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MODULE II

SUBJECT 4

INTERNATIONAL JURISDICTION IN REGULATION (EC) Nº 44/2001 (I): scope of application, objective forums and assignation of international jurisdiction by the parties

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PART 4: REGULATION 44/2001 AND INTERNATIONAL JURISDICTION: SCOPE, OBJECTIVE JURISDICTION AND INTERNATIONAL JURISDICTION FOR THE PARTIES[1]

I. Introduction. II. International jurisdiction: 1. Exclusive jurisdiction. 2. General jurisdiction based on the defendant's domicile. 3. Special or optional jurisdiction. III. International jurisdiction and intention of the parties: 1. Express jurisdiction. 2. Tacit jurisdiction. 3. Limitations and remedies to jurisdiction. IV. Particular problems in relation to international jurisdiction: 1. Examination as to jurisdiction. 2. *Lis pendens* and related actions.

I. INTRODUCTION.

There are three main stages to an international action: (1) jurisdiction is exerted by a State judicial body; (2) the proceedings are brought in that State and, finally, (3) the judgment is recognised and enforced outside that jurisdiction. We will now consider the first stage.

Under the Spanish system, the primary sources governing international jurisdiction are, firstly, Council Regulation (EC) No. 44/2001 on the recognition and enforcement of judgments in civil and commercial matters (henceforth the 'Jurisdiction Regulation') and, where the Regulation does not apply, conventional rules shall apply or, if it be the case, internal rules[2].

The *general requirement for application* of the Jurisdiction Regulation is that the defendant should be domiciled in an EU Member State, and this is also a key element in determining the international jurisdiction of the courts of a Member State. The general scope of the Jurisdiction Regulation with respect to the *parties* is that it will only apply if the defendant, whatever his nationality, is domiciled in a contracting State. There are, however, *exceptions* to this rule: 1) Even in those cases where the defendant is not domiciled in an EU Member State, jurisdiction will nevertheless be governed by the Jurisdiction Regulation where the parties submit to the jurisdiction of the courts of a Member State (discussed in Chapter III). 2) The Regulation also applies in the above situation where the courts of that country have exclusive jurisdiction (Art. 22). 3) Furthermore, if the defendant is not

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[2] The Judicial Regulation applies to all Member States of the European Union, according to its *territorial scope*. The *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, of 16 September 1988, which extends the Brussels Convention to the Members States of the EFTA (Iceland, Norway, Switzerland) has been modified and replaced with another text (*vid.* OJ L339/3, of 21 December 2007). The Lugano Convention is not covered in this discussion, although it should be mentioned that while it adopts the same framework and practically the same rules, there are nevertheless certain differences which make it advisable to consult the Convention when the litigation, whether in respect of jurisdiction or recognition of judgments, binds jurisdictions in EU Member States to third states involved in the proceedings. Finally, for relations with third countries Spain has a single *bilateral convention* in this matter (Convention between *Spain and the Republic of El Salvador*, of 7 November 2000, Official Gazette No. 256, of 25 October 2001, on *jurisdiction, recognition and enforcement of judgments in civil and commercial matters*).

domiciled in an EU Member State but nevertheless has a branch in that State and the dispute concerns insurance, certain consumer contracts or individual contracts of employment, the Jurisdiction Regulation will also apply. 4) In addition, the rules concerning *Lis pendens* and related actions apply irrespective of any requirement for the defendant to be domiciled in the EU.

All this is of considerable significance. Firstly and above all, because it makes it possible, as commented, to choose the relevant jurisdiction. Secondly, because in disputes where the Jurisdiction Regulation does not apply and *the defendant is domiciled outside the EU*, it is the internal (national) rules on international jurisdiction which apply (Art. 4). However, from a comparative viewpoint, the rules and criteria to determine jurisdiction in some legal systems are considered to be 'excessive' or 'exorbitant', although this is not the case with Spanish system. A classic example is Art. 14 of the French Civil Code, under which it is sufficient for one of the parties in the proceedings to hold French nationality to enable the French courts to have jurisdiction over the dispute, which grants an unwarrantable degree of priority to nationality.

> Imagine, for example, a suit concerning a French trader incorporated in France, and a Spanish trader temporarily incorporated in Equatorial Guinea, where the contract is to be performed. Once a dispute has arisen, the French company will be entitled to bring proceedings in the French courts, and Art. 14 of the French Civil Code will govern the determination of international jurisdiction. One can easily appreciate how far removed this court will be from the detailed facts it will be required to examine. The excessive effects would be most strongly felt by the recognising jurisdiction: the judgment of the French courts against Spanish property owned in Spain by the Spanish defendant could be recognised in Spain under the rules established in the Jurisdiction Regulation, which solely require that the judgment is delivered by the court of a member State.

The scope of the Jurisdiction Regulation is also restricted to certain *areas of law*, which are stated to be '*civil and commercial matters*' (Art. 1.1). The Regulation does not apply to proceedings concerning disputes between government bodies or State-owned companies, although the prerequisite for exclusion from the scope of the Regulation is that the parties are governed by *ius imperii*. Within the area of civil and commercial law, the Regulation also excludes matters concerning the status or legal capacity of natural persons, family law and wills or succession (Art. 1. 2 a), disputes concerning bankruptcy and other insolvency proceedings (Art. 1.2 b; the subject of a separate Regulation), social security (Art. 1. 2 c) and arbitration (Art. 1.2 d).

Finally, the *geographical scope* of application is defined by the territory of the European Union[3].

The Member States' courts will only apply the Jurisdiction Regulation to questions of international jurisdiction where the defendant is domiciled within the EU, with the above-

[3] With regard to this possibility, consideration must be given to the amendments that would be caused by the possible coming-into-effect of the *Convention on choice of jurisdiction agreements of 2005* in application of R. 44/2001 to the clauses that award jurisdiction. The aforementioned Convention has been signed by the European Union and the United States and ratified by Mexico (at November 2009). In particular, the said changes would be the consequence of the special relation between the Convention and R. 44/2001 as provided in article 26.6 of the said Convention. The text is available for consultation at www.hcch.net.

mentioned exceptions, and the dispute concerns civil or commercial matters. If any of these requirements is lacking, the courts will apply conventional law or, if the case may be, national rules.

Faced with the prospect of international proceedings, the primary interest of the parties is undoubtedly certainty. As a result, the parties need to know beforehand to which country's courts they will have to apply to enforce their rights in the event of differences. This is also important because the court found to have jurisdiction will apply its own legal system (Private International Law or national law) in resolving the dispute. In other words, the applicable law depends on the jurisdiction. This interest in certainty concerning the nature of the proceedings is heightened due to the availability of alternative venues for defendants in addition to the general jurisdiction based on their domicile. This encourages an active approach by the defendant and can lead to disagreeable surprises for the other parties, who may eventually find themselves before a national, and possibly very distant jurisdiction, which they had not originally foreseen. Predictability, a concept closely related to international commercial activity, is ensured by the inclusion of a jurisdiction clause in the contract (Article 23). As well as the express choice of jurisdiction, Article 24 regulates the tacit choice of jurisdiction.

I. INTERNATIONAL JURISDICTION:

The Jurisdiction Regulation is built on a framework which distinguishes between *exclusive*, *general* and *special* international jurisdictions. The framework creates a hierarchy of international jurisdictions amongst the Member States, in such a way that *prima facie* the courts that have exclusive jurisdiction will hear the cases and for other cases national courts may hear the case because a jurisdiction clause determining their jurisdiction has been included for all cases where this is possible (Chapter III) or, otherwise, if they coincide with the place of the domicile of the defendant or any of the special jurisdictions according to matter. In short, the Community legislator *has distributed jurisdiction amongst the national jurisdictions* in all Member States on the basis of a hierarchical structure which gives priority to the so-called exclusive jurisdictions for the reasons explained below.

1. Exclusive jurisdiction.

There are certain cases in which public interest has a relevant role, and this explains the desire of all legislators to ensure such proceedings must be brought in specific courts. Observance of these rules is ensured thank to the potential consequences at the recognition stage: if the judge first seised of the matter does not comply with these rules, there is a risk for the parties that the judgment will not be recognised outside the State in which it was delivered (Art. 35.1).

