Brussels I Regulation (recast)
(Introduction, scope of application, jurisdiction, lis pendens)[1]

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Case study

Mr Vittorio is a dentist living and practising in Milan (Italy). He wants to buy a new computer for his Dental Clinic. Surfing online, he discovers that "L'ordinateur", a company with its seat in Paris, offers discounts for the type of computer he is looking for. In October 2018 he bought it through the company's website, which specified that the delivery could take place anywhere in the EU. L'ordinateur agreed to deliver the computer to Milan.

The delivery did take place, but when the computer arrived in Milan, it appeared that it was not the one which Mr Vittorio had ordered and did not fit the requested requirements.

Mr Vittorio refused to pay and quickly bought a new computer, which was much more expensive, through a local retailer. He wants to sue the French company for damages.

However, he is not sure which court will have jurisdiction.

Questions

1. Is the Brussels I Regulation (recast) applicable? Would your answer be the same if "L'ordinateur" had its seat in Toronto (Canada)?

2. Where can Mr Vittorio sue L'ordinateur? Explore the possible grounds of jurisdiction.

3. Assume there was a choice of court agreement written in the online contract agreed through the web, which Mr Vittorio downloaded onto his own computer, in favour of the Paris courts.
    a. Do you think this clause is valid?
    b. If it is valid, can Mr Vittorio sue in Italy?

4. Assume Mr Vittorio has brought the case before the French courts. L'ordinateur wants to react and to sue Mr Vittorio in turn for payment.
    a. Can the company bring a counter-claim before the French tribunal?
    b. Can the company take the case to Italy?

5. Suppose now that Mr Vittorio did not buy the computer for his dental clinic, but for his family.

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a. Where can Mr Vittorio sue L'ordinateur? Explore the possible grounds of jurisdiction available.
b. Does this have an impact on the choice of court agreement?
c. Does this have an impact on the possible action brought by L'ordinateur?

Methodological advice

Training Aims:

- Familiarise the participants with the scope of application of the regulations.
- Explain the objectives underlying the main rules in the regulations.
- Clarify the functioning of the various jurisdiction rules.
- Explain the potential difficulties of multiple actions.
- Explain the various possibilities of decision circulations.
- Make the participants feel at ease with the application of the European instruments.
- Familiarise the participants with some key decisions of relevant EU case law.

For the national training seminar it would be helpful to provide participants with references to relevant publications available in the participant's mother tongue, as well as relevant case law.

Methodology

In any case with a cross-border component, the following steps can assist in finding the right provisions to be applied:

Step 1. Identify the area of law concerned.
Step 2. Consider which aspect of private international law is at issue.
Step 3. Find the relevant EU and international legal sources.
Step 4. Check the substantive, geographical and temporal scope of the respective EU and international instruments; where more than one instrument is relevant, check their relation to each other.
Step 5. Find the correct provisions.

Please note, where no EU, international, multilateral or bilateral instrument is applicable in a cross-border case, the autonomous private international law rules of the State concerned will have to be considered.

Suggested solution

1. Is the Brussels I Regulation (recast) applicable? Would your answer be the same if "L'ordinateur" had its seat in Toronto (Canada)?

Jurisdiction for civil and commercial matters within the EU is subject to 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 (the "Brussels I Regulation (recast)").

Material scope of application

As determined by Article 1, the Regulation applies to "civil and commercial matters". This is a key concept of the Regulation, which led to important cases from the Court of Justice. In particular, the Court decided that the concept should be given an "autonomous meaning", *i.e* that:

"reference must not be made to the law of one of the States concerned but, first, to the objectives and scheme of the [Regulation]" (CJEU, 14 October 1976, 29/76, Eurocontrol, n°5).

In case of doubt, the scope will have to be interpreted by the Court itself, mostly following the public/private law division known to many legal systems in Europe. More precisely, the Court excludes the applicability of the Brussels Regulation if a public authority is involved and "is acting in the exercise of its public authority powers" (CJEU, 16 December 1980, 814/79, Rüffer, n°8).

The Regulation exempts matters from its scope of application, as for instance "revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)", cf Article 1.

