International Commercial Litigation

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PART 0 – GENERAL INFORMATION

1. Human activity across borders is on the rise

- **Individuals, workers**, **corporations, goods** (trade, commerce), **capital** (investments) move / interact across State lines

- Human societies called '**States'** are increasingly **interconnected** and **interdependent**: '**globalization'** of economy, social and family fabric

- **Due to a wide range of factors**
  - **Technology**: communications, improved **travel conditions,** facilitated **cross-border payments** (movement of capital), etc.
  - **Legal factors: freedoms of human beings** celebrated by
    1) national constitutions;
    2) founding documents of the **EU** (four '**fundamental freedoms**');
    3) international declarations (including the **UN Charter**);
    4) **cooperation agreements** (old FCN, FTA, BIT, DTA, etc.) incentivizes them to **move, travel, start businesses, invest,** study, form families, gather experience, in **other/multiple countries**
       – both technical and legal possibility (resulting from removal of technical and legal barriers) for human beings to give their life a cross-border dimension **increases their standards of living** (Preamble, U.N. Charter), **freedom, welfare, wealth, self-fulfillment and happiness** (cf. art. 2 of German Const., art. 2 Ital. Const., art. 3 of TFEU)
       – 'today, a nation ringed by walls would only imprison itself' (B. Obama)

2. Number of cross-border relationships is on the rise

- **Contractual** (B2B – business to business – B2C – business to consumer) **transactions**, **torts** (financial fraud, IP infringement, libel, etc.) **company** issues, family, inheritance, etc.
  - **Switzerland** in general and **Geneva** in particular are illustrative of this trend

- **P.S.** Will awareness of **climate change** cause some cross-border relationships (i.e. those involving carbon emissions) to ***decrease*** in future, to ***reverse*** the trend?

3. Focus on private law disputes that may arise from those cross-border relationships

- **A proportion of human relationships is and will always be bound to become contentious, to spur litigation**
  - We will have the litigational / judicial perspective in mind

- **Resolving (and preventing) disputes is a key function of a State**

- **States still are key players in**…
  - **Enacting/implementing** legal rules:

→ **private law rules** governing those relationships are mostly (mono)**national rules,** with a rising number of exceptions

- **Adjudicating disputes: judicial** courts are still mostly ***State*** **courts**

→ **cross-border (judicial) courts**, i.e. **multi-national courts** having the responsibility to settle multi-national disputes, do not really exist for the time being

4. Disputes between private parties (individual/entities)

- **As opposed to *State – to – individual* disputes**: e.g. investment law, litigation, tax, criminal proceedings, human rights

- **As opposed to *State-to-State*: WTO disputes, etc.**
  - But: **involvement of States** in private-to-private litigation is both *critical* and *hard to define*

5. Disputes arising out of cross-border relationships

- I.e. having connections with **more than one State/country (A, B, C...)**
  - As opposed to *wholly domestic* relationship

- Which fact logically makes the dispute a ***cross-border dispute***

- If a relationship and the dispute arising there from, has connection with multiple countries, **then a set of critical questions arise**
  - **Which country**, A or B, has the power to settle the dispute ?
  - What if **two** or more countries – e.g. both Country A and Country B– award their courts the power to settle the same dispute?
  - [Bases on **what law** the dispute will be settled?]
  - Would Country A be prepared to **accept** the way Country B has settled the dispute?

→ **Those questions essentially are what this course is about**

6. Disputes arising out of commercial relationships

- **Focus on commercial / economic matters and issues**

- **Wide notion of 'commercial':** almost every **civil litigation** (including tort, property, consumer, etc.) apart from **family law**
  - Roughly same notion as under Brussels Ia Reg. and 2019 Hague Conv.

7. Disputes brought before State courts

- As opposed to **arbitral courts/tribunals**

- As opposed to non-adjudicatory **alternative dispute resolution mechanisms** ('ADR'): e.g. non-judicial mediation

PART 1 – THEORETICAL BACKGROUND

Part 1.1: What is a Private Law Dispute?

1. Private person

- **Natural (or physical) person or individual**
  - **Human being** who, as rational agent, is capable of making **decisions**
  - And of identifying their **own needs** and pursuing their **own interests**
    → **child/minor** or **incapacitated adult**: legal representative

- **Legal (or moral) person (or entity): legal construct**
  - Corporation / company, uncorporated entities (eg. partnership), non- profit organisation, foundation, association, etc.
  - Make decisions/act through their **bodies** ('organs'), i.e. **human beings**

2. State / Country

- **Politically organized community which is (believed to be) 'sovereign' and 'independent' ('*equal sovereignty*' and *self- determination* celebrated by the UN Charter)**
  - Able to choose, decide, act through its **legislative, governmental**, **judicial** or law-enforcing **bodies** ('organs')
  - **Federal states**: central state vs. political subdivisions (individual 'sister' *states, provinces, territories,* etc.: **U.S, Canada, Australia, Brazil, UK, etc.**

- **Three components of a State under international law**
  - Personal component: **people / population**
  - Nationals only? also foreigners permanently established?
  - Territorial component: **sovereign territory**
  - Political component**: set of bodies (agencies, or instrumentalities)** (government, judiciary, legislature, etc.) capable of performing acts in the exercice of sovereign authority (cp. U.N. Convention on Immunity)

3. Two private persons

Two (at least) private persons, Party 1 and Party 2 ('disputing parties', 'litigants') advance two claims

- To further a **private interest** of their own

- To satisfy a **need** (physical, spiritual, intellectual, etc.): if we have disputes, it is because our resources are scarce

4.Benefit

Claim is designed to secure a benefit

- To increase the **well-being** of the claiming person (expand freedoms and increase opportunities)

- To contribute to its **self-fulfillment**

5. Incompatibility

The two claims are incompatible

- **Natural laws** (law of physics, principle of non-contradiction) prevent them from being both satisfied: **conflict of claims** which is **conflict of private interests.** Natural laws are the same everywhere: we cannot divide an object in 2, for two people who are claiming for it. This is different for human laws.

- **One claim** (and underlying interest) **has to be sacrificed** (private law is '*a science of sacrifices': A. Pillet*) OR **both claims** are *in part* sacrificed and *in part* upheld.
    - Example: a painting is indivisible. But over a sum of money; we could divide it (But, on a sum of 1 mio CHF, we cannot make that the Party 1 is receiving 1mio CHF and the other maintains 1 mio CHF).
    - P.S. in some areas: '**friendly litigation v. hostile litigation'**, only '**hostile litigation'** tends to be covered by this course. 'Jurisdiction gracieuse' 'Freiwillige Gerichtsbarkeit' falls outside. Example of a friendly litigation: when we come to a trust, the trustee has to request some directives on how to invest the trust's funds and there is no conflict of claims. Or, two spouses want both to get divorced, both parties want the same thing.

6. Subject-matter of competing claims

Examples

- **Sum of money (more than 50% of the cases worldwide) or a physical thing/object/asset**
    - Party 1 claims money or thing from Party 2
    - Party 2 refuses to give money or thing to Party 1
      → This reflects a significant proportion of **contract, tort, property litigation**

- **Conduct: positive (other than pay/deliver) or negative**
    - Party 1 intends to do something unhampered by Party 2
    - Party 2 intends to prevent Party 1 to do it: eg. **IP litigation, defamation/privacy litigation**
      → Example: I am allowed to manufacture my product this way because not contrary to intellectual property **VS** you are not allowed

  Or

    - Party 1 intends not to do something in favor of Party 2
    - Party 2 claims Party 1 ought to do something in its favor

- **Control over a child**
    - Party 1 (typically a parent) claims control over the child
    - Party 2 (typically the other parent) also claims control over the same child
      → The child cannot live with both at the same time

Part 1.2 How to Avert or Settle a Private Law Dispute? (Domestic Context)

1. Private law is about

- Determining which of two claims is '**legitimate**' and deserves being upheld by **public authority** and involves. Example: two parties fight ownership of the painting and Party 1 is the actual owner; then he is making the legitimate claim. It is well founded and that claim needs to be supported by law and public authorities.

- **Assessing** the respective strength of the private claims and interests underlying them: '**balancing of interests**'

- Often based on **most significant bond** between one Party and the subject-matter of the competing claims.
    - E.g.: law of property, maintenance law, children law

2. Legitimate claim

- **Is an individual, substantive right ('droit subjectif').** We must make a balance of interest: *cf* Goddess of justice: the claim or interests that have the most weight, are the most legitimate.
    - Roughly stated, **entitlement to a benefit**
    - **What is the most legitimate claim: closest link with the object? Closest proximity or time? Example**: a person dies leaving an estate. Who has the most legitimate claim to have the estate? In most legal systems, it is the closest family member. Example n. 2: you are shareholder of a company. In some legal systems, if one of the shareholders dies, the other shareholders have a preemption right (can buy the shares of the person who died) because are linked and close to the subject who died. In case a third person would like to buy but also the other shareholders, private law settles this awarding to the person who is already shareholder. Example n. 3: in the public transports in Geneva: all sits are occupied in the bus, I had to stand up. The lady who was occupying the seat moved from the bus. I wanted to sit but there was another man. But because I was closer, maybe my claim was better than his claim. But because he was in the bus before me, maybe he thought he had a closer relation in time, closer than mine.
      → The idea of link and relationship is a phenomenon we find a lot in international private law.
    - **If claim is legitimate → becomes substantive right**. If a claim is legitimate, then it becomes a **substantive right** (of Party 1).

- **Right of Party 1 involves a legal obligation of Party 2**
    - Positive conduct (cooperation): to pay, deliver, do something
    - Negative conduct (abstention): to forbear, to stop doing something (using a trademark), etc.

3. Private law rules

May be described as

- **Rules of conduct ('law guides behavior')**
  - They indicate conduct – positive or negative – that individuals are
    → entitled to **require from each other** (through a contract e.g)
    → and required to **effect to the benefit for each other** (the set of rights and obligations are directed by private law. You do not acquire rights/obligations as long as you do not enter into a contractual relationship).

- **Conflict rules**
  - Private law is essentially about rules of conflict. The purposes of private law are designed to **prevent** or **resolve** conflict **between rival claims** and the individuals making them.

- **Rules of coordination**
  - They coordinate the **domains of freedoms** of each agent so as to avoid **overlaps, i.e. conflicts.** Example: claims over plants. Your plant comes in my garden, you must cut, or I'll cut it. The other can say it's my plant so I won't cut. We must divide the 2 domains of freedom

- **Rules of distribution** ('*distributive justice*')
  - They allocate **rights and obligations to individuals**
  - They distribute **benefits** and **charges to individuals**

4. Legislative assemblies in democratic countries

- **Develop and enact general rules of conduct**
  - Through '*acts*' (federal laws) or '*statutes*' (*statutory law*)
  - Often based on **social/commercial practices** ('bottom-up')

- **Settled in advance**: to the extent that rules of conduct are **clear,** disputes are '**settled in advance**', i.e. **averted**
  - **Rights/obligations** are sufficiently specific ahead of litigation.
    Definition of "averting": general rules of conduct want to reduce the conflicts in communities to a minimum. It is not nice to be in front of a tribunal. If, in order to see what your rights and obligations are, you must every time go to the tribunal to ask, it is not possible. Usually we act according to a general code of conduct. Example: employment contracts. Employment relationships don't really contain contentious clauses to go to a Court. Individuals may rely on a framework which most of the time is clear enough to avoid litigation**: this is averting litigation**. We give guidance to individuals so that they know what their rights are and obligations.

  - '**Predictability' or 'certainty'** of the law aim to make it **unnecessary** for individuals to resort to actual litigation **("sécurité juridique").** It is the purpose of rules. The idea is to grant members of the society sufficient security in their legal position. The greater the certainty, the greater the likelihood he will comply with

obligation spontaneously. This is good for the individual but also for the society as a whole. Who financially supports the work of a Court? By the society, tax bearer.
'Die Wohltaten des Rechts geniesst jeder täglich und stündlich'

5. Courts

- **Specify and articulate individualized rules of conduct**
  - When application of general law to individual case **fails to deliver clear result** due to inherent **indeterminacy** of legislated law

- **Which may develop over time into general rules**
  - '**Judge-made law', respect for precedents (*stare decisis*)**: Two functions of the courts' activity:
    → **Function 1: settle an actual dispute.**
    → **Function 2: help averting future disputes of the same kind**.
    When it comes at the supreme court, the supreme court has to ensure that lower courts interpreted the same legal rules in the same way (also treatment of equality: treat alike cases alike) and if lower court says A and another lower court says B; there is a problem**. Supreme courts must ensure law is interpreted uniformly.** Through interpretation they clarify rules of conduct that are not necessarily clear. **Courts contribute to make disputes clearer.** Sometimes however courts contribute to make legal system more predictable and clearer so that disputes that rose in the past will not rise again and the supreme court has already spoken on this dispute. **The role of the court is not only to settle actual dispute but also for future ones, to prevent them to become contentious. REMARK:** it is not true that common law is based on case law and that civil law is not. In continental law we also look at past judgements etc.
  - **Significant bulk of judicially developed rules in all systems**

6. Enforcement agencies

- **If decision incorporates an order: legitimate use of force to bring about result equivalent to voluntary compliance**
  Example: law prevents litigation, spares human the costs and the stress of a litigation. If an airline is late and you demand reimbursement, if they know they are wrong, they will give you money and avoid you to go to the court and pay tribunals fees etc. It is better to comply voluntarily than to having to ask for a decision which will have the same result as a individual compliance, and that will also spare money.

7. Responsibilities of State in private law matters

- **To ensure order, peace and stability**
  - Prevent members of community to resort to **self-justice:** violence, threats, retaliation, harassment → **'rule of law' as opposed to anarchy/state of nature involving law-of-the-jungle behaviors**. The idea is to make sure that humans may go about their daily activity having an insurance on their position.
    - We need an **independent** and **neural** law.
  - To secure '**justice**' to all its citizens (e.g. Constitution of India)

- **To empower individuals to pursue their well-being and self-accomplishment**
    - Help individuals achieve the **ends of their choice** and '**pursue happiness'** (U.S. Declaration of Independence)
    - Facilitate **interactions** between members of State community: **facilitative function** of private law
        - Examples: A Swiss company wants to do business with a Chinese one. If this relationship places itself not only exclusively under Chinese or Swiss system; the consequence of this international contract is that the parties do not have idea on their rights and obligations because Swiss side wants to apply Swiss law and China prefers Chinese law. We may think they would be discouraged from entering in this international relation. Chinese party will say: it is better to avoid doing business with Swiss company; better with a Chinese one. Private law permits to enable predictions: the legal risk is sufficient to discourage.
    - **Maximise** each **member's freedom** in a way that is consistent with other members' freedom

        → *jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt...* (German Constitution, Art. 2)

        → enable each member to '*live its own diversity*': Swiss Const.

- **To promote the prosperity of the community**
    - '**Material and spiritual progress**': Italian Constitution
    - Foster **common good**

8. Significance of 'disagreement' in legal process

- **(1) Individuals and, as result, States may disagree on how to approach and solve a particular problem**
    - A **dispute** by definition involves a **disagreement (necessary component in a dispute) on**

        → what individual law should look like

        → what **individual rights/obligations** of parties should be

- **(2) Legislators**
    - **Different political parties may have different, conflicting views on what general law should be:**

        → **diversity of opinions** as a consequence of *freedom* (of opinion, of thought, of expression, of speech, etc.)

        → '**moral or reasonable disagreement**' as to what justice requires/as to how best to allocate rights and responsibilities:
        - **integral** part of modern, **pluralistic** societies
        - **unity of law** (coherence, completeness, non- contradiction) flows from demands of **natural laws**

            a) **Unity of laws and diversity of views**: any legal system has to reconcile the unity of law with the diversity of views on how law should look like. How to reconcile the unity of law, with the pluralistic view, multiplicity of the

society? Self-contradiction is not tolerated. Unity requires a legal system that is complete. **Example of the dissenting opinion:** in Switzerland, at the Federal Tribunal, there is no dissenting opinion in the final judgements. It is the majority opinion that will form the judgement. In England or in the USA, most courts tend to allow their members to publish their dissenting opinions.

b) **Unity of law** comes along with the fact that people have **different opinions** and we must **combine** this is one unit. **Disagreement exists between the legislators but also between adjudicators** (tribunals etc.)

- **The State community has to uphold one view**
  - → should a **contractual offer** be revocable or not?
  - → should a unilaterally predetermined **contractual clause on tacit renewal** of a consumer (contract be valid or not)
  - → should a **wrongful act** give rise to **punitive** damages?
  - → should **women** in Switzerland work until **64** or **65**?
  - → should Switzerland protect **Swiss farmers and local agriculture** or let the free competition play out (cf. referendum on '*souveraineté alimentaire*': 23 Sept. 2018)
  - → should divorce be allowed based on **mutual consent** or should we require a period of separate living?

- **The State community has to leave aside alternative views (even if *prima facie* equally reasonable).** Example: in law, we can have different solutions for one single problem. The law in Switzerland came into effect after a vigorous debate, referendum, etc. There are advertisement panels on the streets where written « vote yes » and just next to it you have « vote no » —> freedom of the Human being to choose.

- **Tie-breaking factor: majority vote in democratic societies**
  - → majority view 'weighs **heavier**' than minority view
  - → once enacted, general law is also **binding** on those who **disagree** with its contents

- **(3) Courts:**
  - **Conflicting views: to the extent that they have discretion, different judges may have different, conflicting views on**
    - How to **interpret** and **apply** general laws
    - How to allocate **rights** and **obligations**
    - How to **solve a dispute** between two individuals

    REMARK: law comes out of a disagreement (voting etc.).

  - **When individual judges are sitting within same court**
    - **Majority voting** to overcome dead-lock. Decisions of tribunals are not always unanimous. Members of courts are uneven to overcome the situation where two opinions can be held. In Switzerland, 30% of the cases are not unanimous.
    - **Dissenting opinions sometimes published** (U.S., U.K., ECHR, no: France, Switzerland, Italy, etc.). **Example** of the dissenting **opinion: in**

Switzerland, at the Federal Tribunal, there is no dissenting opinion in the final judgements. It is the majority opinion that will form the judgement. In England or in the USA, most courts tend to allow their members to publish their dissenting opinions. **REMARK: minority opinions sometimes are a tool to help a law to develop.**

- If court fails to **overcome** disagreement between its members, **denial of justice** (often criminal offence)

- **Appellate courts' overturning decisions of lower court entails possibility of disagreement between courts**.
  - **Same system different outcome**: two courts of the same legal system may apply the same laws but have **different conclusions**. Lower court can support the first litigant while the upper court can support the other party.

- **Highest court** at the apex of legal system ensures **uniformity of interpretation**, **predictability** and **certainty**
  - **Unity on the law**: the function of a higher court is bringing unity. The existence of it, is to ensure that on the dispute disagreement there is still unity on the application of law.
  - Sometimes through set of **binding guidelines** (China)
  - **Higher courts disagreements**: sometimes strenuous **disagreement** between justices also. Example: in the US, on the same-sex marriage, 4 judges said that the ban of the same sex marriage was consistent with the constitution, while 5 judges said it was against the constitution.

- **Importance of finality of decisions (*res iudicata*)**
  - A dispute is **not definitively settled as long as** decision is **still subject to legal challenge**
    - Exhaustion of review mechanisms
    - Or no review sought on time (e.g. Before expiry of deadlines)
  - Otherwise **denial of justice** (*rechtsverweigerung*)
  - **Final decision**: a matter is **settled** and has been **adjudicated** upon (no return back point).

- **Binding for**…: (Once ***res iudicata***, court's decision becomes **binding for**)
  [The binding character of the decision is entailed in the finality of the decision].
  - **On the court that rendered it** (no second thoughts)
  - **On any other courts** of the same state
    - They must '**recognize**' **res iudicata** and refrain from taking jurisdiction **on the same matter**
    - Even if they believe that the decision is flawed or **unfair** or could have been **fairer**
    - **Example:** what if to bring the same dispute for which I have already received a decision - res judicata - to another tribunal in Lausanne, competent based on the domicile of the defendant? Any other court of the same legal system - even if they have potential jurisdiction - is bound by res judicata; even if the judge would agree with me and not with the previous tribunal, the tribunal in Lausanne cannot re-judge.

- **On the enforcement authorities:** Police etc. → in a judgement, if the mother must hand over the child to the father (final child custody order), the mother must hand over and if she resists physically, a public official will bring the custody into execution. It is a legitimate use of force/ coercion.
- **On the individuals involved in the litigation.** If a decision becomes final/*res judicata*, there is no way for the parties to challenge anymore the decision. In the sphere of the individuals, the substantive rights and individual's obligation have been articulated by the decision that became *res judicata* or through rights and obligations and can't be changed anymore.
- **REMARK**: **the judicial process is expensive**. The cost for members of the society is going to increase. If judges had the possibility of reopening an issue, the society would squander money without allowing the members of the society to have an answer as to their rights and obligations. The final decision involves the absence of any further review mechanism.

- **Finality precludes bis in idem ('not twice in the same thing')**
  - **Conflict of decisions**: otherwise, **second court** may decide matter differently, leading to potential conflict of decisions.
  - **Preclusion effect:** if a decision is final, there cannot be another litigation on the same issue.
    - **Annihilation of judgements**: dispute would not be settled, litigation potentially endless, no legal rights and obligations. The possibility of allowing bis in idem, leads to a possible domestic conflict of judgement. This is a justice denial situation. The two decisions would annihilate each other. They would be exclusive.
  - **This implies mechanisms to avert and solve conflicts :**
    - **Ex ante**: mechanisms to **coordinate** jurisdiction to prevent **parallel litigation** and **conflict of judgments. Litispendance concept**. This is to prevent any conflict + avoid paying two times (procedural economy)

      →Often: '**prior-in-time**' rule if both have jurisdiction
      → In case **two courts** are seized and **both courts claim** that they have legitimate jurisdiction, sometimes…

      ⇒ Highest court is empowered with settling a '**conflict of jurisdiction'.** (France and Italy).

      ATTENTION: **despite those mechanisms to avoid a conflict of justice, there can still be one!** In the 80s, in France, a court in Lyon awarded a property right to an individual. After some weeks, another French court in Grenoble awarded the very same movable to another individual. The court of cassation can either set aside one of the two courts; or making a third judgement.
    - **Ex post**: mechanisms to eliminate **conflicts of judgments** should such conflict arise (rare)

      → Earlier decision controls? Later decision?

→ **Third decision by supreme court displaces the other two** (art. 618 of French CPC). To solve conflict of judgement, we have 618 FCPC: the Court of cassation can see if a judgement is consistent with law and regulations. If there is conflict:

a. **Either upholding one and annulling the other**; **OR**
b. Setting **aside both** judgements and **making a third**.

- **(4) Enforcement**
  - If the decision **grants** the claim, it incorporates an **order/injunction**; **when final**, it becomes **enforceable**
    - i.e. capable to be implemented **through coercion.**
  - For legal system/rule of law/private rights to exist, there **has to be** a way to ensure decisions are **enforced**
    - **No true rights and obligations** if it were not be possible for right-holder (judgment creditor) to obtain satisfaction against will of obligated person (judgment debtor).
  - **Voluntary compliance v. forced compliance**
    - Vast majority of decisions **complied with** to avoid **adverse consequences** associated with *actual* enforcement (additional costs, social stigma, etc.) **Exécution forcée:** the police come to my house take the paintings and sell them to pay the money I had to pay (the fitness). Or, they go to the bank and say to freeze a portion of money which is equivalent to the sum I had to pay.

ATTENTION 1: some decisions are by nature incapable of being enforced: i.e. those dismissing the claim

Example of non-enforceable decision: there are some decisions that are not enforceable Intrinsically. A judgement has become final and dismissed the claim made. Example: we start an action and claim was 2000CHF. The court concludes we are not entitled to receive; so our claim is dismissed. If the decision is final: can it be enforced? No because it is a negative decision (I am not allowed to receive this money)

ATTENTION 2: a decision may be *enforceable* before being *final*

→ in many countries, lower court decisions are enforceable before time for appeal is expired and/or during appeal

→ if enforc*eable* lower court decision is **enforced** and then **reversed**, **restitution** (potential 'counter-enforcement')

Final decisions are enforceable. But sometimes non-final decisions are already enforceable. Example: I want to launch appeal to the court of appeal for the silhouette store. But the lower court decision is already enforceable. So I first have to pay and satisfy the lower court decision and then only lodge an appeal. Even if I lodge an appeal, then the decision is enforceable then I have to pay.

→

If a decision of a **lower court** which becomes **enforceable** (and I got to pay) then is **reversed** in **appeal**, **then** the **appellate judgement** must be **applied** AND therefore there must be a **restitution**

- Court's order requires a **conduct**

- Which reflect nature of **substantive right/obligation** articulated by court and corresponding to **initial claim**

- Payment of a **sum of money:** '**money judgment**'
- To do something: **positive injunction**
  → **BUT** both **extent** to which systems require *specific performance* v. *pecuniary equivalent* and **means of pressure** (contempt of court, *astreinte*) vary
- To refrain from doing something: **negative injunction**

- Implementation of **money judgments** is obtained through seizing **assets/estate** of judgment debtor
  - Satisfaction through ordering **banks/asset holders** to transfer money to judgment creditor
    'Quiconque s'est obligé personnellement, est tenu de remplir son engagement sur **tous ses biens mobiliers et immobiliers, présents et à venir'** (article 2284 French Code civil)

- **'Finality' of enforcement**: person having obtained money/delivery is **NOT** subject to **restitution** / **counter- enforcemen**t based on same cause of action (consequence of *ne bis in idem*)

Part 1.3: What is a Cross-border Dispute?

1. What it is:

- **Essence of a cross-border dispute is the same as a purely domestic one**
  - **At least two persons** fighting for the same **benefit** (serving self-accomplishment / interests) through advancing **two incompatible claims**
  - **Natural laws** make it impossible to satisfy **both** and require **sacrifice** of one or partial sacrifice of both

BUT

- **Human relationship is connected with two (or more) State communities A and B (C, D, E...)**
  - **Either through either the Parties involved:** domicile, resident, place of establishment, nationality, people/populations, territories (example1: contract between two companies having domicile in 2 different States) (example 2: place of establishment, where the event took place. Two Swiss people living in CH but had an accident in Spain: Human relation in Spain and CH) **OR**
  - The **thing** or the **conduct** (or its effects) forming the **subject-matter** of the dispute
    → Party 1 may be established in State A, Party 2 in State B
    → Party 1 and 2 are established in State A, wrongful conduct takes place in State B, disputed asset is located in State B, etc.

Part 1.4: The Challenges of a Cross-border Dispute?

1.State A and State B are sovereign and independent in their internal affairs:

Differences between States are just a consequence of sovereignty of states' community:

- **Free to choose constitutional organization**

- **Free to develop and enact the private law rules (civil law, tort law) and model of justice of their choice**, i.e. to determine:
  - Which of two actual or potential claims is **legitimate** and deserves support by **public authority**
  - Law of **State A** may differ from Law of **State B: diversity** as an inescapable consequence of sovereignty and independence: **justice pluralism/conflicts between different State models of justice.**

    → **Different justices and freedoms lead to different models of justice and private law.**

- **Free to organize judicial and procedural system**
  - To **allocate jurisdiction** among various courts

    → Specialized courts in some areas, federal/state courts: China has some courts specialized in internet law matters. In Switzerland we don't have this. We have courts specialized in Labor matters in Switzerland; but not everywhere.
  - To organize **proceeding** (time-limits, law of evidence, etc.)
  - To determine **grounds** and **mechanism** for review
  - To establish interim **relief**
  - To **shape** law enforcement, etc.

2. If State A and State B make competing claims:

- **To govern human relationship connected with their societies through their general law i.e.:**
  - To allocate rights and obligations among Parties 1 and 2
  - To determine which of competing claims is legitimate

  … this generates a **conflict of laws** ('*conflit de lois*') **which essentially is conflict between two mutually incompatible schemes of rights and obligations**

  Examples:

  → Switzerland and France have their views on how consumers must be protected. Regarding the silhouette case: French law would say that the clause renewing the contract is against the law. Swiss law says the opposite: that clause is valid and enforceable —> **conflict of jurisdiction**.

  → If two Swiss persons make an accident in Spain. If we don't find a mechanism to coordinate the exercise of jurisdiction, the situation would trigger a Swiss and a Spanish proceeding. Weird that Spanish taxpayers are paying for something between 2 Swiss and vice versa Swiss taxpayers don't want to pay for something happened in Spain

(Plus, this situation may lead to inconsistent judgment (individual 1 is not responsible for CH; individual 1 is responsible for Spain).

- **To adjudicate dispute between the Parties, this may result in 'conflict of jurisdictions'** ('conflit de juridictions') **which may lead to conflict of adjudications** ('conflit de décisions')
  - Decision by court of State A may uphold Party 1's claim
  - Decision by court of State B may uphold Party 2's claim

- **To enforce adjudications: 'conflict of enforcement operations'**
  - Enforcement of decision of State A in A may be **frustrated** by enforcement of decision of State B in B, and conversely

3. Two levels of analysis:

- **Inter-personal level: Party 1 and Party 2**
  - Party 1 and Party 2 are making **incompatible claims**
  - Party 1 may base its claim on **law of State A** and Party 2 may base its claim on **law of State B**
  - Party 1 may request **court of State A** to adjudicate and Party 2 may request **court of State B** to adjudicate
  - **Example**: think about the case of Neilson and Makhfouz. There are two parties. The dispute involves 2 private parties. To reach an amicable settlement, the two States are unlikely to be involved. **But at the same time, every time we have a private dispute between two people from 2 different States, then those 2 States are involved. So which are the parties: private actors (people) or public actors (State)?** Private international law must resolve form having in mind those two levels. We have at least two private parties and at least two countries. Two countries involved must coordinate the whole with each other.

- **Inter-country level: State A and State B**
  - State A may be willing to apply **its own law** and uphold claim of Party 1 and State B may be equally willing to apply **its own law: conflict of laws**
  - State A may be willing to confer **power to adjudicate** onto its own courts and State B may be willing to do **the same conflict of jurisdiction**
  - State A may be willing to **enforce** decision of A in A and State B may be willing to **enforce** decision of B in B: **conflict of decisions**

4. Digression: Private international law and public international law:

- **Because a cross-border human relationship also triggers a relationship between two States, A and B, the best way to shape legal rules designed to govern cross-border human relationship is for States A and B (and C, and D...) to work together and agree on a set of rules that are designed to**
  - Prevent and resolve **conflict of laws between them** for the benefit of the individuals concerned (Party 1 and 2)
  - Prevent and resolve **conflict of jurisdictions between** them for the benefit of individuals concerned
  - Prevent and resolve **conflicts of decisions between them** for the benefit of the individuals concerned

- **Instruments done together by States, called treaties, conventions, accords, agreements, protocols, etc. are generally part of public international law**
  - **CLug** is a public international law convention. **Bru1** is also a regulation binding on 27 Member States and has been done via a multilateral union. Rules on private international law may be contained in instruments on international public law. **The two are thus no completely divided.**

- **The commonly held view that sees a clear divide between the two (two distinct domains of law having little to do with each other) is – it is submitted – inaccurate and dangerous**
  - **Treaties** are the instruments through which States shape and govern **inter-state relationships,** i.e. Relationships among them
  - And because cross-border relationship between two individuals engage two States and triggers a **relationship** between them...
  - Instruments of public international law are **best adapted** to make sure private international relationships are governed by law, i.e. **to shape** proper private international law.
  - So a significant bulk of rules governing **private international relationships** flows from instruments **of public international law**
  - Those rules are both
    - ⇒ part of **public** international law with respect to their source and origin (product of multi-national, multi-lateral negotiations)
    - ⇒ part of **private** international law as to the nature of the individual interactions they intend to govern

- **P.S. within a domestic legal system, private law is**
  - Product of **public** debate, of liasing between public/State authorities
  - arises through public law mechanisms: majorities required, relationships between two Chambers of Parliament, amendments
  - So rules of so-called '**private law' are in fact public** as to their source and origin while they are private as to the nature of activities they intend to govern
  - **Is CLug private or public?** Its sources and origin are **public international law**, subject to rules on interpretation (CVDT, 1969). However, we can consider **private international law** in terms of the nature and activities that the rules tend to cover. Is it strange to have

private and public international law together? Rules on inheritance, on liability etc. They are private rules, but at the same time they are public because they have been done by public authorities that were engaged and making any reform on private law involves public authorities.

5. The 'close' or 'closest relationship' principle or test :

- **Alternative designations**
  - **'(Most) significant relationship'** or 'connection', 'proximity principle', 'minimum sufficient contacts' or 'most significant contacts', 'center of gravity' (Schwerpunkt)

- **General principle under pinning most rules of p.i.l.**
  - **Rules on jurisdiction**: based on **connecting factor** reflecting such a strong connection between dispute and a State to justify **exercise of jurisdiction by courts of that State**
  - **Conflict rules**: connecting factor deemed the '**most significant**' one and used to a solve **conflict of laws**
  - **Recognition rules**: test is whether, in the eyes of forum, connection with foreign country was sufficient to warrant exercise of jurisdiction by foreign court

- **Formula: the stronger the connection of a relationship/dispute with a country, the stronger (more legitimate) the interest or claim**
  - **By an individual:** to have relationship governed by **the law of that country** (rather than the law invoked by the other individual) or dispute adjudicated by **courts** of that country
  - **By that country:** to have relationship governed by its own law and dispute adjudicated by its own courts than by the law and the courts of other countries (**'interest analysis'**)
  - **Example for the above-mentioned formula**: Barbara Neilson. Is Australian or Chinese law applicable? The outcome may be significantly different. **The greatest the relationship of the dispute with China, the greatest the interest of China to be the law applicable the dispute. If Neilson was a Chinese national, the Chinese connection would be greater than it actually is.** There is a connection between the law applicable and the relation with the country. The same applies for individuals: the accident took place in China, is little relevant compared to the fact that Neilson is Australian and therefore Australian law should apply.

- **Reflects an idea that often operates in private law**
  - **(1) Private law rules often prevent conflicts by awarding subject matter of potential dispute to individual having the strongest relationship with it**
    - ⇒ **Property**: preemption rights accorded to **neighbor** in case owner wants to dispose of his/her land. **This principle of proximity also operates between States**: think about a river marking the border of 2 countries; common barrier and natural resource. States who share these resources agree on how to exploit these

resources. What country has to say how the river must be governed on the activities/trade? Example: The river Rhine. Are we asking Colombia how activities must be trade on the Rhine? No, it is too far. It does not have any claim for it. A State is independent and sovereign on its territory and not on the territory of another country. Example of fires in Brazil: Macron said it's not because Amazon Forest is in your territory, that you can do whatever you want, because what you are doing has consequences on what we can do. Bolsonaro responded that "it is our territory and we are free to decide". Brazil has a legitimate claim, possession, ownership on the land (property right). **Property right is related to proximity.**

⇒ **Inheritance**: '**closest' members** of the family exclude more distant ones (e.g. children over grandchildren)

- Term '*next*-of-kin' embodies the idea of '**proximity**'
- A will and testament of testator generally reflects the **bond that** exists between testator and beneficiaries
- **Example of proximity**: someone owning an estate passes away. All countries of the world make rule on how this estate passes on, because if someone dies, he cannot give his position. There are laws that apply to all of us. Countries have to know how the estate will pass on to survivors. One of the factors is proximity. If someone dies, the person may have children, brothers, parents etc. Because of the close relation between the dead and the survivors, it is natural to have the rule creating a proximity. But what CH or FR consider as a close relation, can be considered different from another country. A spouse and child are close with the dead father/husband in Italy, they deserve both to be the successors. France has another view: if a person leaves children, the relation between the child and father is bigger than the dead and the spouse. Muslim law: relationship between parents is the most important, so if someone dies, property goes to parents; while in Occidental view, it does not go to parents but to children.