The courts identified for these purposes are those which are geographically closest to the subject of the dispute. Therefore,

1) In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated have jurisdiction (Art. 22.1), except in respect of tenancies of immovable property concluded for private use for a maximum period of six consecutive months, where proceedings may be brought in the Member State in which the defendant is domiciled.

2) In proceedings concerning the validity of the constitution, the nullity or the dissolution of companies or other legal persons, the courts of the Member State in which the company or legal person has its seat have jurisdiction (Art. 22.2);

3) In proceedings concerning the validity of entries in public registers, the courts of the Member State in which the register is kept have jurisdiction (Art. 22.3);

4) In proceedings concerning the registration of intellectual and industrial property, the courts of the Member State in which the deposit or registration has been applied for have jurisdiction (Art. 22.4.)

> Further specific rules found in other parts of secondary Community legislation should be borne in mind when considering industrial property matters. Firstly, there is *Regulation 40/94 of 20 December 1993 on the Community Trade Mark (OJ* 14/01/1994), which includes rules governing international jurisdiction. The speciality principle would account for the priority this enjoys over the Jurisdiction Regulation. Jurisdiction is determined according to the purpose of the proceedings. If the action seeks to *contest a trade mark application or the validity of the trade mark registration*, the Community Trade Mark Office shall have jurisdiction (Art. 55). The rules governing *infringement of trade mark*s is somewhat more complex: Community trade mark courts designated by the Member State in which the defendant is domiciled have jurisdiction in such cases. If the defendant is not domiciled in any of the Member States, jurisdiction is exercised by the courts of the Member State where the defendant has an establishment. Apart from these specific cases, jurisdiction is exerted by the courts of the Member State where the defendant is domiciled, or, by default, proceedings shall be brought in the courts of the Member State where the Office has its seat (i.e. Spain).

5) Finally, in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced have jurisdiction (Art. 22. 5).

2. General jurisdiction: the defendant's domicile

The general requirement under the Jurisdiction Regulation is that the defendant's domicile must be in a Member State, which also serves as the general rule to determine the jurisdiction. The approach adopted is primarily based on the traditional *actor sequitor forum rei* principle of procedural law in the Member States, as there is presumably no-one better than a judge in the defendant's domicile to comprehend the latter's property interests with a view to the prospective judgment and at the same time to enable defendants to maximise their chances of defence. The use of this rule in Community law is intended to harmonise the treatment of nationals of the Member States and non-Member State citizens who are established in the EU in the pursuit of business and financial activities.

Under the Jurisdiction Regulation, the defendant's domicile is *subsidiary* to the exclusive jurisdiction. The result is that unless the subject matter of the litigation falls under the matters reserved for exclusive jurisdiction, the defendant may be sued in the courts of the country in which he is domiciled. Having fallen outside the matters reserved to exclusive jurisdiction, the general jurisdiction of the defendant's domicile will not apply if the defendant opts to invoke one of the special or optional jurisdictions (Arts. 5, 6 and 7).

The definition of defendant's domicile can give rise to difficulties due to discrepancies in the laws of the Member States and *the lack of a Community definition* of domicile. The Jurisdiction Regulation provides certain guidelines with a view to ensuring that the law is applied in as uniform a fashion as possible amongst the Member States' courts. With respect to *natural persons*, Art. 59 of the Jurisdiction Regulation provides that, in order to determine whether a person is domiciled in the relevant Member State, the court "shall apply its internal law". It will be necessary to interpret broadly this reference to internal law, making use of the rules of procedural law, on which each Member State bases its approach to international jurisdiction. The Spanish LOPJ and the Civil Procedure Act (LEC) are quite vague in this respect. However, there are general principles governing such matters: i.e., Arts. 40 and 41 of the Civil Code, or registration in the Municipal Register.

> As a result, if the court initially seised of the matter determines that it has jurisdiction and that there is no domicile (e.g. in Spain) and ascertains, pursuant to Art. 59.2 of the Jurisdiction Regulation, that the defendant is *domiciled in another Member State*, it must decline jurisdiction. Although this requirement is not present in Art. 25 of the Jurisdiction Regulation, which solely requires that a court examine its status in respect of exclusive jurisdiction, it should be construed as implied in the Regulation in view of its purpose. If it is established that the *domicile is outside the Member States*, the court may then exert jurisdiction on the basis of its own internal rules, and this includes exorbitant jurisdiction in the case of countries other than Spain.

With respect to *legal persons*, the Jurisdiction Regulation establishes that a company or any other legal person is domiciled at the place where it has its statutory seat, central administration or principal place of business (Art. 60). This rule provides a flexible response to the need to overcome the differing approaches to the domicile of legal persons in the individual Member States.

3. Special or optional jurisdiction.

We have seen how general jurisdiction under the Jurisdiction Regulation is granted to the courts in the defendant's domicile. It is also the case that claimants are given the *option* of suing in another court if they so wish. Therefore, optional jurisdiction means that all jurisdictions analysed below entail a wider defence for the plaintiff rather than exceptions to the general jurisdiction of the domicile of the defendant. This jurisdiction falls into two classes. There is *special* or *optional* jurisdiction in the strict meaning of the term, and *specific* jurisdiction based on the subject of the litigation.

Special or optional jurisdiction is governed by Arts. 5 and 6 of the Jurisdiction Regulation and, strictly speaking, refers to an *optional or alternative jurisdiction for the claimant*, i.e. the claimant may issue proceedings in the courts of the defendant's domicile or in any of the jurisdictions cited in Arts. 5 and 6. This is also a *special jurisdiction based on the subject matter*, given that the Regulation attempts to allocate the subject matter of the dispute to the court which is geographically closest (*the proximity principle*, e.g. in Arts. 5.1 and 5.3) or that which is best able to administer justice (*rationalisation of proceedings*, e.g. in Art. 6.1).

It has been pointed out that all of these rules have general *shortcomings*. The first objection is that as the initiative lies with the claimant, the Jurisdiction Regulation presents one of the

parties with the dilemma of resolving the dispute either in a general jurisdiction, or in any of the special jurisdictions; therefore, as a result, one of the parties can choose the applicable law if unity is lacking in the material law. Secondly, also as a result, claimants are therefore tempted to bring the other party before their jurisdiction of choice as soon as possible. Finally, one further undesired effect: the rules encourage an abrupt descent into contentious proceedings and prevent the parties from reaching an amicable settlement, given that the only means of inserting certainty into the procedure is to amend jurisdiction clauses.

Turning to the *second* class of jurisdiction, alternative or special jurisdiction based on the subject matter is also available with respect to insurance contracts (Arts. 8-14), certain consumer contracts (Arts. 15-17) and individual contracts of employment (Arts. 18-21). The difference in the Jurisdiction Regulation with respect to the previous types of jurisdiction lies in the *imperative nature* of the remedies, given that all cases concern contractual relationships in which there is a weaker party. The rules therefore compensate, in contentious proceedings, for the weakness of one of the parties caused by a lack of bargaining power. Firstly, the 'weaker party' (the consumer, the employee) is compensated, where it is the claimant, by the conferral of an option to choose the courts in the country where he is domiciled or the country in which the other party to the contract is domiciled. Secondly, jurisdiction clauses are prevented from being operational in an unlimited way; thus, only agreements entered into *after* the dispute has arisen are upheld (Arts. 13, 17 and 21). This time limit prevents the 'stronger party' in the contractual relationship from imposing beforehand, on the policyholder, the consumer or the employee, courts which serve only its own interests. Finally, the imperative nature of jurisdiction in matters of insurance and certain consumer contracts is reinforced during the recognition stage, as Art. 35.1 of the Jurisdiction Regulation provides that a judgment *will not be recognised* where the court seised of the proceedings has delivered judgement based on a ground of jurisdiction other than those contemplated for these matters in the Regulation.

There follows below a discussion of special or optional jurisdiction, commencing with reference to contracts. Given that specific, or protective jurisdiction refers in its entirety to contracts, all the separate aspects of this jurisdiction will be included under the same heading for ease of exposition, although, as commented, they have a different purpose and therefore designate different courts.

1) Contractual matters

(A) General jurisdiction in contractual matters.

