



Judicial cooperation in civil matters in the European Union

A guide for legal practitioners

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Introduction

1.1. 'Judicial cooperation in civil matters' — building bridges between the judicial systems in the EU

Over the past 15 years, an important development has taken place in the field of European law which, however, remains largely unnoticed by legal practitioners. Private international law or — as it is called in the Treaty — 'judicial cooperation in civil matters' has developed into an independent and separate field of European law. Since the Treaty of Amsterdam conferred competence to the European Union to legislate in the area of private international law, an important number of European legislative acts in this field have been adopted. As with other areas of European Union law the instruments adopted in this field take precedence over the domestic laws of the Member States and interlink with national law when it comes to establishing at Union level common minimum procedural standards in specific legal areas.

European private international law is of practical relevance for legal practitioners — judges, lawyers, notaries and other legal professionals — who are taking decisions about matters of civil and commercial law or are advising and acting for clients in such matters. The principles of free movement of goods, services, capital and persons encourage the mobility of European citizens and the development of commercial activities throughout the European Union. As a result, legal practitioners find themselves increasingly faced with situations having cross-border implications and with problems and legal questions governed by EU law. Such situations can involve, for example, the fulfilment of contracts involving the delivery of

goods and the provisions of services across borders, legal issues relative to the movement of tourists and to traffic accidents abroad, questions relating to the acquisition and disposal of property, moveable and immoveable, by individuals and businesses in one or more Member States of the European Union other than that in which they are based, and succession to the estates of individuals who have property in and connections with several Member States. In the area of family law also, multi-national personal relationships are increasingly frequent and legal questions arise regularly in cases about cross-border family and parental responsibility relationships. Equally, nowadays, small and medium enterprises — SMEs — which are a large component of the European domestic market are transacting across borders almost as a matter of course and often online. As a result, legal practitioners in the Member States cannot afford not to keep abreast of the latest developments in this increasingly complex and significant area of European Union activity.

1.2. Towards a genuine European area of civil justice

The rules of judicial cooperation in civil matters are based on the presumption of the equal value, competence and standing of the legal and judicial systems of the individual Member States and of the judgments of their courts and so on the **principle of mutual trust** in each other's courts and legal systems. The mutual recognition of the orders of courts of the Member States is at the centre of this principle which also embraces the idea of the practice of **cross-border collaboration between individual courts and court authorities**. The importance of uniform rules in this field is to

foster legal certainty and foreseeability in legal situations with cross-border implications: if each Member State were to individually establish which law should apply to and which court should be competent in each cross-border legal relationship and which judgments of which other Member States were to be recognised, the result would be a lack of legal certainty for citizens and enterprises both in respect to jurisdiction and the applicable law.

At the **Tampere European Council** on 15 and 16 October 1999 the Council had formulated the aim of the creation of a 'genuine European area of Justice', based on the principle that individuals and companies should not be prevented or discouraged from exercising their rights by incompatibilities between or complexities of judicial and administrative systems in the Member States. The Council established as priorities for action in this area, in particular, **better access to Justice** in Europe, **mutual recognition** of judicial decisions and increased **convergence** in the field of civil law.

The term judicial cooperation in civil matters originated first from the Maastricht Treaty, the Treaty on the European Union, which defined judicial cooperation in civil matters as a subject of common interest to the Member States. With the Treaty of Amsterdam, this policy of cooperation, which had hitherto been solely directed at action to be taken by the Member States, became a matter for legislative action by the institutions of the European Community. The Treaty of Lisbon refers explicitly to the principle of mutual recognition of judgments in civil matters but left the legislative competence essentially untouched. Article 81 of the Treaty on the Functioning of the European Union sets out a comprehensive list of activities which may be the subject of legislation. Many of these are familiar from the contents of

the earlier Treaties but the list now mentions expressly affording effective access to justice and judicial training for members of the judiciary and the staff of the courts. Article 81 also clarifies that judicial cooperation in civil matters may include the adoption of measures for the approximation of the laws and regulations of the Member States. With the exception of measures in family law all legislation in these matters is now adopted under the ordinary legislative procedure, under which Union legislation is adopted jointly by the European Parliament and the Council as co-legislators. Family law measures are adopted under the special procedure in which the Council acts unanimously after consulting the Parliament.

1.3. Special position of Denmark, Ireland and the United Kingdom

When applying European private international law instruments, legal practitioners have to bear in mind that not all instruments apply to all Member States. Denmark, Ireland and the United Kingdom have special arrangements under the Treaty with respect to legislation adopted in the area of civil justice. Denmark does not take part in the adoption of any instruments in this area and is not bound by any of them. Nonetheless, a number of instruments have been extended to Denmark by way of a bilateral agreement with the EU. The United Kingdom and Ireland have the right to choose whether to take part in the adoption of legislative instruments in this area and are only bound by an instrument if they have 'opted in'. So far the UK and Ireland have opted in to most although not all of the legislative acts in the area of civil and commercial matters. The UK and Ireland did not opt into the adoption of the Regulation on Succession for example. When

applying a legislative instrument in this area it is advisable to check whether that instrument applies also to either or both of these Member States and to what extent Denmark may have agreed to participate.

1.4. Enhanced cooperation

Finally, under the provisions for **enhanced cooperation** in the Treaty on the Functioning of the European Union, it is open to at least nine Member States to take measures to enhance cooperation between themselves by taking measures which further the objectives of the EU, but only as a last resort where it is shown that the measures in question cannot be taken by the Member States as a whole. In the area of judicial cooperation in civil matters the only measure adopted so far in this way concerns the law applicable to divorce (the 'Rome III' Regulation).

1.5. The 'acquis' in civil justice

The 'acquis communautaire' — the body of legislation in the area of judicial cooperation in civil and commercial matters — has grown significantly over the last fifteen years. There are legal instruments in place which govern jurisdiction, mutual recognition and enforcement of judgments and applicable law in a broad range of matters, extending from contract to successions and maintenance obligations. European legislation also provides for direct cooperation between the courts and competent authorities of Member States, for example when taking evidence abroad or in matters of child abduction. Access to justice in cross-border cases has been improved through provisions on legal aid, mediation and simplified and low-cost

procedures for small and uncontested claims. In order to facilitate the application of the *acquis* in practice, the European Judicial Network in civil and commercial matters was created.

The **acquis** is now of sufficient maturity that 'second' and even 'third' generation instruments are being adopted. The **need to update the existing measures** reflects the experience of their functioning in practice **as well as** new thinking about what the instruments should do to meet contemporary social and economic circumstances.

1.6. The principle of mutual recognition and the abolition of 'exequatur'

The cornerstone of policy in the area of EU judicial Cooperation in civil and commercial matters is the principle of **mutual recognition**. Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation are intended to facilitate Cooperation between authorities and the judicial protection of individual rights. The final aim of the policy of mutual recognition is for judicial decisions of all kinds in the field of civil and commercial matters to circulate freely among all the Member States and so be recognised and enforced in other Member States without any intermediate steps.

A key element in the development of EU law in this respect is the progressive removal of the barriers to recognition and enforcement of judgments between the judicial systems of the Member States. The Tampere Council in October 1999 called for a further reduction of the intermediate measures

still required to enable the recognition and enforcement of a decision or judgment in the requested State and the complete abolition of the procedure required to have a foreign judgment declared enforceable (*exequatur*).

As a first step the intermediate procedures were abolished for small consumer or commercial claims as well as for uncontested claims. The amendment of the Brussels I Regulation goes one step further and abolishes the *exequatur* procedure for judicial decisions in civil and commercial matters generally. The *exequatur* procedure has also been abolished for certain decisions in relation to family law and maintenance.

The instruments adopted so far are described in the following pages of this Guide. The description of each instrument is intended to give an idea in summary of the contents of the instrument but it is not intended as a substitute for reference to and study of the text of the instrument itself. There are separate guides to some of the instruments individually to which reference is also made.



Jurisdiction, recognition and enforcement in civil and commercial matters — the Brussels I Regulation

2.1. General Introduction

Jurisdiction of the courts of the Member States and rules of applicable law in **civil and commercial matters** are at the heart of judicial cooperation in civil matters in the European Union. National rules of private international law and international civil procedures differ from State to State. This can hamper the sound operation of the internal market in the European Union. To prevent this it is essential that there be uniform provisions in the EU which determine the competent court as well as simplified procedural formalities to achieve rapid and simple recognition and enforcement of judicial decisions issued in another Member State. This way, it is ensured that judicial decisions can circulate freely from one Member State to another.

Example 1

Company A based in Member State 1 enters into a contract with trade fair organiser Company B, whose central administration lies in Member State 2, in terms of which Company A books 500 square meters of exhibition space and corresponding services for an agreed price at a three-day trade fair in Member State 2, in which it plans participation as an exhibitor. Five days before the start of the fair, Company A is informed by its main client that it cannot participate in this fair. Company A therefore cancels its reservation with Company B. Due to the late notice, Company B is unable to rent the 500 square meters of exhibition space to another exhibitor and demands payment from Company A of the agreed contract price. Company A refuses to pay. Company B

wishes to proceed against Company A and asks how and where it should do so to best advantage of its interests.

In situations such as this the European civil procedure rules in civil and commercial matters, which, as regards the jurisdiction of the courts is based essentially on Regulation 44/2001⁽¹⁾, known colloquially and referred to hereinafter as **the Brussels I Regulation**, has brought greater certainty to situations such as this. The jurisdiction rules in Brussels I are the same in all Member States⁽²⁾. Each judgment rendered under this Regulation in one Member State receives equal recognition and enforcement in all other Member States concerned. Separately, provisions in the European Union establishing unified rules on applicable law ensure that courts and tribunals decide which law governs legal relationships in relation to the various subject matters by applying the same rules.

By applying the jurisdiction rules in Brussels I Company B can choose between two alternative ways of proceeding: firstly - it can take legal action before the court which has jurisdiction over Company A's place of business in Member State 1. According to the general rule, at present in Article 2, action can be brought before the court of the defendant's place of business. Alternatively Company B may prefer to proceed before the court in its own Member State 2, which has jurisdiction under Article 5(1)(b) of Regulation Brussels I being the place where the contractual

- (1) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- (2) Denmark, which is not bound directly by Brussels I, nonetheless participates in the application of the instrument by virtue of having entered into a separate agreement with the EU and its Member States for this purpose: see OJ L 299/62, 16.11.2005.

services were to be performed. A favourable judgment obtained from the court in Member State 2 would be recognised and could, in relatively simple proceedings, be made enforceable in any Member State where Company A holds assets. Company B has no cause to worry that these courts may decide the case by applying different rules of applicable law since under the Rome I Regulation, which applies in most of the EU Member States⁽³⁾, the same rules govern which law is applicable (cf. further below in chapter 5 on applicable law).

(3) All except Denmark.

2.2. The Brussels I Regulation and the Brussels I recast

2.2.1. Overview

The **Brussels I Regulation** entered into force on 1 March 2002. It replaced the previous Brussels Convention of 1968 which had the same subject matter and which continues to apply vis-à-vis some overseas territories of certain Member States. The Brussels I Regulation was revised subsequently and a new — ‘recast’ — version of the Regulation was adopted in December 2012⁽⁴⁾ which contains a number of significant changes from the original

(4) Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012; see OJ L 351/1, 20.12.2012; this regulation, which will be referred to in this Guide as the Brussels I recast, will apply as from 10 January 2015; Denmark has given notice that it intends under the agreement it has with the EU, that it should apply the Brussels I recast in relation to the EU Member States; see OJ L 79/4, 21.3.2013.

text of Brussels I which are referred to later in this chapter⁽⁵⁾. Subsequent to the adoption of the ‘recast’ a further amendment was adopted to take account of the coming into application of the European Patent Agreement and to allow for the jurisdiction of the Unified Patent Court⁽⁶⁾.

In the 1980s, the rules of the Brussels Convention were extended to the Member States of the European Free Trade Association (EFTA) by way of an international convention. This Convention, known as ‘The Lugano Convention’, was renegotiated once the Regulation Brussels I had been in force for a number of years and this gave rise to a revised Convention. Today, the new Lugano Convention applies in proceedings between the EU Member States and Iceland, Norway and Switzerland⁽⁷⁾.

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- (5) In this Guide the various Articles are referred to according to the numbering in the recast version of the Regulation; apart from the changes in substance effected by the recast, the numbering of the Articles is changed in the new version of the Regulation and that numbering is used in this Guide; the recast contains a helpful correlation table in Annex III showing the equivalent Articles in the two versions of the Regulation. The drafting technique used for the recast was to redraft the whole instrument rather than amend it by a series of textual amendments.
- (6) See paragraph 2.2.8 below for a fuller description of the provisions of the ‘Patent Court’ instrument.
- (7) The original Lugano Convention, so called because it was negotiated and signed at Lugano in Switzerland, was signed on 16 September 1988. The new Convention was signed on 30 October 2007 and was ratified by the EU and entered into force between the EU and its Member States, including Denmark, and the Kingdom of Norway on 1 January 2010. Subsequently it was ratified by Switzerland with effect from 1 January 2011 and Iceland with effect from 1 May 2011.

2.2.2. The scope of the Brussels I Regulation

The Regulation applies in civil and commercial matters, excluding revenue, customs or administrative matters. It does not apply to certain areas of civil law, such as the status or legal capacity of natural persons, matrimonial matters, wills and succession or bankruptcy. Nor does it apply in relation to matters of maintenance (other than for transitional cases), unlike the original version of Brussels I, since maintenance is now dealt with by the Regulation on that specific subject⁽⁸⁾.

2.2.3. The jurisdictional system of the Brussels I Regulation

Brussels I sets out a closed jurisdictional system, assigning jurisdictional competence as between courts of the Member States to resolve cross-border civil and commercial disputes. The competent court within the judicial system of the Member State with jurisdiction under the Regulation is then designated by the domestic rules of civil procedure of the Member State concerned. Only the jurisdiction rules in Brussels I can apply as between the EU Member States, and certain of the jurisdiction rules of the national law of the Member States are not to be applied as against persons domiciled in a Member State⁽⁹⁾ though they are still available against non-EU domiciliaries⁽¹⁰⁾. These 'exorbitant' jurisdiction rules are to be listed in the Official Journal following notification to the Commission⁽¹¹⁾.

(8) Council Regulation (EC) No 4/2009 of 18 December 2008; dealt with separately in Chapter 7 below.

(9) See Article 5.

(10) See Article 6.

(11) See Article 76. These rules were previously listed in Annex I to the Brussels I Regulation.

Example 2

Company C from Member State 3 has sold a machine to Company D from Member State 4. Company D had submitted an offer to purchase which stated, *inter alia*, that the purchase was to be subject to Company D's general sales conditions printed on the reverse side of the offer.

These conditions contained a choice of forum clause establishing the jurisdiction of Court E in Member State 4 for all disputes arising under the contract. Company C accepted the offer in a confirmation letter. After delivery, Company D claims that there are crucial malfunctions in the machine and has brought an action for damages for breach of contract against Company C before Court E. In the proceedings, Company C claims that Court E does not have jurisdiction. It points out that under the laws of Member State 3, a choice of forum clause contained in one party's general sales conditions is valid only if expressly signed for acceptance by the other party.

According to Article 25(1) of Brussels I parties, regardless of their domicile, can agree that a court or the courts of a Member State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship.

Such jurisdiction is exclusive, unless the parties have agreed otherwise. In Brussels I the formal validity of a choice of forum clause must be derived exclusively from the Regulation, which provides an autonomous

set of rules. These rules have preference over the corresponding rules in the Member States' national civil procedure laws (cf. further below). Thus Company D will have to show that the form with the general sales conditions conforms to the provisions of Article 25(1) if the argument as to the exclusive jurisdiction of Court E is to prevail.

2.2.3.1. *The basic rule: jurisdiction of the court of the defendant's domicile*

The **basic jurisdiction rule**, according to Article 4 of Brussels I, is that, for persons domiciled in the territory of a Member State, jurisdiction is exercised by the courts of the Member State in which the **defendant is domiciled**, regardless of his or her nationality. Domicile is determined in accordance with the domestic law of the Member State where the court has been seised. In the case of legal persons or firms, their domicile is determined by the country where they have their statutory seat, central administration or principal place of business. If the defendant is not domiciled in a Member State, Article 6 of the Regulation states that the jurisdiction of the courts of each Member State will be determined by national law, subject to the 'protective' jurisdiction rules for consumers in Article 18 and employees in Article 21 and the rules for exclusive jurisdiction and prorogation of jurisdiction in Articles 24 and 25 respectively.

2.2.3.2. *Alternative and special rules of jurisdiction*

Articles 7 to 9 of the Regulation contain rules of special jurisdiction alternative to the general rule in Article 4. Some of these rules enable the plaintiff to choose whether to commence proceedings in the courts of the Member State of the defendant's domicile or in courts of another Member State

having a special jurisdictional basis. In practice, the most important special jurisdiction is contained in Article 7(1), which involves matters relating to contract, other than contracts of employment or insurance or with consumers. International jurisdiction over the cause of action lies with the courts of the place **of performance of the obligation** in question under the contract. In the case of the two contract types found most frequently in European cross-border practice, the place of performance covers all obligations arising out of the same contract. Unless otherwise agreed, in the case of the sale of goods the place of performance of the obligation is the place in a Member State where, under the contract, the goods were delivered or should have been delivered, and in the case of the provision of services, the place where, under the contract, the services were provided or should have been provided.

Article 7 provides further special rules of jurisdiction over several special matters, like for example, matters relating to civil claims for damages or restitution or as regards disputes arising out of the operations of a branch, agency or other establishment⁽¹²⁾. Article 7(2) which covers jurisdiction over matters relating to delict and tort has assumed increasing importance. Claims in matters relating to tort, delict or quasi-delict may be raised in the courts of the place where the harmful event occurred or may occur. The European Court of Justice has established that this is the place where the damage occurs or, alternatively, the place where the damaging action was carried out or produced.

(12) Article 5.2 of the Regulation 44/2001 previously contained a rule of special jurisdiction in matters relating to maintenance; since the Maintenance Regulation came into application on 18 June 2011 the jurisdiction rules in that instrument apply.

2.2.3.3. *Prorogation of jurisdiction and defendant's appearance*

Prorogation or Choice of Court refers to the situation where parties to a contract have agreed to refer any dispute arising from the contract to the decision of a specific court or the courts of a specific legal system. Such an agreement can be included in a broader contract on the substance of the legal relationship between the parties or it can be separate. Such an agreement can also deal with disputes other than those arising out of a contract. There is nothing in the terms of the Regulation to restrict the use of a choice of court to situations where the dispute in question arises out of a contractual situation. However where the dispute relates to a situation where the parties do not have a pre-existing legal relationship, such as in disputes arising out of delict or tort, in those cases as a matter of fact very often the agreement can be entered into only after the dispute has arisen⁽¹³⁾.

The rule regarding choice of court agreements set out in Article 25 is one of the most important and frequently used rules of Brussels I. Prorogation of jurisdiction is generally allowed. However, limitations exist in favour of parties secured by the 'protective' rules of jurisdiction in relation to matters concerning insurance, consumers, and employees⁽¹⁴⁾. It should be noted that a prorogation of jurisdiction cannot prevail over the grounds of exclusive jurisdiction set out in Article 24⁽¹⁵⁾.

Under the previous version of Brussels I⁽¹⁶⁾ an agreement to choose a court in a Member State entered into between parties one or more of whom had a domicile in a Member State had the effect that any court other than the court chosen could take the case even if the jurisdiction agreement conferred exclusive jurisdiction provided that that other court was first seised. The Brussels I recast⁽¹⁷⁾ changes that provision to the effect that an agreement prorogating the jurisdiction of a court of a Member State, if valid, will prevail regardless of the domicile of the parties⁽¹⁸⁾. The Brussels I recast also added provisions to the effect that the substantial validity of the prorogation agreement shall be determined under the law of the Member State whose courts are chosen⁽¹⁹⁾ and that the prorogation agreement if part of a contract is to be treated as an agreement independent of the other terms of the contract and the validity of the prorogation cannot be disputed solely on the ground that the contract is invalid⁽²⁰⁾. It is intended also that any question of the validity of the choice of court agreement should be determined in accordance with the law of the Member State of the chosen court.⁽²¹⁾

The Brussels I recast contains another important change which strengthens 'party autonomy' in relation to choice of court agreements by requiring a court seised of a case, which is not the court chosen by the parties in an

(13) It is, for example, not usually possible to enter into a choice of court agreement to deal with a disputed claim arising out of delict or tort before the event giving rise to the claim has occurred.

(14) See the provisions of Articles 15, 19 and 23.

(15) See Article 27.

(16) Regulation 44/2001 Article 23(1); this position could be contrasted with the situation where none of the parties to the choice of court agreement was domiciled in a Member State; in that situation any other court in a Member State other than the court chosen had no jurisdiction over disputes between the parties to the agreement unless the chosen court had itself declined jurisdiction; see Article 23(3) of Regulation 44/2001.

(17) Regulation 1215/2012.

(18) See Article 25(1).

(19) *Ibid.*

(20) See Article 25(5).

(21) See Recital (20).

exclusive choice of court agreement, to take no procedure in the case until the chosen court, whether it is seised first or not, has determined if it has jurisdiction under the choice of court agreement. Once the chosen court has established its jurisdiction any other court seised must decline⁽²²⁾.

Example 2 continued

In the case in Example 2 above, the two Companies from different Member States are arguing about the validity of a choice of court clause contained in the general sales conditions of one of them, Company D. The solution can be derived from Article 25 of Brussels I.

With regard to the formal requirements for a choice of court clause, Article 25 contains a set of differentiated rules. The basic rule is that a choice of court clause must be agreed to by the parties in writing, although a written document signed by both parties is not required. Exchange of written statements or oral agreements confirmed in writing also meet the requirements. The same is the case with a form which accords with practices which the parties have established between them, and in international commerce, a form which accords with a usage which is widely known and regularly observed in the particular commerce concerned, and which the parties are, or ought to have been, aware of.

To recall the facts from Example 2, Company D submitted a written purchase offer which Company C confirmed in writing. In this purchase offer Company D made explicit reference to its general sales conditions, which it made available to Company C, and in a language used by the parties. The jurisdiction clause established in Company D's sales conditions therefore meets the requirements set out in Article 25(1) of Brussels I. It consequently gives to Court E exclusive jurisdiction to hear the case and Company D's argument therefore prevails.

Apart from jurisdiction derived from other provisions of the Brussels I Regulation, a court of a Member State before which a defendant enters an appearance will be regarded as having jurisdiction, by virtue of Article 26. This does not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24. This rule is important in practice as it forces the defendant to be sure of the jurisdiction of the court before entering an appearance. Once accepted, the jurisdiction cannot be rescinded and the courts' jurisdiction is conclusively established.

The Brussels I recast adds an important safeguard in relation to this rule to the effect that in relation to insurance, employment and consumer contracts where the defendant is, as the case may be, an insured, policy holder or beneficiary of an insurance contract, injured party, employee or a consumer, appearance will not constitute acceptance by such a defendant of the jurisdictional competence of the court unless the court seised ensures that the defendant is informed of their right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance⁽²³⁾.

(22) See Article 31(2) of the Brussels I recast.

(23) See Article 26(2) of the Brussels I recast.

2.2.3.4. *Special rules regarding matters relating to insurance, consumer contracts and individual contracts of employment*

Special rules are laid down regarding matters relating to insurance, consumer contracts and individual contracts of employment. The policy underpinning these contracts is distinguished by the perceived need to protect the weaker party, deemed for this purpose to be the insured, the consumer or the employee. Brussels I provides special rules in these cases with the aim of making a more convenient forum available to the weaker party deemed worthy of protection. In most situations such a party can sue in the court of their domicile and can only be sued there.

Example 3

Mrs A, a resident in Member State 1, orders a book from an internet bookseller and pays the price of €26.80 in advance. The book never arrives. Mrs A has found out that the internet bookseller is a company domiciled in Member State 2. She decides to take legal action and asks where this must be brought. The bookseller claims that his general sales conditions establish the jurisdiction of the courts of Member State 2.

Under Article 18(1) of Brussels I 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 in the courts for the place where the consumer is domiciled. Article 17(1)(c) provides that this choice is open to the consumer if 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 that the contract falls within the scope of such activities. As this rule cannot be departed from by an agreement made previously to the arising of the dispute according to Article 17 and since the bookseller had a website set up particularly to attract customers in Member State 1, it was directing its commercial activities to the Member State of Mrs A's domicile so she can sue the bookseller before the court which is competent in her own place of domicile⁽²⁴⁾.

(24) This issue has been the subject of case law of the European Court of Justice which has suggested some of the elements which need to be in place to establish that activities are directed into a Member State via a website. These include the use of a language of the Member State in question which is different from that of the business, the quotation of prices in a currency specific to that State, indication of directions from one or more Member States to the premises of the business concerned where the services involved are to be provided, the use of a top-level domain name other than that of the State where the trader is established and the mention of an international clientele composed of persons domiciled in various Member States are some of the factual indicators which can establish the intention to direct business to the Member State of the consumer. See the conjoined cases *Pammer v Reederei Karl Schlüter GmbH & Co KG* (C 585/08) and *Hotel Alpenhof GesmbH v Oliver Heller* (C 144/09).