The dispute between Mr Vittorio and "L'ordinateur" is a private contractual dispute, and therefore falls within the scope of "civil and commercial matters".

Geographical scope of application

The general rule is that the provisions of the Regulation on jurisdiction are exclusively applicable if the defendant is domiciled in the EU (Articles 4 and 5).

However, if the defendant is domiciled outside the EU, the jurisdiction is determined by the law of each state, subject to some exceptions (Article 6).

As the defendant is domiciled in a Member State, the Regulation will apply *ratione personae*. Therefore, if Mr Vittorio wants to sue before a Court in the EU, the only applicable rules can be those of the Regulation. No jurisdiction rules other than those provided for in the Regulation can be applied.

Please note that the nationality of the defendant is irrelevant to determine the scope of application of the Brussels I Regulation (recast).

However, if the defendant company had its seat in Canada (*ie*: outside the EU), then the Regulation would not apply, rather the national rules of each country where Mr Vittorio wants to sue would be applicable. For instance, if Mr Vittorio wanted to sue the Canadian company in France, French national jurisdiction rules would apply.

Temporal scope of application

Article 66 Section 1 states that:

"This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015"

Therefore, since the contract was concluded in 2018, the lawsuit will take place after 10 January 2015, the Regulation is applicable *ratione temporis*.

Conclusion: The situation falls within the material, geographical and temporal scope of application of the Regulation. The Brussels I Regulation (recast) is therefore applicable and the jurisdiction of the tribunal of a Member State should be established following its provisions.

Note: As the applicability of the national rules, according to Article 6 of the Regulation, is "subject to Article 18(1), Article 21(2) and Articles 24 and 25", the applicability of these provisions must be carefully checked. In the present situation, the existence of a choice of court agreement (see question 3) and the hypothesis that Mr Vittorio is a consumer (see question 5) would imply that these provisions of the Regulation and not national rules are applicable to determine jurisdiction – even if the defendant is domiciled outside the EU (see in more detail questions 3 and 5).

2. Where can Mr Vittorio sue L'ordinateur? Explore the possible grounds of jurisdiction.

The applicable rules are in Article 4 Section 1 (jurisdiction of the courts of the domicile of the defendant) or Article 7 Section 1 (jurisdiction for actions relating to a contract).

First, according to Article 4 Section 1, "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State." Accordingly, Mr Vittorio can sue **"**L'ordinateur" in France, the place of its domicile pursuant to Article 4 Section 1 of the Regulation.

As L'ordinateur is a company, its domicile has to be determined in accordance with Article 63.

Note: Article 4 provides only for international jurisdiction (i.e. which country) and not for internal jurisdiction (i.e. which city). Therefore, only French law can determine which the specific competent court in France is (e.g. Paris or Marseille). Internal jurisdiction on the basis of domicile is, however, common. Therefore, the courts of Paris are likely to have jurisdiction.

Secondly, Article 7 adds several optional grounds of jurisdiction and gives the possibility of suing in the courts of another Member State different than the domicile of the defendant.

As far as contracts are concerned, the relevant provision is Article 7 Section 1.

According to Article 7 Section 1, the claimant can, in addition to the court of the domicile of the defendant, sue before "the courts for the place of performance of the obligation in question".

The terms "contracts" and "obligation in question" are complex and depend on the nature of the contract. The Court decided that, as for the concept of "civil and commercial matters" they should be given an autonomous meaning, independent of the national laws.

The term “contract” is a European concept. As the Court said in numerous cases:

> “the phrase 'matters relating to a contract' ….is to be interpreted independently, having regard primarily to the objectives and general scheme of the Convention, in order to ensure that it is applied uniformly in all the Contracting States” (CJEU, 17 June 1992, C-26/91, Jakob Handte, n° 10).

Moreover, the very definition of contract, according to the Court, implies that there is an obligation freely assumed by one party towards another.

As the court decided, once again in various cases:

“the expression *matters relating to contract* …is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another” (CJEU, 17 September 2002, C-334/00, Tacconi, n°23).

In the present situation, the contract concluded falls into the category of “matters relating to a contract” according to Article 7.