The basic instrument for the circulation of goods and services in international commerce is the contract. As a result, the litigation of contracts where the *claimant has a choice of jurisdiction* is subject to the special jurisdiction established under Art. 5.1 of the Jurisdiction Regulation, which provides that jurisdiction lies with the courts '*for the place of performance of the obligation in question*'. The complexity of this rule has created a considerable body of case law delivered by the European Court of Justice (ECJ) from the period when this rule formed part of the 1968 Convention.

Firstly, there have been doubts concerning the construction of the term '*matters relating to a contract*'. The ECJ was obliged to clarify that this rule of jurisdiction does not apply to "judgments given in actions between a public authority and a person governed by private law…where the public authority acts in the exercise of its powers' [fn] The Court has also established that Art. 5.1 does apply to cases where the existence of the contract itself is in

dispute [fn] and where the appropriate jurisdiction for contractual matters is in dispute due to the claim that the contract itself is void. Finally, it also appears that Art. 5.1 does not cover the situation in which there is no obligation freely assumed by one party towards another. The ECJ was referring in this case to 'chains of contracts', given that as there is no contractual relationship between the sub-buyer and the manufacturer of a product[4] it is impossible for the manufacturer to reasonably predict in precisely which courts he may be sued.

A further group of practical difficulties arise around the specific meaning of *obligations* as referred to in Art. 5.1. In view of the many obligations created by the contract, it must be decided which of these should be employed in order to determine the place of performance and, hence, the court with jurisdiction. This was the first difficulty the ECJ was required to decide, and it held that where all the obligations are independent, the term 'obligation' applies to "any obligation arising out of the contract (an exclusive sales concession in this case) or to the *contractual obligation forming the basis of the legal proceedings"*[5]. Jurisdiction therefore corresponds to the court in the place of performance of the principal contractual obligation on which the plaintiff' s action is based. This gave rise to the so-called independence of obligations theory and was incorporated into the 1978 amendment to the Convention, although it has not prevented further decisions by the ECJ which, although not contradictory, do nevertheless depart from these authorities.

Alongside the *independence of obligations theory* there has also been a line of thought in certain cases concerning individual employment contracts[6] in which the *classic benefit* theory has prevailed. The theory holds that since in all contracts something is always given or done for monetary consideration, it is the benefit obtained from 'giving' or 'doing' which makes it possible to distinguish one type of contract from another. The place where the benefit which characterises the contract is obtained is therefore the ground of international jurisdiction.

There have been further difficulties involving the construction of the term *place of performance* (of the obligation taken into account). This ground for international jurisdiction obviously causes no difficulties when the place is *agreed on by the parties in the contract*[7]. If this is unclear, the need to ascertain the place of performance of the obligation on which the action is based gives rise to conflict caused not only by the lack of a uniform definition amongst Member States for the term 'place of performance', but also by the distinct procedures employed to reach a definition (i.e. should the question be determined according to the court's own rules of procedure or the rules concerning private international law?). The conflict is evident in ECJ case law[8], to such an extent that the opportunity was taken during the transfer of the Brussels Convention rules to the Jurisdiction Regulation to establish a rule for the uniform construction of 'place of performance', which has mitigated some of the

[4] Judgment of the ECJ of 17 June 1992, Case C-26/91, *J. Handte*
[5] Judgment of the ECJ of 6 October 1976, Case C-14/76, *Bloos v. Bouyer*
[6] Judgment of the ECJ of 26 May 1982, Case C-133/81, *Ivenel*.
[7] Judgment of the ECJ of 17 November 1980, case C-56/79 *Zelger v. Salinitri.*
[8] Cases clearly illustrate the variety of applicable rules to decide this question. Thus, in *Tessili v. Dunlop*, the ECJ requested the national judge to give a preliminary ruling to define the law applicable to the contract in order to decide the place where the judgment was to be enforced according to the said law (Judgment of the ECJ of 6 October 1976, case 12/76). The reverse method was held by the ECJ in case C-288/92, *Custom Made Ltd v. Stawa Metalbau*, with the difference in this case that, as German law is applicable due to German ratification of the Uniform Law on the International Sale of Goods, the place of performance is deemed to be the creditor's domicile (ECJ, judgment in Case C-288/92 of 29 June 1994). In other cases, the Member States' national courts have suggested using the rule seeking the 'closest connection' between the subject matter of the dispute and the courts with potential jurisdiction.

difficulties in this respect. As a result, the place of performance for a *contract of sale* is described as the place where "the goods were delivered or should have been delivered" (Art. 5.1. b, first item). The place of performance for a *contract concerning the provision of services* is described as the place where "the services were provided or should have been provided" (Art. 5.1. b, second item).

(B) Combined actions

The *jurisdiction for combined actions in rem* and *in personam* under Art. 6.4 of the Jurisdiction Regulation may also be relevant to contractual matters. The rule provides that 'in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, a person may also be sued in the court of the Member State in which the property is situated'. A typical example is provided by a mortgage, which consists of a loan and a charge on the property. As immovable property is involved, exclusive jurisdiction would, in principle, lie with the courts of the Member State in which the property is located (as established in Art. 22). The special jurisdiction in Art. 6.4 allows the joinder of both actions in one single court, i.e. the court of the country in which the property is located, whereby the contractual question defers to the real property dispute. The aim is to rationalise the proceedings. However, the rule is of limited effect within the Spanish legal system, where the power to grant joinder is subject to the provisions of the *lex fori*, given that in view of the types of actions which may be joined under this rule, two distinct proceedings are forced to coexist which may not be the subject of a joinder under Art. 73.2 LEC 1/2000.

Finally, if the disputed contract is not covered by the provisions of the Jurisdiction Regulation or the defendant's domicile is not in a Member State, with the exceptions expressed above, the court will have to decide whether or not to exert jurisdiction. In Spain, Art. 22.3 of the LOPJ establishes that the Spanish courts have jurisdiction in matters relating to contractual obligations '…when the obligations have been created or must be performed in Spain…'. In other words, the courts have jurisdiction if the contract was executed in Spain or must be performed in Spain, which is no easier than classifying the nature of the action (which law should be applied to determine the place of formation of the contract, and how many of the obligations must be performed in Spain, one or all of them?).

(C) Jurisdiction relating to certain consumer contracts

The Jurisdiction Regulation does not actually protect all consumers in international litigation. It solely protects certain people, who are always natural persons, from the commercially most aggressive forms of contracts. As a result, the Regulation does not protect categories of litigants, but rather looks to the function of the contract. Arts. 15-17 therefore establish strict limits to the situations protected under the Regulation. The scope of the Jurisdiction Regulation in respect of *persons* focuses on the end-user; the consumer is a person who acquires goods or services for a purpose "which can be regarded as being outside his trade or profession" (Art. 15.1). In practice, this description has given rise to problems of construction in Community case law and can create difficulties where the purchaser is a legal person[9] or where a natural person completes a transaction with a dual purpose or use (i.e. personal and professional).

[9] Judgment of the ECJ of 19 January 1993, case C-89/91, *Shearson Lehman Hutton Inc.*

In relation to the *material* scope the Jurisdiction Regulation (Art. 15) refers to: 1) the *sale of goods on instalment credit*; 2) *a loan repayable by instalments, or any other form of credit, made to finance the sale of goods;* and 3) *any other contract* which has been made for the purpose of providing services or goods, as long as certain conditions are met. Types one and two are not difficult to classify.

Type three opens the door to all other classes of contract, provided they meet certain *specific requirements* which serve to describe the practices from which the consumer is protected[10]. *Firstly,* that the other contracting party "pursues commercial or professional activities in the Member State of the consumer's domicile", i.e. that the other contracting party must be established, or, *secondly*, where the other contracting party operates without establishment, that it must act in that country "by any other means, direct such activities to that Member State or to several Member States", i.e. the kinds of contract offered through the press, advertising or even all electronic commerce as conducted over the Internet. *Thirdly,* the contract must fall "within the scope of such activities", which leads to problems concerning evidence and the whole problem of defining the time and place of contract formation, given that it is precisely in distance selling where the key element is the ability to determine when and where the offer is accepted. In any event, the rule has gradually expanded the range of types of contract to which the Regulation applies, and it now incorporates all contracts in which there is, on the one hand, a stationary consumer who does not go outside the country of his domicile in order to acquire goods and services, and, on the other hand, a businessman or trader; in these cases, the final object of the contract is the purchase of goods for domestic or non-professional use.