2.2.3.5. *Exclusive jurisdiction*

Article 24 of Brussels I Regulation lists circumstances that warrant exclusive jurisdiction where there is a presumption of a particularly close connection to the courts of a particular Member State or where there is special need for legal certainty. These include, *inter alia*, proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property or proceedings concerned with the registration or validity of patents or other industrial property rights. In all cases listed in Article 24, actions are barred from being brought before other courts, such as the court of the defendant's domicile or any other court, which the parties may have agreed on in a choice of forum clause⁽²⁵⁾.

2.2.4. **Measures for interim relief and provisional protection**

With regard to provisional measures, Article 35 of Brussels I also provides for an application to be made to the courts of a Member State, when such measures are available under the law of that State. This applies even if the courts of another Member State have jurisdiction as to the substance of the matter. It should be noted that in the Recast of Brussels I there is a new definition of 'judgment' whereby that term is extended to include a judgment granting a provisional or protective measure by a court with jurisdiction under the regulation on the substance; this does not include such a measure granted by such a court without the defender — presumably the person against whom the measure is granted — being summoned to appear before the measure is granted unless the judgment containing the measure is served on the defender before enforcement takes place. However

a judgment granting a provisional and protective measure issued by a court which does not have jurisdiction on the substance under Brussels I is not recognised and enforced under the Regulation.

2.2.5. **Preventing parallel proceedings — European *lis pendens***

Even under the jurisdiction rules in Brussels I it is still possible that more than one court in the European Union may have jurisdiction in the same civil dispute. The European *lis pendens* rule prevents courts of two or more Member States each hearing simultaneously a case involving the same cause of action and between the same parties with the attendant risk of arriving at conflicting decisions and waste of judicial and other resources. Where such proceedings 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 court first seised has established whether it has jurisdiction. 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⁽²⁶⁾. This rule has great importance in cross-border legal practice. In the 'Recast' Brussels I there are important changes made to the rules on *Lis Pendens*. Firstly, a court seised can request any other court seised to inform it of the date on which it was seised and the requested court must give that information without delay. Next, where there are several courts seised each with exclusive jurisdiction under Article 26, any court other than that first seised must decline jurisdiction in favour of that court. Next, of great importance in the case of Choice of Court, under the Brussels I recast this rule is varied in the case of exclusive choice of court

(25) See Article 27.

(26) See Article 29; Article 30 contains a similar rule for related actions of which there is a definition in Article 30(3).

agreements⁽²⁷⁾ as follows: where a court chosen by the parties is seised and has exclusive jurisdiction under the choice of court agreement any other court seised must stay procedure, and if the jurisdiction of the chosen court is established, decline jurisdiction in favour of the chosen court⁽²⁸⁾. Finally the rules on *lis pendens* are also applied, albeit in a modified form, to actions in non-EU States where a court in a Member State is seised on the basis of the rules in Articles 4 or 7 to 9 inclusive and an action is pending between the same parties and involving the same cause of action⁽²⁹⁾.

2.2.6. Recognition and enforcement of decisions issued by courts of other Member States under the Brussels I recast

The Brussels I Regulation simplified the formalities for recognition and enforcement of any judgment delivered by a court in one Member State ('the Member State of Origin')⁽³⁰⁾ in another Member State ('the Member State addressed'). The Regulation introduced a straightforward and uniform procedure for the declaration of a judgment as enforceable in another Member State, also known as *exequatur* procedure. This has been taken a stage further in the Brussels I recast which has abolished the *exequatur* procedure altogether. From 10 January 2015 it will no longer be necessary for a judgment creditor to apply for a declaration of enforceability; they can apply directly to have the judgment enforced⁽³¹⁾.

(27) See paragraph 2.2.3.3 and footnote 15.

(28) See Article 31 and Recital (22).

(29) See Article 33; there is a similar rule as regards related actions; these provisions were inserted in part to enable the EU to ratify the Hague Choice of Court Convention; see also Recitals (23) and (4).

(30) See definition in Article 2(d).

(31) See Article 39.

2.2.6.1. Recognition

According to Article 36, a judgment given in a Member State shall be automatically recognised in the other Member States without the requirement of any special procedure. Recognition can only be refused in very few exceptional cases of which the most important case, in terms of legal practice, is the one regulated by Article 45(1)(b), with regard to judgments given in default of appearance.

2.2.6.2. Enforcement

As noted above, the Brussels I recast has made a significant change in the procedure of rendering a judgment granted in one Member State enforceable in another. Instead of the party wishing to enforce the judgment — 'the judgment creditor' — having to apply for a declaration of enforceability such a judgment will be directly enforceable in the other Member State if certain documents are produced. A judgment creditor wishing to enforce a judgment requests the court of origin to issue a certificate confirming the enforceability and giving details of the judgment⁽³²⁾. The certificate and a copy of the judgment are then sufficient authority for enforcement in the Member State addressed⁽³³⁾.

In addition to empowering the judgment creditor to enforce the judgment in the Member State addressed in accordance with the law of, and under the same conditions as a judgment given in, that State⁽³⁴⁾ an enforceable judgment carries with it the power to use any provisional, including

(32) See Article 53 and Annex 1.

(33) See Article 37.

(34) See Article 41

protective, measures in accordance with the law of the Member State addressed⁽³⁵⁾. If a judgment contains an order not known in the law of the Member State addressed the order is to be adapted to one of equivalent effect in that State⁽³⁶⁾.

2.2.6.3. *Refusal of recognition and enforcement*

Recognition may be refused if there is a ground for refusal of recognition as referred to in Article 45. A judgment will not be recognised (a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed, (b) if in case of a judgment in default of appearance it is shown that the defendant was either 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, or (c) it conflicts with the rules of exclusive jurisdiction or the special rules on matters relating to insurance or consumer contracts⁽³⁷⁾. In all other cases the court in the Member State addressed must accept the findings of fact regarding jurisdiction made by the court of origin and is expressly forbidden to review the jurisdiction of that court⁽³⁸⁾. Article 36 states that under no circumstances may a foreign judgment be reviewed as to its substance⁽³⁹⁾. Any interested person may apply for a decision that none of the grounds for refusal of recognition apply to a particular judgment⁽⁴⁰⁾. An application may be lodged

by any interested party against recognition and by the judgment debtor against enforcement before one of the courts listed by the Commission for the purpose⁽⁴¹⁾. It relates solely to enforcement of the judgment not to the merits of the case⁽⁴²⁾. In addition the judgment, debtor can apply to the court for refusal of recognition or enforcement of a judgment on the basis of one of the grounds for refusal of recognition⁽⁴³⁾. The decision on the application for refusal of enforcement may be appealed by the parties in a special procedure⁽⁴⁴⁾.

2.2.7. **Enforcement of authentic instruments and court settlements**

Under most legal systems of the Member States it is possible to express obligations to pay money, or perform other types of contractual obligation, in an agreement or other document drawn up by a notary or in some other way given public authority and authentication, for example through registration in a public register or in the court. Such an agreement or instrument is known as an authentic instrument. Under the previous provisions of Brussels I⁽⁴⁵⁾, if such an instrument was enforceable in the Member State of origin where it was drawn up or registered, it was directly enforceable in all other Member States under the same conditions as a judgment. This has the obvious advantage of being a relatively swift and straightforward way of securing the payment of money or performance of other obligations, since such an

(35) See Article 40.

(36) See Article 54.

(37) See Article 45(e).

(38) See Article 45(2) and (3).

(39) See Article 52.

(40) See Article 36(2); the procedure for such an application is as for refusal of enforcement as to which see Articles 46 to 51.

(41) See Articles 47 and 75; the information is to be circulated by the Commission using the EJN.

(42) See Article 52.

(43) See Articles 46 to 48 and Recital (29).

(44) See Articles 49 to 51.

(45) See Article 57.

authentic instrument can be enforced directly once the creditor has obtained a declaration of enforceability. The only ground on which enforcement could be opposed is if that would be manifestly contrary to the Public Policy in the Member State addressed.

Under the Brussels I recast, as a result of the abolition of the need for a declaration of enforceability, all the creditor needs to have is the instrument itself and a certificate issued by the competent authority or, as the case may be, the court in the Member State of origin⁽⁴⁶⁾. There is also included in the Brussels I recast a definition of authentic instrument⁽⁴⁷⁾. Similar provisions as those for the enforcement of authentic instruments apply as regards court settlements⁽⁴⁸⁾.

2.2.8. Special arrangements for the Unified Patent Court and the Benelux Court of Justice

A new Regulation applies simultaneously with the application of the Brussels I recast as from 15 January 2015 to make special rules as regards the relationship between proceedings before the Unified Patent Court and the Benelux Court of Justice (collectively referred to as the ‘common courts’) on the one hand and the courts of the Member States under the Brussels I Regulation on the other⁽⁴⁹⁾. It also has rules as regards relationships with courts in third, that is non-EU, States. The proposal on which this Regulation is based was adopted by the European Council and Parliament in June 2014.

(46) See Articles 58 and 60 of the recast text.

(47) See Article 2(c).

(48) See Article 57 and Articles 59 and 60 and the definition in Article 2(b) of the recast text.

(49) See Regulation (EU) No 542/2014 of the European Council and Parliament.

The instrument contains provisions relating to the relative jurisdictional competence of courts of the Member States under the Brussels I jurisdiction provisions and the relationship of these to the jurisdiction of the common courts, and it also contains rules on *lis pendens* and deals with recognition and enforcement of decisions under the two regimes.

This amendment to the Brussels I recast became necessary in order to allow for the implementation of the ‘patents package’ consisting of two Regulations⁽⁵⁰⁾ (the ‘Unified Patent Regulations’) and an international Agreement (the ‘Unified Patent Court Agreement’ or ‘UPC Agreement’) which creates a unitary patent protection in the European Union. Under the UPC Agreement and the Regulations it will be possible to obtain a European patent with unitary effect — a legal title ensuring uniform protection for an invention across 25 Member States⁽⁵¹⁾ — on a one-stop shop basis, providing cost advantages and reducing administrative burdens.

The Benelux Court of Justice is a court common to Belgium, Luxembourg and the Netherlands which was established in 1965 and has the task of ensuring the uniform application of rules common to the Benelux countries concerning various matters such as intellectual property (in particular certain types of rights relating to trademarks, models and designs). Up to today, the Benelux Court’s task consists mainly of giving preliminary rulings on the interpretation of these rules. In 2012, the three Member States created the

(50) Regulation (EU) No 1257/2012 of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection; Council Regulation (EU) No 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation requirements.

(51) The Unified Patent Regulations were adopted in enhanced cooperation by all Member States except Italy and Spain.

possibility of extending the competences of the Benelux Court of Justice to include jurisdictional competences in specific matters which come within the scope of the Brussels I Regulation.

These amendments to the Brussels I recast aim at ensuring compliance between the agreement relating to these common courts and Brussels I recast, and at addressing the particular issue of jurisdiction rules *vis-à-vis* defendants in non-European Union States.

The main jurisdiction rule is that a common court shall have jurisdiction under the rules of Brussels I where such jurisdiction would, under those rules, be conferred on the courts of a Member State party to the agreement establishing that court as regards a legal issue within the scope of the agreement. As regards parties domiciled outside the EU, the Brussels I rules are extended to apply to defendants domiciled in third states for matters falling within the jurisdiction of the common courts. In addition, the common courts are able to hear defendants domiciled outside the EU on the basis of a subsidiary rule on jurisdiction: if a common court has jurisdiction over a dispute matter relating to an infringement of a European patent out of which damage has arisen in the EU, it may also deal with a claim for damages arising from that infringement outside the EU against a defendant not domiciled in the EU, if property belonging to that defendant is located in a Member State party to the common court agreement⁽⁵²⁾. The rules on *lis pendens* in the Brussels I recast are applied to actions brought simultaneously in a common court and a court of a Member State which is not a party to the relevant agreement⁽⁵³⁾. As regards recognition and

enforcement in general the rules of Brussels I will apply except where a judgment given by a common court is to be enforced in a Member State which is a party to the relevant agreement and that agreement has rules on recognition and enforcement in which case those rules will apply⁽⁵⁴⁾.

(52) See Article 71(b).

(53) See Article 71(c).

(54) See Article 71d.



The European procedures in civil and commercial matters

3.1. Overview

The European Union has adopted four separate Regulations which facilitate the swift and efficient recovery of outstanding debt (collectively referred to as ‘European procedures’). Three Regulations create uniform European procedures which are available to litigants as an alternative to procedures existing under national law. The fourth Regulation foresees that the court which issued a judgment certifies that certain minimum procedural standards have been met. The decisions issued in these procedures are recognised and enforced in another Member State without the need to obtain a declaration of enforceability (exequatur). The procedures thereby created are, in order of adoption, the European Enforcement Order for uncontested claims (EEO)⁽⁵⁵⁾, the European Order for Payment (EOP)⁽⁵⁶⁾, the European Small Claims Procedure (ESCP)⁽⁵⁷⁾ and the European Account Preservation Order (EAPO)⁽⁵⁸⁾. The procedures are available only in relation to cross-border cases.

3.2. The European enforcement order for uncontested claims — EEO

The purpose of the **Regulation** creating a **European enforcement order for uncontested claims**⁽⁵⁹⁾ was to dispense with any intermediate measure

(55) Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004.

(56) Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006.

(57) Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007.

(58) Regulation (EU) No 655/2014 of the European Parliament and of the Council.

(59) The Regulation applies to all Member States except Denmark.

to be taken prior to enforcing a judgment in a Member State other than that in which it has been given by laying down minimum procedural standards. This Regulation applies, with a number of exceptions, in civil and commercial matters, whatever the nature of the court or tribunal.

The concept of **uncontested claim** covers all situations in which a creditor, given the verifiable absence of any indication that the debtor disputes the nature or extent of a pecuniary claim, has obtained either a court decision against that debtor or has an enforceable document vouching or acknowledging the debt which requires the debtor’s express consent in form of an authentic instrument or a settlement approved by a court.

If a judgment on an uncontested claim has been delivered in a Member State and has to be recognised and enforced in another Member State, the creditor has two options: they can either apply to have their judgment certified as a European Enforcement Order or they can apply for a declaration of enforceability under the Brussels I Regulation. A judgment on an uncontested claim which has been certified as a European Enforcement Order in the Member State of origin is recognised and enforced in the other Member States without the need for a declaration of enforceability. For judgments given in legal proceedings instituted after 10 January 2015, the exequatur procedure has been abolished by the Brussels I recast. For these judgments, the European Enforcement Order will have particular relevance with respect to the enforcement of maintenance claims from the United Kingdom since the Maintenance Regulation upholds the need for a declaration of enforceability in relation to that Member State.

Example 4

Mr A has launched a pecuniary claim against Mr B by legal action in Member State 1, where both of them are domiciled. The court has ordered Mr B, who has not contested the claim during the legal proceedings, to pay €10 000 to Mr A. As Mr B has recently transferred all his monetary assets to a bank in Member State 2, Mr A asks how he can enforce the judgment in Member State 2.

At present, Mr A has two options: he can apply to the court of origin in Member State 1 for certification of the judgment as a European enforcement order for uncontested claims; thus the judgment, with the certificate, would be recognised and enforceable in Member State 2 without any further special procedure required. The second option is that Mr A applies under the Brussels I Regulation in Member State 2, where enforcement is sought, for a declaration of enforceability of the judgment. The procedure of exequatur set out in that Regulation would involve proceedings in Member State 2 separate from those in Member State 1 whereby the judgment was rendered. This has the potential to cause a certain delay and give rise to further costs.

In future under the Brussels I recast Mr A, as regards the second option, will not have to apply for a declaration of enforceability in Member State 2 since, as from 10 January 2015, the judgment will be recognised and enforceable in Member State 2 with no need for the use of the intermediate procedures currently in the Brussels I Regulation.

The EEO procedure provides a tangible benefit for creditors who thereby gain access to speedy and efficient enforcement of judgments in uncontested claims in other Member States without the involvement of the judiciary of the Member State where enforcement is sought nor the concomitant delay and expense. Moreover it also dispenses generally with the need for translation since multilingual standard forms are used for certification. The court of origin issues the European Enforcement Order certificate using the standard form in Annex I, in the language of the judgment. The EEO Regulation establishes minimum standards for the proceedings leading to the judgment in order to ensure that the debtor is informed about the court action against them, the requirement for active participation in the proceedings to contest the claim at stake and the consequences of non-participation in sufficient time and in such a way as to enable them to arrange for their defence. The courts of the Member State of origin are entrusted with the task of scrutinising full compliance with the minimum procedural standards before delivering a standardised European Enforcement Order certificate that makes this examination and its result transparent. The interests of the judgment debtor are preserved at the enforcement stage by allowing a limited right of refusal of the order in the Member state of enforcement short of review on the substance.

The EEO came into application as from 21 October 2005. Further information about the EEO procedure can be found in the Practice Guide for the application of the EEO Regulation which was published under the auspices of the European Judicial Network in Civil and Commercial matters⁽⁶⁰⁾.

(60) This Guide can be accessed online at http://ec.europa.eu/civiljustice/publications/docs/guide_european_enforcement_order_en.pdf.

3.3. The European Order for Payment procedure — EOP

This procedure has some similarities with the EEO in that it covers cross-border monetary claims which are not contested and leads to the granting of an order which is enforceable in other Member States without the intermediate procedures set out in the Brussels I Regulation. Unlike the EEO, however, it is not necessary first to have a court order or document of debt such as an authentic instrument or court settlement. The EOP can be used only for pecuniary claims for specific amounts that have fallen due when the application for the order is submitted. The EOP is purely a written procedure and does not of itself involve a court hearing unless or until such time as the EOP is contested or opposed. Once the EOP is opposed, the case ceases to proceed under the EOP; if the claimant wishes to continue the case, that has to take place under another appropriate procedure.

The EOP procedure is optional in respect that it is up to the claimant to choose to use it rather than any of the other available ways in which the same claim could be made including under national procedural law. It is commenced simply by completing the application form, Form A, which is found in the annex to the Regulation. Form A and the other EOP forms are also available in electronic versions online at the European e-Justice Portal⁽⁶¹⁾.

The EOP is of particular interest to claimants which have claims which are not likely to be opposed, particularly in cases between businesses and consumers. It has to be remembered though that the jurisdiction rules applicable in claims against consumers under the EOP are modified from

those in the Brussels I Regulation which would otherwise apply. When a claim under the EOP procedure arises from a consumer contract and the consumer is the defendant, the competent court with jurisdiction has to be that of the Member State where the defendant is domiciled, as established under Article 59 of the Brussels I Regulation.

If the claim under the EOP is accepted and not opposed by the defendant, the court will issue the order and a certificate and thereafter the Order can be enforced in other Member States with no additional procedures being required and without the need for the European exequatur under the Brussels I Regulation. To this extent the EOP Regulation abolishes exequatur⁽⁶²⁾. Enforcement takes place under conditions similar to those in respect of enforcement of an EEO.

The EOP came into application as from 12 December 2008. Further information about the EOP procedure can be found in the Practice Guide for the application of the EOP Regulation which was published under the auspices of the European Judicial Network in Civil and Commercial matters⁽⁶³⁾.

3.4. The European Small Claims Procedure — ESCP

The European Small Claims procedure 'ESCP' is the third of the procedures in which the intermediate measures required for recognition and enforcement of judgments have been reduced, thus fulfilling the call of the European council

(62) See Article 19 of the EOP Regulation.

(63) This Guide can be accessed online at: http://ec.europa.eu/justice/civil/document/index_en.htm.

(61) https://e-justice.europa.eu/content_dynamic_forms-155-en.do

at Tampere⁽⁶⁴⁾. In that respect it is similar to the EEO and EOP procedures, however in other respects it is very different from those two procedures.

In the first place the (ESCP) deals both with contested and uncontested cases and so it contains provisions of a procedural nature including for the holding of an oral hearing and the taking of evidence. It contains also a number of time limits which if observed should enable the procedure even in defended cases to be concluded rather more speedily than under other procedures. The ESCP is basically a written procedure and is intended to be able to be used by claimants and defendants with the minimum of difficulty and without the need for legal representation, although that is not excluded.

The ESCP, like the EOP, is only available for cross-border cases and it is an alternative to national procedures of a similar nature. The successful party in an ESCP can expect to receive the costs from the other party but only if these are proportional to the value of the claim. The aim of restricting the cost of the procedure is central to the aim that the ESCP should assist access to justice in particular for individual consumers and for proprietors of small businesses who might not otherwise be willing or able to seek to pursue their claims in Member States other than their own.

The most important factor about the ESCP is the description of the claims which can be taken under the procedure. In the first place these must not be above €2 000 in value. This sum is to be calculated at the commencement of the claim and excludes any interest on the claim or expenses. If there is a counterclaim in a defended case the counterclaim must not exceed the limit of €2 000 either but the claim and counterclaim are not aggregated

to calculate the limit. As regards subject matter, claims of a civil and commercial nature can be taken under the ESCP with similar exceptions to those in the Brussels I Regulation. There are some additional matters excluded including employment claims, claims in relation to tenancies of immovable property and delictual claims relating to infringement of the right of privacy and defamation.

Enforcement of an order under the ESCP is similar to that in relation to the EEO and EOP a certificate is issued under the Regulation by the court which granted the order and the judgment is served on the parties. Once the certificate and judgment are available no further procedure is required before enforcement can take place in another Member State. As with the EOP the forms for the ESCP are available online in the various EU languages, an electronic version can be completed online and if permitted by the court with jurisdiction can be transmitted online to that court⁽⁶⁵⁾.

The ESCP came into force from 1 January 2009. Further information about the ESCP procedure can be found in the Practice Guide for the application of the ESCP Regulation published under the auspices of the European Judicial Network in Civil and Commercial matters⁽⁶⁶⁾.

The ESCP Regulation is, at the time of the writing of this Guide, the subject of a proposal by the Commission for some amendments to the procedure⁽⁶⁷⁾.

(65) See https://e-justice.europa.eu/content_small_claims_forms-177-en.do for the online forms for the ESCP.

(66) This Guide can be accessed online at http://ec.europa.eu/justice/civil/files/small_claims_practice_guide_en.pdf.

(67) See the text of the proposal dated 19 November 2013; COM(2013) 794 final, 2013/0403(COD).

(64) See paragraph 1.5.

3.5. The European Account Preservation Order — EAPO

With the Brussels I recast, EEO, EOP and the ESCP, the Civil Justice acquis of the EU has developed to the stage that for claims for payment a creditor who secures an enforceable order in one Member State can relatively simply and cheaply take the order to another Member State for enforcement with little or no additional steps of procedure required. Up until now, however, the actual execution of the order has been a matter for the national law and procedures which vary considerably from one Member State to another. When it comes to methods of enforcement one very common procedure is the ‘freezing’ of bank accounts to prevent a recalcitrant judgment debtor from moving funds out of or between accounts to the detriment of creditors’ interests. This is a particular issue for a creditor who seeks to secure simultaneously bank accounts of the debtor situated in several Member States. Doing this under the various national procedures can prove cumbersome and costly. For these reasons the European Commission began work on a proposal for a European Account Preservation Order. The Regulation based on the proposal was adopted on 15 May 2014 and will apply from 18 January 2017⁽⁶⁸⁾. An important feature of the EAPO procedure is that the procedure allows for a single order to be made in the courts of one Member State which would be capable of ‘freezing’ any bank account of a debtor in any Member State. The order should be issued without the debtor being heard in order to prevent him from moving the funds to be preserved during the time it takes to implement the order. To counterbalance this, the procedure provides for safeguards for

debtors to make sure that the amount ‘frozen’ reflects the amount of the creditor’s legitimate claim and that the debtor is given an early opportunity to go to court and challenge the order. A more detailed explanation of the procedure is given in Chapter 13 on Execution of judgments.

(68) Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.



Insolvency

4.1. Background

Insolvency was one of the subject matters excluded from the scope of the Brussels I Regulation. Nevertheless it was recognised that there was a great need for a European instrument providing for the possibility for an order in matters in insolvency law to be recognised and enforced in all the Member States and which was neither restricted in application by the borders of Member States nor by their national procedures, very varied as they are. The activities of business undertakings have more and more international as well as cross-border effects as a result of the development of the internal market. In addition it was necessary to seek to remove any incentives for business undertakings to transfer assets from one Member State to another in an attempt to defeat the interests of creditors and to seek to obtain a more favourable legal position. Furthermore the proper functioning of the internal market requires that cross-border insolvency proceedings in the European Union should operate efficiently and effectively. Objectives of this nature obviously could not be achieved to a sufficient degree at the level of the Member States thus rendering it necessary for provisions on jurisdiction, recognition and applicable law in insolvency to be expressed in a measure in European Law. Negotiations to this end were commenced between the Member States in the early 1990s following the entry into force of the Maastricht Treaty and concluded with the adoption on 23 November 1995 of the text of an international Convention among the then Member States. This Convention never entered into force but was effectively the basis for the subsequent Regulation adopted on 29 May 2000.

