fail to

agree on an arbitrator, then the court of law will hear the case and therefore as we are saying in the second bullet, the court of law will still have residual jurisdiction in the case where the parties do not agree on whom to appoint as arbitrator to hear the dispute.

- Arbitration

- 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.

- Issa, article 742(4), ma tapplikax biss ghal PIL, for any arbitration li tkun ghaddejja, jekk ghandi arbitration ghaddejja quddiem ic-centru tal-arbitragg u jiena l-plaintiff nista naghmel xorta mandat ta' sekwestru ma dik l-arbitration, Mal-claim.

- Issa, in the case of an arbitration il-madat ta' sekwestru ma 'niffajljahx' mac-centru tal-arbitragg, imma fir-registru tal-qorti civili. Mela, even though there are arbitration proceedings going on, one can still file a precautionary warrant (per ezempju sekwestru) but it has to be filed at the registry of the courts of justice not with the arbitration centre. Araw ftit article 742(4). This is because an arbitrator cannot issue a precautionary act or warrant.

  - Arbitration

  - An arbiter cannot issue precautionary acts or warrants (garnishee orders, seizures, etc); therefore even when there is an arbitration agreement, the court still has jurisdiction to issue them.

  - 742 (5) says that a precautionary act issued in terms of the preceding sub article shall be rescinded:

  - (a) if the party against whom it is issued makes such deposit or gives such security sufficient to secure the rights or claims stated in the act; or

  - (b) if the applicant fails to bring forward his claim, whether before the arbitrator or before the court, within the said time limit of twenty days; or

  - (c) On the expiration of the duration, original or extended, of the particular act in terms of this Code; or

- (d) For just cause on the application of the debtor as the court may deem proper in the circumstance.

- Jekk taraw article 742(5), a precautionary act, mela a precautionary garnishee order, sekwestru, ghaliex precautionary? Mandat kawtelatorju? Ghax ghad mghandix sentenza, mhuiex ezekuttiv, a precautionary act issued in terms of the preceding article shall be rescinded f'dawn ic-cirkustanzi.

- (a) hrigtlek sekwestru, kif tista tnehhih? Ghadha qed tinstema l-kawza, billi taghmilli garanzija. So jekk hemm sekwestru for €10,000 inti tista tiddepozita garanzija ta €10,000 fil-qorti u dan is-sekwestru jitnehha, pero xorta hemm dik il-garanzija tal-€10,000 sakemm tinqata l-kawza.

- The second circumstance where a precautionary act (mandat) can be removed is under sub-article (b). Dawn issibuhom taht il-provisions f'COCP tal-mandati. Jekk jien ghamiltlek is-sekwestru, kontestwalment m'ghamiltlekx il-kawza, sekwestru wahdu ma joqghodx, jew trid taghmlu kawza mieghu jew trid taghmlu within 20 days li ghamilt is-sekwestru l-kawza, normalment issir kontestwalment ghamilt il-kawza u s-sekwestru. A precautionary act on its own does not stand.

- There are persons who make the precautionary act before as try and avoid a case because the defendant would get scared and pays him. However, if one made the sekwetru and the twenty days have passed and there is no case, the precautionary act falls and it becomes rescinded. Ghax fin-natura tieghu hemm kawza mieghu sekwestru.

- Sub-article (c), ghamiltlek sekwestru jiena biex indejqek mhux biex niehu l-flus li ghandek ittini, the defendant to go against the precautionary act can make a plea for revocation of the precautionary warrant (il-mandat revoka).

  - Ghamiltlek sekwestru ghal €10,000, the amount is nowt due in the opinion of the defendant so the defendant, allura x'ghamel id-defendant ghamel application in the acts of the garnishee order where he is stating that the €10,000 are not due to X and he presents the agreement that it was paid.

- In this case the judge/magistrate (skint it-threshold tal-ammont) will see or give a hearing to the parties or decides in-camera and removes the sekwestru as it was already paid. In a precautionary act one can also hold a person responsible on damages.

  - Introduction

  - Regulation 1215/2012 seeks to facilitate access to justice, in particular by providing the rules on the jurisdiction of the courts, and the rules on a rapid and

simple recognition and enforcement of judgements in civil and commercial matters given in the Member States.

- The Regulation replaces Regulation 44/2001 (the Brussels I Regulation) which, however, continues to apply to proceedings instituted before Regulation 1215/2012 comes into application on 10 January 2015 (for further details see Article 66 of Regulation 1215/2012).

- Se nibdew ftit iktar fid-dettall fuq prorogation, voluntary submission ghal qorti etc, imbghad nghalqu bil-brussels recast biex imbghad jibqalna Rome I u Rome II.
- Bhala introduction, ghedna il-Brussels Recast qieghda hemmhekk ghal civil jew commercial issues u tirrigwarda ukoll enforced recognition and enforcement of foreign judgments.
- Point two, issues li saru taht ir-regolament l-antik, Regulation 1215/2012, baqghu jigu r-regolati, hemm transition period fuq dik ir-regolament l-antik.
  - Introduction
  - The Regulation applies between all MS including Denmark which has concluded the 2005 agreement between the European community and the Kingdom of Demark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
  - The necessary legislative amendments in Denmark already entered into force on 1 June 2013.
- In the beginning Denmark was not a member of the regulation and had an exemption but eventually it joined.
  - Introduction
  - The Regulation determines the courts of which Member State have jurisdiction to decide on a civil and commercial dispute where there is an international element.
  - The Regulation further provides that a judgement given in a Member State shall be recognised in the other Member States without any special procedure being required.
- Ovjament fuq mandat tista zzommu responsabli ghad-danni jekk ikun sar biex idejqek biss.
  - Prorogation of jurisdiction (Art 25)

- Prorogation of jurisdiction is the conferring of jurisdiction on a court by the consent of both parties, or by one of the parties submitting the jurisdiction of the court after commencing proceedings by the plaintiff.

- Art 25 states If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

- Art 25 allows the parties to settle any disputes which may arise between them.

- Ha naraw x'inhi prorogation of jurisdiction Article 25. Prorogation of jurisdiction is when two parties, for example regarding a contract, decide to choose themselves which court ghandha tissindika dispute bejniethom.

- It can be either the two parties in the last clause of the agreement which state that for example the courts of Malta shall have jurisdiction or even though this court does not have jurisdiction, the defendant voluntarily agrees with the jurisdiction but making a reply to the lawsuit.

- The proviso makes the clause of the jurisdiction null and void if there is an issue on public policy. 'Such jurisdiction shall be exclusive unless the parties have agreed otherwise'. In the agreement it can be stated that if there is a dispute one will go for arbitration but if they do not agree in a set period on who is going to be the arbitrator then they will go to court. Such clause can also be made. Here there would be the consent of both.

  - If the parties agree that the Court of a particular Member State has jurisdiction, then the proceedings have to be brought in that Ms, not under the provisions of general and special jurisdiction.

  - One has to sue in the court specified by the parties in the contract.

  - The choice of court agreement creates the presumption that it is exclusive jurisdiction unless the parties agree otherwise.

  - This reflects exclusive jurisdiction as the agreement would imply that one particular place would have jurisdiction excluding all other jurisdictions

- It is possible to have non-exclusive jurisdiction agreement, which gives the parties an option, they need not sue in a particular member state but can have another forum.

- Under the third bullet it is clear that the parties can also agree on non-exclusive jurisdiction, therefore there will be the option to have various courts. So if there is a dispute on point ‘A’ it will be the Maltese courts that will have jurisdiction and if there is a dispute on point ‘B’ it will be the Italian courts that will have jurisdiction. So there is no exclusive jurisdiction in the contract made amongst the parties.

  - One must always look at the jurisdiction clause to see which disputes are captured under said clause

  - Michael Peresso LTD v UPIM (2016) the plaintiff was a Maltese company involved in retail, whilst the defendant was an Italian company exporting retail. The parties concluded an agreement which contained a jurisdiction clause whereby any dispute concerning the interpretation, validity, termination and enforcement of the agreement would be subject to the exclusive jurisdiction of the courts of Milan.

  - The plaintiff argued that during negotiations, the defendant company failed to disclose that it was on the verge of bankruptcy and could not perform their part of the deal.

  - Therefore the plaintiff sued for pre-contractual liability. The question was whether the dispute fell under the jurisdiction clause.

  - The court held that the claim was not based on the jurisdiction clause but rather it was a claim in tort which was based on the behaviour of UPIM in the negotiations, so the was not bound to bring proceedings in Milan but could bring proceedings in Malta through Art 7.

  - https://ecourts.gov.my/onlineservises/Judgements/Details?JudgementId=0&CaseJudgementId=96647

- Il-kaz Michael Peresso LTD (tal Eurosport) vs UPIM, there was an agreement and there was a jurisdiction clause. Michael Peresso is a Maltese company and UPIM is an Italian company, any dispute concerning interpretation, validity, termination and enforcement of the agreement however the parties agreed that there will be jurisdiction by the court of Milan. Peresso argued that during negotiations leading to the agreement, Peresso stated there was no transparency and so Peresso sued for pre-contractual liability, so he sued on the negotiations which happened before the contract.

- The issue was, since the issue was on pre-contractual liability, (fuq in-negozjali) ghandha tapplika the jurisdiction clause for the court of Milan? The court of Malta said (ghax peresso mar Malta habba li pre-contractual) that it was a claim in tort. So Peresso was no bound to bring proceedings in Milan but could bring proceedings in Malta through the legal basis of Article 7 of the Recast Directive.
- So in this case, even though there was a jurisdiction clause for the courts of Milan, since Peresso sued not on the basis of the contract but on the basis of pre-contractual liability, this jurisdiction clause did not apply. So the Maltese court could hear the case as it was on tort.
    - CHEMIMART LIMITED (C1214) vs RECKITT BENCKISED HEALTHCATE INTERNATIONAL LIMITED
    - Plaintiff had a distribution agreement with the defendant company who terminated the agreement and Chemimart brought a number of claims, one of which was based on damages.
    - It made another claim for breach of contract as the defendant company failed to provide the quantity of products they agreed to.
    - The contract also included a jurisdiction clauses which stated 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.
    - CHEMIMART LIMITED (C1214) vs RECKITT
    - BENCKISER HEALTHCARE INTERNATIONAL LIMITED
    - The court rejected one argument made by the defendant that the jurisdiction clause applied only to the interpretation of the agreement. The question arose whether the claim for pre-contractual liability fell under the jurisdiction clause.
    - The court held that insofar as there is a claim on non performance of the contract, it was covered by the jurisdiction clause, but the claim which was non-contractual but was of tort or quasi-tort, then that claim fell outside the jurisdiction clause and proceedings could be brought in Malta.
    - Therefore the action for damages did not fall under the jurisdiction clause.
    - https://ecourts.gov.mt/onlineservices/Judgements/Details?Judgementid=0&CaseJudgementid=79621

- In the case of Chemimart Limited (tal-ispizeriji), one of the claims was the stopping the distribution agreement led to Chemimart to have no products and therefore caused them damages.
- Another claim was on the breach of contract due to the Benckiser, the defendant was not providing the plaintiff the quantities which it needed according to the contract. Hemm breach of contract fejn jidhlu l-quantities.
- The contract between them had a jurisdiction clause (choice of court clause) where the choice of court was an English court. The Maltese court rejected the defendant's argument that the jurisdiction clause applied only to the interpretation of the agreement. Therefore the issue arose whether pre-contractual liability fell under the jurisdiction clause.
- Here the court distinguished between two circumstances
  - In so far as there is a claim on non-performance of the contract, it was covered by the jurisdiction clause. So the question of the quantity is a contractual obligation and therefore it is to be decide by the English court since there is the jurisdiction clause. But the claim which was non contractual but was of a tort or quasi-tort nature (mela hija damages issa), then that claim fell outside the jurisdiction clause and proceedings could be brought in Malta.
- So the court said that where there is an infringement breach of a contractual obligation it is the English court as it is the court which was agreed on in the contract, but where the issue is about damages, here the case could have been done in Malta.
  - Therefore ….
  - Therefore one must look at the specific phrasing of the jurisdiction clause to check which claims are captured under the clause and what type of disputes the parties intended to regulate.
  - Issue of validity of jurisdiction agreements: the Regulation makes a difference between formal and substantial validity.
- The regulation makes a distinction between formal and substantial validity, fejn jidhol kuntratt.
  - In formal validity, Art 25 provides a list:
  - 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.

- The Regulation wants to make sure that there is some form of agreement and durable record and hence why an agreement must be in writing, but can also be done by electronic means, as per Art 25(2)

- The law, Brussels Recast, Article 25 explains what formal validity is.

- For a contract between two parties is applicable, what is to be seen? As the defendant may raise a preliminary exception or a bilateral plea. It has to be in writing, in a form which accords with practices which the parties have established between themselves, and 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.

- Under point (c), if it is a question of international trade, therefore an international contract, this choice of court has to take the dimension according to the usage of the trade in the specific sector. This agreement can also be made by electronic means.

  - El Majdoub case (2015)

  - The plaintiff was a car dealer who concluded a sale on the website of the defendant company.

  - None of the parties were consumers ie it was a B2B contract.

  - He had to agree to the terms and conditions of the sale by click wrapping.

  - The defendant cancelled the sale however so the plaintiff brought an action to the German courts for non-performance

  - Amongst the terms and conditions, there was a jurisdiction clause in favour of the German courts

- The question was on the formal validity of the clause, since the contract was concluded by click wrapping.
- The court held that the requirements of form were satisfied provided it was possible to save and print the form. The jurisdiction clause was therefore valid.
- The important thing is that it provides a durable record of the agreement.
- http://curis.Europa.eu/juris/document/document.jsf?text=docid=164356&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&cid=1253317
- Pierre Jacqmain case: the court held that the list of formalities is exhaustive, and MSs cannot impose formal requirements other than those found under the list.
- http://curia.Europa.eu/juris/showPdf.jsf?text=&docid=91016&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&1253385

- In the El Madjoub case, the plaintiff was a car dealer, none of them were consumers as they were a business to business defendant company was a company in business as well, it was not a consumer. It was non-performance as the defendant company breached the agreement, non-performance of the agreement. In the electronic agreement, there was a jurisdiction clause where there was the choice of the German courts in the case of a dispute.
- The question arose if such clause was legal or not according to the formal validity since the contract was concluded by click wrapping. The court said that the formality were satisfied since one could have saved and printed the form of agreement.
- In the Pierre Jacqmain case, the court held that the list of formalities is exhaustive, and MSs cannot impose formal requirements other than those found under the list.
  - Salotti di Conzani (1976): court held that the requirement of writing is there to make sure there is consent between the parties since the purpose of the formal requirements is to ensure that thee really was consent.
  - http://curia.Europa.eu/juris/showPdf.jsf?text=&docid=89370&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&cid=1253410
- In the Salotti di Conzani case, the court stated why it was important that there is the formal requisite in writing, this is to make sure that there is consent between the parties.

- Berghoefer 1985
- The parties reached an oral agreement on jurisdiction, and one of the parties sent a letter confirming the agreement they reached, but the other party did not reply.
- The court held that the letter was sufficient, the formal requirements were satisfied since the other party did not raise any objection to the letter.
- https://eur-lex-Europa.eu/legal-content//EN/TXT/PDF?eui=CELEX:61984CJ0221&from=EN

- In the Berghoefer case, there were two parties who made an agreement orally. One party eventually sent a letter that it is confirming the agreement done between themselves, however, the other party did not reply to the letter. The court accepted that the formality was there even though there was no reply to confirm what was agreed on the argument that the other party did not raise any objection. Therefore there was the formal recognition of the jurisdiction even though the agreement was made orally. This was the formal validity.
  - Substantive Validity
  - There can also be a question on substantive validity, where cone of the parties claims consent was lacking or it was vitiated.
  - There was no rules under the old regulation on substantive validity. The current Brussels Regulation Art 25(1) states that the 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.
  - Therefore if the contract states that the Maltese courts have jurisdiction any allegation on the substantive validity will be determined by Maltese courts, therefore the Regulation determines both the formal and substantive validity.
- Substantive validity is when one of the parties states (we did these under obligations) that he did not give the consent for that clause/jurisdiction clause. Or his consent was vitiated, this can be done by violence, or by error. These are the vices of consent which are found under the law of obligations. Formal validity dejjem applikata fuq jurisdiction clause u ghandna substantive validity. Sfurzani biex niffirmahha.
- In the previous regulation there was no provision (of the older recast) on the substantive validity. If the defendant raises a claim of vice of consent on the jurisdiction, it has to be heard under the court which they agreed had jurisdiction.

- Art 25(5) states 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 Jurisdiction clause is many times just one of many clauses found in a contract.

- If the contract or some of the clauses are invalid, it does not mean the jurisdiction clause is also invalid, as it is deemed to be a separate contract from the original contract.

- Therefore even if the party alleges the entire contract is null and void, it does not mean that the jurisdiction clause is null as well.

- If the agreement is good in certain areas, it does not mean that the agreement is totally wrong, so the areas which are good will apply. The agreement will not fully become null. So even if the agreement is half wrong, it does not mean that jurisdiction clause is invalid and so one can move on this jurisdiction clause which was agreed upon for the dispute.

  - Benincasa case

  - There was a contract which the parties concluded and the court chosen by the parties was that of Florence but the case was brought in Germany.

  - The plaintiff agreed that the contract was null and void therefor the jurisdiction clause was null and void.

  - However the court held that the jurisdiction clause is regulated by the Brussels Regulations; whilst the substantive provisions of the contract is governed by the lex causa, the validity of the jurisdiction clause is to be determined by Art 25 and the party may still bring proceedings under the court chosen through the jurisdiction clause.

  - http://curia.Europa.eu/juris/showPdf.jsf?text=&docid=43682&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=1253508

- In the Benincase case, the choice of court was Florence in Italy however the case was brought in Germany, the plaintiff argued that it was null and void and so was the jurisdiction yet the court said the jurisdiction clause is covered by the recast and the validity is to be regulated by Article 25 since the parties had agreed on the choice of court.

  - Eric Gasser case

- This led to a change in the rule under the Brussels 1 Regulation.
- The new rule is found in Art 31(2) which changed the position of lis alibi pendens where there is a jurisdiction agreement.
- This was an amendment made to the Recast Regulation.
- The Court held that if the nominated court is seized second, it will not have jurisdiction. A court seized second whose jurisdiction had been claimed under an agreement conferring jurisdiction had to stay proceedings until the court first seized had declared that it had no jurisdiction.
- http://curia.europa.eu/juris/showPdf.jsf?text=&docid=48782&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&cid=1253536

- In the Gasser case, this case had some changes in the Brussels I regulation , the new rule is article 31(2) regarding lis pensens, were triggered in regards to when there is two cases on the same subject. For example if the parties agreed that the German courts will have jurisdiction, but for some reason the case was opened in front of the Maltese courts, the Maltese court will have to keep on listening to this case until either the judge notices that there is a jurisdiction clause or until it is raised but one of the parties, normally the defendant. Here the Maltese court will first state that it does not have any jurisdiction and the case will be opened in the German courts where there is the jurisdiction clause.
- So this jurisdiction regulates what happens when the case is opened in front of another court even though there is a jurisdiction clause. It has to be continued from the first court which was seized, if this court says that it does not have jurisdiction in terms of the agreement it will stop and a case will be opened in the other court which was chosen in the jurisdiction clause.
  - Voluntary submission (Article 26)
  - This provision deals with submission to jurisdiction.
  - It state 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.
  - If one contests the merits and appears before the court, that court will have jurisdiction as one’s submission will give that court jurisdiction even if it did not actually have jurisdiction.

- In order to not submit to the particular jurisdiction, one must start by pleading lack of jurisdiction and raise a defence on the merits.

- Article 26, article 25 rajna prerogative jurisdiction, in comparison to Article 25 there is no choice this time. It has to be one of the court of the 27 MS. So here one made a case where it can be made not as a plaintiff in the court where it was supposed to be done that has jurisdiction but the defendant still showed up and answered to the case.

- The defendant therefore did not raise a preliminary plea that the court is wrong since it does not have jurisdiction, therefore the case would start on the merits. Here there would be a voluntary submission.

- This does not apply if the defendant showed up where he is raising a preliminary plea that the court does not have jurisdiction. In this case there would not be voluntary submission.

  - Rohr Case and Pierre Jacqmain case

  - Court held that if one contests jurisdiction of the court, one can raise a defence on the merits without losing the right to raising as objection to lack of jurisdiction.

  - However, one must first raise the plea of lack of jurisdiction.

  - The Court made it clear that the challenge to the jurisdiction cannot be made after the making of submissions (ie making plea of the merits).

  - http://curia.Europa.eu/juris/showPdg.jsf?text=&docid=91264&pageIndex=0&doclang=en&mode=first&part=1&cid=1253569

- In the case of Rohr, the defendant received the case, he made the reply, he made preliminary plea including that there is no jurisdiction and he also made points on the merits of the case. The fact that he answered the case and therefore he made a reply in the merits and also a preliminary plea on jurisdiction, it does not mean it is a voluntary submission. He is still arguing the plea of jurisdiction.

- This court decided that the plea of jurisdiction has to be raised in the first stage of the case because the case enters in the stage of the merits, otherwise it is deemed to be accepted. This has to be raised as a preliminary plea because if the court finds that there is no jurisdiction, it will give a sentence on this and stop there, it will not waste time on the merits.

  - Art 26(2) contains a rule as the weaker parties are concerned. Whilst Art 26(1) has grave consequences to submission of jurisdiction, (2) tries to help the

weaker parties by making the court inform the weaker parties of their rights and ask whether they wish to continue submitting to the case or raise the plea of lack of jurisdiction.

- Article 26(2) has a rule in defence of the weaker parties.
  - Article 26.
  - **26**. 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.
  - 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.
- Since shall is used it is mandatory. The court is obliged that where there are issues which relate to the consumer and where he did not raise the plea of jurisdiction, the court is obliged to tell the consumer that there is an issue of jurisdiction.
  - Article 27
  - Art 27 states Where a court of a Member State is seized 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
  - Even though the defendant may have subjected to the jurisdiction of the court, if the case falls under Art 24 (on exclusive jurisdiction), the court has to declare itself that it has no jurisdiction to hear the case.
- Article 27, there are circumstances in Article 24 where there is exclusive jurisdiction and therefore the court tells the person which court has jurisdiction. If the defendant still submits himself to the court, the court itself has to inform the defendant that it does not have jurisdiction since it is a case of exclusive jurisdiction which emerges out of the law, article 24.
  - Article 28 - Contumacious

- Art 28 states Where a defendant domiciled in one Member state is sued in a court of another Member state and does not enter on 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.

- It deals with a situation where the defendant is contumacious, that he has been notified with the claim but has not filed a reply.

- If the defendant does not appear, and the court sees that it does no have jurisdiction, since the defendant is contumacious, the court shall declare of its own motion that it has no jurisdiction.

- Meta xi hadd ma jwigibx ghall kawza. He is contumacious because he was notified and he did not answer. He would not have filed a reply within the twenty days as established by the COCP. If the court notices that it does not have jurisdiction, the court on its own motion shall declare that it has no jurisdiction.

  - When defendant is not yet notified

  - Furthermore, 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.

  - If the court sees that the defendant has not yet been notified, then the court must wait before taking any decision.

- The causa will not continue before there is notification to the defendant.

  - Lis pendens

  - This section was included in order to facilitate the free movement of judgements, and to avoid having incompatible judgements.

  - This applies where the same case is instituted in two different courts and the Regulation wants to make sure that courts do not come to different conclusions of the same case.

- Il-kuncett tal-lis pendens, lis is lawsuit. This is when there are other proceedings which are pending in another court. This principle was established in order to avoid incompatible judgments across the Member States. This is the case where the same case is being heard from two courts in Member States which are different.

- Art 29 Lis Alibi Pendens
- 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.
- The second court must seize proceedings until the first court decides whether it has jurisdiction to hear the case itself.

- Article 29, here is the same cause of action therefore the same subject. If there are two cases which are opened in two Member States on the same subject and between the same parties, the first court seized will hear the case. If the court seized will state that it does not have jurisdiction then the case can be continued in front of the court of the other Member State. But they cannot happen at the same time, one of the court has to stay proceedings, in this case it will be the second court.
  - If the 1st court decides it has jurisdiction, the 2nd court must decline its own jurisdiction.
  - If however the first court sees that it does not have jurisdiction, then the 2nd court may continue hearing the case if it has jurisdiction itself.
  - However one exception to Art 29 is Art 31(2) which is a new rule introduced in the Recast Regulation.
- We have an exception to article 29 which is article 31(2).
  - Art 31(2)
  - Art 31(2) was created after the Gasser judgement, which involved a choice of court agreement whereby the parties decided that the Austrian courts had jurisdiction.
  - Notwithstanding the choice of courts of Austria, one of the parties brought proceedings in the Italian courts, The court state that the Austrian court, which was the 2nd court seized, must wait for the Italian court to decide whether it has jurisdiction, even though it was the choice of court under the agreement.
  - Therefore the rule of lis pendens also applies in that situation. This lead to criticism since Art 29 frustrated choice of court Agreements. This is why Art 31(2) was created which is an exception to Art 29.

- Article 31(2) has been introduced in the Brussels Recast as a result of the Gasser case. The Gasser case involved a choice of courts where the parties choose the Austrian courts and despite this choice of court, one of the parties filed proceedings in the Italian courts. The court in this case the Italian court said that the Austrian court, which was seized second had to wait until the Italian court decided on jurisdiction even though the choice of court was Austria. Since the Italian court was first seized they had to wait until the Italian court pronounced itself that it had no jurisdiction.
    - It states; 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.
    - So it reverses the rule in Art 29 and give priority to the court chosen under the jurisdiction agreement, even if it is seized 2nd.
    - The first court must wait until the court under the jurisdiction agreement decided if it has jurisdiction.
    - Once it decided that it has jurisdiction, any other court must decline jurisdiction.
    - http://curia.Europa.eu/juris/shotPdf.jsf?text=&docid=48782&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&cid=1253536
- Here there is a reversal of the rule found in Article 29 and in this case priority is given to the court which has jurisdiction in terms of the jurisdiction clause in the contract, even though it is seized second.
    - However Art 31(2) does not apply where the claimant is the insured, consumer or employee and where the agreement is not valid under the rules on those sections.
    - Choice of court agreements cannot be entered into to deprive the weaker party of the protection given to him by the Regulation.
- Here one finds an exclusion, article 31(2) where the claimant is the weaker party, based on the principle that choice of court agreements cannot be entered into to deprive the weaker party of the protection given to him by the Regulation.
    - Furthermore, Art 29(2) where the court seized of a dispute may ask the other court to inform it of the date when it was seized. The date when the court is

seized is determined in Art 32(a) which states For the purpose of this Section, a court shall be deemed to be seized:

- (a) At the time when the document instituting the proceedings or an equivalent document is lodged which the court, provided that that claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; or – the court is deemed to be seized at the time when the document to institute proceedings is lodged with the court i.e the date when the sworn application is filed.

- The date is important as priority is given to the court who was seized first.

- Article 29(2), establishes another principle. Here a court can ask the other court when it was seized as to be able to determine which court was first seized.

  - 32 1(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.

  - This refers to other countries where first one needs to effect service before lodging an application in court.

  - This does not apply to Malta.

- Article 32(1)(b) provides another circumstance ,which does not apply to Malta since we do not have this system of procedure. There are counties where before a case is made, one has to do a service. This can be compared to when one has to make a case against the government or department of the government where one would have to send an official letter. This does not apply in front of the Land Arbitration Board.

  - The same cause of action

  - COJ has held that the notion of lis alibi pendens must be given an autonomous interpretation.

  - The question is whether the notion applies solely for the same causes of action.

  - Gubisch case: one party sued for performance of a contract whilst the other party sued for recission of the contract, ie they were 2 different actions for the same case. The court held that both actions referred to the same cause of action.

- The action for rescission could be regarded as a defence to the first action, so the 2nd case involved a claim which was similar to a defence to the action of the other case.

- Thus it was covered by the notion of the lis alibi pendent.

- http://curia.Europa.eu/juris/showPdf.jsf?text=&docid=94798&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&cid=1253683

- Autonomous interpretation is an interpretation which is given in terms of the regulation not in terms of domestic law of any one of the MSs.

- In the Gubisch case, there was two different actions for the same case and the court held that both actions referred to the same cause of action; one was for specific performance of the contract and the other to stop the contract. Here there is the application of the principle of lis pendence since it is the same subject taken from a different view point and they are the same parties which are involved so you have the lis pendence.

  - Tatry case: it does not matter if the party is a plaintiff in one case but a defendant in another case as long as they both have the same object.

  - https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61992CJ0406&from=EN

- In the Tatry case, the court decided that as long as there is the same object of the lawsuit, they are deemed to be the same so only one court can have jurisdiction.

  - Overseas Union insurance case: court held that the court seized second is not entitled to investigate whether the court seized first was entitled in concluding that it had jurisdiction .

  - The regulation is based on a system of trust and thus the court seized 2nd cannot make such an investigation.

  - https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61989CJ0351_SUM&from=DA

- In the Overseas Union Insurance Case, there was another principle which was established. Once the first court seized has decided that it has jurisdiction, the issue cannot be raised in the second court that the first court did not have jurisdiction and could not make such an investigation.

30th March 2023

Lecture 7.

- Let’s continue on what we did last week.
    - Turner case: the question was could the anti-suiting injunction (order issued by a court or arbitral tribunal that prevents an opposing party from commencing a continuing a proceeding in another jurisdiction) be used when proceedings are brought in the wrong Member State?
    - The court did not allow it.
    - http://curis.Europa.eu/juris/showPdf.jsf?text=&docid=49081&pageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&cid=1253762

- In the Turner case, the court said that in terms of the regulation this is not allowed because the proceedings where filed in their own court.
    - Related actions (cases)
    - Art 30 deals with related actions. Ie actions which fall within the scope of Art 29 but they are related to each other.
    - In this provision, the 2nd court may stay proceedings as the proceedings are not identical but they are just related.
    - It state For the purposes of the Article actions are deemed to be related where they are so closely connected that it is expendent to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.
    - Article 30.
    - **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.

- These are actions which fall within the remit of Article 29 but they are related to each other. In this case the court may stay proceedings as the proceedings are

not identical but they are just related. Point three can also occur at a national level. When the cases have the same merit but have different parties, normally the parties ask to be heard together, therefore they will be in front of one judge, but the cases will not be combined. Normally this would be the judge which would have started to listen to the first one. So the second judge will pass a digriet so that the case will be heard by the first judge.

- Therefore unlike Art 29 where the 2nd court must stay proceedings under Article 30, the 2nd court has a choice whether to stay proceedings or not.

- In the Tatry case, court held that the concept of related actions must be interpreted widely to cover all cases of conflicting decisions even if the actions are related but not necessarily irreconcilable.

- This case was on a ship owner carrying cardo, the cardo was damaged, and different persons sued the owner in various member states. It was the cargo of separate persons but the facts were the same. The court held that these were related actions.

- https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61992CJ0406&from=EN

- In the Tatry case, the cargo was damaged on board the ship. The facts where the same as it was damage to cargo of different persons.

  - Art 30(2) Where the action in the court first seized is pending at first instance, any other court may also on the application of one of the parties declare jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

  - Therefore if the court first seized also has jurisdiction to hear the other cases, the court seized 2nd may decline jurisdiction in favour of the court first seized

- The first court seized of jurisdiction in a related lawsuit has also jurisdiction to hear the other cases, therefore the second court may decline jurisdiction. It make sense that if a case is related and is being heard by the court that this second case on the same object is to be heard from the first court which heard the first case, if it is permitted by the procedure of the country where it is heard.

- Normally in Malta there will be a rikors so there will be what is called as konnessjoni tal-azzjonijiet, so that the cases are heard together. The second court will send a decree where it will send the file to the first court, however the cases are separate.

- Art 33-34 – Proceedings pending before a third state court
- Prior to these provisions, England had similar rules called the forum non conveniens doctrine.
- According to the forum non conveniens, a national court may decline to exercise jurisdiction on the ground that a court in another state, which also has jurisdiction would objectively be a more appropriate suitable for the interest of all the parties and the ends of justice (Spiliada Mareteem Corporation case 1987).
- https://swarb.co.uk/spiliada-maritime-corporation-v-cansulex-ltd-the-spiliada-hl-1986/
- Article 33.
- **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.
- (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.
- (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.

- Article 34.

- **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.

• Before there was the Brussels Recast, the UK already had rule on the forum non conveniences, which is explained in point two. This was seen in the Spiliada case. What is this principle? If a court goes to hear a case and another court went

to hear the case on the same merit, normally that court must abstain until the case is decided by the First Court.

- Art 33 is similar to the doctrine of forum non conveniens but there is the idea that courts can decide to stay if there are ongoing proceedings in a 3rd state.
- It is not identical to the English notion but similar.
- Recital 23 refers to this provision, stating it is a flexible mechanism when dealing with 3rd states.
- Art 33(1) Where jurisdiction is based on Article 4 or on Article 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 seized 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:

- Issa, similar to the principle, the UK principle of forum non convenient huwa article 33 tar-regulation, tar-recast, but there is the idea that courts can decide to stay if there are ongoing proceedings in the third state.
- Article 33(1) says where jurisdiction is based on article 4, or on article 7, 8 or 9 and proceedings are pending before in a court of a third state, at the time where a court too is a member state is seized of an action involving the same cause of action. The court of the member state may state the proceedings if it is excepted that that court will give a judgement capable of recognition in that third state.
  - (a) it is expected that the court of the third State will give a judgement 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.
- If there is a case which started in front of a court of a third state, therefore not a court of the EU such as that stated in Article 27, has the same object and has the same persons, and the next case started in a court of a MS, the court of the MS may stay the proceedings.
  - Therefore if there are pending proceedings in a 3rd state, the court of the Member State may stay if it believes that the 3rd court will deliver a proper decision capable of recognition and capable of delivering administration of justice.

- If the court of a Member State was the first court where the proceedings were still brought, then Art 33 does not apply.
- Art 33(2) Furthermore, it is up to the court to decide whether to stay or not. The court may continue to hear the case 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.

- So under (a) if there is a sentence from a court in Morocco which is enforced in Malta and can make an appeal in the first court to recognise and enforce this sentence. The circumstance under (b) allows for discretion on the court of the MSs. The stay is when the proceedings are stopped. The second circumstance therefore it is referring to the fact that it is better that the case is heard by that court, probably there will be more connecting factors with that country, such as the people are there, the subject of the case or the contract are there etc. So in this case the court decides that it would be better that this case is heard in the court of this third country.
- Here there is the use of the word may therefore it is not mandatory. The court of the Member State has the right to choice whether it stays proceedings or otherwise.
- If it is the other-way round, and this case was started in a court of the Member State, then the court of the MS will hear it not the court of the third state.
- Article 33(2) uses may as well, therefore it is not mandatory. Under (a) the court may decided to continue hearing the case if the court of the third state makes a stay of proceedings. Under (b) the court of the MS has to see that the cases under the third state will not end, it may choose to keep hearing the case. Under (c) is where the MS court sees that due to the nature of the cases presented, it is pertinent that it hears this case in the interest of justice.
  - Art 33(3) – Moreover, if the 3rd state has decided the case and the judgement is capable of enforcement, then the court must dismiss the proceedings.
  - Art 34 deals with related actions. It provides the exact rules as Art 33 however dealing with related actions.

- Article 33(3), If the case in front of the third state has been concluded and therefore there is a sentence which can be enforced, the court of the Member State has to stop proceedings by force as you have a judgement which is res juudicata by the court.
- Article 34 deals with related actions.
  - Art 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.
  - The COCP allows the plaintiff to file a precautionary warrant intended to freeze the assets of the defendant so that when the court decided the case, there will be assets to enforce the judgement.
- What are provisional protective measures? Such as a precautionary garnishee order.
- When there is a case one can such a garnishee order to freeze the money until the case will be finished. Every country has its own protective measures. Even if the case is being heard from another courts if one, for example knows that he has money in Malta, the one can make this precautionary garnishee order in Malta not in the country where the case is being hear and he has no money there. Therefore the protective measure can be made where one thinks that the debtor has money, it does not have to be made in the country where the case is being heard.
  - In cross border cases, where there are assets in a foreign country, even though the courts of another number state have jurisdiction on the substance of the matter, an application can be made in the court of the place where the assets are found to safeguard such assets.
  - Ex case is opened in Malta ie Malta has jurisdiction but the assets are located in France.
  - The plaintiff may issue a precautionary warrant in France to freeze those assets.
  - Protective measure are defined as measures which do not conclude issues between the parties, they are of a provisional measure.
- The precautionary warrant in France is made until the court is finished with the case in Malta. When there is a precautionary warrant the money will be in the court and so the other party does not take the money. What he can do instead of

a mandate is to make a guarantee for a particular amount such as that of ten thousand and ask the court to then, support him with a counter mandate. In this way, he can be rest assured that he has a guarantee deposited in a court register.

- If a mandate is frivolous against a debtor, one can be found liable to an amount of six thousand euros as a penalty.

  - Brussels I

  - Recognition and enforcement of foreign judgements

- L-ahhar parti tal-brussels regulation li titkellem fuq recognition and enforcement of foreign judgments. Chapter three tar-regulation.

  - Brussels I Regulation applies in cases of recognition and enforcement of judgements from the EU, whilst judgments coming from third states are regulated by the COCP, which also applies to European judgments which do not fall within the Brussels Regulation.

  - Recognition means treating a claim which was adjudicated as being determined once and for all, ie a res judicata.

  - Article 36.

  - **36**. (1) A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

  - (2) Any interested party may, in accordance with the procedure provided for in Subsection 2 of Section 3, apply for a decision that there are no grounds for refusal of recognition as referred to in Article 45.

  - (3) If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of refusal of recognition, that court shall have jurisdiction over that question.

- A sentence given by a domestic court in one MS can be recognised in another Member State court, this can also be done automatically. Normally there would be an official letter to the debtor where one would inform him that there is a sentence in a specified country, you ask him to pay and if he does not pay, the judgment will become recognised and enforced.

- What is the effect of a judgment becoming recognised and enforced? By doing so, one would be able to put a sekwestru ezekuttiv for the amount which is requested by the sentence, jew subbasta, jew mandat.

- For there to be recognition, one would need to bring an original sentence from the court. So if the case was in the court of Milan one would need to bring an authentic sentence from the court register of Milan and also fill in ‘Annex 1’ of the Brussels Recast Regulation.
- This includes which order, the name of the court, the name of judge, the amount awarded etc. The certificate and the sentence are entered in the court register, they are seen by a judge (normally tal-ghassa) and he issues a decree that the sentence is enforceable in Malta.
- What can a defendant who has a judgment against him do against the enforcement which is being done? In this case one has to see Article 45 where there are five instances where a defendant can make a rikors/kawza.
- These grounds are for the refusal of recognition. One of such is on the basis of public policy such as the rate of the interest if not in line with Maltese law or he was never notified of the sentence in Milan therefore he could not answer for that case.
- Before the Brussels Recast, in the old regulation the plaintiff used to make an application (rikors) in the court. Under this new regulation there is no need to make an application (rikors) but can simply make an official letter. However it still happens that certain lawyers draw an application (rikors).
    - For such examples one can see the cases in VLE.
- The idea behind Brussels Recast was not to waste time making a application (rikors) where there would be the need of hearing the case and it taking longer.
- This applies from a domestic point of view in terms of recognition and enforcement. Recognition of judgments coming from third counties are regulated by the COCP not by the Brussels Regulation. The COCP applies also the judgments which are European in nature but do no fall under the Brussels Regulation which is shown in the previous. So all the judgments which are not in a domestic court of the EU, one has to refer to the COCP.
- In relation to the second bullet, recognition means treating a claim which was adjudicated as being once and for all a res judicata. Res judicata means to the final judgment, this is the case after appeal or immediately res judicata if it was not appealed.
    - Recognition has 2 purposes:
    - It can either allow the claimant to enforce the judgement, or else

- For the defendant to impede an action brought by the claimant in Malta.

- So under the second purpose the defendant can oppose the decision taken by the other court (for example, the court of Milan), there are five grounds.

  - The Regulation further provides that a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

  - The regulation provides for two forms, namely:

  - 1)The certificate concerning a judgment, and

  - 2)The certificate concerning an authentic instrument/court settlement.

- There is no special procedure because the Brussels Recast provides for ease of enforcement and recognition. Therefore it removed a lot of formalities. A judicial letter is used even when to enforce a constitution of debt agreement. One can send a judicial letter to the debtor where one would inform the debtor that time has passed and that he did not pay, so the constitution of debt agreement becomes a sentence once one enforces the judicial letter. It is important that there is notification.

- The second point refers to the formalities which the regulation provides, there are two forms. The certificate concerning a judgment is certificate found in Annex 1 in the regulation. This has to be filled in from the court of origin (the court which gave the sentence). The certificate concerning an authentic instrument is the copy of the original sentence. This can be either an authentic instrument or a court settlement (transazzjoni jew compromise). The compromise would a document similar to a contract where there would be the amount to be given is written etc. This is an authentic instrument, or a court settlement.

- So after the decree which was given by the judge and now one will proceed to enforcement.

  - Once the judgement is recognised, one may proceed to enforce the judgment.

  - However a number of changes were made through the Brussels I recast regulation.

  - Under the old law, there was an intermediate step which was considered to be an obstacle to the free movement of judgements, and one of the purposes of the new Regulation was to remove such intermediate step and to facilitate the free movement of judgements.

- It is important there is always a civil or commercial matter for the judgment to be recognised and enforced. One is going to recognise the judgment for there to be enforcement. It useless recognising a judgment alone, it is necessary so that eventually one will file the mandates to execute the sentence.
  - The judgement must be on claim in a civil and commercial matter.
  - Once the judgement is one on a claim which is a civil or commercial matter, it is irrelevant whether the judgement is taken against someone who is not domiciled in an EU MS.
  - What matter is that the judgement is given from an EU MS court.
  - It is also irrelevant as a general rule that the court was wrong in assuming jurisdiction, however there are certain exceptions.
  - Under the Regulation, judgement means any judgement given by a court or tribunal of a Member State, whatever the judgement 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.
  - It also includes provisional measures etc.
- It can include decision on the tax of the court. Provisional measures are interim measures. What are courts are regulated by the procedural law of the Member States, therefore it falls on the national law.
  - Av. Hugh Peralta nom v Zet limited related to whether a particular action fell under the term judgement of the regulation and the court held that decreto inguntivo did fall under the term judgement.
  - Hoffman – provisional measures should be given the same effect as a judgement in the state of origin. However the obligation to recognise the foreign judgement must be recognised within the scope of the Regulation.
  - Peralta:
  - https://ecourts.goc.mt/onlineservices/Judgements/Details?JudgementId-0&CaseJudgementID=65529
  - Hoffman
  - http://curis.Europa.eu/juris/showPdf.jsf?text=&docid=89251&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=1254495

- To be recognised, the judgement must not be impeachable for jurisdictional error.

- It is irrelevant whether the court got it wrong on the issue of jurisdiction, however there are certain exceptions where it is possible to raise the defence that the court which gave judgement breached a rule of jurisdiction.

- In the case of Hugh Peralta, this is one of the cases where there where issues as to see if this case falls under the regulation or not. This case not recognised as a judgment.

- The Hoffman case, mentioned provisional measures. An example of provisional measures can be for example the provisional measure of maintenance which is given until the judgment is finalised.

  - Non-enforcement

  - Art 45(e) states that recognition shall be refused of the judgement 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.

  - The former refers to consumer, employment and insurance contracts, whilst the latter considers exclusive jurisdiction and if there is a breach of any of such provisions, then the court may refuse recognition of the judgement.

- If the judgment which is going to be enforced has a mistake in jurisdiction, it cannot be enforced. If one is going to try and recognise and enforce a foreign judgment, the defendant can raise on of the oppositions, therefore he can plead that the court did not have jurisdiction in terms of the regulation.

  - Non-enforcement

  - The judgement must not be impeachable for procedural or substantive reasons in order for the judgement to be enforced.

  - However these exceptions are limited, Art 45(a) states that recognition shall be refused if:

  - Such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed; public policy depends on the interpretation by the national court.

  - <u>Article 45</u>

- **45**. (1) 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;
- (b) 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;
- (c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;
- (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; or
- (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.
- (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.
- (4) The application for refusal of recognition shall be made in accordance with the procedures provided for in Subsection 2 and, where appropriate, Section 4.

• Sections 3, 4 or 5 are the sections where the consumer, the insured the employee are the weaker party. So when there is a breach of jurisdiction in terms of these categories, the defendant can raise this issue and state that is opposing the recognition and enforcement. The defendant will draw an application (rikors) and will oppose on certain grounds.

- The area of recognition and enforcement of foreign judgment are being present in courts more frequently recently. Article 45(1)(a) (recognition and enforcement of judgements is important) is the second head of opposition. Here the judgment would be something which goes against the public policy of Malta, so the judgment would be unenforceable since it cannot be recognised.
  - Public Policy
  - The ECJ has given guidance on what is meant by public policy.
  - In the Krombach case, recourse to public policy may only be envisaged where the judgement infringes a fundamental principle of that legal order eg breach of the right to a fair hearing.
  - However not every rule of Maltese law which is different from a foreign law means that there is a breach of public policy.
- What is public policy has to be seen on a case by case basis and it is to be given an autonomous interpretation in terms of the regulation. One case is that of Krombach case.
  - a) In the Maxicar spa case, court held that Art 45 can only be applied if there is a manifest breach of the rule of law which is essential in the legal order of a state. Moreover, one cannot reopen the facts of the case and make legal arguments on the merits which were already made or addressed before the court which gave judgement.
  - Krombach: https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF?uri=CELEX:61998CJ0007&from=EN
  - Maxicar: https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF?uri=CELEX:61998CJ0038&from=EN
- In the Maxicar spa case, (article 45 are the grounds fejn id-defendant li qed jistenna l-judgement jista jimponi) there was an important observation which was made, that one cannot reopen the facts of the case in the procedure of recognition and enforcement.
  - Art. 45 1(b)
  - 45 1(b) where the judgement 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 judgement when it was possible for him to do so.

- The third ground relates to the lack of notification and therefore the lack of appearance, this applies also if the defendant did get notified but it is so close that he does not have time to make a reply. If this is the case that there is not enough time, the defendant has to make a challenge in the court that he got notified late and that he needs an extension of time to make a reply. If he does not do so, when there is the judgment he cannot oppose the judgment on this basis.
  - This is the case where the defendant was contumacious and did not file a statement of defence as he was not notified.
  - In such case, the defendant may oppose recognition and enforcement of the judgement.
  - The defendant may also oppose the judgement where he did not have sufficient time to make his defence.
  - However the Regulation provides an exception where the defendant had a remedy to utilise but did not exercise that remedy, then this provision does not apply.
  - The notion of a judgement being given in default of appearance should be given an autonomous interpretation.
- If he does nothing in terms of the above situation then he cannot oppose the recognition and enforcement. The autonomous interpretation should be given in terms of the regulation of EU law.
  - Hendrickmann judgement (1966), the defendants did not take part in the proceedings however there were lawyers who filed a defence without consent of the defendants, thus the defendants were never really notified of the case. The court accepted the defendants 'claim.
  - Klomps case (1981) the court held that the Regulation still requires the court to examine whether there was sufficient time for the defendant to make his case.
  - Pendi(1982), the court held that the provisions of the Regulation ensure the defendant's rights are upheld.
  - Hendrickmann: https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF?uri=CELEX:61995CJ0078&from=EN

- Klomps: https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF?uri=CELEX:61980CJ0166&from=DE

- The Hendrickmann case, there was no consent between the defendants. The court accepted that this sentence cannot be recognised as they did not give the advocates consent to make the reply in their name.

- In the Klomps case, the court confirmed that even though he was notified, the defendant should have reasonable time to make a reply. This is important especially when there is a foreign case.

- In the Pendi case, the court confirmed that there are these five circumstances for the defendant to oppose the recognition. 45(1)(c) if the judgements is irreconcilable with a judgement given between the same parties in the Member State addressed; if there are conflicting judgements, there may be refusal of recognition.

  - However there should never be a situation of conflicting judgements as the Regulation regulates this position in order to prevent any such situation.

  - In the Gubisch case a judgement that a contract was lawful is irreconcilable that damages should be paid for its breach.

  - http://curia.Europa.eu/juris/showPdf.jsf?text=&docid=94798&PageIndex=0&doclang=en&mode=1st&dir=&occ=first&part=1&cid=1254985

- Another ground where the defendant can oppose recognition is found in (c). Where there is already a judgment which gives rise to conflicting judgments, then the defendant can ask for the non-recognition of the decision as there already is a prior judgment which will cause conflict with this judgment. This situation is not supposed to arise since the regulation provides that as much as possible there is no concurrent judgments.

- In the Gubish case, it was stated that if there is already a sentence on a contract, one cannot oppose on the basis of damages.

  - Art 45 (1)(d)

  - 45 (1)(d) if the judgement is irreconcilable with an earlier judgement given in another Member State or in a third State involving the same … of action and between the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in the Member States addressed.

- One cannot raise issues at the recognition stage which could have been raised in the court which gave judgement.

- Art 45(3) – without prejudice to point (e) of paragraph 1. the jurisdiction of the court of origin may bot be reviewed. The test of public policy referred to in point (a) of paragraph I may not be applied to the rules relating to jurisdiction

- Moreover, Art 45(2) – In its examination of the ground of jurisdiction refereed to in point (e) of paragraph I, 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.

- If one opposes a sentence, one cannot raise new issues which have not been raised in the court which gave judgment. If one realises that they did not file all the claims, one can ask the court to add another claim but the judge will state that this claim has to be notified to the defendant and he will likely oppose.

- If one is going to oppose, one cannot raise issues which have already been decided as it is not an opposition based on the review of the judgment.

  - Procedure

  - Art 39 states a judgement 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, which was brought through the 2012 amendment, so there is no need to obtain any declaration of enforceability mentioned under the previous law.

  - Moreover under Art 40, the Procedure for the enforcement of judgements given in another Member State shall be governed by the law of the Member State addressed. A judgement given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgement given in the Member State addressed.

- 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.

- 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.

- Article 40 states that if one is going to make an enforcement of a judgment which was brought from the court of Milan, and it is going to enforced in Malta, one will use the procedure of Malta.
- The procedure which is used is that of the country where the judgment is going to be enforced. One is going to use the same tools of enforcement as if one is going to execute a national judgment.
    - For the purposes of enforcement, the applicant must produce a copy of the judgment and certificate issued by the court and file a judicial letter.
    - Under Art 46, the defendant who receives the judicial letter for enforcement of the judgement can then raise defences as aforementioned.
    - Art 46 states On the application of the person against whom enforcement is sought, the enforcement of a judgement shall be refused where one of the grounds referred to in Article 45 is found to exist.
    - Art 41(2) states Notwithstanding paragraph 1, the ground for refusal or of suspension of enforcement under the law of the Member State addressed shall apply in so far as they are not incompatible with the grounds referred to in Article 45.
    - Article 46.
    - **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.
    - Article 41.
    - **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.
    - (2) Notwithstanding paragraph 1, the grounds for refusal or of suspension of enforcement under the law of the Member State addressed shall apply in so far as they are not incompatible with the grounds referred to in Article 45.
    - (3) The party seeking the enforcement of a judgment given in another Member State shall not be required to have a postal address in the Member State

addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.

- For the purposes of enforcement, the applicant must produce a copy of the judgment and certificate issued by the court and file a judicial letter, ha nibghatlu decizjoni u se ninforza, u d-defendent jista jaghmel id-defences li semmejna.
- Jekk id-defendant he manages to prove one of the grounds of opposition hemmhekk jirnexxielu.

18th April 2023

Lecture 8.