Finally, the Section does not apply to transport contracts, except package tours, which provide a combination of travel and accommodation and are construed to be typical consumer contracts.

Jurisdiction in these matters has been described as 'specific', as it represents an exception to the general rule based on the defendant's domicile and specifies strict time limits and formal restrictions in respect of the types of contracts to which this jurisdiction applies (Art. 17), thereby restricting the trader's freedom to 'impose' a jurisdiction which may be oppressive for the weaker party (as will be seen in Chapter III). Furthermore, because the supposedly weaker party in such contracts (i.e. the consumer): 1) may only be brought before the courts of the Member State in which the consumer is domiciled if sued as a

[10] The Brussels Convention of 1968 and successively amended versions incorporated certain conditions which have now been deleted, although they might be useful as aides to interpretation when determining the specific kinds of contract referred to here. The presence of *any of the specific requirements* was sufficient for the situation to fall within the scope of this First Section. Before the parties enter into the contract, there must first be a specific offer or advertising (e.g. catalogues, advertisements in the press) which is directed at the country in which the consumer is domiciled. The consumer was required to have received the offer in the country in which he was domiciled. The offer had to be specifically directed to the consumer, which placed a requirement on the other party to make the offer *in person* (e.g. through a door-to-door salesperson) or *by other means* (by means of a catalogue or correspondence which the vendor sends directly to the potential client), which would also cover *advertising* (e.g. an advertisement placed in a national newspaper).
There was also a requirement that the 'necessary acts' or in other words, the necessary steps had been undertaken for the formation of the contract in the country where the consumer was domiciled. The removal of these detailed rules in the Jurisdiction Regulation, and the apparent simplification of the Regulation may be part of an overall process in secondary Community legislation.

defendant. 2) is entitled to choose between the jurisdiction of his own domicile or that of the other party if he is suing as claimant (Art. 16). and 3) otherwise, if the consumer enters into a contract with a party who is not domiciled in an EU Member State but has an "agency, branch or any other establishment" in a Member State, this place will be taken into account for the purposes of the proceedings (Art. 15.2). If the other party does not have a principal place of business (domicile), a secondary establishment is sufficient for a consumer to sue that party in courts of the Member States. In short, specific jurisdiction provides an initial degree of protection, with the aim of limiting as far as possible the need for the consumer to seek address in a foreign jurisdiction, given the time and money involved in doing so.

(D) Jurisdiction over individual contracts of employment

In the field of employment, the special rules refer only to litigation concerning individual contracts of employment, thus excluding all public law in the field of employment.

Given that the general rule in the Jurisdiction Regulation is based on the defendant's domicile, Section 5, which covers individual contracts of employment, opens with an explicit reference to Articles 4 and 5.5 (Art. 18), whereupon it is to be understood that where the defendant in litigation covered by this class of contract is not *domiciled* in a Member State, the applicable rules determining jurisdiction are either the laws of the Member State (by reference in Art. 4), or, where the employer has an agency, branch or any other establishment in a Member State, the courts of that Member State will be deemed to have jurisdiction to hear all disputes arising from the establishment's activities. The legislation employs the branch and/or secondary establishment to create the fiction that the employer is domiciled in the EU. The *worker may sue the employer* in the country where the latter's branch is domiciled irrespective of whether the defendant is domiciled in another Member State (by reference to Art. 5.5) or whether he has no domicile in a Member State (Art. 18.2). The Regulation therefore extends the protection granted by its predecessor, the Brussels Convention, and thereby demonstrates the ability of Community law to respond in this respect to the progressive tendency of company groups from third states to establish themselves in member states under various arrangements.

In order to understand the *degree* of protection underlying this jurisdiction, it is helpful to determine who is the claimant, i.e. the worker or the employer. In the *first* case, the *worker as claimant* may bring a claim in 1) the courts in the country where the employer is domiciled, whether this be one or several (ex. Art. 19.1) or, if he wishes to sue the employer in another Member State, the employee may choose between 2) "the courts for the place where the employee *habitually* carries out his work" or 3) "in the courts for the *last place* where he did so" (Art. 19.2 a).

The reference to the domicile of the employer as defendant, whether this be one or several, is redundant. However, the ground of jurisdiction relating to the *place where the work is carried out* (Art. 19. 19.2), which is a more detailed definition of the special jurisdiction affecting contracts (*ex*. Art. 5.1), improves upon that earlier definition by introducing the rule that the obligation to be taken into account in respect of an individual contract of employment is always the *employee's obligation*, and therefore that the place where the work is carried out is the ground of international jurisdiction in such litigation. This meets the expectations of the employee, and recognises that there is no better court to hear such cases than that of the place where the work is carried out.

The following points should be borne in mind: 1) the work must be carried out *habitually* (Art. 19.2 a) and therefore occasional travel does not change the appropriate jurisdiction; 2) the place of work initially agreed in the contract may change during the term of the contract; if the employee's place of work changes, obviously within the EU, jurisdiction will be exerted by the court in the last place where the employee carried out his work (Art. 19. 2 a); and 3) the final possibility is that the work is carried out successively or simultaneously in different places (e.g. architects or engineers managing projects), in which case jurisdiction lies with the courts for "the place where the business which engaged the employee is or was situated" (Art. 19.2 b), which is also the general ground for jurisdiction, i.e., the defendant's domicile. In any event, this has the advantage for the employer that it is not obliged to defend itself in several Member States against suits brought by its employees.

> Now, if a worker is transferred to provide services one must take into account the particular rules laid down in *Directive 96/71, of 16 December 1996, concerning the posting of workers in the framework of the provision of services*, which was transposed in Spain *as Act 45/1999, of 29 November (Official Gazette* No. 286, of 30 November 1999). A special case for which the Law of the Member State doubly applies to the transferred worker, to decide on what the notion of "worker" is and also to assign jurisdiction to the "courts of the Member State in which territory the worker is or has been transferred", in other words, to the courts of the State where the worker has been provisionally relocated, a criterion initially followed by Art. 16.1, item one, of Act 45/1999. For these cases, through this Directive the jurisdiction set forth in the Regulation is enlarged, in harmony with the same *ratio*: bringing the competent court closer to the party that needs protection thus allowing the worker to resort to the courts in the country where he has been temporarily relocated. For this reason it is recommended to avoid the reading of item two in Art. 16.1 since it refers to the jurisdiction in contractual matters of the Brussels Convention (Art. 5.1) and jeopardises this protection jurisdiction.

An *employer may bring proceedings* only in the courts of the Member State in which the employee is domiciled, regardless of the inclusion of a jurisdiction clause in the contract, which is subject to certain time limits and formal restrictions to be discussed below (Chapter III).

Finally, it should be remembered that this jurisdiction is provided as an alternative or a parallel route to that which may be established by foreign law. The different jurisdictions are therefore established as options for the claimant, as Spanish legislators do not assume to cover all matters under exclusive jurisdiction.

2nd Foodstuffs Jurisdiction[11]

[11] With regard to obligations created within the scope of family law, new issues include EC Regulation No. 4/2009, dated 18 December 2008, on the applicable law, recognition and enforcement of decisions and cooperation in foodstuffs obligations. The rules on court jurisdiction differ from those applicable to date (R. 44/2001), with the disappearance of the presupposition of domicile of the respondent in the Community and, albeit with certain exceptions, the option for choosing jurisdiction.

The concept of foodstuffs included in R. 44/2001 is very broad and differs from that applied in the domestic legislation of the states. Accordingly, consideration must be given to the different decisions handed down by the ECJ in this area[12].

In relation to the criteria of jurisdiction, article 5.2 of R. 44/2001 provides a special jurisdiction in foodstuff matters, where it awards the claimant the possibility of filing the claim with the courts that correspond to the usual domicile or residence of the foodstuffs creditor in the case of claims that are accessory to an action related to the state of individuals, before the court that hears the action, as long as the jurisdiction were not based exclusively on the nationality of one of the parties[13]. The purpose of this criterion is to concentrate the litigations and avoid the dispersion of the lawsuit.