4.2. The European Insolvency⁽⁶⁹⁾

The European Insolvency Regulation contains provisions for the regulation of the interaction of insolvency proceedings between Member States of the EU. The **Regulation** entered into force on 31 May 2002 and applies to all proceedings opened after this date.

4.2.1. Scope of the EU Insolvency Regulation

The Insolvency Regulation applies to collective insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual in which the debtor is divested of property in whole or in part and a liquidator or administrator is appointed in relation to the debtor. The proceedings concerned are defined by Article 1(1) of the Regulation and listed specifically in Annexes A and B thereto. In order for the Insolvency Regulation to apply, proceedings must be officially introduced and legally effective in the Member State where they are opened.

4.2.2. Jurisdiction rules in the Regulation — Article 3

The Regulation contains rules of jurisdiction to establish which court in which Member State is competent to open and conduct insolvency proceedings. It is based on the principle that there should in the EU be only one procedure in relation to the insolvency of a particular debtor. This should consist of main proceedings with universal scope and eventual further secondary proceedings. The competence for the opening of the main proceedings should lie with the courts in the Member State within the territory of which

(69) Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

the centre of the debtor's main interests is situated⁽⁷⁰⁾. National proceedings covering only assets situated in the State of their opening — referred to as secondary proceedings — are allowed alongside the main proceedings⁽⁷¹⁾. In the situation where national proceedings are opened before the main proceedings, they are called 'territorial proceedings' and continue until the main proceedings are opened.

4.2.3. Main, secondary and territorial insolvency proceedings

Main insolvency proceedings and secondary proceedings are conducted separately and usually by different liquidators. They can, however, contribute to and result in the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. In order for that to happen the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information about the progress of the respective proceedings. The liquidators are to communicate amongst other information, the lodging and verifying of claims as well as measures aimed at terminating the proceedings⁽⁷²⁾. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings is given several possibilities for intervening in secondary proceedings which are pending at the same time.

4.2.4. Creditors

Every creditor who has their habitual residence, domicile or registered office in a Member State has the right to lodge their claims in each of the

insolvency proceedings pending in a Member State relating to the debtor's assets⁽⁷³⁾. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor can keep what they have received in the course of insolvency proceedings but is entitled only to participate in distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims (Article 20(2)). Whether and on what conditions a creditor is admitted to request the opening of secondary proceedings is determined by the law of the Member State within the territory of which these proceedings are opened⁽⁷⁴⁾. Similarly, the effects of such proceeding are restricted to the assets of the debtor which are situated within the territory of the Member State where the secondary proceedings take place⁽⁷⁵⁾.

Example 5

Company A is established under the laws of Member State 1 where it has its place of business and where its main interests are located. It has applied for insolvency before the competent Court in Member State 1 which has opened insolvency proceedings and appointed a liquidator. Company B, whose domicile is in Member State 2, holds substantive claims against Company A. Company B is aware that Company A maintains a business establishment in Member State 2, including a large warehouse and real estate. Company B asks how it can best safeguard its interests during the insolvency proceedings.

(70) See Article 3.1.

(71) See Article 3.2 and 3.3.

(72) See Article 31.

(73) See Article 40.

(74) See Article 29.

(75) See Article 27.

Before the Insolvency Regulation entered into force, Company B could have tried to obtain a Court order for enforcement against Company A's assets in Member State 2. However the effect of judicial decisions relating to insolvency proceedings would have been restricted to the Member State where these decisions were made and often did not prevent acts of individual enforcement in other Member States. Due to the provisions of the Regulation, this has changed substantially. Now, under the rules in the Regulation, as from the date of opening of insolvency proceedings in one Member State, individual enforcement is excluded in all other Member States. Today, as a consequence, in the example of Companies A and B based on the rules of the Insolvency Regulation, Company B must lodge its claim in the proceedings for the insolvency of Company A which were opened in Member State 1.

In a situation such as that of Company A, where the insolvent company holds substantial assets in another Member State than that where the main insolvency proceedings are taking place, the Insolvency Regulation provides the possibility of opening 'secondary proceedings'. Such proceedings can be instituted under certain conditions. The effects of the proceedings are restricted to the assets of the debtor situated within the territory of that other Member State. Company B can be advised, therefore, to investigate whether secondary insolvency proceedings have been instituted in Member State 2, or whether the special conditions are met under which a creditor may apply for their institution.

4.2.5. Applicable Law in insolvency proceedings — Article 4

According to the principle contained in Article 4(1) of the Insolvency Regulation, the law applicable to insolvency proceedings and their effects is that of the Member State within the territory of which such proceedings are opened. The *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. The Regulation furthermore sets out, for the matters covered by it, **uniform rules on conflict of laws** which replace, within their scope of application, national rules of private international law. Provision is made for special rules on applicable law in the case of particularly significant rights and legal relationships, such as rights in rem, set-off, reservation of title and contracts of employment⁽⁷⁶⁾. These exceptions to the general rule are provided to protect the legitimate expectations of creditors and the certainty of transactions in Member States other than that in which proceedings are opened.

4.2.6. Recognition of insolvency proceedings — Articles 16 to 18 and 26

The Regulation provides for **immediate recognition of judgments** concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. As a rule, the judgment opening insolvency proceedings shall be recognised in all Member States from the time that it becomes effective in the State of opening⁽⁷⁷⁾. It will produce, with no

(76) See Articles 5 to 10.

(77) See Article 16.

further formalities, the same effects in other Member States as under the law of the State of opening⁽⁷⁸⁾ unless the recognition would be manifestly contrary to the public policy of a State⁽⁷⁹⁾. Furthermore, the appointment of the liquidator and his powers as conferred by the law of the State of opening will be fully recognised in other Member States⁽⁸⁰⁾.

4.2.7. The proposed reform of the Insolvency Regulation

The European Commission published a proposal for reforming the Insolvency Regulation on the same day as the Report of 12 December 2012 on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings⁽⁸¹⁾. Negotiations on this proposal are currently in their final stages. The reform will essentially consist of the following elements:

- **Scope:** Extension of the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons which currently do not fit the definition; these amendments if adopted would also bring the Regulation more into line with the approach taken by the UNCITRAL Model Law on cross-border insolvency⁽⁸²⁾.

- **Jurisdiction:** Clarification of the jurisdiction rules notably by complementing the definition of the concept of the centre of main interest (COMI) and also by improving the procedural framework for determining jurisdiction by requiring courts and liquidators to examine the jurisdictional grounds for an insolvency proceeding.
- **Secondary proceedings:** Provisions enabling more efficient administration of insolvency proceedings by enabling the court to refuse the opening of secondary proceedings if certain conditions are met, in particular if this is not necessary to protect the interests of local creditors, by abolishing the requirement that secondary proceedings must be winding-up proceedings and by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved;
- **Publicity of proceedings and lodging of claims:** Requirement for Member States to publish relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and for the interconnection of national insolvency registers.
- **Groups of Companies:** Creation of a legal framework for the treatment of the insolvency concerning different members of the same group of companies, in particular by introducing a group coordination procedure and by obliging the liquidators and courts involved in the different main proceedings to cooperate and communicate with each other.

(78) See Article 17.

(79) See Article 26.

(80) See Article 18.

(81) COM(2012) 743 final and COM(2012) 744 final : 2012/0360 (COD).

(82) See http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.



Applicable Law

5.1. Applicable law — the problem ⁽⁸³⁾

In the internal market the need to ensure that citizens and businesses can determine with certainty which law will apply in relation to the various legal relationships which arise or are created is just as important as is the need to establish the jurisdiction rules in relation to court procedures, if not more so. Every day several millions of transactions are entered into or legal situations arise in which questions of applicable law are actually or potentially present. Every time an individual makes a purchase across a border between two Member States the question arises as to which law applies to that transaction. When businesses enter into contracts for the supply of goods or services the question of applicable law is, or should be, a matter of consideration to identify under which law the legal effects of the contract will be determined and therefore to ensure that the parties know what those effects are. If a family goes on holiday to another Member State, and travels by car on a journey through a number of Member States during which journey they are involved, unfortunately, in a road traffic accident caused by the fault of another person, as a result of which they sustain injury and damage to their car and its contents, it is of the utmost importance for them to know under which legal system their resultant claim falls to be evaluated. Therefore, to make the matter more predictable harmonised rules of applicable law replace the rules in the laws of the Member States.

(83) There are other instruments containing rules on applicable law; these include the Regulations on Insolvency, Maintenance Obligations, Divorce and Succession. The subject of applicable law in relation to these is dealt with in the chapters describing the instruments in question.

5.2. The Law applicable to contractual obligations — The ‘Rome I’ Regulation

5.2.1. The 1980 Rome Convention and the Rome I Regulation

The first steps to harmonise the rules on applicable law were taken with the negotiation and adoption of the Rome Convention on the law applicable to contractual obligations which was concluded on 19 June 1980. The Convention came into force on 1 April 1991 with ratification by eight Member States. The Convention was later replaced, except as regards Denmark, by the Rome I Regulation which covers the same subject. Therefore, the Convention is still in force as regards the relationship between Denmark and the remaining EU Member States.

The Convention provides harmonised rules on the subject but these were subject to substantive differences on certain points, due in particular to the fact that Member States were able to enter reservations to certain provisions of the Convention. In order to ensure greater uniformity and legal certainty in this area, a Regulation was adopted on 17 June 2008 and applied as from 17 December 2009.

5.2.2. The scope of Rome I

The Regulation applies to contractual obligations in civil and commercial matters. Certain matters are excluded from scope and these include, broadly speaking, all issues relating to Family law and status of individuals, arbitration, company law, trusts and succession and agency. The rules of the Rome I regulation apply exclusively to determine the law applicable in

the matters covered by the Regulation even if the law thereby designated is not the law of a Member State.

5.2.3. The principle of party autonomy — and its limitations — Article 3

The primary principle in the Regulation, as in the Convention, is the ‘party autonomy’, which means that the parties to a contract may choose the law which governs the contract. The choice can be of the law applicable to the whole or a part only of the contract. The parties’ choice may be made expressly and demonstrated clearly by the terms of the contract or the circumstances of the case. A previous choice once made can be amended by the parties. If all the elements of the contract apart from the choice of the law are located in a country other than that whose law is chosen, any provisions of the law of that country which cannot be derogated from by agreement can be applied. There are certain types of contract in respect of which the principle of party autonomy is limited and where there are special rules which in most cases limit the choice of law to the law of certain specific countries. These include contracts of carriage, insurance and employment and contracts in which one party is a consumer. Details for the rules for these contracts are given later in this chapter.

5.2.4. The law applicable where no choice has been made — Article 4

If the parties have not made an explicit choice of applicable law, the Regulation provides rules as to which law will apply in the case of certain specific types of contract. The basic principle behind these rules is that the contract should be governed by the law of the country with which the

contract has a close connection. For certain specific types of contract these rules are as set out in the following table:

Type of Contract	Law applicable				
Sale of goods	law of the country of the habitual residence of the: <table border="1" style="margin-left: 20px;"> <tr> <td>seller</td> </tr> <tr> <td>service provider</td> </tr> <tr> <td>franchisee</td> </tr> <tr> <td>distributor</td> </tr> </table>	seller	service provider	franchisee	distributor
seller					
service provider					
franchisee					
distributor					
Provision of services	law of the country of the habitual residence of the:				
Franchise contract					
Distribution contract					
Right in rem in immovable property or tenancy of immovable property	<ul style="list-style-type: none"> law of the country where the property is situated; however where the contract is a short-term tenancy, law of the landlord's habitual residence if the same as the tenant's where the tenant is a natural person 				
Contract for the sale of goods by auction	law of the country where the auction takes place if determinable				
Certain types of contract concluded within a multilateral system for the buying and selling of interests in financial instruments	law governing the multilateral system within which the contract has been concluded if the system is governed by one single law				

For contracts which are not in these categories, or which would be covered by more than one, the contract is governed by the law of the country of habitual residence of the party whose performance is characteristic of the contract. If a contract is more closely connected with a country other than one which

would be indicated by these rules then the law of that other country applies. Finally if the law applicable cannot be determined by applying these rules the law of the country with which it is most closely connected shall apply.

In the case in Example 1 concerning a contract for exhibition space with a trade fair organiser, Company B, cancelled by Company A five days before the trade fair concerned was due to open (see Example 1 in paragraph 2.1) Company B would like to be sure that the contract with A is governed by the rules in the law of its own country of Habitual Residence, that is of State 2.

Trade fair organisers usually stipulate in their general trade fair conditions that contracts with exhibitors are to be governed by the laws of the State where the organiser concerned has its place of business. The Rome I Regulation, like the Convention before it, establishes the principle of party autonomy conferring on the parties the freedom to choose the law to be applied to a contract: see Article 3(1) If in the contract between A and B the parties have made a choice of the law of State 2, the habitual residence of B, then that law will govern the contract.

If no choice has been made it is necessary to fall back on the 'default' rules in the Regulation to find out the rule which might determine the applicable law in the absence of choice of law. To do this it is necessary to characterise the contract since if it were to fall into one of the categories stated in Article 4 then the applicable law would be such as is indicated in that Article. Of the different contracts mentioned in the Article it is likely that the one which comes nearest to the rent of exhibition space at a trade fair is that in Article 4(1)(b), the provision of services. If that is so,

and that will depend on the terms of the contract, then the applicable law in the absence of choice will be that of the habitual residence of the service provider, namely the country of Company B, again State 2.

If the contract cannot be characterised thus then the further fall-back is to the law of the country of the habitual residence of the party whose performance of the contract is the most characteristic. It is likely that that would be found to be the law of State 2 again since the rent of exhibition space and related trade fair services which were to have been provided by Company B were most characteristic of the contract. This is obviously different from Company A's obligation to pay, which is an obligation of a most general kind. Therefore on this basis the law applicable to the contract would be again the law of Member State 2, being the country where Company B has its central administration and is therefore habitually resident following the rule in Article 19(1) of the Regulation.

5.2.5. Special rules and protective rules for the weaker party — Articles 5 to 8

There are special rules which cover contracts of carriage of goods and passengers and contracts such as those involving consumers, holders of insurance policies and employees under individual employment contracts.

5.2.5.1. *Contracts of carriage — Article 5*

For contracts of carriage, which often have standard terms and conditions, there is a general rule enabling the applicable law to be chosen but this is different between carriage of goods and carriage of passengers because of the need to respect certain international conventions. For carriage of goods there is an unrestricted possibility to choose the law applicable under the general rules on party autonomy. If no choice is made then the law applicable shall be either the law of the country of the habitual residence of the carrier, where it coincides with that of the consignor; if not it shall be the country where the place of delivery of the goods is situated. For contracts of carriage of passengers the law which can be chosen is restricted to the law of the country where:

- The passenger is habitually resident,
- The carrier is habitually resident,
- The carrier has a place of central administration,
- The place of departure is situated, or
- The place of destination is situated.

If no law is chosen the law of the country of the habitual residence of the passenger shall apply if that is either the place of departure or the place of arrival of the journey. If neither of these applies it shall be the law of the country of the habitual residence of the carrier.

5.2.5.2. *Protection of the weaker party*

5.2.5.2.1. Consumers — Article 6

A contract between a consumer and a professional, as defined in Article 6(1), is governed by the law of the country where the consumer has their habitual residence, if either the professional carries on business activities there or by any means directs such activities to that country. Any choice of law in a contract between such parties cannot have effect if it would deprive the consumer of protections which would be available if the applicable law was the one of the consumer's habitual residence. These rules do not apply in the case of certain contracts for services provided to the consumer other than in the consumer's country of habitual residence, contracts of carriage other than package travel, contracts relating to immovable property other than timeshares and certain financial instruments.

In the case of Mrs A, seen above in Example 3 in paragraph 2.2.3.4 , who is a resident in Member State 1, and who ordered a book from an internet bookseller and paid the price of €26.80 in advance but it never arrived, Mrs A has found out that the internet bookseller is a company based in Member State 2. Mrs A has decided to take legal action to recover her money since she has meanwhile bought the book from another online trader. Apart from the question of jurisdiction dealt with in Example 1 there arises a question of applicable law because Mrs A wishes to take advantage of the special protections afforded to online purchasers in Member State 1 whereby the onus of proof that

the goods ordered were delivered falls on the trader not on the consumer.

However Mrs A has now read the small print in the online contract which terms and conditions she had to agree before placing the order and she has seen that it applies the law of Member State 2 which does not have such a protection for consumers. The book-selling trader claims that the general sales conditions cover all sales by the seller including those online and therefore that Mrs A has to prove that the book was not delivered and not that he has to prove that it was. Mrs A wonders if the regulation can help her in this respect.

Applying the terms of Article 6 to this case the first point is that it is a consumer contract since Mrs A is not acting within a trade or profession in buying the book whereas the bookseller does. Next it can be said that one way or another the bookseller is pursuing trading activities within the country of Mrs A's habitual residence or at least directing those activities to that State. That means that by her agreeing the choice of the law of State 2 Mrs A comes within the terms of Article 6(2) under which the choice cannot result in her losing the protections afforded to her by the law in State 1. Since the bookseller is unable to prove delivery of the book Mrs A stands a good chance of being able to obtain an order for payment to her of the price.

5.2.5.2.2. Insurance — Article 7

The special rules for applicable law in relation to insurance contracts are divided into two categories: those relating to large risks as that term is defined in the relevant EU law⁽⁸⁴⁾ and other types of insurance contract. As regards large risk insurance contracts the party autonomy principle rules and the parties are free to choose the applicable law. If there is no choice there are two default rules: either the law of the country of the habitual residence of the insurer or the law of another country where the circumstances make it clear that the contract is manifestly more closely connected with that country. In the case of contracts of insurance, other than covering large risks, the freedom of choice of law is limited to the following:

- The law of a Member State where the risk is situated at the time of the conclusion of the contract;
- The law of the country of habitual residence of the policy holder;
- In a policy of life assurance the law of the Member State of the nationality of the policy holder;
- For a contract which covers a risk over events in one Member State other than that where the risk is situated the law of that Member State;
- For a contract covering risks related to commercial, industrial or professional activities situated in different Member States the law of any of those Member States or the law of the policy holder's country of habitual residence.

(84) First Council directive 73/239/EEC of 24 July 1973.

In the first, second and fifth situations there may be more freedom to choose the applicable law if the country concerned allows that. If no choice is made in these cases the law applicable shall again be that of the Member State where the risk is situated at the time the contract is concluded. There are certain extra rules where it is mandatory under the law of a Member State to enter into insurance contracts and in order to determine the country where the risk is situated in which case reference must be made in the case of contracts, other than for life assurance, to the Second Council insurance Directive⁽⁸⁵⁾ and for life assurance contracts to the EC life insurance Directive⁽⁸⁶⁾.

5.2.5.2.3. Employment contracts — Article 8

Employment contracts shall be governed by the law chosen by the parties and, in the absence of a choice, by the law of the country in or from which the employee habitually carries out their work in performance of the contract. Where the law cannot be determined in their way, for example if the employee does not habitually carry out his work in any one country, the contract is governed by the law of the country in which the place of business through which they were engaged is situated. However, if from the circumstances as a whole it appears that the contract is more closely connected with another country, then the law of that country governs the contract. In the case of a choice of applicable law, an employee cannot be stripped of protections arising from mandatory labour law rules under the

law which would, in the absence of a choice, have been applicable to the contract under the Regulation.

5.2.6. The scope of the applicable law — Article 12

The law applicable will govern:

- Interpretation and performance of the contract,
- Consequences of breach, partial or total, and assessment of damages,
- Extinguishing of obligations through prescription and the limitation of actions, and
- The consequences of nullity.

As regards the manner of performance and defective performance the law of the country where the performance takes place shall apply.

5.2.7. Other provisions as regards applicable law in contract

There are other significant provisions in the Regulation dealing with certain specific issues in relation to the law applicable, including mandatory rules of the country where the contract is to be performed which are to be given effect subject to consideration of their nature and effect as well as the consequences of their application, notably in so far as they would render the contract illegal. These rules are such as to safeguard the interests of the country concerned and are regarded as crucial for this purpose. Other issues covered by special rules are those regarding the material and formal validity of a contract, questions of incapacity, assignation and subrogation, multiple liability, set-off and the burden of proof. There are rules to indicate the place

(85) See Article 2(d) of Second Council Directive 88/357/EEC of 22 June 1988 as amended by Directive 2005/14/EC.

(86) See Article 1(1)(g) of Directive 2002/83/EC of 5 November 2002 concerning life assurance; OJ L 345/1, 19.12.2002.

of habitual residence of legal persons and individuals acting in the course of a business, to exclude the application of *renvoi* as regards the rules of private international law of any country whose law is applicable under the Regulation, to deal with the application of the Regulation as regard states with more than one legal system and the relations with other provisions in EU law and with the Rome Convention.

5.3. Applicable law in Tort and Delict — the Rome II Regulation

5.3.1. Background

Although both the Brussels Convention and the Brussels I Regulation contained jurisdiction rules in both contractual and non contractual obligations, only the rules on the law applicable to contractual obligations had been harmonised under the Rome Convention. Once the Rome Convention had been completed some progress was made towards negotiating a Convention on the subject of Applicable Law in Tort and Delict. However work was not concluded by the time the Treaty of Amsterdam came into force in 1999 and the project was postponed for a number of years. Somewhat later, the European Commission submitted a proposal for an instrument on the law applicable to non-contractual obligations and the resultant Regulation, known colloquially as 'Rome II' was adopted on 11 July 2007, and applied as from 11 January 2009.

5.3.2. Scope of 'Rome II' — Articles 1 and 2

The Regulation deals with applicable law in non-contractual obligations in relation to civil and commercial matters. As with other instruments in this area the scope does not include revenue, customs or administrative matters.

The intention is that between them the regulations Rome I and II should cover all civil obligations, at least subject to these and the other exclusions from scope. As regards the territorial scope of the Regulation it applies in all the Member States except Denmark. It should be noted that the rules also apply to situations where there is prospective liability such as in anticipated breaches of the law likely to give rise to a delictual or tortious liability.

5.3.2.1. *Meaning of 'non-contractual obligation' — Article 2*

Article 2 sets out the meaning of non-contractual obligations for the purpose of the Regulation. These comprehend the traditional categories of legal wrong within the compass of Delict and Tort. However they also include obligations which in the past were not to be characterised as either delictual or contractual such as unjustified enrichment, *negotiorum gestio*, or the right to recompense for expense incurred in performing voluntarily a service for someone, and obligations arising from the breach of contractual negotiations leading to loss incurred by a party who in reliance on the negotiations had incurred expense in anticipation of the contract by performing actions required under the contract, known as *culpa in contrahendo*. These last three categories of obligation are so specific that there are special rules for them in the Regulation.

5.3.2.2. *Exclusions from scope — Article 1*

Some areas of non-contractual obligations are excluded from the scope of the Regulation, such as non-contractual obligations arising out of family or similar relationships, matrimonial property regimes and trusts and succession. Also excluded are such obligations arising out of various commercial relationships such as those in relation to bills of exchange and other negotiable instruments and company law matters. The subject of

obligations arising out of nuclear damage is also excluded as it is dealt with under broader international Conventions and is in itself very controversial for certain Member States. Of particular significance is the disapplication of the regulation to liability of the State for acts and omissions in the exercise of State authority. Finally, included within scope when the instrument was proposed, defamation and violation of rights of privacy and personality were excluded in the adopted instrument⁽⁸⁷⁾.

5.3.3. The rules on applicable law

The Regulation provides different rules for determining the law applicable in respect of the two categories of non-contractual obligation covered by it, namely those that arise out of a delict or tort and those that arise out of the other legal relationships. In addition to providing general rules for these two categories, within the area of obligations arising out of delict and tort there are special rules for five types of situation, namely product liability, competition, environmental damage, intellectual property and industrial action.

5.3.3.1. Party autonomy — Article 14

Unlike the position under Rome I, choice of the law applicable has a more restricted role for delict and tort cases. Parties are not generally in a position to make a choice before the event giving rise to a claim for loss, injury and damage has occurred since in normal circumstances they will not have

anticipated such an event and therefore there is no one with whom the party suffering such loss could enter into an agreement beforehand. This means that it is not possible under the Regulation to enter into an agreement on a general choice of law made before such an event. Thus the timing of the choice is restricted to the period after the event has occurred. There is one situation which is covered by the regulation where parties can enter into agreement to choose the law applicable before the event and that is where all parties involved pursue a commercial activity. Any choice of law shall be subject to the exception that the law chosen will not be applied where there is a close connection with the chosen law of another country provisions of whose law which cannot be the subject to contracting out will be applied. The choice must either be explicit or emerge clearly from the circumstances of the case.