- Ha nergaw nirrepetu l-ahhar lecture u recognition and enforcement of foreign judgements important. We will conclude the recast today with this item. Then we will have lectures on Rome I and Rome II and we can conclude.
  - Brussels I
  - Recognition and enforcement of foreign judgements
  - Brussels I Regulation applies in cases of recognition and enforcement of judgements from the EU, whilst judgements coming from third states are regulated by the COCP. Which also applies to European judgements which do not fall within the Brussels Regulation
  - Recognition means treating a claim which was adjudicated as being determined once and for all, ie a res judicata.
- The first bullet is a very important principle, the regulation applies only in cases of recognition/enforcement of judgements from EU Member States courts.
- On the other hand, in the case of judgments which are delivered by courts of third counties, then we have to apply COCP procedure. The COCP procedure also applies to to judgments which do not fall within the Brussels Regulation. The Brussels Regulation applies only to civil and commercial matters, so any other judgment on any other issue which is not civil or commercial has to be looked into through the rules of the COCP.
- Another important principle is that when speaking of recognition, the judgment would be a res judicata either through an appeal or because the time for the filing of the appeal has expired and no appeal has been filed and therefore the matter is res judicata

- Recognition has 2 purposes:
- It can either allow the claimant to enforce the judgement, or else
- For the defendant to impede an action brought by the claimant in Malta

- This is the aims of recognition. Under the first point, once there is recognition of a judgment in a Member States, then one can go to the enforcement part (this can include a garnishee order, a seizure order, judicial sale etc,). Here it will be one of the warrants to enforce a judgment.
- We are going to see through Article 45 one can see that the defendant in the case of a recognition and enforcement of foreign judgment can oppose the recognition on five different grounds.
  - Recognition articles 36-38
  - Art 36(1) “A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”
  - Art 37(1) “ A party wishes to invoke in a Member State a judgement given in another Member State shall produce:
  - (a) A copy of the judgement which satisfies the conditions necessary to establish its authenticity; and
  - (b) The certificate issued pursuant to Article 53”
  - The court/authority before which a judgement given in another MS is invoked may, where necessary, require the party invoking it to provide, in accordance with Article 57, a translation or a transliteration of the contents of the certificate.
- The recognition articles are Article 36 to Article 38. Article 36(1) is very clear and included the word shall, showing that it is mandatory. It shows that there is no need for any other special procedure, such as a procedure in court. There is only a very simple procedure where one obtains an authentic copy of the judgment, fill in ‘Annex 1’ of the Regulation and it is submitted to the court. Through this it is decreed that the judgment has been recognised and therefore it is enforceable.
  - Once the judgement is required, one may proceed to enforce the judgement.
  - However a number of changes were made through the Brussels 1 Recast Regulation.

- Under the old law, there was an intermediate step which was considered to be an obstacle to the free movement of judgements, and one of the purposes of the new Regulation was to remove such intermediate step and to facilitate the free movement of judgement.

- These are the requisites for recognition;
- A copy of the judgment which is a legal copy issued by the court registry which has delivered the judgment, such as the court in Rome.
- Then one has to fill in the certificate which is marked as ‘Annex 1’ with the directive, whereby one would have to provide information on the court of origin, for instance, the claimant, the address of the claimant, the defendant, his particulars, the date of the judgment.
- There may also be a need that one also provides a translation of the judgment. This is usually asked for when the judgment is in a language which the court does not understand you have also to provide a translation.
  - The judgement must be on a claim in a civil and commercial matter.
  - Once the judgment is one on a claim which is a civil or commercial matter, it is irrelevant whether the judgement is taken against someone who is not domiciled in an EU MS.
  - What matters is that the judgement is given from an EU MS court.
  - It is also irrelevant as a general rule that the court was wrong in assuming jurisdiction, however there are certain exceptions.
  - Definition of judgement
  - Under the Regulation, judgement means any judgement given by a court or tribunal of a Member State, whatever the judgement 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. Art 2(a)
  - It also includes provisional measures etc.
- Once the judgment has been recognised, and a decree has been issued by the Maltese courts that the judgment has been recognised as they requisites have been satisfied, then on the strength of this recognition one can file a garnishee order for instance. As one knows a garnishee order (sekwestru) needs to have an executive title. The title in this case would be the recognition of this judgment otherwise it will be out of the remits of the recast.

- Once it is established that the judgment is on a civil and commercial matter, it is irrelevant that the judgment is taken on a person who is not domiciled in an EU Member State. What matters is that the judgment has been issued by a court in a Member State. At this stage of recognition, one does not discuss jurisdiction or domicile.

- There may be cases where the court assumed the wrong jurisdiction however there are certain exceptions.

- What is a judgement? Have a look at article 2(a), the judgment is to be an EU Member State, not of a third state. It does not matter what the judgment is called, the above examples all fall within the parameters of a judgment and therefore they can be recognised and eventually also enforced. This also includes provisional judgments, judgements of a provisional nature such as maintenance pendente lite.

  - Av. Hugh Peralta nom v Zet limited related to whether a particular action fell under the term judgement of the regulation and the court held that the decreto inguntivo did fall under the term judgement.

  - Hoffman – provisional measures should be given the same effect as a judgement in the state of origin, however the obligation to recognise the foreign judgement must be recognised within the scope of the regulation.

  - Peralta: https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=65529

  - Hoffman: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=89251&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=1254495

- In the case of Hugh Peralta, the court confirmed the that the term judgment is given a wide interpretation.

- In the Hoffman case, it established a point on provisional measures, should be given the same effect as a judgement in the state of origin, however the obligation to recognise the foreign judgement must be recognised within the scope of the regulation.

  - Art 38 The court of authority before which a judgement given in another Member State is invoked may suspend the proceedings, in whole or in part, if:

  - (a) The judgement is challenged in the Member State of origin; or

- (b) An application has been submitted for a decision that there are no grounds for refusal of recognition as referred on the basis of one of those grounds.

- Art 45 is the refusal of recognition.

- Article 38 speaks of two instances when one may ask for the suspension of proceedings. The first is when the judgment is challenged and the judgement has been pronounced, however it is being challenged in a court of the state of origin or in the case where an application has been submitted for a decision, that there are no grounds for refusal of recognition as referred on the basis of one of those grounds.

- Article 45 holds five circumstances where one can oppose to the refusal of recognition.

  - Enforcement

  - Art 39 – A judgement 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.

  - Art 40 – An enforceable judgement shall carry with it by operation of law the power to proceed to any protective measures which exists under the law of the Member State addressed.

- Article 39, ir-regolament se jitkellem fuq enforcement. If one has a judgment of a court which is from the court of Rome and it is to be enforced in Malta, one would need the copy of the original judgment and Annex 1. It went to a magistrate, it was correct and therefore a decree was issued. The recognition was done so that there is enforcement eventually. This would be done as the debtor for example has assets in this country.

- X'irrid naghmel biex naghmel enforcement? Article 39 states that nothing special needs to be done, once there is the decree that it is recognised one can go to the register of the court and make a mandate on the basis of this recognition. With the mandate the judgment would need to annexed with it.

- Article 40, Under Article 40 one can pass to any type of enforceability or protective measure which can be given by national law of the Member State where one is going to enforce.

  - Art 41(1) " –the procedure for the enforcement of judgements given in another Member state shall be governed by the law of the Member State addressed. A

judgement given in a Member State which is under the same conditions as a judgement given in the Member State addressed”

- The party seeking the enforcement of a judgement given in another Member State shall not be required to have a postal address in the Member State addressed. Nor shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the part.

- Il-procedura tal-enforcement, article 41, the procedure which is to apply is the procedure of the country in which the judgment is to be enforced. Therefore in Malta, the COCP will apply as if it where a judgment of a Maltese court. If a Maltese judgment is being enforced in Malta, one has to follow the procedure of Italy.

- The second part of this article it is specified that there is no need to have a postal address in the Member State addressed. Even if one does not have a postal address (therefore no presence), one can still enforce in another Member State.

  - Requisites for enforcement - Art 42

  - Applicant shall provide the competent enforcement authority with:

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

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

- Article 42, the requisites for enforcement are the same requisites of recognition. Once the judgment is recognised, the documentation is necessary as it is to be annexed with the mandate. The translation might be necessary here too.

  - Art 42(2) Enforcement of a judgement ordering provisional/protective measures

  - Application shall provide the competent enforcement authority with: (a) a copy of the judgement which satisfies the conditions necessary to establish its authenticity;

  - (b) The certificate issued pursuant to Article 53, containing a description of the measure and certifying that;

  - (i)The court has jurisdiction as to the substance of the matter;

- (ii)The judgement is enforceable in the Member State of origin; and
- (iii)Where the measure was ordered without the defendant being summoned to appear, proof of service of the judgement.

- Under point (iii), one would also need to bring proof that one tried to notify the defendant but he was absent (kontumaci) from attending for the proceedings.
  - Art 43(2)
  - Where the person against whom enforcement is sought is domiciled in a MS other than the Member State of origin, he may request a translation of the judgement in order to contest the enforcement of the judgement is not written in or accompanied by a translation into either of the following languages;
  - (a) a language which he understands; or
  - (b) the official language of the Member State in which he is domiciled or, where there are several official languages in that Member State, the official language or one of the official languages of the place where he is domiciled
- Article 43, the translation might be necessary so that the debtor, if he does not know the language, he would still have the possibility to contest such enforcement. The judgment has to be translated in a language which the defendant understands or the official language of the Member State in which he is domiciled.
- The law also specifies what happens when there are several official language, normally it is translated in the language that the defendant understands so that he does not raise an exception in the beginning stating that he is not understanding.
  - To be recognised, the judgement must not be impeachable for jurisdictional error.
  - It is irrelevant whether the court got it wrong on the issue of jurisdiction, however there are certain exceptions where it is possible to raise the defence that the court which gave judgement breached a rule of jurisdiction.
- To be recognised, the judgement must not be impeachable for jurisdictional error, where there are issues where the jurisdiction is exceptional and therefore has to be done by force according to the regulation, here one of the pleas which can be raised by the defendant is that issue of jurisdiction. Here one has to make reference to issues of exclusive jurisdiction which are found in article 24, public

registers, issue of maintenance etc. Here the court can find that this judgment is to be recognised.

- Refusal of recognition – Art 45
- On application of any interested party, the recognition of a judgement shall be refused:
- a) If such recognition is manifestly contrary to public policy in the MS addressed
- b) Where the judgement 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 judgement when it was possible for him to do so.

- Article 45, li semmejna fil-bidu, it holds the circumstances which the defendant can use to oppose the recognition and the eventual enforcement of a judgment.
- The first one would be public policy. For this he would make an application and there will be a sort of a case. He will know that one is trying to enforce the judgment as there will be notification given to the defendant. As soon as there is notification, he can oppose on the basis of public policy.
- The second would be on default of appearance (kontumaci). Defendant kien kontumaci. Mhux biss ma kienx notifikat, pero jista jkun kien notifikat hazin. Article 45(b) holds another proviso. This ground cannot be used if the defendant did not take the action to commence proceedings to ask for the court to extend the time. So there was a missed opportunity. So if the judgment is given at this point in time then the plaintiff may oppose that he had enough time to make an application (rikors) so that the courts extend the time for a response.

- Refusal of recognition – Art 45
- c) If the judgement is irreconcilable with a judgement given between the same parties in the Member State addressed.
- d) If the judgement is irreconcilable with an earlier judgement 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 judgement fulfils the conditions necessary for its recognition in the Member State addressed; or
- e) If the Judgement 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

- The third ground would be opposition. So here there are two irreconcilable judgments.
- In the fourth ground the emphasis on the irreconcilability with an earlier judgment which is given in another Member State or a third state instead of another case with the same parties.
- The fifth ground for opposition is found in sub-article (e).
- Sections 3, 4 or 5 are the ‘famous’ sections of the insurance, consumer contract, or employment contract where there is the issue of the weaker party.
  - Refusal of enforcement
  - Art 46 “ –On the application of the person against whom enforcement is sought, the enforcement of a judgement shall be refused where one of the grounds referred to in Article 45 is found to exist”.
  - i.e. Same grounds of non recognition.
  - Art 47(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.
  - In view of the principle of judicial autonomy of the MS
- When the defendant has received the document of enforceability (mandat) he has to make an application (rikors). So if I made a garnishee order, (sekwestru) in Malta and the defendant received the garnishee order (sekwestru), he can make an application (rikors) stating that he is opposing the mandate and on which basis. The court will then give a hearing. Of course, in this case the plaintiff would have to make a reply. So in this procedure, the plaintiff would become the defendant himself as he would be opposing.
- Where there is refusal of enforcement, there are the same grounds as those for non-recognition. So the grounds in Article 45 applies both for non-recognition and both for enforcement.
- Another provision on enforcement, article 47(2) has repetition that the procedure which is used, is the national procedure (the domestic law). Each Member State has judicial autonomy where its procedure is involved, there is no harmonisation at an EU level.

- Refusal of enforcement
- Art 47(3) – The applicant shall provide the court with a copy of the judgement and, where necessary, a translation or transliteration of it
- Art 47(4) The party seeking the refusal of enforcement of a judgement given in another Member State shall not be required to have a postal address in the Member State addressed. Not shall that party be required to have an authorised representative in the Member State addressed unless such a representative is mandatory irrespective of the nationality or the domicile of the parties.
- Art 48 – the court shall decide on the application for refusal of enforcement without delay.
- Art 49(1) The decision on the application for refusal of enforcement may be appealed against by either party.

- If there is refusal of enforcement, and one is making an application (rikors) to oppose the enforcement, the plaintiff would state that he has the authentic decision with the documents attached.
- Article 47(4) is seen as another circumstances under recognition. It states that there is no need to have a postal address unless he has a representative in the MS where the enforcement is being done.
- Article 48 states that in cases of refusal of enforcement the case has to be heard without delay. There could also be an appeal from the refusal of enforcement from both parties.
  - Refusal of enforcement
  - The judgement must not be impeachable for procedural or substantive reasons in order for the judgement to be enforced.
  - However these exceptions are limited, Art 45(a) states that recognition shall be refused if:
  - Such recognition is manifestly contrary to public policy (order public) in the Member State addressed; public policy depends on the interpretation by the national court.
- If the defendant was never notified for the case and there was a sentence and it was proved from the register of the courts that he was never notified from a marshal, this is a proof that there is a defect in the procedure as he never knew

about the case. Public policy depends on the interpretation by the national court, as it is the national court which will recognise and enforce that judgement

- Public Policy
- The ECJ has given guidance on what is meant by public policy.
- In the Krombach case, recourse to public policy may only be envisaged where the judgement infringes a fundamental principle of that legal order eg breach of the right to a fair hearing.
- However not every rule of Maltese law which is different from a foreign law means that there is a breach of public policy.

- The ECJ has given guidance on what is meant by public policy. An example could be the right to fair hearing, here there is an issue regarding public policy if the defendant did not have time to defend himself in the court which gives the judgment.
- Of course one has to see what is public policy of that specific Member State.
  - a) In the Mexicar spa case, court held that Art 45 can only be applied if there is a manifest breach of the rule of law which is essential in the legal order of a state. Moreover, on cannot reopen the facts of the case and make legal arguments on the merits which were already made or addressed before the court which gave judgement.
  - Krombach: https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61998CJ0007&from=EN
  - Maxicar: https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61998CJ0038&from=EN
- One cannot reopen the facts and open issues on the merits of the case as the judgment has already been taken.
  - Art. 45 1(b)
  - 45 1(b) where the judgement 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 judgement when it was possible for him to do so.

- This is the case where the defendant was contumacious and did not file a statement of defence as he was not notified.
- In such case, the defendant may oppose recognition and enforcement of the judgement.
- The defendant may also oppose the judgement where he did not have sufficient time to make his defence.
- However the Regulation provides an exception where the defendant had a remedy to utilise but did not exercise that remedy, then this provision does not apply.
- The notion of a judgement being given in default of appearance should be given an autonomous interpretation.
- Hendrickmann judgement (1996), the defendants did not take part in the proceedings however there were lawyers who filed a defence without consent of the defendants, thus the defendant s were never really notified of the case. The court accepted the defendants 'claim.
- Klomps case (1981) the court held that the Regulation still requires the court to examine whether there was sufficient time for the defendant to make his case.
- Pendi (1982), the court held the provisions of the Regulation ensure the defendant's rights are upheld.
- Hendrickmann: https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61995CJ0078&from=EN
- Klomps: https://eur-lex.Europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61980CJ0166&from=DE
- Art 45(1)(c)
- 45(1)(c) if the judgement is irreconcilable with a judgement given between the same parties in the Member State addressed: if there are conflicting judgements, there may be refusal of recognition.
- However there should never be a situation of conflicting judgements as the Regulation regulates this position in order to prevent any such situation.
- In the Gubisch case a judgement that a contract was lawful is irreconcilable that damages should be paid for its breach.

- https://curia.europa.eu/juris/showPdf.jsf?text=&docid=94798&pageIndex=0&doclang=EN&mode=1st&dir=&occ=first&part=1&cid=1254985

- Regarding conflicting judgements, in this case there can be a base of composition of the recognition.
- This ground is not supposed to be possible as in the regulation it states that there concurrent lawsuits, there should be a stay of the proceedings in one of the Member States. However, if it does occur then there can be an opposition on the basis of this article.
- In the Gubisch case, if one already has a sentence that a contract is valid and legal, there cannot be a sentence which is giving damages. If the contract is valid, there is no damages.
  - Art 45 (1)(d)
  - Art 45(1)(d) if the judgement is irreconcilable with an earlier judgement given in another Member State or in a third State involving the same course of action and between the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in the Member State addressed.
  - Art 45(e)
  - Art 45(e) states that recognition shall be refused if the judgement 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.
  - The former refers to consumer, employment and insurance contract, whilst the latter considers exclusive jurisdiction and if there is a breach of any of such provisions, then the court may refuse recognition of the judgement.
- This is the last circumstance, here the weaker party would not be sued in accordance with regulation and their exclusive jurisdiction. In fact section 6 is about exclusive jurisdiction where there is no other choice. In this case exclusive jurisdiction can be raise as the regulation itself would be specifying the jurisdiction.
  - One cannot raise issues at the recognition stage which could have been raised in the court which gave judgement.
  - Art 45(4) – 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.

- Moreover, Art 45(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.

- This is another important issue, if the defendant had an issue, he could have raised it in the court which gave the judgment. One is only asking for the recognition and enforcement here, one is not reopening the case. There cannot be the reopening of issues of fact. These are the five grounds of opposition granted to the defendant.

  - Procedure

  - Art 39 states A judgement 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, which was brought through the 2012 amendment, so there is no need to obtain any declaration of enforceability mentioned under the previous law.

  - Moreover under Art 40, the procedure for the enforcement of judgements given in another Member State shall be governed by the law of the Member State addressed. A judgement given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgement given in the Member State addressed

  - For the purpose of enforcement, the applicant must produce a copy of the judgement and certificate issued by the court and file a judicial letter.

  - Under Art 46, the defendant who receives the judicial letter for enforcement of the judgement can then raise defences as aforementioned.

  - Art 46 states on the application of the person against whom enforcement is sought, the enforcement of a judgement shall be refused where one of the grounds referred to in article 45 is found to exist.

  - Art 41(2) state Notwithstanding paragraph 1, the grounds for refusal or of suspension of enforcement under the law of the Member State addressed shall apply in so far as they are not incompatible with the grounds referred to in Article 45.

- To have enforceability of the judgment, there is no need for an additional procedure. Before the regulation before the recast required a declaration of enforceability which today does not exist. It is automatic.

- He must serve a judicial letter onto the defendant to inform him that now the judgment is being enforced. When the defendant is notified with the enforcement, he can make the opposition on the 5 grounds stated above.

  - Article 52 " –Under no circumstances may a judgement given in a Member State be reviewed as to its substance in the Member State addressed."

- Article 52, the procedure of recognition and enforcement it is not a type of appeal or a review. There can only be opposition on the 5 grounds or the grounds of jurisdiction is there was exclusive jurisdiction that did no occur as the regulated stated. Therefore the grounds of opposition are very restricted once there is a judgment.

  - AUTHENTIC INSTRUMENTS AND COURT SETTLEMENTS

  - Article 58(1) – An authentic instrument which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required.

  - Enforcement of the authentic instrument may be refused only if such enforcement is manifestly contrary to public policy (order public) in the Member State addressed

- Article 58, what is an authentic instrument? This would be for example a constitution of debt agreement. Here the parties would write a paper stating that the debt exists. It has to be done in front of the notary. If this debt is not payed, the instrument has to be enforced, however, here it is not a case but with an official letter. Once it is enforceable one can even make a mandate on the issue. So in this area, the regulation is speaking not only on the recognition and enforcement of foreign judgments but also on authentic instruments.

- Court settlement is where for example 'A' and 'B' have court proceedings, the advocates during the case agree they are gonna forfeit the case (icedu l-kawza).

- So this there needs to be a court settlement, therefore it is an agreement that they are gonna forfeit the case, what are the obligations of each party and there are no more pretensions and claims against each other. In other words there an agreement that acts like a sentence between them. Once it is signed, they will show up in the next sitting and inform the judge that the forfeit the case. So there can be recognition and enforcement of these in the Member State.

  - Definitions

- Art 2(b) ‘ –Court settlement ’means a settlement which has been approved by a court of a Member State or concluded before a court of a MS in the course of proceedings’. Eb Compromise Agreement

- Art 2(c) ‘ –Authentic instrument ’means a document which has been formally drawn up or registered as an authentic instrument in the MS of origin and the authenticity of which:

- 1)Relates to the signature and the content of the instrument; and

- 2)Has been established by a public authority or other authority empowered for that purpose.

- The definition of court settlement and authentic instrument are found in Article 2 of the regulation. These definitions are also found in national law, however, the regulation is giving an autonomous definition of what they mean.

  - Art 58(2) – The authentic instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.

  - Art 59 – A court settlement which is enforceable in the Member State of origin shall be enforced in the other Member State under the same conditions as authentic instruments

  - Art. 60 – The competent authority or court of the Member State of origin shall, at the request of any interested party, issue the certificate using the form set out in Annex II containing a summary of the enforceable obligation recorded in the authentic instrument or of the agreement between the parties recorded in the court settlement

- Article 58(2) provides the requisites of an authentic instrument. It has to be an authentic instrument in terms of the MSs of origin.

- Article 60, if one needs to make a recognition and enforcement of a judgment, one of the criteria for such is that there needs to be ‘Annex 1'. This applies the same to recognition and enforcement of an authentic instrument or a court settlement but this time it would be ‘Annex 2’ that is attached with the regulation. ‘Annex 1’ is a certificate concerning a judgment in civil and commercial matters, while ‘Annex 2’ is a certificate concerning an authentic instrument/court settlement.

  - General provisions

- Article 61 – No legalisation or other similar formality shall be required for documents issued in a Member State in the context of this Regulation

- Article 61, Once one gets from the register of the court the judgment which is duly authenticated, one does not need to make a legalisation (or apostile).

  - Transitional clause

  - Article 66(1) – This Regulation shall apply only to legal proceedings instituted, to authentic instrument formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.

  - Article 66(2) – Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgements given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.

- Article 66, the recast applies only to judgments which are approved or concluded on after 10th January 2015. The old regulation which is now abrogated (regulation 44/2001), is saved by Article 66(2). Therefore the old regulation still applies to pre 10th January 2015.

  - Article 73

  - 1. The Regulation shall not affect the application of the 2007 Lugano Convention.

  - The Lugano Convention 2007 is an international treaty negotiated by the EU on behalf if its member states (and by Denmark separately because it has an opt-out) with Iceland, Norway and Switzerland. It attempts to clarify which national courts have jurisdiction in cross-border civil and commercial disputes and ensure that judgements taken in such disputes can be enforced across borders.

  - 2. This Regulation shall not affect the application of the 1958 New York Convention.

  - 3. This Regulation shall not affect the application of bilateral convention and agreements between a third State and a Member State concluded before the date of entry into force of Regulation (EC) No 44/2001 which concern matters governed by this Regulation.

- There are other provisions which include the Lugano Convention. Article 73, the Lugano Convention is the convention between the EU and LEFTA countries

where the concern is jurisdiction etc. So this article is stating that the recast does not affect the applicability of the Lugano Convention.

- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the “New York Arbitration Convention” or the “New York Convention”, is one of the key instruments in international arbitration. The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration.

- It also does not affect the 1958 New York Convention nor does it affect bilateral conventions which there might be between third stated and EU Member States which would have been agreed upon before the entry of the regulation (in 2015). These are safeguarded. The New York Convention speaks on foreign arbitration awards.

  - Enforcement of foreign judgements under COCP

  - In order to decide whether we recognise and enforce foreign judgements, we need to apply the rules of the COP, which cater for 3rd country judgements as well as judgements of EU states which do not fall under the Regulations.

  - The COCP safeguards the application of the regulations of the EU in those circumstances where the regulations apply.

- Enforcement under the Code of Organisation and Civil Procedure, the rules under the COCP apply when there are judgments from third countries or when there is subject matter which does not fall under the recast since they are not civil or commercial.

- So first one will look at the regulation and if it does not fall under the regulation then one will see the PIL rules of Malta.

  - Enforcement of foreign judgements under COCP

  - In Art 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.

  - Therefore, where the Regulations apply, the provisions of the Regulations are to apply, whilst if the matter falls beyond the scope of the Regulations, then the COCP is to apply.

- Article 825A, the article states that the regulations prevail over the COCP.

- Enforcement of foreign judgements under COCP
- Enforcement of a foreign judgement will only be granted if it is delivered by a court which has jurisdiction to hear the case according to Maltese PIL.
- Under English common law, for a judgement to be recognised and enforced it must be a final and conclusive court who has jurisdiction to hear the dispute.

- Since it is final and conclusive, the case has to be a res judicata.
  - Adams v Cape Industries plc (1990)
  - If the defendant was present in the jurisdiction of the court on the date of which proceedings commenced, then it should be considered to have jurisdiction.
  - State Bank of India v Murjani.
  - Either presence or residence on when proceedings instituted is sufficient. If the defendant was present when proceedings were instituted but he later appeared to defend his case, then that court has jurisdiction under English PIL.
  - Adams: https://simplestudying.com/adams-v-cape-industries-plc-1990-ch-433/
  - India: https://www.oxbridgenotes.co.uk/revision_notes/bcl-law-oxbridge-conflict-of-laws-bcl/samples/state-bank-of-india-v-dot-murjani
- Here the case of Adams vs. Cape Industries and State Bank of India vs. Murjani can be seen.
  - Art 826 – Saving the provisions of the British Judgements (Reciprocal Enforcement) Act, any judgement delivered by a competent court outside Malta and constitution a res judicata may be enforced by the competent court in Malta, in the same manner as judgements delivered in Malta, upon an application containing a demand that the enforcement of such judgement be ordered.
  - Chapter 52 British judgements (Reciprocal Enforcement) Act is intended to make provisions for the enforcement in Malta of judgements obtained in the United Kingdom and in the British dominions.
- Article 826, the British Judgements (Reciprocal Enforcement) Act is Chapter 52 of the Laws of Malta which applies as it is a special law when there are judgments. This law was never abrogated. The judgment here must be conclusive as it is a res judicata. Here there is a difference in the procedure. While under the recast there is no special procedure to recognise and enforce, where there are

judgments from third states under the COCP, there needs to be an application in the court.

- So to recognise and enforce a judgment under the COCP there must be an application in the court. Here there must be a sentence attached.
  - Elements of Art 826
  - 1. Delivered by a competent court outside Malta
  - 2. The judgement must constitute a red judicata
  - The demand must be made by means of an application containing a demand that the judgement be declared enforceable in Malta.
  - The application will be notified on the defendant and he may file his defence explaining why the enforcement should be refused.
  - In the cases under COCP, there is no direct recognition and enforcement, it is only the Maltese courts who decide on recognition and enforcement.
- It must be a competent court therefore not a Sharia court. The law says application under bullet two not a sworn application. The main difference between the COCP and the Brussels Recast is that recognition is not automatic. So in this case the court is 99% is gonna do a hearing to hear the parties.
  - Competent court outside Malta: Art 827(2) for the purposes of this article, the plea to this jurisdiction of the court by which the judgement 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.
  - The foreign court must have founded its jurisdiction on domicile, residence of the defendant or his voluntary submission.
  - If the foreign court bases jurisdiction on other conditions not mentioned under this provision, that judgement will not be enforced in Malta.
- The articles relating to enforcement under the COCP are from Article 825A to 827.
- Article 827, so the defendant can raise the issue of jurisdiction as opposition.
  - Defences

- Red judicata: it must be a final and conclusive judgement.
- If it may be altered eg subject to appeal. Then it is not final conclusive.
- In order to determine whether to the judgement is final, one has to look at the law of that state.
- Assuming that the foreign court had jurisdiction, there are a number of defences which the defendant can raise.
- This emerges from Art 827(1) which states the provisions of the last proceeding article shall not have effect:

- Defences, to see if a judgment is res judicata, one should not only look at the Maltese law but at the law of the country which gave such judgment.
- For example in France and Italy there might be a procedure of Cassazione which can be done. Not all lawyers are authorised to go in front of the Court of Cassazione
  - Defences
  - (a) If the judgement sought to be enforced may be set aside on any of the grounds mentioned in article 811;
  - (b) In the case of a judgement by default, if the parties were not contumacious according to foreign law;
  - (c) If the judgement contains any disposition contrary to public policy or to the internal public law of Malta.
  - These grounds are grounds for retrial.
- Under these three circumstances, the court can make an inquiry. Article 811 regards retrial. It can happen after the appeal but on specific grounds, but is not like another appeal. The grounds are different from the five grounds which are present in the Brussels Recast.
  - Under Art 811, the grounds for re-trail are:
  - 1. Where the judgement was obtained by fraud. The fraud must be of a serious nature and result of which influenced the decision of the case. Under English law, fraud encompasses advancing a false claim, fabrication of evidence and intimidation of witnesses.

- 2. If the allegation of fraud is accepted the court must investigate that fraud, even through the foreign court may have rejected such argument (Jet Holdings v Patel (1990)

- 3. The defendant does not need to show that he has discovered evidence which could not have been put forward before the foreign court. He could also use the same evidence used in the foreign court which rejected such allegation.

- 1. Where the sworn application was not served to the defendant, ie was not notified and a judgement was given against him. However if the defendant appeared in the case, then this provision does not apply.

- 2. Where any of the parties was under legal disability to sue or be sued eg interdiction.

- 3. Where the foreign did not have jurisdiction – same as Art 827.

- 4. Where the foreign judgement contains a wrong application of the law. One of the most important differences is between the wrong application of the law and the wrong interpretation of the law.

- 5. Hichlin v Agius (1997), retrial is not allowed if there is the wrong interpretation of the law; there must be the wrong applicability of the law.

- https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=2580&CaseJudgementId=0

- 1. Ultra petita: judgement was given on another cause of action which the party did not rely

- 2. Extra petita: court granted a remedy in excess than that it was granted.

- 3. Where the judgement is conflicting with a previous judgement.

- 4. Where the judgement contains contradictory dispositions.

- 5. Where the judgement was based on evidence which was previously declared to be false.

- 6. Where after the judgement, 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 judgement.

- 7. Where the judgement was erroneous resulting from the proceedings or documents o the cause.

- Art 827 (c) refers to public policy which is important and horizontal application.
- If the judgement comes from a third state and is contrary to public policy, then the judgement will not be recognised.
- Dr Renato Cefai nom v Valletta Freight services Ltd referred to the % of interest which did not go against public policy since the law was amended to include cases where interest may be exceeded.
- Cefai: https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=64669

• These are other grounds which can be used. These grounds are all under Article 811.

- SCHOELLER INTERNATIONAL GMBH NOE vs ELLUL MARIO ET
- The court examined the notion of public policy.
- The fact that the company is distinct from its members, it is public policy, if the foreign court ignores that principle then the judgement cannot be recognised.
- If the rules of the foreign court are not the same as those of Malta, it does not mean the judgement is not to be recognised, it will not be recognised if those foreign rules come in conflict with the fundamental principles of Maltese law.
- The concept of moral damages is not in breach of Maltese public policy since there are instances where Maltese law grants moral damages in certain situations.
- JMBH: https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=5618

• In the case of Schoeller International, the court examined the issue of public policy.

- This is a very important topic for the exam, and so is foreign jurisdiction.

25th April 2023

Lecture 9.

- Defences

- (a) If the judgement sought to be enforced may be set aside on any of the grounds mentioned in article 811;
- (b) In the case of a judgement by default, if the parties were not contumacious according to foreign law;
- (c) If the judgement contains any disposition contrary to public policy or to the internal public law of Malta.
- These grounds are grounds for retrial.

- L-ahhar lecture konna qed nitkelmu jurisdiction meta ghedna m'hemmx taht il-Brussels recast jurisdiction fuq COCP u ghedna li hemm id-defences, grounds of article 811, li huma il-grounds of retrial, fil-ligi taghna COCP specific rounds fejn fil-ligi taghna wara li taghme,l appell tista ukoll taghmel retrial li mhux facli f'kazijiet specifici, dak huwa l-(a), (b) in the case of a judgement b default if the parties were not contumacious according to foreign law, and the third if the judgement contains any disposition contrary to public policy or to the internal public law of Malta dawn huma defences li wiehed jista jaghmel ghaliex m'ghandux ikun hemm recognition and enforcement of a judgement
  - Under Art 811, the grounds for re-trial are:
  - 1. Where the judgement was obtained by fraud. The fraud must be of a serious nature and result of which influenced the decision of the case. Under English law, fraud encompasses advancing a false claim, fabrication of evidence and intimidation of witnesses.
  - 2. If the allegation of fraud is accepted, the court must investigate that fraud, even though the foreign court may have rejected such argument (Jet Holdings v Patel(1990).
  - 3. The defendant does not need to show that he has discovered evidence which could not have been put forward before the foreign court. He could also use the same evidence used in the foreign court which rejected such allegation.
- Araw article 811 ta' COCP.
  - 1. Where the sworn application was not served to the defendant. Ie was not notified and a judgement was given against him. However if the defendant appeared in the case, then his provision does not apply.
  - 2. Where any of the parties was under legal disability to sue or be sued e.g. interdiction.

- 3. Where the foreign did not have jurisdiction – same as Art 827.
- 4. Where the foreign judgement contains a wrong application of the law. One of the most important difference is between the wrong application of the law and the wrong interpretation of the law.
- 5. Hicklin v Agius (1997), retrial is not allowed if there is the wrong interpretation of the law, there must be the wrong applicability of the law.
- https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=2580&CaseJudgementId=0

- Dawn huma l-grounds of the COCP.
  - 1. Ultra petita: judgement was given on another cause of action which the party did not rely
  - 2. Extra petita: court granted a remedy in excess than that it was granted.
  - 3. Where the judgement is conflicting with a previous judgement.
  - 4. Where the judgement contains contradictory dispositions.
  - 5. Where the judgement was based on evidence which was previously declared to be false.
  - 6. Where, after the judgement, 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 judgement.
  - 7. Where the judgement was erroneous resulting from the proceedings or documents of the cause.
- Ultra petita, extra petita, araw ftit l-811 tac-COCP.
  - Art 827 (c) refers to public policy which is important and has horizontal application.
  - If the judgement comes from a third state and is contrary to public policy, then the judgement will not be recognised.
  - Dr Renato Cefai nom v Valletta Freight services Ltd referred to the % of interest which did not go against public policy since the law was amended to include cases where interest may be exceeded.

- Cefai: https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=64669

- 827(c) jirreferi kif ghedna, ghal public policy, jekk hemm judgement fit-third state imma se jigi infurzat malta, id-defendant jista jqajjem l-issue li dak il-judgement m'ghandux ikun recognised f'Malta.
- Renato Cefai vs Valletta Freight Services, kienet fuq percentages of interest which did not go against public policy, since the law was amended to include cases where interest may be exceeded.
  - SCHOLLER INTERNATIONAL GMBH NOE vs ELLUL MARIO ET
  - The court examined the notion of public policy
  - The fact that the company is distinct from its members, it is public policy if the foreign court ignores that principle then the judgement cannot be recognised.
  - If the rules of the foreign court are not the same as those of Malta, it does not mean the judgement is not to be recognised, it will not be recognised if those foreign rules come in conflict with the fundamental principles of Maltese law.
  - The concept of moral damages is not in breach of Maltese public policy since there are instances where Maltese law grants moral damages in certain situations.
  - JMBH:
  - https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=5618
- In the case of Schoeller International, the court examined the issue of public policy.
- There is also the issue of moral damages which is not that developed as a concept. For moral damages there is a general provision in the Civil Code and they can also be given under Chapter 573, the Government's Land Act where there is expropriation.
- Moral damages can also be given under the constitution where is damages against the government where there advocate of the state. Therefore in Malta there are specific laws where moral damages are permitted and the court gives such in its discretion as to how much and how to provide moral damages, there are not thresholds.

- SCHOLLER INTERNATIONAL GMBH NOE vs ELLUL MARIO ET

- Sentenza ta ’qorti barranija ma titqiesx li tmur kontra l-ordni pubbliku ta ’Malta ghar-raguni bissilli, li kieku l-Kawza nstemghet u nqatghet hawn Malta. Kienet tinqata ’mod iehor. Tmur kontra l-ordni pubbliku jekk tohloq konflitt ma ’dawk il-principji ewlenin ta ’l-ordni guridiku li huma l-qofol tas- Sistema legali billi jharsu l-valuri l-aktar fondamentali tas-socjeta ‘fejn ikun fis-sehh dak l-ordni.

- Il-qrati lokali pero ‘ma jistghus jaghrfu sentenza barranija dik is-sentenza ma taghrafx effect legittimu tal-ligi ta ’Malta, Ghalhekk jekk sentenza barranija tinjora l-principju tal – personalita ’separata tal-azzjonisti u l-ufficjali ta ’ kumpannija minn dik tal – kumpanijja taghhomdik is-sentenza ma tistax tingharaf mill- Qrati lokail

- The quote is saying that if a sentences goes against public policy, in this case as it did not acknowledge the difference between a shareholder and the company itself, then this judgment cannot be recognised nor enforced. There must be a distinction between compensatory damages and punitive damages.

  - Compensatory damages arise from moral damages, however foreign systems also have punitive damages, whereby the court does not grant compensation for the damage suffered by the victim but ir orders the defendant to grant punitive damages.

  - Punitive damages are the payments that a defendant found guilty of committing a wrong or offence is ordered to pay on top of compensatory damages. They are awarded when compensatory damages – the money given to the injured party – are deemed to be insufficient,

  - Punitive damages go beyond compensating the aggrieved party. They are specifically designed to punish defendants whose conduct is considered grossly negligent or intentional.

  - Punitive damages are legal recompense that a defendant found guilty of committing a wrong or offences is ordered to pay on top of compensatory damages.

- We distinguish between compensatory damages and punitive damagesIn Malta we do not have punitive damages, but we have compensation for damages caused etc.

  - Maltese law does not have punitive damages, only compensatory damages and therefore cases of punitive damages may not be recognised as they would be contrary to Maltese public policy.

- Punitive damages are in addition to the compensation of the damages. So if a foreign sentence awards punitive damages, then the Maltese courts cannot recognise it if it is not in the system of Malta's laws. It would have to be enforced in the state where it was decided.
- Mela allura, hawnhekk irrid nasal, jekk sentenza ta qorti barramina awarwdjat damages ma tistax tirrikonoxijha, Trid tibqa infurzata fl-istat li ttiehdet.
  - Dr Joseph Zammit Mekeon v Laferla Insurance (2013) whereby the court held that there must be a breach of Maltese public policy for there to be non-recognition of a judgement.
  - The simple fact that the law applied by the foreign court is different from Maltese law is not enough, there must be a breach of public policy or internal public law.
  - https://ecourts.gov.mt/onlineservices/Judgements/Details?JudgementId=0&CaseJudgementId=83847
- In the case of Mekeon vs. Laferla, it is seen that public policy can be raised by way of defense. The defence of public policy is in addition to the grounds of re-trial.
  - Penal laws – penal revenues
  - If the foreign judgement involves penal revenue, then the recognition and enforcement can be refused on the basis of public policy.
  - Huntington v Attrill the Privy Council explained what is a penal law in this context and held that the courts of one country will not enforce the penal laws of another country.
  - Penal laws are those rules which redress a public wrong.
  - If proceedings have been brought in a foreign court for the payments of fines or other penalties, those fines are payable to the state for breaching those laws and the judgement which emanates from the foreign court will be caught by this rule and ergo unenforceable.
  - The courts will not recognise foreign judgements which would incvolve enforcing the penal revenue.
- Another ground would related to penal laws. This can be seen in the case of Huntington where the court said that other countries will not enforce penal laws if they are not present in that country. Here one is speaking about the area which regards multi and contraventions, these would be collected by the country where

they are given. For example a case in Morocco cannot enforce a €10,000 fine on to someone who is in Malta since this is of a penal nature.

- According to the Huntington v Attril case, a penal law is to punish for an offence. The penalty must be issued by the state. Whilst the prohibition of penal and revenue laws is established, there are other cases whereby their enforcement is not so clear.

- Huntington: http://www.uniset.ca/other/cs6/1893AC150.html

- Again fejn jidhlu penal laws, the foreign judgement involves penal revenue. Whilst the prohibition of penal and revenue laws is established, there are other cases whereby their enforcement is not so clear.

  - Effects of registration of judgement

  - Art 828 – The judgement ordering the enforcement of another judgement delivered by a court outside Malta, upon being registered in the Public Registry Office, shall create as from the day of registration a hypothec in regard to the debt judicially acknowledged by the judgement enforcement of which is ordered

- Article 828, here the hypothec would be a legal hypothec. If the sentence is registered the hypothec would become a legal hypothec.

- This was the Brussels recast, meta nistudjaw naraw article 1, jurisdiction li tibda min article 4 sa 6, imbghad special jurisdiction, important specjalment il-grounds min article 7(1) to 7(7), articles 7, 8 u 9. Fejn tidhol jurisdiction fuq l-insurance m'hemmx ghalfejn nafu d-dettalji imma jistenna li nkunu nafu li fejn hemm insurance consumer contracts u employment contracts hemm rules apposta ghalihom. X'inhuma l-grounds ta' exclusive jurisdiction, article 24. Imbghad araw sew, recognition and enforcement min article 36, sa 47, incluz l-opposiition li nista naghmel id-defences kontra recognition and enforcements.

- Other instruments halluhom, constitution of debt (so min article 58 il-quddiem)

- Importantissimu, special jurisdiction, exclusive u recognition and enforcement of foreign judgements. Jekk inkunu nafu ta' Malta ukoll ahjar taht ic-COCP.

  - Rome I

  - Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligation (Rome I)

- Ha nibdew Rome I fuq il-kuntratti. Ir-recast tkellimna fuq jurisdiction issa wara li naraw jurisdiction irridu naraw fuq ic-choice of law, jekk il-partijiet f'kuntratt ghamlux choice of law provision.
- This is Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17th June 2008 on the law applicable to contractual obligation. Rome I regards contracts. Brussels Recast speaks about jurisdiction, but after that one has to see on the choice of law, if the parties made a choice of law provision.
    - Private international law
    - Applicable law, governing law or 'choice of law 'for contracts (ex contactus) is regulated by Rome I Regulation 593/2008
    - The predecessor of the Regulation was the 1980 Rome Convention
    - Rome I lays down choice of law rules for contractual claims
    - Just like Rome II Regulation, Rome I applied in all situations within its scope of application involving conflict of laws.
    - In civil and commercial matters, and as far as the subject matter has not been excluded from the Regulation by virtue of Article 1, Rome I applies to choice of law for contract in all civil and commercial contractual matters, whether the court of the MS has jurisdiction to hear the case on the basis of the Brussels I Recast, or on the basis of its national PIL.
- Another area where the EU made a harmonisation in regards to PIL is where contracts are involved. Due to the internal market there were a lot of contracts which where being made between individual companies of the MSs and the need was felt that there are common PIL rules, so as much as possible the rule of jurisdiction are clear but specifically in regards to the contract the choice of law of such contracts.
- Under Article 1 the first element of the application of Rome I applies when there is a conflict of laws. It is applicable to contracts only and for those contracts in the remit of civil and commercial matters, the same as the recast.
- Article 1, in this regulation one finds a number of rules where there is choice of law that the parties would have decided on it in the contract. One shall also see what happens when the parties did not decide on a law.
- How is one going to know which law is applicable if the contract is cross-boarder? The regulation provides for such.

- Rome I is a uniform measure of PIL which replaces national PIL.
- So, for example, if an Italian company and a French company and the parties have, in the contract, chosen French law to govern the contract. Rome I requires the English court to apply French law in order to decide the case.

- Unless there are some exclusions, which are found under Article 1(1) in second sentence, Article 1(2) and Article 1(3), Rome I will apply. Rome I prevails over national law since a regulation has a direct applicability in the domestic law of the Member States.
- Rome I does not speak about jurisdiction in terms of courts, it is only Brussels Recast or the COCP when Brussels Recast is not applicable. Here Rome I speaks about the choice of law for contracts.
- In the example above, French law would be applied as there would be experts which would be brought in. However, this topic will not go into the procedure of such.
  - Rome I and Rome II
  - Both Regulations deal with the issues from civil and commercial matters area.
  - The rules are coordinated as a whole and aim to synchronise, on a continental scale, the laws applicable to legal relationships irrespective of the country of the court in which an action is brought, and ultimately to further implementation the European internal market.
  - Both Rome Regulations recognise party autonomy and therefore allow parties to select their own governing law.
- The idea of having harmonisation in Rome I was because of the internal market of the EU. Rome I recognises the autonomy of the parties to decide themselves in the contract (the sanctity of contracts). The parties are free that in a contract they can decide the terms of the contract, as long as they are within the remits of the law.
- Therefore Rome I recognises the freedom of choice to contract and the freedom of choice on the law obviously to contract.
  - Rome I or Rome II – Allies or enemies?
  - These two instruments are more allies than enemies because the basics of the obligation falling under the Rome I or Rome II is very different in its nature:

- Voluntary in the case of contractual obligations and non-contractual obligations
- The Rome I and II Regulations bind the EU MS to a common set of rules for the choice of law in international law disputes.
- And their reach even extends to the application of non-Member State law.

- Rome II regards torts and quasi-torts. In Rome I there is a voluntary obligation as the parties free to decide whether they are going to exercise the freedom of choice on the law of the contract or not, if not it will be regulated by the regulation. However, where there are non-contractual obligations (tort) it is non-voluntary.
- The last point refers to Article 2 of Rome I. Here the parties may agree on a law which will regulate the contract which is not a law of the EU. Therefore they can agree on a law of a third country. Therefore there is universal application, they can choose a lot of a third country, such as Chinese law or Russian Law.
  - Rome I
  - Under Rome I parties may agree on which law (which need not be the law of a Member State) is to be the law applicable to the contract and may change that choice of law at any time.
  - If the parties to a contract do not stipulate the law governing such contract, then Rime I Regulation sets out a number of rules.
- In relation to the first bullet, il-partijiet fuq kuntratt, let's say for example the jurisdiction of the contract is Malta and therefore the court that will hear any dispute in relation to this contract is that of Malta, the parties are not tied that Maltese law should apply, they have a freedom of choice. They may choose that Italian law is applicable to the contract.
- If they do not choose the law which applies to the contract, here Rome I will state what is the applicable rules.
  - Rome I General rule
  - Pursuant to the Rome I Regulation, as a general rule, there the parties do not choose the governing law, the contracts will be governed by the law of the country with which they are most closely connected.
  - The rules are intended to achieve the highest degree of predictability as to the applicable governing law, and, where necessary, to grant courts with the discretion required to determine the law that is most loosely connected to the relevant situation.

- The general rule, if the parties do not choose the law which will govern the contract, normally the court will take the law in which there is the most connections to. This could be where the parties are or where there was the supply etc.
  - Rome I and Rome II
  - The Rome Regulations can be seen as a single set of uniform rules which apply directly to EU MS and replace their domestic law.
  - The substantive scope of Rome I and Rome II Regulations should be consistent especially with the Recast Regulation 1215/2012
- Rome I and Rome II came into force to give more predictability and legal certainty and to replace domestic law with respects to contracts when there is a PIL element. It is to be seen in the contest of the Recast Regulation as first one has to see which court has jurisdiction.
  - Principles
  - Rome I runs along 4 basic principle.
  - 1) The principle of the parties to choose applicable law.
  - 2) Specific regimes for a limited group of protected categories.
  - 3) A high degree of predictability, so as to assist the internal market.
  - 4) At the same time room for manoeuvre for the forum to correct the default of choice in favour of the country with which the contract is most ‘closely connected’.
- Mela allura nistghu nghidu li Rome I u Rome II dahlu fis-sehh biex igibu iktar predicability u legal certainty fl-internal market, u to replace domestic law with respect to contracts when there is a PIL element, jekk jiena ghandi kwistjoni fuq kuntratt ma xi hadd malti m’hemmx PIL element u ma tidholx ir-Rome I u rridu naraw ukoll ir-Rome I u Rome II within the framework of the Brussels Recast fuq jurisdiction, ghedna qed nanalizzaw kaz fuq PIL l-ewwel ma rridu naraw liema ordni ghandna juurisdiciton imbghad immorru naraw jekk hemmx choice of law clause, filkas taqa’ fuq Rome I, jekk mhux kuntratt imma huwa tort immorru fuq Rome II u naraw x’se tghid ir-Rome II.
- Erba principi which characterise Rome I. L-ewwel wahda, il-freedom of choice, the freedom of the parties mela, to choose the law applicable to the contract which they have just signed. Dawn normalment ikunu kuntratti kbar jew ta franchise, fejn il-partijiet jaghzlu l-ligi, hafna drabi jkunu partijiiet min pajjizi differenti u allura

jaghzlu ligi ta pajjiz li jkunu komdu bih ghax jafuh it-tnejn, gieli jkun hemm arbitration pero kif se naraw arbitration hija excluded mir-Rome I

- It-tieni principju, specific regimes for a limited group of a protected categories, hawn se nergghu nsibu dawk is-setturi li sibna fir-recast, l-insurance, l-employment, consumer u ukoll carriage of goods.
- It-tielet principju ghaliex saret ir-Rome I for predictability purposes, legal certainty, so as to assist the internal market, the internal market, m'ghandux ikun hemm barriers, x'inhume dawn il-barrriers? Customs duties, taxes by whatever name, charges having an equivalent effect, pero fl-interrnal market hemm barrier ohra MTBs. Iktar m'hemm legal certainty iktar thenni l-legal barriers.
- Ir-raba' principju, il-connecting factors li ghamilna f'korsijiet ohra tal-PIL. Ir-rabta, in-nexus bejn dispute li ghandek quddiemek u fatturi ohra bejn il-perrformance, fejn imorru l-partijiet, domicile, connecting factors.
  - Applicability
  - Applies solely to matters of contract
  - Only those concluded after 17 December 2009 (Art 28), leaving the Rome Convention in operation for contract concluded before the Date.
  - Applies more specifically to contractual obligations in civil and commercial matters [art 1(1)] hence not to torts or other con-contractual obligations, such as unjust enrichment (for which we now have the Rome II Regulation), nor to contracts in non-civil or non-commercial matters (such as public law, tax, and customs).
  - Art 1(2) provides for a list of largely self-explanatory exclusions.
  - Rome II has a universal scope, meaning that any law specified shall be applied, whether or not it is the law of a MS.
- Applicability diga rajna it applies to contracts.
- Issa, tapplika, hemm cut off date, transition period. Ir-Rome I tapplika min 17th December 2009, issa nghidu, jekk ghandna kuntratt qabel it-2009, hemmhekk tibqa tapplika l-convention ghal affarijiet li huma pre- 17th December 2009.
- Jekk taraw article 1(1), Rome I shall not apply in particular to revenue, customs or administrative matters, ghax ghedna r-relic taghha hija civil and commercial. Meta gbir ta' dwana, taxxi etc, huma ta natura amministrattiva, mela ma jaqghux taht Rome I

- Article 1(2), again ghandna numru ohra Lista twila a-j ta' exclusions. U the universal scope semmejniha diga, ghedna li zewg partijiet fuq kuntratt jistghu jiddeciedu li hija applikabli ligi li mhux tal-EU, Chinese law.
    - The Regulation replaced the 19080 Rome Convention – the rules were based on a Convention since at the time the EU did not have competence to legislate in the sphere of PIL.
    - Thus the commission made a proposal to the council and EP to replace the Convention.
    - Article 24 of the Regulation states that the Regulation replaces the 1980 Rome Convention.
    - It is effectively a reproduction of the Convention, with a few changes, the most significant being in the sphere of absence of choice.
- The regulation replaced the 1980 convention, ovjament Rome I hadet hafna elementi tar-Rome Convention pero hemm regoli godda li dahlu fir-regolament, f'dak iz-zmien l-unjoni ewropea ma kelliex il-vires powers to legislate in the area of PIL. Meta naraw dawn il-poteri hemm ir-Rome I u harget mil-convention.
- Bdiet b'commission proposal, the initiator of legislation in the EU, tipproponi draft proposals tal-ligijiet lill kunsill u l-parlament Ewropew, u f'dak il-kas proponiet Rome I u il-parliament u l-kunsill iddecidew bil-co-decision u dahlet fis-sehh. Din qieghda verbalizzata f'article 24, hemm transitory period tal-kuntratti qabel 17th December 2009.
- X'jigri meta jkun hemm il-ligi tal-kuntratt?
    - Malta
    - Prior to the Regulation, choice of law matters in Malta were governed by English Common law.
    - Now England had actually implemented the Rome Convention in 1990 through the Contracts (applicable law) Act, but Malta continued to refer to English Common law as a source since as a rule Maltese courts cannot refer to English statute law to fill in lacunae.
    - Denmark Excluded.
    - Preamble 7 provides that the substantive scope and the provisions of this Regulation should be consistent with Brussels I (today the Recast Regulation 1215/2012) and Rome II.