⇒ **Maintenance**: **closest** person to maintenance creditor is generally under an obligation to pay support (maintenance debtor)

⇒ **Contract law:** what differentiates an 'offer' from 'invitation to offer' is the different degree of **proximity** between the goods and the recipient of the declaration; types of recoverable damages may depend on how '**remote'** or '**proximate'** they are

⇒ **Tort law:** 'remoteness' of loss excludes liability (**proximate v. damage; cp. 'proximate cause')**; moral damages is awarded to close members of the victim: '**the closer the tie, the greater the claim for consideration'; 'proximity of a person to the accident'** as yardstick to recover damages for nervous shock (both quotes from House of Lords, McLoughlin v. O'Brian,

1982). Many tort law rules also have the **proximity rule. Rules on moral damages:**

a. **Traffic accident**: there is an unwanted interaction, two vehicles make a collision. Rules on moral damages: a particular person does she have claim to recover damages? Depends on how close the person was to the victim. Is it possible for a cousin to request damages? or friends? or parents? The closer the relationship between the victim and the claimer; the greater the consideration the claim deserves.
b. **Emotional shock**: the mother had 3 children and the 3 died in a car accident. The first boy died on the spot. The 2 daughters died after; in hospital. The mother had a nervous shock. She wanted to recover for this nervous shock. **How to calculate an emotional shock (illness)? It is the proximity to the accident**. The mother saw her 2 children dying just before her eyes. Proximity in space and time to the accident. Has she learned the death long after the emotional shock, this would not have given rise under English law to damages, because the gap in space and time would have been too big.

- **(2) In case of actual dispute, Justice (Goddess) evaluates the respective weight and strength of competing claims**
  - ⇒ **Holding 'balance' and searching for** '**centre of gravity**', the interest which weighs heavier, the strongest
  - ⇒ **Children law**: parent with whom the child has developed the '**strongest bond', closest relationship,** is generally awarded custody. If you think about children law, one of the yardstick to decide whether custody should be awarded to daddy or mother, is the bond created through the years is the most important. But when the toddler is really small (new-born) the bond created with the mother is really bigger than with his father, so the baby usually is put under the mother's custody.

    Children law has to reflect the reality of how the relationship between parents and children generally play out. If there is a dispute between parents, and the child cannot live with both, one of the factors is a natural one: a parent has been able to establish a closer relation with the child; the physical proximity. The parent that has been looking after the child has built a stronger bond. We look at this bond, how it is really rooted in the reality.

6. Four cases-study:

- **Case study 1: Bin Makhfouz (UK) v. Ehrenfeld (US) (2007-2012):**

- Rachel Ehrenfeld writes a book ('Funding evil') claiming Bin Mahkfouz is **financing terrorism** - Bin Makhfouz, Saudi citizen having significant ties with UK wants to obtain **damages** based on **defamation** and to **prevent publication** of the controversial book - **Defamation claim supported by English law and not by U.S. law: different model of justice:** justice pluralism which may trigger a conflict between U.S and English la

  - **Case summary:** This case involves 2 persons. The first person is an American of Jewish ascend, Ehrenfeld. She wrote a book, and this was on how terrorism is financed. The title was « funding evil ». The writer contended that Bin Mahkfouz was involved in terrorism financing including al Qaeda. Makhfouz became furious and wanted to get compensation because of the damage for which he suffered. He wanted to be able to prevent distribution of the book. That is between 2 Human beings. But Makhfouz was Saudi Arabian, based in the UK (had one of his various residences) and Ehrenfeld was in the US. **Ehrenfeld was relying on freedom of speech of US Constitution law.** She said she was on her own rights. **Makhfouz was relying on English law which protects more privacy**. So, when it comes to the balance between privacy and protection of freedom of speech: US law protects more freedom of speech while English law protects more privacy. English law is more about privacy because of the Queen/King. Ehrenfeld was a journalist dispatched sometimes in the UK but she had little connection with the UK; she was American. She wrote and published her book in the US and so relied on US law. She was wondering whether she had to pay compensation or distributing the book. And he was wondering whether he was entitled to prevent her to publish law. **Both claims were based on different legislations.**

- **Case study 2: Neilson case (2005) (China/Australia)**

- Accident occurs in **China** where the alleged victim, Barbara **Neilson**, an **Australian national**, is **temporary resident**. - Barbara Neilson claims **compensation** from **Mercantile Insurance**, **incorporated in Australia**, which resists the claim - **Barbara Neilson's claim** is supported by **Australian law** (of Western Australia) whereas **Mercantile's** claim is supported by **Chinese law** → statutes of limitation ('prescription') are different under Chinese law and Australian law

  - **Case summary:** on the one side, Neilson (person, Human being) on the other side there was a company (Mercantile Insurance). The Insurance employed Barbara's husband: he was offered to go to China for 2 years for a subsidiary company. They accepted and moved to Wuhan. The Insurance owned the flat in Wuhan and was made available for the couple. They were not satisfied of the state of the flat and at some point;

Mrs Neilson could not sleep, so she woke up and because the stairs didn't have the handrail; she had to undergo surgery and spent money for the treatment. She wanted to be reimbursed. The Insurance said: "You should have put on the light." They say they are not liable.

Let's look at the laws: Australian law is subdivided in different parts, because it's a federal State**. Neilson had their domicile in the West so that Australian law was applicable while Mercantile was based on Chinese law.**

The problem is that Neilson decided to make the claim 1.5 years after the incident; so, under Chinese law it was too late (prescription / time bar). But the prescription was not time bared in her Australian law.

So: according to Chinese law, no right to be compensated. According to Australian law, right to be compensated.

How to reach a solution to avoid the situation of constant proceedings that are frustrating and that annihilate each other? What legislation can we think of? They have to think about a treaty (multilateral or bilateral). What is clear is that a unilateral action (China acting on its own acting under Chinese jurisdiction etc.) is not the best solution. If China says – when comes to applicable law – « we think the place of tort is the closest relationship » and Australia wants to apply its law because of nationality; both legislations unilaterally come to conflict. Rather than having a conflict on law being settled; we have a conflict between China and Australia. Unilateral way is not the best way. The relationship requires coordination between the countries involved. They have to come to an agreement on proximity as to whether is Chinese law or Australian law applies. Choice of law rules designating the law.

- **Case study 3: French-Swiss Consumer case (2018)**
  - **Case summary**: Mr Dupont lives in France and works in France and Switzerland. In August 2012: he purchased a subscription at the Silhouette gym, based in Switzerland, for one year (expiry: Aug. 2013). General terms and conditions ('conditions générales') practised by Silhouette incorporate clause for tacit renewal of subscription, unless notice of termination is given in registered letter at least 2 months before expiry date. From August 201 to February 2015: Mr. Dupont regularly exercises at the gym and in Aug. 2013 and in Aug. 2014 he agrees to pay for subscription for an additional year. In February 2015: Mr. Dupont moves to another flat having a fitness room and stops going to Silhouette center without giving notice to Silhouette. In August 2015: Fitness center claims one-year subscription (1.000 CHF) based on tacit renewal clause, Mr Dupont refuses to pay. **According to French law, clause is invalid and Silhouette's claim is unfounded, according to Swiss law, clause may be valid and Silhouette's claim may be founded**

- **Case study 4: French-Swiss child custody case (2014)**

  - Child is born in 2002 as dual citizen (Swiss and French)
  - Parents separated in 2007 and divorced in 2008
  - French mother lives in Paris with child who is enrolled in American School in Neuilly-sur-Seine
  - Swiss father lives in Geneva and has visitation rights
  - May 2013: father brings proceedings in France, obtains provisional custody by tribunal de Nanterre and is authorized to temporarily enroll child in Collège du Léman
  - February 2014: mother seeks a Cour de Versailles ruling which reverses the French order and orders the child to return to France and resume American School
  - March 2014: father has in the meantime sought a custody order from Genevan Court, which assigns the custody to the father and restrains child from travelling to France
  - **P.S. Case-Study 4** is the **only one** where the different outcomes do not depend on differences in the relevant legislations of the two countries involved (France and Switzerland), but on differences in **the pratical application to the case at hand of the 'child best interests'** which is relied on by both the French Civil Code and the Swiss Civil Code

  - **Case summary**: the child locks himself s up in Neuilly-sur-Seine. He says that unless his father comes and gets him to CH, he will commit suicide. The father cancelled everything and flied with his private jet to Paris to get a court order allowing him to take the child to CH. The father enrolls the child in a school thanks to a Swiss judgement, but the mother launched an appeal against this decision and wanted to take the child back. The mother fights to take the child back to France. There are appellate proceedings in Versailles. The father not only had enrolled the child in a school but also had he filed a custody action before the swiss courts. **The swiss courts said that as the child was now is CH; we have the power to rule a custody dispute to the father. The court of Versailles however says the mother can have the child.**The potential outcomes between a father living in GVA and a mother living in Paris. Both apply for custody. Mother lost custody by a judge who required the father to bring father to GVA school in CH. But the mother challenges this order before a French court of appeal and this court may well reverse this order. But the first point: swiss or French court to decide ? If you look at swiss legislation and then French legislation → they look like each other (see the child's interest).The CH court may however see the child's interest differently as the French Court. Different outcomes may depend on how same principle is construed and applied practically in the case which involves both countries.

Part 1.5: How to settle a cross-border Dispute ?

1. State A and State B ought to avoid:

- **Purporting each to apply its own laws based on the significant connection of the dispute with it**
  - If laws of A and B are different, two States fail to ensure **predictability** and **certainty** ahead **of litigation**
    - ⇒ **Case-Study 1**: if English and U.S. law are both applicable, Ehrenfeld and Bin Mahkfouz have **no pre-litigation certainty** as to their rights and obligations
  - Litigation is **encouraged** rather than **discouraged,** which runs against goal of **minimizing conflicts, of minimizing litigation**
    - ⇒ **'Forum shopping' or 'race to the courthouse'**: in **Case-Study 1** Ehrenfeld is tempted to 'rush' to U.S. forum and Bin Mahfouz is tempted to 'rush' to English forum
  - **No justice (as 'fairness')** because one Party may, by winning the race to the forum, **select** the law
    - ⇒ **No impartiality** of the dispute-settling mechanism

- **'Ought' because it should be shared interest of both States:**
  - **Flowing from their duties towards members of their communities**
  - **Freedom is not absolute.** States are sovereign and independent because they can organize their domestic affairs including private parties belonging to their society. However, this freedom is not absolute. Switzerland vs China law: they cannot award the painting both to the surviving spouse and to the child. So, when private litigation comes on: each of the country is not free and independent. What is meant by cross-border? The relationship question is occupying 2 territories. Because the relationship between private parties, State A is not totally free to govern the relationship through the application of its own laws or adjudications of its own courts. The same is for State B: the relationship occupies not only sovereignty of State B, but also territory of State A. State B is not free and independent to do it.
  - **Natural law:** CH and any nation, is constrained under natural law: we either give the child to the mother (in Lausanne) or to the father (Geneva), but to both, it is not possible. In case study 2, if we think about child custody case, both FR and CH were subject to natural laws. Each of them cannot attribute custody for mom and dad; the same happens when the mother lives in a country and the father in another. In case study 3, State A (CH) says the fitness has a right to receive money from the party and indeed Dupont has to pay. If the dispute is brought to Courts of CH, then Courts of CH will go through a Court judgement saying that Party 1 is a right ; while at the same time, France says party 1 has no right to receive money because the controversial clause is invalid in the contract and as a consequence the party 1 should not receive the money.

- **Purporting each to confer jurisdiction on their courts and to require them in all cases to exercise jurisdiction**
  - Decisions resulting from proceedings in A and B may be in **conflict against each other**
  - **Following consequences arise**
    - ⇒ **dispute is not settled** (through law/legal mechanisms)
    - ⇒ parties do not benefit from a '**legal order**', an 'ordre juridique', they are caught up in a '**legal disorder'**
    - ⇒ As a result, parties are left to find and enforce **self-justice mechanism of their own** (state of nature, 'law of the jungle')
    - ⇒ **Individuals of society A and society B** are deterred from entering into relationships / transactions with each other
      - if they face a **legal no man's land,** a legal disorder
      - **facilitative function** of private law is impaired
    - ⇒ **State A and State B**
      - Do not meet their **primary** (joint) **responsibility, to avert and solve disputes**
      - Miss opportunity to increase **common good**
      - Waste **public resources**

2. Case study 2 (Neilson): what if

What would happen if both countries really insist on applying their own legislation, having their courts recognizing jurisdiction? What are going to be the consequences?

- **Because China has a strong relationship between Nielson and Mercantile, China wants to apply Chinese law.** Mercantile insurance may decide to bring an action vs Nielson. Where? In China, because Mercantile is relying on Chinese law and because Chinese law (place of accident) will be held applicable by China Courts. Mercantile will hold an action vs Mrs Nielson in Wuhan. Mercantile will obtain a decision by a Chinese Court based on Chinese law. Mercantile sues Mrs Neilson in **China** and obtains a decision holding that, based on Chinese law, **Mercantile owes nothing to Mrs Neilson**: **Chinese decision Nr 1 (declaratory judgment)**. It is declaratory because it declares that an obligation does not exist. But Mrs Nielson is not in agreement with this.
- **As Mrs Neilson was domiciled in Australia, she sues Mercantile in Australia** and obtains an Australian decision based on Australian law ordering Mercantile to **pay 30000 Australian dollars to her**: **Australian decision Nr 1**
- Mercantile is made – if necessary, with the assistance of Australian law enforcement – to pay 30.000 dollars out of a bank account it owns in Australia: **enforcement of Australian decision Nr 1.** Mercantile (Australian company but operating in China) has seizable assets in Australia. Nielson can seize Mercantile's assets in Australia.
- Mercantile obtains in China an order for **restitution** of 30.000 dollars based on **unjust enrichment: Chinese decision Nr 2**
  - Under Chinese prospective, that money was not owed to Mrs Neilson and was unduly paid, i.e. without good cause, and has to be paid back
  - Mercantile can start new proceedings in China. Mercantile owes nothing to Nielson according to it. Because it had to pay 30k to Nielson, it was unduly paid for it (unjust enrichment): action for restitution. Mercantile after having subject to the Australian decision and be constrained to comply with Australian decision n.1; may try to obtain another Chinese decision, that can order Nielson (defendant in the 2nd Chinese procedure) to transfer back 30K to Mercantile.

- Mrs Nielson **retransfers** 30.000 dollars to Mercantile out a bank account she owns in China: **enforcement of Chinese decision Nr. 2.** Nielson lives between Australia and China. If she has a bank account in China, the Chinese decision n.2 ordering Nielson to pay 30k back in Wuhan; she would have to pay this money to a Chinese bank account. If you are Mrs Nielson: you received money and have to pay it back: it's like you did not receive it!
- Mrs Neilson seeks a new Australian decision ordering Mercantile to **repay** the 30.000 d.: **Australian decision Nr 2**
- Mrs Neilson obtains assistance of Australian law enforcement to get Mercantile to **pay again** 30.000 dollars out of bank out it owns in Australia: **enforcement of Australian decision Nr 2...**

Consequences:

Time and costs (1) spent on this case, on Australia and Chinese Courts. Multiple proceedings have been going on, taxpayers pay the burden of judicial and enforcement process. These costs are not a problem *per se*; if you ask Nielson and Mercantile, they are unlikely to say "we are satisfied" because it is not settled: not only an enormous cost was spent but also it was not useful No outcome reached. **Legally unregulated (2) and no way to regulate**: none has a right to obligation if there is such an unregulated law. It comes to an end but not through legal money. **Comparable to Sisyphus punishment.**

Nielson cannot afford such fees compared to Mercantile but she will relinquish her claim, the **dispute will actually end at some point (3)** (all wars come to an end: through surrender or through escaping enforcement) but this is not a legal outcome because there is no legal decision saying she has not a claim; but by a human behavior; she is exhausted and may say « I cannot anymore ». **This outcome is unsatisfactory for lawyers also. We should benefit from a legal order rather than from a legal disorder/mess**. Mrs Nielson renounces her claim, not because it is legally unjustified, but because of the conflict she's exposed to.

- **Conflict of laws may deter the individuals engaging cross-border or in international trade or internationally generally.** If you think about Mrs Nielson, if she was aware that by spending years in China, if an accident happened and knew she would not receive proceedings, if her husband said « let's go to China » ; she would say « no, because I had too many problems with this country ». This is true in international contracts and commerce. If a Chinese company offers some goods to a Swiss company, it may switch the relationship to a no-mans-land because Switzerland wants a law and China wants another law; then the Chinese corporation will think twice or 3 times to trade with Switzerland, because there may have problems that could not be resolved. **The lack of coordination and insistence of 2 countries wanting to apply their legislation may be really counter-productive. Rather than encouraging the Australian/Chinese relationships, this can be really deteriorating (4).**

3. State A and State B are inter-dependent:

- **State A and State B are inter-dependent**
  - When it comes to governing private relationships **having connections with both State communities**
  - Just as States **have to coordinate with each other** if they want to build and maintain an inter-country highway, motorway, tunnel (e.g. Grand Saint Bernand, Mt Blanc), cable car (e.g. Aiguille du Midi)
- **State A and State B generally (should) have a common interest in making sure they enact**
  - **Rules on international jurisdiction that**
    - ⇒ Either confer **jurisdiction on one of them only** (**Step 1**)

⇒ Or confer jurisdiction on **both** (**Step 1**) but provide for mechanisms to **coordinate** exercise of jurisdiction (**Step 2**)

- What about joint exercise of jurisdiction (joint responsibility, 'bi-national' or mixed tribunal)?

- **Conflict rules or choice-of law rules that designate either law of A or law of B (Step 3)**
  - ⇒ Based on **shared assessment** as to most **significant relationship**
  - ⇒ Or leaving up to Parties to **designate applicable law**
- **Rules on mutual recognition and enforcement** that,
  - ➢ if A made a decision, prevent B to allow **relitigation**
  - ➢ if A made a decision, require B to **support** enforcement **(Step 4)**

If the problem is that Mrs Nielson may go to Australian Court and Mercantile to a Chinese one; the two countries could agree on one single court having power to adjudicate the dispute. **One way to reduce the problem: passing from duality to unity.**

Even if it's hard for one country to say, « I relinquish a connecting factor that I think deserves being adopted in a jurisdiction's rules ». Ex: CLug is a product of negotiation between multiple parties. If we see Case 3: Dupont lives in FR but there is a fitness contract in CH. We retain 2 factors: we allow the dispute to be brought by the CH company before the Court in FR (domicile of the defendant if the action is started by the company) but also at the same time in CH (place of performance).
So, it is not possible to try to reduce the circle of connecting factors: they decided to maintain both places. But if we maintain both, we must work on a 2-levels-rules →1. Allocating jurisdiction and 2. Coordinating jurisdiction.

If Switzerland and Austria engage in a conversation, they will reach the conclusion that they must decide which country has jurisdiction, they would probably chose the place of tort to trigger jurisdiction (place of the defendant). They may decide that, if Mercantile insurance brings the dispute before the Chinese authorities before, then, if Mrs Nielson brings it to Australian authorities later on, Australia has to refrain and decline based on a prior **litispendance** in China (Step 2). This is what happens in Brux1 and CLug.

In contractual matters and extra-contractual matters, these instruments rely on multiple bases of jurisdiction, while at the same time, they try to coordinate on the prior in time rule. The prior in time rule has the goal to prevent the conflict of judgement.

4. Four steps:

- **Step 1: Jurisdiction allocating rules.**
- **Step 2: Jurisdiction coordinating rules**: when we have multiple countries on jurisdiction and to avoid a conflict of judgement, we must work on rules coordinating jurisdiction.
- **Step 3: Applicable law**. What is the law against which the Court has to hear the dispute. What legislation, law of which country the Court must apply?
- **Step 4: Mutual recognition and enforcement of judgements**. The first one that has been addressed by countries. It is the enforcement of decisions. It makes little sense for China and Australia to agree on a rule that says: « Australian courts has the power to adjudicate based on some rules will apply Australian law », if then the Australian judgement is not recognized and implemented in China.

5. Step 1: Allocating International Jurisdiction

- **Model 1: jurisdiction-allocating rules based on a single jurisdictional connecting factor, just one**

    - **(1) E.g. habitual residence of the child (1996 Hague Children Convention, applicable in Case-Study 4).**
        - Roughly 50 countries (1/4 of the sovereign countries of the UN) agreed on the **residence of the child being the only connecting factor**, defining jurisdiction in child custody litigation (see case study 4). CH and FR managed to agree on the habitual residence of the child, the factor defining the jurisdiction.
        - With respect to real situations, we still face problems. **It may not be easy to define where is the child residence.** Even if CH and FR agree that only the habitual residence is the factor; still the Courts may disagree on where the habitual residence of the child is located. The French appellate Court may still think that the relevant domicile is in France while the Swiss Courts think domicile has been changed to CH following the order of French Courts, saying the child must go to a school in Switzerland.

    - **(2) E.g. domicile of consumer in B2C litigation (Case-Study 3)**
        - **But:** countries A and B **may disagree** as to where domicile or residence of an individual is located, which may require coordination (Step 2)
        - E.g. French court may locate domicile of consumer (Case 3) and residence of child (Case 4) in France, Swiss court in Switzerland
        - In case study 3, we may decide that the only jurisdictional connecting factor is the domicile of the consumer (because consumer is the weakest party, also via CLug).

    - **(3) P.S. domicile of defendant may point to two potential fora depending on who's the defendant (e.g. Case-Study 1)**
        - And domicile **may change** after **facts occurred** and **before lawsuit** is filed
        - In a number of situations, domicile of the defendant is the only connecting factor that exists. This is true in the CLug and Brux1. The domicile of the defendant may point two countries, because you don't know who the defendant is. In Case 2, Mrs Nielson wanted to initiate a lawsuit against a Mercantile and *vice versa*. Dependent on who the defendant is, this may fail to deliver the answer: where the parties are allowed to litigate (as there are two defendants). Another problem is domicile may change over time. If you think about the accident that took place in Wuhan, there was at the time the confirmation to say she lived in China. But then she moved to Australia! **So, the defendant domicile, depending on a number of factors, may not be entirely clear. It may change and may not be clear who the defendant is going to be.**

- **Model 2: jurisdiction-allocating rules based on limited number (but more than one) of significant connections**

    - **(1) E.g. in tort matters (Case 2): place of wrong (China) and place of domicile of the defendant (Australia) but not nationality of either**
        - But place of wrong may point towards **multiple countries:**
          Case-Study 1: place of conduct is in the U.S, place of damage is in the U.K
        - **In extra-contractual liability cases**, **we may conclude the place of wrong as a legitimate place of connection.** Ex: China has a good claim in this case. At the same time, domicile of the defendant is also a legitimate one. Even if we were to agree on just the place of wrong, to define jurisdiction and forget place of defendant. In extra-contractual case it's hard to choose, because it's either one or the other. Even if we were to agree on the place of wrong and forgetting the domicile of the defendant, it would be impossible and still it would be hard to set the place of wrong. Case 1: a book published, saying something injurious about somebody who was Saudi Arabian in terms of his nationality, but corporate presence in the UK. This person claimed to have been harmed in the UK: US is the domiciled potential tort-feasor *versus* UK-domiciled potential victim. **Place of wrong is the only relevant factor according to parties: but where is it?** In case of defamation, it can be in many places. In this case, the woman who wrote the book has been present in US territory (**place of conduct**) and so, occurred in the US. The UK could be the **place of wrong** is where the **harm was suffered**. Even if they would agree on one factor, they would face the situation where the wrong is made by different elements. If we were to construe place of wrong, we would say it is in UK and in the US. So, both countries would be competent.

    - **(2) E.g. in contractual matters: place of performance and domicile of defendant/ consumer but not place of conclusion nor nationality**
        - But place of performance may point towards **multiple countries**
        - In contractual matters, statistics show that countries retain **place of the defendant (domicile) and place of the performance of the contract**. **But where is the contract to be performed?** I am a watch-maker corporation and I make watches in Switzerland and you are a distributor. I would like you to find clients (agency contract) willing to buy my watches in RO, SL, HU. Where is this agency contract to be performed? **We may argue that it has to be performed in as many different markets as those indicated in the market for which the agent or distributor is competent.** This is an international agreement and must be performed in RO, SL, HU so multiple places are that of performance. If we think, we must find 2 connecting factors, yet there are multiple locations, so the end result is that we have 3-4 connecting factors.

6. Step 2: Coordinating Exercise of Jurisdiction

Between two courts of competent jurisdiction, which is the one that may actually exercise jurisdiction? **There are 3 different models we are willing to follow.**

- **Model 1: Prior in time rule (first come, first served) reflecting a sort of "proximity in time"**
  When you want to buy a flat, if you are not the first one to make the offer, you will be disappointed but if someone else made an offer, the first is going to secure the deal. Nielson made her claim to the Australian Court first (Mercantile seized only after the Chinese court).
    - **CLug and Brux1a:** this approach was adopted by signatory States to CLug (applicable to Case 3) and to Member States of Brux1a Reg

    - **Pros**: easy-to-handle, legal certainty at time **of first 'seisin'**
      - **Comfort** for whoever contemplates court action: **prospective plaintiff**
      - **Clarity** for courts on how to proceed and **no long jurisdictional enquiry** on the part of the court is needed
        - **If court is first seized: it has to exercise jurisdiction**
          What happens if the Australian proceeding is initiated the same day as the Chinese one? Do we focus on the hour? The time when lawyers or postman delivers the claims to the defendant? In most cases, it's easy to find which is the Court that has the possibility to hear the dispute based on the prior in time rule.

        - **If court is second seised: it has to stay/decline jurisdiction**
          Mrs Nielson suits first and she knows that the Australian courts will be competent for the dispute. Mercantile will try to refrain from making a suit, because Mercantile knows that Nielson already suited Australian courts. The doors of China courts are closed because of the prior seize in Australia: Mercantile will save money and time. This makes prospectivity and clarity. It is clear that Mercantile will decline jurisdiction in China. These advantages apply to parties and or courts.
      - **P.S. determining 'prior seisin' presupposes identifying the procedural act that defines the time of seisin**: serving of process, filing, etc.

    - **Cons**:
      - **Blunt, rigid, inflexible approach**: court first seised is **not necessarily** the most '**convenient'** based on **objective circumstances** of the case
      - **Pre-litigation uncertainty** may stimulate litigation ('race to the courthouse', forum shopping) rather than encourage **negotiations.**
        The court that is seized is not always the most appropriate. Being the « prior in time » is not based on the circumstances of the individual case, the most appropriate to rule the dispute. If we are allowed to take all factors/actors, China is the most convenient forum. On balance, if we take all the circumstances into account, the connections with China are more relevant. **Forum shopping is stimulated** so parties are not stimulated to find a negotiation, because the one who loses will be penalized. **Litigation is encouraged through this system rather than discouraged.**
      - **Favors unilateral choice** of forum by **one litigant**
        - **Who secures unfair (?) benefits** over the other (breach of the 'Waffengleichheit' or equality of arms principle)?
        - The '**quickest' is often the 'wealthiest'**, that may secure best (and most expensive) legal advice on where to litigate (Mercantile in **Case-Study 2**)

- **Model 2: search for the "most convenient forum" in the individual case (embodying a broader notion of "most significant bond")**
  This model takes the disadvantages of Model 1 and is about to tanking an all-together different approach. Rather than embracing the prior in time rule, why don't we try to come up with the best solution of the best forum in each individual case? What are the advantages?

  - **Pros**:
    - **Forum determined by a judge based on objective factors**
      - The court will hear the problem objectively based on the case. So, we base ourselves on objective factors rather than unilateral moves that maximize profits and minimizing those of the other party. It is justice as fairness towards countries and parties.

    - **Justice and fairness towards the parties (and the countries)**
      - **Avoiding unilateral choice, discouraging forum shopping, encouraging negotiations with a view to an amicable settlement.**
        The forum is based on an assessment by the Courts, neutral parties, on neutral facts rather than a unilateral move from one party to the detriment of the other. If we feel it is unfair to let the party run through the court and giving a premium rather than to find an agreement: why don't we try to get rid of the problem by making a rule?

  - **Cons**:
    - **Long and potentially expensive enquiry about best forum**
      - Access to **substantive justice** may be **delayed**
      - Is it reasonable to spend 6 months, 1 year or 2 years or more to 'litigate about where to litigate'?

    - **Who decides which is the most convenient forum?**
      - **Courts at two competing fora may have different views**
      - **Hague conv. 1996** (applies to case-study 4) or **Brux2a: exchange of views**/jurisdictional **dialogue** between courts and countries
        - **If agreement: bi-national decision on jurisdiction. They may engage in an interjurisdictional dialogue with the courts in CH** (cooperation in the judiciary between the authorities, Art. 8+9 Hague Convention). FR may engage in a dialogue with the CH counterparts. They proceed together to an exchange of views. If they agree – in view of the child interest, case 4 – for the matter to be settled in CH, then the FR authorities – residence of the child – will transfer to adjudicate to the CH authorities based on a share view and the most suitable forum. **It is the judgement that is the closest with best child interests. If there is an agreement to the effect that the Court other than the seized one, is better equipped to hear the dispute, then there is a transfer of jurisdiction mechanism through a dialogue.** If two States, say it is better for the child that the Court is the one in France, then there is no transfer.
        - **If disagreement: the forum first seized has jurisdiction.** If there is a disagreement (FR thinks it is

the best forum and CH also thinks it is the best) → the prior in time will prevail. It comes to solving a conflict of jurisdiction.

- **Setting up bi-national tribunal ruling on jurisdiction (Mixed tribunal)**?
  - Case-study 4: what if a 'French-Swiss tribunal' determines whether French or Swiss forum is most appropriate?
    - **We also can set up a bi-national tribunal**. This means a member of a French Court will seat with a member of a Swiss Court. The president of this tribunal is entrusted with the determination « what is the best forum ».
    - **E.g. (international criminal law): Enrica Lexie incident (2012):** Indian/Italian tribunal ('pca'- permanent court of arbitration) entrusted with deciding whether India has jurisdiction. Two marines (Italian) on board of a vessel shot two fishermen, Indian, somewhere in the Indian ocean. They were on board an Italian vessel, Italian marines. They were captured for a very long time by Indian authorities. The family members of the Indian victims would like the prosecution and civil action to take place in India. Italy does not agree: marines enjoy an immunity and should be tried before Italian authorities This conflict opposes the perpetrators of victim / offensers and States (IT/India). The countries involved agreed on an international tribunal (one judge from IT, one from IN and 3 other judges with different nationalities). This body with 5 judges must decide who has authority. It is a permanent court of arbitration.

- **Case example:** M. Romano had to deliver legal opinions. The succession was open according to continental ideology – tha person died in 2013 – today, 6 years after the dead passed away, parties are still unclear whether the litigation should proceed in Monaco, Bern or Geneva. This is a risk we run, if we embrace the « most convenient forum » approach. **What is the most convenient forum?** This can take months or years. Parties spent 3 mio CHF to determine, to know if it was Monaco, Bern or Geneva: and they don't have an answer! Monaco thinks the most important is the Swiss Court and Switzerland says it's Monaco (negative conflict). Also we had to determine who was responsible to decide what is the most important forum: should we leave the first seized court to decide? Or to identify the authorities responsible for this adjudication?

- **Model 3: Jurisdiction agreement between the Parties**
  Model 3 offers the parties the right to decide for themselves where to litigate.

  - **Pros**

- **Fairness to individuals ('bilateral choice') and to countries**
  - Preventing **one party** to choose forum and get the 'competitive advantage' of 'unilateral choice' to the detriment of the other
  - **Restraining forum shopping** and avoiding forum running

- **Predictability of the forum ('choosing is predicting')**
  - **Predictability of outcome of potential litigation is enhanced**. Choice of forum internationally is gaining momentum. If you look at the international instruments, the choice of forum is becoming more and more important because of the predictability of it. And, as a result, of procedural rules, of rules of evidence, of applicable law, of mandatory provisions, etc.
    - ⇒ **Anticipation of the rules in terms of procedure**: they will know what rules they will be subject to, in evidences e.g. These rules may differ in CH and in AU. They have a rule of procedural and substantive rules, legal framework against which the relationship will play out and which will be settled.
  - **Less incentive to actually litigate** (in the interests of everybody)
  - **Made through:**
    - ⇒ **Pre-contractual forum agreement**: this may be done through a choice of forum agreement or clause incorporated in a contract (in international contractual matters): "all the dispute will be settled in a court in Australia"
    - ⇒ **Ex-post agreement:** after the conflict, case with China/Australia; they may get together to choose a forum.

- **Possibility of selecting a neutral forum**
  - Equally 'distant' from the countries of **both parties** and more likely to **be even-handed (?)** (less 'forum bias')
  - Forum designated maybe **highly trained in the subject-matter**

- **Cons**
  - **Stronger party may impose choice to weaker party** (**case-study 3**)
    - **Remedy: restraining choice in areas of protective jurisdiction (that's what CLug does to protect Mr. Dupont: case-study 3).** You allow a corporation to include a forum choice, there are chances that a corporation will include a forum nearest from it (corporation) than to the client. If you go to a gym in Geneva, in it, there is a forum clause (must be in Geneva). If you live in France, you may have to be protected and you may be willing to have the dispute where you are domiciled; so more and more (also in CLug) we put the forum in the State of the weaker party. **If we allow both parties (one of each, has greater negotiating power) to agree on a forum, there is a strong likelihood that the stronger party will impose the forum advantageous for them**. This is the case also in banking contracts or purchase of standardized goods. But the choice of this forum is settled by the company/professional and not really chosen by the parties: so either you take it, either I won't conclude the contract with you. **Forum may be dangerous because it is not a fair/balanced**

negotiation conduct. One response to it may be: we decide that the forum clause that has not been negotiated by both parties, does not bind the party that did not have the leverage (ability) to choose.

- **Not always easy to find a consensus**: not always, *ex-post-facto* the parties will be able to find a consensus as to where to litigate. One of the elements that Mrs. Nielson is prepared to fight for, is the place where litigation is going to proceed, because there are lots of stakes here. If China is the proper forum, there is a chance that China will apply its own Chinese law. If Australia is the proper forum, Australian Courts will apply Australian law. The outcome may be tremendously different. It is not hard to imagine that the party would relinquish as we saw (Mrs. Nielson could relinquish the Chinese forum and Mercantile could relinquish the Australian forum).

➢ **Unlikely in case of tort/extracontractual liability (case-study 1 and 2)**

7. Step 3: Determining Law Applicable

- **Coordination of rules on applicable law (or 'conflict rules'/'choice of law rules') is vital**

  - **(1) 'Conflicts of choice-of-law rules' should be avoided**
    - **They create pre-litigation unpredictability** for the individuals involved as to their substantive rights and obligations
    - For countries to work at a jurisdictional level only, **it may not be enough to minimize conflicts and combat forum shopping**
      - Case-Study 1 (Ehrenfeld vs Bin Makhfouz): when a US-based citizen wonders what law applies to her liability for book distributed in US and UK, if UK says English law and U.S. says U.S. law, he/she becomes **victim of a conflict of laws.** If US law applies, Mrs Ehrenfeld has no liability and Mr Bin Makhfouz does not have the right to receive compensation. It is not enough to work on common rules and jurisdictions or step 1 and step 2. **They have to do more work and go through additional efforts, making sure that the parties are able to at least predict what law they will apply**. **You also want to know what substantive law applies to the matter.** This matter is dealt with choice of law rules: designate the rule of law, law that has to apply to a scenario. What the countries should avoid, is the conflict between their choice of law rules.

  - **(2) Conflict of choice-of-law rules may take two forms**
    - **Positive conflicts of choice-of-law rules**
      - **Country A says law of A applies, country B says law of B**
        - Case-Study 2 (Neilson vs Mercantile Insurance): if China says Chinese law applies based on place of wrong, and Australia says Australian law applies based on common domicile, that's a **positive conflict.** Assuming China – regardless of jurisdiction – has a rule saying that in extracontractual relationship, those relationships are governed by the law of place of wrong (*lex delicti*). Let's say Australia has the law of the common nationality governs the tort. If it is so, if any point a pre-litigation stage, Nielson and Mercantile are led to ignore what law applies to them. If a Chinese court says it is competent based on place of tort, it will apply Chinese law. If Australia is seized first, then based on jurisdictional rules (prior in time rule), Australian Court will apply Australian law. This means that any pre-litigation stage, when 2 countries are competent to hear the dispute in the conflict of jurisdiction based on prior in time rule or on place of wrong rule, then both countries are competent. We are not clear about what law applies. **Positive conflict**.

        - Case-Study 3: if Switzerland says Swiss law applies based on choice-of-law clause, and France says French law based on residence of consumer, that's a **positive conflict**

    - **Negative conflicts of choice-of-law rules**

- Country A designates law of B, B designates law of A ('renvoi')
  - Case-Study 2: if China says Australian law applies and Australia says it is Chinese law, that's a **negative conflict.** There can also be a **negative conflict**: renvoi problem. China may adopt a rule to the effect that extracontractual liability is governed by the nationality of the common domicile. Based on the Chinese rule of law: Australian law applies. While according to Australian law, the place of wrong rule applies, so Chinese law applies (place of wrong). The 2 countries want to apply the law of the other.