5.3.3.2. Applicable law in the absence of choice — Article 4

The general rule as regards an obligation arising out of a delictual or tortious situation depends on the application of the law of the country where the damage occurs or is likely to occur, irrespective of the country where the event giving rise to the damage occurred or to any country in which indirect consequences of that event occur. The objective of that rule, which confirms the *lex loci delicti commissi* as the law applicable, is to guarantee certainty in the law whilst at the same time seeking to strike a reasonable balance between the person who it is claimed is liable and the person sustaining the damage. However, where the person claimed to be liable and the person who has allegedly sustained damage are habitually resident in the same country at the time when the damage occurs, the law of that country shall be applicable. The Regulation goes on to provide a general exception clause which aims to bring a degree of flexibility, enabling the court to adapt to an individual case so as to apply the law that reflects the centre of

(87) This exclusion was the subject of a statement by the Commission at the time of adoption of the Regulation in terms of which the Commission undertook to submit a study on the subject, not later than December 2008, to the European Parliament and the Council. The study was in fact published in February 2009.

gravity of the situation, so that, whenever the delict or tort is manifestly more closely connected with another country, the law of that other country shall be applicable. The Regulation additionally provides special rules that apply to some areas of law such as product liability, unfair competition or intellectual property law.

Example:

In 2010, a person of French nationality residing in Olomuc in the Czech Republic was involved in a road traffic accident whereby he was struck by a car and injured while crossing a road in Bratislava. The car involved in the accident was registered in Hungary and was being driven at the time of the accident by a person of Hungarian nationality and habitual residence. The car was insured under a policy with an Austrian insurer based in Vienna.

In 2012, the victim of the car accident brought an action for personal injury and damages against the insurer before the court in the Czech Republic. Which law will apply to determine the rights and obligations of the parties including the determination of liability and the amount of damages? Also which law will apply as regards the issue as to whether the insurer may be sued without recourse against the person responsible for the accident as well as to the insurer's claim for reimbursement against that person?

Applying Article 14(1)(a) of the Regulation the parties can agree after the dispute has arisen on the law to be applied. Assuming that they do not do so the general provisions in Article 4 will apply. Since the

injured person and the liable person are habitually resident in different countries, Article 4(2) does not apply. The law applicable is therefore to be determined by Article 4(1) pointing to the law of the country in which the damage occurred. In the case of a road traffic accident such as this that will be the country where the accident happened. Given that the accident in this case happened in Slovakia the Slovak law will apply.

The question whether the action can be brought direct against the Austrian insurer depends on whether the law applicable to the delictual act, that is the Slovak law, so allows or if the law applicable under the contract of insurance does.

Finally the law which will govern the right of subrogation of the insurer against the person liable for the loss and injury caused in the accident will, under Article 19, be the same law as applied to the obligation of the insurer to pay the injured person, once again in this case the law of Slovakia.

5.3.3.3. *Rules for special situations in delict and tort — Articles 5 to 9*

There are various special rules covering five different situations, as follows:

- Product liability — Article 5; the applicable law needs to be assessed under a cascade of connecting factors: in the first place that of the country of habitual residence of the person sustaining the damage, at the time the damage occurred, if the product concerned was marketed in that country. Failing that, the law of the country where the product was acquired if it was marketed

there, or failing that, the law of the country in which the damage occurred if the product was marketed there. If the person claimed to be liable could not reasonably foresee the marketing of the product in any of those countries it shall be the law of the country of habitual residence of that person. If the case is manifestly more closely connected with a different country the law of that country shall apply.

- Unfair competition — Article 6; various rules apply depending on the situation. Broadly these rules are intended to protect the interests of both consumers as well as businesses against anti-competitive activity. So where an act of unfair competition occurs the law applicable is that of the country where competitive interest or the collective interests of consumers are or are likely to be affected. The general rule in Article 4 applies where the interests of a specific competitor are affected. Specific rules in Article 6(3) deal with anti-competitive practices focusing on applying the law of the countries in which relevant markets affected thereby are situated. It is not possible to contract out of these rules by a choice of law under Article 14.
- Environmental damage — Article 7; a delictual or tortious obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage is primarily governed by the law chosen by the parties. However the person who is making the claim has the choice of basing it on the law of the country where the event giving rise to the damage occurred. The possibility of unilateral choice underlined the general commitment of the EU to the promotion of environmental protection.

- Intellectual property rights — Article 8; here a distinction is drawn between EU intellectual property rights and national rights. As regards the latter the law applicable is that of the country for which protection is sought. For EU rights where the matter is not regulated in the relevant EU instrument the law applicable is that of the country where the act of infringement of the right occurred. Again no choice of law is permitted for these cases.
- Industrial Action — Article 9; this, the last of the special situations, concerns non-contractual obligations in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests, such as trades unions or associations of employers, for damages caused by industrial action, whether already carried out or pending. Whilst in such cases the general rule in Article 4(2) applying the law of the country of the common habitual residence applies, Article 9 provides that the law of the country where the action is to be, or has been, taken will apply.

5.3.3.4. *Applicable law in cases of unjustified enrichment — Articles 10 and 11*

With regard to non-contractual obligations in unjustified enrichment arising out of an act other than a tort or delict — such as unjust enrichment and agency without authority — the Regulation provides rules to ensure that the obligation be governed by the law of the State most closely connected to its subject, while leaving the courts with sufficient flexibility to adapt the rule to their national systems. In both situations there is a hierarchy of rules established.

- Unjustified enrichment — Article 10; the primary rule is that where the obligation arose out of an existing relationship between the parties closely connected with the unjustified enrichment, it is governed by the law which governed that relationship, say contract. If that does not apply and the parties are habitually resident in the same country at the time that the obligation arose the law of that country applies. If that cannot determine the law to be applied it shall be that of the country in which the unjustified enrichment took place. If the situation is more closely connected to another country than those specified in the other provisions then the law of that country shall apply.
- *Negotiorum gestor* — Article 11: here the first rule is similar to that in relation to unjustified enrichment; where there is a relationship between the parties closely connected to the obligation then the law applicable to that relationship shall apply. The second rule is again to apply the joint habitual residence of the parties and the third is to apply the law of the country where the act giving rise to the obligation was carried out. Finally there is a most closely connected rule similar to that in Article 10(4).

Example

An employee of Company A based in France, when arranging an electronic bank transfer of funds to pay a fee for a trade fair in Italy to Company B which had organised the fair, made an error while completing the online transfer so that the fee paid was shown as €50 000 instead of €5 000. Furthermore the payment was made to the account of a third party not at all related to the Italian company or to the transaction. That party,

domiciled in Austria, happened to have an account in the same bank as Company B, the number of which is only one digit different from that of Company B's account. The third party refuses to make repayment so that Company A has to raise an action against that party in the courts of the domicile of the latter, namely Austria, there being no special ground of jurisdiction for cases of unjustified enrichment such as this under the Brussels I Regulation. The question is, which law should the Austrian court apply?

Given that the situation is about the unjustified enrichment of the third party, Article 10 of Rome II is to be applied. The first option, namely the existence of a contractual or delictual relationship connected to the factual situation out of which the unjustified enrichment arises, is not relevant here given the absence of any existing relationship between Company A and the Austrian third party. Neither is the common habitual residence of the parties applicable since Company A and the third party are habitually resident in different countries.

That leaves the last of the connecting factors in Article 10(3) which points to the law of the country in which the unjust enrichment took place. In the case in point, this would lead to the application of Italian law, as the Austrian party's bank account is situated in Italy. The special provisions in Article 10(4) are unlikely to affect the applicability of Italian law, as the circumstances of the case do not demonstrate a clear connection with another country.

5.3.3.5. *Applicable law in obligations arising from culpa in contrahendo — Article 12*

Culpa in contrahendo refers to the situation where a non-contractual obligation arises out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not. This includes breach of a duty not to disclose information, the violation of and the breakdown of contractual negotiations. Again the rules in Article 12 provide a mini-hierarchy. Thus the first step is to apply the law which governs the contract or would have applied to it had it been concluded. Failing that, the applicable law is that either of the country where the event giving rise to the damage occurred irrespective of the country or countries in which there are indirect consequences, or that of the country of the parties' common habitual residence or, where the relationship is manifestly more closely related to a country different from one indicated by the other rules, by the law of that country.

5.3.4. **Scope of the law applicable — Article 15**

The law which is applicable under the rules of the Regulation governs:

- Basis and extent of liability
- Grounds for exemption from liability and any limit or division of liability
- Existence, nature and assessment of damage or of the remedy sought
- Measures which a court can take to prevent or terminate injury or damage

- Transfer of a right to compensation for damage including by inheritance
- The persons who are entitled to compensation for damage sustained personally
- Vicarious liability for the acts of another person, and
- Extinction of an obligation by prescription and the limitation of actions and interruption of periods of prescription and limitation

5.3.5. **Other provisions as regards applicable law in non-contractual obligations**

As with the Rome I Regulation there are other significant provisions in the Regulation dealing with certain specific issues in relation to the law applicable. These include also an article about the mandatory rules of the law of the forum dealing with the case which are to be given effect irrespective of the law otherwise applicable. Other issues covered by special rules include a rule that rules of safety and conduct in force when and where an event giving rise to liability occurred are to be taken in to account and a rule whereby a person may raise an action direct against an insurer of the liable person so long as the law of the rules applicable to the non-contractual obligation or to the insurance contract allow. There are rules applicable to subrogation, multiple liability and as to the formal validity of an act related to a non-contractual obligation. Finally there are rules about the burden of proof, the place of habitual residence of legal persons and individuals acting in the course of a business, the exclusion of the application of renvoi as regards the rules of private international law of any country whose law is applicable under the Regulation, the application of the Regulation as regards states with more than one legal system and the relations with other provisions in EU law and some international Conventions.



Parental Responsibility and Divorce

6.1. The Brussels IIa' Regulation

6.1.1. Background — the Brussels II Regulation and the Brussels II a Regulation

Regulation (EC) 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (known as the 'Brussels II Regulation')⁽⁸⁸⁾ entered into force on 1 March 2001. This Regulation dealt with jurisdiction, recognition and enforcement in civil proceedings relating to divorce, legal separation or marriage annulment, but in so far as it dealt with matters of parental responsibility was confined to situations where these arose in the context of a matrimonial proceeding concerning children common to both spouses. The Regulation was itself the successor to a Convention among the Member States which was negotiated before the Treaty of Amsterdam came into effect. The text of the Brussels II Regulation and the Convention are virtually identical but the Convention⁽⁸⁹⁾, which was adopted on 28 May 1968, never came into force.

The territorial scope covers all Member States except Denmark. The material scope of the Brussels II Regulation was seen relatively soon after it came into force to be too narrow as far as its provisions on matters of parental responsibility were concerned. This was one reason behind the Commission proposal made in August 2002⁽⁹⁰⁾ for a draft Regulation intended to replace the Brussels II Regulation that would cover all decisions on parental

responsibility, regardless of the marital status of the parents and regardless of whether there was a pending matrimonial case existing between the parents. It was also proposed to deal with matters of parental responsibility involving the placing of children in institutional care as well as fostering. The proposal followed to a large extent the rules of 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 ('Hague Child Protection Convention') which was not yet in force for any Member State at that time. The Brussels IIa Regulation was adopted on 27 November 2003 and applied as from 1 March 2005⁽⁹¹⁾.

6.1.2. The Brussels IIa Regulation and Child Abduction

The Brussels IIa Regulation as proposed was also to contain special rules for cross-border parental child abduction within the European Union and so to deal with the problem of the unlawful removal and retention of children in breach of custody rights as between the Member States. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction is in force in all the Member States. Under that Convention, when a child is abducted to or retained in a country party to that Convention other than that of her or his habitual residence, the authorities of the State to which the child is abducted or in which they are retained are to order their immediate return to the State of their residence where that State is a Contracting State. The rules of the Brussels IIa Regulation were intended to complement and reinforce the provisions of the Convention in their operation between the Member States and so to dissuade parents and others from taking the unilateral step to remove or retain children away from the Member State of their habitual residence.

(88) See OJ L 160, 30.6.2000, p. 19.

(89) See OJ C 221, 16.7.1998, p. 1.

(90) See OJ C 203 E, 27.8.2002, p. 155. A separate Practice Guide to the operation of the Regulation is available on the website of the e-Justice Portal.

(91) Denmark does not participate in this Regulation.

6.1.3. The Brussels IIa Regulation and Matrimonial matters

6.1.3.1. Jurisdiction in matrimonial matters — Article 3

The Regulation took over unamended the rules on matrimonial matters from the Brussels II Regulation. For these proceedings the Regulation provided rules for establishing:

- jurisdiction among the courts of the Member States, and
- recognition and enforcement of judgments rendered by the courts of other Member States.

Example

Ms A is a citizen of Member State 1 and has been married to Mr B for three years; they have been living together in Member State 2, the home State of Mr B. Ms A, taking the view that the marriage is over, wishes to apply for a divorce and to return to her home country, where her family lives. She would like to leave as soon as possible and apply for divorce in her country of origin. She has not spoken to Mr B for two weeks, and is concerned that the divorce might turn into a serious problem.

Under the rules of the Regulation in Article 3(1) jurisdiction for divorce rests with the courts in the Member State of the spouses' habitual residence or last habitual residence if one of the spouses still resides there. It can also be with the courts of the Member State of the common

nationality of the spouses (in the case of the United Kingdom and Ireland, the 'domicile' of each of the spouses). Were Ms A to return to her country of origin (Member State 1), she would only be able to apply for a divorce before a court there once she is habitually resident there and if one of the following conditions is met:

- Mr B agrees to make a joint application for divorce with her.
- Should Mr B not be prepared to go along with making a joint application, if Ms A has resided there for at least six months before making her application. Should Ms A decide to move to a third Member State of which she is not a citizen, she would be allowed to apply for a divorce there only if she is habitually resident there and has resided there for at least one year before making her application.

Ms A will be made aware that Mr B, who intends to remain at the spouses' present common residence in Member State 2, is in a rather more favourable position in that he can apply for a divorce to a court of that Member State immediately. Ms A can also do so there since Mr B is still habitually resident in that Member State, whereas to make the application in Member State 1, she would have to wait for at least six months.

Should Mr B decide to raise the application in Member State 2, that action would effectively prevent Ms A from subsequently applying in Member State 1. This is because Article 19(1) of the Regulation establishes that where proceedings involving the same cause of action and between the

same parties are brought before courts of different Member States which have jurisdiction to take the case under the Regulation, the competent court first seised proceeds with the case and the court second seised must stay its proceedings and once the competence of the court first seised is established should not proceed with the case; this is under the *Europea lis pendens* rule in that Article.

The Regulation applies only to the dissolution of matrimonial ties, but does not deal with issues such as grounds of divorce, the property consequences of the marriage, maintenance obligations⁽⁹²⁾ or other measures which may be ancillary to the divorce.

6.1.3.2. *Recognition and enforcement of orders in matrimonial proceedings under Brussels IIa*

Based on the principle of mutual trust, a judgment given in one Member State shall be recognised in all other Member States. The grounds for non-recognition are kept to a minimum. In the case of judgments regarding separation, divorce or annulment of a marriage, no special procedure is required for updating the civil status records of a Member State. It is also a basic principle under the Brussels IIa Regulation, as under the Brussels I Regulation, that the State addressed should review neither the jurisdiction of the court in the Member State of origin nor the findings of fact of that court. Judgments related to matrimonial matters are recognised by operation of law and can be enforced in other Member States once they have been declared enforceable by the relevant court in the Member State of

enforcement (*exequatur*). The decision to grant an *exequatur* can be reviewed upon appeal. Legalisation is not required for any document including the divorce order submitted for recognition and enforcement.

6.1.4. Brussels IIa and Parental Responsibility

6.1.4.1. *Scope*

The Regulation is very wide as to the scope of issues of parental responsibility. It covers the traditional forms of parental duties in parent-child relationships such as the determination of the place of residence of the child and rights of contact, guardianship, measures for the protection of the child in relation to their property. The placement of the child by a public authority mentioned in paragraph 6.1.8 is also covered. It provides rules in relation to jurisdiction of the courts in such matters and the recognition and enforcement of orders on parental responsibility.

6.1.4.2. *Jurisdiction in parental responsibility — Articles 8, 9, 12 and 13*

The general rule is that jurisdiction lies with the courts in the Member State of the child's habitual residence. The term habitual residence is nowhere defined in the Regulation but it is intended to have an autonomous meaning and this has been confirmed by the Court of Justice of the European Union in a number of cases⁽⁹³⁾. In addition, the Regulation introduces a limited possibility, and subject to certain conditions, for a court of a Member State other than in which the child is habitually resident to have jurisdiction in relation to parental responsibility where for example the matter is connected

(92) See below at Chapter 7.

(93) See, for example, the following cases: A, C-523/07 of 2 April 2009, and *Mercredi v Chaffe*, C-497/10 PPU of 22 December 2010.

with pending divorce proceedings under Article 3 of the Regulation in that other Member State⁽⁹⁴⁾. It also provides for jurisdiction based on the presence of the child in a Member State but only where it is not possible to determine the habitual residence of the child⁽⁹⁵⁾. Where a child moves across a border from the Member State of their habitual residence to another with the agreement of the holders of parental responsibility (i.e. mostly the parents) the courts in the first State continue to have jurisdiction in respect of the variation of any orders for contact but only for a period of three months following the move and where the holder of access rights is still living there⁽⁹⁶⁾.

6.1.4.3. *Transfer of cases between courts — Article 15*

The Regulation contains a further innovative rule in European law whereby a court which is seised of a case, and has jurisdiction on the substance, by way of exception can transfer it to a court of another Member State if the latter is better placed to hear the case. The court may transfer the entire case or a specific part thereof.

(94) See Article 12(1).

(95) See Article 13.

(96) See Article 9.

Because under the general rule in Article 8, jurisdiction lies with the courts of the Member State of the child's habitual residence at the time the court was seised, jurisdiction does not shift automatically where the child acquires habitual residence in another Member State during the court proceedings. However there may be circumstances where, exceptionally, the court which has been seised ('the court of origin') is not best placed to hear the case. In such circumstances Article 15 allows the court of origin to transfer the case to a court of another Member State provided that this is in the best interests of the child. The procedure for effecting such a transfer and the categories of court to which the transfer may be made are set out in the Article. Once a case has been transferred to the court of another Member State, it cannot be further transferred to the court of a third Member State⁽⁹⁷⁾.

6.1.4.4. *Jurisdiction in Child Abduction situations — Article 10*

Some children are abducted from one Member State to another by parents who want to bring a case for parental responsibility in relation to those children, for example, before a judge of their own nationality in the hope of receiving more favourable treatment. Under the Regulation the unlawful removal or retention of a child cannot result in a shift of jurisdictional competence from the courts of the Member State of the child's original habitual residence unless all those with custody rights as defined in the Regulation have acquiesced or the child has resided in the new State for at least a year after the person having rights of custody has had or should have had knowledge of the whereabouts of the child and either no application for return under the Hague Child Abduction Convention has been lodged within that year or an application having been made is withdrawn, or if an

(97) See Recital (13).

order for custody has been made in the Member State of the child's original habitual residence which does not entail the return of the child to that State. In this way parents who think that they can gain advantage by taking their children unilaterally to another Member State are deterred from doing so by the fact that within the European Union it is clear that such activity will not lead to a change in the jurisdiction in matters of parental responsibility.

6.1.5. The functioning of the Hague Child Abduction Convention in the European Union — Article 11

6.1.5.1. *The basic principles of the Convention and the Regulation*

The Hague Convention of 1980 on the Civil Aspects of International Child Abduction continues to operate within the European Union but the Regulation contains provisions which complement the operation of the Convention between the Member States. These provisions are intended to strengthen the functioning of the Convention and in particular to reinforce the central principle of both the Convention and of the Regulation that it is against the best interests of children that they be removed or retained unlawfully away from the State of their habitual residence. This principle is supported in turn by the procedural principle that if such a removal or retention takes place the child or children concerned should be returned to the state of their habitual residence as quickly as possible, if the court so decides, and it is for the court of that State to make appropriate decisions in the best interests of the children as to with whom they should live and have contact and on what basis.

6.1.5.2. *The complementary provisions of the Regulation — Articles 11(1) to 11(5)*

Article 11 contains a number of provisions which are intended to strengthen these basic principles and which are to be applied in cases where the return of a child is sought under the Convention from one Member State to another; these are as follows:

- In considering the application for return and any opposition to it through the exceptions provided in Articles 12 and 13 of the Convention unless this is not appropriate, the child is to be given an opportunity to be heard during proceedings, having regard to their age or maturity. The Regulation does not specify how this should be done and that is left to the national procedural law of the Member States. However, it is clear from the provision that the court which is considering the return of the child should consider whether they should be heard — Article 11(2).
- Proceedings for return under the Convention should be concluded as expeditiously as possible and unless exceptional circumstances make this impossible should take no longer than six weeks after the application is lodged until judgment⁽⁹⁸⁾ is issued; this provision is similar to those in the Convention⁽⁹⁸⁾ and reinforces the proposition that prompt return of children is a fundamental aim of both instruments — Article 11(3).
- Under Article 13(1)(b) of the 1980 Hague Convention mentioned above parents may seek to avoid an order being made for the return of the children whom they have removed unlawfully by

(98) See Articles 2 and 11.

claiming that the return of the child concerned would put the child at grave risk of physical or psychological harm or in an intolerable situation. As with the other exceptions the onus of establishing the risk to the child to the satisfaction of the court rests with the person seeking a non-return order. In fact this exception has generally been construed very narrowly by courts in most Contracting States including EU Member States and the Regulation reinforces this construction by providing that this exception cannot be used to found non-return if it is established that adequate measures of protection have been made for the child after they return to the State of habitual residence in the courts of which welfare issues are to be decided taking into account the best interests of the child — Article 11(4).

- Unless the person requesting the return has been given the opportunity to be heard the court cannot refuse return — Article 11(5).

6.1.5.3. What happens if a non-return order is issued — Articles 11(6) to 11(8)

As noted there are limited exceptions set out in the Convention on the grounds of which the court will not make an order to return a child to the State of habitual residence following an unlawful removal or retention in another State. To prevent parents seeking to take advantage of these, often on rather spurious grounds, and to ensure that the long-term future of children who have been subjected to such action will be decided in the State of their habitual residence, the Regulation states not only that the courts of the Member State of the child's habitual residence before the

abduction retain jurisdiction⁽⁹⁹⁾, but also after the abduction those courts will have the final say as to the long-term future of the child. So a decision based on Article 13 of the Convention not to return the child issued by the courts in the Member State to which the child has been abducted may be followed by a later judgment requiring the return of the child issued by the competent courts in the Member State where the child habitually resided immediately before the abduction.

6.1.5.4. Recognition and enforcement of an order for return of a child following a non-return order — fast-track procedure — Articles 11(8) 40(1)(b) and 42

If such a judgment requiring return of the child is issued, it is to be recognised and enforced without any special procedure (such as exequatur), provided that certain procedural safeguards are met, for example that the court in the Member State of the child's habitual residence gave the child an opportunity to be heard⁽¹⁰⁰⁾. The court which has made the non-return order will send the case papers to the court with jurisdiction in the child's country of habitual residence immediately before the wrongful removal or retention. The parties are invited by the court with jurisdiction in the child's country of habitual residence immediately before the wrongful removal or retention to make submissions to that court; if a submission is made the court will examine the question of custody.

(99) See Article 10 and paragraph 6.1.4.4.

(100) See Article 42(2)(a).

6.1.6. Recognition and enforcement of orders for contact — fast-track procedure — Articles 40(1)(a) and 41

The Brussels IIa Regulation followed the enforcement provisions in the 1996 Hague Convention on Jurisdiction, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children and added certificates to facilitate the circulation within the Union of decisions on divorce and parental responsibility, including orders for contact, issued in a Member State. The certificate on rights of access includes statements on the procedure followed by the court: when the judgment is given in default of appearance the certificate will confirm that the person defaulting was served in a way which enabled them to arrange to defend the case; that all parties and the child, in the light of the child's age and maturity, were given the opportunity to be heard. There is no appeal against the issue of the certificate in the Member State of origin; the certificate can be rectified (Article 43). The certified judgment cannot be enforced in the Member State of enforcement if it is irreconcilable with a subsequent enforceable judgment.

6.1.7. Recognition and enforcement of orders — standard procedure — Articles 21 to 39

For other orders on parental responsibility the procedure is similar to that for orders subject to the procedure in the Brussels I Regulation. Once granted and enforceable the order is issued with a certificate in the standard form set out in the Regulation⁽¹⁰¹⁾. The procedure for applying for a declaration of enforceability, or registration for enforcement in the UK (Article 28) is

(101) See Articles 37 and 39 and Annex II.

according to the law of the Member State of enforcement (Article 30). The person seeking enforcement applies for a declaration of enforceability in the Member State where the order is to be enforced. Once issued this is drawn to the attention of the person against whom enforcement is sought according to the procedures required under national law. That person may seek to oppose the declaration but only on the grounds set out in the Regulation⁽¹⁰²⁾. Actual enforcement of the order is carried out according to the procedures required under national law⁽¹⁰³⁾.

6.1.8. Placement of children in care in another Member State — Articles 55(d) and 56

It has been mentioned that the Regulation covers cases which involve decisions to place children in institutional care or with foster parents. Such decisions on parental responsibility may involve a child being placed in another Member State and where this is contemplated there is a special procedure set out in the Regulation. Before the court with jurisdiction can make the placement order it must first consult the central authority or the authority with jurisdiction in the Member State in which placement of the child is contemplated if the intervention of a public authority is needed in that State. Only if the competent authority agrees can the placement order be made. If public authority intervention is not needed for the placement of a child in a foster family in another Member State consent is not needed and the placing authority need only inform the Central Authority or the authority with jurisdiction⁽¹⁰⁴⁾. The Central Authorities established under the Regulation are to assist the process by providing information and assistance to the

(102) See Article 23.