According to Article 7 Section 1, a specific solution is set up for sales: the place of performance of the “obligation in question” is “the place in a Member State where, under the contract, the goods were delivered or should have been delivered”.

This is to say in a sales contract, the place of performance is the place of delivery. This criterion reinforces legal certainty, since it is a clear and, in most cases, simple connecting factor to use.

> As the Court puts it:
> “Under that rule of special jurisdiction, the defendant may also be sued in the court for the place of performance of the obligation in question, since that court is presumed to have a close link to the contract. In order to reinforce the primary objective of legal certainty which governs the rules of jurisdiction which it sets out, that criterion of a link is defined autonomously by Regulation No 44/2001 in the case of the sale of goods”. (CJEU, *Falco*, 23 April 2009, C-533/07, n° 25 and 26).

In the present situation, the place of delivery is according to the terms of the contract in Milan (Italy). Therefore, the Italian courts should be considered as having jurisdiction pursuant to Article 7 Section 1 of the Regulation.

Note: Article 7 Section 1 provides not only for general international jurisdiction of the courts of a specific Member State (as is the case in Article 4) but also, more specifically, to the courts of the designated place (“in the courts for the place of performance of the obligation in question”). Therefore, the courts in Milan (as opposed to any another city in Italy) have jurisdiction.

Both French courts, (pursuant to Article 4 Section 1) and Milan courts (pursuant to Article 7 Section 1) have jurisdiction. Mr Vittorio therefore has the choice to sue **“**L’ordinateur” in either jurisdiction.

3. **Assume there was a choice of court agreement written in the online contract agreed through the web, which Mr Vittorio downloaded onto his own computer, in favour of the Paris courts.**

a) Do you think this clause is valid?

Pursuant to Article 25 of the Regulation, the validity of the choice of court agreement is subject to formal and substantial requirements.

Formal requirements are listed in Article 25 Section 1. The most important requirement is that the agreement conferring jurisdiction shall be in writing. Article 25 Section 2 adds that "any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'". Therefore, if the agreement was explicitly included in the contract concluded by Mr Vittorio, the fact that the contract had been concluded through electronic means is irrelevant. If the choice of court agreement was incorporated in the general terms and condition of the contract, the CJEU requires, however, a "click-wrapping" acceptance, meaning that the buyer must have "clicked" in a specific box to accept the general terms and conditions.

As the CJEU stated in the important El Majdoub case (CJEU, 21 May 2005, C-322/14):
"the method of accepting the general terms and conditions of a contract for sale by 'click-wrapping', such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract."

Subject to that requirement, the clause is formally valid.

As to the substantial validity, the general rule followed in Article 25 Section 1 is that "if the parties, (…) have agreed that a court or the courts of a Member State are to have jurisdiction (…) that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State."

It is very controversial what is meant with the last part of the sentence just quoted. In legal literature you can find a debate on whether the validity of the forum clause is to be exclusively determined by the conditions of Article 25. I would, however, argue that the material validity of the choice of court agreement in the contract between Mr Vittorio and **"**L'ordinateur" should be governed by French law, as the law of the chosen court.

In the present situation nothing indicates that the contract would be "null and void", and it can be considered that the clause is also substantially valid.

Therefore, the choice of court agreement in favour of the French courts in the in the contract between Mr Vittorio and "L'ordinateur" is valid and in that situation the courts of Paris, designated by the clause, will have exclusive jurisdiction to hear the case.

Note:

1. Even if "L'ordinateur" is domiciled outside the EU, the choice of court agreement will be subject to the provisions of the Regulation, since Article 25 states that:

"If the parties, *regardless of their domicile,* have agreed that a court or the courts of a Member State are to have jurisdiction (…) that court or those courts shall have jurisdiction" (emphasis added).

The solution is therefore the same as outlined above: the choice of court agreement in favour of the French courts in the contract between Mr Vittorio and "L'ordinateur" is valid and the courts of Paris, designated by the clause, will have exclusive jurisdiction to hear the case.

2. The question of the determination of the substantial validity could be governed by another law if a French choice of law rule will designate another law in this specific situation (i.e.: the law of the contract). This solution is subject to some discussion, but certainly favoured by Recital 20 of the Regulation, which states that:
"Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of- laws rules of that Member State."

b) If it is valid, can Mr Vittorio sue in Italy?