- **How coordination on applicable law may be achieved**

  - **(1) Countries may reach a consensus on the connecting factor defining applicable law**

    - **Bilateral treaty**: the swiss-italian treaty of 1868 (inheritance)
      - Provides for **nationality** of the *de cujus* as shared connecting factor
      - **Based on a bilateral swiss/italian conflict rule**

    - **Multilateral treaty**: the **1980 Rome convention** on law applicable to contractual obligations
      - **Case 3: habitual residence** of the **consumer** with some **exceptions** (but Switzerland not party to it)
      - The Hague Conference on private international law. The Institutional task is to work on common rule on private international law, including governing law. So, this possibility helps defining common rules on applicable law. This is what happens in respect to contractual cases, where 1980 Rome Convention (became a regulation) applies. This regulation was negotiated in all countries of the EU. CH is not party to this Convention.

    - **Supranational instrument**: **Rome 1 Regulation** in the EU
      - Member States debated extensively how the **European conflict rule** applicable to consumer contracts (case 3) should look like
        - There was **disagreement** among them, as within each national parliament when it comes to new legislation
      - Common objective : minimize conflicts.
      - They came up with a **community view**, a common rule (**Article 6** of Rome 1 Regulation applicable to consumer contract)
        - Choice by the parties of applicable law is allowed
        - In **consumer contracts**, cannot impair or diminish the protection afforded to consumer by **law of his/her habitual residence** if professional pursues its activity in the country of consumer
  - **(2) Each country selects**

- **Best connecting factor defining applicable law in its own view** and endorses it in a **unilaterally enacted '<u>first-tier conflict rule</u>'**
  - Case-study 2: China retains freedom (there is no treaty) to choose place of damage, Australia retains freedom to choose place of common domicile, Thaïland to choose place of harmful conduct, etc.
    - ⇒ In case 2, there is no treaty between Australia and China with respect to tort. The coordination between 2 legal systems in 2 countries where there is no treaty is not impossible: the coordination may take place simultaneously. There is a choice of rule of 2 countries: China is free to enact the choice of law rule of its choice. **China is free to choose which connecting factor is the most appropriate to extra-contractual liability (place of wrong? Of damage? Of residence?). Australia is free to do the same and choose the best-connecting factor**. These are the **<u>first-tier choice of law rule</u>** (or first level choice of law rule). These rules may coordinate spontaneously with each other. Thy could designate the same law as applicable. If China decides the place of wrong as the proper applicable law and Australia decides the place where the initial injury was suffered as law; in that case, those 2 choices of law define the same law – Chinese law; China being the place of wrong and also the place of initial injury. **If those 2 rules, unilaterally, turn to Chinese law, then there is no need for both countries to go to the 2nd level choice of law rule.**
  - Case-study 1: England retains freedom to choose law of residence of presumed victim, U.S. retains freedom to choose law of residence of presumed tortfeasor, etc.

- **Adopts a unilaterally enacted '<u>second-tier rule</u>'** for the case of a conflict of rules on applicable law with another country, e.g. adopting the '**most significant relationship**'
  - if China and Australia have the same first-tier conflict rule with respect to torts, then no need to apply their **second-tier rules**
  - if China and Australia have different first-tier conflict rules, then positive or negative conflict may arise, in which case both would rely on their **second-tier conflict rule**
  - **Example**: if it turns out that unilaterally the choice of law conflict with each other (China law designates the Chinese law and Australia designates Australian law) then we have a **positive conflict** and at this point both countries must decide a **<u>subsidiary rule</u>** whose purpose is to reconcile the two conflicting choice of rule (=second tier rule). This then usually works and there should be no conflict at this level. If really at this level, there is still a problem; there should be a third level.

BUT: to the extent that a country wants to apply its public policy provisions or its mandatory provisions ('lois de police'), goal of coordination may be frustrated: assuming that Australia designates the place of first injury and China the place of wrong: in both cases, it is China. This means that Australia also needs to apply Chinese law. But what if Australia remembers that prescription is 1 year in China, and this is inconsistent with Australian public policy? There can be mandatory rules or public policy rules that can prevent the application of Chinese law.

8. Step 4: Mutual recognition (and enforcement)

- **(1) Probably the most important step:**
  - Coordination at **jurisdictional level** (Step 1 and 2) and **applicable law level** (Step 3) **is of little use if**
  - **Country B is permitted not to recognize decision from A**

- **(2) A decision may be recognizable without being enforceable:**
  E.g. Case-study 3, French judgment saying consumer has no obligation to pay contractual damages

- **(3) Non-recognition paves the way (prépare le chemin) for conflict of judgments:**

  - **Case-Study 1: if U.K. orders Ehrenfeld to pay in favour of Mahfouz, and U.S. does not recognize, U.S. courts may have to adjudicate a new**
    - And U.S. courts may conclude Ehrenfeld owes nothing to Mahfouz: U.S/U.K. conflict of judgments

  - **Case-Study 4**: **if France makes a custody order (e.g. in favour of the mother) and Switzerland does not recognize it, then Swiss courts may allow relitigation (to avoid domestic déni de justice)**
    - And Swiss custody order may be in favour of father
    - So a Swiss/French conflict of custody orders: dispute still unsettled, no rule of law benefits this relationship
      - if child is in Switzerland
        - Swiss authorities may prevent him from travelling to France visiting with his mother there (!)
        - for fear of him being taken by French police and handed to mother in compliance with French order

NOTA BENE:
The French Court is seized by the French mother and the Swiss Court is seized by the Swiss father. Based on the common rules on jurisdictions, which say habitual residence rule of the child defines jurisdiction, both say the child lives on their territory.
The problem is settled by the coordination of jurisdiction rules (Step 2): the FR-CH agreement of 1996 have rules on coordination of jurisdiction requiring the 2nd Court seized, to differ to the determination of the first Court. The Swiss Court, 2nd seized, has to decline, because the FR Court has been seized first and because the FR Court has a firm jurisdiction **(prior in time rule)**. The CH Court has to decline jurisdiction or at least to stay the proceedings (sursis à statuer) waiting for the determination of the FR Court on their jurisdiction. Once they assess jurisdiction, then CH has the will to accept to be bound by it.
Now let's assume the FR Court awards the custody to the mother and allows the child to go to FR. The French appellate order is becoming final and biding, requiring the child to over to FR. What if this decision is not recognized in CH? Even if the judgment is based on FR substantive law – and CH accepted on rules of FR on applicable law: what if not recognized in CH (because the best interests of the child are not complied with ; or CH Court says the child was not heard in FR proceedings so the FR order cannot be recognized in CH). CH may

think this is not consistent with CH public policy or tainted with bias. What may happen at this point? FR judgement was based on common rules on jurisdiction and on applicable law. If we see Art. 21 of the 1996 Convention; it says that one of the signatory country may still in some limited circumstances, deny recognition to the judgement emanating from another signatory country. E.g.: in case of public policy or the person was not heard. Indeed, 10 years old: CH makes it able for children to be heard but in FR, 10 years is too young. This is a legitimate ground for CH to refuse recognition. CH may still comply with their own obligation even if it does deny with FR judgement. What happens then? In FR, the mother is the custodian. In CH, the mother is not necessarily the custodian because the FR judgement has been denied recognition in CH. In CH the question of who is the parent custodian, is not settled.

- **(4) Importance of mutual recognition in treaties**
    - **Treaties on mutual recognition of judgments have historically been the first to appear**
        - Article 220 of Treaty of Rome (1957): foundation of European PIL

- **(5) In case there is no treaty**
    - **(a) A lot of countries have no treaty with any other country or have treaties with just a few countries and not with all others:**
        - Some of them still have a disfavourable attitude towards decisions of other countries
            - China / Australia in Case-Study 2
            - U.S. 'Speech Act' applies to Case-Study 1 and would prevent recognition of English order
            - This is a legal context: there is an agreement. There is a decision of a FR court, but, not enforceable if some grounds are fulfilled. But what if there is no treaty at all on recognition on foreign judgement? China does not have treaty on the recognition on foreign judgement. Same for US. **China works with the principle of reciprocity** (if you have never recognized one of my judgements in your country, I won't recognize one of yours). **The grounds are limited but still they exist in some circumstances.**
    - **(b) Even when a treaty exists, it generally fails to force a signatory in all circumstances to recognize decisions by other signatories**
        - Lugano Convention (art. 34-35) lists some grounds for **refusal** by Switzerland to recognize French order in Case-Study 3
        - 1996 Hague Children Convention (art. 21) contains no less than six grounds for legitimate **refusal** to recognize
            - Case-study 4: French court makes a custody order, but Swiss court is permitted not to recognize it based on **public policy,** i.e. on its view of child best interests

THERE ARE FOUR DIFFERENT MODELS TO ACHIEVE A COORDINATION FOR MUTUAL RECOGNITION

9. Model 1 (mandatory or quasi-mandatory recognition) to Step 4 (mutual recognition and enforcement)

How to avoid the situation of –no law – (as in the custody case) ?

- **(1) Country B is required in all circumstances to recognize decisions of Country A and conversely**
    - **Auth. of B are bound by decisions of A without being able to control them: no public policy exception (like in domestic context: e.g. Berne/Saint Gall)**
        - Example-case: a mother from the German part of CH and a father from the FR part of CH. They speak EN to the 3 sons. They have been living as a family in Bern (FR speaking part). The mother unilaterally removed the 3 kids and settled them down in Saint Gall. She decided on her own. She never asked the father. The father feels betrayed and wants the kids to be raised where they have been raised so far, in Bern. The St Gall decision seemed really biased: it said that the mother was allowed to stay, and she was the mother and the children should have their residence there. This decision, if becomes res judicata, the authorities in Bern would have to implement it, even if they think that the St Gall decision was unfair and biased, and the best interest of the child was not complied with. But: there is no mutual recognition between cantons → **Once a judgement emanates from a canton and becomes res judicata, it cannot be re-litigated elsewhere in CH**. Even if the Court in Bern would have had the jurisdiction (had it not been for the prior in time litispendance). Once a judgement becomes res judicata, CH is no longer free not to recognize or not to implement the judgement. Is it a realistic approach? Mr. Romano is not optimistic for this to be implemented.
    - **Countries are forced to recognize in all circumstances, decisions of the other**

- **(2) Hardly realistic among 'sovereign' States:**
    - **(a) Countries want to retain a measure of control over the decisions emanating from other countries, for two reasons**
        - **Number 1, no representation: countries feel not bound by a decision made by an authority in which they were not represented**
            - Compare the slogan 'no taxation without representation'
            - Think about UDC (Swiss far right party)'s arguments against the proposed 'Framework Agreement' ('Accord-cadre') between Switzerland and European Union (based on art. 5, 'Intégration des actes juridiques')
            - **A country hardly feels bound by a decision made by an authority by which it does not feel represented.** CH could say: there was a **FR judgement**, there were **FR judges**, **FR nationals**, **FR education** etc. Why should we, CH, not be represented in that FR court? We were not participants in the judicial process, should we accept this?
        - **Number 2, risk of forum bias**: **when one party has a close link with forum A, B may suspect lack of impartiality of courts of A**
            - A tribunal that is French, may be closer culturally, linguistically, psychologically, politically to the litigant to the resident or national of that country. Ex: China supplier and Australian importer. China is the main exporter of Australia. Australia is reluctant, without retaining a measure of control, to

give effect on a Chinese adjudication that said that the Australian corporation has to pay an amount in contractual damages. The idea is that, it was an Australian adjudication, and the Australian Court might have not been totally fair to both parties (include the Chinese party) because there is a greater relation between Australia and the Australian corporation and China here has to pay to Australia: Australia becomes richer. There might be a reluctance from Chinese authorities that causes them not willing to engage in a multilateral system whether they would lose control over the foreign decision. Same for the Australian side: we may understand hesitation from Australia to recognize a wholly Chinese adjudication without saying « this is not valid with our values ». **This is why arbitration is becoming more and more popular. Both countries lose control over the adjudication made by the other country.**

- **(b) Even in highly integrated regions, often no mandatory recognition:**

  - **Within the EU:** no abolition of grounds for non-recognition
    - Though grounds reduced, public policy still exists in most areas. What has happened though, is that the **EUCJ tends to control, the way the individual members States use public policy to defeat implementation of another member State decision.** Although still public policies justify country not to recognize judgements, the freedom of Member States to rely on them, is shrank.
    - **Brux1 Regulation:** there is still a possibility to say "I am not recognizing this". The history of EU is to narrow down the scope of each country to deny recognition of judgements of the other countries. For example: there is a limited increasingly reduced scope for Germany to deny recognition of a Belgian judgement, it exists, but very limited, based on public policy.

  - **Within the U.S.:** 'full faith and credit clause' (Art. 4.I U.S. Const.; cp. Section 118 Austr. Const) does not prevent use of public policy. E.g. same-sex marriages before Obergfell v. Hodges, U.S. Supr. C, 26.6.2015. USA: provision in the USA Constitution (Art. 4) → a judgement of California has to be given full faith and credit clause anywhere else in the USA. But in the interpretation before 2015: we could not say, in Texas, that same-sex marriage is valid just because it is in California. Since 2015, a Texas Court must give full faith and credit to a judgement from California recognizing a same sex marriage.

10. Model 2 (Collaborative justice) to Step 4 (mutual recognition and enforcement)

- **(1) Courts of B are associated in judicial process before courts of A**
  - Typically, if one of the litigants so requests
  - If courts of A and B agree on the outcome of the litigation, 'bi-national' adjudication
    - Which is binding on parties and authorities
    - 'Common', 'bi-national' judgment more legitimate than 'mono-national', unilateral one
      - Similar to Step 2 but on substance (not jurisdiction)
      - Example: we may allow CH to have a say, to give their view, on how the father and mother should be settled. **The FR authorities will retain the jurisdiction, but the CH courts would be associated to the process in FR. Example: by giving an opinion, giving a report. The judgement would still be FR but would mention the CH advisory opinion**. **We can expect CH to recognize the FR judgement because CH had a stake in the process, because CH cooperated through an advisory opinion**. It is fair to imagine that CH would be prepared to refuse to oppose public policy to the extent that CH had a voice.
  - If courts of A and B disagree, courts of A would retain the responsibility of the decision and have final word (?)
    - Duty to motivate why point of view of courts of B not followed (?)
    - What if CH/FR disagree? If CH says: the child must stay in CH because he has good grades, his father has money to maintain him there and the mother must have a visit right. What if FR does not agree with this? **There is a collaborative justice model**: there would be a court (FR court) that would be doing an adjudication that would enter a judgement explaining why they disagree with the CH opinion and why they want to have a decision that is different from the CH courts' point of view.

- **(2) Existing examples of 'collaborative justice'**
  - **Visitation rights: art. 35(2) of 1996 Hague Children Convention**. The Hague Convention on Children: IT and Spain. They are both bound. The child lives with the mother in SP. The father lives in IT. The father wants visitation right. The father may apply before the courts in Italy. Habitual residence of the appellant is in Italy and the court in IT is competent not to adjudicate on the visitation right, but to produce a report that will be forwarded to the Spanish authorities, which are responsible for the visitation right because it is where the child is resident. The report of the Italian courts says the father is capable to maintain him, to see him on holidays, etc. The Italian authorities make this report. The Spanish authorities may follow these recommendations, they may take it into account they can depart from, but they cannot disregard. They are not obliged to follow.

- **Inter-country adoption: 1993 Hague Adoption Convention**. CH resident want to adopt a child from Colombia. The Hague Adoption Convention → CH is responsible for part of a process, Colombia also, Colombia is responsible for selecting adoptive child and CH responsible to select adoptive parents. But still, the countries can say « we don't want this child for these parents etc. ». In order for an inter-country adoption to take place and be pronounced, both countries must agree on this. If they don't, it cannot work.

- **(3) Strengths and weaknesses**
  - **Courts B more likely to accept to be bound by Courts of A if B had the opportunity to state its views:** art. 11(7) Brussels II-bis
  - **Inequality between two countries**: one has the last word (country A) and the other (country B) just consultative voice

11. Model 3 (higher court settling conflict of judgements) to Step 4 (mutual recognition and enforcement)

- **(1) Country A decides and Country B may deny recognition**
  - **If Country B makes a counter-decision, then the conflict of judgments will be submitted for resolution to a higher court**
    - At the initiative of **one party** to the dispute
      - **Case-Study 4**: the mother, the father, the child
    - It seems to **make sense** that conflicts between two mono-national decisions reflecting a conflict of sovereign states on how to solve a conflict between two private parties connected with both states be resolved by **an international court** (Case 4: French-Swiss Court). If County A does not recognize decision from Country B, there is a conflict of judgement. Example: if CH refuse to recognize a FR custody order, then CH can make a counter-judgement in conflict with the FR judgment: there would be a conflict of judgement. This can be submitted to a higher Court (Swiss-French Court). *Mutatis Mutandis* what happens here, in child custody, applied to other contractual matters.

- **(2) Institutions within which higher court may operate**
  - **Within the European Union: may be the CJEU**
    - Today: only if violation of **European Union law** (Sneersone v. Campanella). Sneersone (Latvian citizen) and Mr Campanella (Italian citizen): they are an unmarried couple, they have a child, Marco, 2 years. Their parents divorce. Sneersone wants to go back to Latvia with her baby. Mr Campanella files a complain at Latvian authorities, based on the 1980 Child Abduction Convention. « My son has been abducted from Italy to Latvia without my consensus » (unlawful, abduction). Latvian Courts dismissed the claim: they say that it is not in Marco interests' to go back to Italy. At the same time, Rome courts say that the custody goes to the father → **True conflict between Latvia and Italy. Both think they are competent, but they clearly disagree with each other.** The Latvian authorities, initiated proceedings against Italy for violation of EU law. The regulation was Brux1a. In order to solve this conflict of judgement, Latvia tried to call on a higher court (CJEU). This is only possible if there is a violation of EU law. The Commission of EU law, which must give an advisory opinion, thinks that there is no violation of EU law from Italy.

  - **Between Switzerland and EU**: 'tribunal arbitral' created through proposed '**Framework Agreement**'. The framework agreement encapsulates a clause on an arbitral tribunal, which is made from one Swiss, one EU, and one Chinese or Japanese (president of arbitration: cannot be CH or any EU state).

  - **At global level, may be**
    - **United Nations?** institution that 'unites all nations'
      - **One location** only: **the Hague?** (why not a specialised chamber of the **International Court of Justice**?)
        - **Switzerland v. Belgium** (before the ICJ). We could also think about the UN: why don't we use the ICJ? In CH-Belgium there was a problem of interpretation on Sabena (Belgian air company) that went bankrupt. There was a dispute: CH launched a claim to ZH authorities saying that CLug did not apply to Sabena Case, because CLug did not apply to bankruptcy and so it was under LDIP (PILA) to decide whether the CH

had jurisdiction. Simultaneously, Belgium launched a suit in Bruxelles. The Belgian companies said that CLug applied and that the issue was a contractual issue (under CLug/Brux1) based on the domicile of the defendant and the CH company did not have jurisdiction under CLug. The CH courts were competent VS Belgian Court also: interpretation of the CLug by ICJ. It is rather strange that ICJ interprets international private law rules.

- **Multiple location: regional chambers** (New York, Sao Paulo, Bangkok, Shanghai, Sydney, Paris, Nairobi, etc.)

- **(3) Composition of the higher court**
  - Countries would send in the judges
    - Secretariat of U.N. or the Permanent Bureau of Hague Conference may keep the list of national judges
    - They may appoint judges from a list of judges proposed by States
    - **Composition is multinational**

- **(4) Decision by the higher court**
  - **(a) Uphold decision** of A or B or dismiss them both and **replace them through a third one** (cf. art. 618 of Fr. CPC)
  - **(b) Is binding on the countries** A and B and their authorities: nvolves the setting up of a higher court which composition is multinational **and whose decision is binding on both countries involved and under this system, it will not be possible any longer to oppose for example public policy to the judgement made by this higher court**. This decision is binding, final, conclusive on both countries.
  - **(c) Is binding on the Countries A and B and their authorities**
    - The two concerns country B may have towards decision of country A (lack of representation and forum bias) are eliminated
      - Case-Study 4: Switzerland will be bound by the decision of the higher court just as is bound by the decisions of ECtHR or ICJ, which are two international courts (as in the proposed Framework Agreement, 'Accord-cadre'). **The legitimacy is made by a joint participation of both countries in the setting up of the court and set up of the judges.** The weakness of this model is that parties have to wait before they have access to a higher court to be faced with a conflict of inconsistence of judgment. If we think of case 4 (custody child): the two custody decision are opposing (FR/CH): either party wants to submit the judgement to a Swiss-French Court.
        - Switzerland was represented in court (appointment of judge)
        - The decision emanates not from a French court but from an international court (Swiss-French): super partes, no bias
        - No public policy (just as no public policy to oppose ECtHR)

- **(5) Weaknesses: three proceedings, two mono-national and one supranational, long and costly**

12. Model 4 (inter-country tribunals) to Step 4 (mutual recognition and enforcement)

Model 4 tries to respond to model 3 weaknesses. We think about an inter-country tribunal already at first instance. We would have one Chinese and one Australian judge, at first instance.

- **(1) A number of models may serve as an inspiration**
  - **(a) Federal courts in 'diversity jurisdiction' cases (U.S.)**
    - **Dispute between a New York citizen and a California citizen may be heard rather than by State Court of NY or CA:** the federal Courts in the USA. When it comes to jurisdictions, there are two sets of courts (Federal Courts and State Courts). Federal Courts are appointed by the federal government. The finding fathers are the men that were thinking about the best system giving the greater guarantee of impartiality. They realized that if you have a dispute between resident of Massachusetts and another living in Georgia, they were afraid that if the dispute was brought to a court in Massachusetts, the Court in Massachusetts (because judges that are sit in Court in Massachusetts, will probably be people from Massachusetts) will be biased in favor of the Massachusetts residence and against the Georgian resident. **What they decided, is that in this diversity case, either party may request that the dispute is settled at a Federal Court** (and it does not matter whether the court is in Massachusetts or in Georgia, because what is important is the composition of the Court). You do not have a full Massachusetts composition in terms of who sits in the Court. The members of the federal courts, irrespective of the geographic location where they sit, are appointed by the government.

    - **By a federal court: judges appointed by federal government**
      - Rationale: the bias a state court might otherwise have towards a litigant resident in its own jurisdiction

  - **(b) International judicial courts set up in some jurisdictions**
    - **Singapore International Commercial Court ('SICC'):** if we see the composition of the Court, there is an Australian judge! He is a judge in Singapore Court. There is also a French judge. It is not because it is in Singapore, that only Singapore people are sitting there. There are also UK, American and Australian sitting at the Singapore Court.
    - **Dubai International Financial Center Courts ('DIFC Courts')** : not only Emirati judges sitting. We also have judges from all over the world.
    - **Brussels International Business Court** (yet to be implemented): the idea is to be implemented. The idea is to allow international corporations to submit their disputes to a court sitting in Bruxelles. The procedures may be in English language. The Court may rely on the expertise of judges coming from other countries (in particular common law countries). In fact, because of Brexit, the London Commercial Court will lose attractiveness, so other Courts want to be competitive.

    - **Paris Court of Appeal**: specialized chamber for cross-border disputes

- **(c) International arbitration courts**
  - **An international arbitral tribunal promises greater impartiality than a mono-national judicial tribunal**
    - **U.N. Convention of New York on** recognition of arbitral decisions (1958): 150+ countries have ratified it
    - **Countries better prepared to recognize international decisions than mono-national decisions**: less bias, greater legitimacy
    - **The best existing model is international arbitration tribunal:** the idea of international tribunal is impartiality. This gives an additional comfort to parties. This is better than a mono judicial tribunal. Even if it's quite expensive (because parties do not pay for lawyers, but also for arbitrators themselves). There may be a lot of proceedings and for this proceeding you have to pay for counsels. A significant number prefer arbitration because generally if you have arbitration, you have one proceeding before the arbitrators and maximum a second proceeding to a supreme court of a country. **Setting aside an award of arbitral tribunal can be before a court but you never have 3 stages**. **You have only one set of proceedings and not multiple sets of proceedings reflecting the multiple countries involved.** This explains the success of international arbitration. If we think about the NY Convention, it attracted a huge number of ratifiers. This Convention recognizes recognition of arbitral awards emanating from arbitral judges sitting in other signatory countries. Ex: China may be reluctant to recognize a fully domestic decision of an Australian court. China did not have the possibility to express their opinion so why should they be bound? What about an arbitral award delivered by an arbitration award made by Melbourne in Australia? This arbitration was composed by a Chinese judge and an Australian judge, and the president of arbitration was from Brazil. China is more inclined to recognize arbitral awards emanating from arbitral tribunals than wholly domestic judgements. **This is because the award is less biased, more participation, greater impartiality** → more inclination to recognize these international awards. Some awards are defined as international awards. In a court: domestic decision on an international dispute. But it is not an « international » decision. The decisions delivered by arbitral awards, is regarded as an international decision. It has a vocation to circulate because the characteristics of the tribunal and the joint participation of the countries to set up the tribunal.
  - **Movement towards Inter-Country Tribunals in international tax issues** (modern Bilateral Tax Treaties encompass similar mechanisms): Another example is present in international tax treaties (bilateral tax treaties) : if you look at the more recent generation of these treaties, they encapsulate a provision saying that if tax administration of counties do not have an agreement on where the tax residence of an individual is located (CH thinks the corporation is taxed in China and

Australia thinks it is in Australia), how they solve this, is that the last instance responsible for settling this Chinese-Australian disagreement is a Chinese/ Australian arbitration panel whose competence is to determine whether the individual has his place of business in China or Australia and both countries have undertaken the treaty and considering themselves bound by it.

- **Arbitral tribunal in the proposed EU-Swiss Framework Agreement**

- **(2) Appointment: countries or litigants or both?**
  Who should appoint the inter country tribunals?
  Who should bear the costs?
  - **If countries, model follows international courts (ECJ, ICJ, ecthr…)**
  - **If parties, model follows international arbitration tribunals**
  - **Case-Study 4:** Should Switzerland and France designate each one a 'public' (legally qualified) judge or should French mother and Swiss father designate a 'private' judge, i.e. Arbitrator?
    - Does a 'State-appointed' judge give greater guarantees to be super partes than a 'party-appointed' one?

- **(3) Costs: born by the countries?**
  - **A single proceeding rather than one in A and one or two in B and third or fourth before higher court: less expensive and more expeditious than Model 3**
    - **Arbitration: costs born by parties, which is at times regarded as privilege of wealthy individuals and corporations.** One of the characteristics of the International commercial arbitration is that the parties are supposed to pay for counsel and for arbitration fees but also for register and secretariat fees. Arbitration is helped by institutions (ICC or Stockholm arbitration center or ad hoc arbitrations etc.). Prof. Gian Paolo Romano was president of an arbitration tribunal once and had to ask his brother to be secretary for this panel. In the arbitration model, parties bear the costs and sometimes this is a weakness. Arbitral justice – although in neutrality and impartiality is seen as something superior – is reserved for wealthy people. Do normal people want to pay much more ?
    - **But: in international tax issues, inter-country arbitration is paid by the two States involved**
      - Case-Study 2: Why if Mrs Neilson and Mercantile want to have the dispute settled by an international tribunal (Australian and Chinese), not a wholly Chinese, not a wholly Australian? Should they pay themselves for the costs of the tribunal (e.g. Salary of the members, etc.) Just as in arbitration proceedings?

- **(4) Law applicable**
  - **Law designated by choice-of-law rules of countries involved (A and B) (like in international arbitration)**

- But no forum bias in interpreting those rules and exercising discretion when it comes to open-ended notions (good faith, assessment of damage, most significant relationship, interests of the child, etc.)

- **(5) Appeal**
  - **Review mechanism of decisions entered by inter-country tribunals should arguably be set up**
    - **Like in federal jurisdiction (appeal):** U.S. district courts at first instance and U.S. court of appeals ('circuits') at appeal level. There should be an appellate level in this model, and the appellate court should also be inter-country**. This is not so, in most of international commercial arbitration.** If we have arbitration proceedings with a corporation that is Chinese and another that is Australian and an arbitration clause in Geneva and each party appoints a judge. The Arbitral tribunal may deliver an international award that can be appealed against (not real appeal like in Switzerland). **The motifs for review are more limited than on an ordinary appeal of judicial court.**

    - **Before higher court as envisaged under Model 3?**
      - Bottomline: appeal court should be an inter-country court
        - **Unlike commercial arbitration**, where appeals are heard by mono-national courts of country of seat: **Domestic courts (Federal tribunal) is responsible** to hear the application to set aside. We fall back on the appellate level, to domestic courts. **This is not wise:** the appeal is made in front of the federal tribunal, which is composed only by **swiss judges**.

        - **Like investment arbitration** under the Washington or 'ICSID' Convention (1965), 153 signatory states: ad hoc committee. We would rather see the international investment arbitration: we have a Swiss investor in China and on the other hand, the Chinese governments. This is based on a bilateral investment treaty between China and Switzerland. In the treaty there is a clause saying that the investor has some complaints, they are allowed to make complain in front of international investment tribunal (one Chinese, one Swiss, one Mexican). If one is not satisfied by the tri-national tribunal, they may appeal to an ad-hoc convention (ICSID) and the committee in Washington (ICSID) will also be composed **by multi-national countries judges.**

- **(6) Decisions once become final**
  - **Are binding on both countries and their authorities (like decisions of the higher court in Model 3)**

- **(7) European Union**
  - **Inter-country tribunals may be European tribunals established across the territory of the European Union**
    - Just as federal tribunals are established across the U.S.

- **(8) Existing example: Unified Patent Court ('UPC')**
  - **(a) Organisation: Court of First Instance and Court of Appeal:** we have an example of such an inter-country tribunal in Europe: the unified patent court. It is not yet in operation because of Brexit and because of a technical / legal problem existing in Germany : one individual made a constitutional complain before the constitutional court in Germany. He claimed that the agreement that provides for the establishment of the UPC is against the German constitution. Germany has to decide whether this agreement is against German constitution, because they already signed the agreement on UPC. Germany cannot implement therefore the agreement for the moment. For the experts, the constitutional court will probably say the signature of the treaty is not anti-constitutional.
    - **Central division:** the Court has different Chambers, with seat in Paris, sections in London (pharma) and Munich (engineers)
    - **Regional divisions:**
      - For two or more Member States upon their request: Estonia, Latvia, Lithuania and Sweden said they want responsibilities for adjudicating patent cases.
      - May hear cases in multiple locations
    - **Local divisions: in a Member State upon its request**
      - Additional loc. Division: if 100+ cases per year, max 4 per MS
      - In Italy, we have Milano. In Germany, we have Düsseldorf, and two other cities.
    - **Court of appeal: Luxembourg (which also serves as registry**):

  - **(b) Composition of the panels**
    - 'Any panel… shall have a multinational composition' (art. 8)
      - Some selected from among 'Pool of Judges' case by case
      - When there is a patent case that falls under the ambit of the jurisdiction of the court, it is at first instance a court that is located in one of the EU cities that will be competent, **but the composition of the panel is going to be multi-national. The agreement specifies that all panels should have multi-national composition**. **This is true not only on first instance but also on appeal.** There is a court of appeal in Luxembourg (= multinational on composition).

  - **(c) Jurisdiction**: with respect to disputes about 'European patents' governed by domestic law and European patents with unitary effects governed by European law
    - Disputes on European patents. This is a bundle of domestic documents. If I am an engineer and I think I am clever, and I made an invention and want it to be patented. I have to select a market (because every additional country has its costs so it's more expensive). If I am an engineer and I am interested in a patent registered in Germany/

Spain/ Sweden, **I can make an application to the European patent office in Munich, one single application procedure**: they deliver European titles (Swedish patents, German patents, French patents) : **one city delivers a set of patents governed by several domestic laws**. **As many patents as countries for which the registration is sought but only one procedure**.This is now going to change because the European countries decided to make a purely European unified patent (uniformed procedure and substantively European patent). If we think about an international case brought before the local division in Milan: there are multi-national judges. Once the judgement is made by this local division of the UPC, there is a possibility for the dissatisfied parties to lodge an appeal against this « European » judgement delivered by local division of European unified patent court, to the court of appeal in Luxembourg.

- **(d) Decisions by UPC are directly applicable and binding on States: no legitimate refusal to enforce based on public policy. Once final, the decision is binding on all European countries**. **You cannot rely on domestic public policy. It is not a domestic decision. It is a European decision.** You don't have disagreements between member states. In the EU, it is interesting because member states are bound to embrace one of the models we have been describing so far, to the TFEU whose Art. 67 says the Union should be a union of freedom, [..] and justice. The EU has to accommodate the variety of the legal systems but also that these differences do not add up to create conflicts for human beings/ EU citizens. In other words, in case study 4, if we had a German and a French decision, it would have been against the TFEU if we would have continued to allow Germany to issue a custody order and at the same time, allowing France not to recognize this custody order. The child custody conflict would be clearly against the idea of 67 TFEU. This would be a denial of justice.

13. Obligation by EU to embrace one of 4 models

- **(1) If Countries A and B are EU Member States**
  - **(a) Conflict of adjudications between Member States, which amounts to denial of justice, is contrary to Art. 67 TFEU:**
    - 'The Union shall constitute **an area of freedom, security and justice** with respect for fundamental rights and the different legal systems and traditions of the Member States'
  - **(b) EU has a duty towards the EU citizens and residents to spare them conflicts between legal systems of Member States**
    - Which explains why private international law is increasingly a matter for European law as of the 1997 Treaty of Amsterdam
      - **EU Regulations largely superseded domestic legislation**
    - **BUT as long as mutual recognition is not mandatory and subject** to conditions, potential for conflict between MS as to how settle a dispute between private parties remains
      - **Should ECJ be empowered to settle conflict of decisions according to Model 3?**
      - **ECJ**: actions by a MS against a MS for violation of an obligation under European law: **Sneersone v Campanella, Brussels IIa)**

14. Has the ECtHR a Role To Play?

- **If Countries A and B are parties to ECHR**
  - **(1) Access to justice and right to a fair trial (art. 6 ECHR) involves for any individual *inter alia,* according to the ECtHR**
    - Right to a **final decision** that conclusively settles the dispute involving **him/her**
    - Right to a final decision that is **enforceable**
    - Right to seek cooperation **by enforcement authorities** to enforce the **rights** as recognized and shaped by judicial decisions
      - No substantive right exists as long as long it is not protected and may not be enforced by the rightholder, if necessary, by resorting to public coercion
    - **Right to know** – to have final clarity about – one's rights and obligations arising from a cross-border relationship

  - **(2) Case-study 4**: **Does conflict between French and Swiss child custody orders violate art. 6 ECHR (and art. 8 family life)?**
    - **The situation of a bi-national child with strong bonds with two State communities right to live in a 'bi-national', workable legal framework as opposed to bi-national legal no man's land?** Prof. Gian Paolo Romano asked some judges at the ECHR: what do you think about the situation where Belgium says the child should come to Belgium while Germany says the child should be in Germany? Is the situation consistent with the child HR? **These people say that the outcome is against the ECHR. The countries together breach the right of fair trial (art. 6 ECHR).** These rights are violated. But they are not sure that the system, how it is right now, permits to have both countries accountable. Each of those countries provides a judgement but the problem is the inconsistency between the two judgements, which is against 6 ECHR – in terms of outcome.
    - **Can two States parties to the ECHR be simultaneously and jointly liable?** How to make them both accountable? There must be some changes, typically permitting an individual to launch a claim against 2 countries simultaneously. Usually countries are supposed to take measures against violation of HR, but when there is no possibility to avoid for a conflict with ECHR, it is difficult.
    - **Can they be jointly liable for failing to overcome their (initial) disagreement over how to settle the French-Swiss child custody dispute**?
      - Much like a judicial body composed of more than one judge is liable for failing to overcome the disagreement between its members and refusing to adjudicate?