(103) See Article 47.

(104) See Article 56.4.

courts. Member States are required to establish clear rules and procedures for the purposes of the consent referred to in Article 56 of the Regulation, in order to ensure legal certainty and expedition. The procedures must, inter alia, enable the court which contemplates the placement easily to identify the competent authority and the competent authority to grant or refuse its consent promptly⁽¹⁰⁵⁾.

6.1.9. Cooperation of Courts and Central authorities — Articles 11(6) to 11(8), 15(6), 42(2)(c), 53 to 55 and 67

As in the 1980 Hague Child Abduction Convention and the 1996 Hague Convention on Jurisdiction, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children a fundamental and important role is given to Central Authorities in the Member States to cooperate with each other and with other relevant authorities in the fulfilment of the aims and provisions of the Regulation. For this purpose one or more Central Authorities are to be established by each Member State. There will be more than one Central Authority where a Member State has two or more legal systems⁽¹⁰⁶⁾. The duties of the Central Authorities are both general and specific. An additional function of the Central Authorities under the Regulation is to assist the courts in their cooperation notably as regards the return of children after a non-return order and where the courts are contemplating transfer of a case or a cross-border placement. The Regulation came into operation on the basis that cooperation between Central Authorities and communication between them

and between the courts⁽¹⁰⁷⁾ of the Member States for the purposes of the Regulation would be supported by the European Civil Judicial Network in civil and commercial matters (EJN)⁽¹⁰⁸⁾. The purposes of this communication and cooperation is to seek to assist in resolving what are frequently extremely difficult and sensitive cases involving children⁽¹⁰⁹⁾.

6.2. Applicable Law in Divorce — The ‘Rome III’ Regulation⁽¹¹⁰⁾

6.2.1. Background

A proposal for a Regulation dealing with applicable law in divorce was launched in July 2006 by the European Commission. Negotiations proceeded on this proposal until it became clear, in 2008, that there were insurmountable difficulties in securing the necessary unanimity for adoption by the Member States⁽¹¹¹⁾. Shortly thereafter a group of Member States⁽¹¹²⁾ resumed the initiative under the new arrangements for enhanced Cooperation in the

(107) See Articles 11(6) and (7), 15(6), 53, 55(c) and (d) and 56.

(108) See Article 54; The EJN comprises a network of contact points and the central authorities under the Regulation; see Chapter 14 below regarding the European Judicial Network in civil and commercial matters.

(109) See in this context Article 55(e).

(110) 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.

(111) Measures on Family Law are required to be adopted unanimously by the Member States in Council unlike most measures in Civil justice matters where a qualified majority in the Council is sufficient.

(112) Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia.

(105) CJEU, judgment of 26 April 2012, *Health Services Executive*, Case C-92/12, paragraph 82.

(106) See Article 53.

Treaty for the Functioning of the European Union⁽¹¹³⁾ and this led to the adoption of the Rome III Regulation on this subject.

6.2.2. Territorial and material scope

On and from 21 June 2012, 14 Member States became bound by the uniform rules on applicable law as regards divorce and legal separation. These were the original 15 States which applied to cooperate in this enhanced procedure, minus Greece which withdrew from the negotiations and then subsequently gave notice of its intention to be bound by the Regulation. Lithuania is also now bound by the Regulation⁽¹¹⁴⁾. The Regulation excludes from material scope a number of matters of family law, similar to those excluded from the scope of the Brussels II a Regulation⁽¹¹⁵⁾, many of which are now dealt with separately in other Regulations. The Regulation is of universal character, meaning that the law designated by this Regulation shall apply whether or not it is the law of a Member State participating in the Regulation.

(113) TFEU Article 328.1.

(114) Greece became bound, with effect from 29 July 2015 see Commission Decision (2014/39/EU) of 27 January 2014 and OJ L231/41, 28.1.2014; from 22 May 2014 the Regulation applies also in Lithuania; see Commission Decision of 21 November 2012 and OJ L 323, 22.11.2012, p.18.

(115) The subject matters excluded are capacity of natural persons, the existence, validity, recognition or annulment of a marriage, the name(s) of the spouses, the property consequences of marriage, parental responsibility, maintenance obligations and trusts and succession.

6.2.3. Choice of Law

In terms of the Regulation the parties are permitted to make a choice between any of the following laws:

- The law of the State of the habitual residence of the spouses at the time the agreement to designate the law applicable is concluded;
- The law of the State of their last habitual residence, if one of the spouses is still residing there at the time the agreement to designate the law applicable is concluded;
- The law of the State of the nationality of either of the spouses at the time the agreement to designate the law applicable is concluded; or
- The law of the forum

An agreement designating the applicable law may be concluded and modified at any time, but at the latest at the time the court is seised. Also, if the law of the *forum* so provides, the spouses may also designate the law applicable during the course of proceedings. If they do the designation so made shall be recorded in court in accordance with the law of the *forum*. The material validity of a choice of law is to be determined under the law which, in terms of the choice made, would be applicable were the agreement to be valid. The agreement on the choice of law has to be expressed in writing, dated and signed by both spouses. Other additional formal requirements for this type of agreement may apply depending on the law of the Member State(s) of habitual residence of the spouses.

6.2.4. Applicable law in the absence of a choice

Where no choice of law has been made the following rules shall apply to determine the law applicable; the law of the State:

- where the spouses are habitually resident at the time the court is seized; or, failing which
- where the spouses were last habitually resident, provided that the period of residence did not end more than one 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
- of which both spouses are nationals at the time the court is seized; or, failing that
- where the court is seized.

6.2.5. Other rules

6.2.5.1. Law of the forum applied

Where the law applicable pursuant to the Regulation makes no provision for divorce or does not grant equal access to divorce or legal separation because of the sex of one of the spouses, the law of the *forum* shall apply.

6.2.5.2. Exclusion of renvoi

The application of the law of a State refers to the rules of law in force in that State other than its rules of private international law⁽¹¹⁶⁾.

6.2.5.3. Public policy

A court may refuse to apply a provision of the law designated in accordance with the provisions of the Regulation only if such application is manifestly incompatible with public policy of that forum.

6.2.5.4. Differences in national law

The Regulation does not oblige the courts of a Member State whose law does not provide for divorce or does not deem a marriage to be valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of the rules in the Regulation.

(116) See, for a general description of the effect of the exclusion of renvoi, paragraph 8.3.9 below.



Maintenance Obligations

7.1. Background to the Maintenance Regulation — the Brussels I Regulation and the Hague 2007 Maintenance Convention

Rules on jurisdiction, recognition and enforcement in respect of maintenance obligations within the then EC were included in the Brussels I Regulation. It enabled the maintenance creditor to sue in the courts of the Member State of their domicile or habitual residence. This arrangement worked well up to a point but it still required the maintenance creditor to go through the process of seeking a declaration of enforceability in order to be able to enforce the order in another Member State. This was difficult for many creditors who needed rapid and effective enforcement of the order since they relied on the payment of the maintenance. This was a more acute problem in relation to maintenance for children.

In 2005, in order to remove the intermediate measures needed for the recognition and enforcement of orders for payment of maintenance and to establish common procedural rules to simplify and accelerate the settlement of cross-border disputes concerning maintenance claims, the European Commission adopted a proposal for an EU Maintenance Regulation.

At the same time as the EU negotiations on this proposal, the Hague Conference on Private International Law was engaged in the negotiations which led to the adoption in November 2007 of the Hague Convention on the Recovery of Child Support and Other Forms of Family Maintenance. The 2007 Hague Convention offers a comprehensive framework for dealing with maintenance obligations with States which are party to it. It is accompanied by an optional Protocol containing rules on the law applicable

to maintenance obligations. The European Commission and the Member States took full part in these negotiations and incorporated many of the rules agreed at international level into the Maintenance Regulation which was adopted in December 2008.

The 2007 Hague Convention was ratified by the European Union on 9 April 2014. It entered into force for all Member States except Denmark on 1 August 2014. The Protocol was adopted on 8 April 2010 by the European Union⁽¹¹⁷⁾ and applies since the entry into force of the Maintenance Regulation on 18 June 2011, between all the Member States except the United Kingdom and Denmark. EU Member States will use the 2007 Hague Convention only with non-EU States which are party to it.

7.2. Purpose of the Maintenance Regulation⁽¹¹⁸⁾

The central purpose of the Maintenance Regulation is to create an instrument to simplify the process by which a maintenance creditor in one Member State of the European Union can apply to obtain payment of maintenance quickly and simply from a maintenance debtor in another Member State through the use of the provisions on jurisdiction, conflict of laws, recognition and enforceability, enforcement, legal aid and cooperation between Central Authorities. A maintenance creditor who has a decision in one Member State should be able to have it declared enforceable (when necessary) and enforced in another Member State under simplified procedures set out in

(117) Council decision (2009/941/EC); see OJ L 331/17, 16.12.2009.

(118) Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

section 7.6 below. A maintenance creditor can also seek to obtain payment of maintenance by establishing a maintenance decision in another Member State. A maintenance debtor should also benefit from the assistance of Central Authorities to make applications not only for the recognition of decisions but also for their modification. The situation in which public bodies subrogate to the rights of a creditor is also covered by the Regulation.

7.3. Scope

7.3.1. Territorial scope

The Regulation applies to and binds all the EU Member States except Denmark. However, Denmark has agreed to be bound by it as set out in the agreement between the EC and Denmark of 19 October 2005⁽¹¹⁹⁾ to the extent that this Regulation amended the Brussels I Regulation (EC)⁽¹²⁰⁾. The effect of this is that the Regulation has effect as regards Denmark with the exception of the provisions in Chapters III (applicable law) and VII (cooperation between Central Authorities)⁽¹²¹⁾. This means the rules in the Regulation on jurisdiction, recognition and enforcement of judgments and access to justice apply as regards Denmark on that basis and subject to the requirements of the Regulation for non-Hague Protocol States.

As regards the United Kingdom and Ireland, each of these Member States had to give notice within three months of the proposal being made that

they wished to be bound by the Regulation⁽¹²²⁾ if they wished to be so bound. Ireland opted in before the start of negotiations on the EU proposal which became the 2009 Maintenance Regulation; the United Kingdom did not⁽¹²³⁾. The United Kingdom participated in the negotiations and opted in subsequently and is bound by the Regulation except that the United Kingdom has not ratified the 2007 Hague Protocol on Applicable Law and so the rules on recognition and enforcement of decisions in the Regulation apply to the United Kingdom as set out at section 7.6.

7.3.2. Subject matter scope

The Regulation applies to all maintenance obligations which arise through family relationships, parentage, marriage or affinity. It contains rules on jurisdiction, applicable law, recognition and enforcement and cooperation. It also provides important rules relating to access to justice notably in relation to the availability of legal aid and the assistance to maintenance creditors and debtors available through the Central Authorities.

7.4. Jurisdiction

The jurisdictional rules of the Regulation apply to courts, which are defined to include the administrative authorities listed in Annex X to the Regulation⁽¹²⁴⁾.

(119) See OJ L 299, 16.11.2005, p. 62.

(120) Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; OJ L 149, 12.6.2009, p. 80.

(121) See OJ L 149, 12.6.2009.

(122) See Introduction paragraph 1.3 and the Protocol on the position of the United Kingdom and Ireland annexed to TEU and TFEU.

(123) See Recitals (46) and (47).

(124) See OJ L 293, 11.11.2011, p. 24. See also for Denmark: OJ L 251, 21.9.2013, p.1.

7.4.1. General rules — Article 3

The following are the courts with jurisdiction to hear cases under the Regulation.

The court:

- for the place where the defendant (maintenance debtor) is habitually resident,
- for the place where the creditor is habitually resident,
- which under its own law has jurisdiction to hear status proceedings if the maintenance claim is ancillary to those proceedings, or
- which under its own law has jurisdiction to hear parental responsibility proceedings if the maintenance claim is ancillary to those proceedings,

provided in the last two options above that jurisdiction is not based solely on the nationality of one of the parties.

7.4.2. Choice of court — Article 4

Parties may agree the court to have jurisdiction to settle any existing or future dispute about maintenance except disputes in relation to a maintenance obligation towards a person under the age of 18. The following courts may be chosen:

The court or courts, at the time of the conclusion of the choice of court agreement or when the court is seised:

- of the Member State in which one of the parties is habitually resident,
- of the Member State of which one of the parties has the nationality,

- in the case of maintenance obligations between spouses or former spouses, which have jurisdiction in matrimonial matters, or
- in the case of maintenance obligations between spouses or former spouses, of the Member State of the last common habitual residence, for a period of at least one year.

The choice of court agreement has to be in writing or in any communication by electronic means which provides a durable record of it. The jurisdiction conferred by the agreement is exclusive unless the parties have agreed otherwise.

7.4.3. Other jurisdictional rules — appearance of the defendant, joint nationality and forum necessitatis

If the defendant enters an appearance before a court without contesting its jurisdiction, that court shall have jurisdiction.⁽¹²⁵⁾ The courts of the joint nationality of the parties have jurisdiction for maintenance only if there is otherwise no jurisdiction under the Regulation or under the 2007 Lugano Convention⁽¹²⁶⁾. Exceptionally a court in a Member State where there is sufficient connection with the dispute may take jurisdiction where there is no other court of a Member State with jurisdiction and proceedings cannot reasonably be brought in a third State⁽¹²⁷⁾.

7.4.4. Modification of decisions on maintenance — Article 8

Once a decision has been given in a Member State or a State party to the 2007 Hague Convention where the maintenance creditor is habitually

(125) Article 5.

(126) Article 6.

(127) Article 7.

resident, proceedings to modify or replace that decision cannot be commenced by the maintenance debtor in any other Member State so long as the maintenance creditor remains habitually resident in the State which issued the decision. This is subject to a number of exceptions in particular where the parties have made a choice of court agreement for the jurisdiction of that other Member State under the Regulation or where the maintenance creditor has submitted to the jurisdiction of that other Member State's courts.

7.4.5. *Lis pendens* — Article 12

Where proceedings on the same cause of action and between the same parties have been brought in the courts of different Member States, the court first seised if it has jurisdiction will take the case and the other court must stay its proceedings until the jurisdiction of the court first seised is established and then decline jurisdiction.

7.5. Applicable Law — Article 15

As mentioned, the Regulation applies the optional 2007 Hague Protocol by which all the Member States are bound except the United Kingdom and Denmark. The rules set out in the Protocol are outlined briefly in the box below.

The applicable law shall govern the law in respect of all maintenance obligations from a family relationship, parentage, marriage or affinity; where the obligation is in respect of a child it is regardless of whether the parents

are married or not⁽¹²⁸⁾. Any law may apply even if it is that of a State which is not a contracting party to the protocol⁽¹²⁹⁾.

The general rule is that except as otherwise provided the law applicable is that of the habitual residence of the maintenance creditor⁽¹³⁰⁾. If that law does not enable the creditor to obtain maintenance from the debtor in obligations between parents and children, and generally towards those under 21, then the law of the forum will apply. Also, for those types of obligations, if the creditor seises the court of the State where the debtor has their habitual residence, the law of the forum shall apply, except if that law does not enable the creditor to obtain maintenance from the debtor. In such case, the applicable law will be the law of the State of the habitual residence of the creditor⁽¹³¹⁾.

In spousal maintenance cases or in cases of maintenance between ex-spouses or parties to a marriage which has been annulled, if a party objects to the law of the creditor's habitual residence and the law of another State is more closely connected to the marriage, notably that of the State of the last common habitual residence of the spouses, that law shall apply⁽¹³²⁾.

There are rules to enable parties to agree to designate the law applicable, both in relation to a particular proceeding whether already instituted or about to be instituted, as well as in general⁽¹³³⁾. In the case of a general designation the laws which may be chosen are:

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- (128) Protocol Article 1.
 - (129) Protocol Article 2.
 - (130) Protocol Article 3.
 - (131) Protocol Article 4.
 - (132) Protocol Article 5.
 - (133) Protocol Article 7.

- that of any State of the nationality of either party
- that of the State of the habitual residence of either party in each case at the time of the designation,
- the law applicable by choice of the parties to their property regime or to their divorce or legal separation or the law already applied to such matters by the authority seised⁽¹³⁴⁾.

Any agreement to designate the law applicable is to be signed by both parties, in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference.

As with choice of court it is not possible to make a choice of law on maintenance obligations in respect of a person under the age of 18; that is also the case in respect of a person with impaired or insufficient personal faculties⁽¹³⁵⁾.

The law applicable governs various aspects of maintenance including whether and to what extent maintenance is liable, retroactive claims, the basis of calculation of the amount liable and indexation, prescription and the limitation of actions and the extent of the obligation of maintenance debtors where a public body seeks reimbursement of payments made to a creditor in place of maintenance⁽¹³⁶⁾.

There are special provisions as to the application of the rules as regards States with several legal systems and also the EU and other organisations of that nature⁽¹³⁷⁾.

(134) Protocol Article 8(1).

(135) Protocol Article 8(2) to (5).

(136) Protocol Article 11.

(137) Protocol Articles 15 to 17, 24 and 26.

7.6. Recognition and Enforcement

7.6.1. General background

There are two separate procedures for the recognition and enforcement of maintenance decisions depending on whether or not a Member State is bound by the 2007 Hague Protocol.

7.6.2. Member States bound by the Protocol

Where a decision on maintenance is given in a Member State bound by the 2007 Hague Protocol, it must be recognised in another Member State without any special procedure and without any possibility of opposing its recognition. A decision given in a Member State bound by the 2007 Hague Protocol and enforceable there is enforceable in another Member State without the need for a declaration of enforceability. Where a maintenance debtor has not entered an appearance there is a limited right to apply for a review of the decision in the Member State of origin of the decision. Enforcement can take place on production of a copy of the decision, together with an extract from the decision on the form set out in Annex I to the Regulation and where appropriate a document showing the arrears of maintenance due. It may be necessary to supply a translation of the content of the form in the relevant official language of the Member State of enforcement. Once this is issued the authorities in the Member State of enforcement have the right to refuse or limit enforcement of the decision as set out in Article 21.

7.6.3. Member State not bound by the Protocol

Where the decision is given in a Member State not bound by the 2007 Hague Protocol (United Kingdom and Denmark) recognition requires no special procedure in another Member State. An enforceable decision made in a Member State not bound by the 2007 Hague Protocol can be refused recognition in the Member State where recognition is sought and requires a declaration of enforceability in the Member State addressed. This procedure is overall the same as that used in the original Brussels I Regulation⁽¹³⁸⁾. However, specific deadlines must be respected: except where exceptional circumstances make it impossible, the declaration of enforceability must be issued at the latest within 30 days of the completion of the formalities to apply for it. The court seised of an appeal against that declaration must give its decision within 90 days from the date it was seised, except where exceptional circumstances make this impossible⁽¹³⁹⁾.

7.6.4. Authentic instruments and court settlements⁽¹⁴⁰⁾ — Article 48

Authentic instruments and court settlements which are enforceable in the Member State of origin are recognised and enforceable in another Member State in the same way as court decisions. An extract from the court settlement or authentic instrument must be issued by the competent authority in the Member State of origin using the appropriate forms in the Annexes to the Regulation.

(138) See above at paragraph 2.2.6.

(139) Article 30.

(140) See definitions at Article 2.

7.7. Legal aid and exemption from costs — Articles 44 to 47

The Regulation enables parties in maintenance cases to obtain legal aid for effective access to justice. Where an application is made through the Central Authorities under the Regulation, legal aid should be provided by the requested Member State to any applicant who is resident in the requesting Member State. This will not apply if and to the extent that this is not necessary to enable parties to make their case and the Central Authority provides such services as are necessary without charge.

The requested Member State will provide free legal aid in respect of all applications by a creditor through the Central Authority concerning maintenance obligations arising from a parent-child relationship towards a person under the age of 21. However in relation to applications for establishment or modification of a decision concerning such maintenance obligations, the competent authority of the requested Member State may refuse free legal aid if it considers that, on the merits, the application or any appeal or review is manifestly unfounded.

The entitlement to legal aid is not to be less than what is available to parties in equivalent domestic cases. Legal aid means the assistance necessary to enable parties to know and assert their rights and to ensure their application is dealt with effectively and as necessary will cover:

- pre-litigation advice,
- legal assistance in bringing a case before an authority or a court and representation in court,
- exemption from or assistance with costs of proceedings and fees,

- costs payable by a losing party in receipt of legal aid to the winning party if such costs would have been covered had the recipient of legal aid been habitually resident in the Member State of the court seised,
- interpretation,
- translation of documents required by the court or by the competent authority and presented by the recipient of legal aid which are necessary for the resolution of the case,
- travel costs of the recipient of legal aid and other persons who have to be physically present in court to make that party's case when the court decides no other way of hearing them will do.

A party who has benefited from complete or partial legal aid or exemption from costs or expenses in the Member State of origin of the maintenance decision is entitled to the most favourable legal aid or the most extensive exemption from costs or expenses provided for under the law of the Member State of enforcement. A party who has benefited from free proceedings before an administrative authority of the Member State of origin listed in Annex X to the Regulation is also so entitled provided they present in the Member State of enforcement a statement from the competent authority of that State to the effect that they fulfil the financial requirements to qualify for the grant of complete or partial legal aid and/or exemption from costs or expenses. Such competent authorities are listed in Annex XI to the Regulation⁽¹⁴¹⁾.

Legal aid may be granted under national law (including means and merits tests) where it is not granted under the Regulation.⁽¹⁴²⁾ Legal aid is to be available under the provisions of the Regulation not only for proceedings

(141) See OJ L 293, 11.11.2011, p. 24. See also for Denmark: OJ L 251, 21. 9.2013, p. 1.

(142) See Article 47(1).

before the court but also, where the decisions and procedures on granting or enforcement of maintenance are taken or carried out by other authorities, in relation to proceedings before such authorities⁽¹⁴³⁾.

7.8. Central authorities — Articles 49 to 63

The Central Authorities established under the Regulation are given a wider role than is the case in other maintenance instruments. In particular they are to assist creditors who apply for the enforcement or establishment of maintenance decisions. There is at least one Central Authority in each Member State; where a State has more than one system of law or several territorial units it is free to appoint more than one Central Authority⁽¹⁴⁴⁾. The functions of the Central Authorities are set out in detail in the Regulation⁽¹⁴⁵⁾. The Central Authorities may take appropriate measures or may facilitate their provision to assist maintenance creditors to secure payment of the sums due including the location of debtors and in appropriate cases information about their income, assets and bank accounts. In the exercise of their functions the Central Authorities are to cooperate between themselves and transmit applications and information to the appropriate authorities including the courts. Central Authorities are not to charge for their services⁽¹⁴⁶⁾. The functions of Central Authorities may, to the extent permitted by the national law of the Member State concerned, be performed by public bodies or other bodies subject to the supervision of the competent authorities of that Member State.

(143) See definition of 'court' in Article 2(2); the authorities which are subsumed within the definition of 'court' are to be listed in Annex X.

(144) Article 49(2).

(145) See Articles 50 and 51.

(146) See in general for the role, powers and functions of the Central authorities chapter VII of the Regulation.



Succession

8.1. Background and purposes of the Regulation on Succession⁽¹⁴⁷⁾

With more and more citizens of the European Union exercising their fundamental right to move to and settle in Member States other than those of their origin or to acquire property there, it has become increasingly necessary to consider the need to put in place a legal framework for faster, easier and cheaper procedures in the area of cross-border successions. Thus the European Council meeting in Brussels in December 2009 resolved that, as a part of the Stockholm Programme, mutual recognition of orders and other measures should be extended to matters of succession and wills which had been excluded from earlier instruments.

The European Commission took action in response by making a proposal for a Regulation on the subject which was adopted in July 2012 by the European Parliament and the Council. Although the Regulation applies in respect of the succession to persons who die on or after 17 August 2015 it will also have effects as regards the choice of law in succession and dispositions of property on death made prior to that date provided that these meet the conditions established in the Regulation⁽¹⁴⁸⁾. As with other civil judicial cooperation instruments this Regulation does not apply to Denmark. The UK and Ireland have decided not to participate.

(147) Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. It should be noted that, in addition to Denmark, the Regulation does not bind the UK and Ireland who have not opted in to its adoption.

(148) See Article 83.

The main purposes of the Regulation are as follows:

- to improve the legal certainty and foreseeability of jurisdiction of the courts in matters of succession including by ensuring that citizens who make a will can choose the law applicable to their succession, which also may impact on the court which will have jurisdiction;
- to ensure that it is clear which law will apply in succession, especially where the person whose estate is involved is connected to more than one Member State;
- to enable agreements as to succession to be drawn up with clear indication as to their scope and effect having regard to the law to be applied to govern them;
- to ensure that the identity and powers of those responsible for the administration of the estate of a deceased person are clear and that these powers are recognised and enforceable in Member States other than those where they originate;
- to ensure that decisions given in a Member State are recognised in the other Member States without any special procedure;
- to ensure that effect is given to authentic instruments in matters of succession so that these have the same effects in other Member States as in that where they were drawn up and authenticated or registered, and
- to make provision for an optional European certificate of succession which will indicate clearly who is entitled to succeed to the estate and who is empowered to administer the estate or execute the will.