- Qabel dan ir-regolament ahna konnha naqghu taht English common law. L-ingilterra peres li harget mhux certi jekk zammitxxorta r-regulation jew waqghetx fuq il-convention, Denmark is excluded. Il-preamble tghid li Rome I ghandha tkun kontsistenti mal-Brussels Recast fuq jurisdiction, imbghad jekk kuntratt ha naraw ic-choice of law li fih il-kuntratt, jekk fih.
  - Scope
  - Article 28 – the Regulation shall apply to contracts concluded after the 17th December 2009.
  - Article 1(1) provides that the Regulation applies in situations involving a conflict of laws, to contractual obligations in civil law and commercial matters.
  - The Regulation shall not apply, in particular, to revenue, customs or administrative matters.
- Din rajniha.
  - Art 1 – Exclusions from Rome I
  - Status or legal capacity of natural persons, without prejudice to Article 13 (special provision on incapacity)
  - Obligations arising out of family relationships including maintenance obligations.
  - Maintenance is covered by Regulations 4/2009
  - Divorce and legal separation are covered by Regulation 1259/2010 (Rome III).
  - Obligations arising out of matrimonial property regimes, wills and succession.
  - Obligations arising under bills of exchange, cheques and promissory notes
- Rajniha wkoll. Ghedna l-ewwel exclusions article 1(1) second sentence huma revenue, customs u administrative matters.
- Issa, article 1 (2) ghandnha lista kif nafu min (a)-(j) ta’ exclusions, status of natural persons, obligations arising out of family relationships u hemm maintenance excluded ghax maintenance huwa regolat bir-rikors 4/2009. Fejn jidhol maintenance jekk tigi klijenta tghidlek gibt separazjoni mil-italia u rrid ninforza maintenance hawn irridu naraw 4/2009 mhux Rome I, u qed isiru komuni hafna.

- Divorce jew legal separation hemm ir-regulation 1259. Mela ghandna ir-regolamenti specifici.
- Obligations arising out of matrimonial property regimes ma jaqghux taht Rome I. x'inhuma matrimonial property regimes? Community of acquests, CORSA, separation of estates, wills and succession ghax hemm regolamenti ohra.
- Kambjali, bills of exchange, cheques u promissory notes.
  - Art 1 – Exclusions from Rome I
  - Arbitration agreements and agreements on the choice of court.
  - Law of companies and other bodies corporate or unincorporated. Such as the creation, legal capacity, organization or winding up on companies, and the personal liability of officers for the obligations of the company.
  - Whether an agent is able to bind a principle in relation to a 3rd party
  - Constitution of trusts and relationships between settles, trustees and beneficiaries.
  - Obligations arising out of dealings prior to the conclusion of a contract (pre-contractual liability is in fact dealt with under Rome II)…
  - Some insurance contracts, i.e life insurance, work/accidents at work sickness.
- Arbitration agreements, jekk f'kuntratt jiena u l-parti l-ohra iddecidejna li mmorru ghamilna klawzola that any disputes between us should be governed by arbitration, hemmhekk l-arbitration se tiprevala mhux ir-Rome I
- Agreement on choice of court, dik tapplika fuq contracts with respect of choice of law in that contract. Law of companies and other bodies, corporate or incorporated.
- Whether an agent is able to bind a principle, it-tip ta agreements fejn agent jolt il-principle, min qed jissupplixxih il-principle, constitution of trust ukoll.
- Any dealings li jsiru qabel il-kuntratt, pre-contract, in-negozjanti li noun qed naghmlu qabel iffirmajna l-kuntratt, pre-contractual liability ma taqax' taht Rome I imma taht Rome II
- U insurance contracts.
  - Article 1(3)

- Article 1(3) – Rome I shall also not apply to evidence and procedure in such cases, the lex fori applies.

- A question that often arises is what happens in a situation where there is a contractual obligation between the parties but an even gives rise to a tortuous action as well

- It is argues that Rome I applies and not Rome II even though under national law there is an action In tort.

- Issa it-tielet area, mela ghedna hemm revenue customs etc, 1(1) li rajna 1(2) issa ghandna 1(3), law of evidence u law of procedure ghaliex? Ghax dawn jaqghu' taht il-lex fori, fejn tidhol evidenza u procedura tapplika l-ligi tal-qorti fejn qed jinstema l-kaz. Jekk qed jinstema Malta, japplika COCP u procedura inkluza l-law of evidence li nsibu fic-COCP. Ma tistax tapplika procedura ohra.

- Party gejja mill-principle of judicial autonomy tal-qrati tal-EU. Il-Member States fejn jidhlu qrati, l-EU ma tidhlilhomx x'tip ta qrati jekk hux qorti tal-appell, tal-imhalfin, jaghmlux third appeal, dik f'idejn il-Member States, kif isir it-tqassim tal-qrati u procedura f'idejn in-national governments tel-member states.

- It-tieni bullet, jinqalghu kazijiet fejn ghandek Danni gejjin min kuntratt u danni marbutin fuq l-istess suggett min tort, it is argued that Rome I applies not Rome II.

  - Universal application

  - Article 2 provides that any law specified by the Regulation shall be applied whether or not it is the law of a Member State

  - The regulation is not only applicable as among MS of the European Union like the Rome Convention, it also applies in case the law of a Non-Member state is made applicable.

  - Universal application, i.e it also applies to 3rd countries, the Regulation does not necessarily require the application of a law of a MS.

  - Moreover, both the Rome I and Rome II regulations are linked together, as the preamble of Rome I holds that the scope of its provisions, must be consistent with those of Brussels I (today the Recast Regulation 1215/2012) and Rome II.

- Universal application, semmejniha diga, article 2, li hemm partijiet li jistghu jaqblu fuq ligi ohra li m'hix ligi ta' member state.

- Under Article 28, the Rome Regulation is only applicable in the case of contracts concluded after the 17th December 2009 and the contracts must fall under a civil and commercial matter.
- Therefore the 2 conditions for the Regulation to apply are:
- 1. It must be a civil and commercial matter cannot be a public law matter.
- 2. The claim must be contractual.

- Din rajniha diga li hemm linkage bejn ir-Recast, Rome I u Rome II, irridu narawhom kemm jista jkun flimkien, in synchrony with each other although subject matter is different, recast ghandna jurisdiction, Rome I ghandna kuntratti u l-law which governs those contracts u Rome II ghandna torts, quasi torts etc.
  - No choice of court Clause
  - The Regulation does not apply to choice of court agreements, as per Art 1.
  - A choice of court agreement is considered to be separate from the substance of the agreement, thus Rome I applies to the substance of the agreement but not the choice of court clause.
  - The rule of determining questions on the validity of choice of court agreement is found under Brussels I (today the Recast Regulation 1215/2012)
  - It also does not apply to evidence and procedure as they are regulated by the lex fori.
- Din rajniha diga, dawn civil u commercial matters biss u contracts
  - Art 3(1) – Freedom of choice
  - “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.”
- No choice of court clause, the regulation, Rome I does not apply to choice of court agreements, imma choice of law. Ghax ghedna il-qrati il-juridciton qieghdin taht ir-Recast, u ma tapplikax ghall-evidence and procedure ghax dawn huma regulati mill-ligi tal-procedura ta’ fejn qed jinstema l-kaz, il-ligi tal-qorti li qed tisma l-kaz.
  - Inferred choice

- Preamble 11 provides that the parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-og-law rules in matters of contractual obligations.

- Article 3(1) provides that 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.

- The choice of law may be done expressly (by means of a clause in the contract) but the Regulation does not necessitate that the choice be made expressly.

- It may thus also be inferred from the contract or the circumstances of the case (implied)

- Inferred choice must be demonstrated with reasonable certainty, and must represent the clear intention of the party making it.

- Din importanti arawha ftit,article 3(1) a contract shall be governed by a choice of the law chosen by the parties. Jekk le naraw x'jghidu l-provisions ta' Rome I jekk m'ghazlux f'Rome I

- Kif qed tara fit-tieni sentenza, choice of law can be either express imnizzla fil-kuntratt, the parties agree between them that the choice of law shall be Italian law for example, Inkella implied, mhux facli, imma tista tkun implied, jekk hija express ahjar ghax hija cara. Jew express or clearly demonstrated by the terms of the contracts, il-kuntratt innifsu it is pointing to a particular law, inkella, or the circumstances of the case the overall circumstances of the case li ghandek quddiemek ghalkemm ic-choice of law m'ghaziltiex, qed jimmarkaw ghal certu ligi. Il-partijiet jistghuu (possibli) jew jaqblu fuq il-ligi li se tikkundizjona l-agreement kollu jew anke parti mil-agreement, din il-parti se tkun in terms of Italian law, the rest in terms of Maltese law. It is possible by the regulation.

  - Inferred choice

  - Examples of inferred choice of legal agreements are:

  - Where the contract is in a standard form, known to be governed by a particular system of law.

  - Where the contract contains a choice of forum clause naming the place of litigation, in circumstances indicating that the Court should apply the law of that place – when there is an exclusive jurisdiction clause, it may be possible to infer that the parties intended the governing law to be the law of the chosen forum.

- Inferred choice, implied choice, il-kummentarju fuq il-ligi, tista' tkun inferred by implication jekk se mmorru fuq implication ta' x'nahsbu li ghanda tkun il-ligi tal-kuntratt we have to establish reasonable certainty and the intention tal-parties li applikaw dik il-ligi.

- Ezempji ta inferred choice of law, huwa per ezempju kuntratt li huwa standard form contract fejn nafu li a standard form contract huwa normalment imhaddem min ligi partikolari mela ghandna implication, issa it-tieni ezmepju where the contract contains a choice of forum clause mainly the place of litigation, mela ghedna ukoll in case of a dispute the maltese courts of law shall have jurisdiction in circumstances indicating that the court should apply the law of that case when there is an exclusive jurisdiction clause, it may be possible to infer that the parties intended the governing law to be the law of the chosen forum. Meta ghandna l-qorti msemmija wool fejn ha mmorru bhala dispute nistghu niehdu inferenza li ahna ridna ukoll li tigi applikata dik il-ligi tal-qorti fejn tigi applikata dik il-qorti, mhux ghazla tal-ligi by inference il-ligi ukoll ta fejn qed jinstema l-kaz ghalkemm ma semmejnihiex.

  - Inferred choice

  - Preamble 12 in fact provides that an agreement between the parties to confer on one or more courts or tribunals of a MS 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.

  - This not automatic, and the simple fact that the parties make a choice of court clause does not automatically mean that they chose the law of that place as the applicable law. Any inference arising from a choice of jurisdiction clause must always be subject to the other terms of the contract and all the circumstances of the case.

  - When there are conflicting provisions, it cannot be said that the choice can be inferred reasonably clearly; therefore Article 4 (Applicable law in the absence of choice) of the Regulation will apply.

- Preamble 12, it-tieni bullet, yet again ma jfissirx li ghax hemm choice of law tal-partijiet, awtomatikament hija l-ligi ta' dik il-qorti li se tapplika. Dejjem irridu naraw ic-cirkustanzi tal-kuntrattt u t-terms tal-kuntratt, to which law they are pointing, irrdu narawh as a whole il kuntratt.

- Jekk xorta m'ghazilniex il-ligi b'mod espress, bil-klawzola, qed niipprovaw naghmlu inference by implication, mela liema nahsbu li l-ligi u xorta ma nistghux nasal, hemmhekk se naraw article 4 tar-regolament ghaliex jghidilna x'jigri, fejn

m'ghazilniex ligi. Mela ligi m'ghazilniex, qed nipprovaw insibu l-ligi tal-kuntratt after studying the whole contract, nahsbu li l-ligi Ingliza jew il-ligi Maltija pero xorta ghadna ma wasalniex. Hemmhekk naraw x'tghid il-ligi naraw x'tghid Rome I Article 4, u Rome I article 4 se taghtina numru ta' regoli, ta rules li ghandna napplikaw.

- Inferred choice
- The Giuliano and Lagarde Report lists other situations where it may be possible to determine an inferred choice:
- When a standard form is used
- When there is a choice of court clause (not automatic – one must see the other terms of the contract + other circumstances)
- Where the contract refers to express provisions of the law of a particular country.
- An express choice of law in a related transaction –e.g. parties have a complex business deal with a number of related transaction, and one of them includes no choice of law clause but the others have it.
- A previous course of dealing under contracts containing an express choice – e.g. parties always had a standard method of dealing, but in one particular transaction they forget the choice of law clause.

- Giuliano and Lagarde Report, huwa raport fuq Rome I li jigi konsultat u huwa awtorevoli.
- L-ahhar bullet, meta l-partijiet kellhom kuntratti qabel u kienet tintuza it-tali ligi, dik hija inference li ghandha tintuza f'dan il-kuntratt dik il-ligi li kienet tintuza qabel to settle disputes between them.
  - Inferred choice
  - In Oldendorf v Liberia Corporation, the contract included an arbitration clause with London being the chosen jurisdiction, but there was no choice of law clause. The Court determined that, by inferred choice, English law governed the contract.
  - The selection of a place of arbitration was a strong indication that the parties had chosen English law.

- It was clear because the parties had chosen a neutral forum (since they were German and Japanese) and it makes sense that they would want a neutral law as well.

- Oldendorf v Liberia Corporation. Mela l-partijiiet ftiehemu fuq international arbitration f'Londra. Il-qorti uzat l-inferenza, l-implication u qalet la l-partijiet iddecidew fuq arbitration f'Londra jaghmel sens li l-inferred choice of law hija l-ligi ingliza tal-kuntratt la se jinstema Londra l-arbitragg.

- It-tielet bullet, inferenza ohra ghaliex English law, mhux ghax ghazilna l-arbitragg Londra imma l-partijiet kienu Germaniz u Gappuniz and it makes sense that they want a neutral law as well. Dan huwa kaz bl-ezempju ta' inferred choice of law.

  - Art 3(1) – Freedom of choice

  - 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.

- Din qrajniha diga, article 3(1).

  - Art 3(1)

  - 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.

  - Therefore the law gives priority to choice of court agreements, even if the chosen court is in a third state.

  - There is nothing in the Regulation which states that the applicable law has to be the law of a MS, nor that the parties must be domiciled in a MS.

  - Rome I applies therefore as long as the court seized in a MS.

  - The provision also gives flexibility and does not preclude parties from incorporating a non-EU MS body of law in their contracts.

- Article 3(1), l-ewwel bullet hija fuq kif ghedna by implication jew express, parties can choose the law in the contract, u kif qed nghidu fit-tielet bullet if the parties chose the law mela tapplika c-choice of law li ghamlu fil-kuntratt u mhux l-

applicable law in the absence of choice (article 4) ghax f'dan il-kaz ghandhom l-ghazla.

- Hemm universality, jistghu jifthemu l-partijiet li japplikaw ligi li mhux wiehed mil-member states uu ic-choice of law ma tiddependix li jghazlu fuq id-domicile taghhom, il-partijiet huma free li jaghzlu l-ligi li jridu.
  - Art 3 (2) – Freedom of choice
  - 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.
- Il-partijiet jistghu ukoll jibdlu dik il-ligi li ddecidew fuqha, Article 3(2). Jekk iddecidew li jibdlu l-ligi ma jistghux jamluha f'pregudizju ghal tibdil tat-terzi.
  - Art 3(3) – Freedom of choice
  - 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.
- Article 3(3) where all other elements relevant to the situation, to the situation of the contact. Qieghdin Malta, pero uzajnha choice of law tal-Italja. Jekk ghazilna ligi ta' pajjiz li hemm issue fuqha, hemm issue ta' public policy etc, dik il-ligi li ghazilna ma tapplikax ghax hemm issue ma ligi ohra.
  - So, for example, if the parties to a contract were French, the contract was to be performed in France and, indeed, all other aspects of the contract were connected with France, Article 3(3) provides that even if the parties choose (say) Chinese law to govern their contract and they submit to the jurisdiction of the English courts, the English courts will, nevertheless, apply the mandatory rules of French law (example dealing with unfair terms). The same principle applies to mandatory provisions of the EU.
- Tghajt ezempju hawnhekk. Mela, ma jaghmilx sens article 3(3) jekk il-connections kollha huma francizi, ghandha partijiet francizi, il-kuntratt sar Franza, hemmhekk, wiehed xorta jista jinjora dik il-ligi li ghazilna ghax m'hemm l-ebda connection, m'hemm l-ebda senz, jista jkun hemm derogation through article 3(3).

- Art 3(4) – Freedom of choice
- 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.
- Art 3(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 Article 10,11 and 13

- Article 10 huwa consent and material validity, which we shall see, article 11 huwa formal validity, article 13 refers to the capacity of the parties. Allura qed nghidu li a choice of law agreement does not cancel mandatory domestic rules which cannot be derogated from.
  - Therefore a choice of law agreement does not cancel the application of mandatory domestic rules or EU rules (i.e. rules which cannot be derogated from) such as crucial provisions for a country to safeguard its public interests(political, social and economic policy), which are applicable to any situation with their scope.
  - This thus leads to the application of the lex fori, superimposing the choice of the parties.
- Hawnhekk qed nitkelmu fejn jidhlu political interests of a member state u social and economic policy dawn they prevail over the choice of law that the parties have made in agreement.
- F'dan il-kaz fejn jidhlu political interest social and economic policy ta pajjiz tapplika il-lex fori. Tirbah mela if it is superimposed over the choice of the parties in the contract.
  - Article 9(2)
  - Nevertheless, Article 9(2) is very relevant, since it says that nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. Thus, in the example above, the English courts would still be able to apply the overriding provisions of English law.
  - It is not possible to choose a law which is not of a country – ex. Sharia law.

- U allura hawn se nigu ghal Article 9(2) li jghid nothing in this Regulation shall restrict the application of the overriding (tintuza hafna fl-EU law fir-regolamenti) mandatory provisions of the law of the forum. Li ghedna, political interest, social consideration etc. kif ghedna ma tistax taghmel kuntratt b'suggest ta' religious law, bhal m'hija Sharia law.

  - Art 9 – Overriding mandatory provisions

  - (1) Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interest, such as its political, social or economic organisation, to such extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

  - (2) Nothing in the Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

- Article 9, overriding mandatory provisions, li dawk they prevail over the choice of law of the parties li huma semmejnihom diga, public interest ta' pajjiz, ta' Member State such as political, social and economic organisation of that member state. Meta hemm dawn l-issues, these prevail over the choice of law of the parties.

  - Art 9 – Overriding mandatory provisions

  - (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, regards shall be had to their nature and purpose and to the consequences of their application or non-application.

- Araw ftit ukoll din sub article (3) fuq overriding mandatory provisions.

  - In the absence of the above categories

  - In the absence of the above categories, the applicable law shall be the habitual residence of the characteristic performer (eg the vendor) and moreover, Art 4(3) provides an escape clause for the applicable law as it states that if there is a closer connection with a specific state, then regardless of Art 4(1) and (2), it is Art 4(3) which shall apply.

- In the absence of the above categories the applicable law shall be the habitual residence of the characteristic performance. Se naraw ukoll article 4(3), it

provides an escape clause for the applicable law. If there is a closer connection with a specific country. In that case the law of that country shall apply, article 4(3).

- Applicable law in the absence of choice
- The Convention on which this regulation was based on, included a complex system of presumptions which has now been replaced with more clear rules.
- Article 4 simply lists different types of contract and the law applicable to each.
- There are then residual rules which apply if the contract does not fall in the list in Article 4(1).

- Issa jekk naraw article 4 se nsibu cirkustanzi min (a) sa (h), of the law which is applicable in the absence of choice by the parties
- U kif ghedna, jekk ghazlu partijiet se nuzaw dik il-ligi jekk mhix miktuba se nipprovaw naghmlu by inference, jekk ma naslux anqas se mmorru fuq article 4 u se naraw l-artikli min (a) sa (h), contract of sale, contract of services, lim hi l-applicable law. Jekk xorta ma nsibuhix irridu mmorru fuq ir-residual clauses li jtinha article 4. Li huma article 4(2), article 4(3) u article 4(4).
  - Art. 4(1) – Applicable law in the absence of choice
  - Article 4(1) says that 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 (contract of carriage, insurance, contracts, individual employment contracts), the law governing the contract shall be determined as follow:
  - (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;
  - Preamble 17: 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.
- Mela per ezempju contract of sale of goods, m’ghazilniex ligi, m’ghandniex choice of law, u ghandna kuntratt ta’ sale of goods. In that case, it shall be governed by the law of the country where the seller has his habitual residence. Jekk jiena qed

nisporta l-fridges ghall-Italja, qam dispute, fridges huma goods, jiena habitual residence tieghi Malta mela tapplika l-ligi tas-seller, il-fejn qieghed jiena.

- Fejn jidhlu services issa, kuntratti ta services, ghandek engineering services, legal services. Il-ligi applikabli hija where the service provider has his habitual residence. L-istess, mela xi hadd qed jaghti servizz lill-klijent fl-Italja, m'ghamilniex choice of law fil-kuntratt tal-consultancy li qed intih u qam dispute, ic-choice of law hija il-ligi fejn qieghed is-service provider, Malta.
- Araw ukoll ftit preamble 17 tar-regolament.

9th May 2023

Lecture 10.

- L-eżami se jkun sitt domandi, erbgha ta' Dr. Bugeja, wahda ta' Prof. Refalo u wahda ta' Dr. Sceberras Trigona, naghzlu tlieta, open se tkun, sit domandi u nistghu naghzlu li rridu, basta nwiegbu tlieta.
- Case studies m'hemmx, id-domandi huma cari, mhux se jkun hemm compare and contrast imma id-direttivi rridu nistudjawhom u ftit case law milli ghamilna fil-klassi. Importanti huma x'inhu civil and commercial u l-interpretazzjoni taghhom li tajna fil-Brussels Recast, xeba caselaw u interpretations, ghamilna hafna caselaw u interpretation etc. X'inhi general jurisdiction li tigi section 1 tar-regulation imbghad ghedna, hemm areas fil-ligi fejn hemm special jurisdiction li hija section 2, articles 7 and 8. Dawk importanti.
- Fejn jidhlu kuntratti t'insurance fejn ghedna there are specific rules on consumer u employment forsi nkunu nafu li jezistu u li hemm regoli ghalihom imma not in detail. (Biex ma jghidx mhux importanti pero ghalina nafu li hemm regoli specjali fejn jidhlu dawn l-areas)
- Exclusive jurisdiction section 6, u fejn tidhol section 1, section 2, chapter 2 tar-regolament, recognition and enforcement. Mela ghedna l-ewwel jigi recognised imbghad tista tinfurzah hemm regoli ohra, u c-cirkustanzi where you can impose the enforcement and recognition. Prattikament chapter 3, narawh sew kollu Chapter 3 tar-regolament, jigifieri jibda min articles 36 sa 60. Recognition and enforcement of foreign judgements.
- Rome I hija importanti ukoll, importanti li nkunu nafu li hemm il-freedom of choice. Article fejn wiehed jista jaghzel ic-choice of law fil-kuntratt. u il-possibilitajiet l-ohra, id-diversi tipi ta' kuntratti u the law which applies to them.
- Article 3 freedom of choice, ghedna tista tkun expressed tista tkun implied jew conferred, u specjalment article 4 li jitkellem x'inhi l-applicable law in the absence of choice, f'kaz li l-partijiiet ma jkunux ghazlu l-ligi, x'jigri, xi jtik fir-regolament,

- Contracts of carriage u insurance contracts (mhux se jsaqsi suppost) u nkunu nafu r-regolament in generali fejn gieli jaqa' fuq habitual residence.
- Rome II, naraw ftit articles 1 u article 2, article 4, 10, 11, 12 u 14 freedom of choice, 15, u 23.
- Mhux se jkollna caselaw, domandi diretti se jkunu, direct questions se jkunu x'inhi jurisdiiction x'inhi choice of law, x'jigri jekk ma jkunx hemm choice of law. Dr. Bugeja l-basics jistennihom.
    - Art. 4(1) – Applicable law in the absence of choice
    - Article 4(1) says that 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 (contract of carriage, insurance, contracts, individual employment contracts), the law governing the contract shall be determined as follow:
    - (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;
    - Preamble 17: 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.
- Din semmejniha ghedna li importanti, article 4 sub-paragraph (1) meta l-partijiiet m'ghazlux il-ligi li se tirregola l-kuntratt x'se jigri? Rome I tipprovdi ma nghidulhomx special rules imma huma regoli speciali jiddependi mit-tip tal-kuntratt, min-natura tal-kuntrat per ezempju contract for the sale of goods. Governed by the law of the country where the seller has his habitual residence. Kif qed naraw, filwaqt li ir-Recast timxi fuq id-domicile, Rome I u Rome II jitkellmu fuq habitual residence, fejn hemm kuntratt ta' sale of goods the applicable law hija the law of the country where the seller resides. Where he has his habitual residence.
- Services l-istess, mela ghandna jew sale of goods jew provision of services, hija again the country where the service provided has his habitual residence.
- Araw ftit preamble 17 tar-Rome I.

- Art. 4(1) – Applicable law in the absence of choice

- (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 – lex situs;

- (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;

- (c), tip iehor ta kuntratt, mela jew immovable property, drittijiet ta' ownership, right in rem jew tenancy, kirja. The law of the country where the property is situated, il-lex situs, it is recurrent, f'kull regolament, normalment fejn hemm il-properja dejjem japplika il-lex situs ta fejn qieghda l-propjeta, the law where the immoveable property is situated. (d) isha extension ta' qabilha, a tenancy of immovable property; kirja, concluded for temporary private use for a period of no more of six consecutive months, mela kirja ta' mhux iktar min sitt xhur, ghadna hekk fil-private residential leases, shall be governed by the law of the country where the landlord has his habitual residence, habitual residence is recurring mela fejn joqghod is-sid. Where the landlord has his habitual residence.

  - Art. 4(1) – Applicable law in the absence of choice

  - (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;

- Franchise contracts, again jekk il-partijiet ma' ftehmux fuq ligi, m'hemmx choice of law fil-kuntratt, fejn il-franchisee has his habitual residence, mela ghandna franchisor u franchisee, il-franchisee huwa min qed jiehu il-franchise, fejn joqghod il-frenchisee mela.

- Distribution contracts, tajt lil xi hadd distribution agreement biex ibiegh iz-zraben 'Puma' shall be governed by the law of the county where the distributor has habitual residence, mela mhux l-agent imma l-post fejn joqghod id-distributor. Il-ligi taqa' fuq il-weaker party.

  - Art. 4(1) – Applicable law in the absence of choice

- (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 facilities the bringing together of multiple third-party buying and selling interest 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.

- Mela ghamilt kuntratt ma xi hadd biex inbieghu xi affarijiet bl-auction. (Jekk tkun online tista tigi bhala service provider f'dak il-kaz)

- Imbghad kuntratt li ghandhom x'jaqsum ma financial instruments.

  - Article 4(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.

- Issa, fejn kuntratt ma jaqax taht paragraph 1 u lanqas jaqa' taht wiehed mill-kuntratti min (a) sa (h), ghandna residual clause, jekk ma jaqax la taht paragraph 1 u lanqas (a) sa (h) ghandna residual clause li tghid dejjem naqaw' fuq il-habitual residence, fejn Rome I ma taghtix regolament, ma ttinix rule. Fejn ghandu habitual residence il-party li trid taghmel performance tal-kuntratt, mhux min tah il-kuntratt, il-parti lii trid tipperformjah.

  - Art. 4(2) – Applicable law in the absence of choice

  - Thus it is NOT the place of performance – but rather the place where the party (who was to perform the characteristic performance of the contract) has his habitual residence. (socio-economic performance of contract)

  - Preamble (19) where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the

specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

- U ghallura, hemmhekk ingibdet konkluzjoni thus it is not the place of performance f'kazijiet hekk but rather the place where the party who was to perform the contract has his habitual residence, naqghu fuq habitual residence ghalhekk hija habitual clause 4 sub-paragraph (2).
- Araw ftit preamble 19 ta Rome I.
  - Applicable law in the absence of choice
  - Article 4(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.
  - Therefore, both [1] and [2] may be corrected it there is a manifestly closer connection with another state: that is the escape clause: art 4(3)
  - Article 4(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.
  - The latter two provisions are known as escape mechanisms/clauses.
- Issa, 4(3) se ttina regola ohra, Rome I, where it is clear from all the circumstances of the case that the contract is manifestly more closely manifestly, mhux just more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
- Mela, ghedna il-4 subparagraph (2) hija a residual clause li naqghu fuq residence, habitual residence, il-4 subparagraph (3) qed ittina dik li nghidulha escape clause. Pero, provided meta huwa manifestly clear that it more closely connected to a country indicated, allavolja il-kuntratt jaqa taht il-1 u 2 imma dan il-kuntratt huwa marbut hafna mal-pajjiz partikolari, gie iffirmat hemm se jigi esegwit hemm, il-partijiet jghixu hemm, hemmhekk naqghu fuq il-law of the other country. Ma jaqawx taht il- 1 u 2 imma naqghu taht sub-paragraph 3, li hija the country which is closely associated with that contract. Isha it prevails ghalhekk hija escape clause, it prevails over 1 and 2 ghaliex hija manifestly close connection ma pajjiz, ta kuntratt ma pajjiz li ma taghmilx sens nuzaw il- 1 u t-2.
- il-4 subparagraph (4) again ghandna escape clause, ghandna regola ohra, where the law applicable cannot be determined pursuing to paragraphs (1) and (2), mela meta il-kuntratt li ghandna, qed naraw il-ligi li tapplika ghalih, ma jaqax taht

paragraph (1) u (2) the contract shall be governed by the law of the country which it is most closely connected.

- The weaker party in the contractual relationship
- The law also has special rules to protect the weaker party to the contract, whereby in the case of:
- consumer
- Employment and
- Insurance contract
- ... The applicable law is that of the habitual residence of the weaker party or where the weaker party carries out his work (in case of employees).

- Issa ir-Rome I, kif rajna ukoll fir-recast ghandna kategoriji li huma kunsidrati bhala the weaker party in the contract, in the relationship between party 'A' and party 'B'. Ma ninsewx li qieghdin fuq kuntratti, Rome I is on contracts u huma l-istess kategoriji li rajna fir-recast u ghalhekk rome I ghandu special rules ghalihom, consumer, employment u insurance contracts.
- A rule of the thumb hija li the applicable law is that of the habitual residence of the weaker party, mela, fejn il-weaker party, fejn il-konsumatur ghandu r-residenza fir-recast kien id-domicile, or where the weaker party carries out his work, filkas ta' employee, il-ligi choice of law ghandha tkun fejn jahdem l-employee. Dawn huma kategoriji specjali li ma jaqghux taht ir-regoli general ta' Rome I imma ghandhom regoli ghalihom taht ir-regolament.
  - Art 5. Contracts of Carriage of Goods and Passengers
  - Art 5(1). To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.
  - Art 5(2). To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of

departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

- Contracts of carriage of goods and passengers. Again, we have special rules in Rome I. Mela, fejn m'ghazilniex il-ligi li se tirregola l-kuntratt, f'dan il-kaz contract of carriage of goods and passengers, the applicable law shall be the law habitual residence of the carrier.
- In the case 5(2) ta' passenger, hija fejn il-passenger ghandu habitual residence. Dawn m'hemmx ghalfejn nidhlu fid-dettall, basta nkunu nafu li jezistu.
  - Art 5. Contracts of Carriage of Goods and Passengers
  - The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the alw of the country where:
  - (a)The passenger has his habitual residence; or
  - (b)The carrier has his habitual residence; or
  - (c)The carrier has his place of central administration; or
  - (d)The place of departure is situated; or
  - (e)The place of destination is situated.
  - 3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, 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.
- Article 5 contracts, carriage of goods, again ghandek regoli ohra. Kif qed nindunaw din ir-regola, qed tghid x'jistghu, ishom m'humiex free il-partijiet, pero qed ittihom choice ta' x'jistghu jaghzlu bhala choice of law.
- Fejn jidhlu carriage of goods and passengers, il-partijieit jistghu jaghzlu ghandek hames options. Li hija 5 sub-paragraph (2); (a), (b), (c), (d) mela nista naghzel jew il-ligi where the passenger has his habitual residence, jew fejn il-carrier ghandu il-habitual residence jew inkella fejn il-carrier ghandu his place of central administration, jew il-place of departure jew il-place of destination, fejn se jasal.
- Again (3) issa hawnhekk nergghu insibu isu proviso f' sub-article (3) pero jekk qed tghid il-liigi hemm cirkustanza fejn il-partijiet m'ghazlux il-ligi imma din ic-cirkustanza is more closely manifestly indicated in paragraphs 1 or 2, the law of

that other country shall apply. Hemm il-buonsense, vera hemm il-ligi, pero jekk hemm circustanzi, cara hafna li l-ligi marbuta mal-kuntratt hija ta certu pajjiz, jew jigi ffirmat gol-istess pajjiz, il-partijiet jghixu gol-istess pajjiz, ha jigi performed fl-istess pajjiz, allura hemmhekk taghmel sens li tkun the law of the other country. Issa din sta' on a case by case basis titqajjem fil-qrati u sta' ghall-qorti skont l-argumenti tal-partijiet.

- Consent and Material Validity

- Article 10(1) provides that 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.

- Article 10(2) says that never the less, 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.

- Issa, consent and material validity. Jekk tqum issue fuq l-existence and validity, (dan tajjeb jew hemm xi vice of consent) x'jigri hemmhekk? Jekk il-kuntratt qed nghidu skont ir-regolament tapplika ghalih il-ligi ta' pajjiz 'A', u qamet kwistjoni fuq li mhux validu l-kuntratt ghax hemm vice, ezempju violence etc, hija l-ligi ta' dak il-pajjiz li se tissindika l-istess kuntratt, li tissindika l-issue tal-vice of consent, validity etc.

  - Is there a contractual relationship?

  - While a MS may regard a matter as contractual, another may not, because for example it lacks a lawful causa.

  - It may be considered that since Article 10(1) says that the validity of a contract shall be determined by the law which would govern it under this Regulation if the contract or term were valid, then the Regulation may also determine whether the matter under review is a contractual relationship or not.

  - However it could be argued that it would be illogical to apply a provision of the Regulation to determine whether the Regulation is applicable at all.

  - One could however counter-argue that the Court will come up with an autonomous definition. This would mean that one would have to rely on the interpretation of the Court – rather than the Regulation itself, or the lex fori – to determine whether a matter is indeed contractual.

- Article 10(2), mela qam issue, party minnhom tghid le jiena ma tajtx kunsens. Jekk ha tqum issue fuq il-validity tal-kuntratt, xi vice of consent, hemmhekk semmejna ghandu lawful causa dan il-kuntratt jew le? Jew dan il-kuntratt qieghed biex niddifrodaw lil xi hadd jew il-gvern? Hemm lawful causa? Jekk irridu naraw hemmx lawful causa naraw l-istess ligi li se naraw il-kuntratt.
    - Art 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 principle place of business.
- Accessorium sequitur principalis.
    - Art 19 – Habitual residence
    - 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 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.
- Habitual residence hemm referenza ghaliha f'article 19, companies and other legal bodies, il-place of central administration, natural person, his principal place of business. Fuq kuntratti qed nitkelmu allura his principal place of business interpretata habitual residence, not his home, his place of business.
- 19(2), ghandek l-istess fejn tidhol branch, agency jew establishment.
- Fejn kien il-habitual residence? The relevant point in time on the conclusion of the contract, mela meta gie iffirmat il-kuntratt bejn il-partijiet. lejn dik irridu nharsu biex naraw il-habitual residence. Fejn kien hemm il-habitual residence tal-partijiet meta ffirmaw il-kuntratt?
    - Restrictions on Party Autonomy
    - Article 6, 7, and 8 of Rome I contain special provisions in relation to consumer contract, insurance contracts, and contracts of employment, and have the effect of either limiting the ambit of the general choice of law provisions, or excluding the presumptions.

- Din iltqajna maghha diga, fejn jidhlu ghedna il-kategoriji ta' consumer insurance, u employment ghandna special rules fil-ligi. The aim again is to provide for the weaker party. Mela ghalhekk qed nghidu restrictions on the party autonomy ghax il-ligi qed tipreskrivilek hija stess x'regoli hemm mhux qed thallik liberu li taghzel ic-choice of law tieghek, to protect the weaker party.
  - Consumer Contracts
  - Article 6 (1) – without prejudice to Article 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 he:
  - (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.
- Ha naraw ftit hafif consumer contracts, issa ftit iktar fid-dettall. 'As being outside his trade or profession' kif inhu definit konsumatur.
  - Article 6(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(3) – if the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Article 3 and 4.
- Ir-relazzjoni ma tridx tkun ta trade jew profession otherwise ma tkunx definit bhala konsumatur, it-trader jew il-professional li ghamilt il-kuntratt mieghu. Il-konsumatur vs l-avukat/it-tabib/accountant. Jew il-konsumatur vs it-trader li bieghlu fridge. Fejn jidhlu consumer contracts again naqghu taht habitual residence, ma ninsewx li fir-Recast nuzaw id-domicile.
- Ghandna l-provisos.
  - Consumer Contracts

- Consumer Contracts
- Article 6(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;
- (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;

- Xorta l-partijiet mela it-trader u l-konsumatur jistghu jghazlu l-ligi, li jixtiequ jirregolaw il-kuntratt, pero xorta il-konsumatur ma tistax iccahdu mil-protection afforded to him by article 6. Ghax ghedna huma artikli specjali biex jipprotegu l-konsumatur. Tuh daqqa t'ghajn article 6 fejn jidhol consumer contracts
  - Consumer Contracts
  - (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;
  - (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).
- Hawnhekk ghandna zewg exclusions, zewg exclusions mir-regoli generali fejn jidhol konsumatur. Ma japplikawx with respect to the contract for supply for services where the services are to be supplied to the consumer exclusively in the country other than that in which he has his habitual residence u fejn jidhlu contracts of carriage relating to package travel. Ghandek id-direttiva dal-package travel li tirregola hi dawn ic-cirkostanzi, mela fejn jidhlu package travel, package holidays u package tours jekk gie klijent ghandek bi kwistjoni mhux se tara Rome I imma ha tara d-direttiva, council directive 90/314EEC lex specialis derogat generalis, tapplika din il-ligi mhux Rome I li hija ta' natura generali.
- Kuntratti relating to a right in rem in immoveable property or a tenancy of immoveable property. Rights and obligations in connection with a financial

instrument, a fund per ezempju u kuntratti li jaqghu taht article 4(1)(h) again fejn jidhlu financial instruments

- Article 8(1) – Individual Employment Contracts
- Provides that an individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3.
- Such choice of law cannot deprive that employee of the protection of the mandatory 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, 4 and 4 of this article.
- Individual Employment Contracts
- Sub-Article (2) – 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.
- Sub-Article (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.
- Example: an employee who constantly travels.
- Sub-Article (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.

- Kategorija ohra li ghandha ir-regoli specjali taht Rome I, individual employment contracts.
- Mela, l-employer u l-employee jistghu jiddeciedu fuq choice of law fil-kuntratt, jista jkun hemm qbil, kunsens, hemm il-freedom of choice u jiftehemu liema regolamenti, liema ligi se tirregola il-kuntratt tax-xoghol, yet again kif rajna fil-konsumatur the choice of law cannot deprive the employee of the protection of the mandatory provisions that cannot be derogated from by agreement under the law, jigifieri ma jistax l-employer jghidlu lill-employee li din il-ligi jrid juza bilforrs, ghax ghandu l-protection taht ir-Rome I.
- Pero jekk hemm kunsens jipprevala l-kunsens.

- Jekk ma jifthemux fuq ligi, l-employer u l-employee, tapplika l-ligi where the employee mhux habitually resides, habitually carries out his work fejn qed jesegwixxi l-kuntratt li ghandu tax-xoghol.

- Hemm proviso iehor, jekk jaqilghu sitt xhur jahdem f'pajjiz iehor hija kkunsidrata temporanja, rridu naraw fejn sar il-bulk tal-employment contract. Jekk kien l-italja l-italja, il-fatt li nqala' ghall- sitt xhur fl-islovenja, ma nistghux nuzaw il-ligi tal-islovenja ghax il-bulk kellu jsir fl-italja.

- Jekk ma nistghux nistabilixxu ghal xi raguni il-place of performance ta fejn kellu jahdem l-employee ha naqgghu fuq regola ohra, sub-article (3). Jekk ghal xi raguni ma nistghux insibu fejn kellu l-perfomrance tal-kuntratt ghax kien f'diversi pajjizi, hemmhekk immorru fuq il-place of business fejn gie engaged l-employee. The place where the employee was initially engaged.

- Sub-paragraph (4) recurring f'Rome I jekk hemm cirkustanzi li jorbtu l-kaz ma ligi partikolari hija dik il-ligi partikolari ta dak il-pajjiz li ghandha tapplika.

  - Overriding Mandatory Provisions

  - Article 9(1) says that overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as it political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of law otherwise applicable to the contract under Rome I

  - Article 9(2) says that nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

  - Therefore, not withstanding the choice of law, the lex fori laws which are mandatory will apply nevertheless

- X'inhuma dawn il-ligi titkellem fuq l-overriding mandatory provisions?

- Mela dawn huma issues meqjusin fuq livell tal-istat to protect the public interest, such as its political social or economic organisation. F'dan il-kaz meta ghandna mandatory provisions they override the general provisions. Mela meta hemm public interest tal-istat hija l-ligi ta dak il-pajjiz fejn hemm l-issue ta public interest li tapplika. Meta hemm issues ta public policy bhal m'huma the political organisation of the state, social issues, jew affarijiet relatati ma economic policy, dawn ir-regolamenti semmihom specifikament; such as mhux exhaustive list. Public interest u ta l-ezempji such as political, social or economic organisation, jista jkun hemm affarijiet ohra.

- Overriding Mandatory Provisions

- Article 9(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.

- The mandatory provisions are superimposed over the applicable law meaning they will apply regardless.

- Kif qed naraw f'bullet (2) biex naraw jekk hemmx overriding mandatory provisions irridu naraw kaz, kaz, their nature and purpose and to the consequences of their application or non-application. Dejjem f'choice of law qed nitkellmu mhux choice of court. Choice of court huma biss brussels recast, biex naraw liema hi l-qorti applikabli. La fir-Rome I u lanqas fir-Rome II contracts u tort qed naraw biss liema hi l-ligi applikabli ghal kuntratt jew ghal tort.

- Mandatory provisions prevail.

  - Formal Validity

  - Article 11(1) – a contract concluded between persons who, or whose agents, are in the same country at the time of it 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.

  - Article 11(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.

- Formal validity ga rajna, meta huwa kuntratt formally valid? Regolament 11 qed ikun car, the law tal-pajjiz li sar. Jekk il-ligi maltija tghidlek li l-eta maggorenni hija 18 u xi hadd iffirma ta 14 does it satisfy the formal requirements of the law?

- which governs it in substance under this Regulation, ghandek ic-circulation, or of the law of the country where it is concluded

- 11 (2) ghandha regoli ohra li tirrigwarda persuni li gejjin min pajjizi differenti.
  - Formal Validity
  - Article 11(4) – Paragraphs 1, 2 and 3 of this Article shall not apply to contract that fall within the scope of Article 6 (consumer contracts). The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.
  - Article 11(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 the 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.
- Ovjament, fejn jidhlu consumer contracts they are carved out from article 11(4) ghax ahna nimxu with the law of the country where the consumer has his habitual residence.
- Fejn tidhol immovable property jew tenancy, mela personal rights fuq il-propjeta', hemm il-lex situs.
  - Scope of the law applicable
  - Article 12(1) provides that 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;
- Scope of the applicable law, il-ligi li ghazlu ghalina r-regolamenti, li se naraw il-kuntratt fit-tali ligi, jekk hemm issues ta' interpretation, performance u jekk se naraw ukoll hemmx xi breach of obligations li maghhom igibu damages, irridu narawhom ukoll dawn it-tlett issues bl-istess ligi li se naraw il-kuntratt.

- Mela ghandna il-ligi taljana se tara il-kuntratt from a substantive point of view, pero jekk tqum issue ta performance, qed jigi performed il-kuntratt, qed ninterpretawh tajjeb? Jew qamu issue ta' xi damages taht il-kuntratt, dawk l-istess, irridu narawhom ukoll bil-ligi sustensiva ta dak il-kuntratt, bl-istess ligi li hija l-ligi taljana ezempju.
- Mela, jekk il-ligi sustantiva li se tirregola l-kuntratt hija l-ligi taljana for the substance of the contract ghax ghazilna l-ligi taljana, jekk ancillarjament qamu issues ta interpretation, performance jew danni jridu ukoll jigu irregolati b'dik il-ligi taljana, il-ligi tal-kuntratt.
    - Scope of the law applicable
    - d) Various ways of extinguishing obligations, and prescription and limitation of actions;
    - e) The consequences of nullity of the contract.
    - Article 12(2) – In relation to the manner of performance and steps to be taken in the event of defective performance, regard is given to the law of the country in which performance takes place.
- Tkompli b'various ways ta kif jispiccaw l-obligations, prescription jew limitation of actions. Kif jispiccaw l-obligations? Per ezempju bil-hlas, jispicca l-perjodu naturali tieghu il-kuntratt, jew subrogation, jiena hadt l-obligazzjonijiiet tieghek, ghax ma wasaltx int hadt l-obligazzjonijiet, extinction of obligations taht ic-civil code, jew jien hallast ghalik ghax qieghdin fl-insolidu, imbghad jiena I repeal il-flus minghandek, inkella prescription, diversi tipi ta' prescription li ghandu kull pajjiz fil-ligi tieghu, u limitation of actions, dekadenza (peremptory).
    - Art 13 - Incapacity
    - In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.
    - Article 14 – Voluntary assignment and contractual subrogation
    - 1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

- Article 14 – Voluntary assignment and contractual subrogation

- 2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

- 3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

- Article 14, voluntary assignments and contractual subrogation, tapplika the law that applies to the contract between the assignor and assignee under this regulation, xi hadd qed iced kuntratt, cessjunarju cedenti; assignee, under a voluntary assignment, meta xi hadd icedi konvenju ezempju, or contractual subrogation. xi hadd li habat, tiftah claim, x'taghmel bl-insurance? Tfittex third party ghax ghandha subrogation rights li huwa ukoll forma ta kuntratt, ghalhekk nghidu contractual subrogation, forma ta kuntratt.

- Article 15 – Legal subrogation

- Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

- Article 15, Din ghandna klawzola isha l-istess fil-ligi, ghandna xi haga simili fil-ligi civili, kreditur ghandu jiehu, hemm insolidum fejn hemm dejn x'jista jaghmel kreditur? Imur fuqu, hallas on behalf of the other co-debtor u jista jfittex lid-debtor l-iehor.

- Legal subrogation, mal-banek issir ukoll meta jiena ghandi loan ma bank, mort ma bank iehor u l-ewwel bank gave a legal subrogation to a second bank u ha l-loan minghand l-ewwel bank.

- Article 16 – Multiple liability

- If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may

rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

- Multiple liability, dawn mhux importanti ghall-ezami.
  - Article 17 – Set-off
  - Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is assessed.
- Set off, pacija bil-malti. Immorru fuq il-claim, liema hi l-ligi tal-claim? Tat-talba, il-ligi li tirregola l-claim, jekk se naghmel set-off irrid immur fuq il-ligi tal-claim.
  - Art 18 – Burden of proof
  - 1. The law governing a contractual obligation under this Regulation hall apply to extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.
  - 2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.
- Burden of proof fejn tidhol choice of law, legal effect huwa kuntratt.
  - Art 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.
  - The application of a provision of the law of any country specified by this regulation may be refused only if it is manifestly incompatible with the public policy of the forum.
  - Public policy must be interpreted within the EU parameters, and excludes particular provisions of the applicable law.
- Public policy, again dawn li rajna qabel li kienu overriding huma public interest, issa ghanda public policy, specifika. L-overriding t’article 9 titkellem fuq public interest, article 21 issemmi public policy ta pajjiz partikolari. An applicable law can be overruled if such application is manifestly (b’mod car hafna).
  - Art 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.

- Exclusion of renvoi, ovjament il-ligi minnha nnifisha hija fuq choice of law allura renvoi hija excluded taht ir-Rome I, l-istess hija excluded taht ir-Rome II.

- Ir-referal issir, u ghaliex ghandna dawn iz-zewg regolamenti Rome I u Rome II in order to provide legal certainty, certezza legali, provision f'EU Law,.

  - Conclusion

  - Both Regulations exist to provide legal certainty and predictability in the area of civil and commercial matters in the current situation in the European Union where the substantive unification of law is still missing.

- That the citizen/the individual has to have certainty on what the law is, mhux fejn interpretata mod u post iehor interpretata mod iehor, u hemm principju ta predictability, jiena naf x'inhi l-ligi hemm legal certainty u hemm element ta predictability. Ma ninsewx li tapplika taht civil and commercial matters.

  - Rome II Regulation

  - Choice of law

  - Regulation 864 of 2007

- Rome II regulation, regulation 864 of 2007, maghrufa bhala Rome II regulation of European parliament and of the council of 11th July 2007 on the law applicable to non-contractual obligations.

  - The Rome Regulations can be seen as a single set of uniform rules which apply directly to EU MS and replace their domestic law.

  - The Substantive scope of Rome I and Rome II Regulations should be consistent especially with the Recast Regulations 1215/2012

- Mela, Rome II again, m'hix se tidhol fuq choice of court imma hija choice of law fejn jidhlu torts, delicts, u other non-contractual obligations, l-idea li jkun hemm Rome I u Rome II, kienet biex l-EU ikollha regal certainty u element of predictability u uniformity in EU law, fil-qasam ta' pil, x'inhi EU law fil-pil.

- kif qed taraw fit-tieni bullet it should be consistent with the Brussels recap regulation on jurisdiction and recognition and enforcement of foreign judgements.

Pero kif ghedna Rome I u Rome II ma jidhlux fil-jurisdiction dik hija recast, jibnu fuqha, jitkelmu biss fuq choice of law.

- Rome II
- Rome II deals with the question of applicable law regulating non-contractual claims (tort, delict and quasi-delict) ie:
- 1. negotiorum gestio,
- 2. culpa in contrahendo and
- 3. unjust enrichment.
- It applies both to the issue of responsibility as well as quantification of damages.
- Therefore Rome II classifies the matter of quantification as substantive and is thus subject to the applicable substantive law, thereby ensuring that the outcome will be the same irrespective of where the proceedings take place.
- All Member States are subject to this Regulation, with the Exception of Denmark, which has opted out of the Regulation.

- Ghandna referenza ghal negotiorum gestio, culpa in contrahenhdo, pre-contractual liability u unjustified enrichment, li ahna taht Civil Code, negotiorum gestio, unjustified enrichment u in debiti soluzio (din ma tissemmiex ghalkemm hemm referenza ghaliha) ahna taht il-ligi taghna nghidulhom quasi contacts. M'ahniex nitkelmu fuq kuntratti hawn, fir-Rome II torts, quasi-torts, delicts quasi delicts etc.
- Tapplika ukoll fit-tieni bullet, kemm on the issue of responsibility kif tafu quantum of damages dejjem jigi stabbilit fuq national law, m'hemmx harmonisation fuq il-quantum bejn il-member states kulhadd japplika il-ligi tieghu.
- Therefore Rome II classifies the matter of quantification of the damages as substantive and is thus subject to the applicable substantive law. Il-qorti nazzjonali tiddeciedi hemmx danni u jekk hemm danni kemm ghandhom ikunu dawn id-danni, hemm diversi danni fosthom material damages, damnum emergens, lucrum cessans, loss of profits, pagi, loss of chance li tiehu kuntratt, u hemm ukoll li mhux elaborat fil-ligi taghna moral damages.
  - The particular complexity in the case of conflict rules for tort lies in the intensity with which the proposal and the eventual Regulation have been linked to the efforts to create a European ius commune.