15. Can the ICJ resolve a conflict between States on how to solve a cross-border private dispute?

- **Two conditions :**
    - **(1) Both countries agree to jurisdiction of ICJ and**
        - If countries are parties of an international agreement, as Belgium and CH to CLug and the judges have a disagreement on the interpretation of a clause. If CH says « CLug does not apply, CH has the power » and Belgium says « no it is my jurisdiction to decide »: they had to agree to bring the conflict to interpretation to ICJ
    - **(2) There is international set of rules on which decision may be based**
- **Example, the only one in 60+ years of history of ICJ**
    - **(1) Belgium v. Switzerland** (Sabena case) (2009)
        - Belgian companies sue Swiss companies before **Belgian court**, which affirms jurisdiction based on Lugano Convention
        - Swiss companies sue Belgian companies before **Swiss court**
            - **Affirms jurisdiction** based on **Swiss LDIP** claiming that **Lugano Convention is not applicable**
            - Refuses to pay heed to *lis pendens* and fails to stay proceedings
        - Belgian government **sues Switzerland before the ICJ for violating an international treaty** (Lugano Convention)
            - Switzerland submits to jurisdiction of the ICJ
        - Belgian government later **drops its claim:** no ruling by ICJ

Part 1.6: Relationship to the procedure

Basics as to the proceedings (irrespective of procedural rules)

1. Parties to the dispute: 'litigants' – plaintiff

- **(1) Plaintiff/claimant(/petitioner): the party who makes a (procedural) claim by suing the other before a court.** Proceedings are initiated by Human beings. The one who initiates the proceedings is the plaintiff or claimant, sometimes called petitioner. Initiation or commencement takes place by the claimant filing an action before the court.
  - **by bringing/filing an 'action' or 'lawsuit'** (US)
    - **Seeking damages (pecuniary action)** : by bringing a claim, the claimant is making a request. Example: when he concluded a contract for the delivery of a painting, but the contract was not executed: the seller did not sell the painting. The plaintiff is not satisfied with pecuniary compensation: he wants the specific performance of the contract (=the painting).
    - **Seeking specific performance or injunction** (order to do/not do something)
      - **Seek a performance:** deliver a thing, allow access to sport center, etc.
      - **Seek injunction:** remove illicit content of website or search results, etc. Order not to do things. The person must abstain from manufacturing goods e.g
    - **Seeking declaration or negative declaration** (declaratory proceedings)
      - **Seeking declaration:** he is demanding something, requesting.
      - **Negative declaration**: someone who is accused of something, can go make a declaration saying she or he is not liable.

  - **And by *stating* its claim(s): 'statement of claim' or 'document instituting proceedings'**
    - **Which is filed with court and served on the other party** (*complaint*: U.S.; *claim form*: UK)
      - **Claim form** = you have to fulfill a form. In the US, it is a complain because if you go to a court you are complaining something. But **stating a claim** is a better term, very general and applicable to different proceedings. In EU countries, the term is the **document instituting proceedings**. The document is notified or served on the other party. You have first to file then serve or vice versa depending on the states. **In Switzerland: you file the document and then the Court serves the document**. In other systems, parties must serve the documents.

- **Which generally contains: facts, 'cause of action', legal rules, evidence, request for relief or legal remedy**
  - 'relief' is type of benefit sought from the court
  - **If we look the contents of the stating claims, a part from some technicalities, there are**: facts, the setting out of legal rules and provision of laws, the means of evidence (you want to rely on), request for relief (or prayer for relief, you pray the court to grant the relief you are seeking, you want the court to respond positively to your demand).

- **(2) Plaintiff may assert several claims against same defendant**
  - **Arising out of the same fact/event: related actions**
    - And based on the same cause of action
    - Or different causes of action (e.g. contract and tort)
  - **Arising out different facts/events: unrelated actions**

- **(3) There may be more <u>plaintiffs</u>**
  - **Co-plaintiffs/joint plaintiffs**
    - sometimes necessary (e.g. joint copyright owners, co-heirs)
      - whether two persons have to act jointly is determined by applicable law (law of the forum, law governing the substantive relationship)
    - sometimes voluntary (e.g. two alleged victims of the same tort)
  - **'Class action' or collective redress: see here under**

2. 'Class action' (according to countries / litigants / judges)

- **<u>(1) Class action 'U.S. style' (Art. 23 Fed. Rules Civ. Proc.)":</u>**

  - **(a) Plaintiff sues defendant on behalf of class of absent parties:** What is this class-action? If you took a pharmaceutical and it was bad for your health and the pharmaceutical was containing a substance that was unlawful, one of the individual may suit the defendant (US pharma) in order for it to stop producing it. One of the beauties of this system is that one party may decide to act on behalf of all other parties. **The plaintiff, for a class suit, suits the defendant if four conditions are satisfied** (23 Fed. Rules Civil. Proc. In the USA).
    - Class is so **<u>numerous</u>** that joinder of all members is **<u>impracticable</u>**
    - Questions or law/fact are **<u>common to the class</u>**
    - Claims of plaintiff ('representative party)' **<u>are typical of class</u>**
    - Plaintiff will **<u>fairly and adequately protect</u>** interests of class

  - **(b) Plaintiff seeks 'certification'** as a class action and his role as '**representative'** ('leading plaintiff'); if judge **certifies** then

  - **(c) Plaintiff gives notice to members of class in way prescribed by judge:** In terms of notice, all terms of the class must give notice. The greater the number of people, the more you can inform people about the problem.
    - **Each member of the class may opt out:** If I opt out, I make my own litigation.

- **If they fail to opt out** (because they have not received or understood notice), they are **bound** by proceedings. I am regarded as a participative member of the class, even if I have limited rights to participate because the leading plaintiff is acting for me. If I fail to opt out, because I was not informed or I don't want to be bothered, I will be bound by the judgement / settlement.

- **(d) Plaintiff and class counsel's (appointed by judge) conduct litigation**

- **(e) Outcome – settlement or judgment – is binding on all members**

- **(f) Advantages and criticism**
  - **Pros**: improved efficiency of legal process, lower litigation costs, avoidance of inconsistent judgments and standard of conduct, solo action would otherwise be impossible, deterrence of future wrongdoing on the part of defendant. The counsel has an interest in making sure that the **procedure is as short as possible**, including for a small amount of money. Sometimes they just receive «coupons». **The goal is to discourage the unlawful conduct on the part of large corporation.** Class action is a threat and may have to participate in class-action as a defendant. Imagine 10 thousand people who want to make a class action: it has a deterring effect discouraging the companies to lower their standards.
  - **Cons**: law firms have incentive to **settle**, connivance between class counsel and defendant to settle quickly for small compensation, individual compensation often minimal ('coupon settlement'), no actual deterring effect

- **(2) Outside the U.S. :**

  - **(a) Germany : 'KapMuG' ('*Kapitalanlegermusterverfahrensgesetz*')**
    - **Limited to investors/shareholders (not general application):** in Germany it used to be reserved for investors or shareholders, if you want to buy shares on the German stock exchange.
    - **Opt-in rather than opt-out (members are individually listed)**
    - But: **12 July 2018,** new legislation on a '**model declaratory action**': only **consumer associations** may bring the action, no compensation awarded, result is binding on individual actions initiated afterward (in force as of **1 Nov. 2018**)
  - **(b) France : 'action de groupe' (2014)**
    - Only certified **consumer associations** may bring a class action: consumer associations must be **certified** and **recognized groups** in order to do it.
      - **Compensation** may be awarded by the judge and then shared among the consumers
    - **4 new areas** (2016): **public health** (damaged caused by drugs: 'action de groupe en santé'), discriminations, personal data protection, **environment** (certified associations may bring action)
  - **(c) Italy** (2007-2009, art. 140-*bis* consumer code): **consumer association and each individual consumer** but also against public administration and concessionnaires of public services

- **(d) Austria: class action 'Austrian style'**
  - An **entity** but also an **individual** may have (tens or hundreds of) **claims of other individuals <u>assigned</u>** to them (e.g. *Schrems v. Facebook*); legal under Austrian law (OGH has repeatedly ruled)
  - Example: a guy said that FB was violating the privacy and misusing private data of FB users. He wanted to start a campaign. He managed to have, based on Austrian class action, thousands of claims of FB users. Not only Austrian residents, but also Spanish and German residents. He had the receivable claims with other thousands of users. He was acting on behalf of all these signors (he was the signee).

3. Parties to the dispute ('litigants') – defendant:

- **(1) Defendant/respondent**: **party who is sued and defends/resists claim (and proceedings)**
  - **(a) By stating its defence(s): 'statement of defence'**: the defence is made through « statement of defence ». What kind of defence may be raised by the defendant? He may file a motion (= request) to dismiss:
    - **As to procedure:** lack of jurisdiction, capacity to sue, etc.
      He can say the other person does not have the *capacité d'agir*. The defendant can say that the plaintiff has no legitimacy to act: *locus standi (intérêt à agir)*. The defendant may therefore say there is a lack of jurisdiction. Generally, with the defendants it is ok with the proceedings, the court will not make long enquiries on it. But if the defendant raises this question, the court will see if it has jurisdiction or not.
    - **As to substance/merits** (contract is invalid, debt has been paid, claim is time-barred, set-off, etc.). The contract was invalid. Or claim is time-barred: the claim should be dismissed based on status of limitation (prescription).
    - **By filing statement of defence**, **defendant 'enters appearance',** otherwise it is a '**default defendant'**
      - Judgment entered against it 'default judgment'
      - **« Enters appearance »:** the party becomes fully party to the procedure. But if the party fails to it, it is a default proceeding. And if a judgement is delivered, it would be a default judgement. This has a difficulty cirulating internationnaly.
  - **(b) There maybe more than one defendant**: co-defendants or joint defendants. Example: car accident. The injured person could open a claim against the driver, but also against the owner and why not the insurance. Is it possible to sue defendant n.2 and 3 at place of residence of defendant n1? When a plaintiff brings action against many defendants, there are multiple actions (action 1 vs person 1 / action 2 vs person 2 / action 3 vs person 3). The court must be sure that it has the power to adjudicate with respect to the 3 defendants.
  - **(c) Defendant may make a counterclaim**
    - Independent action against plaintiff
    - Example: you have been bad against me, so I counter-react by attacking you. You assume that I was in breach of our contract.

I counterclaim: you are the one who were in breach. Moreover, I want damages because you accused me.

- **(d) Defendant may call a third-party into the proceedings** (its insurer, surety, guarantor, etc.) 'third-party complaint' or 'cross-claim'
  - **Defendant may call a third party into the proceedings:** if I am the driver of the car, you sued me for compensation arguing I was responsible. I would therefore call my insurance to help me (third party complaint) → if the defendant is entitled to call the third member to become a part in the proceedings, in order for the final judgment to be binding, then the person becomes party of the proceedings and is not « third » anymore. **Crossclaim: claim made by the defendant against a third party. ATTENTION: if the defendant is located in a country and the third party in another country, the court seized by the claimant is competent to hear both the claim and the counterclaim, is also competent to hear the cross-claim.**

4. Judge :

- **(1) Party not to the dispute but to the proceedings ('trilateral' structure of the proceedings)**
  - Is 'seised' of a matter: dispute is brought before him
  - The judge is party to the proceedings; not to the dispute. He is above the parties/ impartiality /independency etc. You cannot, as a judge, be a brother/sister/ex-wife to a party. What about a distant cousin?

- **(2) Has a duty/obligation to 'respond' to the claim by entering a decision; 'grounds for decision' are explanation of the rationale behind it**
  - **Which either dismisses the claim/action**
    - On procedural grounds: e.g. For lack of jurisdiction
    - On substantive grounds: e.g. Contract is invalid
  - **Which grants/upholds the claim/relief sought and**
    - Orders defendant **to pay some of money** (money judgment)
    - Orders defendant to **abstain from doing** something (injunction)
    - Declares claimant non-liable: **declaratory judgment**

- **(3) Jury trial (civil cases): especially in U.S. and Canada (often on application of claimant)**
  - **UK**: only specific cases (defamation, slander)
  - **Jury trial:** is a constitutional right and the idea is to protect the individual against tyranny.

- **(4) Amici curiae**
  - **Possibility for non-litigants (e.g. Non-profit organisations) to submit briefs advocating for/against a particular interpretation.** Allowed in the US. Either Fed or States' Court. We resort to some organization, typically non-profit, that may want to have their voice heard. They have something to say or helping the court making a final

determination. **This is appropriate: the judge may benefit from some organizations that are working in a particular area.**

- **Admitted in the U.S., Argentina, Honduras, international courts**, etc.

- **(5) May issue a number of procedural or interim orders in order to manage the case e.g.**: the judge, before entering the judgement as to the substances, enters some orders: he exercises power in case management. He is responsible to conduct proceedings through some orders.
  - **To order a witness to appear (subpoena):** communications made to parties. "You should pay the judicial costs otherwise I cannot go ahead". Because the plaintiff does not pay, the court is reminding.
  - **To grant interim relief**: interlocutory judgments, freeze or attach assets, etc.
    - **Interim relief**: **in tort liability case, the judgement as to the merits may split, there is an interim judgment to the merits on the point on the liability**. The proceedings however go on, to see the extent of damages. The idea is: let's see this particular segment. If a judge makes a determination that there is a liability, the judge can decide to settle: they save some money on judicial cost. This is why in liability cases (contractual or extracontractual) there is a possibility to split the issues in 2 (allows the judge to make an interim judgement that generally may be appealed against and the proceedings move on to the determination of damages).
  - **To declare liability while ordering continuation of proceedings to establish amount**: **interim judgments**
  - **PS: sometimes lay-judges under supervision of professional (labour). Lay-judges: in labor proceedings (tribunal des prud'Hommes).** Not all the members of the tribunal are lawyers. Some of them are not judges. They act under the supervision of a professional jusge. In some particular fields of law in some countries, to serve as a judge you do not need to have a legal train. This makes sense in some high technical areas.

- **(6) Lower court judgments may often be appealed**
  - **In some countries: constitutional right**
    - **Waivable**: in advance depending on the countries. The judge may also me appealed: some constitutions permit to launch an appeal against a decision an individual is dissatisfied with, it is a constitutional right.
    - **Sometimes this right is waived:** we make a contract and decide the lower court judgement to be valid and enforceable. The dissatisfied party is precluded from an appeal.
  - **In some cases: a 'leave' for appeal should first obtained – by the same court or by the appellate court**
    - **Writ of certiorari (U.S.)**

- Sometimes also we must ask for a « leave » to appeal before the very same judgement. If the Court says no, you may ask it to the higher court; if the request for appeal is granted (ex: UK).

➢ **Grounds for appeal: errors in fact, errors in law, abuse of discretion, etc.**

- Appellate courts may sometimes / in some countries be prevented from conducting **fact-finding** but defer to the record established by lower court
- The grounds for an appeal may depend: errors / errors in law/ abuse of discretion/ inaccuracy in determining facts. The appellate courts may sometimes be prevented from conducting fact-finding but defer to the record established by lower court, they cannot modify. The facts made by lower law cannot be modified (*de novo*: not possible during appeal procedure for the claimants to make additional allegations of facts, cannot be reviewed by higher courts).

➢ **Appeal may be dismissed or granted – appealed decision affirmed or reversed (or overturned**)

Part 1.7: Relevant Sources

What kind of instruments are applicable and where are they incorporated?

1. European Instruments : civil/commercial matters

- **(1) Contracts**
  - **Jurisdiction and Recognition: 'Brussels I Regulation Recast'** (BR1bis, BR1a) adopted 10 Jan 2015 (n. 1215/2012)
    - Replacing Regulation n. 44/2001
  - **Applicable Law: 'Rome I' Regulation** (n. 593/2008)
    - Replacing Rome Convention of 1980
- **(2) Torts**
  - **Jurisdiction and Recognition: 'Brussels Ia' Regulation**
  - **Applicable Law: 'Rome II' Regulation** (n. 864/2007)
  - **Example:** if Spain has jurisdiction with respect to tortuous claim, then Brux1a applies to the jurisdiction as well as the recognition, with respect to law. To applicable law, we have Rome II (applicable rules on extra-contractual law).

- **(3) Insolvency**
  - **Jurisdiction, Recognition and Enforcement, Applicable Law: 'Insolvency Regulation'** (n. 1346/2000, replaced by n. 848/2015)
  - **Example**: company having assets in multiple countries and it is unable to pay for the debts. What court is responsible to declare the company to restructure etc.? Insolvency regulation 2015 is applicable to the Courts which are responsible to declare a company insolvent and the recognition of an insolvency and the law applicable to it. They are all declared by this regulation.

- **(4) Company law, rights in rem**: **Jurisdiction and Recognition: Brussels I Regulation. BUT there is no instruments on applicable law**. So, if the matter is raised by a court in Germany, what law applies e.g on the liability of the CEO as respect to the shareholders? No applicable law instruments, but there is going to be one in 10 years. But with respect to jurisdiction: if a former director of company is domiciled in the UK and the company has sit in NL: do NL courts have competences to hear a dispute by some shareholders against CEO in the UK? It is covered by Brux1. The NL have jurisdiction? They make judgement and is recognized in the UK through Brux1.

2. European Instruments : Family Law

- **(1) Divorce and parental responsibility**
  - **Jurisdiction and Recognition**: '**Brussels IIa Regulation'** (n. 2201/2003)
  - **Applicable Law** (divorce only): '**Rome III' Regulation** (n. 1259/2010) only **15 Member States** are bound to it
    - By way of 'enhanced cooperation' : procedure allowing minimum 9 Member States to pursue greater integration
- **(2) Maintenance**
  - Jurisdiction, Recognition and Enforcement, Applicable Law: '**Maintenance Regulation'** (n. 3/2009)
- **(3) Succession**
  - Jurisdiction, Recognition, Enforcement, Applicable Law: '**Succession Regulation'** (n. 650/2012, 17 Aug 2015)
- **(4) Property Consequences of Marriage/Reg. Partnerships**
  - Jurisdiction, Recogn, Applicable Law: '**Matrimonial Property Regulation'** (n. 1103/2016, as of 29 Jan. 2019)
    - Enhanced cooperation, 18 Member States
  - Jurisd. Recogn. Applicable Law: **Property Consequences of Registered Partnerships** (n. 1104/2016, as of 29 Jan. 2019)

3. European Instruments : Procedure

- **(1) Taking of Evidence Regulation** (n. 1206/2001): Let's assume there is an accident that takes place in France and the driver of the car that might be liable for the accident, turns out to be liable in Spain. The victim start action against the FR court and the FR court is competent based on the place of wrong/ accident, but the first thing, is that we must take into consideration the service of process: because the defendant is located in terms of domicile in a country other of where the proceedings take place, there must be a cross-border service of process that has to be affected and so service of process regulation regulates **the intraeuropean process when a service has to be affected in a MS other than the one where the main proceedings are taking place**. Assuming this potential witness is located in Germany and this person cannot travel to France and cannot make deposition before FR court. The taking of evidence must be carried out cross-border; because the element of evidence (here the witness) is in a country other than where the proceedings take place. **The "Taking of evidence Regulation" applies and indicates what kind of steps have to be taken by the French authorities and the German ones, in order to make sure this person that is in Germany is able to make a deposition in a way that is going to be relevant for the main proceedings taking place in FR.**

- **(2) Service of Process Regulation** (n. 1393/2007)

- **(3) European Enforcement Order Regulation** (n. 805/2004)
  - for **uncontested claims**, exequatur abolished

- **(4) Small Claims Procedure Regulation** (n. 861/2007)
  - **Civil and commercial matters** for claims of under EUR 5'000
  - Available since 2009 in all EU countries, except Denmark
  - **Uniform European procedure** as alternative to domestic procedures
  - It is not an instrument of International private law. It is an instrument introducing **uniform civil proceedings**. All MS bound by this regulation, to introduce in their own civil procedure, a set of rules that govern what is called a **small claim procedure** that has to be made available in all MS. It's a set of uniform rules governing particular procedures for **small claims** (< or = 5000 euros) and it is a procedure supposed to be **quick; the claimant doesn't need to be represented by a lawyer, nor the defendant**. **It is generally a written procedure. No need to be present in the court**. There are rules governing the deadlines. **The defendant has 30 days e.g to file the statement of defense. The statement of claims is made through a form**: the claimant must just write a couple of keywords about the substance of the claim / origin / amount of the claim. T**he court assists the claimant free of charges** and then there is the responsibility of the court to forward the claim form to the defendant and the defendant has 30 days to respond. Hearings are excluded. Sometimes the court may decide to set up a hearing but usually this is a written proceeding. This procedure is available only in cross-border cases (claimant and defendant domiciled in different MS).

- **(5) Regulation on Protection Measures in Civil Matters** (n. 606/2013, applicable as of 1 Jan. 2015). About restraining orders. E.g.: lady lives in Portugal and complains about violence. She obtains a restraining order precluding her former spouse to approach the space where she lives and works. The lady then moves to FR and the regulation on protecting measures say that the original PT restraining order is automatically recognized in FR.

- **(6) European Account Preservation Order Regulation** (n. 655/2014) (Jan. 2017): uniform European procedure. There is a possibility to obtain information about the funds existing in the bank account anywhere in the EU. Denmark and UK are not inside this regulation. If I sue you, for breaching a contract but I would like to make sure you're not going to transfer all of your assets to China; I may start an action and ask the IT court to issue an European account preservation order that takes effect and may request information of the accounts/funds of the defendant.

4. European Code of Private International Law (?)

- **Talks under way to consolidate the corpus of rules scattered across various regulations in a single, unitary legislation.** There is no EU code of private international law in such. These rules are fragmented, and we are thinking about putting all in one single law.

- **More than 500 articles,** the most comprehensive PIL legislation in human history (reasonable forecast: **by 2025**)

5. Multilateral Instruments

- **(1) Lugano Convention (2007)**
  - Replica of the 2001 Brussels I with some adjustments: CH, IS, NO, EU

- **(2) Hague Conventions (number of signatories vary)**
  - '**Worldwide Recognition Convention'**: adopted 2 July 2019 (**still not in force)**
  - **Choice of Court Agreements (2005),** applicable as of **1 October 2015:** in force in Mexico, the EU, Singapore; U.S, Ukraine, China have signed but not yet ratified. Low number of ratification
  - **Service of Process (1965) and Evidence (1970)**
  - Recognition of Foreign Divorce Decrees (1970)
  - Protection of Adults (2000)
  - Children Conventions
    - Children Protection (1996), in force as of 2009
    - International Abduction (1980)(almost 100 ratifications)
    - Inter-Country Adoption (1993)(90 ratifications)
    - Maintenance Obligation (2007)

6. Regional Agreements

- **(1) Inter-american Conventions:** Extraterritorial Validity of Foreign Judgments, 1979 (10 States: Argentina, Brazil, Colombia, Mexico, Chile, etc.)

- **(2) Minsk Convention on Legal Assistance and Legal Relations in Civil, Matrimonial and Criminal Cases of 1993**: criminal, civil, judicial cooperation cases, mutual recognition of judgement
  - Russia, Ukraine, Azerbaijan, Belarus, Armenia, Kazakhstan, Georgia, Moldova, Tadzhikistan, Turkmenistan, Uzbekistan, Kyrgyzstan

7. Bilateral Treaties: three main categories

- **(1) On mutual recognition of judgments**
  - Switzerland is party to a **dozen** of bilateral treaties on mutual recognition of foreign judgements
    - **Mostly antiquated, recognition restricted on a number of grounds.** They *de facto* are very old and have been repealed by LDIP or CLug, which are more favorable than those treaties. E.g.: CH is also part to 25 treaties on mutual assistance. Example: the service of process has taken place in Turkey, the main proceedings in CH but the defendant is in Turkey and if there is a bilateral treaty between TU-CH, this treaty is applicable for the steps that must be taken.
  - Arrangement between **mainland China** and **Hong Kong special administrative region** (2006)

- **(2) On judicial cooperation ('entraide judiciaire')**
  - Service of process, evidence-taking, legalization requirements

- **(3) On international jurisdiction (rare occurrence) :** Eg. Swiss-US. treaty (1850) (inheritance matters)

8.National (domestic) legislation

- **(1) Model 1** :
  - **Specific legislation/statute on 'pil triad': jurisdiction, applicable law and recognition of foreign judgments**
    - **If there is no international instrument that is applicable to jurisdiction, recognition, applicable law, litispendence: we are left with domestic rules.** If CH must see if it has jurisdiction and no law is applicable: then the CH law must turn back to its own rules (LDIP, specific law, not in CC or CO). The same for Quebec (Quebec civil law), same for NL.
    - Switzerland (1987: one of the most comprehensive to date, 'swiss private international law act', 'LDIP), Quebec (1991, ccq, livre x), South Korea (2001), Argentina (2014), Netherlands, book x bw, Monaco (2017)

- **(2) Model 2: Turkey (2007), Albania (2011)**
  - Specific legislation on jurisdiction and applicable law only
  - Recognition of foreign judgments in civil procedure legislation
  - Turkey has a specific legislation on private international law that contains specific legislation on jurisdiction and applicable law only and the question is to know whether a foreign judgement is left to civil procedure for recognition.

- **(3) Model 3: Germany, China, Russia, Vietnam (2017)**
  - **Specific p.i.l. legislation on applicable law**
    - Chinese law applicable to foreign-related civil relations of the prc (in force since 2011)
    - Japanese general rules of application of laws (2006)
    - Russian civil code: part iii, sect 6, art. 1186-1224 (2001)
  - **Jurisdiction and enforcement in civil procedure legislation** (eg. China: 1991 cpc) : China has legislation on applicable law only and when it comes to recognition of jurisdiction of foreign judgments, the Chinese code of civil procedure is applicable. It has been interpreted from the guidelines coming from the people's supreme court.

- **(4) Model 4**: **UK and commonwealth (Singapore, Australia)**
  - Legislation **on recognition only** (for commonwealth)

PART 2 – JURISDICTION

Part 2.1: Structure of Jurisdiction Rule

1. Touchstone: jurisdictional connecting factor

How does a rule on international jurisdiction look like? It revolves around a **jurisdictional connecting factor**. It is the **cornerstone** of that rule

- **(1) Element that reflects a sufficient link between a State where it is located and human relationship/dispute**
  - Which becomes **head, ground or basis for jurisdiction**, i.e.
  - **Which justifies** court's power to hear dispute
    - **Will of the parties: psychological connecting factor:** that factor = ground for jurisdiction and justifies the courts' power to hear a dispute. Choice of court agreement enjoys some favor internationally. **We may regard a choice of court agreement as reflecting a psychological connection.** If a Chinese company and Brazilian one, agree on the tribunal of first instance of Geneva, they together decide it in a contract, this is a **psychological connection**. They create to have all dispute set in Geneva; they create a connection to Geneva. It is a psychological connecting factor.
- **(2) A State/Country is made of two components**
  - **People/population**: citizens, permanent residents
  - **Territory**: connecting factor may be **personal or territorial**

2. International jurisdiction vs local jurisdiction

- **(1) International jurisdiction**
  - **Courts of a country designated as a unit**
  - **Suballocation** often effected by domestic rules, with some exceptions (art. 7 Brussels Ia Reg. also provides for **local**)
  - **There is a distinction between international jurisdiction and local jurisdiction**: a rule dealing with international jurisdiction is a court of a single country, taken as a whole, that is responsible to hear a dispute. A rule that only deals with international jurisdiction without interfering with national jurisdiction, **does not specify which court within that country - territoriality speaking - is responsible to hear the dispute. This is left to rules on procedure of the country involved**. The distribution/sub-allocation of distribution of power of that particular country is a matter of domestic policy.
- **(2) Local** ('**venue**') / **subject-matter jurisdiction**: which court locally/substantively has the power to hear the dispute (popular in the US) (=local jurisdiction as opposed as to international).
  - **Based on territorial location, subject-matter, value, etc.**
    - E.g. **specialised courts in IP,** in **internet disputes (China)**
    - **The term « subject-matter » has different meanings**, in the EU parliament, it has to do with the power of a court to take acquiescence of disputes in a particular area of law. **In CH: we had for some years a tribunal specialized in intellectual property**. In other countries, this might not exist. In CH, usually this is part of cantonal policy. This is the reason why you ask Geneva lawyers « is there any commercial court in Geneva » the answer will be no. **If you ask a lawyer in ZH if there is a « Handelsgericht »: yes, there is one.**

Part 2.2: Brussels 1 Regulation

1. History of Brussels 1 Conv./Reg.: Key Facts

- **1959:** works for a Recognition Convention **are** started **based on Art. 220** of the **1957 Treaty of Rome :** soon decided to also include **rules on jurisdiction**
- **1968: Brussels Conv. ratified by the 'Six'** (P. Jenard Report): Germany, France, Italy, Netherlands, Belgium, Luxembourg
- **1971: 'Protocol of Luxembourg' is signed: European Court of Justice** is entrusted with **interpretation** of Brussels Conv.
- **1973/1978: Accession Convention:** UK, Ireland, Danemark
- **1981/1985: Accession Convention:** Greece
- **1986/1989: Accession Convention**: Spain and Portugal
- **1988: parallel 'Lugano Convention' is signed:** Switzerland, Norway, Iceland: **updated in 2009,** revised Lugano Conv., in force as of Jan 1, 2011
- **1995: Accession Convention:** Austria, Finland, Sweden
- **2000: Brussels Convention converted into a Regulation (n. 44/2000)** which is binding on **each new Member State**
- **2012: Brussels I Regulation is updated through Recast:** n. 1215/2012
- **Jan. 2015**, 'Brussels Ia' 'Brussels I-bis' or 'Recast'

2. Brussels I*a* Regulation: The Basics

- **(1) Member States bound by it:**
  - **(a) 27 Member States (all except Denmark)**
    - **UK and Ireland** 'opted-in' according to Art. 3 of the **Protocol 21** on the position of the UK and Ireland annexed to TFEU (recital **40**). **Protocol 21** is important with respect to UK/IR who are opposed to measures in respect to private international law: **the UK/IR are not bound by instruments made by EU bodies in international private law.** UK/IR can however notify their **willingness to opt-in rights,** so they can be in any time they want.
    - **Denmark entered into an international agreement with the EU** in 2005 whereby amendments to Brussels I are considered as annexed to it (recital 41). The same that happens for UK/IR applies to DK for Protocol 22 (opposition to the specific instruments dealing with private international law): **they decided they wanted to be bound by Brux1. There is so an agreement DK/UE on it.**

  - **(b) Two main parts : jurisdiction (Chapter 2) and recognition / enforcement (Chapter 3) :** Brux1 is made of **81 articles** with a number of **annexes** divided in 6 parts, called **chapters**, and some chapters are divided in **sections**. Voir tous les chapitres car il les nomme. **The most important chapters for us: chapter 1 / chapter 2 / chapter 3.** The structure is more or less the same you will find in other eu regulations. The skeleton was replicated in other EU instruments.

  - **(c) 41 Recitals: useful interpretive tool**
    - Very often, ECJ relies on general 'scheme' and 'objectives' evidenced through recitals

- The first part of regulation is made of 41 Recitals. They are useful and serve as an **unofficial interpretive rule.** There is no explanatory memorandum on EU regulations, so these recitals are very useful.

▪ **(d) ECJ (28 judges, one each MS; 11 Adv. General) ensures uniformity by way of 'preliminary rulings' (Art. 267 TFEU)**
- ECJ rulings are **binding** for domestic courts
- significant **body of case-law**: **500+** rulings since **1975**, available on www.curia.eu, translated in **20+ languages:** there are multiple hundreds of rules on Brux1: you have access to the decisions in all your native languages. This is the reason why CJEU is so expensive. The budget is huge because every single judgement is translated to more than 20 languages of the EU. This is enormous and big achievement to enable the EU citizens and residents to have access in their own language.
- **CJEU releases judgement by preliminary rulings and wants uniformity**: how a rule is constructed, applied etc. If MS have doubts on how a provision must be ruled/applied, they turn to the EUCJ to a request a preliminary ruling.
- **Preliminary: why?** Because handled down by CJEU in the course of domestic proceedings. The CJEU does not issue a judgement: they issue a judgement on that particular question.
- **There are 28 judges in the CJEU sitting in panels of 3 or 5 or in the grand chamber (15 judges).** They are assisted in most cases by the advocates generals which role is the undertaking the research, digging into national legislations, into doctrine, they prepare the grand work of the court through the analysis and head up to legal opinions. Most of the time the legal opinions are followed by the ECJ. The legal opinions sometimes fall apart the decision, are very different.

– **(2) Rulings by the ECJ: Standard structure**
▪ **(a) Indication of the parties/actors involved**
➢ '**Referring court**': national court which submits question**: the referring court is the one that refers the question** to the EUCJ, is bound by the ruling of the CJEU so the domestic court must follow that guidance in conducting these proceedings.
➢ **Parties to the national proceedings**
➢ **Composition of ECJ (3 or 5) and, if any, Advocate General ('AG')**
– opinion by **AG** not always requested
– if requested, most of the time, but not always**, followed by ECJ** (in a number of **internet cases**: not followed)
➢ **Submissions by national governments and Commission,** which are bound by ECJ and have 'a right to be heard': even national governments can submit observations. **Once the judgement is delivered: it is binding for any domestic court for any MS that will face a similar issue**. The MS participate and it is legitimate to expect them to be bound by a decision that is the product in **which they had a stake**. They had the possibility to file their observations. After the indication of the parties there is description of the legal context.

- **(b) Legal Context:** EU law (recitals, articles) national law. We also consider national law: sometimes not decisive, it is useful to have a look to the kind of characterization of the particular domestic law that are going to be applicable to the dispute. In a number of situations, there is a list in terms of the legal context (not only the particular provision of Brux1 that is relevant).
- **(c) Summary of 'main proceedings'** (before national court)
- **(d) Questions 'referred' to the ECJ:** sometimes just one, sometimes more. On average it is 3 or 4 questions for adjudication.
- **(e) Summary of proceedings before the ECJ** (not always)
  - Resolution of issues raised by procedure (eg. Lechouritou)
  - The facts, as established by the courts: protagonists, nationality, residence, arguments. The facts of the case are settled here.
- **(f) Analysis and answers:** no scholarly works nor national decisions of Member States are cited, only ECJ decisions are. You will almost never find in the actual test; any quotation or citation of any scholar work nor of domestic case law. You only find cases by ECJ itself.
- **(g) Ruling itself, sometimes called the 'operative part'**

– **(3) Substantive scope: 'civil and commercial matters'**
  - **(a) Autonomous interpretation (to avoid divergences)**
    - **'Revenue, customs or administrative law' excluded (art. 1(1)**
      – **Private law claims, included. Public law claims, excluded:** the important rule is to know what is **civil and commercial** and what is not, **through an autonomous interpretation**. The notion of civil and commercial must be interpreted in a way that is autonomous. **Revenue, customs, administrative law: if a claim is a private law claim, it is Brux1 and if it is a public one, it is not Brux1.** The test to see if it is private or public, is to see whether the two parties are private, then it should be a private law dispute but if one of the parties is public; might be public dispute. But if one party is public, it is not causally a public dispute. If the public entity exercised power that was going beyond those that exist under rules applicable as between private individuals, then the public law component is prevailing and as a consequence Brux1 does not apply.
      – **But: distinction betw. Private/public law not the same in MS.**

    - **When a public entity (including State) is involved, test is:**
      – If public entity 'exercise[s] powers **going beyond** those existing under rules applicable as between private individuals', then **public law-related matter** falling **outside BR1a**
        - **Financial transactions** by Ministries (Gazprom, BVG): included. **Gazprom case:** there are 3 entities. One is the German entity EON, the second is the Russian Gazprom and the third is the ministry of energy. They created a company together which has sit was in Lithuania. One of the shareholders was a public entity (=ministry of energy). The ministry was

however acting under a private actor: they created a separate company through a joint-venture. It was a kind of investment by this minister. So, if the Chinese government wants to acquire some shareholdings in a company based in Germany, we are not sure it is allowed. But assuming the Chinese government is allowed to acquire 10% of the capital of a company domiciled in Germany, then there is an issue between share-holders/directors on unlawful conduct ; **that question and the dispute that is associated to that question is likely to be treated as a private law question, so Brux1 applies regardless the public nature of a party ; because the private entity has acted as a private entity.**

- **Liability of public schoolteacher** (Sonntag): included
- **Action by public entity to recover advance sums based on maintenance** (Freistaat Bayern): included (not social security)
- **Action by Billag against subscriber?** Probably excluded: Case. Milano: mother owns a property in St Moritz. His child says: what happens if my mother, living in Milano and having a property in St Moritz, does not pay Billag? (collecting taxes who those who want to see TV). Would CLugano or Brux1 apply? No they would not, because Billag acts on behalf of public powers, the nature of the court or tribunal is no indication of the public/private nature of the dispute. In the Sonntag case, a criminal court has delivered a judgement on civil liability. **The fact that the issuing court was a criminal court, did not prevent Brux1 to apply (even though criminal court is a public court). So, the nature of the court does not determine the Brux1 to apply or not.**
- **Liability of CH militaries making damages in DK (damage = civil)**: excluded by Brux1. The CH army is performing some training on the territory of DK. They have been invited, through an arrangement between the 2 countries. CH can use some military infrastructures of DK. Following this training, CH caused some damages over a Danish land farmer. There is an issue on liability because the CH army was exercising public powers**: it escapes Brux1 because CH were performing trainings. It is typically public power, so it is not Brux1 to regulate this dispute** brought *ex hypothesis* by DK to EUCJ.
- **Public body seeks to recover proceeds from crime: excluded**
  - Criminal Assets Bureau v. JWPL [2007] IHEC 177 (UK case)

- **(b) 'Whatever the nature of the court or the tribunal' (art. 1(1)**
  - **The fact that the issuing court was a criminal court, did not prevent Brux1 to apply (even though criminal court is a public court). So, the nature of the court does not determine the Brux1 to apply or not.**
  - **Also see Billag Case here-above.**
  - **'Civil claim' within criminal proceedings falls within (Sonntag):**
    - **Sonntag Case**: what about the liability of schoolteachers for some injury inflicted on the pupil of the school? German teacher that took the schoolboys and girls to IT and as a result of some negligence of teacher, one pupil died. Criminal proceedings were initiated in IT before a criminal court (place of accident). The members of the family, victims, (father, mother, brother) filed a civil action before the civil court based on IT law; a criminal court is permitted to rule on a civil action started by the victims (civil party). **So, in IT, the civil side of this criminal conduct, maybe tried by the criminal court responsible for the criminal proceedings.** The schoolteachers were convicted with criminal sanction (prison or whatever) and was also tried to some civil damages to the plaintiffs to the civil parties 20 mio liras (=30k CHF). The civil law component of the Italian judgement, for it to be implemented and enforced in Germany, the creditors had to go to exequatur proceedings in DE. One of the questions is: does Brux1 applies? Because if it is applied, the recognition of the judgement would be so much easy ! But if it does not, it is much more complicated. The judgement creditors said that this issue fell under Brux1, applies to mutual recognition of foreign judgement and DE is bound by Brux1 convention and DE must implement this decision (because it is a civil matter). But the teachers say Brux1 does not apply: final answer of the court was that Brux1 does apply, because even though school is public, the kind of supervising power of a teacher has towards pupils, is the same that applies on private school. We don't care the school is private or public, the teacher has an obligation to take care of its pupils.