The succession regime set out in the Regulation also has the potential advantage that it promotes a ‘unitary’ approach to succession, which is to say that it deals with the whole estate and does not favour a split between types of property, mostly between moveable and immoveable property, which is characteristic of a number of the succession regimes in some Member States.

Examples

Mr JMB from Portugal has lived and worked in Brussels for a number of years but intends to return to Portugal eventually. He has property and investments in Portugal and Brussels and a holiday house in the French countryside. His wife and family live in Brussels with him. If he has not made a will containing a choice of law questions will arise as to what law applies to the succession to his property and what courts/authorities have competence to deal with it. If he has and, say, he were to die suddenly in France questions arise as to what consequences this would have as regards succession to his estate.

Another example

Ms K is of Dutch background and has been working in Germany for several years. She has no children but a partner (under a civil partnership/same-sex marriage). She is about to retire and is planning to go to live with her partner in her newly acquired villa in Andalusia whilst retaining her roots and property interests in the Netherlands. She has made a will in the Netherlands which she intends should deal with all issues concerning her estate and it applies Dutch law. As matters stand this is not acceptable to the Spanish legal system — what would happen if she were to die?

8.2. Jurisdiction in Succession

8.2.1. The basic general rule and its variations — Articles 4 to 9

The succession as a whole will be subject to the jurisdiction of the courts of the Member State where the deceased had their habitual residence at the time of death. This rule comes with a number of exceptions, specifically as regards the choice of court and choice of law. Where the deceased has chosen the law of the State whose nationality they possessed at the time of making the choice or at the time of death to govern the succession, the courts of that State may be chosen by ‘the parties concerned’ to have exclusive jurisdiction. It is notable that the deceased is in this instance not one of the parties concerned. Therefore, a direct choice of court made by the deceased, say in a will, does not fall within this rule. However where a choice of law has been made in the will this may have effects as regards jurisdiction in the succession. The Regulation contains subsidiary rules whereby a court or the courts in the Member State whose law had been chosen by the deceased to govern the succession may have jurisdiction by virtue of a choice as noted above or where a court in the Member State of the deceased’s last habitual residence declines jurisdiction in their favour or where the parties to the proceeding have expressly accepted the jurisdiction of the court seised. Finally, apart from the foregoing rules, jurisdiction may be based on appearance by parties in the proceedings who had not exercised a choice of court.

8.2.2. Meaning of ‘Court’ — Article 3(2)

It is a very significant feature of the Regulation that the definition of ‘court’ is much broader than the meaning usually given in EU Civil Law instruments. In addition to judicial authorities competent as regards matters of succession, the term covers other authorities as well as professionals with such competence provided that they act or exercise judicial functions under powers delegated from or are under the control of a judicial authority. Such other authorities or professionals must also guarantee impartiality in carrying out these functions and be subject to review or appeal by a judicial authority. Their decisions should also have a similar force and effect as the decisions in these matters of judicial authorities. The Member States are to inform the European Commission as to which authorities and professionals in their States come within this description.

8.2.3. Jurisdiction — further provisions — Articles 10 and 11

Courts of a Member State may have jurisdiction in the succession of the estate of a person whose habitual residence at the time of death is not in a Member State of the European Union, if there are assets of the deceased's estate there and either the deceased had the nationality of that State at the time of death or, failing that, the deceased was previously habitually resident in that State for a period ending not more than five years before the court is seised of the matter. If there is no court of a Member State with jurisdiction on this basis the courts of the Member State where assets are located will nonetheless have jurisdiction to rule on those assets.

There is also a final fall-back rule where no court of a Member State has jurisdiction by virtue of these rules; in such a situation exceptionally the

courts of a Member State will have jurisdiction in the succession if it would not be possible for proceedings to be raised in a third State with which the succession is closely connected. This rule on *forum necessitatis* should ensure that there is always a court of a Member State available to deal with matters of succession.

8.2.4. Jurisdiction in relation to acceptance or waiver of a right of inheritance — Article 13

A further important rule in the Regulation determines jurisdiction where a person, under the law which is applicable to the succession, makes a declaration before a court about one of the following:

- acceptance or waiver of the succession,
- acceptance or waiver of a legacy or a reserved share,
- limitation of the liability of that person with respect to the liabilities of the deceased person's estate under the succession.

Under this rule the courts with jurisdiction are those of the Member State of the habitual residence of the person making the declaration provided that under the law of that Member State such a declaration may be made before a court.

8.2.5. Assets located in a third State — Article 12

Where in the deceased's estate there are assets located in a third State, that is a State which is not a Member State of the European Union or, as in the case of Denmark, Ireland and the UK, a Member State which is not bound by the Regulation, a court which is seised in the succession may, if

so requested by a party to the proceedings, decide not to make a ruling as regards any such asset if any decision which it might make in respect thereof is likely not to be recognised and enforced or declared enforceable in the third State concerned. Effectively in such cases it means that in respect of those assets separate proceedings will have to be raised in the third State where they are located. This rule is without prejudice to any rights of parties under the law of the Member State of the court seised to limit the scope of the proceedings.

8.3. Applicable Law

8.3.1. Applicable Law — scope — Article 23

The law applicable to the succession as determined following the rules in the Regulation governs the whole of the succession and any such law is applied whether or not it is of a Member State. In particular the following matters fall to be determined under that law:

- the causes, time and place of opening of the succession,
- determining the beneficiaries, their shares of the estate as well as succession rights of a surviving spouse or partner,
- capacity to inherit,
- disinheritance and disqualification by conduct,
- transfer to heirs and legatees of assets and rights as well as obligations of the estate,
- powers of those administering the estate as regards the management of the estate notably as regards sale and payment of creditors,
- liability for the debts,

- which parts of the estate are disposable, reserved shares and restrictions on disposal as well as other claims against the estate or the heirs
- obligations to restore or account for any gifts made by the deceased, and legacies in the determination of the shares of beneficiaries, and
- the distribution of the estate.

8.3.2. Applicable Law — General rule — Article 21

In contrast to the rule on jurisdiction and unless otherwise provided in the Regulation the law to be applied in a succession shall be that of the State — note not the Member State — of the habitual residence of the deceased at the time of death. If it is clear that there was a closer connection between the deceased and a State other than that whose law would apply under the foregoing rule, for example a State of an earlier habitual residence or of the nationality or domicile of the deceased, then the law of that other State shall be applicable.

8.3.3. Applicable Law — Choice of Law — Article 22

The only law which may be chosen by a person as regards that person's succession is the law of the State of their nationality at the time that the choice is made or at the time of their death. Where a person has more than one nationality then the choice can similarly be of any of the nationalities¹⁴⁹.

(149) The issue of considering a person as a national of a State falls outside the scope of this Regulation and is subject to national law, including, where applicable, international Conventions, in full observance of the general principles of the European Union.

The choice is to be expressed and made by declaration in, or otherwise demonstrated by the terms of, a disposition of property on death, that is to say a will or other testamentary document. Any question as to the substantive validity of the act in which the choice is expressed is to be governed by the law which is purported to be chosen. A testator can modify or revoke any choice in the same way as for any disposition on death. This last provision gives some limited freedom to citizens to reflect changes in their personal circumstances as their lives develop, especially if, as is frequently the case, a person decides after retiring from work to move to a Member State other than that in which they have been living during their working life.

8.3.4. Other rules on applicable law — Articles 24 and 25

There are various further provisions dealing with the law applicable as regards the admissibility and substantive validity of dispositions of property on death — that is wills and other testamentary writings — and also as regards the admissibility and validity of agreements as to succession made during the lifetime of a deceased person — known in some legal systems as an *inter vivos* disposition on death — as well as the binding effects of such an agreement as between the parties thereto. Such dispositions and agreements are to be governed, in the absence of a choice, by the law which would have been applicable to the succession of the deceased grantor had they died on the day on which the disposition was made or the agreement concluded. It is open to parties to make a choice of law on the same basis which⁽¹⁵⁰⁾ can be made generally for the succession.

(150) See previous paragraph.

8.3.5. Substantive validity of dispositions of property and succession agreements — Article 26

The issues which are regulated as regards substantive validity comprise:

- capacity of the testator to make the disposition,
- bars to a disposition in favour of, or of receiving property from, a certain person or persons by way of such disposition,
- admissibility of representation for the purposes of making the disposition,
- interpretation of the disposition,
- factors affecting the consent or intention of the person making the disposition such as fraud, duress and mistake.

8.3.6. Formal validity of dispositions of property and succession agreements — Article 27

A disposition of property on death or succession agreement, as well as a modification or a revocation of such a disposition or agreement is valid as regards form when it complies with the requirements of one of the following laws, namely the law of the State — note again not the Member State:

- in which the disposition was made or the agreement concluded
- of the nationality, domicile or habitual residence of the testator or at least one person concerned by the agreement at the time of death or when the disposition was made or agreement were entered into
- where immovable property is situated as far as concerns such property

With regard to the domicile of the testator or any person concerned in an agreement, whether or not such person is domiciled in a particular state is determined under the law of that State.

8.3.7. Appointment and the powers of the administrator of the estate of a deceased

There are special rules as regards the situation where it is mandatory under its own law for the court with jurisdiction in the succession under the Regulation to appoint an administrator to the deceased's estate but a foreign law is applicable as regards the succession. The court may in such a situation appoint an administrator under its own law being such a person as would be entitled under the law applicable to the succession to execute the will or administer the estate of the deceased. If under the law applicable to the succession the administrator would be a beneficiary and if there are conflicts of interest between the beneficiaries or with creditors of the estate, or the beneficiaries disagree about the administration of the estate or due to the nature of the assets the estate is complex to administer, the court may appoint, if so required under its own law, a neutral administrator to the estate. The powers of that administrator are to be those available under the law applicable to the succession exercised in accordance with special conditions as specified by the court. However the administrator will have to carry out the functions and powers conferred in accordance with the law and procedures under the law applicable to the succession.

8.3.8. Other rules on applicable law — Articles 30 to 33

- There are rules specifically about the applicability of certain specific rules to the succession in relation to certain types of

immoveable property and other assets as well as enterprises. Where the law of the state in which these are situated has special rules imposing restrictions regarding the succession to those assets and property then these rules will apply irrespective of which law applies in the succession. This is intended to have the effect of protecting the succession to family and other businesses which receive special treatment under the law of certain States⁽¹⁵¹⁾.

- There are special rules when a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question. In that case that right is to be adapted to the closest equivalent right *in rem* under the law of that State. The aims and the interests pursued by the specific right *in rem* and the effects attached to it must be taken into account⁽¹⁵²⁾.
- There are special rules about people who die as a result of a common calamity, say a road traffic accident, and in respect of whose succession different laws are applicable which either make different or no provisions for that situation. In such a tragic situation, where it cannot be established which of those involved predeceased the other or others, it is provided that none shall have any right to the succession of any of the others.⁽¹⁵³⁾
- Finally, where a person dies without leaving any person to succeed to their estate under the law applicable to the succession, the assets of the deceased may be disposed of under

(151) Article 30.

(152) Article 31.

(153) Article 32.

the law of the Member State where they are situated provided that all claims against the estate can be satisfied⁽¹⁵⁴⁾.

8.3.9. Renvoi — Article 34

Renvoi is the technical term given to the situation that the application of the law which governs a legal situation includes the application of the rules of Private International Law of that law, including its rules of applicable law and applying those rules leads to the law of a further State being applied. This can have the result that it is not clear which law will eventually apply and can even lead to the law of the State, say where the original disposition or agreement was made, being applied even if in that disposition or agreement the law of that State was not chosen. Because this can be confusing and uncertain for citizens very often this renvoi to the law of another State is avoided by excluding from the law applied the rules of private international law of that law so that only the substantive law will have effect. In the Regulation the application of the rules of private international law is dealt with only in so far as the law which under the Regulation will be applicable is that of a third State⁽¹⁵⁵⁾. The general rule is that the law applicable, if it is that of a third State, will include its rules of Private International Law but that is restricted to the situations where the effect is to render applicable thereby the law of a Member State or the law of another third State which would then apply its own law, in other words with no renvoi to the law of yet a further State. However renvoi is excluded altogether in respect of certain of the laws specified under the Regulation, namely those specified in Articles

21(2) (closer connection to a State whose law is applicable), 22 (choice of law), 27 (formal validity of dispositions on death), 28(b) (formal validity of acceptance or waiver where the law applicable is that of the State of habitual residence of the person making the declaration) and 30 (protective rules regarding family and other businesses and assets).

8.3.10. States with more than one legal system — Article 36

Where the law which would be applicable as a result of the application of the rules in the Regulation is that of a State which has more than one territorial unit having separate rules as regards succession, there are provisions as to how the Regulation will apply internally to such a State to determine which of the laws of the various territorial units should apply. In the first place where the State has internal rules as regards applicable law then these will apply. If there are none then the Regulation specifies that references to the habitual residence of the deceased in a State shall be construed as referring to habitual residence within a territorial unit of the State; where there is a reference to the law of the State of the nationality of the deceased that is construed as a reference to the territorial unit within the State with which the deceased had the closest connection; and where other connecting factors are referred to these shall be construed as being factors connecting the relevant aspect of the succession to the territorial unit with which the particular connection is established. These rules apply generally to determine the law applicable in States with various legal systems except in relation to the formal validity of wills as set out in Article 27. For that purpose if there are no internal rules in the State concerned applying the law of a particular territorial unit, the reference is to be construed as being to the law of that unit in the State with which the testator or anyone bound by a succession agreement had the closest connection. This would mean for example that

(154) Article 33.

(155) The notion of third States includes Member States not taking part in the Regulation, which are Denmark, Ireland and the United Kingdom; see paragraph 8.2.5.

where a person made a will in one part of such a State but had assets in another part it will be necessary to consider which is the closer connection as between these two having regard to this rule and the rules in Article 27.

8.4. Recognition and Enforcement

8.4.1. Background and purpose

In order to assist those involved in successions the rules on the recognition and enforcement of decisions given in Member States are streamlined and made simpler as well as enabling such decisions to have effect in Member States other than where they are given, which has not always been the case up until now. For this purpose a decision is defined to mean any decisions in a matter of succession given by a court of a Member State whatever it may be called⁽¹⁵⁶⁾ and that includes decisions given by court officers on matters of costs and expenses.

8.4.2. Rules on Recognition and Enforcement

The rules are very similar to those in the Brussels I Regulation to which reference is made⁽¹⁵⁷⁾.

8.4.3. Authentic Instruments and Court Settlements

8.4.3.1. *Acceptance of authentic instruments — Article 59*

There are also more developed rules for the acceptance and enforceability of authentic instruments. These rules ensure that where such instruments are granted in a Member State they shall have the same effect in other Member States as in the Member State of their origin. The Regulation also provides for a form describing the evidentiary effects which the authentic instrument produces in the Member State of origin. This is important in particular in relation to agreements on succession and other documents which relate directly to matters of succession and which are established as authentic instruments. Such instruments shall have effect in the other Member States as regards their evidential value so long as this is not contrary to public policy. Also no challenge to the authenticity of the instrument can be made other than in the courts of the Member State of its origin. As regards the legal acts or legal relationships recorded in such authentic instrument, the jurisdiction to challenge these shall be as provided under the rules of the Regulation.

8.4.3.2. *Enforceability of authentic instruments and court settlements — Articles 60 to 61*

If an authentic instrument or a court settlement is enforceable in the Member State of its origin it may be declared enforceable in any other Member State on application being made there by any interested party. The procedure for making, refusing or revoking such an application is as for decisions of courts. The same goes for court settlements which are enforceable in the Member State of their origin.

(156) For the meaning of court see paragraph 8.2.2.

(157) See paragraph 2.2.6.

8.5. European Certificate of Succession — Articles 62 to 73

8.5.1. Background

An important innovation in the Regulation is the creation of an optional European Certificate of Succession. This will enable the powers of the administrators of successions and the entitlements of heirs and legatees to be established simply and quickly in the Member States and cut down the time, expense and administrative procedures needed for these powers and entitlements to have effect in other Member States than the one where the succession is centred. The Regulation contains detailed rules about applications for, the issue of and contents and effects of the Certificate as well as about which authorities are entitled to issue it and challenges to decisions of those authorities. Reference is made to the detailed content of these rules which are summarised in the following section.

8.5.2. The rules on the European Certificate of Succession

Is use of the Certificate to be compulsory? — Article 62

The certificate is primarily for use in Member States other than that in which it is issued and is not to be mandatory, nor is it to take the place of documents under their internal law used for similar purposes in the Member States.

What is the purpose of the Certificate? — Article 63

The certificate, which will not replace such internal documents of the Member States, is for use by heirs, legatees and administrators in order to vouch their status, powers and entitlements and the attribution of an assets or assets in successions to heirs and legatees.

Who issues the Certificate? — Article 64

Courts or other authorities competent to deal with succession in the Member State with jurisdiction under the Regulation.

Such authorities may include notaries and other such authorities who under the relevant national law are competent to deal with matters of succession.

By whom and how is an application for a Certificate to be made? — Articles 65(1) and (2)

The application is to be made by any person who is an heir, legatee or administrator of an estate; use may be made of the form established for that purpose⁽¹⁵⁸⁾.

(158) The form of application is to be established by the Commission under the procedure set out in Article 81 of the Regulation.

What information is to be included in the application? — Article 65(3)

Full details of the deceased and of the applicant, the representatives of the applicant, the spouse or partner of the deceased, and of other beneficiaries; the purpose of the certificate, and details of the deceased's actions including dispositions of property, contracts relating to property which might be relevant for the succession, waivers of succession, and generally information which might be useful for the issue of the certificate.

What happens when the application is made? — Article 66

The authority which will issue the certificate verifies the information, declarations, documentation and evidence provided with the certificate and make such enquiries as necessary for this. In the course of the said verification it may request further evidence, require statutory declarations or declarations on oath, inform beneficiaries and hear any persons involved and give information to other issuing authorities on matters relevant for the succession.

How is the certificate issued? — Article 67

The prescribed form is to be used and the certificate issued once all the elements to be certified are established and there are no challenges; once the certificate is issued the authority concerned is to inform the beneficiaries.

What goes into the certificate? — Article 68

- The name and address of the issuing authority, the reference number, date of issue and element which assert the competence to do so of the issuing authority

- Details of the applicant, deceased and beneficiaries
- Information about any marriage contract or similar entered into by the deceased
- The law applicable to the succession
- Whether the succession is testate or intestate and about the rights and powers of heirs, legatees, executors or administrators
- Information about beneficiaries, heirs and legatees
- Restrictions on rights of heirs and legatees, and
- Powers of executors and administrators

What are the effects of a Certificate? — Article 69

Presumed to be accurate as to all elements established under the law applicable to the succession about the heirs, legatees, executors and administrators and their rights and powers; presumption of transactions by those named in the certificate with third parties that they are persons with adequate authority to carry out the transaction in question including the disposal of property in the succession estate; the certificate is a valid document for the registration of succession property in a register of a Member State. The certificate shall produce effects in all Member States without any special procedure being required.

Is the certificate issued to the applicant? — Article 70

The certificate as such is to be retained by the issuing authority; certified copies can be made available to the applicant and anyone with a legitimate interest; the certified copies are valid for six months subject to derogation for justified cases that a longer period of validity may apply; after the expiry of the period of validity of a certified copy anyone who wishes to use the certificate has to apply for an extension

or request a new certified copy; the issuing authority is to keep a list of all persons to whom it has issued certified copies.

Can mistakes in the Certificate be corrected? — Article 71

The issuing authority can correct clerical errors if asked to do so; if the certificate is not accurate the authority issuing it may modify or withdraw it on request; if it does so the authority has to inform all holders of certified copies.

Is it possible to challenge the issuing authority? — Articles 72 and 73
Any person with a legitimate interest may seek to challenge before a judicial authority any decision of the issuing authority; if that authority finds that the certificate is not accurate or that a refusal to issue a certificate was not justified the judicial authority can either itself correct or issue the certificate or ensure that the issuing authority corrects the certificate or makes a fresh decision as to the issuing of a certificate; pending such correction or modification or withdrawal the certificate may be suspended by the issuing, or as the case may be, judicial authority.

8.6. Information about legislation and procedures of the Member States — Articles 77 to 79

Member States are to provide to the European Commission information about their national legislation and procedures in succession. This is to include details of the authorities competent in succession matters including in the receipt of declarations of acceptance or waiver. Fact sheets are also to be provided listing information about documents regarding the registration of immoveable property. All this information is to be made available to the public through the European Judicial Network in civil and commercial matters. Member States are also to let the Commission know about:

- those authorities and legal professionals which come within the definition of ‘court’;
- the courts and authorities which will be competent to deal with applications for declarations of enforceability and appeals,
- the authorities competent to issue European Certificates of Succession, and
- procedures regarding redress in relation to the issuing of European Certificates of Succession,

and any changes to that information. This information is to be made available through the European Judicial Network in civil and commercial matters⁽¹⁵⁹⁾.

(159) See Chapter 14.

Examples revisited

Mr JMB from Portugal has lived and worked in Brussels for a number of years but intends to return to Portugal eventually. He has property and investments in Portugal and Brussels and a holiday house in the French countryside. His wife and family live in Brussels with him. If he has not made a will questions will arise as to what law applies to the succession to his property and what courts/authorities have competence to deal with it. If he has and, say, he were to die suddenly in France questions arise as to what consequences this would have as regards succession to his estate.

Supposing that Mr B unfortunately were to die as result of a waterskiing accident whilst on holiday in France in August 2016. How would the Regulation assist in the succession to his estate. If he made a will it would be applied to appoint heirs and administrators to his estate under the relevant applicable law. What would that law be? Mr B could choose the law of his nationality under Article 22 so if he had done the law of Portugal will apply. If he has not done so the rule in Article 21 will determine that the law to be applied is that of Mr B's habitual residence at the time of his death. Unless Mr B had retired and had gone to live in France that will be either the law of Portugal or that of Belgium. Given that Mr B was at the time of his death still employed in Belgium then it is likely that he will have his habitual residence there in which case the law of Belgium will apply.

As to jurisdiction the regulation does not provide for Mr B to choose a court or authority to manage the succession to his estate but he may

have attempted to do so in his will. If that choice of law is valid under the relevant applicable law then this may also have an impact on jurisdiction. If not, the general rule in Article 4 will determine that the succession is subject to the jurisdiction of the courts of the Member State of the habitual residence of Mr B at the time of his death, again therefore the courts of Belgium. Mr B's heirs may seek to choose a court however and if so that could be the relevant court in Portugal, but only if Mr B had chosen the law of Portugal as the applicable law for the succession.

Another example

Ms K is of Dutch background and has been working in Germany for several years. She has no children but a partner (under a civil partnership/ same-sex marriage). She is about to retire and is planning to go to live with her partner in her newly acquired villa in Andalucia whilst retaining her roots and property interests in the Netherlands. She has made a will in the Netherlands which she intends should deal with all issues concerning her estate and it applies Dutch law. As matters stand this is not acceptable to the Spanish legal system — what would happen if she were to die?

Let us assume that Ms K dies in Spain after her retirement and that she and her partner had gone to live there. Ms K having chosen the law of the Netherlands, that choice will be accepted under the Regulation by virtue of Article 22 even though under Spanish national law that would not have been acceptable. As regards jurisdiction the position as with Mr B is that Ms K could not make a choice of court under the Regulation; however her heirs may wish to choose a court other than that of Spain

especially if Ms K had retained a substantial connection with and had property in the Netherlands. Under Article 5(1) therefore the Dutch courts could be chosen to deal with the succession.

In the cases of both Mr B and Ms K it will be possible to apply for a Certificate of Succession thereby rendering the transactions in the Member State or States other than that where the estate is being administered to be more easily and speedily carried out.



Service of documents

9.1. Background to the Service of documents Regulation

9.1.1. The ‘Original’ Service Regulation

It is necessary in order to support the needs of businesses and citizens of the European Union for access to justice, in particular where claims arise and litigation ensues across national borders, to make the cooperation between the judicial authorities of the Member States of the European Union a reality and to enable that cooperation to work effectively. A key aspect of cross-border litigation involves the service of documents on parties to litigation and others thereby involved. Thus the service and transmission of documents between Member States’ judicial authorities must be fast and secure. Recognition of this reality was given with the negotiation of a Convention on the service of documents which provided for the transmission of documents from one Member State to another for service there whose text was adopted in May 1997.⁽¹⁶⁰⁾ This Convention was never ratified and so did not come into force. Not long after the coming into force of the Amsterdam Treaty the Council adopted a Regulation⁽¹⁶¹⁾ the text of which was to all intents and purposes the same as that of the Convention. This Regulation entered into force on 31 May 2001⁽¹⁶²⁾.

(160) See OJ C 261, 27.8.1997, p. 1.

(161) Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters; see OJ L 160, 30.06.2000, p. 37.