No. The effect of the clause is to give "exclusive jurisdiction" to the courts chosen by the parties. Therefore, pursuant to Article 25, the courts in Paris have "exclusive jurisdiction". This means that no other court can hear the case. Any other court seised should therefore decline its own jurisdiction (see Article 31 Section 1).

Note: Such a solution is to be followed even if a court first seised was not the court chosen by the parties. In that situation, it should stay the proceedings.
The question was raised a few years ago in the context of *lis pendens*. *Lis pendens* is a technique by which when proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings (Article 29 Section 1). Then, where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court (Article 29-3).
In a nutshell, the *lis pendens* mechanism gives precedence to the Court first seised.
When a choice of court agreement is involved, the Court of Justice followed this solution and allowed for *lis pendens* and thus maintained the priority of the Court first-seised even if it was not the court designated by the clause (CJEU, 9 December 2003, C-116/02, Erich Gasser GmbH).
This situation was, however, putting the efficiency of choice of court agreement at risk. The Court designated by the choice of court agreement should have priority and should be granted the power to establish the validity of the clause itself.
Therefore, the solution in Gasser was reversed by Regulation Brussels I (recast). Article 31 Section 2 provides:
"where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement."
In the present situation, there is little doubt, therefore, that the courts in Paris courts have jurisdiction and that this jurisdiction is exclusive.

4. Assume Mr Vittorio has brought the case before the French courts. L'ordinateur wants to react and to sue Mr Vittorio in turn for payment.

a) Can the company bring a counter-claim before the French tribunal?

Yes. Article 8 of the Regulation adds several optional jurisdiction rules and gives the possibility of suing in another Member State if there is a link between two proceedings.
In case the original claim and the counter-claim arise from the same contract, there is a strong connection between the two claims and, Article 8-3 provides for the extension of the jurisdiction of the court seised with the original claim to also hear the counter-claim. Pursuant to Article 8-3:
"A person domiciled in a Member State may also be sued on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending".
Therefore, in that situation, the courts in Paris will have jurisdiction to hear both the claim originally brought by Mr Vittorio and the counter-claim brought by **"**L'ordinateur".

b) Can the company take the case to Italy?

The *lis (alibi) pendens* rule applies to concurrent proceedings in Member States courts. It is very simple: the court second seised has to stay its proceedings if the same action between the same parties is brought before the courts of two Member States. Article 29 Section 1 gives strict priority to the court first seised:
"where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."
The *lis pendens* applies only if there is an identity of action and parties. In the present case, it could be argued that there is no identity since the action brought in France by Mr Vittorio is an action for damages and the action brought in Italy by **"**L'ordinateur" is the action for payment. However, the CJEU took a broad definition of the identity of action. In the important Gubisch case (CJEU, 8 December 1987, 144/86), the court stated that:

> "The concept of *lis pendens* …covers a case where a party brings an action before a court in a Contracting State for the rescission or discharge of an international sales contract whilst an action by the other party to enforce the same contract is pending before a court in another Contracting State".

Therefore, in the present situation, pursuant to Article 21, the Italian tribunal should stay the proceedings because a French court was seised before.

Note: As has been seen above (see Q.3), there is no *lis pendens* if there is a valid choice of court agreement which provides for exclusive jurisdiction. Likewise, there is no *lis pendens* for provisional and protective measures.

5. Suppose now that Mr Vittorio did not buy the computer for his dental clinic, but for his family.

a) Where can Mr Vittorio sue L'ordinateur? Explore the possible grounds of jurisdiction available.

If Mr Vittorio had bought the computer for his family, he could be considered a consumer and therefore be granted specific jurisdictional protection.
Pursuant to Article 17 Section 1 "in matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section."
However, the functioning of Article 17 raises some difficult issues.
First, it must be established that Mr Vittorio is indeed a consumer.
Article 17 defines a consumer as a person having concluded a contract "for a purpose which can be regarded as being outside his trade or profession". It is frequently stated by the CJEU that the interpretation of the concept of "consumer" should be restrictive (see, recently, CJEU, 25 January 2018, C-498/16, Schrems, n°29).
Therefore, it must be clearly established that the reason why Mr Vittorio bought the computer was for family leisure. The context must be analysed and, should Mr Vittorio have both professional and personal activity with the computer, it must be proven that the professional activity is negligible in the context of the contract signed.