- Recital 6 is quite telling:
- 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.

- Mela mill-EU kien hemm exercise ta' drafting biex jista jkun ikun hemm uniform laws fosthom fejn ikun hemm PIL. Ma Dr. Bugeja ghamilna Rome I u Rome II
- Recital 6 (preamble 6 ta' Rome II) , mhux biss free movement of goods, services, capital, persons imma free movement of judgements. Ikun hemm certu uniformity fihom.
  - The Regulation follows a pattern in EU PIL :
  - It has specific choice of law rules for specific kinds of torts
  - It respects parties freedom to choose applicable law
  - It excludes renvoi
  - It has a number or provisions on mandatory law and public order.
  - It applies to events giving rise to damage which occur (the events, not the damage) after 11 January 2009 (article 31 combined with 32)
- X'insibu f'din ir-regulation, ghandna specific choice of law rules for specific kinds of torts, mela ghandna torts li rajna x'inhuma, u kull kategorija ta' tort ghandha ir-rule taghha fejn tidhol choice of law, mil-banda l-ohra Rome II bhal Rome I insibu freedom of choice, li tista tigi ezercitata mil-partijiet fejn tidhol choice of law kif ghedna fuq torts, pre contractual liability etc, kollox li ma jidholx f'kuntratt. It excludes renvoi kif rajna fir-Rome II ukoll and it has a number of provisions on mandatory law and public order, dawn l-istess provisions li rajna fir-Rome II public policy, public interest li jiprvealu fuq ir-regolamenti. Il-cut off huwa the event mhux fejn sehh id-dannu imma events have to occur after 11th January 2009. Naraw article 31 combined with article 32.
  - Case C-412/10 Deo Antoine Homawoo v GMF Assurances [2001] ECR I-11603
  - ECJ held that Article 32 of the Regulation does not set the date for its entry into force but sets the date for its application

- Para 30 “it follows that, as there is no specific provision that sets the date for the entry into force of the Regulation, that date must be determined in accordance with the general rule laid down in the third subparagraph of Article 297(1) TFEU. As the Regulation was published in the Official Journal of the European Union on 31 July 2007, it entered into force on 20 August 2007, that is to say the 20th day following that of its publication”.

- Case Antoine Homawoo, kien hemm issue meta tigi applikata etc, min meta, akkademika, il-qorti qalet Article 32 of the Regulation does not set the date for its entry into force but sets the date for its application. See paragraph 30, jiiccara l-kaz ta meta japplika rome II

  - The reference in Article 31 to ‘events giving rise to damage ’in not necessarily easy to determine. It has been held that the Article is ‘clearly linked to the distinction drawn in article 4(1) between the three separate concepts, namely

  - i) The event giving rise to the damage

  - ii) The damage

  - iii) The indirect consequences of the event

  - George Docherty et al [2018] CSOH 25 – An asbestos exposure case. Lord Tyre held that the damage consisted of the deceased’s illness and death. The indirect consequences are the losses suffered by the deceased’s relatives. The event giving rise to all of this was exposure to asbestos.

- Issa fir-regolament se nsibu events giving rise to damage, li mhux facli li tinterpretahha ghax ghandek the event giving rise to the damage, the event seta sar hawn, Maltaa pero the damage seta inhass l-Italja. L-event u damage mhux bilfors isiru fl-istess post.

- Il-kaz George Docherty, skont il-formjula li juzaw il-qrati 100% illness and death. Dawn huma indirect consequences, kien mizzewweg, il-mara u tfal, mela, l-event l-exposure to asbestos li kelli meta kont nahdem id-dockyard, mhux l-istess ta meta hassejt id-danni.

- The event or the damage, se naraw aktar il-quddiem.

  - The Regulation lays down uniform rules to determine which national law should apply to issues in cases with an international dimension where the claim involves a non-contractual obligation (such as a civil claim arising from a road traffic accident or a defamatory statement in a newspaper or a claim for the recovery of money paid by mistake).

- The material scope of the Rome II proposal is set our in Article 1.
- Applies to non-contractual obligations in “civil and commercial matters”.
- The objective of Rome II is to ensure that courts in each of the Member State apply the same choice of law rules to disputes involving non-contractual obligations, thereby:
- Increasing legal certainty and
- Facilitating mutual recognition of judgements across EU.

- Filfatt ir-regulation marret fid-direzzjoni tal-lex loci damni, the place where the damages happened.
- Ha naraw qed ituna rules ta PIl fejn jidhol choice of law, jew meta ma naghzlux il-ligi ha tapplika regulation ex lege, ha tapplika rules hi, such as a civil claim and so on.
- Again, tapplika bhar-Recast u Rome I ghal civil u commercial matters biss, mhux amministrattiv jew kriminal jew public international law.
  - Preamble 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 judgements, 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.
  - Therefore the legislator wants to ensure that an outcome of a case will be the same irrespective of the forum of the proceedings.
  - Therefore Rome II harmonises the PIL rules on the applicable law but not the actual substantive tort law.
- X’inhu l-ann ta din ir-reformity? To ensure that courts apply the same choice of law rules to disputes involving non-contractual obligations, hawn ghandna kollox hlief kuntratti (Rome I) x’inhu l-ann tar-reformity to increase legal certainty and facilitating mutual recognition of judgements across EU.
- L-idea hi biex ikun hemm harmonisation for uniformity to be achieved.
- ir-Rome II qed tarmonizza il-PIL rules mhux it-tort law ta kull pajjiz, kull pajjiz izomm il-ligi tat-tort law domestika li ghandu, qed nitkelmu hawn fuq il-PIL rules on tort law.

- Preamble 7
- The substantive scope and the provisions of this Regulation should be consistent with:
- i) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgement in civil and commercial matters (Brussels I), today Brussels Recast, and
- ii) The instruments dealing with the law applicable to contractual obligations.
- The concepts used in Rome II need to be given the same interpretation as those given with respect to Brussels I.
- Brussels I and the CJEU judgements on Brussels I have had a very big impact on Rome II Regulation.

- Preamble 7, preamble 7 qed jghidilna bhala priambolu, li Rome I u Rome II irridu narawhom in conjunction mar-recast mhux as separate legal instances.
- L-ewwel ghedna naraw liema qorti ghanda jurisdisdiction iimbghad jekk ikun matter ta' kuntratt naraw ic-choice of law under Rome I u jekk tkun tort or another pre-contractual liability naraw Rome II. They need to be given the same interpretation as those given with respect to Brussels I, u kif qed tara hemmhekk brussels II u court of justice judgement had a very big impact on the formulation of Rome II. Il-qrati tal-EU jekk kien hemm hafna kazijiet ikkonsolidaw ruhhom f'Rome II. il-caselaw saret ligi.
  - If the parties do not specify their choice of governing law, under the Rome II Regulation the general rule is that the law governing the non-contractual obligations between such parties is the lex loci damni, i.e. the law of the country in which the injury is sustained or the property is damaged. [THE PLACE OF THE DAMAGE]
  - The law applicable is to be the law of the country in which the damage arises or is likely to arise irrespective of the country in which the damage arises or is likely to arise irrespective of the country in which the event giving rise to the damage occurred or of the country or countries in which indirect consequences of that event arise.
  - Non-contractual obligation arises not from contract but from the breach of a duty defined by the objective by the objective law.
- Taht Rome II hemm ukoll freedom of choice, jekk naghzlux Rome II jew le.

- Hawnhekk, jew the injury is substained jew f'kay a propjeta where a damage has been caused. Damage irridu narawh f'aspett kemm ta' damage arising, jew xi haga li tirrizulta wara. Damage arises or is likely to arise as a result of the tort.
    - Prior to Rome II
    - The three theoretical models that have to be considered in respect of the choice law in tort have been :
    - (i) The lex loci delicti: the law of the place where the tort was committed – a place that might be entirely fortuitous, having no close connection with law of the injured parties, e.g., an aircraft crash in Germany involving an aircraft made in America, which is operated by an American company and has British passengers as victims;
    - (ii) The lex fori: the law of the place where the tort is litigated – a model that might encourage forum shopping, i.e., seeking to litigate in the country having jurisdiction and the most favourable laws as far as the plaintiff is concerned; and
    - (iii) The proper law of the tort, i.e., litigating in the country having the closest and most real connection with the tort.
- Qabel Rome II, mela qabel 2007 presso-poco, choice of law in tort kien hemm tlett tejoriji pre-Rome II.
- Wahda, lex loci delicti, the law of the place where the tort was committed. Inghata ezempju, an aircraft crashed in Germany involving an aircraft made in America which is operated by an American country and has British passengers as victims. Fejn hu l-lex loci delicti? Il-crash, fil-Germanja, minkejja li huwa operat min kumpanija amerikana.
- It-tieni teorija, lex fori. The law of the place where the tort is litigated mela din id-darba mhux il-lex loci delicti fejn saret il-crash imma post fejn it tort qed jigi litigated, lex fori the lex of the court. Dan il-mudel huwa model li might encourage forum shopping, ligi iktar generuza fejn jinghataw damages.
- It-tielet teorija, the proper law of the tort, niftah kawza in the country having the closes and the most real connection with the court.
    - Malta and UK
    - Prior to Rome II, Malta did not have any particular rules on the applicable law in the case of tort and used to refer to English common law.

- Even though England had a PIL Act on choice of law on delict, Malta only followed common law not the PIL Act.
- In common law, a distinction is made between local and foreign torts

- Ahna qatt ma kelna PIL rules fuq tort (ghandna substantive law) u konnha nirreferu ghal English law qabel dahlet ir-Rome Malta and UK. Ahna hand common law mhux il-ligi statutorja tal-inglizi.
  - As always whenever there is a lacuna, Maltese courts used to refer to English Common law in this regard prior to the enactment of Rome II
  - Under English law, the most important factor is the place where the cause of action arose: the lex loci delicti.
  - A distinction is thus made between torts taking place in England and those taking place abroad. English law is applicable whenever the tort arises in England.
  - (England) actually enacted a law in 1995 replacing the Common law, but in Malta we still used the principles under the latter).
  - The question was where in substance the cause of action arose.
  - Irrespective of the nationality of the parties, once the tort arose in England, English law applies.
- Kif tafu jekk xorta jibqa lacuna ahna mmorru fuq il-common law, common law is still a source of Maltese administrative law. English law tuza t-teorija tal-lex loci delicti (fejn sehh l-event/it-tort). Eventwalment england ghamlet statutory law which replaced common law on PIL on torts.
  - Is the issue of quantification a matter of substance or procedure?
  - The PIL principles is that in matters of substance one applies the lex causa i.e. the applicable law of the case.
  - In matters of procedure one applies the lex fori i.e. law of the place.
- Issa l-issue ta quantification, quantum, ghamilt kawza, tista tillikwidah id-dannu, jew tista thalli l-qorti biex tillikwidah. X'jigri? Jiena se naghmillek kawza, hbadt fija u ghamiltli hsara ta €100,000, u llikwidajtu, fit-talba nghid li l-qorti ghandha ttini €100,000 il-kawza se tigi wara, jekk inhalli l-qorti se tigi inqas.

- fejn tidhol sustanza, one applies lex causa, fejn tidhol procedura one applies the lex fori.
    - Harding v Wealands (House of Lords)
    - A UK national was injured in a car accident in Australia whilst on holiday with his Australian girlfriend, and he sued her in England.
    - The Court decided that since the accident occurred in Australia, Australian substantive law was applicable, since there were no significant factors to decide the case on the basis of English law.
    - The court decided that the question of quantification was always seen by English law as procedural, so on that matter English law applied, but the COA reversed the judgement, saying that the applicable law regulates the whole dispute. Therefore the capping rule under Australian law, related to damages, applied.
    - The House of lords revoked the Court of Appeal's judgement, reinstating the 1st judgement, saying that under English PIL, The traditional distinction between substance and procedure on the matter of damages still stands.
    - The liability issue and availability of certain heads such as moral damages is a matter of substance, but the quantification is a matter of procedure.
- Harding v Wealands, collision saret fl-Awstralja mela kienet argumentat li australian substantive law had to apply. Il-qorti qalet fejn tidhol substantive law of tort il-ligi awstraljana, fejn sehh l-incident, fejn tidhol procedure hija l-ligi ingliza.
- First instance qalet substantive law of tort Awstraljana, procedura ingliza, kemm se tiehu f'danni is a matter of procedure.
    - Scope of application
    - Art 1(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).
- Ha nibdew nidhlu ftit fir-Rome I, fl-artikli, Rome II number 1 titkellem biss fuq civil and commercial matters bhal Recast u Rome I, u mhux fuq il-livell sustantiv tat-torts imma fuq il-PIL element of torts, liema ligi applikabli, dik tibqa ligi tad-domestic court, kif qed taraw fit-tieni sentence tal-article 1 ma tapplikax bhal

Rome I ‘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)’.

- Arbitration?
- Unlike Rome I Regulation, which excludes arbitration agreements from its scope of application, Rome II does not mention arbitration.
- Dickinson – It has been argued that the Regulation applies only to situations where courts and tribunals exercising judicial functions of a MS, hear the case at issue.
- On this view, arbitration tribunals sitting in a MS would be free not to apply the Regulation and determine applicable law in line with the arbitration law of the seat of arbitration, and with the arbitration agreement.

- Arbitration? Rome I arbitrationjekk tiddecidi li tmur ghal arbitration hija excluded, that Rome II m’hix essacc excluded imma hija silent, u allura arbitration tribunals fil-Member State would be free not to apply the regulation, ghax ma tapplikax ghalihom, hija silent Rome II fejn tidhol arbitration, arbitration tribunals local fejn tidhol issue ta’ tort u hemm PIL element would be free not to apply the regulation and determine applicable law of the seat of arbitration, and with the arbitration agreement. Jekk qed issir arbitration f’Malta fuq tort, u qam issue ta’ PIL fuq dak it-torrt liem hija applicable law, l-arbitru jista jghid jiien nista nuza l-principji xorta by consent of the parties ta Rome II jew il-ligi ta fejn qed tinstema l-arbitration, jew il-ligi fl-arbitragg, ikun hemm choice off law clause fl-arbitration.
  - Scope of application
  - Article 1 provides that 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).
  - Non-Contractual obligations, dealing with torts and delicts.
  - Preamble 9 – claims arising out of acta iure imperii should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.

- ECJ cases with respect to Brussels I are relevant here.

- Scope of application hemm tlett elementi, jrid ikollna conflict of laws, dik qabel kollox biex tapplika Rome II. Irid ikun non contractual obligation u fl-area ta civil jew commercial matters.

- Preamble 9 ta' Rome II jikwalifika ftit x'nifmu b'acta iure imperii, hija wiesa hafna, tmur anke fuq ufficjali, anke the individual of its holder.

  - Art 1 (2) Exclusions

  - The excluded matters to a large degree mirror those Rome I Regulation. And, with the necessary caution, one may apply the reasons for exclusion there, to the Rome II Regulation, too.

  - (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 our 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;

- Issa, l-istess bhal Rome I ghandha numru ta' exclusions, kif qed nghidu fl-ewwel sentenza hafna huma simili ghal Rome II u x'inhuma dawn l-exclusions min Rome II?

  - Exclusions

  - (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 organisations 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;

- Huma dejjem non-contractual obligations fejn jidhlu family relationships, matrimonial property regimes, m'humiex issindikati min Rome II bills of exchange, kambjali, cheques, promissory notes, the law of companies and other bodies corporate or unincorporated, issues fejn jidhlu trusts, settlors, trustees u l-beneficiaries fejn jidhlu trusts, dawk m'humiex taht Rome II u non-contractual obligations arising out of nuclear damage. Jekk jisplodi reattur f'xi pajjiiz al-EU huwa excluded it-tort il-hsara li jaghmel lill-individwi fir-Rome II. F'din l-area m'hemmx harmonisation tal-PIL, irridu naraw il-PIL individwalment fil-post fejn sehh l-event.

  - Exclusions

  - (g) non-contractual obligations arising out of violations of privacy and right relating to personality, including defamation.

  - This is important as defamation is excluded from Rome II but it is included in Brussels Recast, so jurisdiction is regulated in case of defamation such as Shevill and Martinez, however with regards to the applicable law, it is the national choice of law rules which have to be applied.

  - This is because defamation is a sensitive topic.

  - With respect to defamation, the EU MS could not agree and thus it was excluded from Rome II.

- Defamation ukoll hija excluded, pero hija included f'aspett ta' damages fir-Recast. Il-kaz Shevill and Martines. Ma gietx excluded defamation ghax ma kienx hemm qbil meta sar ir-regolament.

- Ma tapplikax ghal evidence and procedure l-istess bhal Rome I, Rome II ma tapplikax ghal evidence and procedure, jiddistingwu between substance and procedure, fejn tidhol procedure, ir-regoli tal-evidenza etc, taplika il-lex fori, the law of the court which is hearing the case.

  - Article 1(3)

  - Article 1(3) – This Regulation shall not apply to evidence and procedure, without prejudice to Article 21 (formal validity) and 22(burden of proof).

  - Thus one must make a distinction between substance and procedure. If the issue is procedural (witnesses etc), one must always apply the lex fori. This principle was recognised even before the Regulation.

- Non-Contractual Obligations
- Preamble 11 – the concept of a non-contractual obligation varies from one MS to another.
- Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept.
- The conflict-of-law rules set out in this Regulation should also cover noncontractual obligations arising out of strict liability.
- Jakob Handte (1992), and Reunion European and Others (1998)
- If an obligation is voluntarily assumed towards another it is a contractual obligation. Kalfelis (1988): if the issue is contractual, then it cannot be a matter related to tort, delict, or quasi-delict.

- Kif qed naraw f'preamble 11 the concept of a non contractual obligation varies from one member state to the next ghax m'hemmx harmonisation bejn il-member state tat-substantive law on torts u non contractual obligations, kull member state ghandha il-ligi taghha.
- Kif rajna kemm fir-Recast u fir-Rome II non-contractual obligation irridu ntuha interpretazzjoni awtonoma, fl-isfond tar-Rome II mhux fil-ligi tal-member state.
- Jinkludu ukoll issues ta' strict liability.
- Jakob Handte, mix tort ghax jiena volontarjament indhalt biex naghmel xi haga.
- In Kalfelis irridu mmorru fuq Rome I ghax huwa kuntratt.
  - 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 contrhendo."
  - Art 2(2), "This Regulation shall apply also to non-contractual obligations that are likely to arise."
  - Culpa in contrahendo is a Latin expression meaning "fault in contracting." It is an important concept in contract law and refers to the principle that parties must act in good faith during preliminary contract negotiations. It recognizes a clear

duty to negotiate with care, and not to lead a negotiating partner to act to his/her detriment before a firm contract is concluded.

- Article 2(1) li ghandna qed ittina ius definitiones ta damage, damage shall cover any consequence, tinnutaw mhux damage qed jorbot il-konsegwenza mad-damage, damage shall cover any consequence, mhux bilfors xi haga li grat dak il-hin.

- Jekk tara 2(2) qed jinkludi ukoll non contractual obligations that are likely to arise. F'(2) ghandek definition wiesa li fiha tigbor kull non-contractual obligation. Culpa in contraendo hija fault in contracting. Tissimbolizza l-principju tao-good faith, buona fede tal-partijiet li qed jinnegozjaw agreement. Xorta nista b'xi mod infittex ta' pre-contractual liability.

  - Therefore Rome II also applies to quasi-contracts and pre-contractual libility. They are not deemed to be contractual matters.

  - CJEU in Tacconi v Wagner (2002) had already decided that a claim for not negotiating a contract in good faith was not a contractual matter but was one related to tort within the scope of Article 5(3) of the Brussels Regulation.

- Tacconi case, the court had already decided that a claim for not negotiating a contract in good faith was not a contractual matter but was one related to tort within the scope of article 5(3) of the Brussels regulation.

  - Article 2(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.

  - VFK c Karl Heinz Henkel (2002)

  - A consumer association brought a case to stop a company from using unfair terms in contracts.

  - The court held that Article 5(3) of Brussels I (today Brussels Recast) applies also in the case of a claim to prevent the happening of a harmful event. Brussels I in fact was amended (from previous Brussels Convention) to cover also such scenarios.

- Jekk tara sub-paragraph 3 of article 2, it includes an event giving rise to damage, that is likely to occur, mhux id-dannu li rrizulta dak il-hin anke konsegwenzi ta dak l-event li grali wara, the damage that is likely to occur.

- Karl Heinz a consumer association brought a case to stop a company from using unfair terms in consumer contracts, the court held that article 5(3) of Brussels I today the Brussels Recast applies also in the case of a claim to prevent the happening of a harmful event, il-precautionary principle fil-public international law. Dahlet l-idea tal-harmful event.
  - Art 3 – Universal Application
  - Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.
  - Therefore the applicable law under Rome II need not be the law of a Member State.
  - If the provisions of Rome II point towards the law of a third State, that law will still apply.
  - The law of Rome II itself of course only applies to Member State Courts, but the Rome II Regulation may direct a MS court towards the law of a non-MS.
- Insibuh ukoll fir-Rome I li r-regolament ghandu il-general rule under Rome II, need not be the law of a member state,
  - General Rule – lex loci damni
  - 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 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 occur.
- General rule lex loci damni liema hija l-ligi applikabli? Article 4(1) sakemm m'hemmx xi rule ohra specifika fir-regolament, the law in the country in which the damage occurs. ir-Rome II marret fuq it-teorija tal-lex loci damni, the country in which the damage occurs.
  - General Rule – lex loci damni
  - Art 4(1) includes the general rule for choice of law and instructs to apply the law of the country where the damages occurs (lex loci damni)
  - This is a departure from the previously widely held principle, in the Members, of lex loci delicti commissii, and was 'simply 'intended to lead to less discussion in most cases:

- The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable (recital 15)

- Art. 4(1) of Rome II specifically instructs to ignore the lex loci delicti commissi, as well as the law of the countries where the indirect consequences of the delict are felt.

- Moreover, in accordance with art 17, some rules of the lex loci delicti commissii must in any event be taken into account, such as general health and safety and highway code provisions.

- Article 4(1) tapplika il-lex loci damni, li hija departure mil-principju li kienu juzaw qabel il-lex loci delicti commissi, fejn sar il-harmful event, so we departed from the lex loci delicti commissi u il-principju applikabli huwa il-lex loci damni.
- In this connection araw ukoll recital 15 tar-Rome II.
- However as stated in article 17 where we have special rules on safety and conduct, some rules of the lex loci commissi must in any event be taken into account, in the field of health and safety and the highway code.

- Damage is defined by art 2(1) by reference to various types of non-contractual obligations, by listing torts, plus three other categories: tort/delict, unjust enrichment, negotiorum gestio and culpa in contrahendo.

- It also clarifies that within the scope are both obligations which have arisen and those which are likely to arise – that is the same under the Brussels I Regulation.

- We already said this damage is defined by article 2(1) by referring to non contractual obligations including torts, delicts, unjustified enrichment, negotiorum gestio and culpa in contrahendo. Kif ghedna mhux those obligations which have arisen imma those obligations which are likely to arise.

- Therefore as a general principle Rome II adopts the lex loci damni (the law of the place where the damage occurred), irrespective of the place of the event giving rise to the damage and the country where the indirect effects are felt:

- Preamble 16 – a connection with the country where the direct damage occurred (lex loci damni) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects

the modern approach to civil liability and the development of systems of strict liability.

- In both tort and criminal law, strict liability exists when a defendant is liable for committing an action, regardless of what his/her intent or mental state was when committing the action.

- Preamble 16, outlines why Rome II has adopted the theory of lex loci damni.
- In both tort and criminal law, strict liability exists when a defendant is liable for committing an action, irrespective of what his/her intent or mental state was when committing the tort or criminal act.
  - General Rule
  - Preamble 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.
  - Prior to Rome II, Malta and most other Member States adopted the lex loci delicti commissi rule (the place where the harmful event took place).
- We've seen preamble 17 already. Inkluz malta qabel kelna il-lex loci delitti commissi qabel kellna ir-Rome II
  - General Rule
  - Bier BV v Mines de Potasse d'Alsace (1976)
  - CJEU referred to the Brussels Convention and held that jurisdiction may be exercised by the courts of the place where the damage occurred or the courts of the place of the event given rise to the damage.
  - In terms of the applicable law, however, if one had to apply Rome II, since damage had taken place in the farmer's country, then the only law applicable is the law of that State. One thus cannot mix the concepts of jurisdiction and applicable law.
- Bier BV case, the court referred to the Brussels Convention, meta kienet ghadha convention, jurisdiction may be exercised by the courts of the place where the damage occurred. Or the courts of the place off the event giving rise to the

damage. Il-Brussels convention kienet the place where the damage occurred or the courts of the place giving rise to the damage. If one had to apply Rome II since damage had taken place in the farmers country then the only law applicable is the law of the state. It m

- General Rule
- Antonio Marinari v Lloyds Bank (1995)
- An English bank had incorrectly deemed Marinari's promissory notes to be forged.
- The loss he suffered was in Italy where his assets were held.
- Plaintiff sued in Italy because he claimed he had suffered damages in Italy since that is where his assets were held.
- The ECJ held that the promissory notes were seized in England, so the fact that the estate was in Italy was only an indirect consequence of the damage sustained in England.
- The court which had jurisdiction was thus the English court.
- Thus according the Rome II here English law applies since the indirect consequences are irrelevant – one must see where the actual damage was suffered.

- Antonio Marinari, they said that the promissory notes were forged. Therefore the English court had jurisdiction.
- In this case as per Rome II English law applied since the indirect consequences are relevant and one has to look at the actual damage suffered, the lex loci damni.
  - General exception to the general Rule – Parties habitually resident in the same country
  - Art 4(2) 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.
  - As in the case in Rome I, Art 23 gives a specific definition of 'habitual residence'; as is also the case in Rome I, no specific definition is given of the 'normal ' habitual residence of a natural person (as opposed to when in the exercise of his professional activities).

- Article 4(2) contains an exception, in the sense where the person claimed to be liable (tortfeasor) and the person suffering the damage if both have their habitual residence in the same member state, when the damage occurred, if the tortfeasor and the person suffering the damage both have the habitual residence in the same country where the damage occurred, it's the law of the country where the damage occurred applies, both the tortfeasor and the person who has sustained the damage, if they have the same habitual residence it is the law of the country where the tort has been performed.
- For a definition of habitual residence have a look at article 23, the same as Rome I also defines what is habitual residence.
  - Escape clause: case Manifestly more closely connected with other country
  - Art 4(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 the 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 pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.
- Article 4(3), again we have another exception to the general rule, an escape clause from the general rule, from the lex loci damni, in the sense that when a tort is manifestly more closely connected with a country other than that indicated in paragraphs (1) and (2) so lex loci damni and habitual residence, the law of that other country shall apply. This is an escape clause from article 4 (1) and 4(2).
  - Escape clause: case Manifestly more closely connected with other country
  - 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.
  - The tort has to have that manifestly closer relationship.
  - Evidently contractual relations between parties prior to the occurrence of the tort may indicate such manifest closer connection.
  - This is a flexible exception which gives an element of discretion to the Court, but also creates an element of uncertainty.
- When a case is manifestly more closely connected with other country? This might be based in particular on a pre-existing relationship between the parties, such as the case when the parties have signed the contract, that is closely connected to

the tort in question, in this case the tort has to have, it is manifestly of a closer relationship, and any contractual relationships between the parties prior to the tort may give an indication of this manifest closer connection.

- Escape clause: case Manifestly more closely connected with other country
- The reference to contract in art 4(3) is however, by way of example only. The text is flexible enough to allow the court to for instance take account of a contractual relationship that is still only contemplated, as in the case of the breakdown of negotiations or of annulment of a contact or of a family relationship.

- Article 4 (3) is intended to give flexibility to the domestic courts, it gives them an element of discretion on the application of the applicable eU law however at the same time it creates a level of uncertainty of what is applicable law. So under article 4 the general rule (2) and (3) are exceptions to paragraph (1) sub-paragraph (2) is based on habitual residence when both the tortfeasor and the person suffering the tort has the same habitual residence, in that case the law of their country shall apply, and in (3) we have this escape clause manifestly connected to closure cases.
- We mentioned the reference to contract under article 4(3) however article 4(3) has the flexibility to allow the courts to exercise their discretion in the application of the applicable law and the court can take into consideration for instance the contractual relationship that is still only contemplated.
- An example would he in the case of a break of negotiations in a contract, or the annulment of a contract or a family relationship.
  - Art 14 – Freedom of choice
  - The issue of freedom of choice is mostly relevant in the sphere of contracts.
  - 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.

- The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and will not prejudice the rights of third parties.

- Article 14 reflects a similar article in Rome I freedom of choice in the parties where the parties may agree on the law regulating non contractual regulation, either by a bilateral agreement which is entered after the event giving rise to the damage, or where all the parties are pursuing a commercial activity by an agreement signed before the event which may give rise to the damage, the parties agree on which applicable law will govern their non-contractual obligations.

  - Art 14 – Freedom of choice

  - Article 14(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 parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement [mandatory laws].

  - Article 14(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 implanted in the Member State of the forum, which cannot be derogated from by agreement [mandatory EU laws].

- Article 14(2), therefore this is a mandatory law

- Article 14(3), in this case we have the damage occurring not just in one member state but in other member states. So, Rome II still applies where appropriate as implemented in the member state of the forum.

  - Scope of applicable law

  - After the applicable law is chosen, the next question which arises is what will that particular law regulate. Article 15 deals with a wide scope on the issues which are regulated by the applicable law.

  - Article 15 says that 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, nature and assessment of damage or remedy claimed. Where Maltese law is the applicable law, for example, the heads of damages which are recoverable, and the quantification of the individual heads, will be in according with Maltese law even if proceedings are brought elsewhere.

- (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;

- The scope of the applicable law, article 15. Article 15 outlines a non-exhaustive list of circumstances, it mentions eight circumstances. The applicability of the law applies to the quantum, including the persons who maybe held liable, any exemption grounds from liability, or limitation of liability, and any division of liability in cases where substantive law stipulates on the division of liability, the existence nature and assessment of damage or remedy claimed, mela how the damage is assessed according to the applicable law, fourth, the measures which the court may take to prevent or terminate injury or damage or to ensure the provision of compensation.

  - Scope of applicable law cont.

  - (e) The question whether a right to claim damages or a remedy may be transferred, including by inheritance;

  - Article 1046 Civil Code, for e.g. provides that the action in tort can be initiated by the heirs, but it is the applicable law which applies so it eh applicable law is English law, English law will determine who is entitled to bring the action.

  - Art 1046 “Where in consequence of the act giving rise to damages death ensues, the court may, in addition to any actual loss and expenses incurred, award to the heirs of the deceased person damages, as in the case of permanent total incapacity, in accordance with the provisions of the last proceeding article.”

- As we know the court may also take internal measures in order to prevent further injury from occurring whilst there are the rules of proceeding, issues relating to the inheritance of a claim of damage, infethet kawza ghad-danni, miet min fetaha, u l-eredi qed jassumu l-atti ta dik il-kawza, hawn referenza ghal artikolu 1046 of the civil code. Kazijiet meta miet min sofra d-danni u l-kawza intirtet mil-werrieta tieghu dawn huma cirkustanzi li jinfethu mill-applicable law.

- Scope of applicable law cont.
- (f) Persons entitled to compensation for damage sustained personally;
- (g) Liability for the acts of another person – this refers to indirect liability;
- (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.
- In practice, this last paragraph is very problematic. Importantly, however, rules of procedure are always governed by the lex fori, as stated in Article 1(3) which says that the Regulation does not apply to issues of evidence and procedure.
- The filing of a judicial letter in Malta, for example, is a procedural matter.

- Persons entitled to compensation for damage sustained personally, indirect liability meta ghandek liability li hija indirect for the acts sustained by another person, (il-genituri ghal tifel taht l-eta responsabbli huma), issues relating to the extinction of obligations, we have seen this also under Rome II prescription and limitation of the action including rules relating to the commencement, interruption and suspension of a prescriptive period. Rules of procedure are always governed by the lex fori, the law of the court hearing the case as per article 1(3).
- Rome II does not apply to issues relating to evidence and procedure as they are issues of procedure, the issue of a judicial letter to be sent to interrupt a prescription for instance.
  - Art 23(1) Habitual Residence - Rules
  - 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.
  - Article 23(2) – 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.
- We find the same rules of Rome I on habitual resident for companies and branches agencies and natural persons article 23(1), which define what is habitual residence.

- Public Policy of the forum
- Article 26 – the application of a provision of the law of any country specified by Rome II may be refused only if such application is manifestly incompatible with the public policy of the forum.
- The applicable law will remain the same, but the particular rule that conflicts with the forum's public policy is not applied.

- We find the same article 26 in Rome I on issues relating to public policy of the member state which in effect means that the applicable law may be reduced if the application of the applicable law is manifestly incompatible with the public policy of the member state.
  - Burden of Proof
  - Article 22(1) – the law governing a non contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.
  - Article 22(2) – acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.
- Burden of proof, again we have the same rules of Rome I so proof has to be recognised in terms of the court which is hearing the case.
  - Act 16 – Overriding mandatory provisions
  - 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.
- Another article which is common with Rome I are the overriding mandatory provisions article 16 however in Rome I the article is more elaborate because it mentions public interest and gave examples of public interest, economic, social, policy etc.
  - Rules of safety and conduct

- Article 17 – in assessing the conduct of the person claimed to be liable, account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

- Therefore if for example the applicable law is Maltese law, one would still have to look at the rules of safety and conduct of the country where the even giving rise to the liability took place – for instance if the event was a car accident in Italy, one would have to take note of the fact that in Italy cars drive on the right rather than on the left as in Malta.

- We mentioned this article already, rules of safety and conducts. Whether a person is liable or not we have to look into the rules of safety and conduct at the place and time when the event took place, not at the rules as amended afterwords. So here we have to look at the time of the event not at the time of the damage.

  - Art 24 – Exclusion of Renvoi

  - The application of the 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 is the reference of a matter involving a conflict of laws to the law of the foreign jurisdiction involved including reference to the jurisdiction's rules governing conflicts of laws.

- We have an exclusion of renvoi the same as in Rome I, renvoi is the reference of a matter which involves a PIL element to the law of the foreign jurisdiction.

  - Specific torts

  - Preamble 19 – specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interest stake.

  - Article 5-9 which deal with specific torts and which are applicable instead of the general rule espoused in Article 4.

- Preamble 19, outlines that specific torts and delicts have to have their own rules as we shall see.

  - Article 5 product liability

- In this regards there is also Council Directive 85/371 of 1985, which regards situations where a product gives to injury or death. It was amended by Directive 99/34.

- Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

- This makes it easier to sue the producer. Article 4 of the Directive says that the injured party has to prove the damage, the defect and the causal relationship between the defect and the damage – one does not have to prove negligence.

- Article 5 of Rome II provides for special rules on product liability and article 4 has to be seen together with Council Directive 85/374, regarding situations where a product gives to injury or death. As amended by directive 99/34.
- Directive 99/34 concerning liability for defective products.
- Article 4 of this directive makes it easier to sue the produced. One has to establish the causal link in order to prove compensation in damages.
  - Article 5 product liability
  - Article 5 provides that without prejudice to Article 4(2) (if the defendant and plaintiff are resident in the same country, then the law of their country applies).
  - The law applicable to a non-contractual obligation arising out of damage cause by a product shall be:
  - a) 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) Law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
  - c) Law of the country in which the damage occurred, if the product was marketed in that country.
- Article 5 has also another part, it holds a number of instances.
  - Product Liability

- 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 not 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).

- Therefor here even the producer of the product is given some protection.

- Articles 5(2) – 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 paragraph 1, the law of that other country shall apply.

- A manifestly closer connection with another country might be based on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question (at the discretion of the Court).

- Article 5(2) holds the same wording we have seen as other articles in the law. Here we have a blanket provision based on whether the circumstances is manifestly more connected with a country mentioned under the instances mentioned in sub-paragraph 1 (a), (b) and (c).

- The national court will have discretion on how to interpret this manifestly closer connection.

  - Product Liability

  - Preamble 20 provides the ratio legis behind this specific rule, namely that the conflict-of-law rules 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 undistorted competition and facilitating trade.

  - Creation of a cascade 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 manifestly closer connection to another country.

- Have a look at preamble 20 which speaks on product liability, and among the cascading system of connecting factors we have to first take into account the law

of the country in which the person sustaining the damage has his habitual residence, when the damage occurred, the lex loci damni as long as the product was marketed in that country.

- Art 6 – Unfair competition and acts restricting free competition
- At an EU level many efforts are being made to encourage the private enforcement of competition law.
- Public enforcement is the enforcement by national Competition Bodies and by the Commission and the ECJ.
- Private enforcement encourages victims of competition restrictions to sue for damages, and recover the damages cause by the breach of free competition.
- Courage Ltd v Crehan (2002)
- Court held that the full effectiveness of Article 85 of the Treaty would be put at risk if it were not open for an individual to sue for such damages cause by unfair conduct.

- Article 6, again we have special rules on unfair competition, and acts restraining free competition. This is a result of the efforts of the EU to encourage the enforcement of competition law on two levels. They can be public enforcement which is the enforcement by national competition police or tribunals, by the commission when it exercises quasi judicial powers whereby the commission can also issue decisions on particular individuals or companies or by the ECJ.
- On the other hand, private enforcement, involves the victims of competition, who can file for damages, arising out of unfair competition and to recover the damages for the breach of competition law.
- Courage limited case, article 85 of the treaty itself encourages this enforcement action also on the part of the private individual.

- Art 6 – Unfair competition and acts restricting free competition
- The legislator also wants to make possible collective redress actions.
- Collective redress is when consumers bring an action together to recover the damages which they have suffered as consumers due to anti-competitive behaviour.
- An example would be a concerted practice in Malta between service provider A and service provider B. No single consumer would sue simply to recover

small amounts – but a collective redress action would allow these consumers to sue together.

- Preamble 21 says that the special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it.

- In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy function properly.

- There is also the drive to have collective redress actions when consumers bring a collective action to recover damages from anti-competitive behaviour.

- And have a look also at preamble 21 of Rome II.

- In this sense the reference to unfair competition in Rome I stresses taht the conflict of law in this area is intended to protect competitors, themselves from unfair competition, consumers and the general public and to ensure that the market economy operates in a competitive environment.

  - Art 6 – Unfair competition and acts restricting free competition

  - It is thus no surprise that the legislator also wants to make cross-border actions easier through private international law interventions. The preamble, in fact, notes that the conflict of law rules for non-contractual obligations from unfair competition should be designed to protect competitors, consumers, and the general public.

  - One must make a distinction between unfair competition, which related to breaches of the obligations of traders (ex. Not using the trademark of another trader), and restrictions on free competition, which refers to breaches of competition law such as concerted practices.

  - Article 6 catches both.

- Another scope for the inclusion of article 6 is that the legislator wanted to make cross border actions of competition through uniform of PIL rules easier. Note also the difference between unfair competitions and restrictions on free competition, unfair competition relates to the breaches of obligation of traders such as the breach of a trademark, and restrictions on free competition include conservative actions, dominance and article 6 comprises both unfair competition between traders and also restrictions on free competition.

  - Art 6 – Unfair competition and acts restricting free competition

- Article 6(1) – the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

- Article 6(2) – where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

- Therefore if the issue is just between two competitors (ex. One trader using the same trade name), the rules of Article 4 apply.

- Article 6(3)(a) – the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

- If we look at the rules provided by Rome II on unfair competition, shall be the law of the country where the market or is or is likely to be effective, depending on the effects of consumers in a particular country/member state.
- Article 6(2) the general rule under article 4. So, in the case of two competitors the general rules of article 4 apply.

  - Art 6 – Unfair competition and acts restricting free competition

  - Article 6(3)(b) – When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seized, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

  - Article 6(4) says that the law applicable under this Article may not be derogated from by an agreement pursuant to Article 14 (freedom of choice).

- Ha naqbzuhom dawn

  - Art 12 Culpa in contrahendo (pre-contractual liability)

- Preamble 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.
- Thus in order to fall within the scope of Article 12, the matter must be directly linked to the dealings prior to the conclusion of the contract.

- Jekk naraw article 12, culpa in contrahendo, pre-contractual liability, preamble 30, it includes the violation of the duty of disclosure when two parties are contacting and dealings prior to the conclusion of a contract, for instance bad faith.
- Not after the contract because here we are speaking of pre-contractual liability, negotiations leading to the contract, they have to be negotiations prior to the contract. The contract fails because there was bad faith at a pre-contractual stage and therefore we have culpa in that case.
- We have a definition in article 12(1). Jekk se naghmel kawza fuq pre-contractual liability l-applicable law hija l-ligi ta fejn kieku l-kuntratt sehh.
- Article 12(2) itina xi variables ta meta ma nistghux niddeterminaw il-ligi applikabli.
  - Culpa in contrahendo (pre-contractual liability)
  - Article 12(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.
  - Article 12(2) – where the law applicable cannot be determined on the basis 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
  - (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

- (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.

- Article 10 looks at the rules of quasi contracts, unjust enrichment, in our civil law it is article 1028 and in our case, we deal with unjustified enrichment in the actio de rem verso and the in debito solutio, again under Rome these have an independent and autonomous interpretation.

  - Art 10 – Quasi – contracts

  - Unjust Enrichment

  - In Malta the notion of unjust enrichment is dealt with by the actio de in rem verso and indebiti solutio, but for the purposes of Rome II, they have a single autonomous meaning.

  - Article 10(1) says that if a non-contractual obligation arising out of unjust enrichment, 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 governs that relationship.

  - Therefore if there is a contract between the parties and one of the parties pays the other more than the amount due, he has a right to recover that amount.

  - Since this claim is closely connected to the original contract between the parties, the claim is governed by that relationship – thus by the law governing that contract in accordance with Rome I (contracts).

- Article 10(1) on unjustified enrichment we have to look at the law closely connected with that unjust enrichment. Since in the case of a claim of unjust enrichment it is closely connected to the original contract between the parties, the claim is governed by the applicable law in terms of the contract because there is a contract however I have been unjustly enriched by that contract, so a quasi-contract therefore I have to use the law of the contract for the unjustified enrichment case.

  - Art 10 – Quasi – contracts

  - Unjust Enrichment

- Article 10(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 enrichment occurs, the law od that country shall apply.

- Article 10(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.

- Article 10(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 10(2) when the law cannot be determined, and the parties had the same habitual residence, the law of that country shall apply.
- Article 10(3) when we cannot determine the law in subparagraphs 1 or 2 the applicable law shall be the law of the country in which the unjust enrichment took place, so the law stipulating rules.
- Article 10(4) we find again the issue of the circumstance of manifestly more closely connected with a country again if this is the case then the law of this country will apply as we have seen in other circumstances of other quasi-contracts.

  - Art 11 Quasi Contract – Negotiorum Gestio

  - Negotiorum gestio is a quasi-contract whereby someone voluntarily does something which he is not obliged or authorized to do but which is nevertheless beneficial to the affairs of another person.

  - An example would be a person extinguishing a fire in a house which does not belong to him, but to his neighbour.

  - Article 11(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.

- Negotiorum gestio another quasi contract, article 1012 in our civil code. Per ezempju kien hemm fire mal-girien tieghi u jiena tfejtu, tajt servizz ghax ridt.

- Article 11(1), if there is a contact already one has to look at the law of the contract.
  - Art 11 Quasi Contract – Negotiorum Gestio
  - Article 11(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 damage occurs, the law of that country shall apply.
  - Article 11(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.
  - Article 11(4) – where it is clear from all the circumstances of the case that 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 11(2) when again we cannot determine the applicable law we fall on the law of habitual residence of the parties, where the event giving rise to the damage occurs.
- Article 11(3) when even the applicable law cannot be determined, the applicable law will be where the negotiorum gestio performed his act.
- 11(4) we have the circumstances again when the event is more closely connected with the country which we have seen recurring with previous articles.
  - Art 7 – Environmental Damage
  - Preamble 25: Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventative action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.
  - Article 7: The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

- The regulation also has special rules relating to environmental damage.
  - Art 8 – Infringement of intellectual property rights
  - Art 8(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.
  - Art 8(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.
  - Art 8(3). The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.
- Article 8, the infringement of intellectual property rights. What is the applicable law? Which is the law of the country where protection is claimed.
  - Art 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 action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.
- Article 9, again we find special rules on industrial actions, what is the applicable law? The law of the country where the action is to be or has been taken.
  - Art 23 – Habitual residence
  - Article 23 refers to habitual residence of legal persons. “For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporates, 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.
  - Thus one may see a difference between the connecting factors applicable under the Brussels Recast Regulation whereby the predominating connecting factor is that of domicile.

- Whilst in the Rome II Regulation it is habitual residence which take precedence. Therefore in cases of jurisdiction one must look at domicile whilst in determining the applicable law, one must look at habitual …

- Habitual residence is again defined in article 23, the same, habitual residence is defined the same as it was defined in Rome I

- We said that Rome I and Rome II are based on habitual residence and not domicile.

  - Conclusion

  - When enacting Rome II, the commission said that it would carry out a study on the application of foreign laws by the MS

  - This study has in fact been carried out, and covered how the applicability of foreign law is pleaded, and how foreign law is proved.

- The commission committed itself after enacting Rome II to make a study on the application of foreign laws by the member states and the study was eventually carried out so that the commission could gaiter information on how Rome II is being applied across the member states.

- Il-questions huma diretti, m'hemmx case law u diga kien hemm indication ta' x'hemm importanti.

16th May 2023

Lecture 11.

- Punti ftit importanti, se mmorru fuq ir-regulations u Dr. Bugeja se jindika x'inhu importanti. Fil-karta tal-ezami hemm sitt domandi, m'hemmx sections, tistghu taghzlu li tridu, tlieta min sitta, Dr. Bugeja ghamel tlett domandi, domanda ta' Prof. Refalo u domanda tan-nutar Sceberras Trigona. Fid-domandi ta' Dr. Bugeja m'hemmx cases, huma domandi diretti fuq il-ligi, u ovjament xi caselaw li nafu, pero mhux marbutin fid-domandi. Id-domandi generali, m'humiex compare and contrast.

  - Il-punt ta' Rome I fuq civil and commercial matters, ir-regolament, mhux Rome I biss. Ir-recast ghedna tapplika ghal civil and commercial matters, ma tapplikax ghal kriminal, ma tapplikax ghall-amministrattiv, l-istess ir-Rome I u Rome II. Pero il focus li qed jinghata huwa fuq ic-civil and commercial matters fir-recast. X'inhu civil and commercial. Tistghu tiddiskrivuh mhux bil-ligi imma bil-caselaw.

  - Jekk hemm domanda ovjament irridu nsemmu caselaw fuq inerpretazzjoni ta' civil and commercial matter. Mela, importanti the notion of civil and commercial matters as interpreted by caselaw.

- Article 2, tar-recast ghandna l-exclusions, meta ma tapplikax ir-recast, qed tghidlek hi stess, ir-regolament, social security matters, arbitration, maintenance kif nafu hemm regolament iehor fuq maintenance. Issa, ha nigu fuq il-punt tal-jurisdiction. Articles 4 u 5, u 6. Articles 4 u 5 ghandna il-general jurisdiction u article 6 ghandna dawk it-tlett tipi specifici li huma l-consumer, l-employer, u l-insurance li hemm regoli ghalihom, ir-regolament, ir-recast jaghmel regoli specjali ghax huma mequisin bhala weaker party, jekk gie kliijent issue ta' pil u tikkoncerna issue ta konsuumatur mhux se tmur fuq il-general jurisdiction ta' hija paragraph 4, article 4, trid tmur fejn ir-regolament jitkellem fuq special rules fejn jidhol consumer. Biex jiffacilitalna hajjitna, dawk ir-regoli specifici fuq employer, u insurance mhux se johorgu ghall-ezami.

- Article 7, special jurisdiction u article 8, ghax l-8 tkompli mas-7, tal-ispecial jurisdiction. Mela ir-regolament, jistabilixxi li f'certu cirkostanzi, li f'article 7 hemm 7 cirkustanzi, ir-regolament jghid f'dawn is-sebgha cirkustanzi ma tapplikax il-general jurisdiction imma applika special jurisdiction, ghaliex ma nafux, dik il-ligi u hemm sebgha cirkostanzi, per ezempju in matters relating to tort, delict, f'dawn il-kazijiet ta special jurisdiction, a person domiciled in a member state may be sued in another member state. F'dawn is-sebgha cirucstanzi, mela, m'ghandniex general jurisdiction imma hemm special f'dawn is-seven instances.

- Article 8 tkompliha ukoll mas-seven, huwa special jurisdiction ukoll, ghandek erbgha cirkustanzi ohra taht article 8. When he's one of the number of defendants, a third party in an action, counterclaim.

- Ma nhaltux, (fl-ezami) special jurisdiction ma tlett tipi l-ohra tal-konsumatur, li huma tipi ohra, m'humiex special imma ghandhom ir-regoli taghhom consumer, employer u insurance, mhux se jkollna mistoqsijiet fuqhom dawn it-tlieta. Special jurisdiction importantissima.

- Jurisdiction fuq insurance, ha naqbzuha, employment u consumer.

- Article 24, exclusive jurisdiction. Apparti li ghandna special jurisdiction, apparti li ghedna, ghandna regoli specifici ghall-consumer etc, ghandna kategorija ohra, hija exclusive jurisdiction which is not special jurisdiction. U ghandek hames instances fejn jidhlu kumpaniji, registri pubblici, patents, huwa article 24.

- Prorogation of jurisdiction, tuh daqsxejn daqqa t'ghajn, meta l-partijiet minkejja regoli kollha jaqblu bejniethom, prorogation of jurisdiction.

- Article 26 ghedna nghidulu jurisdiction by appearance, meta jiena min jeddi dirt il-qorti biex inwiegeb, hemm voluntary appearance.

- Issa ha naqbzu ghal punt iehor importanti, ma ninsewx ir-regolament, ir-Recast ghandu zewg areas, il-jurisdiction special, exclusive, u ghandek parti ohra imbghad, ir-recognition and enforcement of foreign judgements.

- Din importanti kollha, hemm artikli fuq recognition, 36 sa 38. Imbghad hemm artikoli fuq enforcement. Ghedna recognition trid taghmel hemm l-annexes maghha, mar-regolament trid timla l-annex, iggib kopja tas-sentenza awktentika, it-translation f'lingwa li jifimha defendant, iddahhalha l-qorti fir-registru. Mela 36 sa 44 huma importanti. Recognition u enforcement.

- Ha nigi ghal 45, importanti hafna ukoll ghax jekk jigi klijent ghandek jghidlek ircivejt tahrika b'sentenza li inghatat min qorti barranija trid tghidlu tistax topponiha fuq xi ground u article 45 ghandkom il-grounds of opposition ghall-foreign judgements.

- Ghandkom hames grounds. Fosthom public policy, default of appearance, mela dawn hemm hames cirkustanzi ta' refusal of recognition. Jekk noqghodu attenti fejn tidhol refusal of recognition, il-ligi tghidlek any interested party jista jitlob refusal of revocation ta dik is-sentenza mghotija min qorti barranija. Refusal of a recognition, dawn il hames instances japplikaw ukoll l-istess ghal refusal of enforcement. Jekk ghandi refusal of recognition ovja ma tistax tinforza lanqas b'mandat. U l-equivalent article, 45 huwa refusal of recognition, l-equivalent article ta' refusal of enforcement huwa l-47 li huwa l-istess, kemm ghal recognition u enforcement hlief, li fil-45 jitkellem fuq interested party, filwaqt li fil-46, jitkellem fuq person, hija aktar wiesa imma grounds huma l-istess (min jidhol fid-dettall imur ahjar).

- Issa, araw refusal of enforcement mil-46 sal-51. Imbghad ghandek il-general provisions imsomma.

- Articles 58 sa 60 ahna ghedna mhux bilfors nitlob li tigi rikonuxxuta sentenza ta qorti barranija nista nitlob li jigii rikonuxxut xi other legal instrument bhal constitution of debt agreement, jew sentenza fuq kambjali etc. Dawn hemm provisions ohra, ghalihom li huma mill 58 sas 60, dawn l-istess, hemm l-istess procedura pero ghandek Annex 2 mhux Annex 1 trid timla, Annex 2.

- Imbghad ghandek general provisions miss 61 sas 65.