(162) See OJ L 160, 30.6.2000, p. 37; before the coming into force of the Regulation service between Member States was dealt with under the Hague Convention of 1965 on Service of documents to which most of the Member States were party; this Convention regulates the issue as between the EU Member States and third States.

9.1.2. The ‘current’ Service Regulation

As with the other Regulations on Civil Justice a review was conducted of the functioning of the first Regulation and in October 2004 a Report was published by the European Commission. The conclusions indicated that whilst the first Regulation had in general led to an improvement in the speed and effectiveness of the transmission of documents for service across borders between the Member States, there were certain aspects of the procedure where application was not wholly satisfactory and the aims of the Regulation were not being realised as fully as desired. The Commission therefore proposed a revised Regulation and this led to the adoption of the current Service Regulation in November 2007⁽¹⁶³⁾.

9.2. The Service of documents Regulation

9.2.1. Territorial and Material scope of the Regulation

The Regulation is in force directly in all the Member States except Denmark. Between Denmark and the other Member States there is a separate agreement for the application of the Regulation in Denmark⁽¹⁶⁴⁾. The Regulation applies in civil and commercial matters where a judicial or

(163) Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000; see OJ L 324, 10.12.2007, p. 79.

(164) See the Council Decision 2006/326/EC concluding Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters (OJ L 120, 5.5.2006, p. 23.) and subsequent Agreement as regards the application to Denmark of the Second Service Regulation — see OJ L 331, 10.12.2008, p. 21.

extrajudicial document has to be transmitted from one Member State to another for service there⁽¹⁶⁵⁾. The expression ‘civil and commercial matters’ has itself been interpreted extensively by the European Court of Justice. In the original Regulation there was no exclusion from the meaning of ‘civil and commercial matters’ relating to revenue, customs or administrative matters but these are excluded from the scope of the current Regulation, as is liability of the State for actions or omissions in the exercise of state authority (*acta iure imperii*)⁽¹⁶⁶⁾. The Regulation cannot be used if the name and address of the addressee are not known but receiving agencies under the Regulation may, if possible, provide assistance when the address is incomplete or incorrect. The Regulation applies to the service of both judicial and extra-judicial documents.

(165) The CJEU has ruled that where the addressee of the document resides in another Member State the service of a judicial document must necessarily be effected in conformity with the requirements of the Regulation. In such a case the courts of a Member State are not allowed to apply a national system of notional service, which in fact deprives of all practical effect the right of the person to be served to benefit from actual and effective receipt of that document, because it does not guarantee for that addressee, *inter alia*, either knowledge of the judicial act in sufficient time to prepare a defence or a translation of that document. See the judgment issued on 19 December 2012 in case Alder, C-325/11.

(166) As of April 2013 the 1965 Hague Service Convention is in force as regards all the EU Member States except Austria; Croatia is also a party to the Convention.

Example

Company A based in Member State 1 has sued Company B based in Member State 2, in Member State 1 for a substantial amount of money. Company B has not defended the action and after about four months the court in Member State 1 has issued a default judgment in which it has ordered Company B to pay the amount claimed to Company A. Company A has submitted an application for a declaration of enforceability to the competent court in Member State 2, where Company B owns assets in the shape of immoveable property. The declaration is granted, however Company B appeals and, upon further examination of the circumstances it becomes clear subsequently that notice of the action raised by Company A had in fact not been correctly served upon Company B. As a consequence the appeal court in Member State 2 revokes the Declaration of Enforceability on the ground set out in Article 34(2) of the Brussels I Regulation. Not long afterwards, and before Company A can retrieve the situation, Company B becomes insolvent and Company A has to withdraw the claim.

This example is included to show that correct service of documents is of fundamental importance in judicial proceedings. Failure of service can seriously jeopardise the parties’ legal interests. Service of documents on parties in other States can be the cause of many difficulties in cross-border litigation cases. Simple and practical cross-border service rules are among the most important conditions for a well functioning European civil procedural system and the provision of these is the aim and purpose of the Service Regulation.

9.2.2. Structure and Content of the Service Regulation

9.2.2.1. *Transmitting and receiving agencies and the central body*

As with the original the current Regulation simplifies the service of documents in cross-border cases by providing that all Member States are to designate bodies, called **transmitting agencies** and **receiving agencies**, responsible respectively for the transmission and receipt of documents. Federal States, States with several legal systems, such as the United Kingdom, or States with autonomous territorial units can designate more than one such agency. In addition it is possible for Member States to designate as such agencies officials such as *huissiers de justice* and other judicial and public officers among whose responsibilities is the service of documents⁽¹⁶⁷⁾. The document or documents to be transmitted for service will be accompanied by a request in the standard form in Annex I. Under the current Service Regulation the receiving agency must send an acknowledgment of receipt of the documents within seven days of receiving them, again using the prescribed form in Annex I. This is one of a number of areas where the current Service Regulation provides for time limits for carrying out actions under the Regulation procedures and so speeding the process of service and thus of access to justice. If clarification is needed from the transmitting agency the receiving agency shall seek this as quickly as possible by the swiftest possible means. Each Member State has designated at least one 'central body' that supplies information to the transmitting agencies and seeks solutions to any difficulties which may arise during transmission of documents for service.

(167) See Article 2.

9.2.2.2. *Service of the document to the addressee*

The receiving agency in the Member State where the documents are to be served serves the document or has it served, either in accordance with the law of the Member State addressed or using a particular method requested by the transmitting agency, unless such a method is incompatible with the law of that Member State. Service is to be effected as soon as possible and at any rate within one month of receipt. If this time limit is not met the receiving agency must inform the Transmitting agency and continue to try to effect service within a reasonable time.

9.2.2.3. *Right of the addressee to refuse service*

The addressee may refuse to accept the document to be served if it is in a language other than the official language of the Member State addressed, or that of the place where service is to be effected where there is more than one official language, or a language which the addressee does not understand. The addressee is to be informed of this right when the document is served using the form set out in Annex II. The addressee must inform the receiving agency of the refusal either at the time when service is effected or by returning the document to the receiving agency within one week⁽¹⁶⁸⁾.

(168) The CJEU has ruled that it is not open to an addressee to refuse service if only the annexes of the documents to be served are not translated in the official language of the Member State of service and these annexes consist of documentary evidence which has a purely evidential function and is not necessary for understanding the subject matter of the claim and the cause of action. Furthermore, in this same judgment the CJEU also held that it may constitute evidence in favour of the argument that the addressee knows and is capable of understanding the language of the documents to be served on him where the addressee in question is bound contractually to conduct correspondence regarding a contract, the subject matter of a litigation, in the language of the Member State of transmission and the documents concerned are written in that agreed language and concern that correspondence; see the judgment issued on 8 May 2008 in the case of *Ingenieurbüro Michael Weiss und Partner GbR v Industrie- und Handelskammer Berlin*, C-14/07.

9.2.2.4. *Certificate of Service*

When the formalities concerning the service of the document have been completed, the receiving agency will confirm this by drawing up a certificate of completion, using the form prescribed in Annex I, which it addresses to the transmitting agency.

9.2.2.5. *Costs of service*

One of the issues mentioned in the Report regarding the functioning of the first Service Regulation was the difficulty which was experienced by those involved with cross-border litigation in the EC of knowing how much service of documents cost in the various Member States. Accordingly in the second service Regulation there is to be found a provision in which it is provided that in principle there should be no cost generated for service of documents coming from one Member State to another except where service is effected by judicial officers or other persons competent to effect service under the law of the Member State where service is to be effected. Where service is to be effected by a judicial officer or similar competent person the fee to be charged is to be a single fixed fee determined in advance which is to be proportionate and non-discriminatory. The Member States are to inform the Commission of these fees ⁽¹⁶⁹⁾.

9.2.2.6. *Direct service to a judicial officer in another Member State*

An innovative provision in the Service Regulation relates to the service of documents directly by judicial officers and other competent persons by direct

(169) Information is available at the European Judicial Atlas at http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_information_en.htm?countrySession=2&

transmission from any person interested in proceedings. That means that a claimant or the legal representative of a claimant can send documents for service direct to a judicial officer in another Member State for service on the addressee without having to go through a transmitting agency. This provision is subject to the fact that such direct service is permitted under the of that Member State. Information on this and other aspects of the functioning of the Service Regulation can be found on various websites including that of the European Civil Judicial Atlas ⁽¹⁷⁰⁾. It is also possible using the site of the Atlas to find the names and contact details of judicial officers and other competent persons who can serve documents in the various Member States.

9.2.2.7. *Direct Service by Post*

It is no longer possible for the Member States to oppose direct service by post as was the case under the first Service Regulation. Under the terms of the current Service Regulation it is provided that each Member State shall be free to effect service of judicial documents directly by postal services on persons residing in another Member State by registered letter with acknowledgement of receipt or equivalent.

9.2.2.8. *Other methods of transmission*

The Regulation also provides for other means of transmission and service of judicial documents such as transmission by consular or diplomatic channels

(170) Link: http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_information_en.htm — See also, for example, the entry for the UK at — http://ec.europa.eu/justice_home/judicialatlascivil/html/ds_otherinfostate_uk_en.jsp#ds_otherinfostate7 — which shows that of the three law districts in that Member State only that of Scotland does not oppose direct service under Article 15.

and service by diplomatic or consular agents or service of judicial documents directly by post.

9.2.3. Protection of the interests of the defendant

9.2.3.1. *Initiating the proceedings*

Where a document initiating judicial proceedings has been transmitted to another Member State for the purpose of service under the provisions of the Regulation and the defendant has not appeared in the proceedings, judgment shall not be given until it is established that:

- the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or
- the document was actually delivered to the defendant or to their residence by another method provided for by the Regulation.

9.2.3.2. *Conditions for granting judgment in absentia*

Member States are to make it known that the court, notwithstanding the restrictions mentioned in paragraph 9.2.3.1, may give judgment even if no certificate of service/delivery has been received, if all the following conditions are fulfilled:

- the document was transmitted by one of the methods provided for in the Regulation;

- a period of time of not less than six months, considered adequate by the court in the particular case, has elapsed since the date of the transmission of the document; and
- no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed.

9.2.3.3. *After the judgment has been granted*

When a document initiating judicial proceedings has been transmitted under the Regulation from one Member State to another for service and a judgment has been issued against a defendant who has not appeared, the court can relieve the defendant from the effects of the expiry of the time for appeal if the defendant:

- without any fault on their part, did not have knowledge of the document in sufficient time to defend the case, or of the judgment to appeal against it; and
- has disclosed a prima facie defence to the action on the merits.

An application for such relief may be lodged only within a reasonable time after the defendant has knowledge of the judgment.



Taking of evidence

10.1. Background to the Taking of Evidence Regulation⁽¹⁷¹⁾

In cross-border proceedings, it is often essential in connection with judicial proceedings in civil or commercial matters pending before a court in one Member State to take evidence in another. Through the Regulation on the Taking of Evidence the EU has created an EU-wide system of direct and rapid transmission and execution of requests for the performance of taking of evidence between courts and laying down precise criteria regarding the form and content of the request. The Regulation has applied since 1 January 2004 with respect to all Member States except Denmark. As regards Denmark, the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters is applicable as it is for such matters between the remaining EU Member States and third states parties to that Convention. However, not all Member States have as yet ratified or acceded to this Convention⁽¹⁷²⁾.

10.2. The Taking of Evidence Regulation

10.2.1. Scope, purpose and methodology

The Regulation provides for the taking of evidence in another Member State where this is necessary in civil and commercial proceedings. This concept should be interpreted autonomously, in line with the other EU instruments

(171) Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters; see OJ L 174, 27.6.2001, p. 1.

(172) As at June 2014 all the EU Member States are party to the Hague Evidence Convention except for Austria, Belgium and Ireland.

in the EU civil justice acquis. The court before which a case is heard in one Member State can choose between two means of taking the evidence: it can either request the competent court of another Member State to take the necessary evidence or it can take evidence directly in another Member State. The Regulation is based on the principle of direct transmission between the courts, in which the requests for the taking of evidence are conveyed directly from the 'requesting court' to the 'requested court'. Each Member State has drawn up a list of the courts competent to perform the taking of evidence according to the Regulation⁽¹⁷³⁾. This list indicates also the territorial jurisdiction of those courts. In addition, each Member State has designated a central body or bodies responsible for supplying information to the courts and seeking solutions to any difficulties arising in respect of a request.

10.2.2. Requests for the taking of evidence

The Regulation lays down precise criteria regarding the form and content of the request, and prescribes specific forms in the Annex for making, acknowledging receipt of, the requesting of further information about and the execution of the request. The requested court is to execute a request for the taking of evidence expeditiously and at the latest within 90 days of receipt. Where this is not possible, the requested court must inform the requesting court accordingly and state the reasons.

10.2.3. Refusal to execute the request

A request for the hearing of a witness shall not be executed when the person concerned claims the right to refuse to give evidence or is prohibited from

(173) See the European Judicial Atlas at http://ec.europa.eu/justice_home/judicialatlascivil/html/te_information_en.htm?countrySession=15&.

giving it, either under the law of the Member State of the requested court or under the law of the Member State of the requesting court, and such right has been specified in the request, or if need be, at the instance of the requested court, has been confirmed by the requesting court. Otherwise, a request for the taking of evidence may only be refused in a few exceptional circumstances.

10.2.4. Presence of parties and the requesting court at the taking of evidence

In its request for the taking of evidence, the requesting court has to state whether the parties to the proceedings and/or their representatives will be present or are requested to participate. The requested court shall inform the parties and any representatives of the date, time and place for the evidence to be taken and has to consider whether and if so under what conditions the active participation sought can be allowed. It is also possible for representatives of the requesting court, including members of the judiciary, to attend when the evidence is taken, as well as to participate actively, if this latter is compatible with the internal law of the requested court and under conditions determined by that court.

10.2.5. Execution of the request

The requested court shall execute the request in accordance with the law of its Member State. The taking of evidence can also be executed in accordance with a special procedure provided for by the law of the Member State of the requesting court, if the requesting court calls for this procedure. The requested court has to comply with such a requirement unless this procedure is incompatible with the law of its Member State.

10.2.6. Use of communications technology

The Regulation provides that the evidence may be taken through the use of communications technology, and in particular by use of teleconference and videoconference. Again if this is requested the court must agree unless it is incompatible with the internal law of the requested court or if there are major practical difficulties. Even if there is no access to the technical means referred to above in the requesting or in the requested court, such means may be made available by the courts by mutual agreement.

10.2.7. Direct taking of evidence

A request for the direct taking of evidence must be submitted to the central body or competent authority of the requested Member State and can be refused only in exceptional circumstances. Direct taking of evidence may only take place where this can be performed on a voluntary basis without the need for coercive measures. Within 30 days of receiving the request, the central body or the competent authority of the requested Member State shall inform the requesting court if the request is accepted and, if necessary, under what conditions according to the law of its Member State the request is to be carried out. The evidence is to be taken by a member of the judicial personnel or by any other person such as a commissioner or an expert who has been designated in accordance with the law of the Member State of the requesting court.

10.2.8. The costs of taking evidence

The execution of the request shall not give rise to a claim for any reimbursement of taxes or costs. Nevertheless, if the requested court so requires, the requesting court shall ensure the reimbursement, without delay, of certain costs as follows:

- fees paid to experts and interpreters, and
- the costs occasioned by the use of any special procedure for the taking of evidence requested by the requesting court (Articles 10(3) and 10(4)).

Only where expert evidence is to be taken may the requested court seek payment of an advance towards the costs of such evidence.

NB. An EJN practice guide is available regarding the Taking of Evidence⁽¹⁷⁴⁾ and another specific guide is available on videoconferencing⁽¹⁷⁵⁾.

(174) See http://ec.europa.eu/civiljustice/publications/docs/guide_taking_evidence_en.pdf

(175) See http://ec.europa.eu/civiljustice/publications/docs/guide_videoconferencing_en.pdf



Legal Aid

11.1. Background

In a European Union of open borders, there are, unfortunately, situations in which EU citizens and businesses may find themselves having to engage in litigation before a Court of a Member State other than that in which they are based in order to recover payments due or to seek to resolve by litigation a dispute. Cross-border disputes may involve individuals who may have only modest means available to pay the costs of litigation. Litigation in general, and cross-border litigation is no exception, can be expensive, especially where large claims are at stake. Most often, cross-border litigation requires legal representation in the Member State where the case is heard, but also legal advice from a lawyer in the party's home State; in addition, cross-border litigants may incur further expenses such as for translations of documents, the attendance of oral hearings and other extra costs.

11.2. The Legal Aid Directive ⁽¹⁷⁶⁾

11.2.1. Overview

The Legal Aid Directive was adopted by the Council in January 2003 with the aim of overcoming obstacles then existing with regard to access to legal aid. The directive applies to Union citizens as well as to third-country nationals who habitually and lawfully reside in a Member State and entitles them to legal aid in the same way as citizens of the Member State in which the court is sitting. The purpose of the Directive, therefore, is to improve access to justice for natural persons in cross-border disputes within the EU

(176) Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; see OJ L 26, 31.1.2003, p. 41.

by establishing minimum common rules relating to the availability of legal aid for litigants involved in such disputes. The Directive applies in all the EU Member States except Denmark.

Example

Mr A, a citizen of the EU based in Member State 1, has received notice that an action has been raised against him in Member State 2 for payment of a sum of approximately €235 000 in respect of loss, injury and damage allegedly caused by his 12 year old son during a holiday spent with his family in Member State 2. Mr A has two daughters but no son. Mr A naturally wishes to defend the action against him and having made enquiries has been informed that a firm of advocates in Member State 2 would be prepared to take the case on, but would require payment of a minimum of €8 000 of which only a small part would be recoverable from the person who has raised the action should it be dismissed. Mr A and his family live on a monthly income of €1 850 net. They are concerned about the costs of the proceedings and do not know how they will be able to afford to pay the expenses of defending the action nor how to contact a local lawyer in Member State 2 who can help them and take the case at a more favourable rate or with the support of legal aid. They are also up against the deadline for the lodging of a defence as the time allowed for this by the Court in Member State 2 is about to expire .

This example of Mr A's situation is set to illustrate the sort of difficulties and obstacles which citizens from different Member States involved in

cross-border disputes often encounter. This is especially so when it is necessary to defend a legal action which is brought before a court of another Member State, as this very often requires legal consultation and representation in two different Member States with attendant expense. Not only can there be language barriers requiring the costly translation of documents, but there can also be ancillary costs such as for expert reports and the attendance of witnesses and the expense incurred when a party has to appear personally before the court of another Member State. In Mr A's case, the availability of legal aid in Member State 2 could help him if he can find a lawyer who will do the case on legal aid. The EU Directive will give Mr A the same right to legal aid in that State as if he were based there.

11.2.2 Scope

The directive applies to civil or commercial cases in which the party applying for legal aid is either a Union citizen or domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced. It seeks to promote the application of legal aid in cross-border disputes for natural persons who lack sufficient resources where aid is necessary to secure effective access to justice. Furthermore, the Directive contains provisions designed to simplify and accelerate the transmission of legal aid applications by coordinating judicial cooperation between Member States.

11.2.2. Right to legal aid

Legal aid is to be granted or refused by the competent authority of the Member State where the proceedings are being heard or where the decision is to be enforced. The aid should not only cover the proceedings before a court, but should extend to cover expenses incurred in the enforcement of judgments or authentic instruments in another Member State, as well as in extrajudicial procedures, if the parties are legally required or ordered by the court to use them. Legal aid shall guarantee legal assistance and representation in court and the cost of proceedings of the recipient, as well as costs directly related to the cross-border nature of the dispute, such as interpretation, translation of the documents required or travel costs.

11.2.3. Application for legal aid

The Member State of the domicile or habitual residence of the beneficiary should provide such services as necessary for the preparation of the application for legal aid and its transmission to the State where the proceedings are being or are to be held. Member States shall designate authorities competent to send (transmitting authorities) and receive (receiving authorities) the application for legal aid. To facilitate transmission, standard forms for legal aid applications and for the transmission of such applications have been established⁽¹⁷⁷⁾.

(177) See Commission Decision of 26 August 2005 establishing a form for the transmission of legal aid applications under Council Directive 2003/8/EC; OJ L 225, 31.8.2005, p. 23; the form is available at the website of the e-Justice Portal at https://e-justice.europa.eu/content_legal_aid_forms-157-en.do and Commission Decision of 9 November 2004 establishing a form for legal aid applications under Council Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes; for the form see also the website of the EU e-Justice Portal at https://e-justice.europa.eu/content_legal_aid_forms-157-en.do.



Mediation

12.1. Settling out of court — alternative methods for resolving civil and commercial disputes in the European Union

ADR methods are extra judicial procedures used for resolving civil or commercial disputes. They usually involve the collaboration of disputing parties in finding a solution to their dispute with the help of a neutral third party. ADR is regarded as an important element in the attempt to provide fair and efficient dispute-resolution mechanisms at EU level.

12.2. The European Code of Conduct for Mediators

The European Commission took the initiative in developing policy for ADR in the EU by first of all assisting the promulgation of a European Code of Conduct for Mediators which was adopted by a meeting of mediation experts in Brussels in July 2004⁽¹⁷⁸⁾. The Code sets out a number of principles to which individual mediators and mediation organisations can voluntarily decide to commit, under their own responsibility. It is intended to be applicable to all kinds of mediation in civil and commercial matters. The Code has been adhered to by a large number of individual mediators and mediation organisations, but it does not replace national legislation or rules regulating individual professions.

(178) See http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

12.3. The European Mediation Directive

12.3.1. Background to and aims of the Directive

Shortly after the adoption of the Code of Conduct, the European Commission submitted to the European Parliament and Council a proposal for a Directive on certain aspects of mediation in civil and commercial matters. This instrument was adopted on 21 May 2008 and the Member States were to have transposed it into national law before 21 May 2011⁽¹⁷⁹⁾. The Directive in its terms did not set out to create a European Mediation Code. The purpose in the main was to set out some minimum standards as regards the meaning and quality of mediation as well as ensuring that the relationship between mediation and judicial proceedings remained in balance. This was against the background of seeking to promote access to ADR and to encourage the use of mediation to settle amicably disputes in civil and commercial matters.

12.3.2. Cross-border disputes — Article 2

The Directive only applies in relation to mediation in cross-border disputes. For the purpose of the Directive such a dispute is one in which at least one party to the dispute is domiciled or habitually resident in a Member State other than any other party. This falls to be determined on one of the following dates:

- when the parties agree to mediate
- when mediation is ordered by a court

(179) Not all Member States had transposed the Directive by the required date.

- when the parties become obliged under national law to go to mediation, or
- a court invites the parties to use mediation to settle a dispute which is subject to litigation

Another situation which is characterised as cross-border under the Directive is where the parties fail to reach agreement and litigation or arbitration ensues after the mediation. If the court or arbitral proceedings take place in a Member State other than that in which the parties were domiciled or habitually resident at the time when the mediation commenced, the dispute is characterised as cross-border with respect to the provisions of the Directive dealing with confidentiality and prescription and limitation periods.

12.3.3. Quality of Mediation — Article 4

The Directive requires Member States to encourage by any means which they consider appropriate adherence to and development of Codes of Conduct of mediators and mediation organisations. There is also a general appeal to Member States to encourage other quality control mechanisms for the provision of mediation as well as the training of mediators.

12.3.4. Recourse to mediation — Article 5

The Directive provides that courts may invite parties which appear before them in litigation to use mediation to seek to settle the dispute or to attend an information session. This does not prevent Member States from making mediation compulsory or subject to incentives or sanctions so long as this does not prevent recourse to the courts.

12.3.5. Enforceability of agreements resulting from mediation — Article 6

An important provision in the Directive, this Article requires Member States to ensure that an agreement resulting from mediation should, subject to certain narrow exceptions, be able to be made enforceable on the request of a party, with the consent of the other. This can be done for example by a court decision or in another way available under the legal system of the Member State where the request for enforceability is made, namely by an authentic instrument established by a notary. Either way, the resulting agreement will be enforceable under the relevant provisions of the European Instruments within whose scope is its subject matter. So for example an agreement resolving a cross-border contractual dispute would be enforceable under the Brussels I Regulation or as an EEO.

12.3.6. Confidentiality of mediation — Article 7

One of the advantages of mediation is that it is confidential as between the parties and as regards the mediator. Some legal systems in the Member States make provision for this; also it is very common practice for parties to mediation to enter into an agreement to mediate where one of the terms of such an agreement is that the process shall remain confidential. The Directive picks up this theme by providing that the Member States are to ensure that neither the mediator nor anyone involved in the administration of mediation shall be compelled to give evidence in subsequent court or arbitral proceedings about anything to do with a mediation unless the parties agree or there is some other overriding public policy reason, say where the best interests of a child are to be protected if such evidence is disclosed.

12.3.7. Prescription and limitation of actions — Article 8

One of the possible difficulties about proceeding to mediation is where a period of prescription or limitation is about to expire and this is likely to occur during a mediation. Mediation is not normally an incidence of interruption of prescription under the national laws of the Member States. Therefore, this provision requires Member States to ensure that if a period of prescription or limitation does expire during a mediation which is subject to the Directive, this should not have the result under the relevant law that a party can no longer institute judicial or arbitral proceedings. This provision is also intended to remove one possible legal disincentive to mediation.