3rd) Jurisdiction relating to tort

In cases of liability for loss, the Jurisdiction Regulation establishes a special jurisdiction for the claimant, under which jurisdiction is exerted by the court "*for the place where the harmful event occurred or may occur*" (Art. 5.3). In practice, the rule has also given rise to difficulties of interpretation. Firstly, there are doubts concerning the meaning of "tort, delict or quasi-delict", in particular when liability arises from a breach of contract. In such cases, the ECJ has stressed the *residual* nature of this jurisdiction with respect to the former, stating that the tort or delict refers to "all actions which seek to establish the liability of a defendant *and which are not related to a 'contract' within the meaning of Article 5.1"*[14].

1) This is equivalent to holding that if the breach of contract also creates a non-contractual liability, the jurisdiction granted under Art. 5.1 encompasses all claims[15].

2) Likewise, the ECJ has stated that this particular jurisdiction is only triggered where the action "tends to bring the liability of the defendant into play". This means that actions may be redirected to this jurisdiction to seek damages for loss not arising out of a contract [16] (e.g. a traffic accident or an offence falling under the jurisdiction of a Member State).

> As a result, those actions seeking a declaration that a juridical act made by the debtor is of no effect, but which do not seek compensation for the loss caused to the creditor (as in a typical Paulian action in French law), are not deemed to have the aim of fixing liability on the defendant[17] and as a result do not fall within the scope of Art. 5.3 of the Jurisdiction Regulation.

3) The Jurisdiction Regulation amended this rule from the Brussels Convention of 1968 by incorporating actions *preventing* loss and granting jurisdiction "where the harmful event... may occur". As the ECJ has recently confirmed, it is considered that the application of this rule is not subject to damage already having occurred, whereupon the rule may be applied to actions such as an action for termination, even if preventive in nature[18].

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[12] Decision of the ECJ of 6 March 1980, in case 120/79 *De CavelII*. Decision of the ECJ of 27 February 1997, in case 220/95, *Boogard vs. Laumen*
[13] Decision of the ECJ of 6 March 1980, in case 120/79, *De CavelII*.
[14] Judgment of the ECJ of 27 September 1988, in case C-189/87, *Kalfelis*
[15] Judgment of the ECJ of 6 October 1976, in case C-14/76, *Bloos v. Bouyer*
[16] Judgment of the ECJ of 27 September 1988, case C-189/87, *Kalfelis*
[17] Judgment of the ECJ of 26 May 1992, in case C-261/90, *Reichert II*
[18] Judgment of the ECJ of 1 October 2002, in case C-167/00 *Henkel*

Turning to the ground for jurisdiction employed in this rule, the general nature of the phrase "*the place where the harmful event occurred or may occur*" has given rise to difficulties of interpretation. (1) The first key consists of deciding what the *initial damage* that is to be retained is: That which arises as a result of the delivery of a faulty product or that which is caused by the normal use of the product? Because it is obvious that the delivery of the product and its use do not necessarily have to coincide in the same space or place and, in an attempt to establish the jurisdiction of the nearest national court for the appreciation of the damages, the ECJ has clearly preferred the latter, based on the existence of a causal connection between the damages and the act causing them [19]. (2) It has also declared that it can designate the place in which the damages are *caused* and the place in which they *appear*, where the claimant has the option of filing the claim with the courts that correspond to one place or the other[20]. (3) A criterion, that of the claimant's option to decide the cases in which the damages *appear in more than one place* more easily. One example would be claims against the media, where there is only one production site but a large number of places where the product is disseminated and where the damage is therefore manifested[21]. In this case the ECJ gives the victim the right to choose between the courts where the damage was generated (which in this particular case was the country where the material was published and where the defendant was established) or the courts of each country in which the victim claims to have suffered injury to his privacy or reputation and solely for the harm caused in each Member State. This encourages a multiplicity of actions, which is contrary to the sound administration of justice.

> Art. 5.4 of the Jurisdiction Regulation contemplates a *special class of joinder* in connection with cases concerning liability for loss. When criminal proceedings give rise to parallel proceedings for civil liability (e.g. liability for loss caused due to the use or consumption of a product which gives rise to a criminal prosecution and a subsidiary civil action in tort), the Jurisdiction Regulation gives the claimant the right to the joinder of the actions in the criminal court, provided the Member State's law of civil procedure permits the joinder of such actions.

4th) Disputes concerning the activities of secondary establishments

It should be borne in mind that if disputes concerning the activities of branches and other secondary establishments are to fall under the jurisdiction established in Art. 5, *the defendant must be domiciled in the EU*. This is not the case, as commented, when the domicile of the branch serves as the ground of international jurisdiction in respect of insurance policies, certain consumer contracts and individual contracts of employment. As a special jurisdiction, this is a further option for the claimant in addition to the defendant's domicile and the other special jurisdictions.

The dispute or *matter at issue* must have some link with the activities of the branch[22]. It has been established that the dispute may concern the management of the branch (e.g. employment contracts), in which case they usually fall within the scope of other special jurisdictions. The action may also refer to the trading activities of the branch or outwardly to its relations with third parties.

[19] ECJ of 16 July 2009, case 189/08, *Zuid-Chemie*, No. 32
[20] Decision of the ECJ of 30 November 1976, in case 21/76, *Mines de Potasse d´Alsace*
[21] Judgment of the ECJ of 7 March 1995, in case C-68/93, *Fiona Shevill*
[22] Judgment of the ECJ of 22 November 1978, in case C-33/78, *Somafer*

The chosen ground for jurisdiction refers to the courts for the "*place in which the branch, agency or other establishment is situated*", as this is the court which is considered best placed to hear disputes concerning the operations of the branch. The jurisdiction is very rarely invoked.

5th) Related actions: co-defendants and joinder.

There are cases in which there is either more than one defendant in the same action or a connection between the actions (e.g. *in rem* and *in personam* actions), and for reasons of procedural efficiency is it preferable to hear the actions jointly before the same court.

(A) Jurisdiction over several parties

In cases where there are *several parties*, these may be either active (claimants) or passive (defendants). The Jurisdiction Regulation refers to the passive situation, i.e. co-defendants. In turn, the status of co-defendant may be either *optional or simple*, with the optional mode being most common. The motive for joinder lies in the efficient administration of justice, as it enables the related causes of action to be heard jointly by the same court. It is therefore one of the options available to the claimant (e.g. against all the partners in respect of the liability of one of the partners). Combined actions may also be *necessary or passive* when they are required by law (e.g. Art. 1139 of the Spanish Civil Code requires the bringing of an action against debtors jointly rather than severally when the debt is indivisible). The Jurisdiction Regulation clearly admits the first type of joinder: the claimant may sue all the defendants in the same court. The *lex fori* of the court hearing the proceedings will be applied to decide whether there is the necessary connection between the defendants for them to be joined in the same proceedings. The best time to judge this is when the proceedings are issued or when additional defendants are added at a later date.

The claimant is allowed to centralise the proceedings contemplated by the Regulation in the court for the place where any one of the defendants is domiciled. Although the advantages are clear, the rule has the disadvantage that it prevents the other defendants from being sued in their own courts, as they must defend themselves in a country in which one of the other defendants is domiciled.

Article 6.1 of R 44/2001 requires: 1) the presence of all co-defendants with domicile in a Member State; 2) a connection between the causes of action [fn] , which is quite reasonable given that jurisdiction under Art. 6.1 is an exception to the general rule based on the defendant's domicile. The Jurisdiction Regulation creates an independent rule in this respect, as it is obviously not desirable to leave the matter in the hands of the various laws of each Member State, by drawing on the provisions of Art. 28.3 of the Regulation with respect to the necessary connection; the claims must be "*so closely connected that it is expedient to hear and determine them together*...".

This is, therefore, a special jurisdiction and an exception to the general jurisdiction based on the defendant's domicile. This jurisdiction does not prevail over express submission to a jurisdiction.