- **(c) 'Liability of the State for acts or omissions in the exercise of State authority**' (*acte iure imperii*) (Lechouritou). Case: dispute brought by the descendants Greek residents and nations who died in the II war. The DE army occupied the northern part of Greece. The descendants of those people started actions to seek compensation before the courts in Greece. The Republic of Germany raised an immunity. The question of the Greek court to the CJEU: does Brux1 apply? **The clear answer was « no »: because the defendant, republic of Germany, has been acting through its army and the exercise of public power falls outside Brux1.** In addition to this case some amendments were made in 2012.

- **(4) Substantive scope : specific exclusions (art. 1(2)) :** Even though Brux1 applies to civil matters, there are still some exclusions:
  - **(a) Status or legal capacity of natural persons (lit. a)**
    - **Celebration and recognition of mariage and adoption or status of incapacitated adult (no EU instrument at all)**
      - Proceedings by which a person under guardianship requests court's authorization to sell its share in immovable (*Schneider*). **Schneider case**. Schneider is an Hungarian national. He's also an Hungarian resident and is 18+ years old, because he lacks full mental capacity, he is subject to guardianship. The guardian is an Hungarian national and resident. Few years later, the mother dies, leaving a property. Schneider wants to sell its part and files an application to a court in Bulgaria where the property is located. **The Bulgarian court asks whether Brux1 applies: the Bulgarian ask this to the preliminary ruling to the CJEU; CJEU says no, because the family law component and legal capacity component is predominant. And as the capacity component is a civil subject expressly excluded, Brux1 does not apply.** The Bulgarian court has to know whether or not it had the jurisdiction to rule on it, was to answer relying to any EU regulation but no Brux1; yet there are no EU regulation that could be useful for this matter so basically could answer only through Bulgarian law.
    - **But: divorce/annulment of marriages**: **Reg. 2201/2003**

  - **(b) Matrimonial property regime (lit. a) and patrimonial effects of marriage-like relationships (registered partnership)**
    - **Regs 1103 and 1104/2016** (in force as of **Jan. 2019**): matrimonial property regime also falls outside, but contrary to matters related to marriage, there are now 2 regulations that entered into force January 2019 applicable to patrimonial effects on marriage (relationship) and matrimonial regime.
    - **Case-example**: Prof. Gian Paolo Romano and wife are under separation of assets regime. Assuming Gian Paolo provides for a part of the sum because she does not have money. Then they separate and Gian Paolo wants the restitution of money he gave her. Is this a contractual question? Or is it matrimonial property regime?
    - ***Iliev Case*:** action regarding liquidation of a movable as a result of divorce concern **proprietary relationships**: exclusion applies (no Brux1). Based on Iliev Case, it is a matrimonial regime dispute, so Brux1 does not apply. Even though in Iliev, they were both Bulgarian, she also had Italian nationality and living in Alba, her former husband lived in Bulgaria. They lived under community of property regime: so who owns the car is a question of matrimonial regime. But had they lived under a separate regime, maybe the response would have been different.

- **(c) Insolvency (lit. b) (Reg. 1346/2000, Reg. 848/2015)**
  - Actions by liquidator to set transaction aside (*Seagon*), actions based on conduct of liquidator: **insolvency-related** and thefore excluded. Seagon case: a Belgian company is declared insolvent through insolvency decree appointed in Belgium. The court appoints Seagon as trustee/ liquidator. He starts collecting the money in order to have an idea of the assets that the company owns. Seagon wants to start an action vs a German company. He would like to start the action in Belgium but he can't, if the action is a contractual /insolvency action. Why he wants an action? The insolvent company is part of a contractual relationship where there is a German defendant and Mr. Seagon as a trustee is alleging breaching of contract from the German defendant and then the breach of contract, even though started by a liquidator against one of the contracting parties, it is a contractual action even there is a solvency issue. So he's precluded from an action in Belgium and must do it in Germany (place of domicile of the defendant and the place where the contract was concluded by the Belgian company that went into liquidation). So no jurisdiction of Belgian court. As a consequence Brux1 does not apply and insolvency regulation applies and based on this insolvency regulation (art. 3 or 4) dispute that falls within the scope of the insolvency regulation may be brought to the court where the insolvency decree was pronounced.
  - Actions by creditor against insolvent based on a reservation of title or actions by liquidator to collect debts: **non-insolvency related**

- **(d) Social security (lit. c)**

- **(e) Maintenance obligations (lit. e) (Reg. 4/2009)** : maintenance obligation falls outside Brux1, to be now included in the Maintenance regulation 4/2009 , comprehensive regulation specifically devoted to the obligations.

- **(f) Wills and successions (lit. f) (Reg. 650/2012)**. Wills and successions also fall out as they have a regulation applicable to them.
  Case: two individuals have an argument. They did not manage to agree on how the succession and heritance had to be distributed after a death in the family. They settled an agreement incorporating a choice of forum clause. Everything was ok, but after 2/3 months, one of the contracting parts said: you cheated on me; because you did not disclose all the assets, if I had known the truth I would never had settled for that amount of money. **So that party opened proceedings to invalidate the contract. The question is: are the proceedings seeking to invalidate the settlement relating to inheritance or are they relating to contract? If it is a contractual dispute, because the settlement is a contract, the choice of forum is applicable because Brux1 and CLug apply**. If that dispute even if it generated by a settlement, is regarded as having to do with inheritance rights because the rights that formed the subject-matter of the settlement was inheritance, then the choice of forum is not valid and the court in Geneva may have to decline jurisdiction because have no jurisdiction. **For Prof. Romano, inheritance matter is predominant so the court should not be competent.**

- **(5) Substantive scope: excluded matters (art. 1(2)) (2)**

  - **Arbitration (lit. d), and recital 12. Recital 12 does not have an equivalent in CLug because has been introduced lately, after this West Tankers case in 2012.**
    - **Exclusion applies to judicial proceedings ancillary or related to arbitration proceedings (rec. 12(4)**
      - E.g. appointment of arbitrator by a court (Marc Rich)
      - Action concerning annulment or review of award
      - Exclusion applies to judicial proceedings ancillary or related to arbitration proceedings. E.g. the high court in the UK should appoint an arbitrator because the parties do not agree on him, this is a judicial decision related to arbitration and therefore falls out. Or, an action filed before the courts of the country of the seat of the arbitration, whatever the outcome of this proceedings, relates to arbitration, so falls outside.

    - **Exclusion applies (Reg. does not) to whether or not an arbitration agreement is valid and enforceable rec. 12(1)**
      - Reg. does not apply to jurisdiction over arbitration agreement
      - nor to recognition of ruling on arbitration agreement **rec. 12(2)**
      - **We don't really know whether Brux1 applies as to the assessment by a court about its own jurisdiction.** BUT other case → the IT court must determine whether an arbitration agreement is binding on the 2 insurance companies. Based on the notion of arbitrability that prevails in IT: the arbitration agreement is not binding to the 2 companies. **Let's assume the IT court delivers a judgement confirming the non-applicability of the arbitration clause. The Italian judgement is not qualified to say this. There is no regulation on arbitration in EU**! There is still the possibility that the IT courts concludes that the arbitration clauses does not apply to the dispute and saying we, IT courts, say that we are competent for this dispute WHILE Arbitration Court sitting in London could at the same time say something else; saying that the arbitration agreement covers the dispute and that hey therefore have competence. **We may end up having a conflict of adjudications: one from a judicial court in IT and one from an arbitration court in London.** Remember the Neilson case: we can have the same scenario as between an arbitration award emanating from a judicial court and an arbitration court between MS in the EU. We could have such conflicts as long as we don't have a regulation, as long as we don't have a uniform law.

    - **Exclusion does not apply to interim measures (freezing measures) (Van Uden Case): the exclusions do not apply to interim measures.** The Italian Court issues some interim measures (freezing assets of West Tankers) the interim measures **is not related to arbitration specifically** so nothing prevents interim measures to be taken.

- **Exclusion does not apply to anti-suit injunction by MS Court of seat targeting proceedings in another MS** (= order issued by a court that prevents an opposing party from commencing or continuing a proceeding in another jurisdiction or forum) **(West Tankers)**
  - **Question whether or not they are permissible, falls under Brussels Ia, which prohibits them** (**West Tankers**): to understand how far these exclusions, stretch, let's take an example. West Tankers vs Generali-Alliance Case → a UK based company that have a ship, through a charter-party (maritime contract) through which the owner of a vessel makes it available to someone who needs one typically to transport oil (oil tankers), they made it available for an Italian company, ERG Petroli (UK based company, West Tankers, lends ships to ERG Petroli). There was a collision because of a technical failure in the vessel, potentially lack of maintenance by the owner (West Tankers). Petroli therefore lost the control soon after sailing. The ship collided to the harbor infrastructure in Syracuse, Italy. As a consequence, the part of harbor infrastructure earned by ERG Petroli itself, suffered lots of damages. ERG Petroli obtained compensation by 2 insurances: (1) was Alliance, German-based insurance and the other was (2) Generali, Italian-based. Once the insurances paid the compensation, they subrogated themselves in the rights against to the tankers → **Generali and Alliance claimed that the ultimate responsibility lied with West Tankers**. **They started proceedings in Italy, because IT was the place of accident, of performance of contract of the charter party etc.** They filed therefore a claim against West Tankers in Italy. West Tankers defendant was not happy because argued there is an arbitration agreement in the charter party. The arbitration clause said: "all disputes arising from the charter party had to be adjudicated by arbitration panel in London". **So West Tankers filed a 2-fold application with the high court of justice in London, asking** :1. the High Court of justice should declare that the arbitration is not only valid and operable but also applies as against the insurance companies. The arbitration agreement is binding not only to parties to the agreement but also to the insurance parties. 2. Arbitration agreement being valid and applicable, the high court of justice was to issue an anti-suit injunction targeting the Italian proceedings, requiring the 2 plaintiffs Alliance and Generali to discontinue the Italian proceedings and to respect the arbitration clause. **Whatever the award of an arbitration, it is clear that Brux1 does not apply to the recognition of those awards. Brux1 is only for judicial courts and not for arbitration!**
  - **Exclusion applies to anti-suit injunction by arbitrators** (**Gazprom**)

It might be pronounced by a court, typically by the court of arbitration or arbitration tribunal itself. In our case, it had been asked by an UK Court and was wondering whether it had the power to issue an anti-suit injunction. It seemed that it was a question of arbitration: **the anti-suit is to protect the effects of the arbitration proceedings so it should be seen as a part of arbitration so Brux1 should not interfere**; but at that time, they had a doubt. Brux1 applies to anti-suit injunctions but Brux1 is incompatible with those antisuit injunctions and as a consequence, Court in the UK are precluded from entering a antisuit injunction.

Reformulation of the case:

Gazprom decision: 3 entities, one of them being the ministry of energy in Lithuania, then Gazprom and finally EOM (German company). They create this joint-venture in Lithuania. They also conclude a share-holders agreement through which they distribute the power the key appointments within the bodies of the company**. The shareholder agreements contained an arbitration clause subjecting all disputes to arbitration sitting in Stockholm.** The ministry of justice suspected that one of the directors of the new joint venture was doing something inappropriate and wanted him to be removed and filed an application before a court in Lithuania arguing that the arbitration agreement does not cover those kind of disputes. **The defendant was Gazprom. The 2 defendants raised motion to dismiss based on arbitration agreement: they contended that Lithuania could not be competent because that dispute was covered by arbitration agreement freely negotiated by parties.** At the same time, the defendants at the Lithuanian proceedings started an arbitration proceedings in Stockholm: they asked the arbitration panel to issue an anti-suit injunction targeting Lithuania proceedings. They ask why don't you try through an award to prevent the proceedings to move forward in Lithuania = antisuit injunction emanating from an arbitration. **That's what they did: they granted it and delivered the injunction requiring the ministry of Lithuania to stop proceedings in Lithuania and the Lithuanian courts were wondering if they should recognize this anti-suit injunction**. **They were looking in the Brux1 and see if the arbitration panel antisuit injunction was having really effect, as it was an arbitration panel! And Brux1 does not deal with arbitration : there is no Brux1 regulation guidance in this case.**

- **Exclusion does not apply – and Reg applies – to (rec. 12(3))**
  - **To recognition of judgment on the substance given after determining the arbitration agreement is unenforceable**
  - **But this is to no prejudice of 1958 New York Convention which takes precedence over BR1a**: If the Italian court goes

to the merits: the decision does not relate to arbitration. It relates to contracts. The substantive judgment falls under Brux1 and if that Italian judgement is presented for recognition in the UK then UK must apply Brux1, but recital 12 says also that if a MS is a party to the NYC on recognition of arbitral awards, then nothing in Brux1 prevents a State of the EU also contracting state of NY, to apply NYC. So if an Italian judgement requires tankers to pay 2mio euros, and we have an arbitration award issued in the UK saying that west tanker is not liable; let's assume the Italian judgement is presented in France for recognition and implementation. FR will find herself in a bad situation: it has to apply Brux1 because the Italian judgment does not regards arbitration; but at the same time FR is bound by NYC.

- **(6) Geographical scope**
  - **(a) Four connecting factors define applicability (jurisdiction)**
    - **(i) Domicile of defendant is in Member State (art. 4-6):** the **default connecting factors**, is the domicile of the defendant. If it is in a MS, then Brux1 applies, whatever the nationalities or domiciles.
    - **(ii) Regardless of domicile, when a basis for exclusive jurisdiction points to a Member State (art. 24):** regardless to the domicile of the defendant, whenever an exclusive jurisdiction points to a MS, then Brux1 applies. Ex: an American domiciliary and a Chinese domiciliary. The US has a property in Venice and the Chinese wants to rent it. **Although they are both domiciled outside the EU, the subject matter is located in an EU MS**. Irrespective of the domicile, because the dispute tendency agreement falls under Art. 24; then Brux1 applies.
      - E.g. **rights in rem**, validity of **registered IP-right**, etc.
    - **(iii) Regardless of parties' domicile, choice of court agreement in favour of court of Member State (art. 25(1)):** there is a choice of court. Ex: a Colombian company makes a deal with a company coming from Thailand. The contract is for the delivery of some components of technology and some of these must be delivered in FR/GE. I assume that this contract contains a clause on FR Court competence (tribunal de commerce de Paris). It the Thai company says that the Colombian company is in breach of the contract and the Thai company brings the question to a German Court. The German Court must determine whether it has jurisdiction over this; applying Brux1. German court must determine whether the clause on FR competence is valid or not, based on Brux1. **The answer is yes: regardless the domicile of the parties, if the dispute is contractual and there is a choice of forum on a court located in the EU, then Brux1 applies.**
    - **(iv) Actions brought by consumer or employee (rec. 14)**
      - If consumer is domiciled in MS, Reg. applies even if consumer is **plaintiff** (art. 18(1)
        - **but: enforcement outside EU problematic**
      - If employee carries out its work in a Member State, Reg. applies even if employee is **plaintiff** (art. 21(2)

- Example-case: you order a beauty product coming from NY. The product is delivered to you at your home address, in France. You realize the product is not as described as in the advertisement : you try to sort out things amicably but you don't get any response by email. You start then proceedings: because you are domiciled in France, **even if you are the plaintiff, you are still a consumer (imbalanced power, weak party) then you can file a proceeding in FR and even if it is the domicile of the plaintiff, Brux1 will apply and the French court will affirm jurisdiction. But how to implement this in the US? It is difficult to implement a judgement coming from the domicile of plaintiff.**

- **(b) If domicile of defendant is outside EU and none of the above scenarios is satisfied: BR1a does not apply**
  - Jurisdiction is determined by **domestic law** of MSs (art. 6) applied non discriminatorily to EU-domiciled plaintiffs
  - BUT next version/recast of **BR1a** will **likely extend** its scope to **non-EU domiciliaries (by 2025)**
  - If none of these situations apply and domicile of the defendant is outside EU: Courts of EU MS will have to determine whether they are competent based on **their own rules**. If Brux1 fails to apply because dispute falls outside the geographical scope, the State must rely on its national law. Ex: Spanish company and Chinese company, contract must be performed in the EU MS, no choice on forum agreement, Spanish company not happy with how Chinese has performed the obligations arising out of the contract; then Spanish open proceedings in Spain. The defendant is Chinese and lives there, outside EU. Brux1 does not apply: the Spanish court will decide whether competent under its international private law. Very probably the next version of Brux1 will apply also in such a situation.

- **(7) Geographical scope: notion of domicile**
  - **(a) Natural person: each State defines domicile (art. 62)**
    There is no clear definition of domicile in European law.
    - **(i) It proved impossible for MS to reach a common definition**
      - **Principal establishment (Professional): France, Italy**
      - **Dwelling place (domestic establishment): Netherlands**
        The court of a MS must apply its own domestic law notion of domicile, in order to determine whether domicile of the defendant or plaintiff is in the forum State. If yes, the analysis stops there. If no, if the domicile of the defendant is not located on our territory, the analysis continues to see whether the domicile is in another MS of EU. To conduct this analysis, the court must apply the notion of domicile of that other State. Example: Belgian domiciliary works in the NL. He commutes every day; he concludes a contract with a company and the company is not satisfied with what the guy has done with the duties. The NL company starts proceedings against him in Belgium. The Belgian court must see whether the person is

domiciled in EU, but as we don't have a notion of domicile, the court must see in Belgian law, whether the person is domiciled in Belgium. **We assume that the place of professional work prevails under Belgian law, so no domicile in Belgium. So then, the Court must determine whether the person is domiciled in NL under Dutch definition of domicile. If yes, then Brux1 applies. This does not mean that Belgian Court is competent or not: this only means that if the domicile of the defendant is located in the EU, then Brux1 applies to the next issue which is: do we have the power to adjudicate this issue? They must respond with Brux1.**

- **(ii) When seized, a court of a Member State**
  - **Applies 'its own internal law'** to determine whether defendant is **domiciled in the forum State**
    - If yes: it ignores any other domicile elsewhere
  - **If not, it applies the notion of any other Member States to determine whether defendant is domiciled there**
- **(iii) UK**: **domicile replaced by residence + substantial connection;** rebuttable presumption of subst. connection if three-month residence (Civil Jurisdiction and Judgments Order, Sch. 1(9): When the UK implemented Brux1 Reg, they enacted a statutory notion of domicile. They say that domicile should be intended as the residence and there must be a substantial connection (presumption of connection if the person has been resident in the UK for a period more than 3 months).

- **(b) Legal person: autonomous definition (recital 15, in fine): either statutory seat (a), or principal place of business (b) or central administration (c) (art. 63**)
  - **Potential for two (or more) concurrent general fora**
  - **Positive conflict of domiciles solved through *lis pendens***

Legal persons: Easier. During the negotiations, they came to an agreement as per a common notion of a corporate person. There are 3 alternative connecting factors, all of them defining domicile:

- Statutory seat (in the article of association, it is the official seat).
- PPB (principle place of business); where the main object of the company is located
- Central administration: shareholders meetings, main decisions are taken here, CEO etc.

Part 2.3: Switzerland position

1. Lugano Convention (revised edition, 2007)

- **(1) Parallel to Brussels I Regulation**
  - **Formally, an international treaty, four signatories: Switzerland, Norway, Iceland and the European Union**
    - Adoption was **delayed** because of uncertainty as to whether EU or each Member States had power to sign
    - ECJ in **Opinion 3/2006** confirmed it is EU and not MS
    - CLug was adopted in 1998 in Lugano and the revised version in 2007 although came into force in 2011. It is parallel to Brux1, *replica* of it, with some adjustments. It is an international treaty: 4 entities have signed it, 3 are countries (CH, Norway, IS and EU).

  - **Text is almost identical to 2001 BR1, but not to BR1*a***
    - **Article numbering is same to 2001 BR**: this CLug is very similar to Brux1, but not to Brux1 Recast.
    - E.g: Recital 12, you don't have it in CLug because the EU has made a step forward; CLug is a bit behind. They think to adopt a CLug3, supposed to replicate some of the innovations brought by the Brux recast (BR1a).

  - **Swiss (Norwegian, Icelandic) courts**
    - **Cannot submit questions for preliminary rulings** nor are they **formally bound by the ECJ** case law. **CH-NO-IS cannot submit questions for preliminary rules, because are not bound to the regulation allowing to submit those questions.**
    - **BUT shall 'pay due account'** to relevant decisions by other States parties and **ECJ**, and conversely (Protocol 2 art. 1)
      - **Federal Tribunal consistently relies on ECJ rulings**
      - They are not bound by the rulings delivered by ECJ although based on a protocol, annexed to an international convention (Luxembourg protocol) says that the courts of the contracting parties that are not part of the EU, must **pay due account of the jurisprudence and case law of EU MS; and the other way round: the ECJ must pay attention to TF jurisprudence.**

  - **Other cooperation mechanisms**
    - Switzerland may submit **statements / observations** in proceedings for preliminary rulings (Protocol 2 art. 4)
    - **Standing committee** (Protocol 2 art. 4)
      - to suggest adaptations or to be consulted in case of revision

- **(2) Scope of application**
  - **As to subject-matter: substantially the as Brux1a** (Art. 1 of both instruments does not vary significantly)
    - But: **maintenance, included by LConv, excluded by BR1*a***
      - **Due to the existence of Maintenance Reg. 4/2009**

  - **As to geographical scope: two major differences**
    - **Choice of court**: domicile of **either party** has to be located in **State Party** (art. 23 CLug differs from art. 25 BR1*a*). Example: a contract between a Colombian and Thai company, choice of court designates tribunals of Geneva as responsible. But, because none of the parties is domiciled in any Lugano state, CLug does not apply, so Geneva tribunals must see whether they have power to decide, based on the LDIP Art. 5.
    - **Consumer / employment contracts: domicile of defendant has to be located in State Party (art. 16 and 19 CLug differ from art. 18 and 21 BR1*a*)**
      - Domicile of defendant must be in a state party otherwise CLug does not apply.
      - But: if domicile outside Lugano States, but '***establishment, agency or branch***' in Lug. State, CLug. applicable (*Mahamdia:* **Embassy of third State** is 'establishment': art. 18(2)
    - If dispute **falls outside**, CLug. not applicable **and LDIP applies**

  - **Since CLug is multilateral instrument, CLug takes precedence over B1a**
    - Switzerland, Norway, Iceland: **can only apply LConv, never BR1*a***
    - Germany, Italy, Spain, Poland, etc.: BR1a or CLug depending essentially on the domicile of defendant

- **(3) Cases : delimitation CLug and Brux1a**
  Let's take 3 cases to mark the delimitation between Brux1a and CLug:

  - **Case 1**: **domicile of defendant in Switzerland, place of performance of the contract in Germany**
    - **Swiss** courts, if seized: apply CLug
    - **German** courts, if seized: apply CLug
      The defendant is domiciled in CH. The plaintiff in Germany and enters a contract that must be performed in Germany. The CH courts are seized. Whenever the CH are seized: either CLug or the PILA applies. The option is never Brux1a, because it is absolutely not binding in CH. In no circumstance we will look to Brux1.If German courts are seized, they also must apply CLug, because the domicile of the defendant is in a CLug country, that is not at the same time party to Brux1. The domicile of defendant, if it is in a CLug and not in a

Brux1 State, defines the applicability of CLug, as taking precedence over Brux1. Although from a German perspective - Germany being part of CLug and Brux1 – we could hesitate; but as here the domicile of the defendant is located in CH, CLug State without being Brux1 State, then CLug applies.

- **Case 2**: **domicile in Germany, performance in Switzerland**
  - Swiss courts, if seized: apply **CLug**
  - German courts, if seized: apply **BR1*a***

    The domicile of the defendant is in Germany and the performance is in CH. The CH courts are seized: they must apply CLug because domicile of the defendant is in Germany, Germany is part of CLug (no question of applying PILA) and the Swiss courts cannot apply Brux1; so we apply CLug.The German courts, if seized, must apply Brux1! Why? Because the defendant is domiciled in Germany that is a country part of Brux1 (Germany is part of Bru1 and CLug: how to choose then?) because the defendant is domiciled in Germany, Germans courts will apply Bru1 **(if a country is part to both, apply Brux1 which takes precedence).**

- **Case 3**: **domicile of consumer (plaintiff) in Germany, place of performance in Switzerland, domicile of trader in the US.**
  - **Swiss courts**, if seized: apply **LDIP** (not CLug: art. 17)
  - **German courts**, if seized: apply **BR1*a*** (art. 19)
  - **U.S. courts** (whether federal or state), if seized: U.S. legislation ('long-arm statutes') and **constitutional principles on jurisdiction** (no Treaty between the U.S, EU and CH)

    Plaintiff (consumer) located in Germany, place of performance in CH, the counterparty domiciled in the US. Based on Brux1a: the domicile of a consumer must be in an EU MS, then Brux1a applies. If the question is brought in front of a CH court, because the defendant being located outside the Lugano space, the Swiss Courts will not apply Lugano but the PILA. The US courts if seized, don't apply CLug because they are not part, nor Brux1a, because no party to it, so, unless there is a convention between the 2 countries (here not) they must apply their own law.
    - German decision based on plaintiff's domicile only is **not** likely to be recognized in U.S. lack of minimum contacts (based on interpretation by U.S. Supreme Court of due process clause)
    - Things may change through **Worldwide Recognition Convention** which is being negotiated at the Hague

- **(4) No other 'Lugano Conventions' parallel to European Regulations are in force between EU and CH**
  - **Currently no 'CLug 2' or 'CLug-bis' in family matters**

  - **Talks under way with respect to feasibility of instruments parallel**
    - to **Brussels II*a*:** divorce and child custody
    - to **Bankruptcy, Succession Regulations, Maintenance regulation**. Matrimonial Regulation etc → **no CLug for these issues**

  - **If CLug does not apply as to substantive scope, then**
    - **International Conventions** to which Switzerland is party
      - **Jurisdiction**: very few, except in **children-related disputes.** In terms of child custody, even though there is no CLug disposition on child custody, it is also true that CH and all MS of EU are part of **Hague convention on child custody**, so on both side there is a potential worldwide agreement here.
      - **Recognition**: a number of **bilateral conventions**, a few **multilateral** (Hague: e.g. recognition of divorces, limited number of States).

2. If no international convention applies then

LDIP or 'SPILA' (Swiss Act on Private International Law) applies ('in absence of any international treaties') (art. 1 SPILA)

Part 2.4: BR1a / CLug equivalent bases for jurisdiction

1. BR1*a*: Survey of Main Bases for Jurisdiction

- **General Jurisdiction** (art. 4 BR/2 LConv) **Section 1**
- **Exclusive Jurisdiction** (art. 24 BR/22 LConv) **Section 6**
- **Special Jurisdiction** (art. 7 BR, 5 LConv) **Section 2**
- **Protective Jurisdiction** (art. 10-23 BR, 8-21 LConv) **Section 3 to 5**
- **Related-Action Jurisdiction** (or 'Derivative Jurisdiction') (art. 8 BR, 6 LConv.) **Section 1**
- **Voluntary ('Will-based') Jurisdiction** ('Choice of Forum')(art. 25 BR, art. 23 LConv) Section 7]
  - Addressed in **Part 3** as Means of Coordinating Jurisdiction

P.S. 2: Number of corresponding articles of Lugano Convention in Part on jurisdiction is as follows: number of Article of BR1, less 2 units! Example: **7** BR1a → **5** LConv / **24** BR1a → **22** LConv, / **25** BR1a → **23** LConv.

2. General jurisdiction or "general forum"

- **(1) Domicile of defendant (art. 4 BR1a, art. 2 CLug):**

  - **(a) Dual function performed by art. 4(1):** criterion to determine *geographical scope* **and** to determine *general jurisdiction*. It serves another function (not only applicability of Brux1) but to trigger general forum or jurisdiction of the court of the country where the person is domiciled. So, it has a dual function

  - **(b) Rationale: convenience for defendant** in conduct of litigation (*Handte*), place where **defendant keeps** most of **its assets**
    - Favors **coincidence** between place of **adjudication** for merits and place of **enforcement**

      As a practical matter, there are some assets that the defendant owns, in the country where he is domiciled. This is important because if the defendant is ordered to pay something or to do something, and the judgement fines for the plaintiff, the judgement orders the defendant to pay a sum of money, if the defendant has money in the same state where the judge sits, then in order to enforce the judgement, it is not necessary to go to a cross-border enforcement (a judgement has been delivered in a country but not possible to implement it in another country and in order to do that, a cross-border enforcement must be done).

      Another explanation: the plaintiff is not satisfied with the state of affairs: the plaintiff has a request and as a matter of policy and courtesy, the plaintiff makes the request at the place where the defendant is. Example: if I want to ask something to a colleague of mine. I pick up the phone and say I want to discuss something with you: when can I come to see you? I want to ask you something, so I come to you.

  - **(c) Notion of domicile:** see *supra*
    - **If domicile of defendant is unknown: last known domicile** (*Hypotecni Banka a.s.*)

      What happens if the domicile is unknown at time of the proceedings? Hypotecni Bank: a German citizen needed money and borrowed it from a CZ bank in Prague. At the time of the conclusion of the contract (Mortgage), Mr. Lindner (individual borrowing money from the CZ bank) was domiciled in CZ, not in the capital, Prague, but still in CZ. He was a German national. There was a contract between him and the bank. Three years afterwards, Mr. Lindner stopped paying the interests and the bank was furious about it. The bank filed a claim in CZ but Mr Lindner had left the CZ: it was not

possible to know where he was. At the time of the contract he was domiciled in CZ. **If at the time of the proceedings his domicile is unknown, there is no evidence that the citizen has left the EU, then Bru1 applies and the domicile of defendant may be regarded as still being as the place where he was (the last known domicile, here CZ). This forum is available generally, save when: exclusive jurisdiction or choice of forum, deviating from general jurisdiction**

2. Forum available generally

- **(a) Exceptions** ('*save in a few well-defined situations*': rec. 5)
  - When **exclusive jurisdiction** exists under art. 24 BR
  - In case of valid **choice of forum** under art. 25BR (*el Madjoub)*

- **(b) Relevant time**
  - **Time of filing: subsequent move is irrelevant**
    - **Example-case**: I organize an outfit, we go to ski in Chamonix and Chinese student has an accident involving Prof Romano and a Chinese student. There is a collision and physical damage. We try to discuss first but then there is no solution. **At the time the accident** occurred, I am going to assume you were domiciled here, based on a swiss notion of domicile. Probably you are not domiciled here, but you are not domiciled in China. And so, habitual residence in CH at the time of residence based on the swiss notion of domicile, is recognized. **When I decide to start a claim**: you go back to China, you are not in CH at the time of the proceedings. So, you are not in a CLug State nor in a Brux1 State. **Should the domicile at time of facts be relevant or should it be when proceedings are started?** There is no clear provision on this, but **timing of filing is relevant and time when facts occurred is not. The only situation where the relevant domicile is when facts occurred, is when it is not possible to have the domicile during filing.**
    - **Equustek Solutions Case** (Canadian case), **defendant and moved out of Canada during proceedings:** Famous case adjudicated by the supreme court in Canada. Equustek is a British Columbia company in information and technology. It has distribution agreement with other companies (DataLink) in Canada. Equuestek manufactured products that DataLink was supposed to market, advertise, distribute, and sell. Distribution agreement between 2 Canadian companies. **Equesteek was sure that DataLink was not doing things properly:** it **was passing off some of the products of Equsteek as its owns, using confidential information, infringing IP Rights** etc. Equsteek started proceedings before courts in BC and during proceedings, DataLink moved out of the jurisdiction. DataLink continued these manoeuvres on a number of website listed on Google, to sell products that were infringing the products of Equsteek . No question of British Columbia having jurisdiction over the defendant. The defendant moved out of the jurisdiction and continued from unknown location to infringe the rights of Equsteek **but it was not possible to say where Datalink was operating from.** Equsteek turned to Google to de-list the websites that were operated by Datalink. **If the defendant is domiciled in a country at time of proceedings and then moves of that domicile, if the domicile is transferred in the courts of proceedings of another country, the relevant domicile at the time of lawsuit is retained jurisdiction irrespective of any move during the proceedings**
  - **Should domicile at time when facts occurred also be relevant? (probably not)**

Part 2.5: Exclusive jurisdiction (Art. 24BR1a, Art. 22 CLug)

1. Rationale :

- **(1) Strong, overriding link between State in question and dispute due to subject-matter**
  - State in question poised to have a **strong concern.** Art. 24 Brux1a is the relevant, with Art 22 CLug: what is the rationale of these rules on exclusive jurisdiction? There is a link between the State in question and the dispute. The State in question must have strong concern to regulate dispute that are so much connected with its own territory and people.

2. Regime :

- **(1) Rule of international jurisdiction only:** sub-allocation among different courts in MS is a matter for domestic law

- **(2) If jurisdictional factor points to a court in Member State**, **no other courts in any other MS have jurisdiction**
  - If connecting factor points to **non-MS**: BR1 does not apply even if domicile of defendant is in a MS (but MS may apply it **by analogy**)

- **(3) Parties are not free to escape exclusive jurisdiction by choice of court (art. 24 displaces art. 25: cp *Rösler*):**
  - **Rösler Case:** Tenancy agreement. The immovable that was the subject of this agreement was located in the Como lake. The owner of the immovable was a German domicilary. The tenant was a German national domiciliary. Something went wrong with the contract: the landlord, owner, complained that the tenant breached the agreement (no more than 4 persons accommodated) and apparently the tenant had parties with 20 people, neighbors complaining etc. Landlords started proceedings in Germany, **but based on Brux1 and CLug, if dispute falls under exclusive jurisdiction, which is the case for tenancy disputes, then the court of the place where the immovable is located has exclusive jurisdiction and even though the parties were ok for courts in Germany** (I mean, in these cases none of them should have hired an Italian lawyer + translation etc. which makes all more expensive). Even if the two parties are fine or support the proceedings in Germany, it is still an exclusive jurisdiction regime requiring German Courts to decline jurisdiction even if there is a strong connection with Germany. **A judgment having breached the exclusive jurisdiction shall be refused recognition** so if the German courts decide to disregard the exclusive jurisdiction vesting in Italy, make a judgment, that judgement is not recognized in Italy. Italy must not recognize it because there is a breach of exclusive jurisdiction. Exclusive jurisdiction is a deviation from the general forum (domicile of defendant jurisdiction) in case of doubts. **Rules under Art. 24 Brux1a must be interpreted narrowly.**

- **(4) Court other than that of exclusive jurisdiction have, if seized, have to decline on its own motion** (art 27(1))
  - appearance of defendant does not suffice (art. 26(1) BR)
  - even during the proceedings before the **Supreme court** (*Duijnstee*)
  - Regime applicable to those area of law subject to exclusive jurisdiction: the rule of international jurisdiction (24BR1a) only defines international jurisdiction within the particular country as a whole **if a jurisdiction points a court in a MS, then no other court in any other MS has jurisdiction.** This is a point of a jurisdiction being exclusive. The jurisdiction of the court excludes any other court, including the jurisdiction of the court of the domicile of the defendant. **The parties are not free to escape exclusive jurisdiction by choice of court:** a choice of court cannot displace or deviate from exclusive jurisdiction, even if parties are perfectly ok with a court other than the exclusive jurisdiction, still the chosen court must decline even against the common will of the parties.