- Araw ukoll ftit m'hemmx hafna il-peas of jurisdiction imbghad, minn-naha tac-COCP li huwa article 741 ahna ghedna li japplika ic-COCP meta ma japplikax ir-Recast, ghandkom 741 u 742 prattikament.

- Ha nidhlu naqra fuq Rome I.

- Rome I ghedna li tapplika, mela, l-ewwel lestejna jurisdiction imbghad raja Rome I u Rome II. Rome I fuq kuntratti, choice of law fuq kuntratti Rome II torts etc. Rome I important ukoll, Rome I iktar min Rome II. (Hint)

- Araw ftit Article 1, l-exclusions li hemm, tissemma ukoll civil u commercial matters kif ghedna. Mhux se jkollna compare and contrast pero min studja sew u jrid jaghmel compare and contrast se jkollu marka ghola.

- Article 3 imbghad, freedom of choice, il-ligi ir-regulation dejjem taghti lil partite the freedom of choice li jghakzlu ic-choice of law huma fuq kuntratt. Ghedna li tista tkun jew express jew implied il-freedom of choice, jew miktuba fil-kuntratt jew nohduha mic-cirkustanzi tal-kaz li jkun.

- Article 4 imporantismu ukoll, x'se jigri meta m'ghazilniex ligi bejnietna? Mela the applicable law in the absence of choice. Ghandhek cirkustanzi min (a) sa (h) article 4 sub-paragraph (1). Mela m'ghazilniex il-ligi, inqghalat kwistjoni bejnietna? Liema hija l-applicable law fuq kuntratt ta' goods, ha tghidilna l-ligi, tippreskrivilna liema hi la m'ghazilniex, liem hi l-ligi fuq kuntratt ta' services Imbghad ghedna ukoll hemm is-sub-articles ta' article 4, li huma it-2, 3 u il-4 is-sub-paragraphs, is-subincizi, li f'certa cirkustanzi jaqghu il-connecting factor jaqa' fuq il-habitual residence.

- Rome I ukoll ghandha specific rules ghal certa tip ta' kuntratti. Mela l-ewwel freedom of choice, article 3 m'ghazlux choice of law il-partijiet, ha naraw liema hi l-applicable law billi mmorru fuq article 4, issa apparti dan kollu hemm specific rules fuq contracts of carriage, insurance contracts u individual employment contracts. Tuhom daqqa t'ghajn ukoll.

- Article 17 set off, 18 burden of proof fuq min qieghda, 19 habitual residence u article 21 public policy.

- Ha naraw daqsxejn Rome II

  - Rome II ghedna li hija l-istess fuq applicable law, pero f'areas ta' torts u delicts. Article 1 bhar-regolamenti l-ohra tibda bl-exclusions, x'ma jaqax tahta, article 2 ghandna non-contractual obligations, damage shall cover any consequence arising of a tort, delict, unjust enrichment, negotiorum gestor and culpa contrahenhdo, pre-contractual liability u tapplika ukoll ghedna ghal non-contractual obligations.

  - Article 3 universal application bhal ma nsibu ukoll fir-Rome I, article 4 hawn il-general rule, il-general rule ghedna hemm hafna tejoriji llum gew consolidated hija il-locus damni, pero imbghad ghandna ukoll exceptions to the general rule li huma

article 4 subparagraph(2) and 4 subparagraph (3) depending, for instance sub-paragraph 2 on habitual residence.

- Imbghad ghandna regoli specifici ukoll, bhall m'hemm fir-regolamenti l-ohra fuq product liability, unfair competition, mhux importanti.
- U se naqbzu ghal article 10 fejn ghandek unjust enrichment, article 11 negotioroum gestor u article 12 culpa contrahenhdo.
- Issa, bhal Rome I, Rome II ghandnha ukoll il-freedom of choice li qieghda f'article 14. Article 15, scope of the law applicable, ghandna certu cirkostanzi, fejn jidhol quantum of damages etc, liema ligi se tasal ghalih? U article 23 habitual residence.
- Insejna nghidu fejn tidhol enforcement, minn naha ta' enforcement of judgements naraw ftit article 825A fic-COCP sa 828.
- Ma ninsewx dejjem that EU law prevails over the provisions of the COCP. When regulations of the EU provide, the regulations shall prevail.
- Irridu nkunu nafu l-ligi, imbghad halli naghmlu caselaw etc, l-ewwel il-ligi. il-ligi cara mhux twila, naqra ikkumplikata. Sakemm jinftiehem x'qed jintqal, il-cases jistghu jinghadu fil-qasir.
- Dr. Bugeja jistenna li l-ligi nkunu nafuha, u nitghallmu ninterpretaw il-ligi, u 'we brief it' with caselaw. Pero biex nghaddu, irridu intuh il-ligi.

- Clarification
  - Rome 1 Art 3(3)
  - However, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than the previous provisions, the law of that other country shall apply. Therefore, Article 3(3) provides that, where a law is chosen to govern a contract but all the other elements relevant to the situation are connected with another country, the choice of law will not prejudice the application of the mandatory rules of that other country.
  - So, for example, if the parties to a contract were French, the contract was to be performed in France and, indeed, all other aspects of the contract were connected with France, Article 3(3) provides that even if the parties choose (say) Chinese law to govern their contract and they submit to the jurisdiction of the English courts, the English courts will, nevertheless, apply the mandatory rules of French

law (example dealing with unfair terms). The same principle applies to mandatory provisions of the EU.

- Rome 1 Art 3(4)
- A choice of law agreement does not cancel the application of mandatory domestic rules or EU rules (i.e. rules which cannot be derogated from) such as crucial provisions for a country to safeguard its public interests (political, social and economic policy), which are applicable to any situation within their scope. This thus leads to the application of the lex fori, superimposing the choice of the parties.
- Brussels Recast Art 38
- The court which has been asked to recognise a judgment - say a Maltese court being asked to recognise a judgment by a court in Italy – MAY suspend the recognition proceedings if the same judgment is being challenged in the Italian court (MS of origin) or an application (rikors) has been submitted by the plaintiff who is seeking to recognise the judgment that there are no grounds of opposition to the recognition of the judgment of the foreign court.
- This article is intended as a mechanism to stay proceedings until the circumstances under (a) and (b) are resolved.

Private International Law.

Prof. Ian Refalo.

13th February 2023

Lecture 1.

- We will talk about two things only today to start off. Firstly, what does one mean by law and secondly where does one find Private International Law.

- The first question, what do you mean when you refer to Maltese Law? What English law or Italian Law is?

  - Maltese law is the law applicable/applied in Malta, it's not the law of the Maltese, nor is italian law the law of Italians. It's the law applied in the territory of Malta, the law applied in the territory of Italy is Italian law, the law applied in the territory of France is French law, the Law applied in the territory of England is English law, the law applied in the territory of Scotland is Scots law not English law.

  - This is a very peculiar phenomenon, it has not always been with us, for example in medieval times. When we refer to godic law, we refer to the law of the gods of the trial which was the godic trial and the law of the vandals, the law was the personal experience.

  - Law was the rules, it was a character, it evolves from customs. So the law of the Romans, the Jus Civilis, the Roman law was applicable to the Romans.

    - For example when St. Paul appealed to Caesar he could have appealed to Caesar as of right because he was a Roman citizens, as to Roman citizens only Roman Law applied.

  - That is, laws differ. It's obvious that laws differ from one country to the next. Different countries, different laws. Different people different laws because laws are customs and customs don't develop according to a rule, they develop differently.

    - For example if a person is capable, the law of capacity for instance. A person in Malta is enter into contracts if they're 18 years old. A person may be able to enter into contracts abroad if they're 16 years old. Depending on the territory, so as different rules apply you have to decide which rules to apply.

    - Let's say a 16 year old enters into a contract with a maltese person. You have to decide whether the contract is valid or not, you have to decide on the capacity

of the person to enter into that deed. His capacity depends on his personal law very often. Initially as long as law was a personal experience you distinguish between you applied law according to the person so a godic law applied to him or Roman law applied to him. Different laws applied to different persons depending upon the personal status.

- A strange thing happened in the middle ages, law became progressively territorial as jurisdictions were consolidated, this law of England is the law passed by English parliament for the English territory.

- With this territorialisation of the law, law became, there was one difficulty that arose, which law do you apply.

  - Let's suppose a person enters into a contract importing wood from Siberia, which law would apply to the contract? Maltese law? Russian law? Which law would give it validity? That is of course the territory marks the boundary of the applicability of the rule, that is a rule would normally be applied in the Maltese rule of law and in the maltese territory.

- But sometimes of the necessity of things arose which may be imperative to apply laws beyond the territory that is, one of the most famous cases in Private International Law, Anton vs Bartolo, arose out of a marriage celebrated in Nadur Gozo in the 1800's, around the early 1860's. The husband had gone to Algiers, he made a fortune in Algiers and when he died his wife realised that he was still married to her so she claimed her share of the inheritance and a famous issue arose regarding the classification of the rule because which rule do you apply? Do you apply the French rule which prevents a foreign person from inheriting or do you apply to classify the rights of the widow which are in the marriage therefore marital rights and they are not hereditary rights so she would be entitled to the inheritance.

- Anton vs Bartolo is perhaps one of the more difficult to understand. Initially Prof. Refalo couldn't understand how the area of classification could be built between the difference of Maltese law and French law seeing how our maltese civil code is based on the French civil law, yet when he read the case he realised that they were married before 1867 and our civil code came into force in 1867 so they were married under the old marriage laws which were made of marriage a partnerships between husband, wife and children with each entitled to a third of the property.

- So she wasn't inheriting at all she had a right to a third of the property and assets. Of course, the difficulty in classification can be explained because our law prior was based on the Codes du Rohan which wasn't French law at all and so the different classification was explained and explained again.

- So, Private International Law is a law which arises due to the application of law in space, every norm is spatially conditioned, that is a maltese norm is applicable in Malta, not applicable in France, an italian law is applicable in Italy not in France or England or Malta.

- In fact, in reality, this territorialisation of the law came into being, consolidated itself in the course of the renaissance, law became mostly a territorial not a personal experience. Initially it was a personal experience. It was a part of you, your personality that is you weren't supposed to be subject to different laws as we travel but with the reduction of law to territorial jurisdictional units you have this experience that law. You wouldn't expect to park in the manner as you park in Malta, but anyway different rules apply different penalties apply.

- The same happens in every realm of life not only in parking but even in contracts and in everything.

    - For example in testate succession it is, any person can make a valid will in Italy simply by writing out a letter stating out what their will is. If they write a letter in Italy saying they bequest their property to 'X' then 'X' becomes the centre of the property to the deceased of the decujus.

    - If I write it in Malta, sign it in Malta that's not enough but if I write a letter in Italy and send it in Malta, it's a will as it is a will done and executed in Italy, the person does not need to reside permanently in Italy, even temporarily, even if the person is in Italy for a day it would still be a valid will. Of course you have to show that it was written in Italy as a rule in italian law is that a holograph (written in your own hand). A holograph will is a perfectly valid italian law, after all in wills what one mainly aims at is to ascertain the will of the person testate and there's no other way to look at in what himself wrote.

    - That is if you type a letter and you sign it it is not a holograph, a holograph must be written in your own hand. That is you must take pen to paper and write the whole will. That is a holograph will.

- So, one thing in Private International Law is Private International Law it gives, the rule that the will is valid is a rule which is not applied only in Italy but also in Malta, let's suppose a person does a will in Italy and dies. He writes the will in Italy it will be given effect in Malta because for the validity, the will will be valid if it's done in accordance with the law of the place the will was made, so a valid will in Malta is a will made in front of a notary and two witnesses, that is the requirement in Malta. In Italy the requirements are different, of course you are giving effect to an italian rule in Malta, let's suppose an italian dies

- Prof. Refalo had a case where an Italian had a Maltese estate, an extensive Maltese estate and he left the will in his own hand bequeathing the estate to his brothers in equal shares, he had previously made a public will in Malta which bequeathed the Maltese estate to one of his brothers, of course the last will if it is a valid will is the will to be applied. The last will said he leaves all his estate in equal shares to the brothers.
- You're actually applying a rule of Italian law beyond the Italian territory, that is normally an italian rule is meant to apply within italian territory, italian jurisdiction marks the extent of the applicability of the rule but in certain cases exceptions have to be made to that rule. This is one of it.
    - For example the validity of wills, a will will be valid if it is valid in the court where the law is made even though it may effect foreign interest, foreign land, foreign property.
- So you're giving effect to the law, beyond.Private International Law has been set to divide the applicability of rules in time and in space. In space it is obvious it is giving effect to the rule of italian law beyond it's italian boundaries. Sometimes this is necessary, suppose you marry a foreigner, supposed you are of the Romantic type and you marry in Paris.
- Different sorts of rules apply to the marriage, the formality of the marriage must be celebrated according to French law to be valid, it must be valid according to the parties in relation to capacity essential.
- So the rules which would normally be applicable in Malta are given a wider meaning than simply applicable in Malta as the marriage is valid for everybody, once it is valid in France it is valid in Italy, in Malta and everywhere. That is one point we had to make.
- Private International Law, exclusively depends on the territoriality of laws of its existence and because the territoriality of laws was realised only after the renaissance, Private International Law got it's development rather late in the day.

- Where do you find Maltese Private International Law?
    - This is another important question. Legally speaking if you look at Private International Law you see that in our law there are very few rules of Private International Law which are inherently Maltese. That is the codes du Rohan had some rules about the civil effects of marriage, there is a rule in the civil code about the validity of wills which is today surpassed. There are some rules regarding foreign judgements in British judgements, rules regarding jurisdiction section 2(9)

of the COCP and the rules regarding enforcement of foreign judgements article 823 or article 825.

- Otherwise there's very little law in Malta on Private International Law.
- So a problem arose of course, when Malta was a part of the Italian Group of States before Malta was one state amongst the several italian states which existed prior to the unification of Italy, prior of the unification of Italy there was a cohort of small states, Sicily, Malta, Venice, Naples states etc. All these states, the necessity of a Private International Law system is proportional to your travel and your business interests. That is the more business interests you have with other countries, the more necessary Private International Law is.
- Prior to becoming a member of the British empire, Malta had very little commerce with foreign countries and so Private International Law was at a minimum but with becoming a part of the British empire, Malta's strengths with the British empire evidently became significant. The significance of that trade you have a lot of Private International Law cases needing decision. How do you decide a case where you have no law, on Private International Law you had no law.
- One way would be that is this was something which was foreseen in the Codes du Rohan, that is there are instructions in the Codes du Rohan to the judges to apply the laws to the termination of the tribunals of Europe where it comes where they don't have a rule.
- Now this man was a reference to the civil law jurisdiction as Malta was part of the civil law system but when Malta became a part of the British empire where the civil law system was inapplicable then there developed the story that in Maltese Private International Law, where Malta had a lacunae in Private International Law you would make reference to English law. Of course it was better than referring to civil law because civil law was particularly unadapted to solve the problems posed by the British empire. That is for example most of the laws add up to nationality, but a lot of people had, living in the empire had British nationality, Malta had other states, African states, cannon states, Australia were not states as they are today.
- Nationality would not solve a problem of a contract between an Australian and a Maltese person so the maltese courts referred necessarily to English notions to determine, they did so under the notion that in public law we apply English law when we have a lacunae.
- This is a theory which has to be handled with great care. We apply English law in Private International Law.

- For example if you look up and you're a student of Domicile, you will see that Domicile was for a number of years in the 1900's in the 1920's determined either according to Italian civil law fashion, Thomas understood as your residence and or according to the English notion of Domicile which is specialised.

- That is, with what happens is that we applied English Private International Law when we had a lacunae, even though English Private International Law might not be perfectly suitable to our civil law notion.

- Of course, the first thing and we'll notice, the first thing by reading his journals. The first thing the English did upon getting possession of the Maltese islands was to try to regularise the maltese, and so they were very unhappy with Maltese law, they wanted the English notions introduced. It is due to capable maltese lawyers that they resisted the introduction of English notions into Maltese law, the excuse they got for not introducing English notions was that introducing English notions would bring havoc to the property rights of the inhabitants and it would cause a lot of grievance. Of course the English had already experienced a rebellion which they had and they were weary of provoking a similar rebellion by applying these, so it was put on the back burner for a couple of year.

- The jury was only introduced in Malta In 1950, criminal law became mostly English law but from the point of view of public law that is it was only in public law, for instance in Private International Law where Private International Law rules would be introduced wholesale into the maltese system to cater for problems which arose of Private International Law.

- You can see this graphically happening by looking at how the notion of Domicile was handled by Churchill from 1880 to 1920, after 1920 the Domicile was settled in the English cells, that is Domicile in this sense is as well nearly an equivalent to a nationality applied to an English empire. A Domicile law, is more than in that place of residence it's the permanent home of the individual and his permanent home, we will have to look at the notion of Domicile in cases applicable before between the 1880's and 1920's and you will see that depending on the judge, after all most of the judges had taken their decrees in Naples, how could they understand English law and English notions of Domicile until the old concepts were put aside by the by the new laws by the English.

- Of course, that English notions would be applicable in Private International Law where there is a maltese lacunae has a basis in law in the sense that because when there are referred to judges to the most renowned tribunals in Europe it was referring to London etc, England, France, Paris, they made it generic so the decisions of the most renowned. So going to the common law was legitimate in

the sense that they were applying or misapplying as we prefer the rule under the Codes du Rohan, they were never one must be careful Malta didn't apply common law, Malta was not a colony Malta already had it's own population when the English took over so Malta was treated as a colony who had jurisdiction by the will of the inhabitance but when the privy council came into rule on this case of Sammut it's that you either saw it as a conquered colony or a settled colony, there was no middle ground if you were not a settled colony you were conquered or seated colony or had a special status and that is so common law was not applicable in Malta. Common law was only applied in settled colonies. The idea of common law being applied in settled colonies because the English settlor took the common law with its package to this new territory, they were settling and therefore common law applied there.

- In other colonies where there were legal systems such as Quebec and Malta, these systems of law then prevalent continued to apply. In Malta so rebels to the common law position, its rebels not to the statutes of England because they are inapplicable in Malta as a result of the colonial law validity of 1972/1873.

- So, the decisions of the united kingdom came to be a source of Maltese law and the common law is a source of maltese Private International Law. Till now it has been a source of Maltese Private International Law now with Malta being a part of the European Union as being supplanted as we were being through our studies by European Regulation so everything is covered, be it wills, be it management, be it testimonies these are covered by European Regulations because the European Regulations are preeminently applicable in Malta, there is no lacunae there and this supplants the old system of law applicable in Malta.

- Those are the things Prof. Refalo wanted to mention today. One is that we consider the reality of laws that is you own your Private International Law thanks to the law becoming territorial, if law had not become territorial we wouldn't have a system like Private International Law.

- The first thing that we said was that Private International Law is as the effect of law becoming territorial through the renaissance process. With the territoriality of law, the necessity of a system arose which would cover differences between laws. Differences between your private law and the private law of another state and which would decide which rule to apply you cannot always apply your own rule.

    - For example wills in Malta are valid if made in front of a notary and two witnesses but what if a person has never lived in Malta and makes his will in Italy? Is the will only valid if I am giving the effect of Maltese rule beyond the Maltese territory, why limit wills to the maltese territory, giving effect to italian rule of wills of the Italian territory so one has to decide spatially how laws apply.

Spatially and temporarily because laws change over time, with the changing of law you have another difficulty, how to unify the exact status of a norm, which norm would apply? The old norm? The new norm? And so on.

- So Private International Law deals with the application and renovation of the norm in space and time.

- Secondly Private International Law in Malta, most of our Private International Law in Malta in English common law, and now in European Regulations. That is all for today.

20th February 2023

Lecture 2.

- We are doing Private International Law, one thing to realise about private intersectional law it's that it owes it's origin to law being territorial in nature, now law wasn't always territorial in nature, law was a territorial experience.

  - Even in Roman law, Roman law the jus civilis was the law of the Romans, the jus gentium was the law of the others. So, Roman law, had a personal idea of law. This personal idea of law it's only natural that our idea of law be personal in nature, because it's the most natural thing in the world for the persons to be governed its own customs.

  - In law, originally was all private customs etc. so the godic law was the gods. Vandal law was the law of the vandals, Roman law was the law of the Romans. Today it is not like that at all, today Maltese law is not the law of the Maltese but the law appleid in Malta, Italian law is not the law of Italians (if Italians exist as such), the law applied in Italy, the law applied in France, law has become after the renaissance, that is, the development started with the renaissance, law became increasingly territorial, founded on jurisdictions which had power within the territory. Law became an author in the sovereign in the territory to a politically inferior subject within the territory.

  - Which we would have no way out but to obey, so the initial attitude was that law was maybe hard, maybe difficult but it was law and it had to be obeyed not withstanding anything.

  - Today things are changing because today, we have put in a qualitative test of law if you ask Michael, the brother and father what law was he used to teach in this university about a hundred years ago, commercial law. He would have no doubt that the law is what is stated in his law books. Today you can query the validity of law because law has to be qualitatively valid as well in the sense it has to be in accordance with human rights provisions.

- Now this territoriality of law, gave rise to Private International Law because although law is the principal territory, of course the territorial reality of laws does not define everything, sometimes rules have to be extra territorial.

    - Let us suppose you marry in France and you go to Australia and you go round the world, but you want your marriage to be valid and it's valid by the rules of France, if it's valid by the rules of France you want the validity of that marriage to recognise by other states, so other states must apply the rules of France to test the validity of marriage.

- Say you marry in France and then you settle in Malta you would expect the Maltese court to apply the rules of France to see whether the marriage is valid or not not the Maltese law.

- If it is valid according to the French law, it is valid according, in a way a Maltese court is enforcing a rule of French law. Prof. Refalo thinks that this is evident, but a marriage is valid, but a marriage celebrated abroad in maltese court is asserting that a rule of a foreign system still apples beyond the territory of that state. Now as we individuals move about from one state to another as we order our books, our things from different jurisdictions, it is necessary to define the jurisdiction which would be applicable in relation to a particular transaction.

- Now, Private International Law is meant to define you precisely that. Now, as we said Private International Law, there is very little Private International Law before medieval law. You have Private International Law is a legal system developed in the 1800's and the 1900s. So there was very little Private International Law before that.

- Now, we come to the question where do we find maltese Private International Law? If we look at maltese law books you would find very little Private International Law saving the odd law rule or two dealing with specifically Private International Law problems such as the rule that the community of acquests, the rule defining the community of acquests formulates people which is a rule in the civil code, the rule defining the formal validity of wills which again is found in the civil code.

- There are these lacunae, these are keeping emphasis, there is a lot of missing information, and rules which had to be fetched from foreign institutions. Maltese law was well used, the Maltese church was well used to this system of law, in fact if you find it in the Codice Rohan published by De Rohan in 1784 that when a judge failed to find a rule defining the issue he would be, it would be legitimate for him to resort to the rules developed in the more renowned European courts.

- This is an attitude of civil law in Europe. All civil law in Europe was until Napoleon started codifying civil law was considered as one so where the local church didn't

find a rule they would be authorised to go and check with the tribunals of Europe to see what the rule was or not.

- This is a rule which is still applicable today. It has been applied in a very famous case which we will study, it has been applied in the Blue Sisters case, where the government, there's a rule of law which says the usufructuary is a corporate entity then the usufruct between the corporate person would terminate 30 years after the pre-quest. As the blue sisters were the corporate entity, so technically speaking, the pre-quest of blue sisters hospital would have finished after 30 years. It didn't finish after 30 years because in a French case, involving the friars, the friars were bequeathed a usufruct in order to build a school.

- When the owners of the land production for D.B was to be returned, the French court interpreted the identical provision in the civil code in the sense that it would be applied to a pre-quest which wasn't to a, for religious or other purpose charitable purpose and in this case as the pre-quest was to be used for education it survived the 30 years rule, the French court said it didn't apply to it. When the blue sister's case hospital came to decision the maltese court applied the similar rule found in the friars case to the interpretation of the section of the law.

- The important thing from our point of view is that it is in application of the codes de Rohan provision which says that the judge is authorised resort to judgements of foreign courts were he has a lacunae.

- What happened in Private International Law? In Private International Law what happened was this, very often judges resorting first of all until the codes du Rohan had very little Private International Law, Private International Law problems started appearing in Malta with Malta becoming part of the British empire. Now applying a Private International Law developed in Italy which was the place of preference, the place where maltese lawyers used to go study law in centuries past.

- It was usual for people to go and study law in the University of Naples (universita' di Federico) and of course they would be impugned with civil law decisions. Now the civil law decision with the insistence of Italians on nationality as a founding principle of Private International Law is particularly the application to solve problems within the British empire. That is, let's say an Australian, as much a British subject as maltese but you want to apply the Australian, Australian law and to the Maltese, Maltese law. The English were very aware of this problem and developed the concept of domicile.

- In the continental concept of domicile was equivalent to residence, nationality was seen as an alternative of residence in order to define the applicability of rules. Very often that is if an italian married a French girl wherever his capacity would

be judged by Italian law, her capacity would be judged by French law which was the law of the nationality whilst if a Maltese married an Australian, what law would you apply? If you say apply the law of nationality they had the same nationality but different laws. So the law of domicile presented as a much better solution than the law of nationality because the law of nationality was very important to Italians and Germans in the 1800s, 1800s were the years of unification of Italy and Germany and the unification of Italy cost considerable anxiety because they thought Malta would go the same way which Rhodes had gone when Greece was created the British possession in centuries rebelled because they wanted to join Greece. The same the English thought would would happen in Malta. Probably the Maltese had a good sense of money and they thought being a members of a British empire provided them more money than being members of a United Europe but when the British obsession of maltese. Being italian can be shown when there was the famous fra di pensier in the nabucco. The nabucco was strictly prohibited from being played out in maltese theatres because of course the fa pensier would enlighten any heart which had a sentiment of Italianism, they were afraid that that would happen.

- We have to study the judgements on domicile between 1880 and 1920 to see this eclectic attitude of the maltese courts there were some judgements which interpreted domicile in the italian sense, there were other judgements which applied domicile in the English sense. The English sense is a very technical attitude, that is you're domiciled if you're for example most of you are domiciled in Malta because your domicile of origin is in Malta.

- To disown your domicile you have to leave Malta, but leave it without any intention of coming back if you exhibited the intention to go back to your country.

- There was one which didn't go to court because they settled but Prof. Refalo's client was where he told her he was full of nostalgia for Malta and he told her wish to be with her in Malta. This was enough to say that he had never acquired an Australian domicile because he wanted to go back to the country of origin, if a person wants to go back to their country of origin, whilst the Italians look up on domicile as residence the English look upon domicile technically, it's very similar to nationality but different because it's not conferred on you by the state.

- You acquire it through residence permanently in your place, so everyone has to have a domicile you're born with it, upon your birth you have domicile of origin if you're a legitimate son you the domicile of origins is your fathers, if you're illegitimate the domicile of origins is your mothers. If you're a foundling your domicile of origin is the territory where you are found and so on and so forth then for the domicile of origin to be displaced you had to bring proof that he had

acquired a foreign residence with no intention of ever going back to the country of origin. It is very hard to prove that.

- One particular case, the witness was a business man and he wanted to say he acquired a domicile of origin in England, but Prof. Refalo asked (he was examining) and he asked why did you want to go to England? He said that he went to England to make money because of opportunities, and Prof. Refalo said when you became a millionaire, what would you have done with your money and he said that he would go back to Malta and enjoy it and That was enough because his idea to come back to Malta nullified the idea that he had acquired a foreign domicile.

- This, now in the 40 years threading the millennium 1880 - 1920, you have a neglected attitude with some courts saying we should take the English concept of domicile others going the Italian way but eventually they settled for the English concept of domicile and with the British empire it made sense to apply the concept of domicile and you could by a small stretch of imagination say that the section in the civil code which permitted the church to make reference to the decisions of the most illustrious court of Europe was a reference to English courts as well, of course no body would say that English courts were not one of the most illustrious courts in Europe.

- In Private International Law, this is the only area of law known of by Prof. Refalo, rules of law taken from the English situation and translated into Maltese law and applied as Maltese law. In no other, Judge Harding in 1940 in Spiteri vs Soler had give a judgement were he said Maltese law had a lacunae you had to apply English principles of Private International Law. Of course applying English principles of Private International Law to these problems made good sense because then Malta was part of the British empire and it's the main commercial dealings with other parts of the British empire. So, it made good sense applying English law, the point is whether it was permissible or legal to do so.

- It may have been illegal to do so but that is settled principle, and it has been a settled principle throughout, of course we've now become part of Europe and of course Europe has created a number of regulations on issues of Private International Law applicable to Europe and these have necessarily formed part of maltese law, so the areas were Maltese law has a lacunae are very few and far between.

    - For example in jurisdiction, the Brussels convention in enforcement the Brussels regulations, in succession there is a regulation on succession. There is a regulation on control, there's a regulation nearly on every aspect of Private International Law.

- And so it has become good practice to apply where Maltese law has a lacunae, British principles of law.
- Of course you have to apply them with some care and in order not to make nonsense of your local institution. Micallef vs Le Peuple Decided by Judge Cremona in 1975. Micallef vs Le Peuple was a case dealing about the proof of a foreign law. How do you prove to the Judge the foreign law applicable? It said that you had to apply in England you prove it by expert witnesses, you bring an expert to give evidence on the foreign law.
- In Micallef vs Le Peuple, we have our law of evidence and opinions where an opinion is stated, the law used to state that you couldn't produce evidence as to opinion, except through the appointment of a legal referee, the court appointed a legal referee to relate on the foreign law, to find void what the foreign law was and then decided accordingly.
- You have to keep clear that when you have a lacunae it is permissible to go back to English law to find the applicable rule, the basis of application of domicile in our law.
- That is, 1880 to 1920 there was an unsettled period in Maltese law were the problem was that most of the lawyers practicing law in Malta had studied in Naples, if you study in Naples, that is, and this explains the long judgement in administrative law by Chappell. Chappell must have studied law in Naples. When you study law in Naples you get so impugned with the attitude so you find this socratism in approach to what's the concept of domicile. It is a good exercise to look at the concept of domicile and see how it developed from 1880 to 1920 by 1920 the position was settled in English law.
- Domicile would be interpreted according to English law even though as a concept it predated English law as as a concept there was a concept in Malta pre-dating English law so how do you interpreter the word domicile in the Code of Organisation and Civil Procedure? The word domicile was interpreted in terms of English law. Being part of the British empire made perfect sense. If you had in your commercial relations with these countries you had to adapt a law which you might as well accept as being a rational position to be assumed by others that is, it was very important from a commercial point of view to resort to and this is why they resort to British law as were Maltese law had a lacunae became a rule of law.
- So in reality when you have a lacunae you are bound to look at English law. Today, of course this is no longer true because Malta's part of Europe it's relations are mostly with european countries the British empire is no more, it's a dream

which has vanished so Europe has intelligently enough started a process of regulating Private International Law. It was important for European states to regulate Private International Law in order to produce a degree of certainty within Europe countries.

- That is, if you're trading with a foreigner how are you certain that you will be able to collect your funds and so the European Regulations were developed which regulated contract law, and all commercial transactions, judgements etc. There's a particular enforcement of judgements.

- Up to the Brussels regulations we had the British enforcement act which was a chapter of the laws of Malta, and sections 824 to 826 of the Code of Organisation and Civil Procedure regulation enforcement of judgements. This has been done away completely in so far as European judgements are concerned. So European Court judgements are given immediately enforceability locally.

- And of course we have to be aware of this because if you were sued in France before Malta became part of Europe it was good advice to ignore this suit completely, but it was very bad advice to ignore this suit complete as it is not enforceable in Malta but once it's enforceable in Malta you have a problem and so it's very important to contest the judgement also abroad to try to defend your clients interest as much as possible.

- So, the rule is now the rule divides all logic because if you look at commonwealth law, commonwealth law there was no way how common law would be applicable in Malta in terms of commonwealth law. (We are speaking about which rules apply to Private International Law, Private International Law problems so the rule in general)

- If you have a Private International Law problem the rules apply to solve that problem must be taken from English law. Now, in there's no way how you could apply statute law clearly because of the British judgement and colonial laws validity act of 1867 you couldn't apply common law because technically speaking Malta was not a settled colony. So how do you apply English law? You still apply English law, common law, principles of English law as being the principles in the most strengthened in the judgements of the court which are applicable to Malta as a result of the codes de Rohan. This is stretching the Codes du Rohan interpretation beyond it's limit, the codes du Rohan as a goal was meant as judges apply jus communis Europea, the common law of Europe not the common law of England. The common law of England was, that is before Malta became part of the British empire it was part of the ,italian system of small states and all these states applied the common law of European a second law there was no realisation alt the time the codes were un-codified and therefore there was no realisation of

the university of rules, so it was fair for the grandmasters to think at the time that the European civil law was one.

- As soon as you started codifying the law. you find out it's the same process as happened when people started writing the vernacular. Before starting to write in the vernacular all people thought they were speaking latin, the French were speaking latin, the Italians were speaking latin, the Spanish were speaking latin. It was a different type of latin and when they started writing it down as vernacular and comparing the difference. So also with law, civil law up until the 1800's up until the codification of the napoleonean commencement by Napoleon civil law was understood as one European law, a common law of all Europe. as soon as Napoleon went to codify his law and Germany under the influence of sovereignty didn't codify under the influence of the historic attitude of the law, you had the realisation that they were different dealing with different laws.

- That is French civil law was different from Italian civil law, was different from German civil laws. They were different laws but the Maltese judges of course had to interpret the decision to apply the decision of the most competent tribunals of Europe so they misinterpreted that section as applying to British judgements and ; they applied British judgements as a result of that section.

- There were many judgements who said that common law principles would apply in Malta. This is not sense a common law principles do not apply in Malta. No common law principles apply in Malta. The only common law which applies in Malta is the law found in Private International Law.

- You have as a source Private International Law British law. This is a source of our Private International Law, of course the importance of this source this was a very important source of law in the 1960-1980 it has become less so now with our appurtenance to Europe and the European Union regulations because the edu regulatory framework has tended to settle issues which were unsettable. Which couldn't be settled. That is how do you create a Private International Law system which gives you uniform solutions allover, and of course you have renvoi, justification and all that but you have in Europe European Regulation which if adopted in all countries does away immediately with the necessity of renvoi.

    - Renvoi is that is if a Maltese picks up his domicile in France and changes domicile to French according to Maltese law you apply the law to the domicile as now it is covered by European Regulation, if according to French law you would apply the different law the law of nationality of the individual which is Maltese law.

- This creates a problem this is the problem of renvoi in it's poorest terms, in it's poorest terms the problem of renvoi tried on the fact that different Private International Law systems apply different laws to the same law.

  - For example French law, French Private International Law and Maltese Private International Law and English Private International Law are nearly different one applies the law of the domicile the other applies the law of nationality. So, where do you stop if you have renvoi it's reference forward or reference back?

  - That is you have a problem, your law refers you to a foreign law, which then would refer you to another foreign law, these differences cannot be solved by renvoi any other system. That is if you want homogeneity of dissolution, if you want that is the ideal that a person married who is married in one state is married all over the world. His marriage could be valid all one the world. The dissolution must be the same wherever the issue arises, if an issue arises in Malta you have to have the same solution as well as if the issue arises in France. Otherwise you' have a limping situation because a person may be a debtor in one country and a creditor in another and this is an undesirable situation.

- The only way to solve the problem is to harmonise the Private International Law of the states and that is what the European regulatory framework tends to do, it harmonises the Private International Law of its states and therefore avoids the necessary. There's no necessity of making renvoi now between Malta and France and Malta and Italy because the same legal rule applies the European network defines the rule applicable in all the states once the rule is the same, there's no need for renvoi specifically.

- Now, Prof. Refalo wanted to be clear of English law as a source of Maltese Private International Law, it is very important that we get this right. It is not statute law which is a source of Maltese Private International Law it's the law decisions which are the common law. The common law is a source of maltese Private International Law being decisions of the courts of England.

- That's all for today.

27th February 2023

Lecture 3.

- In the last lecture we were speaking about the territoriality of laws, now although the territoriality of laws is a natural condition of the law today, in the past it was not always so.

- In the past, law mainly arose out of tribal customs, you belong to a tribe, and the tribe develops customs so the law was a personal experience more than the territorial experience, the law was an author of the sovereign of the territory who was prepared to enforce that the rule by setting up the necessary courts, etc. in the past law was mainly personal in character.
    - For example if you take Roman law, there is the jus civilis and the jus gentium, the jus civilis is the law of the Romans and the jus gentium was the law for the others.
- So law was a personal experience with Roman law applicable only to Roman citizens other had to apply the jus gentium, of course it was a bit of conceit on the part of the Romans to say all the rest should be governed by the natural law as if they had not their own laws.
- Of course in the middle ages with the notion of the Roman empire you had the experience of Roman law continuing to govern Roman citizens and the tribal law starting to govern the proper Roman citizens starting to govern solely a discoed
- If you had a resident in a Roman town to him you applied not Roman law but godic law, that is law. That is law was a personal experience it was the experience, the tie which linked a person to a tribe, today when we speak of Maltese law, when we speak of Italian law, when we speak of French law we don't really speak of the French or the law of the Maltese, we speak of the law applicable in Malta, the law applicable in France, the law applicable in Italy.
- But this posts a serious problem to international trade, international trade is faced with the ability of rights surviving the creation of rights surviving, the creation of rights surviving.
- That is if I want to create a right, if I sell a thing to a non-maltese in Malta and want my money back, wherever he is so the creation of rights became necessary as a part of international law that the creation of rights and to be recognises by other states, a law which was strictly applicable in a territory had to be given extra territorial extension.
- This can be seen easily in the case of marriage. A person married in England in the civil law would be a perfectly valid marriage in Malta today. This was not always so, there were times when the good judges would seek a law which would invalidate that marriage, it wasn't a marriage celebrated in front of the parish priest and two witnesses so, your law of marriage, your law establishing which formalities you have to observe in order to create a valid marriage, are given an approach, are given enforcement through a certain extent, when a maltese court

recognises an English marriage it's giving force to the English rule that that marriage is formally valid.

- So the rule regarding formalities of marriage is applied by the maltese court as to where the Maltese rule?
- This is necessary if you want international trade and commerce, no international trade can develop without Private International Law which recognises, that is a trader once the rights he requires abroad recognises in his own country and in other countries. If he sold a million euros he wants to be able to get that million euros anywhere.
- As law became territorial, now the territorial nature of law has been realised only greatly that is Private International Law, is a very modern development in law, Prof. Refalo thinks that it owns its origins to the 17th and 18th Century writers.
- Of course you want a rule which recognises as valid rights created in foreign jurisdictions as valid everywhere. Now, of course differences in Private International Law, still created situations where you had limping marriages or limping rights, that is a marriage recognised as valid in one jurisdiction and void in another and it could be similar that it would recognise it in one jurisdiction and not in another jurisdiction. It limps because one of the legs is defective.
- The territoriality of laws if you look at our Codes du Rohan, our Codes du Rohan 1784 you find some rules of Private International Law but very few. The rules of Private International Law in the codes du Rohan; During the British reign we had the code of procedure in which rules regarding the jurisdiction of the courts and the recognition of judgements are part and parcel of the code. But there are very few rules. If you go to the civil code, you have nearly no rules whatsoever on Private International Law.
- There's one rule of the validity of wills, which recognise valid wills made according to the laws of the state where they are made. But of course if a will is made in Malta in accordance with English law it would be perfectly invalid because English law allows you to make a will without a notary. Whereas in Malta you have to have the notary public. Only a will dawn up by a notary public in front of the witnesses was considered as valid in Malta.
- Actually, the Hague process in an effort to get rid of the rigidity of the validity of the law, made a will valid to be provided valid through, we're discussing the validity of wills, the Hague conference/process, that is Private International Law tends to be the law, every state has it's own Private International Law there is no general Private International Law which is generally applicable in all states. This is the weakness of Private International Law. Laws aren't territorial so each state

provided which rights it would recognise and which rights it would not recognise created in foreign jurisdictions but if this rules. It created rules according to which you would recognise a right created in a foreign jurisdiction.

- Of course rights created in a foreign jurisdiction were nationally recognised and enforced in your jurisdiction. The idea was that a right should be valid everywhere and oblige the person to perform what he promised to perform in any jurisdiction but as we said, Private International Law is neither private or not truly international. It is very different to public international law, that is whilst public international law is a law above the states, common to all states, the rules of Private International Law are the rules of national law not common to all states but typical of one state.

- So Malta has some Private International Law, Italy has the preleggi which is the Private International Law code to the civil Italian code, the English have their own Private International Law. Each state has it's own Private International Law, with each state having it's own Private International Law differences were apt to creep up between one jurisdiction and another and the main difference in jurisdictions was the domicile and nationality approach. The English preferred domicile as the personal connecting factor whilst the continentals with Italy and Germany emerging it's states from this unity preferred nationality.

- The reason is obvious, why there would prefer nationality because the nationality, because the nationality made them into states, so they revered nationality as a personal connecting factor to domicile. In the English empire, applying nationality as a main connecting factor simply let note, because all subjects were British subjects/citizens, so whether they were domiciled in England or Australia you were still a British subject and technically speaking still subject to the same law.

- So the preference of the common law area to domicile is easily explained. They preferred domicile as a natural connecting factor because it gave rise, whilst applying British nationality would lead no where, let's say nationality is the main connecting factor in the British colony, let's say that you have an Australian born and an Australian who dies, if you say the law of nationality is the law, is it the law of Australia or the law of England that applies?

- Obviously you'd say the law of Australia because that's where he lived all his life but fi you say the connecting factor is the law of nationality to say that you have to say that the connecting factor is based on domicile rather than nationality, so the English empire domicile makes sense and nationality doesn't make sense. That is why common law adopts the domicile approach with a domicile which is closely modelled internationally as possible.

- It is easier to get rid of your nationality and substitute it with another one than to get rid of a domicile. Because every person born is born with a domicile of origin, the domicile is that of the father or the territory where he's from if they're illegitimate, it's the domicile of the mother but every person is born with a domicile of origin. To get rid of that domicile one must establish themselves as residence elsewhere. Not only must they. Establish their residence elsewhere they must do that with an intention never an animus non ne reundi, an intention never to return to their country of origin. Which person leaves their country of origin with no intention never to return to.

- So that is how difficult the acquisition of a domicile of choice is but the point is, Private International Law was a law which was developed during the 1700's and 1800's. The difficulty which arises is no Private International Law was developed which is native to Malta. The Maltese authorities never bothered about specifying what rules were applicable in Private International Law cases so you had to have a cause of foreign law on the grounds, that is an area of law which has a lacuna on the law. This is just by reference to the codes de Rohan which instructs the judges to decide the cases according to their laws and the laws of the most renounced tribunals in Europe.

- Now, the laws of the most renounced Tribunals of Europe was a reference to european law, to the jus commune of Europe which applied in the 1800's, the codes du Rohan was enacted in 1784 up to that time it was the common law of Europe, the common civil law of Europe was seen to be one and only after Napoleon started the process of codification did the apparent similarities distinguish French law from Italian law, Italian law from Spanish law etc.

- So that, when the judges came to apply Private International Law cases in Malta they had to make a choice, either they were going to decide them accruing to the European tribunals or according to the English common law, of course they decided logically to apply them according to English common law even though the statement in the Codes du Rohan, the most well known tribunals of Europe was not a reference to the London courts but a reference to Phoenician courts, Roman courts etc.

- One must understand the mentality of the Maltese, the mentality of the maltese was that they used to study law in Naples and get their degree in Naples. So this is why you find, if you go to old lawyers you will find their rooms cluttered with italian civil law textbooks such as Ricci, Gigi Manzoni, Baudry- Lacantinerie, all in italian translation, etc. Baudry-Lacantinerie which was the French origin is found mostly in the italian translation in Malta not in its French origin, this was because lawyers used to study law in Naples in the times of the Order of St. John.

- The reference in the codes du Rohan is to the continental courts not to the English courts. This was conveniently forgotten, actually they say that Private International Law is being part and parcel of public law. You apply English principles to it. This is Spiteri vs Soler, the attachment of the courts given by the old William Harding. William Harding had decided naturally that he had to apply English Private International Law to the maltese. He said in his judgement Spiteri vs Soler that Maltese law was part and parcel of public law and in public law you applied the common law of England. This was wrong of two counts, Prof. Refalo wonders whether Private International Law is part and parcel of public law or whether we apply common law in public law.

- In a lot of areas of public law we have the idea of law as applied in England but we don't apply administrative law, we don't apply principals of English common law in Malta.

  - For example Cassar Desian vs Forbes, decided the case according to Maltese law whilst appointing the pitfalls presented Chappell vs La Primaudaye but on the basis of Harding's approach.

- It became settled policy in Malta to apply principles of English Public Common law in Private International Law the Maltese issues, Maltese issues arising in Malta.

- Even though this was sometimes difficult to apply. Of course, judge Cremona noticed the uncertainty of the situation and said you had to apply English principles but you had to take care where you had a lacunae, Micallef vs Le Peuple, you had to take care when you had an actual lacuna you had to apply the English principles of law but to adapt them to an application to a Maltese concept.

  - For example how do you prove foreign law? In English law you prove it by expert evidence, any issue of opinion is proved by expert evidence and in Malta an issue which calls into play, it's solved by the court appointing an expert who will then report to the tribunal.

  - If you have an evaluation of land the court appoints an architect to value the land forward, it doesn't take the values submitted by the architect of the plaintiff or the architect of the defendant it appoints its own architect to give its own value.

- Also in Micallef vs Le Peuple the judge Debono decided that where foreign law was concerned the issue/proof of what foreign law was was to be decided by a court appointed expert the same manners as matters of opinion.

- So, judge Cremona in Micallef vs Le Peuple said that the proof of the foreign law is not to be decided in the same manner as an English court could decided but through a court appointed expert. The court would appoint its own expect who would then give advice about what the foreign law is. Which according to Prof. Refalo seems fairer.

- If the experts disagree amongst them on the issue of what foreign law is then it would be hard for the judge to actually decide the matter because he would have to rule in favour of one expert rather than the other.

- We have to take it as good law that in Malta, where Private International Law principles are concerned, we apply the principles of common law rather than the principles of european law.

- Being private international systems, there was one problem which caused/created anxiety to the orders, there was the problem of classification. The problem of classification typically arose out of court initiative, when reading Anton vs Bartolo, who had married in nadur in 1860, her husband had gone to Algiers, he found an Algerian girl with whom he shagged up but his marriage was still valid as according to marriage law in Malta, the marriage was produced so called partnership, marriage partnership. Marriage produced a partnership between husband, wife and children, so she was an heir of all his belongings. The Algerian widow not the Algerian claimant thought otherwise as the was claiming as successor to the wealth of this gentleman Bartolo and according to French law at the time no foreign could inherit a French man so she couldn't inherit.

- So the question was was she claiming her right of succession or was she claiming a right arising out of marriage. Depending upon that classification the whole case would be decided. The French court decided it was a question of marriage/matrimonial rights and the courts retaliated her the share of her belongings which were considerable. So waiting patiently paid its cues.

- Prof. Refalo didn't know when he read Anton vs Bartolo the first time he didn't know that the marriage was celebrated in 1860 and in nadur Gozo, he came to know it by researching the French text of the judgement, the French text was found and they had married because at first it was strange, that the classification in Malta could be different than the classification in French, seeing that French maltese law, civil code is mainly based on the French ciivil code but the Maltese civil code came into being in 1867, after the marriage was celebrated so the marriage was celebrated under the old Codes du Rohan and the difference between classification was of the rule under the codes du Rohan is to the marriage procusing the term of ceremony matrimonial to the wife and the rule in the French law giving succession to the wife. The question was had this rule to be classified

as one of succession or as one of matrimonial rights. By classifying it as one of matrimonial rights the French courts managed to give the Gozitan girl her dues.

- What Prof. Refalo wanted to tell us is that Private International Law is full of these, it's a law which relies very often on reasoning say in the Renvoi.
- Let's say arcading to English law, inheritance of a person is established according to immoveable property, according to the lex situs. Now, according to italian law it is his nationality which demands attention.
- A person ceased of a villa in Capri dies and you have to decide to whom the villa goes, an English court would say lex situs, italian law is to apply and there is the question, is it the local law or is it the Italian law on Private International Law to be included. If one were to say that the Italian law on Private International Law were to be included you would say but the Italian court would have to decide the matter in court in the same matter in the different manner, I want to decide as the foreign court would so the italian court would have applied English law instead of nationality so you would apply English law and this is what Renvoi is, renvoi means reference to, a reference to a further system of law by one system of law. This was an attempt to keep uniformity, to achieve an apparent uniformity because if you achieve uniformity in one case it is not necessary in all cases.
- The real problem arises from Private International Law systems being different and that cannot be sure except through a process which makes international law truly international. This was attempted through the Hague process of unification of Private International Law but it fell to get states to adopt a similar system. Now we have the European regulatory system where European Regulations are appleid normally renvoi is not necessary because the same law is applied through all states of Europe. If all states of Europe apply the same law there cannot be renvoi between one state and the next so renvoi in most cases is totally unappointed and the european law system is a much preferable system to the English Private International Law system. We have had most of our Private International Law substituted by European Private International Law regulations. There are regulations on nearly everything, on contracts, on torts, on jurisdiction, on foreign effects and so on so the European regulatory framework was to Malta a god send because it provided a good system of Private International Law.
- It is important to understand that it is the English common law not English statute law which is a source of Maltese law. English statute law has no application in Malta whatsoever as a result of the colonial laws validity act. It was only applied in a sense of Private International Law in Malta, today we hardly need to refer to English law because most situations are covered by European Regulations
- Next week we will start talking about Marriage.

8th March 2023

Lecture 4.

- We'll still speak on general Private International Law and then start with law of marriages in the next lecture, one thing that we need to realise is that Private International Law arose out of the fact that law principally became a territorial not a personal experience that is tribal law is eminently personal and all law was initially tribal.

  - The territoriality of laws posed new problems, the problem was that you don't want to marry in state 'A' and find yourself unmarried in the rest of the world. If you marry in state 'A' you have to be married in state 'B', 'C', 'D', 'E'. But the territoriality of laws posed a problem because that meant that the laws of state 'A' which govern the territory of state 'A' would be given extra territorial validity, you've married, your marriage would be deemed to be valid you've married formally according to laws of state 'A' where you're married not of state 'B' where you're residing. It's undesirable for your rights to change with your movement.

  - What you want is, people seek stability and to have stability you have to have laws which are affective beyond the limits of the territory

    - For example the law of marriage formalities are covered by the law of the state where the marriage is celebrated. Of course you say that is purely territorial in nature because if you're marrying in Malta you have to be governed by maltese law and you're married according to maltese law. If you're married in England you're married according to Maltese law.

  - Now you don't want a situation where you marry in England according to English government and you serve unmarried in Malta and single simply because you've changed your residence you want the laws of England to be effective in Malta as well in a way in recognising the marriage as valid you are given the law of England beyond its territory you're allowing to have the lawn of England in Malta and Private International Law is about defining the applicability the jurisdiction of law in space and time.

  - Of course law was not always the jurisdiction, the jurisdictional law is our superior and inferior. Law was initially, natural law arose naturally out of relations of time, that is as people lived in society they needed rules to conform by and they made rules for themselves. It was only with the development of the state and the territorial nature of the state in the renaissance that laws became principally territorial.

- You have to consider this, law is today principally territorial it's the order of thee political superior to the political inferior, the political inferior is the subject of parliament which is the political superior which makes the law for us.

- So, a law is an order of a state to its subjects, its subjects defined as persons who are living in its territory, a law has sovereignty over its territory and not beyond.

- Now, Private International Law is very often a law, the methodology followed by Private International Law is different from other legal systems that is people try to derive the particular rules applicable from general rules which say states are applicable in Private International Law.

    - For example, in Ulrich Hubert, purported to the right the universe of conflict of rules from three simple rules. He said the law of each state has force within the limits of that government and that binds all subjects to it but not beyond. All persons within the limits of government that live there permanently or temporarily are deemed to the subjects thereof.

- Sovereignty will somewhere by way of property that rights have title in the remit's of government you take their force everywhere so far as they cannot cause prejudice for rise of government. Ulrich decided that you find a number of theories, which theories, from which conflict of law rules where purported to be derived, there are a number of theories, the comity, the comity of natures, the comity dealing with the recognition of a state that its rules should be applied by way of, how do you explain comity? Comity is a way of good neighbourliness.

- One State applies the rules of another state on the basis of that that other state will apply its own rules in the same circumstances.