(B) Jurisdiction over several causes of action

We have already seen the special rules governing the joinder of several suits where there is *more than one cause of action*. One of these is Art. 5.4 of the Jurisdiction Regulation, which refers to civil liability arising out of tort, delict or quasi-delict (before the court hearing the action in tort). Another, found in Art. 6.4, refers to the joinder of actions *in personam* with actions *in rem*, before the court with jurisdiction to hear the property case. In both these cases, the *lex fori* (or the law of the court exerting jurisdiction) will be applied to determine whether the joinder may be granted.

III. INTERNATIONAL JURISDICTION AND INTENTION OF THE PARTIES

This chapter deals with a very specific aspect, which is the scope of the intention of the parties to determine the international jurisdiction and, therefore, its impact on jurisdiction. Firstly, through *clauses* or *agreements on the choice of jurisdiction*, the parties may award jurisdiction to a court that lacked it and at the same time prevent a court that does have jurisdiction, in terms of the matter subject to litigation, from hearing it. Secondly, certain procedural acts allow the willingness of the parties to submit their disputes to the jurisdiction of the court of a given State to be deduced.

The change of international jurisdiction through the wishes of the parties gives rise to two different effects –albeit dependent on one another– in terms of the court from where the result of any such change is analysed. Thus, *derogatio fori* originates from the court that had jurisdiction to try the case, whereas *prorrogatio fori* arises in favour of the court chosen by the parties and which, in principle, lacked competence.

1. Express jurisdiction

Jurisdiction agreements in the Regulation are contained in Article 23 thereof. Now, as regards the location received by the express choice of jurisdiction in the Jurisdiction Regulation, its inclusion must be highlighted jointly with the exclusive jurisdictional jurisdiction in Article 4.1 thereof. Thus, as is the case with exclusive jurisdiction, the general requirement for the application of the aforementioned Community regulation or, in other words, the domicile of the defendant will not have to be in a Member State in order for the rules of the Regulation to be applied. Nevertheless, it must be pointed out that reference to the express choice of jurisdiction jointly with the exclusive jurisdiction does not entail that jurisdiction for another judicial authority according to the choice of the parties is exclusive and, thus, the consequences inherent to this kind of jurisdiction shall derive. For instance, the choice of a court through a jurisdiction clause may be derogated either by stipulation to the contrary concluded by the parties (Article 23) or after a subsequent tacit choice of another court. This would not be allowed in exclusive jurisdiction.

1) Scope of the jurisdiction agreement clause. Prior application conditions

Art. 23 of the Jurisdiction Regulation provides:

> “If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise (...)”.

Before dealing with the formal conditions that must be satisfied in a choice of jurisdiction clause, in order for the latter to be valid in accordance with the aforementioned precept, we will examine the prerequisites that have to be complied with in order for the provisions of Article 23 of *Regulation (EC) No 44/2001* to be applicable. Therefore we will also make reference to cases that fall outside the norm in order of importance.

Article 23 of the EC Regulation shall not be applied to choice of jurisdiction agreements in favour of a court situated in a Member State of the European Union when made by parties whose domicile is in a Non-Member State. Clauses of choice of jurisdiction for a court located in a non-member State are also excluded [23]. As for the first case, it must be highlighted that the Regulation determines that, although the national law of the State regulates the formal validity of the clause, it does determine that the Courts of the other member states may not hear the case until the first court declines its jurisdiction. With regard to the second case, where it concerns a court situated outside the Community territory, the courts of the other Member States are obliged to accept this choice of jurisdiction only if their internal rules of jurisdiction provide for this.

The express choice of jurisdiction of a court other than the one that would normally have jurisdiction is subject, within the framework of the Community regulations, to a number of conditions that have to be met in order for Article 23 of *Regulation (EC) No 44/2001* to be applicable. Thus:

a) First, *one of the parties must be domiciled in a Contracting State* irrespective of the procedural position that it adopts in the litigation. The link between the litigious situation and the Community territory is achieved through this requirement; however, this does not mean that any connection between the judge, whose jurisdiction has been extended, and the litigation in question has to exist. *A sensu contrario*, as it has been repeatedly announced by the ECJ, there is a total abstraction from any objective element of connection between the relationship subject to litigation and the appointed court[24]. As to the specific moment in which the domicile must be taken into consideration, the ECJ has not given its opinion on this and in the doctrine there are several viewpoints, which go from the moment in which the agreement on choice of jurisdiction is made to the moment when the lawsuit is filed.

b) Second, the conferral of jurisdiction has to be made in the *court of a Member State*. According to the ECJ, for the choice of a court it is sufficient that "the clause state the objective factors on the basis of which the parties have agreed to choose a court or the courts to which they wish to submit disputes which have arisen or which may arise between them. Those factors, which must be sufficiently precise to enable the judge trying the case to ascertain whether he/she has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case." With regard to the designation of the court of a Member State, it is necessary to specify certain criteria: a) the parties can designate the courts of a Member State as a whole (*in genere*) or stipulate the specific

[23] Judgment of the ECJ of 9 November 2000 (Case C-387/98 Coreck Maritime GMBH Handelsveem BV and others).

[24] Judgment of 17 March 1980 (Case C- 56/79 *Siegfried Zelger* v. *Sebastiano Salinitri*); Judgment of 10 February 1997 (Case C-106/95 *Mainschiffahrts-Genossenschaft (MSG)/Las Gravièrs Rhénanes (SARL)*); Judgment of 3 July 1997 (Case C-269/95 *Francesco Benincasa v. Dentalkit*).

court to be seised of the case (*in concreto*); b) in addition, it is possible that several courts be designated to be seised of the case.

The interpretation of the ECJ on the matter has been very flexible; *for example,* it found valid a clause of choice of jurisdiction valid in which, depending on the procedural position adopted by the parties to the litigation (plaintiff/defendant), these may agree to international jurisdiction being assumed by one court or another. In addition the ECJ admitted the generic conferral of jurisdiction to the courts of different States. In the aforementioned judgement, the parties had agreed to a clause of choice of jurisdiction in which it was stated that: "any legal action taken by Meeth (a German company) against Glacetal (a French company), should be in the French courts; conversely, any legal action initiated by Glacetal against Meeth should be in the German courts according to the terms agreed by the parties".

c) Finally, jointly with the cases above, the *lawsuit shall be international*. Although there is unanimity in the requirement thereof, there are important disagreements as to what elements characterise the matter as being international, and the doctrine contributes with hermeneutic criteria that help the judicial authority to consider a lawsuit *in casu* as international.

2) Requirements of formal validity of agreements on jurisdiction

The requirements in Article 23 aim at ensuring that the consent expressed by the parties has been clearly and accurately given[25]. Therefore, the court being granted jurisdiction in the conferral of jurisdiction agreement has to verify that the consent of the parties has been given in an effective manner in the form required.

> The parties cannot allege requirements that differ from those envisaged in the Community regulation, even though they may be standard in the national law, to question the validity of the conferral of jurisdiction clause. In this regard, the ECJ has confirmed that: "*The specific requirements covered by the expression `form which accords' must be assessed solely in the light of the commercial usages of the branch of international trade or commerce concerned, without taking into account any particular requirements which national provisions might lay down*"[26] (the italics are ours).

In accordance with the provisions of Article 23 of *Regulation (EC) No 44/2001*, the conferral of jurisdiction agreement shall be either:

[25] Judgment of 14 December 1976 (Case C-24/76 Estasis Salotti di Colzani Aimo and Gianmario Colzani v. RÜWA Polstereimaschinen GMBH)], [Judgment of 14 December 1976 (Case C-25/76 Galeries Segoura SPRL v. Rahim Bonakdarian).

[26] Judgment of 16 March 1999 (Case [C-159/97 Trasporti Castelletti Spedizioni Internazionali SpA/ Hugo Trumpy)].

(A) In writing or evidenced in writing: This agreement may be included in one or in several documents[27]. The document in which the choice of jurisdiction agreement appears can contain other provisions referring to different aspects of the transaction in question.

The not infrequent case in which *the conferral of jurisdiction agreement is included in the general conditions of the legal transaction* has deserved special attention. In this case it means finding the right balance between the smooth flow of international commerce and the certainty that acceptance of the choice of jurisdiction clause entails complete awareness of its scope. When the agreement on the choice of jurisdiction is included in the printed general conditions at the reverse side of a document, the contract signed by both parties must include express reference to the said general terms and conditions[28]. Only in this way will it be considered that the requirement for a document in writing has been satisfied and, consequently, that the conferral of jurisdiction clause is effective.