As the Court put it in the Gruber case (CJEU, 20 January 2005, C-464/01, J. Gruber, n°47):
"it is therefore for the court seised to decide whether the contract was intended, to a non-negligible extent, to meet the needs of the trade or profession of the person concerned or whether, on the contrary, the business use was merely negligible. For that purpose, the national court should take into consideration not only the content, nature and purpose of the contract, but also the objective circumstances in which it was concluded."

Second, it must also be argued that the contract falls within the scope of application of Article 17 and that "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", as stated in Article 17 Section 1 lit. c.
This concept of "direct such activities" has led to some important case law, particularly in the context of e-commerce.
The Court affirmed that:
"In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile (…) it should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them" (CJEU, 7 December 2010, C-585/08 and C-144/09, Pammer and Alpenhof).
Following this jurisprudence, certain criteria have been established:
"namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is

established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists." (CJEU, 7 December 2010, C-585/08 and C-144/09, Pammer and Alpenhof, para 93-94).
The website of L'ordinateur provides that delivery can take place anywhere in the EU, so the company clearly looks for customers from abroad. "L'ordinateur" has entered into a contract with a person domiciled in Italy and, moreover, has agreed to deliver the goods to Italy. The company can be considered, therefore, to be directing their activities towards the Member State of the consumer's domicile.
In that situation, Article 18 Section 1 opens for the consumer the choice between "the courts of the Member State in which that party [*i.e.*: the defendant] is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled".
Therefore, Mr Vittorio can choose between the courts of the defendant's domicile (France) and the courts of his own domicile (Italy).

It should be noted that the consumer must not show a causal link between the fact that the company directed its activities to the Member State of the consumer's domicile and the conclusion of the contract with the consumer (CJEU, C-218/12, Emrek).

Note: If "L'ordinateur" is domiciled outside the EU, the provisions of Brussels I (recast) on jurisdiction in consumer matters will be applicable only if the company has a branch in Europe. As Article 17 Section 2 puts it:
"Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State."
If the company has no branch in Europe, jurisdiction of the courts will be decided for upon national law.

b) Does this have an impact on the choice of court agreement?

Consumers are protected from entering into a choice of court agreement providing jurisdiction outside their home jurisdiction.
As stated in Article 19, the specific jurisdiction rules can only be departed from by an agreement either entered into "after the dispute has arisen" or "which allows the consumer to bring proceedings in courts other than those indicated in this section".
Therefore, the consumer cannot be deprived of the specific and protective jurisdiction rule set forth in Article 17.

In the present case, if Mr Vittorio wishes to sue in Milan, the existence of a choice of court agreement in favour of the courts in Paris cannot be raised against him pursuant to Article 19 of the Regulation.

Note: Following the case law of the CJEU, it could also be argued that a choice of court agreement in a consumer contract is an unfair term according to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

As the court clearly said (CJEU, 4 June 2009, Pannon, C-243/08, n° 40):
"in a contract concluded between a consumer and a seller or supplier within the meaning of the Directive, a term, drafted in advance by the seller or supplier – which was not subject to individual negotiation – the purpose of which is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller has his principal place of business, satisfies all the criteria necessary for it to be judged unfair for the purposes of the Directive."

If this solution is followed, the choice of court agreement should be completely disregarded as invalid.

c) Does this have an impact on the possible action brought by L'ordinateur?

Yes. If the action is brought by "L'ordinateur", then proceedings can be brought only in the courts of the Member State where the consumer is domiciled (Article 18 Section 2). Therefore, "L'ordinateur" can only bring proceedings in the Italian courts.

Note: However, this does not affect the right to bring a counter-claim in the court in which the original claim is pending (Article 18-3). Therefore, if the Paris courts were seised by Mr Vittorio, a counter-claim could be brought before those courts by "L'ordinateur".

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