- Malta will apply English rules of marriage on a basis that a maltese marriage will be considered valid in England even if it is celebrated according to maltese law. That is comity, comity means giving to others what you expect them to give to you. Others speak of vested rights, or justice there is no single.

- If you look at Private International Law you will find that there is no single that which unites all other legal systems well.

- After all each Private International Law system is a local, national law system it is derived from the state, for example the preleggi in the italian civil code which contain Private International Law rules are national rules of italian law, the common law rules and Private International Law are rules applicable by the United Kingdom, so you'll find that this is the weakness of Private International Law.

- The fact that it is municipal not international in character, tends to hold international problems but it is municipal in character, each state has its own municipal Private International Law rules.

- Moreover these rules were developed throughout the 1700's and 1800's which Malta is particularly lacking in Private International Law rules. You will find every little Private International Law law in Malta for an autonomous nature, of a maltese nature.

- Malta is forced to apply the rules of other states in order to solve problems, in order to solve Private International Law problems, when it was annexed by the UK in 1814. It had its own legal system, the basis on which maltese judges apply the rules of common law, that is rules of common law are applicable in Malta as rules, what is the application of the basis of common law on Malta. This poses a big problem because the common law has no application in Malta as a result of common wealth law because commonwealth law because in commonwealth law common law applied to sediment not concretely voluminous. Malta had it's own legal system the basis on which, all these judges apply English principles of law in solving Private International Law problems is this. There is a rule in law that when the maltese judge finds a lacuna, it is unprovided for, he is to refer to the most eminent tribunals in Europe.

- Of course this might be, the common law of Europe, but in Private International Law it has been given another meaning it is the common law in England, this is applied in Private International Law as a source of Maltese law.

- This, this on the assumption that Private International Law, Spiteri vs Soler a judgement on inheritance by Judge Harding (not the chief justice his father, William), decided definitely that the English law was a source of maltese law. He decided that English law is a source of maltese law on this assumption, he said in public law it is natural for maltese judges to refer to English law as a source.

- Now as we saw in administrative law we took a lot from English law but we took it, it became maltese, that is what was the source of maltese law? Is the attitude to law and to decide the case.

- For example the respect to do judge made law, for example, a lot of us feel this in court when a judge departs from what is perceived as a constant way of judging things. So we even though we don't have a theory of precedent in our law, judge made law is very effective medium of government and there is a lot of judge made law. In Private International Law all law is nearly judge made law, of course, now that we've joined Europe most law is contained in European Regulations/law.

- So judge harding argued that Private International Law is a public law system and in public law you apply English law as a source and not continental law and therefore he applied the common law principles forgetting for the moment that succession in Malta is covered wholly by Roman Law principles, and the heir steps in the shoes of the deceased to continue his personally.
- In roman law it was very important for a person to leave behind him an heir, because that continued, it was a sort of survival, that is he survived after death through his heir, his heir stepped into his shoes and continued his personality.
- In a way this is not common law in inheritance is totally different from maltese law on inheritance, common law on inheritance, you can, common law on inheritance is shoes that there is a transfer of property, personality is not continued, I do not continue the personality of my father or of the person who I am a heir.
- In Italian law you continue the personality the fundamental principle of succession is that you continue the personality of the deceased. The problem which Private International Law posed was, is Private International Law a product done to use in relation to the subject, whether it is a convenient term to use, others used conflict of laws but there is no real conflict here. In deciding which law to apply there's no real conflict between the laws we have to decide which law to apply in the best interest of justice.
- Prof. Refalo thinks that the necessity of having a Private International Law system arose out of a sense of justice but it is necessary for persons to know where they stand and knowing where you stand you need to have a Private International Law system.
- You don't want to lend money to a person in France and find yourself that he doesn't owe you anything in Malta because, if a person owes you money in France he would owe you the same money in Malta and elsewhere.
- So, Private International Law deals with the problems arising in law with the movement of people, and people being limited to moving from one territory which is covered by one law there would be no Private International Law but then it is covered by different states who make different laws and you have to provide therefore for movement, movement its part of life we move from one territory to another, cargo shipping etc.
- In order to provide for movement and stability of rights you need a Private International Law system, that's what Private International Law tends to do you need to provide a system whereby certain laws of foreign state may continue to have force and apply outside the limits of that state.

- Normally a rule applies within the limits of Malta, saying made by the maltese colony and applies by the limits of Malta, and say you have to continue the force of let's say how you get married, with the validity of your marriage, you marry a person you want to say married to them wherever you go, England, France etc.
- In recognising the validity of marriage they are giving effect to the rule of law of Malta specifying how you get married, so to that extent it is specifying the application of law in space, meaning giving extra territoriality of law which are principally in nature territorial.
- What is something we will be dealing with? We will be dealing with, rather that is we will find a lot of discussion of the subject, complete law studies of Private International Law, for the sake of convenience we refer to it as Private International Law because it is neither private nor international really.
- It is a public law system meant to address international law problems arising from the different processes of different territories. So, what rather than losing ourselves in discussion of whether this is proper terminology or not, Private International Law or conflicts of law, whatever. Let us address it in a different manner, let us see the area of our studies.
- First of all jurisdictions over which subject will a court have jurisdiction to decide the issue. Jurisdiction is not only the effective power exercised through a court over a private individual it is a legal power, it is legally defined. Whether you have jurisdiction or not over a person, it's found in section 742 of the COCP.
    - Article 742.
    - **742**. (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;
    - (b) any person as long as he is either domiciled or resident or present in Malta;
    - (c) any person, in matters relating to property situate or existing in Malta;
    - (d) 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;
    - (e) 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;

- (f) 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;

- (g) any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

- (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.

- (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.

- (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.

- (5) A precautionary act issued in terms of the preceding sub- article shall be rescinded:

- (a) if the party against whom it is issued makes such deposit or gives such security sufficient to secure the rights or claims stated in the act; or

- (b) if the applicant fails to bring forward his claim, whether before the arbitrator or before the court, within the said time limit of twenty days; or

- (c) on the expiration of the duration, original or extended, of the particular act in terms of this Code; or

- (d) for just cause on the application of the debtor as the court may deem proper in the circumstances.

- The second bit is the recognition of foreign judgements, that is if you've obtained a judgement in England or France you want to enforce it in Malta, how do you go about enforcing a foreign judgement, the court has a limit, it's limit is the territory of France. But if you're sued me in France then you obviously want to enforce the judgement obtained against me in France in Malta.

- Before the advent of the European Regulation it was good advice to advise the person in another country to ignore the suit and then fight it in the same country. Today it is no longer the same, today if he is sued in a court of a state of the European Union most likely the judgement of that court will be enforced in Malta. They will find it very difficult to contest the judge unless the judgement is enforced against.

- The third instance is the conflict of the extended, the definition of law of the applicable laws. We're dealing with three separate things, jurisdiction, enforcement and indifferent laws.

- The ideal behind it is once you obtained a right the right should be recognised by everybody as being in favour. Now this, wouldn't happen but for Private International Law, but Private International Law is one thing which European Regulations do not have. Private International Law is a national law system not an international law system, because you have Maltese Private International Law, Italian Private International Law, English Private International Law.

- This has given rise to the possibility of conflicts of laws even between the different Private International Law system, that is Maltese law could solve the problem in accordance with the let's say the law of the domicile which is italian law Italian law will solve the question on the basis of nationality and the person has nationality and out of these problems double renvoi has arisen which attempt to solve these problems.

- The problem of this dedication which has been a problem with us since Anton vs Bartolo was decided in France in the late 1800's.

- Well, the problem is that there's no real solutions in Private International Law Maltese problems it's the desire of uniformity, is beaten by the reality of the diversity of systems of Private International Law.

- That is, different systems apply different laws.

- For example, an English national who lived in Malta most of his retiring life was very adverted to taking advice from Maltese lawyers because he thought that Maltese lawyers were not up to the marks so he took advice from this English solicitor and this English solicitor drew up the will for him, in English form. In England a will is valid if it is signed in front of two witnesses by the testator. This testator English man died in Malta when we were not parties of the EU, he left in his will his maltese friend as an heir and ignored his English heirs. His English heirs sued in England, this was a perfectly valid will by English law. Maltese law which was then, which then had a rule about wills which said that wills had to be made in accordance of the law of the place where they have been made what was considered here was invalid because under Maltese law the will to be valid must be made in front of a notary public and signed to the second hall judge and there are a lot of formalities concerning wills which if you don't follow the will will be void.

- The advice was that if the English heirs sued the Maltese in England he would lose his case because English law would recognise the will as valid but if he sued in Malta he would will because Maltese law would recognise the will as null and void because it wasn't valid in Malta according to Maltese law.

- They settled the case by sharing the inheritance but this dissolution to it was only through European Union regulations now the matters provided for the European Union regulations say that persons would be valid if it is made in accordance to the law of its nationality.

- So, in reality, European Union law, stands with the necessity of grounds of limitations of maltese problems in favour of a more solid break because European Union regulation has the advantage of being European rather than national in character, so it transcends the limits of the state, it applies the same identical regulation would be applied in England, Italy, Malta, France etc. in all European Union states so the problem which renvoi sought to solve by creating fictions of law, European Union law sourced because the solution lies in having a truly international system of law not a truly national system of law.

- The problems are insoluble if you assume for one moment that in Private International Law, is a national system of law. European Union law, transcends the national and therefore solves the problem in an accelerable manner. In most European Regulations of course renvoi has no place. That is specifically stated in the regulations that the regulation is to apply the internal law of the state because it's a choice of law rule made by Europe on the basis and if all the states of Europe apply the same rules it would be a problem because the United Kingdom is no longer part of the system.

- As long as the UK was part of the system and as long as all european states were applying the same private international rule then you have an ideal solution to your renvoi problem which you cannot achieve through Private International Law because however much you were, that is the renvoi problem was created in an attempt to achieve uniformity. The English went further, the court, they would decide they said in the same manner in an attempt, the attempt is obvious the attempt is to issue uniformity, a uniformity which was never really not reached because of course you cannot reach uniformity of the system unless you have the same Private International Law.

- If state ‘A’ refers you to Italian law, and state ‘B’ refers you to English law you cannot really get uniformity except by unifying the Private International Law rules, the poses of reunification was drawn in the Hague process. That’s a small success.

- What has been successful in unifying most Private International Law rules has been the European Regulatory system. This system is giving Malta a number of rules which we apply so we have to see the lacunae which was probably given by common law.

- The part of Europe, Malta the lacunae by reference to European Regulations, and as we will see with marriage there are a number of European Regulations which are applicable to marital problems. Which we will be delving into.

- That is what we’re saying is, Private International Law is a public system of law not a private system of law it is a national system of law each state has its own Private International Law. This created problems because the aim of creating a Private International Law system is to create uniformity, having a natural law system of Private International Law means that uniformity disrupts us, uniformity is about the tallowy because once the Private International Law of your state is different of the Private International Law of the foreign state you come with different results.

    - In Maltese law, in Maltese marriage law it was not always that we applied the law of the forum that the marriage was celebrated to commonalities of marriage. Grey vs Formosa is one to look at, Ms. Grey married this Formosa in London through the marriage act, which was a perfectly valid form of marriage in England, it was totally invalid according to the council because the council required the marriage to be celebrated and there was no marriage priest at this marriage. What happened Mr. Formosa eventually got fed up of supporting Ms. Grey and he came to Malta and said that he wasn’t going to maintain them because he found himself to be very religious and appearance to the trade to say that the marriage was void.

- Ms. Grey sued for divorce in England to which Mr. Formosa replied that he was not married to her as the Maltese court had decided. Ms. Grey was unlucky because at that time domicile was jurisdiction governed divorce so the question was, was Ms. Grey domiciled in England or Malta? Ms. Grey having been married to Mr. Formosa would have domicile of dependance at the time if her husband was Maltese. So the English court said I don't have jurisdiction and I don't recognise the law. Ms. Grey argued that according to maltese law, the judgement by the Maltese court was that her marriage to Mr. Formosa was invalid so she still had English domicile and the court said that they would not recognise the Maltese judgement because it was a travesty of justice which it was, unfortunately.

- These problems were only solved by the Maltese Marriage Act of 1975 and then they were solved, so being married to a Maltese person meant as the English court would not recognise the Maltese judgement they would use substantive justice, they said that the Maltese judgement would not be recognised because it was repulsive to English notions of substantive justice which was a new heading of public policy.

• The Maltese judgement was not recognises and Ms. Grey was only valid formerly married to Ms. Formosa and therefore her domicile of dependence was Maltese and therefore the English court would not have jurisdiction over the divorce proceedings which was not very satisfactory to Ms. Grey. Prof. Refalo was very dissatisfied to Mr. Formosa as he got away without paying maintenance to his wife or his children.

- Next lecture will be about marriage, marital problems will devolve most of these lectures, first of all how is marriage valid, what marriage is valid what are the forms required of marriage before 1975 we had no law regulating marriage. Marriage was regulated by the law of the faith of the individual so a Jewish person could marry according to the jewish way, a muslim person could marry according to the muslim way but a catholic in Malta would be married in front of a parish priest and a witness which in England in London, marriage registrar couldn't claim to be a parish priest at all.

• So there were a number of maltese judgements saying that English marriage in London was completely void and whoever married was free from maintaining his wife or his children, which this less-ful state of affairs for maltese gentlemen ended in 1975 when Mintoff enacted the Marriage act of 1975 which expressly stated that in issues of form you had to follow the law of the state where the marriage is celebrated. This did away completely with the old position where, because of course marriage celebrated in London in front of the London marriage registrar

was a purportedly valid marriage in the eyes of English law, even if it was through from the eyes of Maltese law but with the act of 1975 of course the reference of canon law was omitted completely and therefore the marriage would be then considered as valid.

14th March 2023

Lecture 5.

- Marriage is a good place to start discussing Private International Law problems.
  - The last thing one would want is a limping marriage. A limping marriage is a marriage which is valid in one state and invalid in another. If one is marrying, then one would want to be married all over, for all the world wherever you want, and would not want their spouse to suddenly become single by coming to another place. This is what used to be done in the 1950s and the 1960s, come to Malta state that they were Catholic after all, even though they may be married and may have children abroad.
  - Most of the problems are usually Private International Law oriented, therefore involving foreign jurisdiction and foreign laws. Private International Law teaches one how to deal with foreign jurisdiction and foreign laws, therefore it teaches one how laws are valid in space.
  - Marriage is a good starting point as it shows what problem Private International Law wants to avoid. Private International Law is about the effect of rule of law in space. With the territorial nature of laws one would expect the law to be valid in Malta and nowhere else but this is not so. For example, if one take the rule on the formal validity of marriage, a marriage is formally valid in Malta if it is celebrated in accordance with the Marriage Act. If it is a Catholic marriage, it was valid if it was celebrated in front of a parish priest and two witnesses.
  - Private International Law is a law which you have to take into account when you grow up, most of our problems will be Private International Law and if you're a good lawyer most of your problem will involve foreign jurisdiction and foreign laws and you have to find your way around those. Private International Law teaches you how to find your way around foreign jurisdiction and foreign laws. It teaches and explains to you why we say that some laws, the law according to which, the law governing formality in Malta.
  - This is a law which is applicable solely in Malta. If one is marrying in England they would have to get married in front of the English marriage registrar not in front of the Maltese registrar for the marriage to be valid.

- So the rule governing the formal validity of marriage is a rule valid within the confines of the territory of Malta, but it is also enforceable beyond the confines of Malta. For example if a person is married in Malta and goes to live in England, his marriage is going to be considered as valid depending on whether it was valid depending to the Maltese rules of validity. The formal validity of marriage can be enforced by an English judge. Therefore in this situation the Maltese rule is given an extra-territorial enforcement in certain situations. The situation being that first of all the marriage must have been celebrated in Malta.

- Definition of Marriage and Background of Maltese Law on Marriage

  - Marriage is a union between two people for life. If this not always so as in Central Africa people marry for a period of time such as for example they marry till the children are of age. Or a marriage, for example Islam one is permitted to take several wives. Marriage in different states can be defined differently. It can also not always be for life since there is a possibility of divorce.

  - There are two things which one has to consider; the definition of marriage and the rules governing the validity of marriage. These are different things/concepts. The definition of marriage is a matter of public policy of state to define marriages. The rules governing the formal and substantive validity of marriage are different, they are presuming that a marriage has been celebrated. The issue of definition of marriage has nothing to do with the question of validity at all.

    - For example perhaps it would be better to explain upon a formality, Maltese law on marriage till 1975 was existent. Therefore there was no Maltese law on marriage.

    - When the mix marriage case arose, the Cappone case, they had to ask the English government and other judges what the law on marriage was. The law on marriage was pretty much covered by religions.

  - So here Catholics would marry according to the Catholic religion, Jews according to their religions, Muslims would marry according to their religion. That is marriage was seen as mainly a religious institution.

  - This created particular problems. First of all there was no definition of marriage in Maltese law. Even if one looks at the Maltese Marriage Act in 1975, if you look for a definition of marriage in it you won't find it. There is no definition of marriage however, one can assume that a marriage is a Christian marriage therefore a marriage between a male and a female possibly for an indefinite duration or life time.

- So the problem is would a person, when one enters into a potentially polygamous union in a foreign state which allows for polygamy. Are they married in the eyes of Maltese law? Most marriages are actually monogamous even in a polygamous country. Is a marriage which is potentially polygamous but actually monogamous valid? Is it a valid marriage, is it a marriage at all?

- When they married they must have has in mind the possibility that others would join the marriage. Would this be a valid union? The issue of the definition is different is different from the issue of validity. That is, very often we mix up the issue of definition with the issue of validity. Validity is usually covered in nearly all jurisdictions by the law of the state where the marriage is celebrated. In terms of substance this is usually covered by the law of the domicile of the parties.

- This was not always so in Malta. In Malta a marriage which is Catholic, with another person must be celebrated in front of the parish priest and two witnesses. This was a rule which was considered of fundamental important in the Catholic church. So our good judges applied it also to those Maltese who went to London, found it convenient to marry in front of the marriage registrar and after a while coming back to Malta and finding themselves as single because they suddenly discovered they were Catholic after all making their marriage an abomination.

- This is seen in the Gray vs. Formosa case. Ms Gary which was married by the Marriage registrar to Mr. Formosa sued Mr Formosa for divorce in London, he replied by suing Ms Gray for the nullity of marriage of Malta, the nullity wasn't on the basis, he had followed English law but English law forced him to marry in front of the marriage registrar not in front of the magistrates so they said this marriage was void, and the good judge decided more ambiguously saying that this isn't marriage at all.

- He pleaded divorce proceedings instituted by Ms. Gray in London that she was not validly married to him because the maltese courts have pronounced the marriage to be void, the English court developed that issue that no public policy in the 7 heads of public policy, developed an 8th head of public policy which was a judgement which was abhorrent to the English notion of substantive justice. This characterised Maltese judgments as abhorrent to English substantive justice and therefore unrecognisable in England. They refused to recognise the judgment of nullity in Malta. This meant that Ms. Gray was still married to Mr. Formosa and as marriage at the time produced a domicile of dependence, she was domiciled in Malta even though she never set foot in Malta.

- Mr. Formosa has moved back which lead the English court to state they had no jurisdiction over the matter because these people where domiciled in Malta. So the issue of non-recognition of the validity of the marriage did not make Ms. Gray

much good. In judgements you find, it was standard procedure in Malta to find marriages that were celebrated in England in front of the marriage registrar as invalid. There was a number of these marriages until the marriage act was enacted.

- When the Marriage Act of 1975 stated that in marriages formality was governed by the law of the place of celebration of the marriage and substance was governed by the law of the domicile of both parties. So in reality, and further point ht canon law was no longer to be applied in Malta. The non-application of canon law in Malta was meant to prevent the judges from committing, from again saying that persons who were validly married in England, would be considered, their marriage would not be considered void in Malta because they were married in front of the marriage registrar.

- In reality the act of 1975 was a much needed piece of legislation which brought some sense into the matter. The Marriage act affected Private International Law in two ways. First of all as far as the celebration of marriage is concerned, a marriage was deemed to be valid in Malta when it was celebrated according to the law of the place where the marriage was celebrated, and if they were capable of marrying it was regulated according to their domicile.

- Therefore it brought in line Maltese Private International Law and the validity of marriage. This is an issue covering validity not definition of marriage. It brought things in line with the rest of the world. The second issue was in the cause, it was normal not to recognise and enforce a divorce in Malta as a matter of public policy.

- In the case of Fenech Adami vs. Beattie, not only did it not enforce the divorce but it did not even enforce the maintenance order. This is because it was an order given in a divorce and divorce was no recognised in Malta. This was changed by the Marriage Act, it did not mention divorce but it mentions status of persons. Any judgment affecting the status of persons would be recognised in Malta if one of the parties to the judgment was either domiciled or was domiciled or national of this country.

- That is, an English court would be considered to have good jurisdiction and therefore could pronounce divorce if the one of the parties was domiciled or a national of England. The first case which was recognised was Cacciattolo vs. Cacciattolo, which was decided by Judge Mizzi in the 1980. In this case it was held that a divorce was automatically recognised as a result of the Marriage Act in Malta.

- Therefore Maltese law changed drastically as a result of the Marriage Act. First of all because it removed the dependence of marriage law on canon law for the definition and regulation of marriage. Secondly it introduced the possibility of

recognition of divorce as a result of divorce being celebrated abroad, not if it was in Malta.

- Of course today it is difficult to argue that divorce is against public policy and it is also possible to obtain a divorce from a Maltese court under the amendments of the law. That is the law has been amended to the extent of which has been introduced in around 2009/2010. With the introduction of divorce in Malta it is impossible to argue that a judgment of the courts is against public policy.
- So the British Judgments (Reciprocal Enforcement) Act and Article 826 of the Code of Organisation and Civil Procedure would be applicable to divorce proceedings as well. So not only are divorces proceedings recognised but there are two ways of recognising a divorce
- First of all the recognition effected by the Maltese courts was automatic. Say a person who got a divorce abroad need not bring an action in Malta to be enforced but he would simply go to the marriage registrar and the marriage registrar would annotate his divorce on the marriage act.
- That is it was, we usually say the Italians say delibazione, a foreign judgement needs recognition in a state. So usually a judgment is not enforceable in Malta unless the Maltese court orders its enforcement. In the case of divorces, the status of the person would be immediately recognised in Malta without any need of enforcing the judgment. So the judgments of status are immediately enforceable under the Marriage Act.This can be done under the old Article 33 of the Marriage Act.
- It is also enforceable under Article 826 of the Code of Organisation and Civil Procedure, that is for the marriage act, Malta would not recognise divorces as a matter or public policy if it where not for the Marriage Act. With the issue of public policy being removed by the act, it become possible to recognise foreign divorces, under Article 826 of Code of Organization and Civil Procedure.
    - Article 826.
    - **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.
- There is also article 33 of the Marriage Act
    - Article 33

- **33**. Without prejudice to the implementation of any regulation applicable between the Member States of the European Union, a decision of a foreign court or a decision or other official act of equivalent effect of a foreign competent authority on the status of a married person or affecting such status shall be recognised for all purposes of law in Malta if the decision is given or if the other official act is issued by a court or a competent authority of the country in which either of the parties to the proceedings is domiciled or of which either of such parties is a citizen.

- A Maltese marrying abroad would have to marry in accordance with the law of the state where the marriage was celebrated. Secondly the divorces which were done abroad where automatically recognised in Malta and it was an issue whether they were against public policy or not. This was raised in Cacciattolo vs. Cacciattolo, where Judge Mizzi said that the marriage act had radically changed Maltese public policy and therefore the recognition of divorce was no longer a problem.

- Of course with the Maltese becoming independent and with us accepting British pensioners as residents in Malta it was typical to argue that divorce was not recognised in Malta. For this one can see the case of an English divorcee who was remarried in England and lived lived his life with his second wife in England, coming to Malta and suddenly finding himself unmarried because his originally unmarried. This was not something which could happen so the Maltese marriage act eliminated this possibility.

- The marriage act introduced the idea that the validity of the marriage would be governed by the state where the couple is marrying. For example if it is in Italy, the marriage has to be celebrated according to Italian law (usually a civil union in front of the law). Today the civil union concept has been introduced into Malta by the marriage act of 1975 and therefore it is universally accepted.

- Up to 1971, marriage was a religious Catholic union on which the local law had little to say. Incredibly marriage was unregulated by the local law. This issue was highlighted in the Maltese mixed marriage case. The mixed marriage case arose out of a problem which the British had with the Maltese law. This person was betrothed to a certain Chapone, and when he decided to marry her sister, she put in a vertito in the curia, a prohibition of any priest marrying them in the curia.

- As he intended to marry his wife, he was much taken a back with this attitude of the local church. But in discussing it with the governor, the governor told him that he would marry them by his powers rather than being married in front of the parish priest. Of course no parish priest would celebrate the marriage because of the prohibition decree put in by the sister’s wife (who was his former finance). And so he was married to Ms. Chapone, it was still a proceeding which was possible to

do, a vito to the parish priest to marry him to Melita, he wanted to marry Melita but Melita would not have granted him any longer, have anything to do with him unless they were married they went to England and she married him. Was this marriage valid? The problem arose, this went in correspondence to the Vatican City, correspondence with the judges as they were consulted by the governor. The question arose that a person has to marry according to his faith so as he was protestant he could be married to Melita, he could be married in front of the governor general of the governor but this highlights the fact that there is no law governing marriage, this is a valid marriage because the law says, there was no law either governing the formality or the ability to marry. There was no law governing marriage. Marriage created the community of acquests which was regulated by law but marriage itself was not regulated.

- The in Malta but that it was regulated by each religion. Therefore marriage is considered as a union with a religious background. This situation was similar to the situation that it was in Lebanon today. In Lebanon marriage is celebrated according to the religion. Here too marriage is seen as a religious institution and therefore the parties marry according to their faith. In Lebanon marriages between same different religions is still strictly prohibited. Today we think that this breaches our human rights. It was like this in Malta until 1975. Therefore the marriage act was very much needed a person who could marry was regulated under Canon law, for Catholics could not marry their first cousins for Catholics first cousins couldn't marry. Yet a grandfather would have been able to. Today this of course would be unheard of as one could marry whom he wants according to the law of the state.

- This marriage act has one section dealing with Private International Law which says that a marriage is valid is celebrated according to the law of the state where it is celebrated and the parties are capable of entering into the marriage according with there respective domicile. But this is of course is supposing that one can have a marriage. Prof. Refalo thinks that a potentially monogamous marriage is considered as a valid union in Malta.

- Prof. Refalo once had a case where he was a referee. In this case there was a Pakistani doctor who was married in India and had divorced there by talaq (which is a Muslim way of ending a marriage) not an extra-judicial divorce. In this case the husband was a doctor who wanted to marry a Maltese nurse. She wanted to marry regularly and marriage registrar would have not allowed this and he would not marry her because he was divorced by talaq and he would not recognise this divorce. The case ended up in the second hall in the civil court on an appeal from the marriage registrar's decision not to marry them.

- At that point the attorney general asked for time to decide the issue, on Prof. Refalo's advice. The court was in no hurry to decide the issue, however the doctor was in a hurry to marry his wife. Since he saw that thing would take long in Malta he married in front of the Archbishop Marriage in Australia according to Australian law. He is still married to her he has a fleet of children. The issue there was a talaq divorce. It is an extra judicial divorce.

- Today it is difficult to say that a talaq divorce is recognised in Malta because it is extra-judicial. The doctor in this case argued that he would be able to marry in India. He also argued that he would be able to marry into polygamy however this is an argument which does not make much sense in Malta because Maltese law only knows a Maltese marriage. Therefore the fact that he could enter into a polygamous marriage was irrelevant for Maltese law because it was not a marriage.

- A potentially polygamous marriage which is actually monogamous can be recognised under Maltese law. As he was married to the second girl, he had argued that since his substantive validity was covered by Indian law he was able to marry the maltese girl, his marriage according to it would be valid under law. So he could get married to anyone, these arguments however, it was evident that the court did not intent to give a ruling quickly which was not to the liking of the doctor as he was in a great haste to get married. Today the position would have probably been different.

- This was early 1980's or late 1970's, but it shows the problems created by marriage law. Marital problems are the most difficult, most sensitive issues to raise in Private International Law because marriage is an institution which society tends to regulate in order to preserve itself. Therefore the definition of a marriage is a matter of public policy. The validity of the marriage on the other hand is not a definition of public policy.

- One must realise that while initially marriage was a union of male and female for life. This has now no longer remained true. That is women marry women and men marry men. According to some laws, there can be a marriage of two males or two females, this is a validity of public policy, they may be Able to celebrate their marriage but in Malta the reality is that the marriage would be recognised in Malta as well but it is not recognised as a marriage but it is still a matter of validity. Malta has developed a situation where marriage is a union between male and female, unions between males and males and females and females are recognised but not as a marriage.

- Of course in marriage you have first of all the issue of the validity of the marriage, the issue of the definition of the marriage, the validity, once you have a valid

marriage, what are the civil effects of marriage? The civil effects of marriage may be regulated by different laws.

- In Malta there is no law which deals with these things, but luckily the EU has regulated the matter and has created a law for us. Before the matter would be regulated by English law, no other matter was regulated by EU Regulations.

21st March 2023

Lecture 6.

- So today, Prof. Refalo means to talk about matrimonial property regimes. Last time we said that the definition of matter is that of public policy.
  - The validity of marriage is regulated by the marriage act 1975, that forms government by the law of the place where the marriage is celebrated but in substance is covered by the law of domicile of both parties.
  - Now we have to look at the incidents of marriage, one of the incidents of marriage is that it produces the community of acquests between the parties. You have to identify what the matrimonial regime governs the marriage. There are different matrimonial regimes in different parts of the world.
    - For example in England its the separation of estates, Malta its the community of acquests, there's the community of residence, there's the community of goods.
  - Now, here it's one area where we didn't have a lacuna, if you look at the civil code section 1316 of the civil code says
    - Article 1316.
    - **1316**. (1) Marriage celebrated in Malta shall, in the absence of an agreement to the contrary by public deed, produce ipso jure between the spouses the community of acquests.
    - (2) Marriage celebrated outside Malta by persons who subsequently establish themselves in Malta, shall also produce between such persons the community of acquests with regard to any property acquired after their arrival.
  - (1), marriage celebrated in Malta shall, in the absence of an agreement to the contrary by public deed, (2) produces the community of acquests from the date of establishing themselves in Malta. What does establishing themselves in Malta mean? That is living permanently, it doesn't necessarily, first of all it has been interpreted that they have acquired a maltese domicile, by establishing themselves in Malta you better establish yourself in Malta without acquiring

domicile, a couple from Britain who intend to retire back in Britain would not get a maltese domicile but would still for the purpose off community of acquest because of having established in Malta from the date they took up residence here.

- Actually this matter has now been superseded by this regulation of 2016. This doesn't apply to all states but it certainly applies to Malta it's 2016/1103 (COUNCIL REGULATION (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes).
- This covers both the choice of law issue and the jurisdictional issue, which court has jurisdiction to decide what is your matrimonial regime. If you look at the sections 4, it would govern the issue of jurisdiction whilst the rest show choice of law.
- It is still possible to exclude the foreign matrimonial regime if it is discriminatory, if it is possible to, first of all we have jurisdiction and jurisdiction in the event of the death of one party the court seeks succession because this is where matrimonial regime comes into play, when there's the diciest of one of the parties, or in the divorce. You want to know who has what when they separate not when they are living together (it's another problem) but when one of them dies you want to know which property the deceased person had, and which property the spouse who will inherit has. This is a matter of matrimonial law. So the court sees the jurisdiction over succession will also have the jurisdiction dividing the matrimonial regime, this is article 4 of the regulation.

  - Article 22,

  - Choice of the applicable law

  - **22**. 1. The spouses or future spouses may agree to designate, or to change, the law applicable to their matrimonial property regime, provided that that law is one of the following:

  - 2. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only.

  - 3. Any retroactive change of the applicable law under paragraph 2 shall not adversely affect the rights of third parties deriving from that law.

  - Article 26.

- Applicable law in the absence of choice by the parties
- **26**. 1. In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State:
- (a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that
- (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that
- (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.
- 2. If the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of paragraph 1 shall apply.
- 3. By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:
- The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.
- The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph 1.
- This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.

- Also a member state which laws applicable in person in article 22 (a) and (b) or article 26 (1). So a defendant can submit to the jurisdiction of the court in matters of that matrimonial property,
- This is article (a) a defendant putting in an appearance to say not contesting the jurisdiction of the court because it would not be subjective. If he puts in an appearance and submits to the jurisdiction of the cour then the court would have jurisdiction providing that it is applying its own laws.

- That is, if you read articles 4-11,
  - Article 4.
  - Jurisdiction in the event of the death of one of the spouses
  - **4**. Where a court of a Member State is seised in matters of the succession of a spouse pursuant to Regulation (EU) No 650/2012, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that succession case.
  - Article 5.
  - Jurisdiction in cases of divorce, legal separation or marriage annulment
  - **5**. 1. Without prejudice to paragraph 2, where a court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No 2201/2003, the courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application.
  - 2. Jurisdiction in matters of matrimonial property regimes under paragraph 1 shall be subject to the spouses' agreement where the court that is seised to rule on the application for divorce, legal separation or marriage annulment:
  - (a) is the court of a Member State in which the applicant is habitually resident and the applicant had resided there for at least a year immediately before the application was made, in accordance with the fifth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003;
  - (b) is the court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of Article 3(1)(a) of Regulation (EC) No 2201/2003;
  - (c) is seised pursuant to Article 5 of Regulation (EC) No 2201/2003 in cases of conversion of legal separation into divorce; or
  - (d) is seised pursuant to Article 7 of Regulation (EC) No 2201/2003 in cases of residual jurisdiction.
  - 3. If the agreement referred to in paragraph 2 of this Article is concluded before the court is seised to rule on matters of matrimonial property regimes, the agreement shall comply with Article 7(2).

- Article 6.

- Jurisdiction in other cases

- 6. Where no court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles, jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State:

- (a) in whose territory the spouses are habitually resident at the time the court is seised; or failing that

- (b) in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised; or failing that

- (c) in whose territory the respondent is habitually resident at the time the court is seised; or failing that

- (d) of the spouses' common nationality at the time the court is seised.

- Article 7.

- Choice of court

- **7**. 1. In cases which are covered by Article 6, the parties may agree that the courts of the Member State whose law is applicable pursuant to Article 22, or point (a) or (b) of Article 26(1), or the courts of the Member State of the conclusion of the marriage shall have exclusive jurisdiction to rule on matters of their matrimonial property regime.

- 2. The agreement referred to in paragraph 1 shall be expressed in writing and dated and signed by the parties. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

- Article 8.

- Jurisdiction based on the appearance of the defendant

- **8**. 1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State whose law is applicable pursuant to Article 22 or point (a) or (b) of Article 26(1), and before which a defendant enters an appearance, shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or in cases covered by Article 4 or 5(1).

- 2. Before assuming jurisdiction pursuant to paragraph 1, the court shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

- Article 9.

- Alternative jurisdiction

- **9**. 1. By way of exception, if a court of the Member State that has jurisdiction pursuant to Article 4, 6, 7 or 8 holds that, under its Private International Law, the marriage in question is not recognised for the purposes of matrimonial property regime proceedings, it may decline jurisdiction. If the court decides to decline jurisdiction, it shall do so without undue delay.

- 2. Where a court having jurisdiction pursuant to Article 4 or 6 declines jurisdiction and where the parties agree to confer jurisdiction to the courts of any other Member State in accordance with Article 7, jurisdiction to rule on the matrimonial property regime shall lie with the courts of that Member State.

- In other cases, jurisdiction to rule on the matrimonial property regime shall lie with the courts of any other Member State pursuant to Article 6 or 8, or the courts of the Member State of the conclusion of the marriage.

- 3. This Article shall not apply when the parties have obtained a divorce, legal separation or marriage annulment which is capable of being recognised in the Member State of the forum.

- Article 10.

- Subsidiary jurisdiction

- **10**. Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7 or 8, or when all the courts pursuant to Article 9 have declined jurisdiction and no court has jurisdiction pursuant to Article 9(2), the courts of a Member State shall have jurisdiction in so far as immoveable property of one or both spouses are located in the territory of that Member State, but in that event the court seised shall have jurisdiction to rule only in respect of the immoveable property in question.

- Article 11.

- Forum necessitatis

- **11**. Where no court of a Member State has jurisdiction pursuant to Article 4, 5, 6, 7, 8 or 10, or when all the courts pursuant to Article 9 have declined jurisdiction and no court of a Member State has jurisdiction pursuant to Article 9(2) or Article 10, the courts of a Member State may, on an exceptional basis, rule on a matrimonial property regime case if proceedings cannot reasonably be brought or conducted or would be impossible in a third state with which the case is closely connected.

- The case must have a sufficient connection with the Member State of the court seised

- Article 17.

- Lis pendens

- **17**. 1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

- 2. In the 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.

- 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.

- Article 18.

- Related actions

- **18**. 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 actions referred to in paragraph 1 are pending at first instance, any court other than the court first seised 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 decisions resulting from separate proceedings.

- You will find the rules governing jurisdiction in questions regarding matrimonial property. If two courts are seized, second court seizes the first to remain its hearing pending the decision of the first court that it has jurisdiction if the first court seems to have jurisdiction then it's bound to let that court go ahead and decide the case. This is article 17.

  - Article 19.

  - Provisional, including protective, measures

  - **19**. 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 State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

- Let's suppose two English persons have property in Malta, and they are regulated by the community of acquests. Now, if they are suing in England, because they are English or divorced, then the person can bring an action for the other spouse not to sell the property, what we have a point of inhibitory injunction not to sell the property in Malta in spite Malta not having the main jurisdiction over the matrimonial regime. This is article 19. The provisional including protective measures.

- That is, let's suppose the issue of matrimonial regime is in the jurisdiction of the English courts, you still may apply the whole provisional matters in Malta to protect your interest in so far as article 19. Actually, this does create a problem for maltese law because in maltese law once you take a person who takes provisional license to protect his interest in virtue of his spouse to make the action which would be the substantive action in an established period of time. Now, we cannot plead a substantive action in this case because the court has no jurisdiction if it needs the substantive action, the substantive action will be thrown out of your jurisdiction so does this mean that the term of bringing the substantive action does not apply in this case?

- That is let's suppose, two persons resident in England have acquired residence in Malta, to the community of acquests, they are suing both courts and the wife wants to sue the husband for the property in Malta be contractual. She brings an action for inhibitory injunction and she tried to get the husband not to sell the property but she cannot bring the substantive action because the Maltese court does not have jurisdiction on the matter.

- This means that the term within which to bring the substantive action once you have brought the substantive action abroad does not apply here. Once you have brought the substantive action abroad because it will have not, but Prof. Refalo speaks with a lot of doubt on the matter and therefore there is nothing to go by except, our logic. Our logic is much better.

- Now, what law governs the matrimonial property regime, the matrimonial property agreement if we looked at, first of all if the spouses agree to choose the law applicable to them which will govern their matrimonial regime, they are free to choose the matrimonial regime which will govern their relationship whether its the community of residence, community of acquests or separate property.

  - Article 23.

  - Formal validity of the agreement on a choice of applicable law

  - **23**. 1. The agreement referred to in Article 22 shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

  - 2. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

  - 3. If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

  - 4. If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

- That is, first of all the matrimonial property agreement has to be signed by both parties, the parties agreed he spouses agree, they have to decide, besides they have to follow, a maltese couple would have to do it by public deed and they also have to obtain consent, this is a question of substance and capacity rather than of anything.

  - Article 24.

- Consent and material validity

- **24**. 1. The existence and validity of an agreement on choice of law or of any term thereof, shall be determined by the law which would govern it pursuant to Article 22 if the agreement or term were valid.

- 2. Nevertheless, a spouse may, in order to establish that he did not consent, rely upon the law of the country in which he has his habitual residence at the time the court is seised 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.

• If the parties do not use the applicable law, then the applicable law shall be the law of the first common habitual residence up until they were married failing that of the spouses of the common nationality of the marriage failing that the spouses have jointly the connection of the provision of the marriage.

- Article 25

- Formal validity of a matrimonial property agreement

- **25**. 1. The matrimonial property agreement shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

- 2. If the law of the Member State in which both spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

- If the spouses are habitually resident in different Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements for matrimonial property agreements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

- If only one of the spouses is habitually resident in a Member State at the time the agreement is concluded and that State lays down additional formal requirements for matrimonial property agreements, those requirements shall apply.

- 3. If the law applicable to the matrimonial property regime imposes additional formal requirements, those requirements shall apply.

- That is if a maltese spouse marries a French spouse then of course they have different nationalities so the common nationality is, you have to look at the first common habitual residence, if they're established residence in Malta then there is the notion of Malta, if they have established in France they are established in France.

  - Article 26

  - Applicable law in the absence of choice by the parties

  - **26**. 1. In the absence of a choice-of-law agreement pursuant to Article 22, the law applicable to the matrimonial property regime shall be the law of the State:

  - (a) of the spouses' first common habitual residence after the conclusion of the marriage; or, failing that

  - (b) of the spouses' common nationality at the time of the conclusion of the marriage; or, failing that

  - (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances.

  - 2. If the spouses have more than one common nationality at the time of the conclusion of the marriage, only points (a) and (c) of paragraph 1 shall apply.

  - 3. By way of exception and upon application by either spouse, the judicial authority having jurisdiction to rule on matters of the matrimonial property regime may decide that the law of a State other than the State whose law is applicable pursuant to point (a) of paragraph 1 shall govern the matrimonial property regime if the applicant demonstrates that:

  - (a) the spouses had their last common habitual residence in that other State for a significantly longer period of time than in the State designated pursuant to point (a) of paragraph 1; and

  - (b) both spouses had relied on the law of that other State in arranging or planning their property relations.

  - The law of that other State shall apply as from the conclusion of the marriage, unless one spouse disagrees. In the latter case, the law of that other State shall have effect as from the establishment of the last common habitual residence in that other State.

- The application of the law of the other State shall not adversely affect the rights of third parties deriving from the law applicable pursuant to point (a) of paragraph 1.

- This paragraph shall not apply when the spouses have concluded a matrimonial property agreement before the establishment of their last common habitual residence in that other State.

- It is always wise to advise the parties who are marrying foreigners, that may take will make sure you will govern them to the property regime, otherwise they will be in a state of uncertainty where uncertainty is. So, you will notice in the regulations the preference given to residence over.

- It is habitual residence here, it is not nationality, nationality is established in a common residence, they will hold back on nationality, if the maltese marry they do not establish a common residence anywhere, then the community of acquests will apply because maltese law will apply to the marriage as the law of the nationality but nationality is a second choice here. It is the habitual residence of the parties which determines the applicable law in this case, the applicable law is very important because it will determine which private matrimonial property regime issue is governed.

- The Matrimonial property regime can be excluded if it has concepts which are contrary to our public policies. So a matrimonial regime where all the administration is given to the husband was the community of acquests. This was the case before the amendments of 1994. The husband would have lived as a loner and died as a partner as the community of acquests was all in the hands of the husband. Today the community of acquests is administered jointly by both parties and any matrimonial regime which is thought to be discriminatory between the spouses is a matter of a lot of public policy not enforceable in Malta.

  - Article 30.

  - Overriding mandatory provisions

  - **30**. 1. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

  - 2. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a Member State 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 matrimonial property regime pursuant to this Regulation.

- Even overriding mandatory provisions of the law shall apply. Of course you cannot be, you shouldn't be, keep a wide interpretation to public policy because otherwise you explode Private International Law altogether, so it may be refused the application of a law applied by this regulation and the forum. That is it is not simply, the word manifestly has been put there purposefully to make it clear to the court that only in extreme and limited cases will it be able not to recognise a chosen law.

  - Article 37.

  - Grounds of non-recognition

  - **37**. A decision shall not be recognised:

  - (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State in which recognition is sought;

  - (b) where it 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 decision when it was possible for him to do so;

  - (c) if it is irreconcilable with a decision given in proceedings between the same parties in the Member State in which recognition is sought;

  - (d) if it is irreconcilable with an earlier decision 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 decision fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

- Of course, this is in order to have because you cannot have concrete decisions, its a ground on non recognition, the existence of a judgement either on a forum or on another forum which your are bound to recognise, will be recent or not recognising anything between the parties to that decision. It is important to note that once the court is regularly seized in terms of regulations of jurisdiction it will be impossible for the recognising court to refuse jurisdiction, that the court could not have restriction, that is the court's finding on jurisdiction must be respected and there's no, of course if each state, here we are in a situation where the jurisdiction is placed on the regulation and the regulations is one of the regulations so the decision will not lean towards it.

- Article 47, declaration of enforceability.
  - Article 47.
  - Declaration of enforceability
  - **47**. The decision shall be declared enforceable immediately on completion of the formalities set out in Article 45 without any review under Article 37. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.
  - Article 48.
  - Notice of the decision on the application for a declaration of enforceability
  - **48**. 1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State of enforcement.
  - 2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the decision, if not already served on that party.
  - Article 49.
  - Appeal against the decision on the application for a declaration of enforceability
  - **49**. 1. The decision on the application for a declaration of enforceability may be appealed by either party.
  - 2. The appeal shall be lodged with the court communicated by the Member State concerned to the Commission in accordance with Article 64.
  - 3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.
  - 4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings
  - concerning an appeal brought by the applicant, Article 16 shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.
  - 5. An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is

domiciled in a Member State other than that in which the declaration of enforce ability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence. No extension may be granted on account of distance.

- That is if a person applies for recognition of a decision on matrimonial property a foreign decision on matrimonial property the defendant will not be heard before the declaration of enforceability, once the declaration of enforceability is made. If you have, let's get this clear, if you have a judgement on property, the moment of he regiment you want enforced in Malta, to make an application for its enforcement the application is served on the defendant but the defendant cannot put in any submission at that stage so, the court declares its enforceability and then once the court has declared it to be enforceable the party can appeal from this decision so he can give his reasons why the decision should not be enforced. This is the law governing the appeal, is in article 49.

- This is typical of recognition. It is nearly a full faith and credit cause which is found in America. However it is not quite since it would imply the immediate recognition without any possibility of appeal. You don't even need to apply for recognition, that is, for example a judgement given in the State of New York would be enforceable in any other state of the United States. While in this judgement, it would be enforceable but subject to appeal. That is, it is only obtained from the court to which the right of appeal is given to the defendant. However the issues on appeal may be rather limited.

  - Article 49.

  - Appeal against the decision on the application for a declaration of enforceability

  - **49**. 1. The decision on the application for a declaration of enforceability may be appealed by either party.

  - 2. The appeal shall be lodged with the court communicated by the Member State concerned to the Commission in

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- Here domicile is not, must not be interpreted in the English sense, it is the continental domicile which is considered here. That is you have to keep in mind that domicile in England has a very special meaning which is diverse from that of the continent, in the continent domicile, domicili, is the place of residence, of habitual residence of the party, that is what domicile is in continental law.

- As we can see, this puts the judgements of the European Union at an advantage over other judgements that is if you obtain a judgement of the European Member State, on the matrimonial property regime you are going to be able to enforce it in any state of Europe. That is it was policy to advise a person who was sued in a foreign jurisdiction to say nothing because a judgement may be obtained against him in a foreign court and that judgement will be enforceable in all states of members of the enhanced provisions, merely in all states of the EU.

- This does, lets suppose a couple have established a matrimonial regime and they are picking up residence in Malta, if they pick up residence in Malta, actually in maltese law section 1316, this is excluded by the regulations, terms of the regulation say they govern their regulations take to govern their relations.

- We must understand that the regime relied heavily on the Community of acquests as being the applicable regime, now this is set aside by the regulations, the regulations provide that the parties may choose the matrimonial regime, if they don’t choose the matrimonial regime the law applicable will be the law of the first common residence/habitual residence unless they have a common nationality, if they have a common nationality it will establish, two maltese married in Italy; one living in Italy one living in Belgium would have the law of Malta applicable as their common nationality law but if the parties establish their residence in Italy, then the italian residence would prevail and the first habitual residence is the criterion which will govern the application of the law.

- That is, actually the problem with the regime is it may be changed by the parties, and they will do a new agreement however if one of the parties is maltese he can

only enter in the post nuptial agreement by the second hall of the civil court which is a matter of substance rather than formal requirement.

- Prof. Refalo would say, that the necessity to be obtained in the assistance of the second hall of the civil court is a matter of substance, a matter affecting the capacity of the party to enter into the agreement rather than a matter of court. Being a matter of substance it would apply to the agreement by a Maltese party, that is, in Malta under maltese law, we know very well parties are free to choose whichever matrimonial law and regime they feel like their marriage to be regulated before marriage. After marriage to be able to appoint possible new laws of the parties from each others it is such a change that by assistance of the second hall of the second court. If you don't get the authority of the second hall of the second court your post nuptial matrimonial agreement will be considered void, this is a matter which affects the capacity of the parties handling the agreement and would apply to any agreement, that is a maltese spouse, a French spouse entering into a post nuptial agreement the maltese spouse would require the authority of the second hall of the civil court for that agreement to be valid. You would have to go to the second hall of the civil court to authorise the agreement to enter into the agreement, once that authorisation is obtained then you may freely enter into the agreement.

- Also you have to, that is, in maltese law, has a requirement that a post nuptial agreement exceeding the community of acquests or change the community of acquests or interchanging the matrimonial regime has to be by public deed to the registrar, this is to protect third parties inter dealings with the government. That is if they excluded the separation of the community of acquests then they have to formerly register it for the exclusion to be applicable in Malta. If they do not register it in Malta the exclusion will not be applicable in Malta.

- Let's suppose an English couple settling in Malta and they want to exclude the community of acquests surrounding the separation of estates to property. Its true that as a matter of law between them the normal hidden agreement is submission but lets suppose for the parties the exclusion for the community of acquests becomes effective on a public deed being entered into so the public deed would be essential for the validity of the agreement even though if agreed in writing to exclude.

- This is because maltese law, has an eye to the protection to creditors if I am dealing with a married couple then I would have to know this arises always in the sale of land, when I'm selling land to a couple, buying land from a married couple I want to know whether there is the community of acquests or not in order to know who has to sign.

- Let’s suppose a married couple have purchased a house which they want to sell. Now, I want to know whether I need the signature of both or one, if the husband only has purchased it it doesn’t belong to the community of acquests if it belonged to the community of acquests I would need the signature of both parties, otherwise the signature of the husband would be sufficient so that is why changes to nuptial agreements must be entered into by complete freedom and in order to give notice to others of the applicability of the position.

- Of course in the old law you had the possibility of but that is, if a couple have married and established a matrimonial regime, by agreement or otherwise by establishing, that is if a couple marry in Malta and establish themselves in Malta then the community of acquests will apply and it will continue to apply even if they change their residence to a state which does not apply the community of acquests.

- That is, the change in residence does not change your rights in the matrimonial regime, the rights in the matrimonial regime may only change through your consenting given the appropriate form. That is, the matrimonial regime establishes that is the matrimonial regime becomes immutable and accepts an agreement between the parties to change it does not change through, for example if you look to the old Maltese law, a couple who establish themselves in Malta would have the community of acquests applied from the date established in Malta. This means that the matrimonial regime changes, let’s say an English couple married in England who establish themselves in England they do not have the community of acquests, then they establish themselves in Malta, from the moment they establish themselves in Malta the community of acquests would apply. This is the old law. Under the regulation there is no such thing that is if you change your residence your matrimonial regime would continue to apply it does not change with the change of residence, the only applicable change is by mutual consent this is of course through as much as possible freedom of movement in Europe that is, people may move freely in Europe without any loss of their rights.

- We’ve covered most of what we had to say about matrimonial regime.

- The case Anton vs Bartolo was about the certification, decided by the French courts, that case was the effect of the terza anuzjali. There was a law in France in Algiers which prohibited non French members acquiring property by inheritance so it was inheritance with right she would not have acquired the property but if it was a matrimonial right and that is why it was an important case of specification no matter if it was specified as a matrimonial or succession right because if it was a succession right a succession of immoveable property to Algiers would exclude a British subject but if it was a matrimonial right then her succession would not be excluded and the court decided that it was matrimonial and so she succeed.

28th March 2023

Lecture 7.