- **(5) Judgment having breached exclusive jurisdiction 'shall' (=must) be refused recognition** (art. 45(1)(e)(ii)(*Weber*)
  - unclear where court second seised believing it has exclusive should stay proceedings based on *lis pendens* (cf. *BVG*; probably not: *Weber*)

- **(6) In case of doubt, restrictive interpretation is preferred**

3. Exclusive Jurisdiction : subject-matters

- **(1) Rights *in rem* or tenancies of immovables (art. 24(1))**
  - **(a) Rationale:** sovereignty, land law better administered by courts of *situs*, tenancies governed by local law

  - **(b) Scope: two distinct categories**
    - **Proprietary rights**: **ownership**/other **rights *in rem*, i.e. 'against the whole world',** not personal rights (except for tenancies)
      - **Action seeking appointment of a representative to sell an immovable does fall under Art. 24(1) (*Komu*):** Disputes involved in property rights (ownership or rights *in rem*, or rights for mortgage). A right *in rem* is a right expressed against the whole world (*erga omnes*). Example: Komu Case. It is a Finnish family; 6-7 members disagree with each other. They are co-owner of a holiday flat in Spain. Part of the family wants to sell these villas and the other wants to have it. Those wanting to sell, started proceedings in Finland. Those who wanted to have the villa, say that Finnish Court does not have jurisdiction because this issue comes under 24 Brux1a. This was brought to the EUCJ and said that this dispute was to be analyzed under Art. 24 Brux1a: Finnish Court should disclaim for the benefit of Spanish courts.
      - **Action seeking declaration that preemption rights has not been validly exercised is also covered by Art. 24(1) (*Weber*): Weber Case**: these are 2 ladies; one is 82 and the other 78,

they are German. They are co-owner of a real estate. One of them owes 3/5 and the other 2/5. **The one having 3/5 has a preemption right**, **in case the co-owner wants to sell, then she has to have priority over any other buyer.** This preemption right was registered in Germany. Some years later, the co-owner having 2/5 wants to sell to a company, whose director is one of her nephews, who is Italian and lives in Italy. **The co-owner having the preemption right says that she has the right to buy it in priority and seizes courts**. The Italian buyer started proceedings in Italy. The German courts do not know whether this falls under Art. 24§1 Brux1: **EUCJ says yes, it is Art. 24§1 Brux1 and therefore Italian courts should leave the jurisdiction to the German courts at the place of the immovable (?) Sure about this?**

- **Contractual disputes from sale of immovables fall outside!**
- **Action seeking declaration that a person holds immovable in trust on behalf of another fall outside (*Webb*)**

➢ **Tenancies on immovables**

- Actions seeking payment of rent, order to vacate premises, etc.
- No: **contract with travel agent for holiday accommodation (*Hacker*), even if you can use a structure for a time.**
- No: **club membership contract allowing use on time-share basis**

▪ **(c) Jurisdiction** vested with **place where immovable is located**

▪ **(d) Exception**: **additional forum at defendant's domicile**

➢ Tenancies for **private use** of duration of less than **six months; AND**

➢ If tenant and landlord **domiciled in same Member State** (modification triggered by the ***Rösler*** case)

➢ Case of this exception: with respect to tenancy on applicability of the forum of place of property.

Rösler case: dispute between 2 German domicliaries, one is the landowner and the other the tenant, both domiciled in Germany, property was located in Italy short term. At that time, when Rösler Case occurred, there was no exception so even in that situation, Italian court (place of property) had exclusive jurisdiction and German courts must leave their jurisdiction. Because the outcome in that scenario was regarded as unsatisfactory: there was a modification in 1988, in the framework of the then Brux1 Reg : exception applies when the tenancy is for private use of duration of less than 6 months and when tenant and landlord are domiciled in the same MS. If the facts of Rösler would occur today, then not only the Italian Court, place of property, would have jurisdiction, but in addition, there would also be a German jurisdiction (place of domicile of both parties).

- **(2) Legal persons / company law (art. 24(2))**

  - **(a) Scope**: **proceedings relating to**
    - **Validity/invalidity of incorporation process or constitution/dissolution of legal persons.** Example: I have a friend who is Tunisian and he lives in Tunisia and incorporated a company in CH, an oil-business. He markets Tunisian olive oil in Lausanne. He is domiciled in Tunisia. A creditor of his filed a claim against him. He is domiciled in Tunisia but if Art. 24§1Brux1 applies, then Brux1 applies even if the domicile of the defendant falls outside the EU judicial area. A creditor starts claim against him saying that the company whose statutory seat was in Lausanne is invalid because failed to comply with requirements that are necessary under company law to validly establish a company. The creditor wants to trigger liability of this guy. The dispute is about validity regularity of incorporation process and the dispute must be brought before a court in CH, CH being the court of the seat, the country whose validity of which is at stake.
    - **Validity/invalidity of resolutions by their organs**
      - **Actions by a company against officers/directors or advisers or shareholders or members: excluded from art. 24(2)**
      - **Actions concerned with interpretation, meaning and effect of resolutions? English courts: art. 24(2) applies**
      - **Action for payment brought against a company based on a contract is contractual excluded from art. 24(2)**
        - **BVG**: if company pleads **invalidity of resolution leading to contract** because made ultra vires based on by-laws, that's a **preliminary issue** that does not alter contractual nature. BVG Case: German company operating the public transports in Berlin area. This company had some money to invest and invested through a swap or future investment contract, the company even though was operating a public service acting as an investor, no doubt Brux1a applies. **The dispute arose out of this investment contract concluded by BVG with JP Morgan.** Based on this contract, BVG would as an investor, obtain a significant profit, 8 mio every year, unless a party happens to be in default. This event happened: the 3rd party was in default and JP Morgan triggered obligations on the part of the German company to pay a lot of money, 100mio USD. This contract had an English choice of forum; in London. **The proceedings were started for payment by JP Morgan against BVG**. Before the English courts, BVG raises motion to dismiss: they were not informed by the financial situation of the 3rd party, consent was vitiated. Then they contended that because this investment transaction was concluded *ultra vires*, the company had no power to conclude this transaction and therefore was invalid. Why no power? Because the by-

laws, article of association, specifically prevented that kind of transaction from being concluded by the company. The resolution was against the by-laws of the company so was invalid. BVG was claiming that this was a matter for Art. 24§1 Brux1 and had to do with the validity of resolutions of a German company and therefore must have been brought in front of a German court. BVG did so, started a parallel proceeding before German Courts: we had 2 proceedings (one before UK courts and another before German courts). The court of justice said: if a company is sued contractually and if the company by way of defense is raising invalidity of the resolution of their organs authorizing that contract to be concluded, this Art. 24 Brux1 does not apply and as a consequence the English proceedings and courts can rule.

- **(b) Jurisdiction vested with courts of MS of the 'seat':**
  The jurisdiction indicated in Art. 24 Brux1, is the court where the seat of the country where the company is located. The notion of seat is different here: 24§2 says that the notion depends on private international law. Eg: Art. 21 of PILA says that a sear of the company is the statutory seat.

- **(c) Notion of 'seat'**
  - Different from one used as general forum of legal persons (art. 63)
  - 'Court shall apply its **rules of private international law**'
    - notion vary based on substantive legislation: siège réel (France), statutory seat (Netherlands), place of incorporation (UK)

- **(3) Registration or validity of IP rights (art. 24(3 or 4 to check)**
  - **(a) IP rights concerned: rights subject to deposit or registration. Not all IP Rights are covered, only those subject to deposit or registration.**
    - **patents, registered trademarks**, designs, similar rights. Patents must be registered. This is true for most of the trademarks: trademarks holder have the right to use the trademark to advertise their product.
    - **no copyright because it is not subject to registration**. If I take a photo of Matterhorn and I post it on Instagram, you use this picture, then you infringe the copyright. The copyright exists as soon as the object of a copyright comes to exist. No registration needed.

  - **(b) Rationale: public service, sovereignty-related disputes?**

  - **(c) Scope: actions concerned with 'registration or validity' only**
    - **Excluded**: disputes over **title of IP-rights** *(Duijnstee, Hanssen)*. Duijnstee case. He is a trustee liquidator of a Dutch company. He is the liquidator of a company who went to liquidation. As soon as appointed as liquidator, he collects the funds of the money and files an action against Mr. Godebauer. This was an employee of the company who went into liquidation. When he was employed, Mr Godebauer was

granted a patent: he developed an invention and patented it in 4 or 5 countries (FR, Germany etc.). Mr Duijstnee was claiming that the company had title over those patents and so he was requesting Godebauer to transfer these titles to the company. This occurred in the NL: both parties were ok with the dispute being in NL but part of the IP Rights were in countries others than NL. So, was this a dispute about validity and if yes, does the dispute on the French patent must be brought in front of French courts? The NL Court then should only be competent for the dispute relative to the NL patent. The court of justice said the ECJ is not about validity or registration but on who owns what IP Rights (Employee? Employer? etc.). Art. 24 Brux1 does not apply as a consequence, the Dutch forum of domicile of the defendant is competent to determine the dispute, not just over Dutch patent but also patents in other countries.

- **Excluded**: **actions for infringement or arising out of licences**
  - **Infringement actions**: **actions in tort and so choice between general and special forum** (art. 4 or art. 7(2)). Extra-contractual liability: I am the patent holder and I content you because as a competitor you violate my patents, this is an infringement action that I am starting against you and Art. 24§2 Brux1a does not apply.
  - BUT: if invalidity raised **by way of defence**, exclusive jurisdiction **applies** (GAT), infringement action **should be stayed**
    - 'irrespective of whether the issue is raised by way of an action or as a defence'
    - should challenge of validity be seriously arguable?

- **(d) Jurisdiction vested in courts of MS in which**
  - **Deposit/registration have been applied for/have** taken place; OR
    - In infringement action, the defendant is actually raising a question of validity. If I raise an action against you, you are domiciled in Spain and start an action in Spain and you argue that 5 patents (IT,FR,NL…) are not valid : you ask the validity of the patent, then the question of validity, even if asked by way of defense, must be determined in the courts of countries of registration of those patents. Multiple proceedings must be initiated in as many countries as number of patents whose validity is contested.

  - '**Are deemed**' to have taken place based on an international or European instrument (cp Munich Convention)

- **(4) European Patent (Munich Convention of 1973)**
  - **(a) Contracting States:** EU, Switzerland, Turkey, Albania, Monaco, Serbia (last to join: 2010) (38 countries)

  - **(b) Single, unified application procedure:** this system does not overlap with the EU. Through this EU Munich Convention, we have a single procedure.
    - Initiated by the applicant before the **European Patent Office** headquartered in Munich ('**EPO**')
    - Applicant **specifies** Contracting States for which patent is sought
    - **Revocation** (through opposition) may take place through an action **before EPO**
      - Dispute on **ownership** pending application before EPO: residence/PPB of applicant/challenger, place of employment
    - E.g: a Chinese company would like to obtain a patent in multiple EU countries, it must initiate a single application procedure and pay a fee in Munich, and the applicant, Chinese company, must say for which domestic market the patent is sought. If a country makes opposition for this patent, the office exercises a jurisdiciton over this.

  - **(c) Once granted**, as many **national patents** as are countries for which European Patent is granted
    - 'European patent' is in fact a '**bundle of national patents'**
    - Translations are required **after the grant**, **renewal fees** are high

  - **(d) National courts retain exclusive jurisdiction with respect to validity issues of the national patents granted through EPO**
    - **Art. 24(4)(2) BR1a;** for opposition/revocation for which EPO has **concurrent** jurisdiction through quasi-judicial process

  - **(e) When validity is at issue, litigation has to occur in each single country for which validity is challenged**

- **(5) Unitary Patent ('European Patent with Unitary Effects')**

The situation should improve, once what is called european patent with unitary effect, will be in effect.

  - **(a) 26 Member States** took part: Regulation 1257/2012 and 1260/2012 entered into force **January 2013**
    - Through enhanced cooperation: **Spain and Croatia** did not join
    - But **not yet in operation**: should take effect as of entry into force of Unified Patent Court Agreement. This multilateral system: has been established through 2 regulations of 2012 entered into force in 2013; although those 2 regulations establish substantive and procedural provisions unifying EU law, they are not in operation yet because this system starts when unified patent court will start an operation

  - **(b) 'Unitary effect':** single patent, single renewal and maintenance fee, uniform protection, single court: **UPC**
    - Accepted in **English, French or German**, no translation requirement after the grant (cheaper than the traditional European Patent)

- **(c) Unified Patent Court (not yet in operation):** should enter into force when **13 MS have ratified**, **including Germany, France and UK** (Germany has not yet ratified, because of a constitutional complaint: pending before **BVerfG**). The UPC is not yet operational because an individual in Germany made a recourse saying that the UPC is not constitutional with German constitution and Germany has no power to enter into it. The decision by the German constitutional court is expected to be handed down before the end of the year.
  - **Should refer questions to ECJ when applying Regulations**
  - **Exclusive jurisdiction to hear disputes on validity, revocation and infringement (declaration of non-infringement) of Unitary Patents**
  - **Non-exclusive jurisdiction** regarding European patents granted based on the Munich Convention 1973
    - Patentholder can opt out

- **(6) Public registers (art. 24(4) BR)**
  - **(a) Validity of entries in public registries** (commerce, company, land, vessels, aircrafts, etc.)

  - **(b) Exclusive jurisdiction** of courts of MS where **register is kept**

  - **(c) Case-example:** a guy is a trust expert living in Spain. He is the trustee whose fund encompasses an aircraft. The aircraft, private jet, is registered in Geneva. Geneva does not have a big airport. Geneva has a large airport for private jets. This private jet being registered in Geneva, the guy is indicated as the owner in the register for aircrafts. The beneficiaries for the trust live in Turkey, another in Sweden and last in Canada. They want that register indicates that he is the legal owner (trustee) and not real owner. This dispute is to be brought in Geneva where register is kept.

- **(7) Disputes relating to enforcement (art. 24(5) BR)**
  - **(a) Scope: disputes** arising out of '*use of force, of coercion or dispossession of movable and immovable property'*
    - **Measures of execution**, e.g. against movable property and land
    - **Applications to oppose enforcement by a debtor or third party fall under art. 24(5)**
      - **claim to plead set off on this basis is excluded** (*Owens*)
  - **(b) Jurisdiction vested** in courts of the MS where **judgment has been or is enforced (i.e. place of enforcement=place of assets)** and **not** before courts where judgment was entered nor of domicile of defendant
    - dispute as to whether a debt owed by third person which is situated in another MS can be garnished **fall within art. 24(5) and has to be brought before court of place of debt** (*Kuwait Oil Tanker Co. v Qabazard,* English case)
    - **Case-example:** I have a domicile in Germany and one of my creditors sued me in France. A French judgement was entered against me, I was the defendant and I lost the case. A French judgment ordered me to pay money. I don't have assets in FR, enforcement of this French judgement must take place outside France. I have assets in Germany, and I am the owner of a residence in Crans-Montana, lounge is

decorated with a valuable painting. The judgment creditor, the one who is holding a French judgement, who is entitling him to a sum of money, would like to seize this painting in CH. But I argue that I need this for my professional activity: you cannot seize it. Or my wife, says: we live in a community of assets regime and this was bought during the marriage and it also belongs to me; so you creditor cannot seize it. **This kind of dispute should not be brought before FR courts (first seized) nor German courts (domicile of defendants), but should be brought to CH authorities, that are those for the place for enforcement.** Our French judgement holder, whatever his domicile or nationality, rather than setting his eyes on a painting located in CH, would like to be able to seize a debt that I own, in Italy. Somebody that is located in IT owes money to me, I am domiciled in Germany, I have a CH property, I have a receivable that is still outstanding, against an Italian company. This beneficiary at the French judgment would like to garnish a debt I own in Italy, any dispute arising from the question whether or not this debt can be garnished, **is to be brought before the Italian courts, Italian courts being the place of enforcement.**

Part 2.6: Special jurisdiction (Art. 7 Brux1, Art. 5 CLug)

1. Regime (special forum and jurisdiction):

Art. 7 Brux1 it is the most important one and lists 7 situation where a special head of jurisdiction applies.

- **(a) Special forum additional to general forum**
  - **Plaintiff has option** between general and special forum ('forum shopping') (and, as the case may be, between **various special fora).** When a special jurisdiction is there, other than the domicile of defendant, the plaintiff has the option between special forum or general forum (the plaintiff may exercise some measure of forum shopping) In some other situations, the plaintiff has the choice between one general forum and many special fora.
  - **ONLY** applicable if defendant's domicile is **in a MS** (otherwise BR1 as a whole does not apply). Example: the place of harmful event, may be located in different MS. This special jurisdiction is applicable only if the defendant domicile is in a MS, otherwise Brux1 in a whole would not have applied. Importantly, Art. 7 Brux1 identifies not only international jurisdiction but also national jurisdiction.

- **(b) Special bases for jurisdiction**
  - **Identify both international and local jurisdiction**
    - 'without reference to the domestic rules of the MS' (Color Drack).
    - **Color Drack Case**: German and Austrian dispute. Color Drack is a contractual dispute between German supplier and an Austrian corporate purchaser. The place of delivery of the merchandise by the Austrian purchaser is in different places. The item must be delivered in multiple places across the territory. But because Art. 7 defines local jurisdiction in the country (but not the city: Vienna? Graz? Salzburg?), the sub-allocation of jurisdiction is also operated by Brux1; without reference to national rules.
  - **Do not apply to areas covered by protective jurisdiction**
    - e.g. place of performance of contract (art. 7.1) does **not** apply to consumer contract
  - **Are displaced in case of valid choice of forum** (art. 25 BR): in all 7 categories written under Art. 7 Brux1, the parties are free to elect a forum of their choice and if it is valid, the choice of forum displaces, sets asides the general and special forum.

- **(c) Rationale is a close connection ('close link') between dispute and MS towards which they point ('proximity')** (recital 16)
  - Facilitate 'sound administration of justice' (e.g. place of evidence)
  - **Predictability**: possibility for defendant to '**reasonably foresee**' forum and for claimant to '**easily identify**' it. Predictability: it must be possible for a defendant to « reasonably foresee » what forum he may be sued for, based on Art. 7 Brux1 or for the claimant must be possible to identify the forum before which the claimant may press their claim against the defendant.

- **What is the rationale (subject matter jurisdiction) of Art. 7**? To be finding a **close connection** between the disputes and MS towards which those bases for special jurisdiction point. If you look at EU case-law, a close link or proximity is very important. Or « facilitating « sound administration of justice » »: place of harmful event or place where accident occurred or where evidence is located.

- **(d) 'Strict interpretation': they are exceptional in character:** because Art. 7 deviates from the general principle of domicile of the defendant, in case of doubt, Art. 7 must be interpreted narrowly.

2. Contracts (Art. 7(1) BR1)

- **(a) Notion**
  - **Autonomous notion** of '**matters relating to contract**' (based on '*origins, objectives and schemes*' of BR)
  - **Test is 'obligation freely undertaken' by one person towards another (*Handte, OFAB*).** Special forum related to matters relating to contract: the notion of what a contract is, receives different answers depending on the national interpretation. In English law, it is not the same as Spanish or French law. In order to avoid Art.7 to receive different interpretations based on their own notion, these matters must receive an autonomous notion (**European notion must be built**). **The defining feature is the existence of an obligation freely undertaken by one person towards another**.
    - **action by an association against a member for payment of membership fees is contractual (*Peters*).**
      Example-case: I am a member of an international private law association of lawyers in France, as a part of being a member, I must pay a fee. I'm going to assume this French association is claiming an amount of money. They are wondering whether they can use Art. 7§1 Brux1 and wonder whether the action for payment would be characterize as a contractual action. The answer is yes: I freely undertook an obligation to pay this annual fee and because this obligation is fulfilled, it is a contractual action. Art.7 Brux1 would apply.
    - **liability of manufacturer against sub-purchaser/end-consumer is not contractual (***Handte*, cp *Kainz*):
      Kainz Case. is an Austrian. He likes going on bike tours and buys a bike. He is on a bike tour in Germany. He falls and is seriously injured. He says the reason why he has this incident is because the bike is defective. The bike was sold in Austria but manufactured in Germany. **The guy started an action against the manufacturer (not the retailer), in Germany**. The manufacturer, defendant, raises motion to dismiss, the motion is started in Austria and the defendant, German domiciliary says that Austrian courts do not have jurisdiction. What action is this? There is no obligation by German company for the benefit of the Austrian hand-user. **The**

contract was between Kainz and the Austrian retailer, there is no obligation that was freely undertaken between Kainz and the German manufacturer. So, we are in an extra-contractual action.

- ***culpa in contrahendo* is <u>not contractual</u>** (*Tessili*): *Culpa in contrahendo* is a pre-contractual liability, non-contractual. No obligation taken freely. It is pre-contractual, so it is about violation of duties such as good faith. These are not provided in the contract but in a civil code or law. This source of obligation is a statutory source and has been violated. This is covered by Art. 7§2 Brux1.
- **unjust enrichment is <u>not contractual</u>**
- **action by creditor against director of company for allowing it to carry on business even if undercapitalise**d (*OFAB v. Koot*): **is <u>not contractual.</u>**

  Koot case: Koot is a Dutch director of a company in Sweden and moved the seat in the NL. This director is sued by OFAB (Swedish company) who claims liability of Koot because OFAB is a contracting partner of the company of Koot and this company failed to perform some obligations towards OFAB. Koot company went to liquidation, so the creditors are turning towards the director because he failed to exercise some caution, because he knew the company was undercapitalized and he allowed the company to carry on the business. Then, based on a Swedish provision, he is liable. **Because Mr Koot did not take obligations, this action of a Swedish company against the director of one of his contracting parties, triggering liability based on company law, is an extra-contractual action.**

➢ **Insurance, consumer, employment, tenancies of land**: **excluded**

- **(b) Scope**
  - **All actions** arising out of contract/contractual obligation. Example-case: if you say that a contract exists between me and you and you say I should fulfill my obligations under this contract, but I say there is no contract between us: then we were in a meeting, but no contract has risen. This is a contractual dispute: even if I am the plaintiff and the declaration is about the fact that the contract did not arise, then it is a contractual dispute so I am allowed to bring this dispute based on Art. 7§1 Brux1 at the place of delivery, if the contract which I am contending, as not come to existence, is a sale contract
  - **Including disputes with respect to validity, enforceability, annulment, avoidance, termination, damages for breach of contract, specific performance, etc.**
    - **incl. restitutionary claims** following invalidation of contract If the judge invalidates the contract and there is restitution to take place, because some payments were done but the judge annulated it, the restitutionary claim is still a contractual claim,

even if it has a source on a prior judicial invalidation of a contract.

3. Specific contracts: Sale of goods (Art. 7(1)(b)), first indent and second indent

FIRST INDENT

- **(a) Notion :**
  - **If goods need to be manufactured according to specifications of buyer, still sale** (art. 3(2) CISG: *Car Trim*). **Car Trim Case** (to read absolutely): German company. This company manufactures and sells some components of spare parts in the moto industry. It is in a contractual relationship with an Italian company, called Key Safety. Based on several contracts, Key Safety was buying some components from Car Trim, was building them and assembling them into some airbag system and Key Safety was selling them to Italian manufacturers. In 2007, the Italian company all of a sudden terminated the contract: the German company, supplier, claimed several payments as a consequence of breach of contract (unauthorized breach). The German company files a lawsuit seeking payment before a court in Germany, claiming the contract is not a sale but a service, so Art. 7§1b Brux1 first indent is applicable, second indent is applicable (contract of service not for sale), the service was provided in Germany, my obligation was to follow the instructions that I receive from the Italian company in terms of packaging, material, in order to manufacture the components : **this is a service not a sale, the provision of service had to take place in Germany, so German courts have jurisdiction over this dispute. The Italian company said it was a sale and because the delivery had to take place in Italy, so for Italy, Italy was place of delivery and therefore courts in Italy should have jurisdiction, not Germany.** ECJ: it is not because the supply of goods must follow obligations received from the buyer, or, it is not because the supplier must shape in a way that suits the buyer business, that it is not a sale contract. The court of justice relied on Art. 3§2 CISJ (Vienna Convention for international sales of goods): if the goods must be manufactured according to some specifications, it is still a sale, unless the purchaser supplies a significant part of raw material. Now Key Safety was not supplying raw material to Car Trim. It was saying to Car Trim: you must buy this raw material from this supplier and this supplier. But was not furnishing itself. The conclusion: it is a sale contract. In the automatic industry, it is customary that the buyer must give guidelines in order for items to be tailored with buyer's system. **The predominant obligation was to deliver goods and not to manufacture them. The defining feature of sale contract is the delivery.** When the final destination is a MS, but delivery or first carrier takes place in another place, then the delivery that controls,

defining jurisdiction, place of final destination. **In our case the Italian company was right, saying it was a sale and saying the place of delivery was not in Germany but in Italy because place of delivery.**

- **Sale of immovable excluded, sale of software?**

- **What is a sale of goods**: seller, is transferring title and delivers a good to the other contracting party against a purchase price. The seller undertakes the delivery of the subject matter of the contract and the buyer buys it.

- **(b) Forum: place of delivery of the goods for any of the obligations arising out of the contract of sale**
  - **Place of agreed delivery and not of actual delivery**
    - In absence of agreement on delivery, actual delivery
  - **In case of goods to be transported, delivery occurs at the place of physical transfer to purchaser/final destination** (Car Trim), **not at place of handing over to first carrier**
  - **In case of delivery in multiple locations: predominant delivery (based on 'economic criteria') controls. What if delivery takes place in different countries?** Car Trim is a contractual dispute by German manufacturer, supplier, against an Austrian buyer. The German supplier had to supply items but those did not have to be delivered in a single place, but in a number of places within Austria. At the domicile of the buyer's customers: customers redistribute them to clients, different retailers. What happens? There is no single place of delivery! Art. 7§1b first indent is applicable even in case of different places. Second element: if it turns out that one of those places or is predominant over the others, then the place of delivery that defines jurisdiction is where the predominant delivery must occur. How to calculate it? This is calculated based on economic criteria. If there is no way to see what the predominant place is, we can bring it to any place where the delivery takes place; provided the delivery took place in the dispute, there must be problems with the delivered items.
    - **If none of the individual deliveries is predominant, all of them are relevant (Color Drack)**
    - **Plaintiff may sue at place of delivery of its choice**

SECOND INDENT

A service contract within the purpose of Art. 7§1b Brux1 has to fit the following criteria:

- **(a) Notion: 'activity' (facere) supplied in exchange for remuneration (Falco), money or other benefit (Corman).** At least one of the parties and the other must pay through a price or remuneration of different sort.

  - **License for IP-right not a 'service' because there is no activity on licensor' side** (Falco)
    - Loans, letters of credit, surety: no service
    - **Falco Case**: Austrian foundation. This Austrian foundation had licensed to a German individual, a lady, the use of audio-recordings of a concert that had taken place in Austria. The licensee, Germany domiciliary, was allowed to commercially exploit some audio recordings of a concert against payment of a fee. The audio recording was a copy-righted work, the c-r was owned by Falco and the c-r holder concluded a license contract with the licensee, German domiciliary. Falco contended that the lady was in breach of contract: she failed to pay the royalties and was making use the audio-recorders in a way that it was not allowed. Falco filed an action seeking damages possibly and termination of contract in Vienna. Vienna was the place where the foundation plaintiff was domiciled. The foundation continued it was a service contract and that the service was provided in Austria. **The ECJ said it was not true: it was not a service because there was no activity on part of the licensor. What a licensor must do is to refrain from interfering with the commercial use of c-r work and get payment; so there is no actual performance or activity that must be carried out by the IP holder, so it is not a service contract. Because it is not a sale contract either, 7§1lit.c and lit.a are applicable.**

  - **Agency** (Wood Floor), **mediation**, **transport** (Rehder), **distribution** (Corman) (distributor is service provider): **service contracts**

- **(b) Forum: 'place where, under the contract, the services were provided or should have been provided**'
  - **If different parts of service in different countries, and no separate part is predominant**, **all of them are relevant.** Place where the services should have been provided: what if services have to be provided in different countries and no dominant place?

- **Air transport:** b**oth place of departure and of destination (not place of seat of carrier)** (Rehder) choice of plaintiff.
  Peter Rehder Case (transport): Redher is a frequent flyer and needs to travel to Munich to Vilnius and buys a flight with Air Baltic, headquarter, Latvia, Riga. The Flight was cancelled: he bought another flight with another company and arrived with 10 hours delay. He was angry and started compensation based on an EU legislation. Where was this filed? In Germany. **This is not a consumer contract, transport contract are specifically excluded from the area of protective jurisdiction.** Art.7§1lit.b second indent is applicable. Where the service must be provided? Many obligations must be carried out at the place of departure, but then also on the aircraft and place of arrival, if the person arrives safe and sound at arrival and on time possibly. **We cannot say if there is a place of departure or arrival is predominant: both of them should apply.**

- **In case of commercial agency (Woodfloor):**
  - **Main provision of services as specified in the contract**
  - **Failing which, factual analysis (time spent)**
  - **Failing which, presumption in favour of domicile of agent**

- **Service over internet**: location of server? location of receiving computer? both?
  Example-case: service over internet. A friend of mine, a lawyer and based in Geneva, has a French legal background. He practices here but also some activities in France. He needs to have access to French database Dalloz. It costs to be a subscriber, 700euros per year. **He was a subscriber, but the operator did not work. He wanted to ask for a diminution of the price because it did not work, and he did it in CH, because it is where he was based. Where the service under this contract are provided: in CH (where he is, where he logs in, etc) or in FR (because place where the service provider and most of the work takes place?)**

4. Other contracts (no sale no service contracts) (art. 7(1)(a) and (c) BR1)

- **(a) Scope**: **loans,** sale of **land**, of **securities**, of **IP-rights,** licenses of IP (Falco), publishing contracts, **exchange** (oil for food). Loan agreement or exchange contract: you give me USD and in exchange I give you Yuan. It is neither service nor sale (=we need goods).

- **(b) 'Court for the place of performance of the obligation in question'** (art. 7(1)(a) to which art. 7(1)(c) refers back). With respect to this category, the **obligation in question defines jurisdiction**, place where obligation in question will perform.
  - **The particular one which the plaintiff's action is based on**
  - **If several obligations are disputed, and to be performed in different countries**, **then they must be brought before different courts** (or all of them before **general forum: Art. 4)**
  - **NOTA BENE: most of the time, there are 2 obligations**.
    1. The first is « **you fail to pay** »
    2. The second is « **you breach the contract** ». Because Falco concluded contract for license, the place that defines special jurisdiction is the one of performance of the obligation in question. **If there are many obligations: which is the place of performance for which of those obligations? Separate analysis for multiple potential obligation in quest.**

- **(c) To determine 'place of performance'**: **no autonomous meaning, left to national law** (De Bloos, Falco) **choice of law analysis**
  - Example: **payment obligation should be effected at creditor's domicile** (German, Swiss, English, Greek law), **debtor's** (French, Italian law).
  - **For national law to define the place of performance**.
  - **Falco Case:** contract for license of a copyrighted work. Falco, claimant, was contending that the defendant was not paying the royalties. **Where is the place of performance of this obligation? What is the place: Germany or Austria?** The Austrian Court to determine if it has jurisdiction, must define the law applicable to the contract, and based on Rome 1, we say it is based on Austrian law. **It is the place of performance of an obligation of payment and let's assume that based on Austrian law, the place where the obligation of payment is the place of the creditor domicile.** Here it is the Austrian foundation and so creditors domicile is in Austria and therefore payment obligations must be in Austria and **Austrian Courts are competent based on 7§1lit.c referring to lit.a, Austrian courts have jurisdiction over this obligation because the place of performance is at the creditor domicile, Austria.**

- **(d) Controversial issues**
  - **Where is a warranty to be performed**
    - **Where condition/state of affairs is required by contract for sale of IP to exist** (Crucial Music, English case): place of transfer
    - **Controversial issue**s: warranty to be performed? The seller must present to the buyer that the subject matter in the contract is being sold and purchased and satisfies some requirements. I**f someone breaches this contract, because the object/good being sold did not comply with those warranties. This may be an obligation, but where is this obligation to be performed? Complicated. English Courts defined that the place of performance of a warranty that had been breached, is the place where the transfer of the copyrighted work had to take place.**
  - **Where is a negative obligation to be performed?**
    - **If no geographical limitation, special forum not applicable** (Besix)
    - **If place is identifiable** (e.g. not to compete in Country A and B): **that place** (further defined by place of breach)
    - **Example-case**: If, as part of a termination package, I have been employed by you (Omega company), in a watch-making company and the contract is terminated by mutual agreement and I undertake not to compete in CH as well as in FR against you (not accepting a job in CH or FR in a competing company). But I can do it in Cameron, China etc. The location are identified: CH or FR. Assuming I start a company and this company is active in the watch-making in FR, then Omega says I am in breach of my obligations not to compete: in this case we could identify place of performance of negative obligation in question in **France because this was part of area where I was supposed to refrain doing something.**

5.Torts (Art. 7(2) BR1)

- **(a) Notion of 'tort, delict, quasi-delict': autonomous notion, two requirements**
  - **Requirement 1**: **action seeks to establish liability**
    - **Strict / fault-based**; **conduct non necessarily 'unlawful'**
    - **Restitutionary claim** / action to set aside a transfer of property (e.g. *actio pauliana*) against *bona fide* purchaser: **no liability**
    - If I (X) am a *bona fide* purchaser and Y says he has title over the painting, because it had been stolen and I, X, purchased it and therefore I am a defendant: there is no liability on my part! There is no contract between X and Y. I am in *bona fide*, no action in contract, no action in tort. Art. 7§2 Brux1 is not applicable and therefore no Art. 7§1 Brux1, so there is no special forum and can only be sued at my place of domicile.

  - **Requirement 2**: action is **non-contractual in nature.** Negative requirement. Non-contractual.
    - **No obligation freely undertaken by one party for the other:** It is started by a consumer against a trader, requiring the trader to take off some unfair terms that are unlawful. **This is also a non-contractual nature**.
      - Precontractual **liability** (*Tacconi*)
      - Action by **consumer protection organisation** to prevent trader from using unfair terms in contract (*VKI*)
      - **Infringement of IP-rights** (*Hejduk*, *Pinckney*, *Wintersteiger*) unless breach of **license contract** (*Falco*)

- **(b) Actions covered**
  - **Actions for damages (material, moral, treble damages, etc.)**
    - Including actions for **negative declaration** (*Folien Fischer*)
    - Any action that can arise from **extra-contractual liability**, actions for negative declaration (Barbara Neilson vs Mercantile: Mercantile sued Barbara Neilson in China, seeking a non-liability declaration).
  - **Actions seeking an injunction (*Bolagsupplysnigen*)**
    - **Preventing conduct that may generate damages**
      - **Preventative actions**: seeking to deter future torts
    - **Imposing conduct to eliminate damages:**
      Injunction: Estonian company, was seeking to obtain against a Swedish company, a removal of unlawful content placed on a website situated on s Swedish server.

- **(c) Forum at place where 'harmful event occurs'**
  - In case the **harmful conduct** takes place in one State and **damage** is suffered in another, **both determine jurisdiction**
    - '**Ubiquity principle**' (Mines de Potasse)

- **Mines de Potasse Case**: A Dutch farmer growing vegetables on the Rhein in NL. He is not happy because a couple of km downstream of the Rhein in France, a company established in France, is pouring some waste materials in the Rhein and this material causes damages to the vegetables. He suits Mines de Potasse in NL. **Mines de Potasse says that harmful event is in FR and not in NL. The ECJ identifies 2 places: one is the harmful conduct and the other is the damage place, both of them defining jurisdiction**. The dutch farmer was justified to bring action in the NL, NL being the place of damage, where the harmful event occurred and FR also, because where the conduct occurred. So, he can choose FR or NL.