As far as the validity of the conferral clause is concerned within the context of corporate law, the ECJ has established: "that a conferral of jurisdiction clause contained in the statutes of a company limited by shares and adopted in accordance with the provisions of the applicable national law and those statutes themselves conferring jurisdiction on a court of a Contracting State to settle disputes between that company and its shareholders constitutes an agreement conferring jurisdiction(...)", and, as the Court continues, "(...) the clause conferring jurisdiction is contained in the statutes of the company and those statutes are lodged in a place to which the shareholders may have access, or are contained in a public register".

Regulation (EC) No 44/2001 has been adapted to a society in which new technologies are giving rise to a flow of ever more frequent communication. As a result of this development, Article 23 of the Regulation includes a new way in which the parties can reach a choice of jurisdiction agreement contracted by electronic means; thus, the second subsection of the above-mentioned rule states that the formal requirement to be in writing is satisfied when there has been transmission by electronic means that provides a durable record of the agreement. Indeed, by including this precept the aims set for in *Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular, electronic commerce, in the internal market* (Official Journal of the European Communities number 178, of 17 June 2000) have materialised among which the possibility of including a clause on the choice of jurisdiction using an unwritten means which may be accessed through the screen has been contemplated.

Along with confirmation in writing, the conferral of jurisdiction agreement can also be made by the parties *verbally, provided that it is subsequently confirmed in writing*. In this regard the ECJ has stated that "a verbal agreement in which the conferral of jurisdiction clause is stated will be valid provided that there is confirmation in writing by *any one of the parties* and that it has been received by the other party without it giving rise to any objection". Therefore, with regard to this form of choice of jurisdiction agreement, it is necessary to prove that a prior verbal agreement referring expressly to the choice of jurisdiction clause existed, and, in addition, confirmation in writing to the verbal agreement, with no objection by either of the parties.

[27] Judgment of the ECJ of 16 June 1984 (Case C-71/83 Partenreedereims. Tilly Russ and Ernets Russ v. NV Haven - & Vervoerbedrijf Nova and NV Goeminne Hout).
[28] Judgment of 14 December 1976 (Case C-24/76 Estasis Salotti di Colzani Aimo and Gianmario Colzani v. RÜWA Polstereimaschinen GMBH).

(B) In a manner that accords with the practices of the parties: The establishment of a regular commercial relationship between the parties themselves gives rise to practices between them that cannot be ignored. In view of this reality, and as a consequence of the interpretation given by the ECJ, R. 44/2001 includes the possibility for the parties to make agreements on the choice of jurisdiction pursuant to practices which the parties have established between themselves[29]. Therefore, and with regard to the above-mentioned decisions, it should be noted that a choice of jurisdiction clause is considered valid when it is included in the general conditions of a contract, even when there has been neither verbal agreement in reference to the said clause nor express references in each contract, nor the handing over of the text, provided that the clause lies within the framework of the normal relationship between the parties and conforms to their practices.

The clause conferring choice of jurisdiction, adopted in accordance with the usage of the parties, differs from what follows next in our analysis in that the said practices do not have to be acknowledged as normal usage in international commerce.

(C) In accordance with usage in international commerce: The procedure of choice of jurisdiction in accordance with usage in international commerce has been interpreted by the ECJ, which has determined the characteristics that enable an independent definition of the regulation to be given in order to clarify what the usage is and how its existence is to be proved. However, it will be the national judges who will eventually have to rule as to whether the usage referred to conforms to the aforesaid definition. Thus in its Judgement of 10/2/1997 the ECJ, following the conclusions of Advocate General G. Tesauro, establishes that the national judge must verify whether, in this respect, a regular and generalised practice exists in this branch of commerce, and whether it is observed in similar contracts from the point of view of the subject matter or the geographical circumstances.

Similarly, the judge has to determine whether the defendant was aware or should have been aware of such usage, a circumstance related to the cognoscitive aspect; in fact, the ECJ has stressed that the awareness does not have to be at the geographical level, since it is not necessary that its practice be generalised in all the Contracting States or in certain countries, but rather at the level of the subject matter, since proof will be needed of the existence of usage in previous contractual relationships established between equals or different contracting parties and/or in the same sector. The awareness of the parties as to usage of a certain kind does not depend on the degree of public awareness (publicity) that may have existed, if it is in respect of conduct in a certain type of contract in such a way that it could be considered as an established practice, and if the party upon whose agreement the validity of the jurisdiction clause depends is able to learn of it by exercising normal diligence.

2. Tacit jurisdiction

The willingness of the parties to submit their disputes to the jurisdiction of a court other than the general jurisdiction of the defendant's domicile, or the special jurisdiction that may be appropriate because of the subject matter, or the court previously chosen in an earlier choice of jurisdiction clause, can be deduced from their conduct in respect of certain procedural actions.

[29] Judgment of 16 June 1984 (Case C-71/83, Partenreederei ms. Tilly Russ and Ernets Russ v. NV Haven - & Vervoerbedrijf Nova and NV Goeminne Hout); (Judgment of 14 December 1976 (Case C-25/76, Galeries Segoura SPRL v. Rahim Bonakdarian).

As happens with express choice of jurisdiction, tacit choice of jurisdiction is regulated as a criterion to determine the jurisdiction in Article 24 of the Regulation. In order for Community law to be applied, a series of prior conditions must be met: jurisdiction must be conferred on a court of a Member State; the litigation must be international; and it must deal with a subject matter that comes within the scope of application of the Community regulation. Apart from the conditions mentioned above the spatial criterion must be added, which is the need or lack of need of a domicile of the defendant or one of the parties in the Community territory in order to apply the provision contemplated in Article 24 of the Regulation.

This aspect has been hotly debated as there is no agreement among the doctrine, although the ECJ has given its opinion about it. Thus, Judgment of 3 July 2000 of the ECJ implies that Article 24 may apply when the parties tacitly choose as their jurisdiction a court in a Member State irrespective of the place of their domiciles[30]. Two consequences therefore arise: first, it is not necessary that the requirement generally applied, i.e. that the defendant be domiciled in a Member State, be complied with in order to analyse the validity of the tacit choice of jurisdiction in accordance with the Community regulation; and additionally, Article 24 serves as a jurisdiction chosen by the plaintiff as long as the defendant has not contested this, whatever the domicile of the parties.

Tacit choice of jurisdiction is also extended to the plaintiff in the eventuality of compensation or counter-claim, even in cases where an express choice of jurisdiction clause to cover the latter had been agreed to beforehand.

It is necessary to highlight the treatment accorded to the conditions required for the application of this conferral of jurisdiction by the ECJ. In order to interpret that tacit choice of jurisdiction has taken place and, consequently, the coming into effect of *prorrogatio fori* in favour of a court that did not have jurisdiction, the defendant's appearance before the court in which the plaintiff brought the lawsuit must not have the intention of contesting the jurisdiction. The regulation of tacit choice of jurisdiction under *Regulation (EC) No 44/2001* shows greater flexibility than some legal codes. Therefore, the defendant may, collaterally to challenging the jurisdiction, file allegations without this meaning that he tacitly accepts the jurisdiction of the court[31].

As noted in the previous subsection, the interpretation of the notion of appearance in court within the framework of the Community instrument is made independently (Judgement of 8/3/2000 Oberlandesgericht Koblenz); nevertheless, the formal requirements are subject to national law.

3. Limits and remedies in jurisdiction

In previous sections, the scope of the parties' freedom of choice to change the international jurisdiction was established as being either by a prior agreement as to choice of jurisdiction or by the procedural conduct of the parties. However, this freedom of choice is not without limits.

[30] Case C-412/98 (Group Josi Reisurance Company SA/ Universal General Insurance Company (UGIC) in particular whereas 44 and 45.

[31] Judgment of 24 June 1981 (Case C-150/80 *Elefanten Schun GmbH/ Pierre Jacqmain*); Judgment of 22 October 1981 (Case C-27/81 *Établissemenrs Rohr Societé amomyme contre Diana Ossberger*); Judgment of 14 July 1983 (Case C-201/82 *Gerling Komzernz Speziale Kreditversicheerungs-AG/ Ammistrazione del Tesoro dello Stato*).