- Today we will be tackling the law applicable dealing with divorce and separation.
  - The law applicable to divorce, it didn't have any divorced but we didn't have any Private International Law and legal separation as well, so the law applicable to legal separation and divorce if you were to apply British principles it would be the law of the forum that is English law deals with the matter of matrimonial regimes as a procedural issue and the law of the forum is applied.
  - This is regulation number 2201/2003, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. This is divorce and legal separation and you have also the presence this regulation the issue of jurisdiction and recognition.
  - The divorce regulation is Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.
  - From the 1950's and 1960's there was a matter of public policy, divorce still has been introduced Malta in the law and there's no public policy against divorce anymore.
  - This regulation does two things it regulates the law applicable by the court in cases of divorce and legal separation, it gives the parties the possibility of choosing an applicable law, the choice however is not a free choice but there is a single choice, that is besides common habitual residence, on the last habitual residence provided that it is one that is still there or the law of state of nationality of either spouse of the agreements of the law that is spouses divorcing or separating have the possibility of choosing the law to be applied, Prof. Refalo doesn't look much on that because his experience is that parties who are separating would not be able to apply on the law applicable to the legal separation of the law.
  - Basing such agreement on the matrimonial regime, provides that the applicable law shall be the law of applicable residence, is habitually resident to the residence of Malta before the courts was seized.
    - <u>Article 8,</u>
    - Applicable law in the absence of a choice by the parties

- **8**. In the absence of a choice pursuant to Article 5, divorce and legal separation shall be subject to the law of the State:
- (a) where the spouses are habitually resident at the time the court is seized; or, failing that
- (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that
- (c) of which both spouses are nationals at the time the court is seized; or, failing that
- (d) where the court is seized

- The law applicable, first of all it is possible for the courts to choose the law applicable to the legal separation over divorce, secondly even if they did not have chosen any law it is the law of that common habitual residence if they didn't have a common habitual residence provided this was not one year away from the start of the proceedings, failing that also of which both spouses are nationals and where the court is seized. Article 8 of the regulation specifies the applicable law where the parties have not chosen any law.
- To confer the separation into a divorce which is still possible even in Malta, you have to adhere this is to be possible in the right, that is if the parties have separated that the legal separation allows the conversion of the separation, the parties may use that law in order to confer the separation into a divorce.

- <u>Article 11.</u>
- Exclusion of renvoi
- **11**. Where this Regulation provides for the application of the law of a State, it refers to the rules of law in force in that State other than its rules of Private International Law.

- Article 11 excludes renvoi. This is typically of these regulations, the regulations are the European Regulations, exclude renvoi because renvoi become, once parties are given choice of law and the applicable law reflects the choice of interest they took you defeat the parties intention and also the regulation if the regulation says to form a habitual residence it's interesting to prepare everything here. Because habitual residence has become the most important connecting factor in European Regulations.

- Renvoi is excluded completely, that is the law of the habitual residence is the law of the parties habitual residence if its Malta it's Malta, anyway that is if the parties are applying the regulation, let's say it applies the regulation let's say the habitual residence in Italy, its silly to apply renvoi because renvoi to what? To Italy. That is the regulation European Regulations have solved the problem of renvoi by unifying Private International Law, Private International Law becomes European law and it becomes truly international. The problem of renvoi arose because Private International Law was not international law it is a municipal law, in being european law, regulation excludes renvoi and the exclusion in renvoi is merely in all regulations, most of the regulations would exclude renvoi.

- Public policy would still apply that is if a state doesn't recognise divorce they can refuse to recognise a divorce on the basis of public policy though in Europe very few states would refuse to recognise a divorce on the issue of public policy that is the only issue which arises in Malta that is a divorce to be obtained has to be between two parties that have been separated for three years.

- Now, can the parties, let's suppose that English couple is residing in Malta, they're habitually resident in England and have an English nationality, they choose the law applicable, English law with the three year still apply? No that is a couple resident and domiciled, habitually resident in England wanted to divorce and start proceedings in Malta, would the maltese rule that three years have to elapse before proceedings can be completed apply or not?

- Prof. Refalo does not think that the law requiring three years separation is enough, it depends whether you consider it as a matter of public policy because it will tell you it would still be applicable if you do not consider it as a matter of public policy then the parties would be able to ditch by applying the law which allows us a divorce before three years.

- A couple habitually resident in the UK the law allows for divorce immediately, the maltese they sue for divorce in Malta they haven't been separated three years, the maltese law would allow a divorce only for couples which have been separated for three years. Actually if they divorce in the UK that divorce would be recognised in Malta, however if you say that the divorce, that is if the rule of three years is a rule of public policy then it becomes questioned whether the divorce in Malta is applicable in the UK.

  - <u>Article 13.</u>

  - Differences in national law

- **13**. Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation.

- Article 14.

- States with two or more legal systems — territorial conflicts of laws

- **14**. Where a State comprises several territorial units each of which has its own system of law or a set of rules concerning matters governed by this Regulation:

- (a) any reference to the law of such State shall be construed, for the purposes of determining the law applicable under this Regulation, as referring to the law in force in the relevant territorial unit;

- (b) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit;

- (c) any reference to nationality shall refer to the territorial unit designated by the law of that State, or, in the absence of relevant rules, to the territorial unit chosen by the parties or, in absence of choice, to the territorial unit with which the spouse or spouses has or have the closest connection.

- Article 15.

- States with two or more legal systems — inter-personal conflicts of laws

- **15**. In relation to a State which has two or more systems of law or sets of rules applicable to different categories of persons concerning matters governed by this Regulation, any reference to the law of such a State shall be construed as referring to the legal system determined by the rules in force in that State. In the absence of such rules, the system of law or the set of rules with which the spouse or spouses has or have the closest connection applies.

- Article 16.

- Non-application of this Regulation to internal conflicts of laws

- **16**. A participating Member State in which different systems of law or sets of rules apply to matters governed by this Regulation shall not be required to apply this Regulation to conflicts of laws arising solely between such different systems of law or sets of rules.

- In articles 13, 14, 15 and 16, contemplate the issue of the united states, if it is a federated state, which has different laws in different states would the, which law will be determined and in that case of course they would, let's say there are nationals habitually resident in a German state, Germany is a federation, now, if they are resident in a German state, the rule of which will be the applicable law will be decided by the internal law of that state. That is the law of a German will decide which laws will apply.
- Actually, divorce has proven very strictly, with the introduction of divorce in Malta, in the situation considerably you must realise that in the 1960's Fenech Adami vs Speeded decided that no divorce will be recognised in Malta as a matter of public policy not even ancillary to divorce even the degree of maintenance ancillary to divorce could not be recognised as a matter of public policy, this changed.
- Of course the public policy of Malta changed in 1975 with the introduction of the marriage act which and Cacciattolo was the first case which was advertised on foreign divorce in Malta in the 1980's
- In public policy, must remain the law, public policy is not actually found in the law but public policy is for example the rules of public policy the rules found in the human rights prohibitions in the constitution, there are rules of public policy.
- If the three year rule against divorce is not met on public policy and the parties can avoid the three year rule if they are habitually resident in england simply by choosing English law to apply to their case.
- That is first of all the parties are given a choice provided the choice is one of the following.
  - <u>Article 5.</u>
  - Choice of applicable law by the parties
  - **5**. 1. The spouses may agree to designate the law applicable to divorce and legal separation provided that it is one of the following laws:
  - (a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or
  - (b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or
  - (c) the law of the State of nationality of either spouse at the time the agreement is concluded; or

- (d) the law of the forum.

- 2. Without prejudice to paragraph 3, an agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seized.

- 3. If the law of the forum so provides, the spouses may also designate the law applicable before the court during the course of the proceeding. In that event, such designation shall be recorded in court in accordance with the law of the forum.

- They can choose either the law of the habitual residence of the last of the habitual residence provided that one of them still resides in the state of habitual residence, the common nationality, and the forum. It is in the same order, if they do not choose the law applicable to divorce proceedings would be the same in the same order that is first of all there is habitual residence, you will notice that european law gives importance to the law, enormous importance to the law of nationality of the parties. This is only natural in Europe where it wants to, that is european law wants to give freedom of movement to the parties, with freedom of movement, the law of residence becomes most important, it becomes more important than either domicile as an English concept or nationality that is performed, nationality used to be applied in most cases, now the inferior cases have preferred residence because its wrong to discriminate on the basis of nationality, that is discrimination on the basis of nationality dueness the freedom of movement which is promised to everyone.

- The jurisdictional rules and recognition rules of foreign judgements are found in Brussels Bis which is also 2003, but jurisdiction is really based on residence in Europe, that is if you want the residence of the parties, so if the parties are habitually resident in the forum, they are maltese habitually resident in Malta then the maltese court would have jurisdiction, they are able to apply the law of Malta, the law of Malta is applicable to habitual residence, at least once year before, at least not, that is not more than one year before. If they have been habitually resident in a state and they stop being habitually resident in a state. So, if they are habitually resident in Malta and two years lapse of more than one year lapses its useless, you cannot refer to that common habitual residence then it’s the common nationality which applies in that case. If the common nationality does not apply you’d want to go back on the law ultimately on the law of the forum.

- Prof Refalo thinks its very difficult for our court to apply foreign law in these cases. It’s always difficult for a court to apply foreign law, first of all it has to understand what the foreign law requires, secondly it has to apply it its not an easy thing for a court to apply foreign law. First of all whilst a court naturally should know its own

law it needs to know its own law. It cannot be said as far as foreign laws are concerned that is you'd know maltese law well but what of the law of India or Timbuktu, you cannot know the laws of the world, the law of forcing state would have to be proved in evidence to the quote this will create additional difficulty for the court in deciding the case.

- Actually the habitual residence rule leads to the law of the forum because once jurisdiction is based on habitual residence the forum rule would be that habitual residence is the most natural law to apply, if the couple is habitually resident ii Malta what law would the maltese law apply but the maltese law? If a couple are habitually resident abroad, it is most unlikely that they will sue in another country. If they are habitually resident in England they would probably sue for divorce in England and not in Malta.

- So the regulation reflects what usually happens and it reflects this in a manner which allows the court apply its own law, the law of the forum of course the parties may choose a different law from that of the forum but this rarely can happen with the restrictions because the restrictions are either common habitual residence or common nationality, if they don't have common nationality the probability is that they are suing in the state of their common habitual residence that state would have jurisdiction.

- So, ultimately you went up by looking at the law of the forum and applying the law of the forum which brings us to the same situation, the English people are practical people still apply, they don't apply the regulation because the regulation was through the enhanced procedure which the regulation was applied, it was through the enhanced procedure and it was only applied in a number of countries amongst which the united kingdom was included, of course. The united kingdom is excluded today, the United Kingdom is no longer part of the European union, but it was excluded anyway even if it was a part of the european union because this regulation was adopted through the enhanced.

  - <u>Article 21.</u>

  - Entry into force and date of application

  - **21**. This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

  - It shall apply from 21 June 2012, with the exception of Article 17, which shall apply from 21 June 2011.

  - For those participating Member States which participate in enhanced cooperation by virtue of a decision adopted in accordance with the second or

third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union, this Regulation shall apply as from the date indicated in the decision concerned.

- This Regulation shall be binding in its entirety and directly applicable in the participating Member States in accordance with the Treaties.

- Done at Brussels, 20 December 2010.

- Malta is one of them, and the important thing is that it certainly applies to Malta, it doesn't apply to the UK it still retains, in the UK the law applicable would be a matter of procedure and it will be the law of divorce. If you sue in the UK for divorce you will have English law whatever your habitual residence is. If you sue in Italy, France, Malta, you can choose the law applicable to your divorce proceedings so failing habitual residence from the parties which will apply in most cases to the forum.

  - Article 7.

  - Formal validity

  - **7**. 1. The agreement referred to in Article 5(1) and (2), shall be expressed in writing, dated and signed by both spouses. Any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.

  - 2. However, if the law of the participating Member State in which the two spouses have their habitual residence at the time the agreement is concluded lays down additional formal requirements for this type of agreement, those requirements shall apply.

  - 3. If the spouses are habitually resident in different participating Member States at the time the agreement is concluded and the laws of those States provide for different formal requirements, the agreement shall be formally valid if it satisfies the requirements of either of those laws.

  - 4. If only one of the spouses is habitually resident in a participating Member State at the time the agreement is concluded and that State lays down additional formal requirements for this type of agreement, those requirements shall apply.

- Article 7 deals with the formal validity of the agreement of the choice of law. It is possible for the sprites to agree on the applicable law because of the divorce.

What law governs the agreement? The formal validity is regulated by article 7. It has to be in writing or by electronic means. So it shall be in writing.

- Let us suppose, two habitually resident maltese want to make an agreement applying the law would an agreement in writing be valid or not? Prof Refalo thinks not because the law of habitual residents requires for post nuptial agreements the consent of the second hall so they would apply the second hall of the civil court and obtain the permission, governing law and then conclude the agreement by a public deed. Article 7(1) speaks of article 5.

- With Malta you have a problem because maltese, this would be characterised, that is after the marriage has been celebrated parties may enter into an agreement with the consent of the second hall civil court, in any case let's suppose we have a case where two parties have concluded in writing, they are habitually resident in Malta, they are divorcing in England and concluded in Malta in writing that the law of Malta should apply. The law of Malta requires for the formal validity of post nuptial agreements, the consent of the second hall which is a matter also of capacity rather than of form.

- In matters of capacity parties are rendered unable to consent to a postnuptial agreement after the marriage because of the possibility of, that is the rule for the authorisation by the second hall civil court is there to protect the spouses from each other's influence by the spouses in order to have an agreement reached.

- Whether the spouses which are divorcing or legally separating are able to bring that pressure to have a party agreeing to a law which he does not desire to apply to his case, and would award him but if on the other hand you looked at the formal requirements then you would say that the party would require the consent of the second hall and it should be made despite that in most cases the only requirement laid down in the regulation is that it is in writing would be formerly valid. That is ultimately if it is going to be applied by the court, the protection of the parties from the undue duress would be represented by the court of litigation giving application to that law and provides it unjust. Actually there is no rule which allows the court to disregard the parties choice, if the parties choice is valid but it can always conclude that the parties choice is not valid but the parties choice is common residence, common nationality and law of the forum, really if it excludes one law then the law of nationality would be typically the law of habitual residence of the party.

- How many maltese do you know who have a common residence in Malta who do not have a common nationality who are not maltese, nearly all persons who marry in Malta obtain common residence in Malta are Maltese residents.

- If they are foreign nationals then there is the possibility of choice between the local law and the foreign law. But that rarely happens. Prof Refalo thinks that the regulation has not been applied at all in local law because cases for having a foreign element in these situations are far between. This is very rarely that you find a situation requiring Private International Law. The point to notice however in the regulation is the elimination of the renvoi in article 11 of the regulation. Nearly all regulations, that is so because European Regulations have done to Private International Law wha Private International Law has failed to do on its own that is the idea in Private International Law is that a person who has acquired rights in a system of laws should not have those rights challenged or invalidated simply because he moves from one jurisdiction to the next.

- Renvoi was created because of the desire of uniformity, it was created in order to achieve uniformity which was still and is still the hope behind the English foreign court doctrine. In some cases especially in marriage cases, the court will decide not the cases as if it were sitting as a foreign court that is not only applying italian law but as an italian court deciding the idea is that by applying the foreign court doctrine in sudden cases you achieve uniformity. The uniformity achieved relies on other states, if two states apply the foreign court the matter is unresolvable that is if it is the English court which applies the foreign court doctrine that's okay, if the English court will decide as the foreign court would but say if it is a case between italian law and English law or the maltese law were to apply the foreign court law you end up in an extricable circumstance, that is the reality of renvoi has been created to achieve an illusory, the illusion of uniformity, this is called that way because uniformity cannot be achieved except through European Regulation, being once the rule is common to all states, once you have a rule common to all states, it is truly international then of course you don't need renvoi at all you need renvoi because Private International Law is really municipal law and therefore you have different municipal laws and this creates the possibility of renvoi.

- If both states refer to the states, for renvoi to be possible you have not only to have a difference in the municipal law of the state, you want to have a difference in the Private International Law of the state, say one applies and stops the issue in accordance with the law of the domicile, the other stops the issue in accordance with the law of nationality. Interpretation of a renvoi because if the law of domicile of the parties is italian and the italian law says you should solve it according to the law of nationality and the law of nationality is English, but if you have a common European Regulation which is common to both states it is completely, the problem is completely solved that way because here you have a law which is truly international and european in character therefore the same rule will apply in whichever state it arises in.

18th April 2023

Lecture 8.

- We've been trying to lecture on Private International Law of Marriage.

  - In marriage, it's important to know that the definition of marriage is a matter of public policy. There is no definition in our law of marriage but you can assume that the notion of marriage is a christian marriage. Marriage of a man to a woman and the possibility of divorce doesn't in any way make the marriage less. Of course, today, people marry until they divorce. Once they're divorced they're no longer married but when they give the consent to marriage the consent is given to an indefinite duration, for life. That is, there is an central African system where marriage is for a fixed term that is until the children are of age, (or something like that) that is not a marriage in the eyes of maltese law. The definition of marriage is always a matter of public policy because it is an institution which affects the texture and the stability of the whole of society so it is understandable that the definition of marriage should be a matter of public policy.

  - You have to be careful to distinguish between the definition of marriage and the issue, once you know you're treating of a marriage then the validity of marriage in foreign laws make the effects of the validity of marriage, that is for example as a matter of form the lex noti celebraciones, the place where the marriage is celebrated would be the law which controls the validity of that title, as for substance the law of domicile of both parties. That is a marriage to be valid has to be valid in accordance to the law of domicile of either of both spouses.

  - Now, a homosexual or lesbian relationship would not be a marriage according to Maltese law, but it's still a relationship which is recognised in law as giving a rise to rights and obligations. It is regulated by special laws and it's not called marriage but it is the equivalent of a marriage.

  - Marriage, gives rise to a number of property considerations and the law covers the property considerations carefully. First of all which law governs the property rights of the spouses in the marriage? Do they have the community off acquests, do they have the issue of the paraphernal property? This has been governed by a regulation of Europe. The regulation puts the next instance on the habitual residence of the parties, it's that both parties. First of all they can choose the law applicable to their marriage being either the law of nationality or the law of habitual residence. It is not a free choice it's a limited choice. If they do not choose a law to cover their property relationship then their property relationship becomes that of the common habitual residence which they have.

- Most of them, this would govern most instances because most parties who marry have a common habitual residence, that is it is nearly unthinkable for many subjects to have no common habitual residence. Usually it is the norm that parties who marry would live somewhere which they recognise as their common habitual residence, that would govern them so it is no longer the place.

- Does this conflict in Maltese law this was the only aspect in marriage which was covered by Maltese Law on Private International Law. There's a section in relation to the community of acquests which says that parties must have established themselves in Malta would have the community of acquests existing between them. However according to the EU this has been superseded by the European Regulation that they must be habitually resident in Malta in order for the community of acquests to arise. Whilst, according to Maltese law it is sufficient if they establish themselves in Malta.

- It's another asset when the marriage breaks up, the separation and divorce of the parties is covered by the law which they chose provided the choice is a limited choice ranging from habitual residence to nationality, to where they don't make a choice the law of habitual residence. It was good advice formally for a person who was sued in a foreign country not to contest in order to be able not to have the effect of that judgement. If anybody comes from a foreign court, you must contest it because there is the possibility (if it is from a European court) that the judgement will be automatically enforced under the Brussels Regulations and therefore you would have if the judgement is given in the court of a superior you would become liable in the same to the consequences of the judgement whatever they are whilst formally there were a number of defences which could be raised with the enforcement of a foreign judgement.

- A few defences which could be raised under the Brussels regulation to the enforcement of a judgement, once the judgement is obtained abroad then very often its all over because that judgement is enforceable in Malta.

- In one case, that is let's suppose a person comes to you for advice, he has been sued in England for divorce and he has been successfully sued for divorce in England. In one particular case, there was this person being sued for divorced successfully and there was an order for him to maintain his wife. He countersued in Malta for whether the relation of validity of the marriage, the nullity of the marriage speaks of divorce because the nudity of marriage speaks off divorce because you can't get divorced to a person you're not married to. They managed to obtain from Malta a judgement that the marriage was void. This at least gave some protection from the enforcement of the divorce proceedings in Malta, it doesn't give protection from the enforcement of the divorce proceedings in the other countries.

- Another collateral issue which often rises is in relation to maintenance and in relation to custody of the children. In relation to maintenance, now that the wife is equal to the husband and able to find work it's not so important it was terribly important when the husband was the wage earner and the wife had to maintain, today the importance of maintenance and the like has diminished but custody remains so important that is what law should be applied to decide the custody of the children.

- The question is a question really of jurisdiction rather of the applicable law because in the applicable laws calculate that the best interest of the child should be taken into consideration when deciding on custody but whether it is a Maltese court or an American court that decides on custody remains a moot point.

- That is, there was the Camilleri case, who was married to an American wife, the American wife had obtained the custody of the child, he had abducted the child and brought him to Malta and the wife attempted to enforce the judgement of the court in Malta. Now, the position is clarified as far as a custody is concerned by several treaties that is taking the child out of the country without consent of both parents is seen as an abduction and a criminal offence. Most jurisdictions would agree that the court having jurisdiction to decide on the welfare and best interest of the child is the court of common habitual residence of the child. Once that court decides then the ruling should be maintained and applied throughout.

- That is, custody is a sore point. Usually when you have a marriage the implication arises out of property rights and the custody of the children. Unfortunately most spouses use the custody as a sort of, they enjoy using the custody of the children to make the spouses 'jealous', the terrible thing is if the spouse is from a country which has different rules as to custody.

- For example most islamic countries would have the father as the custodian of his children with very little, so once the child is abducted to a country of that sort the father gains automatic custody and denies the custody of the mother.

- In divorce and separation proceedings usually the law of common, that is before, the law has changed substantially because before by applying English law, it stated that in divorce proceedings the law of the forum would apply and it is a matter of procedure and the law of the forum would be applied to issues of divorce and legal separation.

- This is now governed by a European Regulation to which Malta is a party and which entails that in divorce and legal separation the law chosen by the parties entails the matter or if there is no choice the law of common habitual residence would be applied.

- Actually the law of common habitual residence is really and truly the law of the forum. It is enormously difficult for the courts to apply divorce and separation proceedings different to its own law. It would create difficulties for the law. It's difficult enough applying its own law, applying a foreign law would create problems for the court. Still the common habitual residence is the preferred choice. Actually the common habitual residence it is usually the law of the forum. Out of a hundred cases of legal divorce and separation ninety-nine would be the law of habitual residence and the law of the forum would normally coincide, so when directing that the quota applying the law of common habitual residence the direction is that the court applies its own law.

- Then, from the point of view of property rights there is the issue of succession. Succession today is regulated since 2015 by a Regulation on succession. That is, where before we has to go on English law as on the dubious succession that public law is, that matter of public law will follow english law we now have the matter resolved by European Regulations which specifically provide for the cases of succession to property. One must remember that marriage is central to the succession problem, very often problems arise out in relation to problems of succession.

- The first notable case was Anton vs Bartolo, the separation case which was decided by the French courts in the 1890's the first notable case. It was a case arising out of a marriage celebrated in Nadur Gozo in 1860 before the civil code came into force and the question of justification was how were the rights of the wife on the property to be divided, but there were property rights in matrimonial law of succession and the court said that they were matrimonial rights and not of succession rights and she won the case.

- One must understand that in Anton vs Bartolo, one must understand that there was a French law at the time which forbade persons of non-French nationality succeeding to property law. The question was whether this law was applicable or not, the law was applicable if she had the rights to property of her dead husband were also succession she would have lost. If her property arose out of the matrimony of her marriage she would win. The court decided that her rights were matrimonial not hereditary rights therefore she one her case.

- This is the classification case dealt with in Cheschire etc. When Prof. Refalo first read the case, Cheschire doesn't tell you that the marriage was celebrated in 1860 but it is important to remember that the marriage was celebrated before 1865. In 1865 the civil code came into effect, the civil code was modelled on French law, and so our classification problem could arise there but, that is according to Maltese law at the time in 1860 marriage produced a three-party partnership between wife, husband and children and the third portion of property pertained to

the wife as a matter of marriage, not as a matter off succession. So she won her case anyways, the widow of Bartolo won the case anyway. The case was brought against the former lover of this Bartolo who had settled in Algiers and acquired a considerable property in Algiers, the court said you waited patiently till he kicked the bucket and then presented herself to get her share of the property and her share of the property went to her, not as a matter of succession but as a matter of matrimonial rights.

- Now, in the next lecture we will be dealing with succession, but the law of succession, the European Regulation on succession is a welcome, first of fall one must be aware that it gives the possibility for the person to choose the law which will be applied to his succession. It is not a free choice it is a choice which is limited to his habitual residence at the time of making the choice and to his nationality.

- So if one is advising a British subject who wants to give his property and wants to say that his succession would be regulation by English law which knows of no legitim rather than by Maltese law which allows a legitim to the children. If he does not make a choice in the chosen law it is the law of the habitual residence of the deceased, the law which is chosen is applicable law irrelevant of the applicable law of the state.

- One thing we get with the European Regulation of Private International Law is the irrelevance of classification and renvoi problems. Classification and renvoi problems arose out of the desire to have the same ruling in all courts. Renvoi arose out of different Private International Law, laws applicable in different territories in Europe, if you have to see Private International Law rules applicable on all territories of Europe as an effect of European Regulations renvoi, the necessity of renvoi here disappears and you will find that in European Regulations that renvoi is very often excluded.

- That is, the fact of European Regulations, european law is a law which is both national and european in character, it is the common to most states adopting to the European Regulations. It is different from normal law to Private International Law, that is Private International Law is a law which is territorial in nature, territoriality of the law persists in the case of Private International Law. In fact the word Private International Law has been said to be a misnomer because there is nothing international about this law. The law is applied nationally as a law of applicability in the territory. With different territories applying different Private International Law rules you have the possibility of renvoi and the possibility of Private International Law itself achieves being defeated. Why do you have a system of Private International Law? the system of Private International Law has

been created as a result of the desire that the obligations and types of people should not be avoided or rendered void through movement in territory.

- So whether you're residing, if you are married you should be married whether you're residing in England, in France, whichever country you reside in and that is why most countries, that is why the English courts adopted the foreign court doctrine which said that they would decide the matter in exactly the same manner as a foreign court would but with the European law this is totally unnecessary because the European law is a regulation applicable in all the states of Europe equally. So european law is both national and truly international in character, or european in character and this enables the issue of renvoi to be avoided. Instead of the court to avoid the issue of renvoi and you will find the express exclusion of any notion of renvoi in most of the regulations.

- This would be a good question too ask in the exam (hint). Why has renvoi been excluded in European Regulations? It was excluded in European Regulations because once the regulation is applied in different states the necessary issue for renvoi to arise, that is the difference in Private International Law rules does not arise in this case seeing that the European Regulation will be applied as a European Regulation in the same manner where there is analysis.

- So if you have an issue with the maltese residence and the italian residence regulated by the European Regulation the rule whatever the European Regulation says is the same applied whether you are applying the legal issue in an italian court or in a maltese court.

- So, the real, the basic reason for the possibility for renvoi seises to exist, for the possibility of renvoi to exist there have to be two conditions

  - Different substantive laws, different laws under Private International Law. This often happens between England and the continent, England as the continent preferred nationality and England preferred domicile. So, if an Italian dies in England having property in England, say if you apply law of nationality one would apply italian law. If you apply the law of the domicile you would probably apply English law, if he's domiciled in England, and so this gives rise to the possibility of the renvoi is superior.

- Of course if the same rule applies in succession regulations have the effect of harmonising the law of succession for european residence. Of course still, problems may arise because sometimes or if somebody has a holograph document produced by an individual would be perfectly valid when it is written in Italy as a will.

- Let's suppose I am going to make a will and I write my will in Italian, in Italy whilst I'm residing in Italy, that's a perfectly valid will. If it is completely, it is nothing according to maltese law because a public will has to be done in front off a public notary and two witnesses (not necessarily) to be a valid will, but if you're living in Italy and you make a valid will in Italy, then your will is a perfectly valid will and you can dispose of any estate in italian law or maltese law will apply.

- We will continue on the law of succession in the next lecture.

  - One particular important aspect of the regulations of succession is that the person testating can choose the law applicable to his inheritance even though this is not a free choice, it must be either his habitual residence or his nationality at the time of the making of the will, which is, the will is valid if it is made in accordance of the law of the place where it is made. That is if I write a will in Italy, on a piece of paper it will be valid in spite of the fact that it does not conform with Maltese law. If I write down my will on a piece of paper in Maltese law, then it would totally invalid because in Malta one has to make a will in front of a public notary and two witnesses for the will to be valid. But a holograph document produced, n ow one must be careful that this must apply to the there is nothing in law that says that a secret will has to be a holograph document so a document which disposes of a will of the person in front of the judge or the notary would be a perfectly valid will even though it is not written in the hand of the testator, make pen to paper and write it out. There is nothing which says that a secret will is to bear a holograph will.

  - A holograph will is a will made in the hands of the testator because the testator must put pen to paper and write it out if he does not write it out himself then it is not a holograph will.

- We will continue on the issue of succession in the next lecture.

25th April 2023

Lecture 9.

- We're doing succession.

  - Succession in Maltese law is to take up any regulation done under the system of enhanced cooperations so it is not necessarily applied in all states. The regulation was adopted by the council of Europe on the 4th July 2012, number 633/2012.

  - This shall apply to successions opening after the 15th August 2015. That is if you die after the 15th August 2015 then the regulation would be applied to your succession, if you died before the date, well if you died that date, you would have died anyway but there's no clear law of succession in relation.

- That is in maltese law, it has been the accepted wisdom by our courts to apply English principles of Private International Law to all issues arising in Maltese law because in Maltese law we have hardly any Private International Law, some rules of jurisdiction, some rules on endorsement in section 823 of the Code of Organisation and Civil Procedure, but hardly any rules on succession.
- On succession we have only one sole section of the civil code which says that in matters of wills the will to be valid has to be done in accordance to the law of the place where it is made, that is a will made in Malta has to conform to maltese law, a will made in Italy has to conform to Italian law. That is, the validity of wills is governed by the law of the place where the will is made.
- This was the prevalent law in the 19th century but since then the law has been adapted and the law in England for example by statute law after the Hague convention on formalities of the will will be held valid if it is held valid according to one of seven possible applicable laws.
- The law of the place the will was made, the law of the domicile of the individual making the will does the making of the will The law of nationality or his law domicile nationality and habitual residence, this was the Hague convention on wills.
- Unfortunately this deposition in maltese law had remained that no applicable to wills would be the law of the place where the will was made.
- This was a section which created new impossible situations
  - For example, Prof Refalo had a case to advise someone where it is subject who didn't have much weight in Maltese notaries and Maltese lawyers had taken advise on the making of his will from an English solicitor. He had brought the English solicitor to Malta, this English solicitor was foolish enough to draft a will for his client without taking advice on Maltese law. He drafted a will in English law which was perfectly valid according to English law but this person wanted to leave the property to his Maltese friend, what happened was that the will, there was complete nullity under maltese law as it was made in terms of English law being witnessed by a solicitor and two others, which was a perfectly valid will under English law but it was null and void under maltese law.
- So it happened that if the heirs sued in England they would win, if the testamentary sued in England they would win, if the testamentary sued in Malta they would lose because according to the maltese law the will was a total nullity. So these regulations are welcome in Maltese law because they regulate what was before a total lacuna.

- As usual, the scope of the regulation regulates on issues; jurisdiction, recognition by the states as well as choice of law on jurisdiction, the first use of articles of the regulation shall deal with jurisdiction.

  - Article 1.

  - Scope

  - **1**. 1. This Regulation shall apply to succession to the estates of deceased persons. It shall not apply to revenue, customs or administrative matters.

  - 2. The following shall be excluded from the scope of this Regulation:

  - (a) the status of natural persons, as well as family relationships and relationships deemed by the law applicable to such relationships to have comparable effects;

  - (b) the legal capacity of natural persons, without prejudice to point (c) of Article 23(2) and to Article 26;

  - (c) questions relating to the disappearance, absence or presumed death of a natural person;

  - (d) questions relating to matrimonial property regimes and property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage;

  - (e) maintenance obligations other than those arising by reason of death;

  - (f) the formal validity of dispositions of property upon death made orally;

  - (g) property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature, without prejudice to point (i) of Article 23(2);

  - (h) questions governed by the law of companies and other bodies, corporate or unincorporated, such as clauses in the memoranda of association and articles of association of companies and other bodies, corporate or unincorporated, which determine what will happen to the shares upon the death of the members;

  - (i) the dissolution, extinction and merger of companies and other bodies, corporate or unincorporated;

  - (j) the creation, administration and dissolution of trusts;

- (k) the nature of rights in rem; and
- (l) any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

- Jurisdiction, article 1 defines the scope of jurisdiction in the courts of the member state which the deceased have habitually residences shall have jurisdiction to rule on succession as a whole.
- We will notice that European Regulation favour the concept of habitual residence over nationality and over domicile. This is a natural choice in european law, where people are issued of the freedom of movement within the European Union. Now if you have the freedom of movement you don't want to lose right by moving within the European Union so the law of habitual residence nearly regulates all areas of law.
- The jurisdiction of the member states in which the deceases had been residence and has jurisdiction to rule on the succession of the whole. If however, the law allows the testator to make a choice which is a very important section, it's not a free choice you can choose such residence regulated by the law of this nationality this is article 22.
  - Article 4.
  - General jurisdiction
  - **4**. The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.
  - Article 8.
  - Jurisdiction based on the appearance of the defendant
  - **8**. 1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State whose law is applicable pursuant to Article 22 or point (a) or (b) of Article 26(1), and before which a defendant enters an appearance, shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or in cases covered by Article 4 or 5(1).
  - 2. Before assuming jurisdiction pursuant to paragraph 1, the court shall ensure that the defendant is informed of his right to contest the jurisdiction and of the consequences of entering or not entering an appearance.

- Article 22.
- Choice of law
- **22**. 1. A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.
- A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.
- 2. The choice shall be made expressly in a declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition.
- 3. The substantive validity of the act whereby the choice of law was made shall be governed by the chosen law.
- 4. Any modification or revocation of the choice of law shall meet the requirements as to form for the modification or revocation of a disposition of property upon death.

- A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death.
- A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.
- That is, how does a person, it is subject is residence in Malta, all sorts choosing residence is to say that succession is possessed by English law and not maltese law, of course he made this choice.
- So a British national who wants to leave all his property to a Gozitan would be well advised to insert a clause saying that his succession will be governed by British law and not by maltese law, which would mean that the residence would apply for his children.
- Again, this is different from the Maltese law as we knew it before from English law, in English law succession is treated in parts, that is the succession of immoveables is in accordance of the laws of the state where succession of immoveable is situated in accordance of the law of domicile. So whilst here the

law of succession is one law only, that is if the law of succession, it governs both moveables and immoveables, all property to which the person succeeds the law must govern all issues of succession. So there isn't an issue of Maltese law.

- If the person dies, having chosen the law also renvoi is excluded, it's excluded in this case of section 22 in the case of choice of law, it is also excluded in the case of law, a person if you look at article 21 which governs choice of law in relation to succession it says

  - Article 21.

  - General rule

  - **21**. 1. Unless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.

  - 2. Where, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State whose law would be applicable under paragraph 1, the law applicable to the succession shall be the law of that other State.

- Let's take a person who has property in England has lived his life in England has decided to come and retire to Malta and picks up habitual residence in Malta, six months after picking up habitual residence in Malta he dies, obviously in that case his assets are situated in England. It will be English law which will govern the case, as, that is, it is here we're going to a question of the proper law of succession which is the proper law of succession is the most closely connected with the issue, of course this is by way of exception to the law of habitual residence, normally the law of habitual residence which will govern succession in this case the law of habitual residence but this is intended to introduce sufficient flexibility to our courts to choose a different law from the law of habitual residence in circumstances so just.

- That is if a person has all his assets in a particular place he has lived his life in a particular state as changes habitual residence only recently then of course the court is able to say though normally the law of habitual residence would govern this succession in this case the law where his assets are situation is the law which is most closely connected with the succession and therefore the law which will be appleid by the court.This, has been also adapted,

- Then as to re's article 27 is the formal validity of dispositions of property upon death made in writing.

- Article 27.

- Formal validity of dispositions of property upon death made in writing

- **27**. 1. A disposition of property upon death made in writing shall be valid as regards form if its form complies with the law:

- (a) of the State in which the disposition was made or the agreement as to succession concluded;

- (b) of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death;

- (c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death;

- (d) of the State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; or

- (e) in so far as immovable property is concerned, of the State in which that property is located.

- The determination of the question whether or not the testator or any person whose succession is concerned by the agreement as to succession had his domicile in a particular State shall be governed by the law of that State.

- 2. Paragraph 1 shall also apply to dispositions of property upon death modifying or revoking an earlier disposition. The modification or revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under paragraph 1, the disposition of property upon death which has been modified or revoked was valid.

- 3. For the purposes of this Article, any provision of law which limits the permitted forms of dispositions of property upon death by reference to the age, nationality or other personal conditions of the testator or of the persons whose succession is concerned by an agreement as to succession shall be deemed to pertain to matters of form. The same rule shall apply to the qualifications to be possessed

by any witnesses required for the validity of a disposition of property upon death.

- So you can see that here we have in article 27 repeats the Hague convention choice of law rules on formal validity of wills.
- That is, you have seven possibilities domicile, habitual residence and nationality either at the time of making of the will, or at the time of death and the law of the place of making of the will. If the will is valid by any of these laws then it will be valid for everybody else. That is you're dealing with the situation here where the will has been made, the person is dead and there is no possibility of the person again providing different.
- So the law here is administered to give validity to a will provided that of course you can attest that the will has been made by the person concerned. So if the will is valid according to one of those rules it should be applicable. It has to be valid in accordance to one of the seven laws, that is a person making a will in Italy, a will in Italy is perfectly valid if it is a holograph will. So a person making a will in Italy may dispose of his property in Malta simply by writing a letter in which he disposes of his property in Malta.
- The will needs only be written in the hands of the testator, you must be careful here to distinguish secret wills from a holograph will, a secret will is not necessarily a holograph will made in writing in the hands of the testator it can easily be done
- Provided it is done in the hands of a testator. That is a will made in Malta is different to a holograph will holograph will is a will made out in the hand of the testator, the testator has to have pen and paper and write it out so everybody will know the testators intention the most because the person whose writing out the will has knowledge of what he has written and will evidently want to so that is why in Italian law holograph wills are a holograph will is a will written in a hands of the testator. It is the will from the secret will which may be rigged out and signed by the testator. That is, a holograph will is a will written in the hand of a testator, if it is a document which is signed by the testator that is not a holograph will, it's not a will at all in italian law. In maltese law it would be valid if it is made out as a secret will. The will is made in Malta it has to be in conformity to maltese law, that is if it is made in Italy it has to be in conformity of Italian law. The will it is best to follow the law.
- So as you can see, the problem which was pushed by the British settlor who made his will here in Malta in English format had the regulation applicable to that case it would have settled the validity of the will because the validity of the will will be applicable if it is made with the law of nationality of the person.

- Another thing we need to notice that renvoi is expressly dealt with in article 34
  - Article 34.
  - Renvoi
  - **34**. 1. The application of the law of any third State specified by this Regulation shall mean the application of the rules of law in force in that State, including its rules of Private International Law in so far as those rules make a renvoi:
  - (a) to the law of a Member State; or
  - (b) to the law of another third State which would apply its own law.
  - 2. No renvoi shall apply with respect to the laws referred to in Article 21(2), Article 22, Article 27, point (b) of Article 28 and Article 30.
- Article 22 is choice of law, when the person choses their law, the law applicable to his succession there will be no renvoi. Yo will notice here that renvoi is restricted, the restriction to renvoi is natural in European Regulations. You will find that in all European Regulations renvoi is invaluable. Renvoi is a complication necessary where the Private International Law of the state applies its national law but european law is a better national law but it is a general law applicable to all european states and therefore renvoi can be excluded In most cases. This is article 34.
- Article 21(2) is the law most closely connected the proper law of succession, 22 is the law chosen by the testator to cover succession.
  - Article 28.
  - Validity as to form of a declaration concerning acceptance or waiver
  - **28**. A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declar ation, shall be valid as to form where it meets the requirements of:
  - (a) the law applicable to the succession pursuant to Article 21 or Article 22; or
  - (b) the law of the State in which the person making the declaration has his habitual residence.
- Article 28 is the law of the state in which the person is living at the time, habitual residence. So in reality for example if in the law chosen by the testator is British

law it is evident that he wants British law to apply as the law of his nationality and not another law indicated by British law, so a person possessed of a moveable in Malta, British resident possessed by a moveable in Malta, the structures of legitim would be well to say that this will will be covered by English law of nationality rather than maltese law, that would avoid the possibility of all the children suing the heirs of the deceased on the basis of legitim.

- As you can see the existence of these European Regulations that greatly facilitated the operation of Private International Law. Private International Law is a principally national municipal law. In EU law it operates as a municipal law but it is made as a general European Regulation which is applied in terms of European law in all the member states. This does away with the needs of classification and renvoi which are standard problems in Private International Law requiring solutions.

- That is the only real solution to Private International Law does not lie in renvoi and in classification but thus in making Private International Law truly an international system of law, it doesn't become truly an International system of law but it comes truly european system of law. Which is, Private International Law we were told initially is a municipal law like any other law, it is a law which is applied in the territory of the state.

- Maltese Private International Law is the Maltese Private International Law applied by the Maltese courts, English Private International Law is the Private International Law applied by the English courts. So the municipal character of Private International Law is that is, it is a law arising out of the territoriality of laws but if law is only territorial then Private International Law must be territorial as well that is its completely, if it is you've learnt that in positive law in distinction of natural law, law is the the commander of the political superior to a political inferior, political inferior's are citizens, political superior are the parliament which makes the law for us.

- So we have positive law, positive law is an only territorial concept of law it is linked to the territory in which it is applied. Maltese law is not the law of the Maltese it is the law applied in the Maltese territory. Italian law is the law applied in Italy, French law is the law applied in France etc.

- Private International Law is a municipal system of law like any other, its range of application is within the jurisdiction of that state. So English law must be applied by English courts, English Private International Law, now the problem with renvoi is that you require differences in the Private International Law systems of the states. That is the problem of renvoi arose instantly because English law based its concepts of domicile which was only natural in the British empire having an

empire which the sun was never to be set and which now has set. That is, the British empire, domicile in the British empire was a reasonable connecting factor, but Italy and Germany being in the throws of unification chose nationality as the connecting factor. Nationality is the most important.

- So if a law in England, an issue arises say regarding an Italian national who is resident in France, English law may apply French law, and French law would prepare to the law of the nationality of the person concerned which is Italian law, and so the need of renvoi, the need of renvoi arises you have to have two faced with conditions for the possibility of renvoi to arise, conflicting different laws and different laws of Private International Law, that is connecting factors must be different in the conflicting laws for the possibility of renvoi to arise.

- This arises, the possibility of renvoi arises from the desire of courts to do justice with the individual whatever his residence is. That is, a person who acquires a right in state ‘A’ will not lose the right he acquired simply by moving to state ‘B’, his rights will remain his rights the English courts developed the foreign court doctrine which wold entail that the English judge would decide the matter in a similar version as possible as the foreign judge would. That is the most evident example where the English judge had to decide how the Spanish court would have decided the issue had the issue arisen in the Spanish court. It regards the estate of the duke of Wellington in Spain which was considerable. The Spanish king had granted the duke of wellington extensive territories after his victories over the French in gratitude for services rendered. When the duke of wellington died the problem arose to whom the Spanish lands of the Duke of Wellington would go. The court decided that there being land the court had to decide the manner in a manner as similar as possible to the Spanish court that is the foreign court. That is the English court will in sudden cases decide the issue especially in inheritance, decide the issue in exactly the same fashion as the foreign court would. Not even applying partial or total renvoi but going beyond renvoi and applying, that is he could not only apply the foreign Private International Law it would also apply the doctrine of renvoi applicable in that foreign state.

- This would mean, for example in the case of the Duke of Wellington the court would apply English Private International Law would apply Spanish law but seeing that Spanish law applied British law as the law of nationality intended to apply the British law and it would apply British law as the law covering the succession only if the principles of Spanish law accepted or did not accept renvoi so it attempted to decide the matter in exactly the same manner as the foreign court would.

- Of course if all courts were to do that then the decision would become evidently impossible. So, one doubts this sacristy of adopting a system where the issue depends on the other court applying a different law from your own. That is still

the issue of renvoi has arisen from a desire to have uniformity in decision making so that an English court and a Maltese court would decide on the same manner the issue of foreign law. This has been resolved by Europe in the European Regulations. This regulation has been adopted as a matter of enhanced under the procedure of enhanced cooperation in Europe so it is not generally applicable to all European states but to the State Members which adopted it.

- That is if you read the paragraphs 80-81 of the regulation;
  - Paragraph 80.
  - (80) Since the objectives of this Regulation, namely the free movement of persons, the organisation in advance by citizens of their succession in a Union context and the protection of the rights of heirs and legatees and of persons close to the deceased, as well as of the creditors of the succession, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
  - Paragraph 81.
  - (81) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. This Regulation must be applied by the courts and other competent authorities of the Member States in observance of those rights and principles.
- This is made quite clear that it is an enhanced.
  - For example the United Kingdom was never a part of this regulation, this regulation never applied in the United Kingdom but it applies to Malta and to a number of other states, Italy, France, Germany. Now it’s no great deal that it doesn’t apply to England since England is not in the European Union. Still issues may arise as this obsession of British nationals in Malta, where the regulation would apply even if the person dies resident in Malta.
- If you look at marriage, the definition of marriage is governed by public policy but the validity of marriage is governed according to the law of the place of the celebration of the marriage in the courts according to the law of the domicile of the parties of substantial law. This is a general rule then as to the domicile according to the legal separation you have regulations which you have to see, then you have the possibility of custody and in custody the best interest of the

child is generally the rule is that the court of habitual residence of the child would have jurisdiction to decide who has custody of the child.

- The law of custody, the law of maintenance which today is really nearly irrelevant because hardly any maintenance with the equality of the sexes etc maintenance has become unnecessary but there are still regulations on the issue of maintenance.

- Then of course there's marriage and there's succession, the issue of succession is regulated by European Regulations governing particular aspects of the regulation. Each regulation covers jurisdiction and choice of law. That is eventually we are tending to a situation of Private International Law we've come unnecessary because jurisdiction would be placed on a proper jurisdiction, that is, in Private International Law you have a wide jurisdiction and that is why you have the possibility of choice of law. If the choice of law and choice of jurisdiction were tautologous so that the choice of jurisdiction would be in terms of the most proper law applicable to the situation and the issue would become the issue of choice of law would become totally irrelevant because once you choose jurisdiction you have chosen.

  - For example in succession, the law of habitual residence would claim jurisdiction but the law of habitual residence of the deceased is the law which would be normally applied, it is the choice of law option to govern succession.

- So once you've decided the jurisdiction is in the hands of the court, the habitual residence of the last habitual residence would also decide the issue of terms of law thus habitual residence is the preferred choice of law option. If a person choosing the different law say the law of nationality as his chosen law under article 22 of the Regulations but the Regulations have made an advance in the formality, they have provided a proper manner the application of the Hague Convention on the formal validity of the wills and the fact that one law covers the whole issue is more in line with the Maltese ideas of succession than the British ideas of succession. The British ideas of succession is when a person inherits by a particular title any, whilst in the Maltese law the concept of succession is the Roman concept of the person stepping into the shoes of the deceased.

- A person would leave in Roman law as a manner of self deprivation because the heir would step into the shoes of the deceased and continue in his personality. so it is known that the European Regulations are more natural than the Maltese concept of succession than the former British law.

- Of course, we had a lacunae in English law and we applied British law yet the British in the Maltese concept that the European concept of Private International

Law is more enabled to the maltese notions of succession. That is under British law, immoveables are treated by the law,

- An example of what would happen under the former law. Under the British law, immoveables are handled according to the law of the state that the immoveable is in whilst moveables are handled according to the law of the domicile.

- Let's say a British domiciliary dies intestate having property in Malta, the maltese and you have to calculate the legitim, it leaves to his children, his wealth estate which is much more than the property he has in Malta. Does the legitim get detected by the Maltese law? Would the estate having different laws governing different types of succession, here you have one rule which covers the whole succession.

- This is the beauty of the European Regulation from the maltese perspective which is one law which covers the whole succession we don't have a multiplicity of laws to content, we have one law it's either the law chosen by the testator of this nationality or that of habitual residence.

- So a person having property in Malta, a person dies having property in Malta and disposes of the property in Malta by a will made in Rome, the will in Rome is perfectly valid and will apply to Maltese law, to the maltese estate as if it were made in Malta, so it is valid in Malta. So the law of succession is the law of habitual residence off the deceased at the time of death, saving public policy with all its interests in the disposition

- In the next lecture we will deal with the issue of custody of children which is very simply said.

2nd May 2023

Lecture 10.

- Brussels I and II have aspects of matrimonial rights on recognition of divorce. A proper law of jurisdictions solves the problems of Private International Law completely, the tendency in Europe, in the regulations is to choose different jurisdictions for different purposes.

    - For example if we have a contractual relationship there's one jurisdiction, a matrimonial relationship you have a different jurisdiction.

- The jurisdiction depends on the subject matter, that is, how would you define jurisdiction? On what would you define jurisdiction?

- Jurisdiction is a power, the power of a court to take cognisance of a case. It is initially started as recital power, for example in England you have jurisdiction if the defendant is present within the jurisdiction otherwise you don't have jurisdiction, you have jurisdiction through all their languages, which is an extension of jurisdiction.

- Jurisdiction is a plea that you raise in court as a defence, if you don't raise it the court does not take jurisdiction automatically. If the parties submit to the jurisdiction of the court then the court will take jurisdiction. As we are seeing in succession for example, jurisdiction is different in succession. If you have a divorce proceeding and in succession would the jurisdictional requirements are different, if you have a tortuous claim the jurisdictional requirements are different, that is you notice the many regulations Europe creates the opening paragraphs are about jurisdiction then subsequently for example if you look at the law of succession created by the European Union.

- You have, in Chapter II is titled Jurisdiction of the regulation, 2010, 7th just 2012. Chapter I is the Scope and Definition, Chapter II is the Jurisdiction of the court, Chapter III is the Applicable Law, Chapter IV is the Recognition and Enforceability and Enforcement of Decisions, and the same pattern is followed in all regulations not only in succession.

- All regulations first of all deal with the aspect of jurisdiction in that particular area, this, what seems to be developing is that once the jurisdiction is well defined then the court will proceed to apply it's own law. Because if the jurisdiction is the court of habitual residence, habitual residence is the applicable law. You have jurisdiction and applicable law coinciding and then you can forget about Private International Law in a way.

- Also, the need for renvoi diminishes with the European attitude, renvoi is a necessity created to conflictual situations regarding jurisdictions and Private International Law, where Private International Law is really and truly a national law system whilst by becoming European law, in European law because of its character its both municipal and international system. It is common to all states participant.

- Actually Prof. Refalo's remit was marriage and succession we're dealing with succession as an adjoint of marriage because succession and marriage are closely related subjects, this, people get married have offspring etc and that is the right from which succession starts. It is entitlement, now in relation marriage tot have these topics, the definition of marriage is a matter of public policy, it's always a matter for the law to go into the fact, it's never a matter of Private International Law you don't go to the definition of marriage in a foreign country but you adopt

your own definition of marriages so what a marriage is defined and the law of the forum, then the validity of the marriage you have rules of Private International Law. Of course the rules want to avoid as far as possible indeed marriages. These rules are common rules, they were adopted by the maltese law in the marriage act which established the law of lex loci celebraciones for formalities and the law of the respective domicile of the spouses for substance.

- Another important aspect of the marriage act was its great with canon law before marriage was not regulated, if you look up the civil code you will no law of marriage you will find matrimonial property regulated but then as such is it regulated?

- So, you have the definition of marriage which is a matter of public policy, you have the question of validity of marriage a matter of Private International Law that is you apply a foreign law provided you have a marriage situation, the definition of marriage, is marriage defined in Maltese law? Marriage can be defined in maltese law as the union of men and women male and female for life, potentially for life the introduction of divorce doesn't in any way inhibit/make less the understanding that it is for life.

- Marriage, is a union of two persons without limitation of durations so, of course you we are so used to this aspect that we would be very surprised to find a marriage with a limited duration, but marriage.. in central African countries where marriage is for a duration say until the offspring have grown up, that is not a marriage in the eyes of maltese law, that is a union which is not a marriage.