➢ **Notion of 'harmful conduct'**

- **Significant portion of conduct is sufficient:** harmful conduct = significant portion of conduct is sufficient
- **Preparatory acts are excluded** ('causal link' between conduct and damage is required: *Torline*). Preparatory acts are excluded. If they take place in a MS, while the conduct *per se* takes place in another MS, the place where exclusively preparatory acts are taking place cannot be relied on as the place of jurisdiction. This is the same in criminal law field.
  - Co-perpetrators: place where one of them (not party to dispute) acted **cannot be relied on for jurisdiction purposes** against or by the co-perpetrator (*Melzer*)

➢ **Notion of 'damage'**

- **Initial/direct injury defines place of damage, not consequential / indirect loss** (*Dumez*). If a consequential lost takes place in a country but the initial or direct injury in another, the **relevant place is where the initial/direct injury is important**. **Case-example**: A French skier takes courses in CH and then seriously injures himself. He goes back to France and starts a claim against the Swiss instructor, for negligence. It is extra-contractual liability. What is the place of direct damage? Switzerland, and not where he suffered the most his injuries, i.d France.
- **Even if plaintiff is 'secondary victim'** (cp. *Florin Lazar*): **Florin Lazar Case**: Romanian national, has a daughter. She lives in Italy but is Romanian. She is a victim of a car accident, fatality: she dies. Flore Lazar starts action seeking payment of mental distress, loss of support in Romania. He would like Romanian court to be competent: he has no direct contact in Italy. He says he suffers all of this mental distress in Romania. **But, because he is a secondary victim, the only relevant damage is the initial and direct damage, where was the primary victim, was in Italy**. **The Romanian court**

has to decline jurisdiction because Romania is not the place of damage nor of conduct.

- **In case of purely financial loss:** if affected assets are **severable from victim's estate**, **place of damage is where assets were at time of tort (*Marinari*).**
  Marinari Case: purely financial loss. Marinari, Italian. Once he went to the Manchester branch, UK, of the Barclays bank (UK) he had an envelope containing a bunch of notes for a huge amount of money 800mio USD. He enters the bank and presents with these notes the bank employee becomes suspicious and the bank starts criminal investigation against him, he is put in Jail. After some time, there were no result, so he was released. He started an action in Pisa against the Bank, seeking damages and reputational damages and he lost the money! **Barclays starts a motion saying Italian Court does not have jurisdiction. Marinari says that he suffered the loss of money. The ECJ said that, at the time of the conduct took place, the money was in UK, so UK was the place of financial loss.**
  - **Place of domicile of aggrieved party excluded**

- **(d) Specific rules developed by the ECJ**
  - **(i) Defamation committed through printed press**
    - **Place of conduct**: establishment of publisher; jurisdiction with respect to the **whole damage/worldwide damage. The court of the place where the publisher is established, has jurisdiction for whole or worldwide damage.**
    - **Place of damage**: **each place where the publication was circulated,** but jurisdiction for **local damage only** (*Fiona Shevill*).
      Fiona Shevill case: UK lady, she initiated proceedings in UK but had worked in FR for some months and had been employed by a company "Checkpoint", operating networks of exchanges and a newspaper. A French newspaper has a lot of circulation in France, it was called France-soir. This paper wrote that Fiona was involved in money laundry. She went back in UK and started proceedings against the Newspaper. 200-300 copies only of this newspaper had taken place in the UK. **The court of justice said the UK court has power to recognize jurisdiction but only about the alleged damage in the UK, not in FR. If Fiona alleges suffers in FR, then she has to file the action in FR (place of conduct).**

  - **(ii) Defamation/invasion of privacy through internet** (*eDate/Martinez*) (read the paper written by Prof. Romano) (read them closely according to him)
    - **Place where content is accessible: local damage only**

- **BUT**: if action seeks **rectification/removal of unlawful content**: only center of interests or defendant' domicile (art. 4)

- **Additional forum**: **place where victim has its 'center of interests' for the whole damage**
  - **Presumption in favour of habitual residence:**
    - **E-date Case:** it was an Austrian company. This company was running a website and this website contained an article concerning a German guy. This guy was accused in early 90s to have murdered one famous German actor. He was convicted for murder in Germany. When he got out of prison in Germany, he said he relied on right to be forgotten as provided by German law: he started an action against E-date that was running an article on him and saying something that was not true. He said he was entitled to the right to be forgotten. **He started law-suit against the Austrian company, in Germany, where he was domiciled.**
    - **Martinez Case**: about paparazzi. Martinez is a French actor. The dailymirror.co.uk (famous tabloid in the UK): writes article on him and Kylie Minogue. He wanted to rely on the *droit d'image*, based on French law, where he was domiciled, against the daily mirror, domiciled in the UK. Where exactly the tort is committed? The court of justice created an additional forum: where the victim has a **center of interest**, the jurisdiction is competent **for the whole damage and this is the habitual residence**. So, he can act in France.
  - **Also applies to moral persons** (*Bolagsupplysnigen*): **Bolag Case:** the **center of interest** forum, also applies to moral persons. This company (Estonian) was filed by the Swedish company saying that Estonian company was plenty of credulous and dishonest people. Seat of the company: Sweden or Estonia? Estonia company, was targeting the Swedish country, but statutory proceedings were in Estonia. **Here it is question mark.**

➢ **(iii) Infringement of IP-right** (copyright)
- **Place of damage is place where infringed intellectual property exists**, but only **local damage** (*Pinckney*, *Hejduk*)
- **In these two cases, Pinckney and Hedjuk**: place of damage is the place where **infringement of intellectual property**

exists, but only local damages can be covered. Either the forum of domicile of defendant or the place of conduct.

- **(iv) Liability of the manufacturer for defective product**
  - **Place where product was manufactured** (*Kainz*)
    - **Not** where product was **transferred** to reseller/end **consumer: we ask ourselves whereis the place of conduct?** In Kainz Case: place where manufactured (Germany) or place where product was transferred (Austria)? **Here, contrarily to before, the place of harmful event is in Germany.**

6. Civil claim within criminal proceedings (Art. 7(3))

- **(1) Requirements**
  - Civil claim for damages or restitution (*material* damages, *moral* damages, etc.)
  - Based on conduct **criminally relevant**
  - **Criminal suit is filed**
  - Criminal court has jurisdiction under **domestic law** to try **civil claim** as 'annexed matter'
    - ***action civile***, France, Italy, Belgium, Scandinavian countries
    - **Example-case**: Italian living in Italy. I spend some holidays in Thailand. I am involved in a fight outside a pub and a French national punches me and I am injured, I got to go back to Italy. I file a complain: because of the principle of passive or national personality, even if the offense has taken place in the territory of another country, Italy has power based on Italian criminal law, to conduct the criminal investigation against a foreigner resident in France. Italian law permits me to file a claim, a civil complaint, in the criminal court, which is permitted through the Italian law.**Art. 7§3 Brux1 says that if a civil claim is filed for damages based on a criminal comportment, the criminal court has jurisdiction under national law, then the criminal law has special jurisdiction**

- **(2) Court having special jurisdiction**: **criminal court**
  - **Whichever link domestic law** deems sufficient to grant criminal jurisdiction is **indirectly accepted** as basis for international jurisdiction
  - Even if court is seized, based on
    - **nationality** or domicile of the **plaintiff** / victim
    - place where the defendant / accused **was apprehended**

7. Cultural property (new, not in LConv) (Art. 7(4))

- **(1) Scope: civil claim for recovery or return of a 'cultural object'**
  - '**National treasure** possessing artistic, historic or archaeological value' (reference to EC Directive 93/7, now to Directive 2014/60 UE) for definition. The scope is a civil claim for recovery or return of a cultural object: **narrowly defined** in the EC Directive 93/7.
  - **Action must be based on 'ownership'** (and not on a **licence** of use nor – probably – any other right in rem)
    - including but not limited to action by the requesting MS against the requested MS (under art. 6 of Directive 2014/60 EU)

- **(2) Court having jurisdiction: place of situation of property**
  - **At the time when proceedings are started.** Seeks the recovery of cultural object and the court jurisdiction is the one where the cultural object is situated at the time when proceedings started. This is the only time where place of movable goods is relevant as a base of jurisdiction.
  - **P.S. the only case where place of movable asset or good is relevant as basis of international jurisdiction**
    - In other cases, place of the assets which are the subject matter of the claim is **not sufficient** to vest jurisdiction (recovery of painting, of a jewel, of funds)
      - **unless criminal proceedings are started**
      - asset or funds may be frozen, blocked or arrested by way of **interim measure** based on location

8. Forum of 'secondary establishment' (Art. 7(5))

- **(1) Requirements**
  - **(a) Defendant has an establishment, branch or agency in a MS other than the one of its domicile**
    - **Single concept**: **some degree of dependency from parent body** (which exercises 'direction and control')
      - **Establishment may be a subsidiary and defendant parent company** (legal dependency)
        - An embassy of a **third State** is a branch or establishment of the sending state (Mahmadia)
        - **Example-case**: Prof Romano had to deal with a contractual dispute between a family living in CH owning a painting, early 16th century. Family wanted to know whether the painting was painted by Pontormo (=25mio CHF). If it was not authentic (one of the followers of Pontormo), it was only worth 30K CHF They asked the expertise to the directors of Sotheby's UK, domiciled in UK. Apparently, something went wrong because the director of

Sotheby said it was not an authentic Pontormo but then, they sold it as a non-authentic Pontormo and then have discovered it was an authentic Pontormo. They were therefore claiming the difference. They wanted to know if allowed to file this to the court in Geneva, because at the time negotiating the contract, they had talked with Sotheby's in Geneva. Their negotiating counterpart was Sotheby Switzerland. Because this establishment was located in CH, but subsidiary of a UK company, and that Sotheby's Switzerland had a great broker power, the dispute arose between Sotheby CH and the parties, even though the contract was Sotheby's UK! Art. 5§5 CLug applied and CH jurisdiction could be found on secondary establishment.

- **Establishment may also be a commercial agent** if it's 'economically dependent' (not an independent distributor)

- **Some autonomy: management and equipment** of its own are required

➢ **(b) AND dispute arises out of the 'operations' of the establishment**

- Establishment brokered, negotiated, performed transaction in the name and of behalf of defendant/parent body

- **(2) Court having special jurisdiction**: court where the **establishment, branch or agency**, **is located**

Part 2.7: Protective jurisdiction

1. Background

- **(1) Aiming to protect weaker party** by **'rules more favourable to his/[her] interests than general rules' (rec. 18)**
  - **Three categories: consumers, employees, insured**
  - **Two-fold protection**
    - **Access to justice is facilitated** in that protected party may sue in **most accessible/least expensive forum for them**
    - **Choice of court regime** is modified to its **advantage**. Access to justice is facilitated because the **protected party is weak, there is an imbalance**. The weaker party can sue the strong party in less expensive and more accessible forum.It is modified in favor of the weaker.

- **(2) They also define scope of application** of BR1
  - **Recital 14**: 'certain rules of jurisdiction should apply regardless of the **defendant's domicile'**
    - for employees and consumers **only,** not for insured
  - additionally: if defendant domicile is in a **third State** but branch, agency, or establishment in a MS, defendant **is deemed to be domiciled in that MS** (art. 17(2) and 20(2))

- **(3) They exclude rules on 'special jurisdiction'**
  - **place of performance** of contract under art. 7(1) is **not** available (even when action is filed by consumer)

- **(4) Recognition is prevented if original court accepted jurisdiction in contravention of protective rules** (art. 45)

2. Consumer contracts (art. 17 to 19 BR1)

- **(1) Restrictive notion : two conditions**
  - **(a) Consumer: person who concludes contract with trader for purpose outside its trade or profession** ('**B2C**'; no: '**C2C**'). The first condition has to do with the parties: a consumer contract is a contract where a person concludes a contract **for purposes outside trade or profession,** with a person that concludes it within its trade or profession. In other words, there has to be on one side a business supplier and on the other side, a non-business purchaser. Can be a contract of sale or service. **The supplier has to be the trader and the buyer is the non-businessperson.**
    - **Implicit**: **supply** by business supplier to non-business acquirer
    - **Natural person**: associations of consumers are **not consumers**
      - Consumer status not lost if the person lectures, operates websites, collects funds to enforce their claims (**Schrems v. Facebook**, Jan, 2018):

- **Schrems vs FB (to read) Case**: Schrems is a lawyer, he is a FB user for a long time. Some years ago he started a campaign against FB on the use of private data. He campaigned against FB. **FB is domiciled in California but when comes to EU, it has a headquarter in Ireland. He started an action in Austria in contractual liability on consumer contracts.** He was assigned the claims of a number of other FB users in Austria, Hungary, Germany etc. **He was acting on his behalf as well as many other users. In order to raise funds for his campaign against FB, he started lectures, presented TV shows etc. All those elements pushed FB to say that he did not have the consumer status.** Schrems says, that it is not because he is making campaign that he loses his status. **BUT: he acts on behalf of other FB users, so he cannot be qualified as a consumer.**
- **Other example-case:** If I decide to sell a jewel because I want to buy a car, with the cash that comes from the jewel. I am going to propose a sell. I am the seller. The trader is the buyer. It is not a consumer contract because for that, the supplier must be the professional and the purchaser is a person who buys outside the purpose of business**. To apply a consumer contract, the consumer must be a person and not an association of consumers.**

– **Contract for mixed use (business/personal): outside (Engler)**
  - Unless business component is negligible: you buy a car because you are a broker, you need it for professional purposes, even though you also need it to travel with your family. So, nom you are not a consumer.
– **Transport contracts are not included (cp Rehder)**
  - Apart from contract for travel and accommodation for **all-inclusive price** (‘package travel’, such as ‘**cruise**’: Pammer: art. 17(3))

➢ **(b) Additional requirement: either of the following 3 alteratives**
– **Sale contract in instalment credit terms** (art. 17(1)(a)): **Example-case**: I, Swiss resident, buy a boat, the boat seller is located in France and I agree that I am going to pay monthly for 5 years (sort of leasing). I am entitled to consumer protection, to file a lawsuit against the French domiciliary before the Courts in CH.
– **Loan or credit made to finance purchase of goods** (b)
  - **Even if professional carries out no activity in MS of consumer**
  - **Example-case:** I make a loan with a bank to finalize the buying of a boat, even if the professional carries

no activity in CH, still I am protected and can file a lawsuit in CH.

- **Territorial requirement (by far the most important):** professional '**pursues'** or '**directs**' activities in MS where consumer **is domiciled** (c)
  - **Example-case:** whatever the nature of the contract, if the professionals has a direct activity towards MS where consumer is domiciled, then I am protected.

- **(2) Requirements :**

  Professional 'pursues' or 'directs' 'by any means' its activities in the MS of consumer: offline commerce.

  Example-case: If, once I made an investment myself with a German company, I bought some shares and I was contacted with an agent. This German company has no branches but had an agent supposed to find Swiss clients willing to invest in this company. In such a situation, the German company is directing activities in CH; as it has an agent that wants to find Swiss clients.

  - **(a) 'Pursuit of activities' in a MS**
    - If professional **operates** part of its business **in MS where consumer is domiciled; AND**
    - Contract '**falls within** scope of such activities'
  - **(b) 'Direction of activities' towards a MS**
    - If it has **agents, concessionaires, franchisees**
    - If **advertises** its **products**, **through media**, **brochures**, etc.
      - **Example-case**: if a French sportswear outlet sends paper brochures to Swiss residents (cp. advertisements for goods of French retailers displayed on a Geneva tramway: Nov. 2019): French retailors in Annemasse advertised on a Geneva Tramway, their products, encouraging Geneva residents to make Christmas purchases in Annemasse, facilitated by the Leman Express. It is a cross-border advertisement. If I make a purchase in France, I bring it back to CH and find a defect, I want a new one, then I can file a law-suit in CH because even if the contract was concluded in CH, the French seller was directing their activity to Swiss residents.
    - **Is it necessary to prove 'direct link' between**
      - **Activities conducted in consumer's MS AND**
      - **A particular contract in dispute**? (**Probably not**: Emrek).
        - Maisons du Monde, French retailer, operates a Branch in Switzerland (Vaud). Maisons du Monde is French but has some branches in Vaud. A swiss resident buys some items in Val Thoiry. There has been no advertising directed towards Swiss residents. But, because Maisons du monde operates in CH, even if the swiss branch was not active in playing any role in that particular transaction,

it could be argued that this retailor directs activity to CH, even though the contract was concluded in FR, the Swiss resident is protected and can file a suit at the CH jurisdiction.

- **(3) Jurisdictional regime :**
  Available fora
  - **(a) For actions by consumer**: **consumer's domicile** or **trader's domicile (at consumer's choice)** (art. 18(1))
    - **Place of establishment** (art. 7(5) **also available** (art. 17(1)
    - **Place of performance is not available (not even for consumer!)**
    - If consumer **moves** its domicile to another MS after contracting **new domicile defines forum**
      - **Further choice between old and new domicile** if requirements are satisfied with respect to both MS?
      - **The consumer domicile is not the one he had at the time of contracting, but at the time of filing the lawsuit. Mühlleitner case:** Austrian domiciliary. She bought a car in Germany, let's assume that some months before starting the proceedings she moves to Hungary, then her new domicile is in Hungary. She is then able to rely on her Hungarian domicile.
  - **(b) For actions by trader**: **consumer's domicile only**
    - **No alternative: place of performance not available** (Alpenhof)
      - If consumer changed his domicile and his new domicile is **unknown**: **old domicile** (Hypotecni Banka)
    - **No prejudice to bring counterclaim in court of original claim** (refer to art. 8(3))
  - **(c) Restricted choice-of-forum possibility**: see, infra.

3. Internet-related contracts (e-commerce)

- **(1) If trader presents its activity on website it should be ascertained whether trader was envisaging doing business with consumers domiciled in MS where that particular consumer who's party to the dispute is domiciled**
  - **Verify whether 'it was minded concluding contract with them'** (**Pammer Case)**
  - **Alpenhof Case**: the domestic court must make sure whether the professional (Hotel), established in a MS (Austria), was minded concluding contract with domiciliary (Mr. Heller) in another MS (Germany). Mr. Heller is a German national. He likes spending his Christmas Holiday in Austria. He books 2 rooms with a hotel in Austria. He spends there 10 days. When

he checks out, he refuses to pay the invoice because he was not satisfied with the service, color of the carpets etc. The hotel, Austria, files a lawsuit in Austria, where the contractual relationship takes place. Mr Heller raises lack of jurisdiction, he says he is a consumer and based on Brux1, he is not able to rely on the place of performance of the contract (Art.7§1 does not apply). The only place available, he says, is the domicile of the defendant. **This is true to the extent that Alpenhof is pursuing its activity directing it towards Germany. What are the factors that are relevant to this analysis?**

- **(2) Non-exclusive list of factors that may be relevant:**
  - **International nature of activity proposed by trader** (Pammer): in that case, it was a cruise. Mr Pammer ordered a cruise from IT to Far East, but the services in the cruise where not at all what it was written in the contract (small room, no swimming pool etc.)
  - **Use of language or currency other than that of MS where trader is established** (Pammer)
  - **Use of an Internet referencing service** to facilitate access to trader's site by consumers domiciled in other Member States. In Alpenhof was in English and German: so Alpenhof was seeking an international clientele, because otherwise would have only been in German.
  - **Mention of telephone numbers with international code**
    - Mention of **mobile number** of MS of consumer in Emrek
    - The telephone number of Alpenhof hotel, contains the +43, Austrian.
  - **Use of top-level domain name other than that of MS where trader is established** (Pammer)
  - **Mention of international clientele** (Pammer): there are some comments on the website; saying the hotel was perfect etc.

- **(3) Overall assessment based on careful examination of trader's website and activities**
  - **But conclusion rarely reached that trader was not directing its activities to consumer's country.** In the Alpenhof case, it was clear that Alpenhof wanted to conclude with other countries (especially Germans). The fact the website was English is a clear indication. So Mr. Heller was right. No right to bring a suit before Austrian courts.

- **(4) Contract does not have to be concluded at distance** (Mühlleitner)
  - **Protective regime applies** even if contract is concluded during a visit by consumer to supplier's premises **after earlier communications through internet/phone**
  - **Establishment of contract at distance and reservation of goods and services at distance are indications that contract is connected to trader' activity**

- **Mühlleitner Case**: Daniela Mühlleitner was an Austrian and wanted to buy a car. She visited website online. It was a german website and was diverted on a site in Hamburg. She went to Hamburg, buys the car and travels back to Austria with the car. The car turns out to be defective. She starts proceedings in Ausrtia and the Hamburg business said Austrian courts did not have jurisdiction. But because the contract was not concluded online but the ECJ said that the place of conclusion of the contract was irrelevant

- **(5) 'Causal link' not required (Emrek)**
  - **Means used to 'direct activity' and conclusion of that particular contract do not have to be related**
  - **Emrek Case**: he was a German, living in Germany, close to French borders. He had no idea that Mr. Sabranovic was operating a car-selling business in France. He did not know that Mr. Sabranovic entertained a website. Emrek goes to France to buy a car at Sabranovic concessionary. The car has some defects. So, Mr Emrek starts proceedings in Germany, where he is domiciled. Mr. Sabranovic said that Mr Emrek did not know that Mr Sabranovic had a website. So, there is no link between the purchase concluded and whatever it is written on internet! However his website was directed also to German clients: it was written: +33 and +49 → he was intending to make things easier for German clients. The problem: there is no proof and it could not be proved that Emrek was aware of this website. **The ECJ said this is irrelevant.** Whatever the practical use made by the purchaser, it is not relevant.
  - **I.e. Trader's website does not have to have induced conclusion of that particular contract**
    - **Protective regime is applicable** even if existence of website **is ignored** by particular consumer
    - If inducement took place, this may constitute evidence of 'direction of activity'

- **(6) Jurisdictional regime**

  Available fora
  - **(a) For actions by consumer**: **consumer's domicile** or **trader's domicile (at consumer's choice)** (art. 18(1))
    - **Place of establishment** (art. 7(5) **also available** (art. 17(1)
    - **Place of performance is not available (not even for consumer!)**
    - If consumer **moves** its domicile to another MS after contracting: **new domicile defines forum**
      - **Further choice between old and new domicile** if requirements are satisfied with respect to both MS?
      - **The consumer domicile is not the one he had at the time of contracting, but at the time of filing the lawsuit. Mühlleitner case:** Austrian domicilary. She bought a car in Germany, let's assume that some

months before starting the proceedings she moves to Hungary, then her new domicile is in Hungary. She is then able to rely on her Hungarian domicile.

- **(b) For actions by trader**: **consumer's domicile only**
  - **No alternative: place of performance not available** (Alpenhof)
    - If consumer changed his domicile and his new domicile is **unknown**: **old domicile** (Hypotecni Banka)
  - **No prejudice to bring counterclaim in court of original claim** (refer to art. 8(3))

- **(c) Restricted choice-of-forum possibility**: see, infra.

4. Employment contracts (Art. 20 to 23 BR1)

- **(1) Notion of 'individual contract of employment':** there is no definition of the individual employment contract in Brux1, but based on ECJ, the contract is…:
  - **One that creates a 'lasting bond which brings worker to some extent within organisational framework of employer's business'** (Shenavai). **There must be a subordination.**
    - **Actions** by **trade unions based on collective agreement: outside. They are not individual contract of employment.**
    - **Contract for professional services engaging an independent contractor: not employment, but contract for service** (we apply art. 7(1)(b)).
    - **Formal 'conclusion' of a contract is not necessary** (existence of *de facto* relationship is sufficient)
      - (unpaid) internship/traineeship contract ? Should also be included, even if unpaid. The remuneration, although generally exists, is not an indispensable element.
    - '**Bonus agreement**' with another company of the same group part of employment contract (English case: samengo-turner v. Jhm. M&m [2007]) **is covered.**

      Samengo-Turner v. Jhm. M&m Case: case on bonus agreement. This was concluded by the employee with a company other than the company that was actually employing him. Although the company was part of the same companies, the English Court concluded that this is covered.

      Example-case: a guy, after 35 year of loyal work, received a bonus of 5 million. He was employed by a watch company. We don't know whether if it was a donation or bonus. They were friends, him and the employer. The employer sold the company to a UK company and to show his gratitude, he says in the contract, he wants to give him this money. There is a dispute between this employee and his wife, they live in a

community asset, his wife says that this is part of the remuneration and as a consequence, this is money belonging to both. He says however that this is a gift and therefore falls outside the community asset.

- **(2) Contracts hiring ceo, cfo, cho and other high-placed positions**
  - **No express exclusion**: so, in principle **also covered** (Holtermann)
    - **BUT:** Arcadia petroleum ltd. V. Bosworth and Hurley Case [2016]. English company against two Swiss domiciliaries: breach of trade / industrial secrets, conspiracy**,** misappropriation of funds.
    - **Arcadia petroleum ltd. V. Bosworth and Hurley Case:** Bosworth and Hurley worked for several years in London, in Arcadia petroleum (based in UK). They moved in Switzerland for their retirement. An action for breach of trade secret, industrial secrets, conspiracy**,** misappropriation of funds, in 300 mio pounds was started by Arcadia, former employer. Is it a dispute in tort or is it an employment related dispute? It is a dispute in tort, so place of fort controls, place of harmful event, so UK Courts, have the power to rule. English court of appeal; supreme court of UK refers question)
      - **ECJ (April 2019): no employment contract because**
        - **No subordinate or 'hierarchical' relationship**
        - Defendants were at **liberty** of **drafting their own employment contract as they pleased**.

- **(3) Actions by employees**: **employer's domicile (art. 21(1)(a) or habitual place of work ('… where/from where')**
  - **In case of work carried out at multiple locations**, **one may be** '**habitual**' **place** of **main activities** ('where or from which the employee principally discharges his obligations': Mulox).
    Mulox Case: there was an employee of the Mulox pharmaceutical company. This guy was an employee of the company although he worked from Aix-Les-Bains. He was Dutch. He was responsible to find clients and had to travel around many countries because his job was to find clients. So where did he work? The habitual place of work is the place from which the employed principally discharges his obligations.
    - **Where employee has his main office, where organization takes place, where his/her residence is, respective duration, etc. point to effective center of his/her working activity**
    - **If temporary posting**: **place of posting** (art. 6 Dir. 96/71)

  - **If none of them is 'habitual' at time of proceedings, 'last habitual place' controls** (and not the longest: Weber)

- ‘For the last place’: if employment **terminated** at time of proceedings

➢ **Fall-back rule**: if none of the multiple places may be characterized as ‘habitual’, forum is at the place **where business which engaged employee is or was situated** (art. 21(1)(b)(ii))

- **(4) Actions brought by employers (Art. 22)**
  - ➢ **Place of (current) domicile of employee only: no place of work!.** In the Arcadia Case, if this had been characterized as an individual employment contract, then Mr Bosworth and Hurley, at the time of the labor-contractual relationship, they were living and working in the UK.
  - ➢ **Counterclaim before the court of habitual place of work** seised by employee is possible (Art. 22(2))

Part 2.8: Related-action jurisdiction (Art. 8 BR1, 6 CLug)

1. Rationale

Two claims are brought in the proceedings. The two claims are :…

- **(1) Claim 2 is strongly 'connected' with claim 1**
  - 'so closely connected that it is expedient to **hear and determine them together to avoid risk of irrenconcilable judgments** resulting from **separate proceedings**' (Kalfelis)

- **(2) Claim 2 may be brought before court seized of, and having jurisdiction over claim 1, by virtue of this connection**
  - Sometimes: claim 1 is called 'main', 'initial', or 'original claim' and claim 2 is 'ancillary' or 'related' or 'annexed' claim
  - Even if court in question, that have jurisdiction over claim 1, but **does not have jurisdiction over claim 2** were claim 2 brought as a **self-standing claim, still based on tthis connection, then… :**
  - As a consequence, jurisdiction based on claim 1 is **extended** to **cover claim 2** ('derived jurisdiction' or 'ancillary jurisdiction')
    - **Connected/related claims are 'joined' and consolidated in a single proceeding before a single court**
  - **Rationale:** avoiding **irreconcilable** judgments and **procedural economy**

2. Regime: Four specific scenarios only (art. 8(1) to (4)

Four specific scenarios where related-jurisdiction applies. This is therefore not a general head of jurisdiction. In order for someone to benefit from this jurisdiction, he has to show that one of these four scenarios is satisfied.

- **(1) Jurisdiction based on 'relatedness' is NOT a general head of juris.**
  - Example: art. 8 does not allow court that has jurisdiction with respect to **claim 1** (contractual claim) based on **place of performance of obligation in question** (art. 7(1)) to also entertain
    - extracontractual claim 2 arising out of same relationship (unless court seised of claim 1 has self-standing jurisdiction over for claim 2)
    - contr. claim 2 arising out of same contract (neither sale nor service)

3. First scenario: Co-defendants (e.g. joint debtors, tortfeasors) (art. 8(1))

Case where the plaintiff has a claim against two defendants:

- **(1) May be sued by the claimant in court of domicile of any other defendant**
  - **Terminology**: '**anchor defendant'** (=refers to the defendant whose domicile is actually used as a forum) and '**additional defendant'** (= co-defendant who is hailed before the court of a country where he is not domiciled, but because the claim against him is connected with a claim expressed against the anchor defendant, then we must not sue him at his domicile)
    - **Jurisdiction of the court responsible for claim1, main claim, cannot be based on a special head of jurisdiction (under art. 7) or choice of forum (art. 25):** jurisdiction over the anchored-defendant, has to be placed at the domicile of anchored-defendant and not on place where the anchored-defendant acted.
    - If co-defendant **domiciled outside EU**, art. 8(1) **doesn't apply**
    - **Example-case:** I purchased a bike, like Mr Keinz, in CH from Cyril, company in CH, Cyril purchased that bike from Diane, France. The bike is defective. I don't know where the problem comes from. I start an action against the retailor and the manufacturer. I can rely on the domicile of Cyril or in Diane's domicile. The test is: to file a unique claim, we must see whether there is a risk of irreconcilable judgement if it is not done together. The two claims here: **if done separately, there could be a risk of irreconcilable judgement indeed.**

- **(2) It is an option for claimant, not an obligation:**
  - **Claimant may file two separate actions against two defendants.**
    Kainz Case: he is entitled to sue them both of them at the German Court or he is also entitled to sue them both at the Austrian Court of the Austrian retailer. But he can also file 2 different proceedings.

- **(3) BUT: claims brought against co-defendants have to be 'so closely connected that it is expedient to hear and determine them together to avoid risk of irreconcilable judgments'**
  - **Two claims have to arise out of the same factual situation and to involve same legal situation (Roche).**
    - **Kainz Caise:** the two claims are triggered by the same transaction, and it is clear.
    - **Roche Case:** pharmaceutical company. Mr. Primus and Mr. Goldberg, two US domicilaries. They had patent rights in many EU countries (Sweden, France, etc.). They claimed that Roche was infringing these patents. It was an infringement action. They filed a lawsuit against Roche Sweden, Roche Belgium, Roche Italy, Roche Netherlands. So they filed it against multiple co-defendants, all of them being part of the Roche group, but being in terms of corporate law, independent entities. They were contending that these entities were acting in concert with each other, against the two US guys. The ECJ

said that there was no risk of irreconcilable judgement because each of the case had a life of its own. And every patent is covered by their national legislation: the identity of legal situation did not exist. The ECJ said there was no evidence that they cooperated together.

- **Infringement of different patents by different defendants not met**
- **Different legal bases (Freeport) is no obstacle *per se* but probably** (although unsettled), at least in copyright infringement, defendants have to have **knowledge of one another's behaviour** (Painer: to read).
  - ⇒ **Painer case:** Natasha Kampusch, Australian domicilary. She was held for 8 years by a man. Before that, Mrs Painer, was able to take some pictures of her. When she was able to flee from her capturer, all of the sudden, you had many newspapers, many domiciled in Germany (Spiegel, Bild etc.) where publishing the photographs of Mrs. Painer. She says that these photographs should not have been published because she had a copyright on it. She wants compensation, she files a claim in Austria against a defendant and many co-defendants that were domiciled in Germany. Is it possible for Mrs. Painer to have the claim she is asserting against the German defendants by the Austrian Courts? We have to see whether the copyright claims would risk an irreconcilable judgement in two different proceedings. A german copyright is not the same as an austrian one, but the legal bases are very similar. Even if they are not identical, it is not an obstacle to the "co-defendance". **However they probably did not act "concertedly", and this could therefore be an obstacle.**

- **(4) Claim 1 does not have to be admissible ('recevable') (Reisch) (but: plausible or seriously arguable)**
  - But anchor defendant's domicile **not available** when sole purpose is to **remove additional defendant** from its 'natural' forum **(abuse of process)**
  - **Example-case**: I want to file a claim against a manufacturer company. In the Reisch case, the ECJ said that even if the action made against Cyril is based on CH procedural law (irrecevable), because the Cyril is subject to insolvency proceedings, so I am bared to start an action against you, but this is not an obstacle to start an action against Diane (based in FR) in CH, if I am in a good faith. But the anchor-defendant domiciliary, Cyril (based in CH), is not available when the purpose is to move the defendant from its natural forum. In other words, if the only reason why I start an action against both of you is because I want to be able to start an action in the Swiss forum ; so I did not have a problem with Cyril, but I imagine one in order to sue Diane in Switzerland, then this does not work and CH Court must dismiss jurisdiction.

4. Second scenario: Third party proceedings (art. 8(2)

- **(1) Action on warranty, guarantee/other third-party proceedings**
  - **Based on contract** (guarantee, insurance, etc.) **or tort**
  - **Example-case:** I start an action against a retailer (Cyril) who sold a bike to me. The retailor is based in CH, I rely on general forum. Then Cyril can file a claim against the manufacturer, or he can be held to receive an indemnification, should he be found liable, from his own insurance. He would be able to make a third party complaint against the manufacturer in order to have the judgment binding on Diane, manufacturer, as well as against his own insurance.

- **(2) May be brought before Court seized of original/main proceedings**
  - **Whatever the basis of court's jurisdiction**
    - Not only domicile of defendant, but also place of performance, place of tort, choice of forum
  - **Procedural admissibility of third-party proceedings governed by law of the court seized**
    - Only action brought *against* third party or also action *by* third party as intervener? (*unclear*)

- **(3) But not available if only object is to remove third party from jurisdiction of court having competence with respect to him/her:** if my objective is to start an action against your insurance in Germany, but I want you on board also because you are established in the right place (CH), because I want to rely on a CH forum, the only purpose for me to start an action against you in CH, is because I know you would have then to make a third party claim against your insurer in Germany. Then this would not work out and this strategy is discouraged because the CH-court would have to decline jurisdiction.

5. Third scenario: Counterclaim (art. 8(3))

- **(1) Claim made by defendant against claimant ('cross-claim')**
  - Usually claim made with a **statement of defense**.
  - **A counterclaim is**: a claim that the defendant files, against the claimant. Not only the defendant defenses himself saying he did not do anything wrong, but here it is really a claim brought independently.
    - ⇒ **Example-case:** the plaintiff in Geneva started action a defendant, this action arises out of an agreement. The defendant in the same proceedings, fires back and starts a claim against the claimant. The crossclaim is based, not on the same agreement of the first claim, but to a second agreement, really connected to the first one.
  - **Not a simple exception or purely defensive set-off**
  - **By the defendant, not by a sister company of the defendant**

- **(2) If it arises 'from the same contract or facts'**
  - Including related contracts? probably yes, according to interpretation.
  - General unitary transaction

- **(3) May be brought before court of initial claim**

Part 2.9: Determination as to jurisdiction

1. If defendant appears without contesting jurisdiction

- **(1) Defendant is regarded as having accepted jurisdiction** (art. 26(1)BRIa) (‘**tacit submission**’ rule) : the defendant, without contesting the court seized, he is regarded as having accepted.
  - **(i) Only one exception: exclusive jurisdiction is vested with another court.**
    - **Remember**: exclusive jurisdiction of another court under art. 24 BR1a has to be established by court seized on its motion
    - **In which case, court seized has to decline jurisdiction**
    - **Rösler Case:** both parties where Germans, the defendant did not have problem with German Court being competent, but the dispute fell under an exclusive jurisdiction Court, that was the Italian Court of situation of the immovable.
  - **(ii) Tacit submission principle also applies when parties had designated another court by agreement** (Elefanten Schuh). Assuming there is a valid choice of court clause, saying that all disputes have to be brought before the courts in Germany, because even if you, Cyril, are established in CH, you belong to a group of a mother company established in Germany. Assuming I am a professional biker and assuming therefore that rules on consumers do not apply. The contract has a choice of forum: I have a problem with my bike and file a lawsuit against you before CH authorities. You file a statement of defense without raising an issue as to the jurisdiction of the CH Court. You can do this.
  - **(iii) Principle also applies to consumers, employees and insured BUT**
    - Court seised has to ensure **those defendants are informed of (a) their right to contest jurisdiction** and **(b) consequences of (non)-appearance** (art. 26(2)) (addition made by BRIa**, not in CL**).