Consequently, we shall go on to deal specifically with, firstly, the subject matter that does not come within the scope of the above-mentioned freedom of choice, and secondly, the remedies that are available.

1) Matters: Under the Community regulations referred to above, it is impossible for *derogatio fori* to take effect in those matters that are subject to an exclusive jurisdiction, and consequently the parties' freedom of choice in respect of choice of jurisdiction is not overriding.

Similarly, the parties' choice of jurisdiction has limited scope in contracts relating to *insurance, employment and consumers*. There are a number of cases in which the rules of international jurisdiction are set up to take account of a party considered to be weak. This is the reason why the restriction on the parties' freedom of choice to change the jurisdiction is fully justified in such cases.

However, within the framework of *Regulation (EC) No 44/2001* the limited scope of choice of jurisdiction does not exclude the possibility, in cases that have previously been appraised, that the parties may exercise their freedom to confer jurisdiction on other different courts. However, it is true that the party considered to be weak shall not be damaged as the aim is for the party considered to be *strong* not to take advantage of his position and show abusive behaviour:

a) Temporal criteria. A situation that is safeguarded by the possibility of agreeing to a choice of jurisdiction clause *which is entered into after the dispute has arisen* [Article 13.1 for insurance contracts; Article 17.1 for consumer contracts; Article 21.1 for employment contracts]. If the time chosen for the conclusion of the contract is that of the drawing up of the contract, the parties, by common agreement, will be able to extend jurisdiction solely to the court of the State where both are domiciled or habitually resident, provided that such agreements are not contrary to the law of that State (Article 13.3 for insurance contracts; Article 17.3 for consumer contracts).

b) Increasing the number of courts in which only the party considered to be *weak* in the relationship may appear [(Article 17.2 (consumer contracts); Article 21.2 (employment contracts); Article 13.2 (insurance contracts)]. This possibility, envisaged only for the party considered to be in a position of inferiority, enables proceedings to be brought in courts other than those expressly indicated for each case.

2) Remedies: By *remedies* we mean the possibility that the court selected in a choice of jurisdiction clause may not be the only one with jurisdiction to hear the case, but rather the parties may have agreed that its jurisdiction is not exclusive in scope. The *Regulation* has excluded the express reference made in par.4 of Article 17 of the *1968 Brussels Convention* to agreements conferring jurisdiction for the benefit of only one of the parties[32]. An important doctrinal sector attributes this absence to the fact that, in the first paragraph of Article 23, the possibility is envisaged that the parties may incorporate clauses giving them the option of derogating the exclusivity of the chosen jurisdiction, thereby agreeing to appear before a court with jurisdiction to settle, either in accordance with a special jurisdiction or with the general jurisdiction of the domicile of the defendant.

IV. PARTICULAR PROBLEMS IN RELATION TO INTERNATIONAL JURISDICTION

[32] Judgment of the ECJ of 24 June 1986 (Case C- 22/85, *Anterist*)

This heading covers two key obstacles to the smooth functioning of international jurisdiction. Firstly, if the Judge before whom a lawsuit is brought must "self-verify" its conferral of jurisdiction to decide which instrument it is based on. Secondly, the multiplicity of parallel jurisdictions on the same subject matter makes it necessary for those framing the law to establish rules preventing separate national jurisdictions being triggered in order to hear one single dispute (a *lis pendens* plea) or two closely connected actions (a connection plea).

1. Verification of international jurisdiction

This refers to the situation where the court must decide whether or not it has jurisdiction. There are two basic issues here: the precise circumstances in which the court should act, and whether it should either act of its own motion or upon the request of the parties.

The Jurisdiction Regulation contemplates two situations in which the court should determine whether or not it has jurisdiction. The *first situation* is covered in Art. 25, which establishes a special rule *requiring the court* to undertake an *ex officio* examination of its jurisdiction where the subject matter of the dispute falls within the purview of *exclusive jurisdiction*. As a consequence, if it is held that another court has exclusive jurisdiction, the court must decline jurisdiction in favour of that other court. This is a natural consequence of the rules on exclusive jurisdiction, which, it will be recalled, cover imperative subject matters.

The *second situation* is covered by Art. 20 of the Jurisdiction Regulation. This concerns a situation where the *defendant is sued in a court outside the country of his domicile*, because the action was brought under one of the special grounds of jurisdiction, and he *does not appear before the court*. If the defendant's domicile is in a *third country*, the jurisdiction of the country's courts will be determined according to that country's own internal rules governing international jurisdiction, rather than to the Regulation (Art. 26.1.). As a result, the issue of the verification of jurisdiction, and its consequences, must be resolved by national legal principles.

If the defendant is *domiciled in a contracting State* and does not enter an appearance, the court must 1) stay the proceedings, in order that it may 2) ascertain whether the defendant has been duly *notified* (pursuant to *Regulation 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters*). The aim is to prevent proceedings for contempt of court, and the rule is therefore related to the fundamental right to the effective protection of the courts. If the defendant continues to fail to appear before the court, the court deliberates on its jurisdiction of its own motion pursuant to the jurisdiction rules in the Jurisdiction Regulation and 3) if the defendant *does appear*, jurisdiction is triggered by that act of submission to the court's jurisdiction (Art. 24).

Nevertheless, leaving these situations aside (exclusive jurisdiction and defendant's failure to appear before the court through imperfect notification or failure to notify), the plea that the court does not have jurisdiction is only available *upon the application of the parties*. This approach is open to criticism with respect to special jurisdiction protecting the weaker party in insurance and consumer contracts, as any breach of the rule will be deemed a sufficient ground for refusing to recognise a judgment, as will be seen below.

1. Pleas of *lis pendens* and related actions.

Both pleas are founded on the fact that the variety of potential jurisdictions and the multiplicity of systems of law can lead to contradictory judgments resulting from the same dispute, depending on the particular court in which proceedings are issued (e.g. in an action in tort brought under two different national jurisdictions, legal system A holds that the claimant has no right to damages, while legal system B finds that no such right exists). The risk of such contradictions increases in the field of Community law, given that the Regulation reinforces the impression that there might be several courts with jurisdiction over the same cause of action.

The rules on *lis pendens* and related actions attempt to create a logical procedural framework with the *aim of preventing mutually contradictory judgments*.

(A) Plea of *lis pendens*

A plea of *lis pendens* may be entered in those cases where each party brings an action in the courts of different countries. If the object (the purpose of the proceedings), cause of action (the facts and applicable law) and parties coincide (Art. 27.1), any court other than the court first seised must *stay proceedings of its own motion* until such time as the jurisdiction of the court first seised is established. When the jurisdiction of the court first seised is established, any court other than the court first seised *must decline jurisdiction* in favour of that court (Art. 27.2)

Two situations may arise. In the first one, the position of the parties is the same in both proceedings, i.e. the same party is the defendant in both jurisdiction A and jurisdiction B. In this particular case, if the plea of *lis pendens* is successful, it precludes the possibility that the two jurisdictions might deliver irreconcilable judgements in respect of the same dispute.

A second situation is conceivable, in which the parties change roles. In this case, Mr. Y is sued by Mr. X in A, and Mr. Y responds by issuing proceedings against Mr. X in the courts of country B. Under these circumstances, the plea of *lis pendens* protects the original claimant with the aim of preventing oppressive behaviour, which in any event may give rise to contradictory judgments.

(B) Plea of related actions

A similar difficulty arises in the *plea of related actions*. Two courts have jurisdiction, in principle, to hear two related disputes. Reference has already been made above to related actions when considering jurisdiction over co-defendants (Art. 6.1).

The difference lies in the fact that the existence of a connection serves as a ground of international jurisdiction in the former case, whereas in this case it has the opposite effect: it removes jurisdiction from one of the two potentially valid courts.

Further requirements are 1) that the related actions are still at first instance (Art. 28.2); 2) that the court may *stay its proceedings* either of *its own motion* (Art. 28.1) or upon the application of one of the parties (Art. 28.2), although in either case the decision to stay proceedings is at the discretion of the court other than the court first seised, and 3) in both

cases the court first seised must have jurisdiction and its national law must permit the joinder of both actions.

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