- So you have the definition of marriage which is a matter of public policy you have the question of validity of marriage a matter of Private International Law that is you apply a foreign law provided you have a marriage situation, the definition of marriage, is marriage defined in maltese law? Marriage can be defined in maltese law as the union of man and woman, male and female for life, potentially for life. The protection of the courts doesn’t in any way inhibit/make less the understanding that it is for life.

- Marriage is a union of two persons without limitation of duration, so, of course we are so used to this system that we are surprised to find a marriage with a limited duration but marriages with a limited duration, centre everything about communities for regulation say when the offspring would have grown up. Now that is not a marriage in the eyes of the Maltese law, that is a union which is not a marriage.

- Then you have the monogamous and polygamous union. To what extent and potentially polygamous union which is still monogamous would be recognised as a marriage in maltese law? But a potentially polygamous union would not be recognised as a marriage. That is, if a person has two wives or a wife has two

husbands they will not be recognised as married, even the union between two males and two females is recognised at law as a union giving rise to rights and obligations but it is similar to marriage but it is not a marriage as such its a civil union which is recognised and regulated by law but not as a marriage as such. It is a civil union which is recognised and regulated by law but not as a marriage it would not be a marriage.

- The same rules apply to the civil unisons as they apply to marriage. That is the problem arises let's suppose a couple who have married in Holland or Belgium, a lesbian couple had married in a place where this marriage is assumed that this is allowed. Then one of them comes to Malta and falls in love with a person of the other sex and wants to marry. The question is can they marry or will the marriage be regarded as bigamous? Is the union, the civil union which he has tied with another person of the same sex a hindrance to his marrying a person of the different sex or not?

- The law doesn't deal exactly with this but Prof Refalo thinks that if the union is recognised as effective as marriage, that is Malta has adopted a strange notion that by recognising civil unions and not calling them marriage if you give the same rights to a person who is married to a civil union cannot marry a different person of a different sex then you're recognising it for all effects and purposes as a marriage even though you're not calling it a marriage.

- Of course, calling it a marriage may be difficult given certain mindsets of certain people but the same effects of the civil union has the same effects as a marriage. So, technically speaking you would not be able to marry even though he is not married. Of course it is civil union which would not let him from performing another marriage. Prof Refalo wonders whether it would it be bigamous?

- There was a case in Malta where a person married in Libya potentially polygamous, but monogamous married again and she was accused in bigamy and the court found that she was guilty of bigamy, but the question of whether the first marriage was a marriage out of polygamy, actually decided by the court but court did decide that there was bigamy so must have decided that the first marriage was a marriage even though it was potentially polygamous.

- That is this is a maltese person marrying in Libya first and then remarrying in Malta without effecting the divorce of the Libyan marriage. She was found guilty of bigamy but the issue was not raised whether the first marriage was a marriage at all, which could have been raised and decided implicitly of course the court was deciding that the first marriage was indeed a marriage even though the issue was not raised.

- Then in relation to marriage, so you have the validity of marriage, then you have the breakdown of marriage, it is a breakdown of marriages are divorce and legal separation and in divorce and separation you have specific rules governing divorce and legal separation.

- Initially the divorce proceedings were the court would apply its own law as the law of procedure applicable to the case. This is the divorce proceedings now you apply the proper law of divorce to the case which is usually the law of habitual residence which is usually again the law of the forum. So actually, in a roundabout way apply the same law but this time its the law of residence and not as the law.

- Lets suppose a British couple settle in Malta temporarily they fall out whilst in Malta and want to divorce, three years have not passed their separation and there's a rule in maltese law that you cannot divorce unless three years have passed, unless you have not lived separately for three years. If three year shave not passed in these maltese rule its not a rule of English law, would the couple be able to divorce if you apply English law to the divorce proceedings which is the law of habitual residence? Then they would be able to divorce immediately and not wait the three years which you would if the law enforced. Of course these cases are not an actual problem because what the good judge would do was wait for the three years to be up to decide the case which would be a travesty of justice.

  - Mind you this is one of the problems of Maltese law the delay in court proceedings.

- But this issue rises now if the judge is to decide without delay does he decide against of the divorce or in favour of the divorce? Suppose a British couple habitually resident in the United Kingdom wanted to divorce in Malta, would the Maltese judge impose the rule that they would heave to be separated for three years or would they apply the English law and this is the sort of case which may arise.

- Then there's custody can far as custody is concerned, there's common agreement among merely all European countries that custody is determined according to the best interest of the child. What is the best interest of the child determines custody. So the custody battle becomes a battle on jurisdiction taking a child out of its natural jurisdiction without the consent of both parents or without the concept of the court is rendered illegal.

- Say you have an English couple who want to commence divorce proceedings in Malta, do they have to wait for the three years to pass? No they can use the law of habitual residence and apply English Law. If it is a matter of public policy then, public policy is a limit to Private International Law that is Private International Law

leads you to adopt one legal system which is different from your own your public policy intervention says that you cannot apply foreign law which is against your public policy so you would have to consider whether the absence of that is against either the imposition that primitive maltese law is a matter of public policy or not. If it is a matter of public policy then the Private International Law would be trumped. If it is not a matter of public policy.

- Well, marriage has always caused problems in Malta, these laws, actually the problems have arisen from too closely tied, that is tying two closely concepts of marriage with religious concepts that is when the Maltese mixed case, broke out the governor general asked seven judges to give him an opinion on what the law of the marriage was. There, he asked their opinion because there was no law regulating marriage in Malta.

- The judges, you find this, it arose out of a case, the Dr. Ciappone case, a person who was betrothed to a certain Ciappone, he tilted his right to marry her sister, the fiancé noticed that he intended to marrying her sister and so she put a decreto, which is a prohibitory injunction against any parish priest marrying him. So no parish priest would marry him, he must have been complaining to the governor general about this and the general told him no problem I'll marry you and he proceeded to marry him. So he married Melita Ciappone and the question arose this created a whole issue because whether the marriage was valid or void. This is actually the question asked by the governor the local judges and the judges replied that the marriage of the Catholics was regulated by canon law, the marriage of the Jews was regulated by jewish dependant law. It deepened on the regulation of marriage it was like the Lebanese situation today, where you marry, your marriage is regulated by the law of your religion.

- This brought havoc in our Private International Law in the 1960's until the marriage act came to being in 1975 which proceeded to the marriage act is important because of two things.

  - Firstly it recognised divorce which was not recognised before as a matter of public policy

  - Secondly it introduced the dual notion of formality and substance, formality by the lex retenziones and substance by the law of the persistence.

- This gave rise to development of a Private International Law situation in Malta which was previous absent.

  - For example a divorce would not be recognised in Malta as a matter of public policy, that is a divorce between two English people who are habitually resident in England coming over to Malta, settling in Malta, would be still considered as

formally married because the divorce would not be recognised under the purpose of law.

- Besides, there was the difficulty also created by the Council of France which required a marriage formality of having the parish priest and two witnesses.
- This requirement was elevated by maltese judges to a matter of public policy, they never said that it was the public policy of Malta that alleged a marriage to be in a written down form but to examine the judgements you are invariably lacked to that conclusion even when the judges when mentioning public policy they always choose a law which for example, in one case of 1926/1927 it was an Irish man who married a Scots woman with respiratory rights.
- Strangely enough the marriage was valid in Scotland but what the good maltese judge said that everybody knew that the Irish were catholics and they assumed that the husband was catholic and to marry according to this form in front of the parish priest and two witnesses to make the marriage void. There is a whole list of judgements in the 1950's and the 1960's declaring English marriages to be void.
- There is the famous case Grey vs Formosa, which led the English court to say that there was another offensive to British rules of substantive justice, another head of public policy which was not. In order to recognise a foreign judgement by a Maltese court which stated that Grey's marriage to formosa in front of the London registrar to be void.
- Ms Grey didn't get much fun out of the judgement because then the court decided that it had no jurisdiction in the matter because Ms Grey had still the domicile of dependence of the husband was living in Malta and had become a maltese resident so Ms Grey couldn't actually divorce her husband in England. Actually the divorce would not have helped her because she would not be able to enforce that divorce in Malta.
- Maltese judges, that even maintenance orders in divorce proceedings were not recognised in Malta as being public policy, so if you obtained a maintenance order and a legal separation you would be able to enforce it in Malta but if you want to take maintenance over the divorce proceeding you would not be able to enforce it in Malta.
- There was the problems, the quality of the sexes has led to a delusion of the issue of maintenance and separation and this is putting rise for this.
- Innumerable problems can arise under so you'd have to know the law quite well to be able to apply not knowing the law can make the law improper.

- There was a case where the issue of a British citizen who left all his property to his Gozitan friend forgetting his son. The son held an action in the court in Gozo, he had a right. When the British resident, the British person could have avoided this heavily had his lawyer advising him knew the law of succession according to the regulation you can choose to regulate your succession, a law which is the law of your nationality, as his nationality was British he could have chosen British law to regulate his succession which would exclude his son from inheriting. So very often, you have to be very careful to reply on these problems in Malta.

- Sometimes people come to you for advice it is not difficult because they expect the lawyer to give them advice on what would happen. Very often advice depends on knowing the law well enough. It's much more difficult to advise a person on what to do preemptively than to do it property in a manner.

- There was a case where a foreign husband kept a wife under lock and key so that the child born out of the marriage would be legitimate but the marriage could be divided according to the rules of canon law and she and he would be the legitimate parents of a child and sometimes this still exists because in his old age the father remembered he had a son and asked to see him and then the father was habitually resident so the son inherited the father because he was habitually resident, not the illegitimate heir but the legitimate heir. That is he used a rule of canon law to annul the marriage, the marriage rato' ma non consumato' fis-sens, a marriage which is; two people marry and they do not do the colloquial act afterwards, that marriage can be dissolved by either party to the marriage.

- So, by knowing the rule he used the rule to his advantage, certain rules can be used in your advantage provided that the court decides according to law. The court has taken the habit of deciding from what is fair, this is terrible for lawyers because what is fair for a person may not be so far for another.

- If I've acted according to law, then technically speaking the result should be, the lawyers tell so the people now how to cut themselves in their relationships.

- Saying that something is fair or unfair is reveilles, it makes it impossible for the lawyer to do his duty to advise because if you're giving advice on the law, when the judge decides merely on the basis of fairness, then he has done injury in the party who has acted according to law. Of course, a judge should always decide fairly but the fairness should be in accordance of the law. He should find the legal way out which is in the very often difficult to find a way out, but applying your mind to it you usually find it.

- When you decide merely on the basis of what you feel is fair and what you feel is just ignoring the law you're doing a disservice to the state, to the parties, to

everybody. You're making the position of the lawyer impossible because how is he to know what a judge is going to feel fair and unfair? How is he going to know?

- What you can know is whether the person has acted according to the law or not. If a person has acted according to the law then he shouldn't be mulcted for acting in accordance to the law, he should get the result for when he acted according to the law. Another person who was foolish enough not to know the law, then it's his problem.

- In marriage you have definition, validity, then you have divorce and legal separation and you have custody and maintenance and you have enforcement which is Brussels I and II. Then you have succession.

9th May 2023

Lecture 11.

- We have to revise what we've done.

  - We've looked at marriage and we've looked also at custody of children the real problem is jurisdictional not choice of law, nearly all laws agree that the best interest of the child should be looked at. There are some laws or societies where it's not the best interest of the child it's either the father or the mother who get custody.

  - In order to prevent kidnappings etc, this criminal offence to take the child out of jurisdiction without the authority of the court or without the consent of the mother. That is if a child is habitually resident in Malta then the Maltese judge has the right to decide on his upbringing. Whatever the judge decides will be held as having determined the issue definitively for the future. So, in custody it's not really a choice of law but a choice of jurisdiction, once the jurisdiction is chosen there is very little else.

  - Then you have the laws of divorce and legal separation. Before divorce and legal separation were, the English rule was that you had to adopt your own law the law of the forum would be the choice of law. Today there is the possibility of choosing a different law, the law of habitual residence of both parties is the law which governs the divorce failing a choice by the parties. There is a limited choice available, joint nationality and nationality of the parties. Then you have in succession also that is you notice in European law, the parties are free within certain limits to choose their own law.

  - It is not a free choice, that is a limited choice usually restricted to nationality and habitual residence but that can be powerful and to exclude legitimate and other structures of the law of habitual residence. If the law is not chosen by the party

then it is the law of habitual residence which would cover succession of an individual. The last habitual residence of course, because habitual residence may change from time to time.

- It is important to note that from the point of Maltese law actually we say that British law is a source of Private International Law. This was the case over a century that is since 1900's onwards the position that we point, the best example of this is domicile, if you look at domicile the way judges treated domicile you see that up to 1900's judges would adopt the italian idea of domicile and equated to residence but since 1900's onwards the sources became, the source of maltese law became British and domicile was adopted in accordance with British sentence. Today we have very little Private International Law which is adoptions which was adopted in accordance to British standards today we have very little rules of private law which adopted, there are a few rules of maltese law dealing specifically with Private International Law problems.

- Today the European law has and European Regulations have substituted the concept that in Private International Law we adopt English law. In fact this is the only area of law where English rules are adopted in Maltese law, in other areas for example in administrative law which says that English law is a source of maltese law but that is to exclude other systems of law, three is no particular rule of British law which binds employment in maltese law even in Cassar Desian vs Forbes which is the locus classicus statement that in public law English law is a source of maltese law.

- In that case, Sir Arturo Mercies decided the case according to rules of Maltese law on these rules on servitudes, that is the servitude of a lower tenement is a servient tenement in regards to the higher tenement in the sense that it is bound to receive water. If the dominant tenant does works in it which increases flow of water into the servient tenement then that is not admissible it becomes responsible for the damages costs and that is actually what Cassar Desian vs Forbes was about. It was about damage costs should revoke of rain water from Ta Qali' from the fields of Cassar Desian which caused considerable damage to his crops.

- So in administrative law that English is a source of Maltese law is it is true that we adopt the same administrative law, we adopt the same manner of English law in the sense of our idea of law, that is what has changed in Malta with the advent of the British is our law. Law is a command of a sovereign into a political field that is, there are really two aspects of law, there's the natural law which is typical of continental law where law is not an author but a thought out system of norms which would exist, which are created by men according to his own nature. Law can be also understood in the British sense as a positive order e has a positive

order of a political superior otherwise if there's a political order and there's a political superior which wants you to be in accordance with a specified norms and if you don't do things in that specified norms you are not protected by law.

- So there are these two aspects of law. It would be a good area of research to research whether maltese judges think of natural law or positive law, maltese judges have an eclectic, perhaps the nexus between reaching of law in university and the law practices is the court has not been sufficiently explored, it is natural law which is thought in university, we are a natural law ordinance.

- When we go to court we are positive law subjects and you can/should hear the complaints lawyers make when a judge decides according to what is fair or not not according to law because a judge is bound to apply the law after all, he is bound to decide the case in accordance to the law. That is the only way you can predict results by having a system of law which you adhere to it you know what the result would be so whenever a judge decides otherwise there is a lot of complains against this decision making, because he may be very fair but it may be very unfair on the person who is on the wrong side of the stick.

- Now, on the point of revision, it is important that Private International Law, its a thought its not a law which has been enacted, it is a law which has arisen out of a desire of persons who brought us justice that is it could be terribly unjust if a person borrowed money from country 'A' simply by going to country 'B' he is free from all desirability. It is a desire that same results should produce whatever jurisdiction you are in. It's better you are in a Maltese jurisdiction or English jurisdiction your liability does not increase or diminish in accordance with the jurisdiction which you are in. Your liabilities remain the same whatever jurisdiction you are and this is why you find the whole problems of classification and the problems or renvoi in law.

- What is the problem of renvoi? Renvoi has arisen out of the fact that you have to override the differences which arise. That is, it is renvoi arose out of the fact that you have Private International Law its really a municipal law system it is important that it is a municipal law it is not international in character. This is only called Private International Law but it is not really, it's a municipal law system and municipal law systems tend to be different of each other in accordance to the prevailing notions of the country. That is Maltese Private International Law and italian Private International Law are different than Private International Law in other countries. This gives rise to the possibility of renvoi as the idea of renvoi arose mainly as a result of the difference in connecting factors chosen by British Common law which relies on domicile and continental law which relied mainly on nationality. As now it no longer relies on nationality because nationality has become an third world sort of an idea with Europe.

- Now, with Europe and with the development how do you overcome this ? The differences produced by having different legal systems well you become, you can overcome this by unifying Private International Law and that is the Hague process of unification of validation of Private International Law which started in the 1950's the Hague process is a typical favour to unify Private International Law it started with the hope of unifying Private International Law sooner than later. However the European system of law, the European Regulation, unifies Private International Law, it creates a law which is both international, both truly European in nature, and truly municipal in nature. So it solved admirably the problems of Private International Law because you have the same regulation applied in Italy, in Malta, in France and so you don't need renvoi to solve you problems. Of course the problems between the British common law now that great Britain is out of the european union still survives and so renvoi shall be with us for some time but at least within the European area the problem of renvoi ahas been solved and in most regulations renvoi is specifically excluded from its application.

- That is, if you look at succession, the right to choose the law of succession means the right to choose the internal law of succession not the Private International Law of succession so if you choose British law you choose British law without the renvoi because it is your choice and so. Once you've chosen a law to apply then that law should apply irrelevant of renvoi.

- Even in, if two states will choose the same, that is one of the fundamental, what is necessary for renvoi to apply it is necessary not only that the internal las are different but that Private International Law is different now in European Regulations would be that the same in whichever country it is applied. There is a european, it has to be applied that there is no need of renvoi because there is no difference between the Private International Law of the municipal systems and Private International Law in the legal systems.

- Private International Law varies from one state to the other because it is not truly international, it is not international at all it is purely municipal law, that is the laws of jurisdictions and the rules of recognition off foreign judgements and the rules which apply in a certain situation is typically a rule of maltese law that is maltese, there are maltese rules on jurisdiction section 742 of the Code of Organisation and Civil Procedure. There is also a maltese rule on formality of wills saying wills are valid if made according to the law of the place that they are made but this causes some problems because it's jurisdiction choice.

- With the European Regulation which copies basically the Hague Convention on the Private International Law of formality of wills, giving a choice of seven laws and putting them which the will can be remained valid these are the law of the place where the will is made, the law of the domicile either of the time of the

making of the will or the time the person was deceased, the law of nationality and the law of habitual residence. All are applied and if the will is valid according to one of these, it is valid in that state.

- So Private International Law its not truly international, it is a misnomer to call it international because it is a national system of law. European law is semi international its european character but it tends at least in the area of Europe you have been in conformity of Private International Law so the European Regulations dealing with Private International Law have really solved the problem of renvoi and the problem of classification because if you classify according to the will at law and you apply the regulations according to european law in a standard manner which leads to the same choice of law ruling in different times.

- So whether a problem arises in Italy or in Malta say in succession, the same rule off Private International Law will be applicable in Malta and France and in Italy. That is, the succession regulation which applies.

- It is important to think about renvoi and about these problems because Private International Law is a law which is different from other laws whilst other laws relied heavily on the decision made by the state Private International Law is a law which demands a lot of logic. It has been developed in England mainly through the judge made law which is made in common law. In the continent it started out as a law which was though out by individuals but ended up being for example in the Italian civil code there are articles which are a codification of Private International Law.

- You find Private International Law even in England it has now become the state has taken up the task of codifying private natural law, with the codification of Private International Law seeing that there are different ideas of codifying and each state trying to codify in the interest of his own nationals.

- Codifications seem not contribute much to an international approach in Private International Law. The typically municipal approach in Private International Law is really what causes us, why has Private International Law been created? Private international has been created at a desire that a person should not shrug his liabilities by adopting jurisdiction that is his liabilities will remain the same independently of whether he is in one jurisdiction to the other. This has forced the British courts to adopt an article which was their single renvoi and double renvoi in the court doctrine which is a more extreme form of renvoi adopted by the British courts. Foreign court doctrine says that the English court will decide the matter in the same manner as the foreign court would but the foreign court would have only a limited area.

- European Regulations have done away with the foreign court of renvoi and utilised it, that is you have to ask yourself why do you have a Private International

Law? Why do you study Private International Law? Why is it useful? It is useful because there are different states and you want to know the applicability of every rule of every state, you want to know the applicability of the rules. It has been said that Private International Law defines he application of law in space and time. That is, a person comes to make a will in Malta, he would be well advised to put that will in accordance to the norms created in the European Regulation of succession if he wants a private will.

- Before the European Regulation of succession, the issue was simply he either does it in accordance with Maltese law or the will is void. Now, that means that you are giving effect to the rule of law that wills should be made by public notaries and two witnesses, extraterritorial applicability, if the person has done a will in Malta he can live in Australia, make his money in Australia, die in Australia it doesn't change the money made in Malta then you're applying a rule of maltese law in Australian law, that is you're applying the rule of law beyond its natural limits, the natural limits of the rule is that it governing Maltese issues.

- In this way you're governing also a situation where the will is still held to be valid even though it is made in Malta a long time before the decease of the individual. So you will be defining the applicability of your rules in space and in time.

- The existence of a number of municipal laws different from each other would be able to have a problem for persons hoping to achieve uniformity in decision making. Uniformity in decision making breaks down where Private International Law of different states vary.

    - For example, an example would be a case to advise, the case was this person was an English national who didn't have trust in Maltese notaries and in the Maltese legal system, took advice from an English solicitor and the English solicitor drew up an English will for him and got him to sign it in Malta and he left his estate to his friend in Malta, his English heirs claimed. Who did the estate belong to? This was a case which arose before 2015 before we became party to the European Regulation on succession. According to the Maltese law the will was void because it was written in an English form in Malta. In Malta for the will to be valid it had to be made in a Maltese form.

- So if he sues in Malta, if the heir sues in Malta for the estate in Malta, the maltese court will not apply the will and the will is void because it's done in accordance to English law and in maltese law is a void will, and it has no force in Malta.

- If he sues in England seeing that the English law considers the will to be valid, he would succeed because according to English law the will is a valid will in English

law, it is valid because it is made according to the law of nationality which is according to English law and he would take the estate.

- So depending where you sue, if you sue in Malta you lose if you sue in England you win. This is undesirable to have your rights depending on the jurisdiction which ensues, that is ideally it's not a question of where you sue it's a question of law. The issue there arises because the maltese rule on Private International Law and the English rule of Private International Law was at the time different to the rules of Private International Law now. This was a problem that Private International Law sets out to resolve.

- In this case, dissolution is not good because there's no where how to resolve the issue. Let's say the English ensues in Malta and the Maltese ensues in England, they both win. How is the estate to be divided then? So the ideal is that the same decision would be arrived at in both jurisdiction you would ideally have an identical Private International Law rule in jurisdiction and the European law does apply for that, it creates the same rule which is applicable.

- That is if the issue arose today, it would be a perfectly valid will according to the european rules of succession to the European Regulation and therefore maltese law would be considered valid. If maltese law considered the will to be valid, you have to have the same result whichever jurisdiction you choose to sue in, that is Private International Law arises from a result to identify the results to get to jurisdiction.

- This is seen as making Private International Law truly international, as we said Private International Law is not totally international it is municipal in character so the municipality of Private International Law runs counter and therefore the whole problem of renvoi, European Regulations leaves Private International Law municipal and applied by the state court but it becomes European in turn, it's not, the same Private International Law rule will be applied in all european countries because of the European Regulations.

- So the European Regulations hold the possibility of renvoi so the situation of renvoi made it unnecessary to refer to it. Actually if you are applying the same rule of international law in both countries you can't have renvoi, because both will point to the same connecting factor and choice of law. So if both, that is if both Maltese and Italian law says the matter is covered by British law the matter stops there. For the matter to be Italian law has to say the matter is governed by Maltese law and Maltese law says that the matter is governed by French law at the end of the day, which creates the necessity of renvoi and the foreign court.

- In any case the foreign court doctrine and the possibility of renvoi really eliminated by European Regulation. Of course there still remains the possibility of renvoi with

the common law, either because european businesses are concerned the rule will be applied for the jurisdiction, the ultimate idea of Europe is to incentivise movement within the European union in the belief that laws will not break out in the European Union with the liberty of movements. So, whether you are in Italy or France or Malta you have the same rights as a European Citizen and therefore the same rules of Private International Law will be applied to your case and renvoi becomes not only useless but even damaging in reality because actually, renvoi relies on different Private International Law systems being municipal in character and giving different results with the same Private International Law being applied in all european states this possibility cannot arise and therefore renvoi is totally eliminated.

- Of course, renvoi arose out of the law rather than the law enacted it is a law which is thought out by persons who think about law. It is a sort of philosophy of law in a way. Private International Law is in reality a philosophy of law where the person thinking about law, it is agreed and it will look at the extra Private International Law, Private International Law developed not as enacted law but as law, as a philosophy it is a philosophy of law which attempts to bring the same result in different jurisdictions.

16th May 2023

Lecture 12.

- We have to revise what we've done.

  - One thing to keep in mind is that Private International Law different from other laws is very much like civil law it is a though out subject, that is it has arisen out of the thinking of individuals thinking about law, so their ideas on renvoi of the classification etc, are topics which come out of thinking of the law. That is, it is not you distinguish laws between the main distinction in law is between positive law and natural law, positive law is the order of a political superior to a political inferior. That is how law is understood in English sense, natural law is the law which is not an order it arises from the nature of man, of the human being that is the human being needs law to abide by. This is natural law, natural law is law that man creates to make life possible.

  - Now, Private International Law partakes very much the nature of natural law rather than positive law, some say that positive law it has been posivised by human beings but but most remains natural law. That is the ideas of renvoi, the ideas of foreign court doctrine, all ideas which have not been dictated for example the foreign law doctrine is an idea of the common law, no parliament has dictated courts when and where to apply the foreign court law, it's the courts themselves thinking about rights and obligations that have developed the foreign court of law.

- Private International Law is always in a struggle to arrive at a situation where the rights of the individual are not ordered or diminished by movement, no much how you move your rights must remain the same, what you have a right to should remain yours and this is why Private International Law has been created that is of course movement is in natural to human beings, movement of human beings and movement of their goods.

  - Now, if you purchase a painting in France and you purchase it according to the law of France, you don't want to come to Malta and find your purchase to be annulled because of a Maltese rule. That is property rights must remain unauthorised and this is why Private International Law has been created, of course certain laws have to have an effect beyond the natural boundaries of the state.

  - So if you marry in Malta you want to stay with whoever your married under the law unless there is a divorce wherever you find yourself in, if you marry in Malta you want your marriage to be applicable in the United States and Australia, wherever you might be in France or Italy, but you've married to Maltese law not a foreign law system, if you marry according to Maltese law you want your marriage recognised everywhere even if it does not confirm to the law of the state where you're living.

  - Let's suppose you've civilly married in Malta, you move with your husband to Italy you want to stay married with the movement so the maltese form of marriage, must have, the maltese rules on the formality of marriage must have the effect on italian law as valid as the maltese law, so the Italian court will apply the Maltese law on the issue of formalities on the marriage. It is out of this natural desire to have rights remain unaffected by movement that Private International Law and the thinking, the foreign law doctrine, the renvoi etc had.

- Of course the problem of Private International Law is it was always a system of municipal law, you had no certainty that the Private International Law of state 'A' would be the same as state 'B'.

- It is the difference creates the necessity of renvoi. European Law does away with the difference, that is, renvoi arises from the fact that Private International Law is a municipal law system not an international law system. European Regulations have rendered renvoi in most cases unnecessary because of course, eu law unifies the rules of Private International Law where regulations are made by the European law.

  - For example in marriage, divorce, legal separation are all regulated by regulations of Europe.

- So these regulations would apply in Europe rather than applying renvoi you apply your regulation as you find it, there cannot be a renvoi between Malta and Italy as the same regulation applies in Malta and Italy. Therefore you can have renvoi between Malta and the United Kingdom because different rules apply but you cannot have renvoi between Malta and France where the rule it's identical and there's the European Regulation which must be applied and interpreted homogeneously throughout the European Union and with European Law.

- Certain regulations apply even for disputes between other states, there renvoi can arise but the European Union really encourages straight and movement in the European Union, being put there, at an advantage. Of course renvoi is eliminated in the internal market of Europe because our relations are mostly typically between states, of course in Malta it's different because we have regulations with England. Renvoi, when our relations where made with England renvoi would not arise because Maltese law would adopt English law as its Private International Law now we adopt European Regulations where European Regulations have arisen. So, renvoi could arise between Malta and England.

  - How would you advise a person who came to you to make his will? If he was a British national habitually resident in Gozo who wanted to disinherit his son and leave his wealth estate which was considerable to his Gozitan fiancée? How would you advise him? What would you advise him to do? In Malta you cannot, yet he doesn't want to do that, but how does he do it? According to the succession regulation he can choose the law which governs his succession and if he choses his national law, British law for succession he wouldn't have to pay the legitim and excludes the application of Maltese law.

  - It will be held valid if it is made according to the form off the country it is made. It is made according to the form of the validity of where it is made, it is held to be valid according to the domicile, habitual residence or nationality of the person at the time of making of the will or the deceased. So a British national who makes an English will in Malta would still have been a validity legal will even though it's in the English format.If the British national had gone to a maltese notary to take advice for his will the notary would have told him it would be void and he would have made it in a Maltese form.

- Knowing your law means knowing your way about things.

HABITUAL RESIDENCE

Case 523/2007

Children C,D,E settled in Sweden with their mother (Mrs A) and their Stepfather (Mr F). Previously, D and E has been taken into care of municipality X in Finland due to their Stepfather's violence. This, however, was discontinued. In the Summer of 2005, the family left Sweden for the holidays and stayed on Finnish land, lived in caravans and on various campsites and the children did not attend school. In October, the family applied to the social services department of the Finnish Municipality Y for social housing.

In November 2005, C,D, and E were taking into immediate care in Finland and placed into a foster home. Mrs A and Mr F applied to have this decision quashed however the court stated that as a result of them being taken into care, the children got the help they needed and also started school again. Ms A appealed this and stated that Swedish Courts had jurisdiction and not Finish. The reason being that they had Swedish nationality.

It was decided that a decision ordering that a child be immediately taken away into care is covered by a 'civil matter under Brussels II. They utilized article 1(2)(d) to confirm jurisdiction of the Finnish Court.

The core problem here was the definition of habitual residence. There was a distinction between article 8 and 13, therefore the whole discussions was between presence (art 13) and habitual residence (Article 8).

> Article 8 - *1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.*
>
> Article 13- *1. Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.*

"The physical presence alone of the child in a Member State, as a jurisdictional rule alternative to that laid down in art. 8 is not sufficient to establish the habitual residence of the child.

So here, the mother is relying on nationality and the AG is quoting the law of habitual residence.

The AG stated that the element of intention is only important when it comes to disputes of divorce. The element of intention is not appropriate to consider when it comes to to a child's habitual residence.

Therefore, the AG considered the actual CENTRE OF INTERESTS OF THE CHILD- this was divided in 2 baskets. We can dee that the AG did not reduce habitual residence to mere presence.

1. *the duration and regularity of residence*
2. *the child's familial and social integration*

} *these are different from intention*

The court agreed with the AG that the Finnish Court had jurisdiction.

- *Is the child in Finland merely living in the caravan and moving around or has he been adopted by the stepfather's sister and been integrated in the school? There 2 concepts are very different.*

> ∴ Habitual residence correspondence to the place which reflects some degree of integration by the child in a social and family environment to that end, in particular, the duration, regularity, conditions and reasons to stay in the territory.

The judge pointed out that they were merely setting the rules of how habitual residence should be addressed. They did not decide on the facts of the case so the national courts should assess all those criteria.

Swaddling case 90/1997 (link to Regulation 1408/71)

Mr Swaddling was working in France and the UK back and forth. His main to the place of work was France but occasionally returned to the UK and also paid National Insurance contributions to the UK.

He was made redundant in 1995 and after failing to find work in France, he returned to the UK. a He declared that he no longer wants to take a job which entails long periods of time spent abroad. Son on 9/1/1995, he applied for income support.

The Adjudication Officer accepted that as of 9/11 1995, Mr Swaddling satisfied the conditions of entitlement to income support, However, in so far as Mr Swaddling did not meet the habitual residence requirement prescribed by national legislation and was considered to be a 'person from abroad', and accordingly was not entitled to any income support. My swaddling appealed and the case went before the ECJ.

The AG was saying that under British law, habitual residence meant reside that a) the person in was settled and had an intention to reside I the UK and b) the person completed an appreciable period of residence there. Under British law, foreigners would have factually reside in the UK for 12 months to show an appreciable presence the UK, but British nationals were only required to stay 3 months.

Regulation 1408 was own also applicable here and it had its definition of habitual residence which prevailed over national legislation.

The ECT held that under article 10 (a) of the regulation, 'the MS in which they reside' refers to the state in which the persons concerned habitually reside and where the habitual center of their interests is to be found. From this one once that see that intent is less Significant and not intrinsic.

- In that Context, account Should be taken in particular of the employed person's family situation, the reasons which led him to move, the length and continuity of his residence, and his intention as it appears from all the circumstances.

So, in contrast with the British definition, where they use intention, we now the move to where the central concept of the person's center of interests. - Intention was one of 5 criteria not the only one!

The ECT was relying on its own interpretation other than the British. It stated that they cannot allow of a merely English interpretation of habitual residence under its own law that 8 weeks is not Sufficient or appreciable amount of residence in the UK, and therefore habitual residence did not started. Art 10(a) of Regulation 1408 states that 'In the exercise of freedom of movement to establish himself in another member state of the EU, in which he has work, when he returned to his MS of origin, where his family lives, in order Seek work, he could not be denied this unemployment benefit not because he had shifted his center of interests'

The UK government said that Mr Swaddling should have been able to obtain unemployment benefits from France under French Legislation. They also stated that a day after he arrived was not enough to show an appreciable amount of time – THE ECJ REJECTED THIS HOWEVER

- "the length of residence in the MS in which payment of the benefit is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of art 10a of the regulation."

Article 3(1) of Brussels II Recast has 7 sub-heading which apply in divorce, separation and annulment. The applicant holds the right to sue, and this is different to the Jurisdiction in Brussels 1 where one sues in the domicile of the defendant. Therefore, the general presumption is turned in Brussels II.

(3) In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State:
(a) in whose territory:

v) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or

(vi) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is a national of the Member State in question; or

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Marinos v Marinos

Greek man and British Lady met and got married in 1992. They had 2 children (1 in 1996 and the other in 2000). In 2002, the parents moved in Greece. They enrolled their Children in schools in Greece. The husband took up a job with a medical center in Athens and the wife returned to her job with British Airways Cabin Crew - 3 weeks working within a 9 week period. In 2006 She worked 4 weeks in 6 weeks for a 6 month term. She was always pursuing a part time law degree which the was told She Could not continue in Greece, therefore she completed it in Birmingham from 2004-2006. She studied in her parents' house and used her old room when she visited them.

The couple separated in 2007. The wife returned to England In Feb 2007 and enrolled the children in a new school. They lived in a hotel until the tenants moved out of their London Residence.

They separated de facto on 31/11 2007 and she filed for divorce on 1/2/2007, just a day later. The husband also filed for proceedings, but later. The husband disputed the jurisdiction of the British court on the basis that they were habitually resident Greece and she did not in have habitual residence under point 6 of article 3. (the judgement favored the wife, however).

The judgement is based 4 aspects.

1. The judge held that habitual residence is a European Concept and rhus the EU autonomous meaning must be referred to, regardless of what their own acts hold.
2. Secondly, a person can only have 1 habitual residence at any time for the purposes of the autonomous definition.
3. (most explosive) The word 'resided' in the 6th indent means resided not *habitually* resided.
4. In appropriate circumstances, a person can acquire new habitual residence under the autonomous meaning, very quickly (the wife was found to be habitually resident in 24 hrs).

How did they reach a Conclusion?

1. The judge Stated that there shouldn't be a uniform definition to carry on to all Brussels conventions. Although the Borras Report was not applicable, particular account was taken to the definitions provided by the ECJ. "Without the legal draftsmen giving definition in the regulation, reference kept being made to what the ECJ has repeated- "habitual residence is the place where the person has established on a fixed basis their centre of interest with all the relevant facts being taken into account for the purposes of determining such residence."

2. The second argument in the judgement is the question if there can be more than one habitual residence. In previous cases, it was submitted that it could be possible if time was divided between two states BUT it was not possible to have more than one habitual residence at any one moment of time. This is done to provide legal certainty by EU legislators to unify internal rules of PIL.

3. The third argument was whether 'reside' in the 6th indent meant habitually reside.
   The judge disagrees w/ Dicey and Morris who stated there must least be habitual residence for jurisdiction for at least 6 months.
   The judge stated that 'reside" means just that - mere residence. Where the law wanted to say residence it did, therefore in this case, if it wanted to mean habitual residence, it could have stated so. In order to satisfy the requirements, they must show habitual residence on the day of submitting the lawsuit and ordinary residence in the previous 6 months. The residence of the previous 6 months need not be habitual.

4. The lapse of time when one acquires habitual residence depends on the regulation which is being interpreted.
   In this case, coming back with the children, separating de facto and, and submitting a de jure application for divorce means that she acquired habitual residence in 24 hours.

The wife succeeded in this.

↳ The judge also even in that quoted swaddling case saying that the length of residence is not an intrinsic element of the concept of habitual residence.

Munro v Munro (case which overturned Marinos v Marinos)

It held that as for as indent 6 is concerned, the 6 month antecedent period of residence was held and interpreted to be **habitual residence**, i.e. Centre of interest.

In this case, the judge gave a **soft interpretation** interpreting the 12 month period proceeding qualification as mere ordinary residence as there is habitual residence on the date of application.

THIS DEBATE WAS REVISITED IN: **Pierburg V Pierburg**

- The husband and wife were both born in Germany. They met in Dusseldorf and gor married in 1985.
- They moved to Switzerland in 1999.
- They separated in 2017.
- The wife held that she moved to England on 12th July 20137. This was disputed as her husband said that she moved on 15th of August 2017 – this was a difference of 34 days. Although she did fly to London 12th July, She went back + forth between London and Switzerland until August 15th.
- She filed divorce proceedings in Jan 2018 in England on the basis that she claimed to be domiciled and habitually resident in England, having resided there for at least 6 months immediately Prior to the presentation of the decision.
- On 12th Feb the husband filed proceedings for divorce in Germany. He stated that his wife was domiciled in Germany and was habitually resident in Switzerland.

- She stated that in the 12 months prior to January 2018, She Spent 172 nights in London and 162 in Switzerland. In the 6 months leading up to 12 January 2018, She spent 154 night London and just 26 in Switzerland. She Said that She has established domicile of choice in England as she is a resident and intends to live there permanently.

- Her husband stated that she never made Switzerland he home and went to Germany every month. She had a phone number registered in Dusseldorf, a hairdresser there, a florist and all her doctors and dentists were in Germany. She even chose a German Company to fit a new bathroom in London.

The judge had to determine whether indent 5 or 6 applied here. He refer to both the Marinos Case and the Munro Case and said that although they are not binding, they are persuasive.

The judge tried to determine:

1. WHEN DID THE WIFE BECOME HABITUALLY RESIDENT IN ENGLAND?
2. DID SHE BECOME RESIDENT ON A DIFFERENT DATE?
3. WAS SHE REALLY DOMICILE IN ENGLAND?

WIFE'S POSITION- her stance was supported by Marinos v Marinos

- She stated that she was habitually resident on the 12th of January 2018 and in accordance with Marinos, was resident in England and was domiciled there- *this was for indent 6 to apply*
- She also stated that she was habitually resident on the 12th of January and had been resident there for at least a year – *for indent 5 to apply*
- She quoted the judge in Marinos and stated that the regulation does not state 'habitually resident' but 'resident'.

HUSBAND'S POSITION- supported by Munro v Munro

- He claimed that the wife retained her German domicile and did not move to England until 15th August 2017.
- Contrary to Marinos, he stated that the Regulation requires habitual residence for the entire period from the date proceedings the date of petition, not just on the date of the petition itself.
- For indent 5 to apply, she had to be habitually resident from 12 January 2017 or for indent 6 to apply, habitually resident from 12 July 2017.

In this case, the judge criticized the judge in Marinos for being too literal. In many interpretations, it was always interpreted as habitual residence.

Answers to his questions:

1. He accepted the that use habitually resident on 12/1/2018 as England was clearly England center of on interests.
   She was not habitually resident in England on 12/1/2017 and she was still habitually resident in Switzerland. (Indent 5 fell through).
   He also states that she was not habitually resident in July 2017 since she returned for a long period to Switzerland. In August, she only returned for 2 nights. So he found that She became habitually resident on 15 August 2017. (Indent 6 fell through)

2. She only spent 4 nights in England between 12 July and 15 August. So she did not satisfy the resident requirement under 5+6.

3. (was she domiciled in England?)
   He concluded that She retained her domicile in Germany even when she was living in Switzerland. Her family was there and she kept close links to Germany. Even the fact that she had doctors there proved this. So she was not domiciled in England in 2018

So the wife's petition in London was dismissed as she had not proven jurisdiction.

In the 20 years of this regulation, there have been 2 developments:

1. A new amendment to English law

From 1st January 2021, the English Domicile and Matrimonial proceeds Act was amended in support of the Mannos judgement – this decision made England the divorce capital.

- Their idents 5+6 read the word 'and' and not 'if' – so the addition of this 'and' brings with it an accumulation of 2 items – habitual residence and 12 month residence.
- The EU Regulations have 'if':
    - If the 'if' is to be interpreted softly, then it suggests mere residence. (soft)
    - If the 'if' is interpreted as an 'and', it tightens it because there is an accumulation of both. (soft)
    - If the 'if' is taken as a 'provided that', then it would become harder to prove. (hard)

- UK: the person has to be habitually resident on the day of application and prove that he/she was merely a resident for 1 year (soft).
- EU: the habitual residence depends on the centre of interests being in that MS for a whole year. There must be 1year of habitual residence from the date of application.

2. The ECJ judgement – IB VS FA IN 2021

- IB, French husband and FA, Irish wife.
- They had a family house in Ireland and their children were raised there.
- In 2007, he found a job in Paris. He had an apartment there but visited his family in Ireland every weekend. He paid taxes in France and was registered with the Parisien Social Security.
- In 2018, he filed for divorce in Paris. The wife challenged this because she said that he was habitually resident in Ireland. He continued to travel to Ireland until 2018.
- The French court determined that it lacked jurisdiction. This was because the husband's choice of employment in France was not sufficient to demonstrate an intention to sufficiently establish this habitual residence in France. This was appealed.
- The French Court of Appeal asked the ECJ – 'Where is it apparent from the factual circumstances that one of the spouses divides his/her time between to 2 Member States , is it permissible to conclude, in accordance with and for the purposes of the application of art 3 of Regulation Brussels 2 bis, that he/she is habitually resident in 2 MS, such that, if the conditions listed in that article are met in two MS , the courts of those 2 MS have equal jurisdiction to rule?'

The Court established 5 arguments for this question:

1. ***The Contextual argument***
   The regulation in no place does it refer to the concept of habitual residence in the plural, and so, habitual residence is always referred to in the singular. So the regulation never says that a person, spouse or child, may have more than one HR.
   The plurality of habitual residence is not textually supported.

2. ***Domicile of choice argument***
   In the sphere of domicile, in order to acquire a domicile of choice, there must be the intention to make the new place your new permanent home and the intention to not return to your previous domicile.
   The concept of habitual residence reflects a permanence and regularity which emerges more clearly in the case of a transfer of a person's habitual residence to another member state -when examining this we have to examine the transfer of the center of the interests to the latter state. (So, you drop the previous one and shift your interest to another state.)
   So the judges are using the argumentation from domicile in order to argue the singularity of habitual residence.

3. ***Policy Argument***
   The judges here are saying that having more than 1 habitual residence would create legal uncertainty and this is the opposite of what the EU wanted.
   The judge said that the 7 options given in Article 5 are not hierarchal, in the sense that one doesn't have to exhaust indent 1 to make use of indent 2. Plaintiffs can pick and choose.

4. ***Material consequence argument***
   This was meant to reflect the fact that usually, there are other matters which are brought before the court or immediately after the divorce is granted. For example, maintenance and partition of property.
   This is hugely consequential and is usually attached to the lawsuit under the Courts. Hnece why the jurisdiction has to be established on a strong ground, which implies that one habitual residence would give a stronger ground.

5. ***Habitual Residence vs Nationality***
   They concluded by saying that Habitual Residence and nationality are different. The conclusions given in the Haddodi Case cannot be transported to habitual residence as that case dealt with dual nationality.

How the Personal connecting factor has been used in contracts of employment.

Sandra Noviela and Others vs Crewlink Ltd & Miguel Jose Moreno Asoca vs Ryanair – Brussels 1

Ryanair is an international service and Crew link specializes in the recruitment of crew members.

The lawyers of Ryanair constructed employment agreements/contracts subject to Irish law and a jurisdiction clause provided that the Irish courts had jurisdiction. – So, choice of law and choice of jurisdiction.

They added, in the contract, that the work of the employees concerned were deemed to be carrying out their work in Ireland, albeit their work would be carried out all over the world.

Since the planes were registered in Ireland, it would be the nationality of the planes that determined the connection to be stronger to Irish Law and Irish jurisdiction.

The homebase of the employees in Belgium. They started and ended their working day in Charles-Roi airport and they were contractually obliged to live within 1 hour from the homebase.

Miguel Jose Moreno resigned in 2011 and said that his proceedings for compensation against his employer should be held before the Belgian courts under Belgian law. He asked the court to interpret Brussels 1 whether the place where the employee habitually carries out his work would take precedence. So in this case, it is where they habitually work not live.

The Court first established that the jurisdiction clause cannot be relied upon against Mr Moreno since article 21 of Brussels 1 states that the weaker party can sue in the place where habitually has his place of work.

- The Court said that considering the contract, they couldn't accept a contract that is aimed at preventing an employee from bringing proceedings where he habitually works – this is very courageous of the court because a contract is a contract. If found that the contract was removing the protection that the Brussels 1 recast, gave to the weaker party.

If then referred to Criteria by referring to the EU Regulation on the aviation sector, to determine the place of work where the employee habitually performs his work.

1. The place from which the employee carries out his transport related task.
2. The place where he returns after his tasks and where he receives instructions about his tasks.
3. The place where his tools and uniforms are to be found
4. Where the aircraft aboard which his tasks are to be performed is stationed.

(All the 4 points establishes where the employee habitually works.)

So it was clear that the above complies with 'home base' under the regulation, therefore BELGIUM had jurisdiction.

Jurisdiction in the case of damages created by toxic material against a particular person

Bier BV vs MINES de Potasse d'Alsace

Biet sued Mines in the Netherlands but defendant was French,

The Court held that:

- The plaintiff/victim can follow Article 4 and sue the defendant according to where he is domiciled.
- Article 7(2) – under this article, you can sue in the place of the illegal conduct giving rise to the damage and sue for Full amount of damages.
- Article 7(2) – sue in the place where the actual damage ensues.

This led to the reasoning in the Sherill case.

- This was a case of defamation on a newspaper.
- This case created the mosaic principle – which meant that one can sue proportionately to the damage in each MS where the damage happened.

Therefore, in the case of newspapers, in order to calculate damages, one had to look at the states in which the newspapers was sold and how many newspapers were sold.

So in this case, one could sue under:

1. Article 4,
2. The place of publication which is where the conduct which gave rise to damage was done and
3. In the MS where the newspaper was distributed (where the reputation suffered damages).

eDate Avertising Gmbtl vs Societe Marv Ltd

In this case, the ECJ created a new jurisdictional pillar. This was because this case was about damages on one's reputation on the internet. So apart from the jurisdictions established in Bier, the plaintiff could also sue from the place of his centre of interests. For example, where he is professionally established and where he is pursuing his professional activity. In this way, he could sue for all the damages.

BlogSupply vs Sverisk Handel

Victim can sue:

1. In defendant's domicile (usually where the website is registered), under Art 4, for damages and removal of conduct.
2. Sue in the place where conduct giving rise to damage was done.
3. Sue in the place where damage was felt (Mosaic principle)
4. Centre of interest state of victim (full damages and removal of content)

GtFlix Tv v DR

This case validates the Mosaic theory.

It varies that the removal of content constitutes a single and indivisible application.

Petruchova v FIBO – Brussels 1

Yana Petruchova contracted a framework contract with FIBO – Cypriot, the purpose of which was to enable her to make transactions on the International Forex market.

One of the provisions in the contract held that jurisdiction is conferred on the Cypriot courts.

On 3/10/2014, Yana concluded a transaction. Due to the processing of a long series of orders, the order placed by her was delayed by 16 seconds, during which there was a fluctuation in the exchange rate. She lost around 3 million euro due to the delay.

She went before the Czech Court and defied the exclusive jurisdiction clause. So the Czech courts immediately had a challenge before them – whether to allow the contractually stipulated exclusive jurisdiction clause. So the Czech Courts immediately had a challenge before them – whether to allow the contractually stipulated exclusive jurisdiction clause or to grant Petrucova jurisdiction in the Czech Court under Brussels 1 because of clause 17 for protection of the consumer.

Article 17(1) of Brussels 1 pivoted on how to define a consumer, especially in the context of financial investments.

The question referred to the CJEU was whether art 17 (1) should be interpreted as meaning that she is truly a consumer or whether the individual's financial knowledge, expertise, the complex nature of the contract, and the risks involved determine that she is not a consumer.

This is different than buying a scarf – you don't have to be an expert in scarves to be a consumer, but in this case, this was far more complex. So one would need some level of financial knowledge – why is this critical? – Article 17 defines who is NOT a consumer.

FIBO wanted to show that she was not a consumer – she was involved in financial investments and was involved in taking risks – there is some expertise involved. It wasn't as simple as the service of the exchange of currencies.

- If she were not considered a consumer, then she would be bound by the exclusive jurisdiction of the Cypriot courts.
- However, to come to this conclusion, one has to determine when does a consumer become a trader and no longer benefit under Art 17.

The tipping factor – the fact that she was a university student – this weighed a lot in building her profit as a consumer as she was not doing these exchange foreign investments as her TRADE.

It was held in previous cases that Art 17(1) meant that a natural person who under a contract such as CFD with a brokerage company, carries out transactions on the Forex Market through that company, must be classified as a consumer within the meaning of the provision if the

conclusion of that contract does not fall within the scope of that person's professional activity, which is for the court to ascertain as a matter of fact.

For the purpose of that classification →

1. VALUE of the transactions carried out under these contracts was taken into consideration. The value was used by FIBO to say that Yana was a trader. The Court dismissed it.
2. The extent of RISKS of financial loss was also taken into consideration. However, this was dismissed as the risk she took was not necessarily going to affect her lifestyle. If she were a trader, the effect would have been harsher.
3. Any KNOWLEDGE OF EXPERTISE which the person has on the financial instruments – to be on the market you can't just be a random person. You have to be informed otherwise. You will lose money. FIBO said they are not mere consumers but this was also dismissed.
4. ACTIVE CONDUCT – so not once or twice a year, 42 times. The active conduct characterizes whether a person is a trader.

The Court said these above are all irrelevant.

The Court felt very strongly to protect the weaker party.

The Court made reference to the MIFID Regulation which provides a more nuanced protection to the weaker for financial transactions. However, they dismissed this since reference is made to legal persons and commercial companies are set up to make trade so they shouldn't have consumer protection.

They also dismissed the relevance of Rome 1 which FIBO argued on to show how contracts were regulated however Rome 1 and Brussels 1 are completely different and shouldn't be mixed up.

The Court in this case, threw out a contractual clause to protect a consumer.

Romana Ang vs Reliant Co

The defendant company was a Cypriot company offering financial products and services through an online trading platform. The plaintiff was a person of substantial wealth who invested in Bitcoin.

She sued the defendant fro wrongfully terminating her account. Had they not done so, her returnes would have been at 11 Million.

There was an exclusive jurisdiction clause which stated that Cypriot Courts would have exclusive jurisdiction over all disputes arising out of the agreement. – The plainriff however, sued in English courts based on the fact that she was protected by special jurisdictio rules available to consumers.

Was she a consumer?

- She was not employed or earning in any self-employed trade or profession, save that she was such a regular customer of Reliant Co, that she could be classified as a trader.

- She had no education or trading in Crypto currency however her husband had earned a lot of money and considered himself as an investor of Bitcoin.

She claimed that exclusive jurisdiction clause was ineffective because. She was a consumer under Article 17.