12.3.8. Information about mediation — Article 9

In an endeavour to spread the word about mediation, Member States shall encourage the dissemination of information about how the public can contact mediators and mediation organisations. In addition, the European Commission is to receive from Member States, and publish, information about which courts can render mediation agreements enforceable as provided in Article 6. This information is available on the site of the European Civil Judicial Atlas ⁽¹⁸⁰⁾.

(180) See, for example, the information regarding enforcement in the law districts of the United Kingdom at http://ec.europa.eu/justice_home/judicialatlascivil/html/me_competentauthorities_en.jsp?countrySession=4#statePage0



Execution of Judgments

13.1. Background

As noted earlier⁽¹⁸¹⁾, the Brussels I recast, EEO, EOP and the ESCP enable creditors with claims for payment who secure an enforceable order in one Member State to take the order relatively simply and cheaply to another Member State for enforcement with little or no additional steps of procedure required. The actual execution of the order, however, is still a matter for the national law, and enforcement procedures vary considerably from one Member State to another.

Differences between national legal systems exist in particular with respect to the conditions for issue and the implementation of protective measures. At present, it is more cumbersome, lengthy and costly for a creditor to obtain provisional measures to preserve assets of their debtor located in another Member State. This is a problem because quick and easy access to such provisional measures is often crucial to ensure that the debtor has not removed or dissipated their assets by the time the creditor has obtained and enforced a judgment on the merits. This is particularly important with regard to assets in bank accounts. Currently, debtors can easily escape enforcement measures by swiftly moving their monies from a bank account in one Member State to another. A creditor, however, has difficulty blocking a debtor's bank accounts abroad to secure the payment of their claim. As a result, many creditors are either unable to successfully recover their claims abroad or do not consider it worthwhile pursuing them and write them off. For these reasons the European Commission took the initiative to make a proposal for a European Account Preservation Order to prevent the removal of money from bank accounts to the detriment of creditors. The resulting Regulation was adopted on 15 May 2014 and will apply from 18 January 2017⁽¹⁸²⁾.

(181) Paragraph 3.5.

(182) Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

13.2. European Account Preservation Order (EAPO)

13.2.1. Territorial scope

The Regulation binds all the EU Member States with the exception of Denmark and the United Kingdom which did not opt in⁽¹⁸³⁾. Creditors domiciled in a Member State not bound by the Regulation or in non-EU States cannot avail themselves of the procedure even if the competent court or the account or accounts involved are maintained in Member States which are so bound⁽¹⁸⁴⁾. The Preservation Order can only operate against bank accounts maintained in one or more Member States bound by the Regulation⁽¹⁸⁵⁾ though the accounts do not have to be with a bank which is based in the EU provided that in such a case they are held by a branch situated within the EU⁽¹⁸⁶⁾. Use of the Preservation Order is limited to cross-border cases⁽¹⁸⁷⁾. A cross-border case is one in which the bank account or accounts to be the subject of the order are maintained in a Member State other than that of the court seised of the application for the order or the Member State in which the creditor is domiciled.

(183) See Recitals (49) to (51); it is open to the UK under the Protocol No 21 annexed to the TEU and TFEU to opt in to the Regulation at a future date.

(184) See Article 4(6).

(185) See Articles 1(1) and 2(2).

(186) See Article 2(2).

(187) Defined in Article 3.

Examples of cross-border cases:

Example 1: Creditor is domiciled in Member State A which is bound by the Regulation; the creditor has a judgment from a court in that Member State for payment of €100 000 against a debtor who has bank accounts in three other Member States, B, C and D, all of which are bound by the Regulation; the creditor wishes to take steps to secure each of these accounts using an EAPO; they would have to make the application for an EAPO to a court in Member State A where the judgment was issued.

Example 2: Creditor is domiciled in Member State A and wishes to raise an action for payment of €250 000 against a debtor who is domiciled in Member State B and to secure the outcome of that action by an EAPO; the debtor has bank accounts in Member States B and C. The creditor would have to apply for the EAPO in the court of a Member State which has jurisdiction on the substance of the matter. However, they could not apply for an EAPO in Member State B even if the courts there have jurisdiction on the substance because all the accounts subject to the order must be maintained in a Member State other than that of the court seised with the application of the EAPO.

Examples of cases which are not cross-border¹:

Example 3: Creditor is domiciled in Member State A and holds an authentic instrument drawn up in Member State A according to which a debtor domiciled also in that Member State is obliged to repay the sum of €150 000. The creditor is aware that the debtor has bank accounts in Member State A and B. The competent court for issuing the EAPO

would be the courts of Member State A where the authentic instrument has been issued. The creditor cannot apply for an EAPO in respect of the accounts in Member State A since that application would bring the case outside the definition of cross-border cases. However, the creditor could apply for an EAPO in respect of the account maintained in Member State B.

Example 4: Creditor is domiciled in Member State A and is suing debtor for €150m in that Member State in respect of the delivery of faulty trains; the creditor is aware that the debtor has accounts in various Member States including A but is uncertain which has the most at credit; the creditor wishes to apply for an EAPO in respect of all the debtor's accounts but can only do so in Member State A; the case falls outside the definition of cross-border because not all the accounts are maintained in Member States other than that in which the creditor is domiciled or of the court with jurisdiction to take the application. In order to fall within the scope of the Regulation, the creditor would have to exclude the accounts located in Member State A from the application for an EAPO.

13.2.2. Material scope and availability

The procedure can be used for pecuniary claims in civil and commercial matters. There are some exclusions from scope which are similar to those in the Regulation Brussels I.⁽¹⁸⁸⁾ In addition the procedure cannot be used to secure funds at credit of accounts held in banks which are immune from

⁽¹⁸⁸⁾ See the list in Article 2(2); revenue, customs and administrative matters are also excluded as are *acta iure imperium*.

seizure under the relevant national law⁽¹⁸⁹⁾ nor accounts held by or with the central banks acting as monetary authorities⁽¹⁹⁰⁾. The procedure can be used by a creditor either before or after an order is obtained⁽¹⁹¹⁾. It is also available for use to enforce an obligation expressed in an authentic instrument or contained in a court settlement⁽¹⁹²⁾. The procedure established by the Regulation is available to creditors as an alternative to the procedures already available under the national laws of the Member States⁽¹⁹³⁾.

13.3. Jurisdiction

The courts of the Member State where jurisdiction on the substance lies have jurisdiction to issue an EAPO where the creditor has yet to obtain a judgment, court settlement or authentic instrument⁽¹⁹⁴⁾. There are special rules for consumer debtors whereby only the court of the consumer's domicile has jurisdiction against the creditor⁽¹⁹⁵⁾. After the creditor has obtained a judgment, court settlement or authentic instrument, the courts in the Member State where the judgment, settlement or authentic instrument in question was granted shall have jurisdiction⁽¹⁹⁶⁾.

(189) Article 2(3).

(190) Article 2(4).

(191) See Article 5.

(192) *Ibid*; see also definitions in Article 4(9) and (10).

(193) See Article 1(2).

(194) Article 6(1).

(195) Article 6(2).

(196) Article 6(3).

13.4. Obtaining an EAPO

13.4.1. The nature of the procedure

The procedure for obtaining an EAPO is *ex parte* so as to ensure that the debtor does not have warning of the creditor's intentions before the order is granted and to prevent the removal of funds by the alerted debtor. The order always has to be issued by a court. The court proceeds in principle on the basis of written evidence produced by the creditor in or with the application. If the court requires further evidence from the creditor this is to be in documentary form. The court may hold an oral hearing of the creditor, experts or witnesses including through the use of communication technology. When issuing the order, the court is bound by certain time limits which are specified in the Regulation.

13.4.2. Conditions to be satisfied by the creditor

In all cases the order will only be granted where the creditor has submitted sufficient evidence to show that their claim is in urgent need of judicial protection. The creditor has to satisfy the court that there is a real risk that the enforcement of their claim would be impeded or made more difficult if the order were not to be issued⁽¹⁹⁷⁾. Where the application is made before the creditor has obtained a judgment they must also satisfy the court that they are likely to succeed on the substance of the matter⁽¹⁹⁸⁾. A recital clarifies that enforcement may be impeded or made substantially more difficult because of a real risk that the debtor may have dissipated, concealed or

(197) Article 7(1).

(198) Article 7(2).

destroyed their assets, or have disposed of them under value to an unusual extent or through unusual action. The fact that the financial circumstances of the debtor are poor or deteriorating should not in itself constitute sufficient ground for the issuing of an Order. However, the court may take these factors into account in the overall assessment of the existence of the risk.

13.4.3. The provision of security

The court may require the creditor to provide security as to ensure that the debtor can be compensated at a later stage for any damage caused to them by the Preservation Order. The court should have discretion in determining the amount of security. In the absence of specific evidence as to the amount of the potential damage, the court should consider the amount in which the Order is to be issued as a guideline for determining the amount of the security.

In cases where the creditor has not yet obtained a judgment, court settlement or authentic instrument requiring the debtor to pay the creditor's claim, the provision of security should be the rule. However, the court can exceptionally dispense with this requirement, or require the provision of security in a lower amount, if it considers that such security is inappropriate in the circumstances of the case, for instance, if the creditor has a particularly strong case but does not have sufficient means to provide security⁽¹⁹⁹⁾.

In cases where the creditor has already obtained a judgment, court settlement or authentic instrument, the provision of security should be left to the discretion of the court. The provision of security may, for instance, be

appropriate where the judgment on which the EAPO is based is not yet or only provisionally enforceable due to a pending appeal.

13.4.4. Procedure and time limits

The application is to be submitted using a form to be established by the Commission⁽²⁰⁰⁾. It is not necessary for the creditor to give exact details about the account or accounts to be preserved such as the account number or numbers. It is sufficient for the creditor to indicate the bank or banks where the account or accounts are held. The application and any supporting documents may be submitted electronically if this is permitted by the procedure rules of the Member State where it is lodged⁽²⁰¹⁾. Depending on the circumstances various time limits apply to a decision on the application for an EAPO. Where the creditor has yet to obtain an enforceable title the court issues a decision by the end of the tenth working day after the lodging of the application. Where the creditor has an enforceable title the decision is to be issued by the end of the fifth working day after the application is lodged. Where there is an oral hearing the decision should be issued within five days of the hearing date and similar time limits apply to the decision as to whether the creditor should find security. If the creditor is obliged to do so the decision on the application for the EAPO is to be issued as soon as the creditor has provided the security ordered.

(200) See Articles 8(1), 51 and 52.

(201) See Article 8(4).

(199) For further examples see Recital 18.

13.4.5. Access to information about bank accounts

As set out above, the creditor does not need to have their debtor's account numbers but the names and addresses of the relevant banks are sufficient. If the creditor does not know with which bank the debtor holds an account in a certain Member State, they may avail themselves of a special procedure for obtaining information about the account or accounts of the debtor by making an application to that effect to the court with which the application is lodged⁽²⁰²⁾. Normally this procedure to obtain account information can only be used if the creditor has obtained an enforceable title, either a judgment, court settlement or an authentic instrument requiring the debtor to pay the claim of the creditor. If they have a title which is not yet enforceable, they can apply to obtain account information only if the amount to be preserved is substantial and the creditor can show that there is an urgent need for that information because there is a risk that without this information their position might be jeopardised and that this could consequently lead to a substantial deterioration of their financial situation. In order to avoid fishing expeditions, the creditor has to substantiate why they believe that the debtor holds accounts in a given Member State.

13.5. What happens once the EAPO is granted

The EAPO procedure contains a number of innovative features. Apart from the ex parte nature of the original application procedure, the enforcement of the order has to take place without delay and with the maximum of efficiency. The procedure is the first whereby the EU provides directly for

(202) Article 14.

the execution of judgments and the key features of the EAPO are therefore of considerable significance.

13.5.1. The form of the order

The EAPO is to be issued in a standard prescribed form which is to be in two parts and containing the information set out in the Regulation. Any funds remain preserved so long as the order is in force and subject to any modification, limitation, revocation, termination of the order or enforcement of the liability in respect of which it was granted⁽²⁰³⁾. The order is to be enforced, without delay, in accordance with the rules applicable for equivalent orders in the Member State concerned⁽²⁰⁴⁾. No declaration of enforceability is required⁽²⁰⁵⁾.

13.5.2. Transmission to the bank

The order is to be transmitted to the bank or banks concerned along with a blank form of declaration to be completed by the banks. The transmission procedure depends on whether the order is to be enforced in the same Member State as the court which granted it or in another Member State. In the former case the transmission is effected according to the procedural law of the Member State concerned. In the latter case the order will be transmitted to the competent authority of the Member State of enforcement, if necessary accompanied by a translation into an appropriate official language of that State⁽²⁰⁶⁾.

(203) Article 20.

(204) Article 23(1) and (2).

(205) Article 22.

(206) Article 23(3).

13.5.3. Response of the bank

Any bank to which an EAPO is addressed has to implement it without delay. The bank has to preserve the amount specified in the order by ensuring that it is not transferred or withdrawn except to a special preservation account⁽²⁰⁷⁾. Within three days of the implementation of the order the bank sends the declaration of preservation of funds to the creditor or, where the order was issued in a Member State other than that of enforcement, to the competent authority⁽²⁰⁸⁾ in the relevant Member State which in turn sends it to the creditor⁽²⁰⁹⁾.

13.5.4. Service on the debtor⁽²¹⁰⁾

Thereafter the order is served on the debtor with the declaration, the application and accompanying documents either by the creditor or by the competent authority of the State of enforcement⁽²¹¹⁾. Where the debtor is domiciled in the same Member State as that where the order was issued service is effected in accordance with the law of that State. Where the debtor is domiciled in another Member State than that where the order was issued, service is effected within three working days after receipt of the declaration from the bank. The documents to be served are transmitted to the competent authority in the Member State of the debtor's domicile and that authority then serves them on the debtor in accordance with the law

(207) Article 24; this Article contains various provisions about the implementation of the order which should be studied carefully.

(208) For the definition of 'competent authority' see Article 4(14).

(209) Article 25.

(210) Article 28.

(211) Article 28(1).

of that Member State. Where the debtor is domiciled in a third State the documents are served in accordance with the rules on international service applicable in the Member State where the order was issued.

13.6. Remedies and other provisions for protection of the debtor's interests

Since the EAPO is issued without the debtor being heard, the Regulation grants the debtor a variety of remedies against the Preservation Order itself or its enforcement⁽²¹²⁾. The remedies available to the debtor are, in addition to the conditions for issuing the order and the liability of the creditor for any breach of those, a key element in the Regulation to strike a balance between the creditor's and the debtor's interests. The debtor can request a review of the Preservation Order notably if the conditions for issue set out in the Regulation were not met, for example because the issuing court did not have jurisdiction or because the creditor's claim did not exist or existed only in a lower amount, or because the creditor's claim was not in urgent need of protection in the form of an EAPO⁽²¹³⁾.

The debtor can also request a review if the circumstances that led to the issuing of the order have changed in such a way that the order would no longer be justified, e.g. because the claim has been paid in the meantime.

A remedy is also available if the Order has not been properly served on the debtor or if the documents have not been translated into a language they

(212) Articles 33 -39.

(213) Further examples are set out in Recital 12.

understands or into the language of the Member State where they reside and these defects of service have not been cured within a specified time period.

A form for use in applying for the various remedies is to be prescribed by the Commission⁽²¹⁴⁾. An appeal is available against any decision as regards the remedies provided in the Regulation⁽²¹⁵⁾. The debtor may also apply for release of the funds on provision to the court which issued the order of sufficient security or assurance under the national law of the court⁽²¹⁶⁾.

The Regulation also contains a number of additional provisions protecting the debtor's interests. Thus, certain amounts can be excluded from the implementation of the order where these are exempted from seizure under the law of the Member State of enforcement whether at the request of the debtor or otherwise according to that law; these will include amounts needed for the maintenance of the debtor and their dependents⁽²¹⁷⁾. In addition, the creditor is liable for any damage caused to the debtor by the Preservation Order due to fault on the creditor's part; the fault is presumed in certain situations⁽²¹⁸⁾. Finally, the creditor is bound to request the release of any funds above the amount specified in the Order where several accounts have been preserved by an EAPO or by an equivalent national order⁽²¹⁹⁾.

(214) See Articles 36, 51 and 52.

(215) Article 37.

(216) Article 38.

(217) Article 3.

(218) See Article 13.

(219) Article 27.



Facilitating Judicial Cooperation and Access
to Information in practice

14.1. The European Judicial Network in civil and commercial matters

14.1.1. Establishment and constitution of the Network

The European Judicial Network in civil and commercial matters (EJN-civil) was set up by the Council under a Decision of 28 May 2001⁽²²⁰⁾ binding all the Member States except Denmark and started operating on 1 December 2002. The EJN-civil is a concrete and practical response to simplify judicial cooperation for the benefit of citizens which results in improved cross-border access to justice. The Network has a flexible, non-bureaucratic structure and operates in an informal way with the aims of facilitating judicial cooperation between the Member States by supporting the implementation of European Civil Justice measures and international Conventions to which the Member States are party and by providing information to the public to facilitate their access to the national judicial systems. It provides support to the Central Authorities and is used by them as stipulated in the relating specific instruments, and facilitates relations between different courts and with the legal professions.

The idea behind the creation of the EJN is that the gradual establishment of a genuine area of justice in Europe entails the need to improve, simplify and expedite effective judicial cooperation between the Member States

(220) Council Decision No 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters; see OJ L 174, 27.6.2001, p. 25. Decision No 568/2009/EC of the European Parliament and the Council of 18 June 2009 completed its legal basis by modernising it and integrating legal professions into the Network. The Commission is currently preparing a report on the activities of the EJN-civil which should be published before the end of 2014.

in civil and commercial matters. The Network also represents an original and practical response to the objectives for access to justice and judicial cooperation set by the Tampere (Finland) European Council in 1999 and repeated at the Councils in The Hague in 2004 and Stockholm in 2009. The European Council of 26 and 27 June 2014 emphasised the need for further action to facilitate cross-border activities and operational cooperation. The EJN therefore provides valuable access to justice for persons engaged in cross-border litigation or non-contentious judicial proceedings.

14.1.2. Details of the EJN membership and operations

The membership of the Network consists of one or more contact points designated by each of the Member States involved together with the various bodies and central authorities specified in the EU Civil Justice instruments and in international conventions and other instruments to which Member States are also party. The contact points play a key role in the Network. They are available to other contact points and to local judicial authorities in their Member State to assist them to resolve cross-border issues with which they are confronted and to provide them with any information to facilitate the application of the law of the other Member States applicable under Union or international instruments. They are also at the disposal of authorities provided for in Community or international instruments relating to judicial cooperation in civil and commercial matters. The contact points assist these authorities in all practicable ways. In addition, they communicate regularly with the contact points of other Member States.

Since the coming into force of the Decision ⁽²²¹⁾ amending the original instrument setting up the Network, membership is extended beyond other judicial or administrative authorities responsible for judicial cooperation in civil and commercial matters whose membership is deemed to be useful by the Member State, as well as the Liaison magistrates with responsibilities for cooperation in civil and commercial matters, to include the professional associations of legal professionals.

EJN-civil has more than 500 members and at present around 100 contact points have been nominated by Member States. The EJN holds six meetings per year. The EJN has established fact sheets giving information for citizens in more than 20 different legal areas and these are available in all Union languages through the European e-Justice Portal. Nine Guides for citizens outlining information and Good Practice for practitioners in relation to a number of the EU instruments in the Civil Justice acquis have been published and are updated regularly.

Concrete cases are regularly discussed in confidential EJN bilateral meetings between Member States aimed at assisting in the resolution of these cases in the area of family law on maintenance obligations, child abduction and access or custody rights to a child. The EJN Secretariat is provided by the European Commission which also organises and chairs the Network's meetings.

The EJN-civil facilitates judicial cooperation in civil and commercial matters by interaction between national EJN contact points and is the

most important tool available in this area. The EJN is particularly important for solving practical difficulties in concrete cases involving cross-border judicial proceedings. In addition the Network provides a valuable forum for the evaluation of EU instruments in the civil justice acquis based on sharing of experience among the contact points and other members. It is also an important medium of communication and contact among the central authorities involved notably with the EU family law instruments such as the Brussels IIa and Maintenance Regulations.

More and more EU legislative instruments in civil and commercial matters explicitly make reference to the use of the Network to support their implementation and the Network plays a significant role in providing information on national law in different legal areas. As referred to in the Commission's Communication of 11 March 2014 on the EU Justice Agenda for 2020 ⁽²²²⁾, the Network has a fundamental function when it comes to the consolidation of available Union instruments in the area of civil justice.

14.1.3. Recent development of the EJN

The main challenge for the EJN under the revised legal framework ⁽²²³⁾ has been to integrate as of 2011 the new membership of legal professions to the Network's activities. The **new Decision** has sought to bring about better operating conditions for the Network within the Member States by the way of the national contact points and to reinforce their roles both within the Network and in relation to judges and legal professions. In addition to extending membership to the professional associations, representing legal

(221) Decision No 568/2009/EC of the European Parliament and of the Council of 18 June 2009 amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters; see OJ L 168, 30.6.2009, p. 35.

(222) COM(2014) 144.

(223) As from 1 January 2011.

practitioners at national level who are directly involved in the application of EU and wider international instruments concerning judicial cooperation in civil and commercial matters, the EJNI contact points have appropriate contacts with these professional bodies.

In particular, those interactions may include exchanges of experience and information with regards to the effective and practical application of European Union instruments and Conventions, collaboration in the preparation and updating of the information sheets available on the EJNI website and the participation in relevant EJNI meetings (namely the annual meeting of the EJNI members). In the area of Family Law, the EJNI has proved to be beneficial where in addition to participating in bilateral and plenary meetings of the EJNI, Member States have, in accordance with the requirements of Union legislation, established central authorities to assist directly in cross-border judicial cooperation in these very difficult and often highly sensitive matters.

14.2. Making Information available at the European e-Justice Portal

One of the key tasks of the EJNI has been the establishment of a webpage containing information about European and international legal instruments and about the national law and procedures of the Member States. In this the EJNI contact points work very closely with the European Commission. The aim was also to implement and update, step by step, an information system directed at the public in order to facilitate their access to the national judicial systems, particularly through the website, which largely migrated to the European e-Justice Portal. For that purpose, the EJNI developed factsheets on national legislation and procedure relating to Union law instruments. These

factsheets edited in all official languages of the EU are available through the EJNI pages at the European e-Justice Portal: <https://e-justice.europa.eu>

The EJNI pages at the European e-Justice Portal also contain information about all the EU Civil Justice instruments and the various EU procedures. A specific section at the portal is dedicated to forms.

In addition the EJNI was instrumental in working with the European Commission to prepare and keep up to date the European Civil Judicial Atlas. This is also available online and contains valuable and very detailed information about the legal systems in the individual Member States. Through the use of the judicial atlas, which is public, potential exists to access information about various aspects of each legal system such as the competent courts of the Member States for the various national and European procedures, details of enforcement officers and of the legal professionals. On this site are also available forms for many of the European procedures such as the Order of Payment and Small Claims.

Following the migration of the Judicial Atlas, material can be accessed through the e-Justice Portal. Here is the link to the Judicial Atlas:

https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-88-en-do

Alongside the development of the e-Justice Portal is the e-Codex project in which teams in various Member States are sharing the development of techniques for the online processing of various procedures. The first of these projects is to establish an online procedure for European Small Claims.

In addition the Justice site of the European Commission provides information about the European Union's policies and activities in the field of Civil Justice. This site also allows some access to the other sites mentioned through hyperlinks. Here is the link to the site itself: http://ec.europa.eu/justice/civil/index_en.htm

Also published through the EJM are various Practice Guides and other written information about the European Union's Civil Justice initiatives. Most of these are also available on-line at: http://ec.europa.eu/justice/civil/document/index_en.htm

LIST OF INSTRUMENTS REFERRED TO IN THIS GUIDE

Title of Instrument. *Paragraph*

COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) 1.5 and 2

REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast) 2.2

REGULATION (EU) No 542/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice 2.2.1 and 2.2.8

REGULATION (EC) No 805/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 creating a European Enforcement Order for uncontested claims 3.2

REGULATION (EC) No 1896/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 creating a European order for payment procedure 3.3

REGULATION (EC) No 861/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 establishing a European Small Claims Procedure 3.4

REGULATION (EU) No 655/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters 3.5 and 13

COUNCIL REGULATION (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings 4

REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I) 5.2

REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) 5.3

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 (Brussels IIa) 6.1

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 (Rome III) 6.2

COUNCIL REGULATION (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations 7

REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession 8

REGULATION (EC) No 1393/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 9

COUNCIL REGULATION (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters 10

COUNCIL DIRECTIVE 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes 11.2

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil and commercial matters 12.3

COUNCIL DECISION No 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters 14.1

DECISION No 568/2009/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 June 2009 amending Council Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters 14.1

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