      Alpenhof Example: Alpenhof. The hotel started a claim against a client that did not pay the sum of money. He was hailed before a Court in Austria. As a consumer, he can raise a motion to say that the Austrian court does not have jurisdiction, and that should be hailed before courts of his domicile. Let’s assume he files a statement of defense without challenging the jurisdiction of the Austrian Court. He argues with respect of the merits of the case, without saying anything related to jurisdiction. What the Austrian Court has to do now, based on Brux1a, is to make sure that he is aware of the fact that he can simply, by raising a motion to dismiss, cause the Austrian Court to decline jurisdiction and force Austrian plaintiff to start new proceedings before the court of competent jurisdiction in Germany. The attention of the protective party, whether it is consumer or employee, has to be driven by the court to that issue of jurisdiction.

- **(iv) Contesting jurisdiction is no longer possible after first defense as to substance has been submitted**
  - **Defendant could not challenge jurisdiction on appeal for the first time** (BR1 prevents domestic proc. law from providing otherwise): it would not be possible for the law of the forum seized, to allow challenges of jurisdiction on appeal level. Even if national laws permit appeal.

2. If defendant contests jurisdiction and subsidiarily (but in same statement of defence) makes submission as to the substance

- **Defendant is not regarded as having voluntarily submitted to jurisdiction** (Elefanten Schuh). The court has to determine as first issue, whether it has or not jurisdiction.
- **This is common in CH!**

3. If defendant does not enter appearance

- **Case 1**: **exclusive jurisdiction of another MS (art. 27): Court seised declines jurisdiction on its motion.** We've seen this before.

- **Case 2: if court seised establishes that it has no jurisdiction for other reasons: it also declines jurisdiction on its motion (art. 28(1))**

- **Case 3**: **if court holds that it does have jurisdiction, it must stay proceedings until some verifications have been effected to make sure defendant has been properly served**
  - **(i) Before the courts concludes on its jurisdiction, the court must make verifications**. The idea is to make sure the defendant has failed to appear in court, was aware of the proceedings, before declaring default proceedings. **The rule on service of process must have been complied with.**
  - **(ii) What are these scenarios? There are four. They depend on where the defendant has his domicile.** The service of process has to be effected where he has his domicile. Nature and extent depend on where service has to take place
    - **(a) If service is within forum, court should make sure defendant received statement of claims in sufficient time to prepare his defense. In other words:** if the defendant is domiciled in the country where the forum is, then this is not cross-border service, it is domestic service. (art. 28(2)
      - Or 'all **necessary steps [must]** have been taken' to this effect
    - **(b) If service in another MS, compliance with Regulation 1393/2007** ('Service Regulation') is required (art. 28(3)): this **is an intra-European service**

    - **(c) If service in a non-MS (and BR1a still applies) which is State party to 1965 Hague Service Convention** (some 70 signatory states), compliance with HagueConv. is required (art. 28(4)): Remember, Brux1 applies even if the defendant

lives outside the EU, if this third country is a signatory country of the Hague Convention 1965 service convention, then compliance with this Convention is required.

- **(d) If service is a non-MS which is not party to 1965 HConv, then forum rules on international service of process apply**

4. Assessment of facts triggering jurisdiction

- **(1) What kind of inquiry court has to engage in to establish facts relevant to jurisdiction? What standard of proof?**
  - Where is pl. of **harmful event** (art. 7.2)? where is pl. of **delivery**? (7.1)

- **(2) Forum national law and practices control**
  - **Most countries rely on plaintiff's allegations to the extent they are not *prima facie* unreasonable (*prima facie* assessment)**
    Example-case: a court is seized by a person, claimant, that is saying that the Court of Poland is competent because part of the harmful conduct has taken place in the polish country. This is an allegation of a fact that is relevant for the purposes of establishing jurisdiction. This allegation of fact that has consequences is contained in the statement of claims. **What does the polish Court has to do? Has it to undergo to an investigation whether the conduct that has been carried out, is harmful, unlawful, and where exactly the conduct has taken place OR is the polish Court allowed to rely on the plaintiff allegations? There is no clear rule emanating from Brux1a, so practice of MS may vary**. Most countries rely on plaintiff's allegation provided they are not unreasonable. If based on the allegation of facts, the court may also look at counter allegations, to assess what the claimant is contending, is reasonable, this is the only standard that must be complied with. **SO, IF:**
    - **Step 1: *prima facie* assessment**. It may happen that court holds that e.g. place of tortious conduct for the purposes of jurisdiction is at least in part in the **forum** and, as a result, **asserts jurisdiction** based on Article 7(2) BR1a.
      IF *prima facie* what the plaintiff is contending males sense, there is an arguable case about the conduct having taken place in Poland and this conduct being unlawful, that is fine, the polish court will assert jurisdiction.
      IF STEP 1 IS OVER because the Polish court concludes that part of the conduct has taken place in Poland and part of this conduct may allegedly be unlawful, then WE GO TO STEP 2.
    - **Step 2**: **full investigation**: When examining the substance based on thorough investigation, it concludes that. We make an investigation as to the merits of the case. **The polish court has to assess really, this conduct has taken place and whether this conduct constitutes a tort.**
      IF THERE IS NO UNLAWFUL CONDUCT:

- **no unlawful conduct occurred** (in the forum or elsewhere)
- conduct which occurred in the forum is **lawful** and **unlawful conduct took place in another country:** jurisdiction remains established (as a consequence of Step 1) **and cannot be called into question.** In this case, should Polish Court dismiss the case, because no unlawful conduct has taken place in Poland? In this case, once the Poland has asserted jurisdiction based on *prima facie* assessment, the Court may conclude that part of the conduct was unlawful, even if this conduct did not take place in Poland, still the Polish Court is competent, and may grant compensation to the plaintiff.

P.S. so-called 'théorie des faits doublement pertinents'
→ **the Polish court will reject the claim**

- **Other countries allow courts to engage in in-depth analysis of allegations** (as to jurisdiction) by plaintiff and counter-allegations (as to jurisdiction) by defendant
  - including some **evidence-taking activity** (e.g. hearing witnesses)

Example-Case:
Prof. Romano worked on an international fraud case. The claimant contended that a Saudi national and domiciliary had perpetrated a fraud on an international scale, having stolen millions of dollars. The two parties were domiciled in Saudi Arabia. The defendant was the beneficial owner in Caribbean jurisdiction of many companies - safe heaven - most of those companies being in Cayman Islands. The claimant started an action for compensation for fraud in Cayman Islands. The Courts in Cayman had to determine whether it had competence over the dispute and based on a preliminary analysis, the court in Cayman concluded that the defendant, although domiciled in Saudi Arabia, had also acted potentially unlawfully in Cayman Islands. Part of the alleged conduct had taken place in Cayman. This is where the money stolen in Saudi Arabia, landed in a safe bank account owned by the defendant in Cayman. **The answer as to the jurisdiction was that part of the conduct has taken place in the Cayman Islands,** as a consequence we have the power to adjudicate on this international fraud case. The Court in Cayman concluded that there was a fraud, but the conduct for which the defendant could have been blamed for, had taken place exclusively on the territory of Saudi Arabia. But still because Cayman was competent, they punished the defendant to pay 2.5 bio USD. What the judgement creditor sought to do, is to obtain recognition of this judgement in CH. The CH court had to see whether the court in Cayman had asserted jurisdiction based on a rule that is compatible with jurisdiction law in CH.

5. When BRIa does not apply: Consequences

- **(1) Examples :**
  - Contract between a **Canadian**, Ontario-based company, and a **German** company for the supply of aluminum. Based on the contract, the place of delivery is in Le Havre. The domicile of the defendant is Canada, outside EU.
    - Place of delivery: **Le Havre**, a port in **France**
  - German company wants to sue Canadian company: something goes wrong with the contract.

- **Domicile of def.**: Canada, **outside EU**; no exclusive jurisdiction of court in MS (art. 24 does not apply), no *choice of forum* (art. 25 does not apply), plaintiff is no consumer (art. 18(1) does not apply)
- **As a result, dispute outside geographical reach of BR1a**
  - **Admittedly, not entirely rational** (keep a *critical eye* on legislation of private international law!): **this transaction has a strong connection with EU**: domicile of one party is in EU (Germany), place of performance in EU (France)
  - **Next edition of BR1a** (by 2025?): this geographical limitation will **likely** be eliminated, BR1a will be extended to cover actions **against non-EU defendants as well**
    - In which case: place of delivery (art. 7.1.lit b), France, will probably define jurisdiction, but not place of assets (assuming defendant has assets in Germany: see next slide)

- **(2) If German company brings action before German court**
  - German court falls back on **German rules on jurisdiction**
  - Look at art. **23 ZPO** (=German Civ. Proc.) which provides for forum in Germany if defendant **has assets** in Germany
    - '*Für Klagen wegen vermögensrechtlicher Ansprüche gegen eine Person, die **im Inland keinen Wohnsitz** hat, ist das Gericht zuständig, in dessen Bezirk sich **Vermögen derselben** oder der mit der Klage in Anspruch genommene Gegenstand befin*det': **part of the assets = is sufficient**
    - '***exorbitant*** basis for jurisdiction', banned in BR1a as against *EU defendant*, but **still permitted** as against *non-EU defendant*
    - so, if Canadian defendant *has assets in Germany*, German court **should affirm jurisdiction based on German rules**
    - Canadian defendant **unlikely to be happy with this**:
      - This is what he/she might think: '*Why do you apply against me a rule on jurisdiction that you know is **exorbitant,** that you don't apply against French, Polish, Spanish… defendant*?'

  P.S. German judgment will benefit (!) from **BR1a** for recogn./enf. in EU

- **(3) If German company brings action before French court**
  - French court would also conclude Brussels Ia does *not* apply
  - French court would fall back on ***French rules*** **on intern. jurisdiction**
    - if place of performance is accepted under French jurisdiction law, then French court will confirm they have jurisdiction

PART 3 – COORDINATING JURISDICTION

3.1 Jurisdiction Agreement: BR1a

1. 'Jurisdiction agreement' ('forum-selecting agreement'):

First mean to coordinate jurisdiction that is available, in Brux1, CLug. The term "jurisdiction agreement" or "forum selecting agreement" …

- **(1) Designates a bilateral or multilateral act having dual nature:**
  - **Contractual nature :**
    - **Validity**: formal validity, substantive validity, as to capacity, consent (which may be vitiated through error, fraud, duress, misrepresentation...)
    - A jurisdictional agreement is an agreement so has to be valid!
  - **Procedural effects**: designating **forum where to litigate**, i.e. the '**designated forum**' or '**chosen forum**' or '**chosen court'**. The court of this agreement = the essential effects, reason why the parties conclude a jurisdiction agreement is to fix and establish the forum where they are going to litigate. It is the "designated forum".

- **(2) 'Jurisdiction clause', 'forum-selection' or 'choice-of-forum' clause is a clause included in a substantive agreement**
  - Id est, a **commercial contract**, or **articles of association** (Powell Duffryn, 'multilateral agreement'), **shareholders' agreement** (cp Gazprom)
  - It is a clause that is included in a substantive agreement: imagine the investment contract that BVG concluded with JP Morgan. High risk and profit investment contract. There was a clause saying that all dispute had to be brought before the commercial court in London. There was a choice of forum providing for the jurisdiction, included in the investment contract. The investment contract is the substantive agreement as opposed to the jurisdictional agreement.
  - In Gazprom: three companies established a joint-venture domiciled in Lithuania and those 3 companies concluded a share-holding agreement that contained not a choice of forum clause, but a choice of arbitration clause.

- **(3) 'Prorogation of jurisdiction'** designates the fact of conferring jurisdiction to a court that ordinarily (based on ordinary rules) is not vested with it.

2. 'Choice of forum'

- **(1) Larger concept also covering** '**unilateral choice**' other than by filing a suit (technically: no 'agreement'). Example: inheritance. Inheritance case. A lady died, 92. She had claimed to be domiciled in Bern. She left 3 testamentary papers, she included in those a choice of forum clause, if a dispute arises, I would like the CH courts to be exclusively competent to hear those disputes. This is a choice of forum: it cannot be an agreement, it is unilateral.

- **(2) Few examples only of unilateral designation**

- Designation by the **settlor** of a **trust**, eg **trust deed** (article 25(3) BR1a)
- **Testamentary designation** by *de cujus* (if permissible)

3. Scope of BR1a, Art. 25 Brux1a:

- **If designated forum or chosen forum** is **in a Member State**

- **Irrespective of domicile of the parties** (even if both in non-MS)

4. Formal validity:

Agreement is valid if one of four alternative requirements is satisfied (art. 25.1 BR1a)

- **(1) Requirement 1: written form, including by electronic means**
  - **(a) If a contract signed by both parties incorporating by express reference another document (eg standard terms used by one party) containing jurisdiction clause, written form is satisfied** (Estasis): substantive agreement bearing signature of both parties.
    This also works when:
    - **(i) Same applies if written offer incorporates jurisd. clause and is followed by written (separate) acceptance signed by offeree (7E, English case).** One of the clauses refers to a separate document, still because there is an express reference, the parties are to have accepted all terms and conditions that are in that other document **(letter of acceptance). Written offer is followed by a written acceptance.**

    - **(ii)** '**E-transactions**' (**B2B)**: if window asks 'click here to view terms and conditions' and to complete transaction you have to click on 'I agree with terms and conditions' ('**click-wrapping**'), **writing** satisfied (El Madjoub).
      El Madjoub case: sale of the car, the buyer was a professional. He was a retailor, domiciled in Germany, and he visited the website of the seller. He completed a transaction: he had to click on a window saying, "I agree with T&C". He agreed even though those terms contained a jurisdictional clause. These conditions were not displayed on the screen. The window containing the list of T&C did not open automatically and the purchase therefore decided not to view these T&C. The choice of forum was in Louvain, Belgium, where the mother company was domiciled [the Tochtergesellschaft was in Germany but the Muttergesellschaft was in Belgium]. Choice of forum was incorporated in the E-transaction. There was a problem with the delivery of the car, it is not delivered. The seller says there is a problem. The German guy was not satisfied with this and said it was an excuse. The German buyer starts an action against the German seller in Germany. The German defendant raises a motion to dismiss, saying there is a choice of forum in Louvain. The German court should not have jurisdiction. The German buyer said he never consented to this forum and

because the choice of forum was included in a standardized T&C, it did not open automatically, the written form was not satisfied for him. **The ECJ replies that indeed the written form was satisfied and so, the fact that the transaction has been completed via a "click" there is no obstacle to this forum.**

- Requirement 1 probably **not satisfied if standard terms are available somewhere on website, but no action is required on customers' part showing he or she was aware of them**

- **(iii) Consumer contracts (B2C) are excluded from art. 25**

➢ **(b) No separate signature is required by BR1a nor can be required** by **national law**, **BR1a being exhaustive in point of form**

P.S. if after contract is concluded, a party sends invoice incorporating jurisd. clause to the other, which fails to object (Gasser): written form probably not satisfied (alternative requirement 2, 3, or 4 may be), although another requirement, may be fulfilled.

Gasser Case: contractual dispute between Gasser GmbH, limited company in Vienna. On the other side, Misat, Italian company. For federal years Misat bought baby clothes from the Austrian company. The Austrian company had kept sending invoices to the buyer, who honored those invoices. On the back of it, a jurisdictional clause said that all disputes should be submitted in Vienna. At some point, the Italian company stopped paying the invoices. Because Misat new that Gasser would file a claim, Misat ran to the Italian forum and filed an action seeking declaration of termination of the contract. Some weeks after, Gasser filed a claim in Vienna. Misat was accused to delay justice, they wanted to prevent Austrian Courts to hear the dispute. Based on Lis pendens, even though Austrian Court was the designated one, it was to the first seized, so the Italian one, to determine whether or not the choice of forum was valid. The Italian Court takes at least a year for such a decision.

▪ **(2) Requirement 2: written evidence of an oral agreement**
  - ➢ E.g. **oral substantive agreement includes** oral jurisdiction agreement: if there is a substantive agreement that includes an oral jurisdiction agreement, then this oral jurisdiction agreement … →
  - ➢ **Is evidenced by a confirmatory document sent by one party** to the other which failed to object (Segoura). So, document emanating from one party only is sufficient to trigger validity.

▪ **(3) Requirement 3: form which accords with bilaterally established practices**
  - ➢ **(a)** Language taken from the **1980 Vienna Sales Convention** (CISG)
  - ➢ **(b)** Concept to be interpreted autonomously and without reference to any particular national law
  - ➢ E.g. **distribution agreement** containing jurisdiction clause has expired but **parties tacitly extend agreement**, including clause: a distribution

agreement is done by a Swiss-making company in Neuchâtel and a Jordanian distributor. The CH watch-maker had to supply watches to the Jordanian distributor. The Jordanian had to distribute watches in the Persian Gulf. The duration of contract was set for 3 years. At the end of these 3 years, none of the parties concluded it. Tacit renewal of it: after this expire date however, there was a problem with a delivery. The supplier in Neuchâtel filed a lawsuit in Neuchâtel, because even if the place of delivery was Jordan, that agreement contained a choice of forum in Neuchâtel. The defendant, the Jordanian domiciliary, said that the choice of forum is not valid because it had a duration of 3 years. What Prof Romano said that we have to use the "bilateral established practice" as a resolution, because the parties continued, in spite the expiry of the duration of the initial contract to execute the obligations, they could have taken to have, tacitly, agreed on the continuation of the initially written choice of forum.

  - **At least if contract validly renewed according to applicable law**

- **(c) Standard terms previously used by parties in their dealings will not apply if negotiations leading to new agreement clearly indicate a contrary intention** (HDW v. CNAN, French case)

- **(4) Requirement 4: form which accords with commercial usages**
  - These are '**usages widely known and regularly observed'** in the **trade or commerce** involved of which parties ought to be **aware**:
  - E.g. in transportation by sea, **bill of lading** signed in the front by the parties and jurisdiction clause **printed on the back** (Castelletti), in the maritime sector.

P.S. Important: if one of formal requirements under article 25 is satisfied, consent by the parties is presumed. They deal with forum but also with consense.

5. Substantive validity: aspects regulated by BR

- **(1) Scope** (article 25(1)
  - **(a) Parties are free to submit to the designated forum** 'Any **dispute which have arisen, or which may arise…**'
  - **(b) In connection with a 'particular relationship'**
  - **(c) Relationship has to be related to matters covered by BR1a:** contracts, torts, company law, and so on (except matters infra)
    - The **extent/scope of the clause** (which disputes it actually covers) **sometimes subject to controversy** (cp arbitration clause). Arbitration field: **Gazprom**. One of the shareholders (Ministry of Energy) said that the arbitration clause, not that it was invalid, but that the dispute (to choose another director) did not fall under the scope of the arbitral clause as incorporated in the shareholders' agreement.
  - **(d) Application to third parties: excluded except in two scenarios**:
    1) contract concluded for the benefit of a third party (eg. insurance). The third party, in insurance field, is not only

bound by the choice of forum, it is also entitled to benefit from the forum chosen by the parties;
2) if under national law, (originally) third party has succeeded to the rights and obligations of one of the parties under the contract (Tilly Russ): then, the transferee or assignee, is bound by the choice of forum and is entitled to benefit from it.

- **(2) Acceptable choice of forum**
  - **(a) Choice of neutral forum is permissible**
    - **No real or substantial connection** between the dispute and the MS of the designated court required, contrarily to China, where a connection is required.
  - **(b) Jurisdiction agreement for benefit of one party only is permissible (asymmetrical choice of forum):** if the choice is only binding on me, it is not binding on you. You are the claimant, you can file a claim against me, before the choice of forum as well as any other forum having jurisdiction.
  - **(c) Court/courts may be designated directly or indirectly through reference to objective factors** (e.g. Hypotecni Bank). In insurance contracts, it happens that the forum before which all disputes have to be submitted, is the one of the domicile of the insurer or of the bank, at the time of filing the proceedings.

- **(3) Jurisidiction clause is independent** of the other terms of contract (article 25(5))('**severability** principle')
  - Invalidity of the **contract does not** in principle automatically entail invalidity of the jurisdiction clause (article 25(5) BR1a; cp. BVG) reliance on a clause in alleged contract is possible by a defendant that **denies existence** of alleged contract (English cases

6. Substantive validity: aspects not regulated by BR

- **(1) Compliance with formal requirements leads to a presumption of consent**

- **(2) Lack of consent** owing to **error, fraud, improper pressure**, lack of authority... but what **substantive law** applies to those aspects? Depending on what substantive law applies to the agreement, you might try to contend that the clause is not binding on you, even if the clause is valid as to form, it is not valid as to substance. One of the questions is what law applies to those aspects that are unregulated by Brux1? There is no clear definition on what is error, fraud or improper pressure in Brux1. **We are left to fall back on national law. In all Brux1 regulations, there is no specific answer!**
  - **(i) In old BR1/in LConv**: no specific answer, unclear, **three** options:
    - substantive law of the country of the judge seized (which may not be the designated court)
    - law designated by the choice-of-law rules of the judge seized
    - law of the MS of designated court

- →**Remember BVG Case**. There was a choice of forum clause incorporated in the investment agreement. English proceedings as well as German proceedings. Let's assume that BVG, is not willing to pay 100mio under a contract, is filing an application to the German Courts saying the substantive contract is invalid but also the jurisdiction agreement is invalid. It was inducing error. What law applies to this? German law applying to that particular contractual component? Or, law designated by the choice of law rule of the judge seized (German Court deciding UK law rules apply) or finally, law of the MS of designated Court (UK law).

➢ **(ii) In BR1a (NEW)**: law of the **Member State** of the **designated court** (article 25(1) BR1) is applicable…

- '**unless the agreement is null and void as to its substantive validity under the law of that Member State**'
  - In line with **Hague Choice of Court Convention** (2005) (which is force since 1 Oct 2015 but in **EU, Mexico and Singapore** only)
  - What is **unclear** is whether 'law of that Member State' refers to **substantive law** (to be preferred) or **choice-of-law rules** as well
  - What is clear is that **any other court** before which validity of the clause may be questioned has to **refrain from applying** its own law

7. Effects of the Jurisdiction

▪ **(1) Positive effect**

➢ **(a) Conferring jurisdiction on designated court as to substance of the proceedings (art. 25(1))**

- **Jurisdiction is deemed to be exclusive unless otherwise agreed by parties** (strong but not irrebuttable presumption)
  - If non-exclusive, other ***fora*** **continue to be available**
- **No discretion of chosen court** to decline in favor of court of non-MS even if domiciles of both parties is in a non-MS (even if domicile of both parties are outside the EU). There is an obligation (provided the clause is valid as to form and to substance) for the chosen forum to decide on the merits.
- **NEW**: **conferring jurisdiction on the designated court as to rule on validity or applicability of the jurisdiction agreement itself** (to counter effects of Gasser) (**article 31(2)**). If the Italian company is seeking a declaration of termination of contract before the Italian Courts (Court 1 is Italian court) and some weeks later the Austrian company is filing an action for performance of the contract requiring payment before a Court in Vienna (chosen forum), then if there is a parallel proceedings situation – Court 1 Italian and Court 2, Austria, knowing that Court 2 is chosen one - Brux1 says that Court 2, chosen forum, to be exclusively competent to rule on applicability / validity of the jurisdiction agreement. So Court 1, if seized first has to stay the proceedings and let the Austrian

1 to make the job to decide whether the Austrian Court is validly competent

- **If non-designated court seized first and designated court seized second and validity of agreement is contested, non-designated court has to stay proceedings ('prior-in-time rule' does not apply)**

- **(2) Negative effect**
  - **(b) All courts except the designated court have to decline jurisdiction (but only if agreement or clause is exclusive, which is presumed to be)**
    - Once designated court has **established jurisdiction**, all courts except the designated one, have to decline jurisdiction and stay proceedings (art. 31(3) BR1a

8. Restrictions as to substantive validity (art. 25(4))

- **(1) Consumer contracts (art. 19): agreement valid only if (one of these 3 scenarios)**
  - **It is entered into after the dispute has arisen; OR**
  - **It enlarges jurisdictional options already available to consumer; OR**
    - e.g. allowing consumer to sue at place of performance, without preventing the consumer to file at the place of domicile of the trader.
  - **If it confers jurisdiction on the courts of the MS where**
    - **consumer and professional were both domiciled** or **habitually resident at the time of conclusion; and is not contrary to the law of that MS**
      → **purpose**: preventing consumer from moving to another MS and suing at his/her new domicile if there is choice-of-forum agreement designating court of earlier common domicile
    - **all requirements** under art. 25 have then to be satisfied

- **(2) Employment contracts (art. 23): agreement valid only if**
  - It is entered into **after the dispute** has arisen **OR**
  - It **enlarges** the options already available to employee.
  - **Example**: employer and employee have a dispute. They terminate the contract of employment and they finally are able to reach an amicable settlement. That settlement may incorporate a choice of forum clause. That clause is concluded after the dispute has arisen.
  - **It is binding for employer and employees**

- **(3) In the areas covered by exclusive jurisdiction (art. 24): agreement 'no legal force'.** Even if the Court is the chosen court, if it says it is another MS to determine, then it has to decline jurisdiction even if it is the court indicated in a choice of forum clause.

3.2 Lis pendens

1. Scope of application of BR/CLug - Lis Pendens rules

Court 1 (seized first) and Court 2 (seized secondly): "Lis alibi pendens" *(le litige est pendant autre part)*

- **(1) Proceeding 1 and proceeding 2 are initiated** :
  Action 1 and action 2 are filed – before courts of **two Member States, Court 1 and Court 2** (article 29 Brux1)
  - Proceedings fall within the **substantive scope** of BR (deal with contract, company law etc.)
  - Court 1 and Court 2 (**may) have both (*prima facie*) jurisdiction**
  - Whether jurisdiction of court 1 and court 2 is based on **BR1** or on **domestic law** (should BR not apply) is irrelevant
    - If proceedings are pending before two courts of the **same** MS (domestic *lis pendens*), **domestic procedural rules** apply
    - **Example (DE/CA/FR):** a German company starts a lawsuit before a Court in Germany, where the defendant, Canadian, has assets. The jurisdiction of the German Court is based on German domestic rules. Let's assume the Canadian company sues the German company in France, place of delivery. The French proceedings have been initiated after the German proceedings. French proceedings, French Court have jurisdiction, based on Brux1, because French proceedings have been initiated by an out of EU claimant against an EU defendant, the defendant is domiciled in the EU so Brux1 applies to jurisdiction of the French Court. Brux1 does not apply to German Court. The fact that rules on jurisdiction that are applicable before one or both court, is based on national law, as opposed to Brux1, does not prevent the application of Art. 29 Brux1. **So French Courts seize the second, if German Courts establish they have jurisdiction, even if that jurisdiction is based on German rules, still French courts have to apply Brux1, in terms of Lis Pendens and has to stay proceedings as a first step, and subsequently decline jurisdiction (not for lack of jurisdiction, but for lis pendens!)**

- **(2) If proceeding 2 is pending before a Member State and proceeding 1 is pending before a third *State*: then Brux1 applies. NEW article 33. There is no equivalent in CLug.**
  - Brux1 applies in the perspective of **Member State court** only, court of third State is **not** bound by BR
    - CLug does **not** incorporate *lis pendens* rule with respect to **third** States
      - If a third State is involved, **national rules on international *lis pendens*** apply (in Switzerland: article 9 SPILA)

- **Example-case**: German/Canadian/French case. Let's assume that part of the delivery had to take place in Canada. The defendant company starts action before courts in Ontario. The German company then starts an action in Germany consequently. We have a situation of parallel proceedings: proceeding 1 is pending before a non-EU Court. Proceeding 2 is pending before an EU Court. Brux1a rules on Lis Pendens applies in perspective of the German Court (and clearly not in perspective of the Canadian Court, because Canada is not bound by Brux1). Canada cannot rely on Brux1 because Brux1 is by no means binding on Canadian Courts, but based on perspective of the German Courts, seized second, Brux1 applies.

2. Requirements: identity of actions

Proceedings 1 have been initiated before a Court in Canada and Proceedings 2 in the EU, most of the time whe there is a Lis Pendens to which brux1 is applicable, there is a competition or a tension between Courts of 2 MS. What are the requirements of a lis pendens?
What does identity of actions mean, for lis pendens?

- **(1) Identity of parties ('between the same parties') (art 29(1)):**
  - **(i) Procedural position is irrelevant**
    - Party 1 may be claimant in action 1 and defendant in action 2 and conversely (think about BVG, English v. German court: German company started proceedings in DE and English subsidiary of JPM started proceedings in UK and so the procedural position was reversed but this is no obstacle to retain identity of parties)
    - Sometimes: Party 1 files same action before Court 1 and Court 2: to avoid statute of limitation should Court 1 dismiss. Example-case: the claimant filed an action in Monaco and field the same, before the same defendant, in Bern. Filing twice the same action costs money, you have to pay two lawyers. The claimant must hire lawyers in Monaco and in CH. Why do that? Avoiding prescription, déchéance, délai fixe etc. This is consistent in international law. Especially in big money cases.
  - **(ii) Flexible notion: if interests of two persons/entities are identical and indissociable (or indivisible), those persons are regarded as the same person**
    - If Party 3 is **assignee** of rights of Party 1, Party 1 (involved in action 1) and Party 3 (involved in action 2) **are same**
    - If insurer sues in insured's name under **subrogation**, and insured is sued in another action, insurer and insured are **same party** (Drouot)
    - **Action brought against ship** under English law before Court 1 and action brought by shipowner in Court 2: ship and shipowner **same party.**
    - If action 1 is against company in **solvent liquidation** and action 2 is **brought by or against liquidator**, company and liquidator **same** party (Kolden v. Rodette, British case)

- **(iii) Partial identity**
  - **Where some, not all parties to procedure 2, are same as in procedure 1, *lis pendens* operate between common parties only to both proceedings** (Tatry)
  - **Procedure 2 may continue between parties not involved in procedure 1**
    - **But court 2 may rely on related action (article 34) to avoid fragmentation of proceedings**

- **(2) Identity of substance:**
  It is the identity of subject-matter. 'Cause of action' (English revision) identity of 'objet' and 'cause' (French version: 'triple identity': parties, objet, cause)
  - '**Objet**': **legal purpose**, **i.e. intended legal outcome**
    - 'The end the action has in view' (Tatry)
    - **But broad and flexible interpretation**: **core of the two proceedings are the same** ('**Kernpunkttheorie**') **(not limited to formal identity in the specific relief sought)**
  - '**Cause**': **juridical basis of the claim**
    - **Comprises facts and legal rules relied on as basis of an action**
    - **But:** there are cases where identity has been held satisfied even if claim 1 was based on contract and claim 2 on tort → broad definition of legal rules. **Example**: you may have in action 1 contractual legal rules and in action 2 , extra-contractual legal rules and still some rules conclude to identity !
  - **Most appropriate test**: would judgments delivered by Court 1 and Court 2 be **mutually exclusive, impossible to implement**? If judgement from Court 1 and judgement from Court 2 would be mutually exclusive in a strict sense, no implementation, then the identity of substance is satisfied.

- **(3) Some examples**
  - Action filed with **Court 1 seeks to enforce** the contract and action filed with Court 2 seeks to **rescind/avoid/discharge** the contract
    - Share same 'cause of action' (Gubisch): binding character of that contract '**lies at the heart of both actions**':
      Gubisch case: Gubisch is a Machinfabrik, domiciled in Germany. Mr. Palumbo, Italian businessman, they conclude a contract. For Palumbo said there is no real contract: there is a disagreement on whether the contract came into existence. The German company started an action in Germany. The Italian company started in Italy. The Italian Court wanted to know whether it was allowed to continue. The German proceeding was seeking performance of contract. The Italian claimant was seeking a declaration that he did not consent or that it was vitiated contract. Is there a situation of identity of subject-matter? The ECJ said yes. The test was: what would happen if we allowed German proceedings to prosper as to result in a German judgement and we allow Italian proceedings to result

in an Italian judgement? The two judgements would be exclusive, if German courts say "you must pay" and Italian courts would say "you do not have to pay". → Kernpunkttheorie.

- Action filed by party 1 with Court 1 seeking non liability and action filed by party 2 with Court 2 seeking **liability: identity** (Maciej Rataj)
- If action 1 is concerned with **one obligation** under contract and action 2 with **other, distinct obligations** (Morgan v. Primacom): **no identity. We conclude a contract for the supply of printing machines and toner to you and I start an action against you saying you did not pay for the last printing machines. You file an action against me before another Court saying the toner you delivered does not comply with what we agreed. So, one action is about printing machines and the other about toner. There is no mutual exclusiveness of the two judgements: a judgement saying to me I have to pay for the printing machine can clearly coexist with a judgement saying to the other party "you have to pay the money to me because you failed to deliver toner as specified in contract". So we have a judgement in your favor (I have to pay the machines) and the other judgement in my favor. Both judgements would be perfectly consistent with each other.**

3. Effects: prior-in-time rule

- **(1) If proceedings 1 and 2 are commenced before two MSs**
  - **(a) Jurisdictional priority is given to court seised first** ('Court 1')
  - **(b) Procedural steps** to be taken by court **seised second** ('Court 2')
    - **(i) Court 2 should dismiss proceedings if it concludes (*prima facie*) it has no jurisdiction based on relevant jurisdiction rules**
      - No need in this case to wait for determinations of Court 1
      - *Lis pendens* rules are meant to resolve a conflict between two courts which both **have jurisdiction based on ordinary rules, which may have jurisdiction *prima facie*. In BV Case** (UK Court 1 and German Court 2). If German Court is seized second, if the German Court says it has no jurisdiction because there are no rules applicable for German jurisdiction: then German Courts must not **stay** proceedings (because they continue to be pendent), it must **dismiss** proceedings.
    - **(ii) If Court 2 concludes it has or may have ordinary jurisdiction, it should stay proceedings until Court 1 has ruled on its own jurisdiction** (if Court 1 has not yet ruled on its jurisdiction)
      - Court 2 should act on **its motion** (art. 29.1)
      - Court 2 should stay even if it believes that Court 1 **has no jurisdiction** under BR (exception: here after)

        P.S. criticized for encouraging *Torpedo* actions (Gasser): Torpedo = what Misat was accused that it

was not interested in the issue, but just wanted to cause things to stagnate. You sue a Court that is particularly slow e.g

- **(iii) If Court 1 affirms/has affirmed jurisdiction, Court 2 has to decline jurisdiction in favour of Court 1** (art. 29.3)
  - **Not just a *stay*** of proceedings, but a ***dismissal***
  - What if Court 1 affirms, but Court 1's decision on jurisdiction is challenged before appellate court in MS1?
- **(iv) If Court 1 declines jurisdiction, Court 2 may affirm jurisdiction**

What is the idea behind these steps? To avoid having Courts 1 and 2 both addressing the substance of the case.

4. Effects: exceptions to prior-in-time rule

- **(1) Exclusive jurisdiction agreement (art. 25):**

  Priority awarded to chosen court regardless of chronology: art. 31(2) (not in CLug)

  - **(a) If Court 2 is chosen court:**
    - If it establishes the agreement is valid, Court 2 **does not have** to stay proceeding and wait for determination of Court 1 but shall **proceed with the merits. Example: Gasser**: Court 2 is the Austrian Court. If it is satisfied that Austrian forum printed on the back of the invoices amounts to a valid choice of forum, even if the Austrian Court is seized, it does not have to comply with prior in time rule. It may directly address the merits of the case. It is for Court 1, Italian (not the chosen court in the agreement in question), has to stay proceedings until Court 2, chosen court, establishes jurisdiction under the jurisdiction agreement.
  - **(b) If Court 1 is not the chosen court, Court 1**
    - **Stays proceeding until Court 2 has established jurisdiction under the jurisdiction agreement**
      - What if Court 2 **is not seised yet**? Probably art. 31(2) does not apply and Court 1 may determine whether jurisdiction agreement is valid or not
    - **If and when Court 2 establishes jurisdiction, Court 1 declines in favour of Court 2**
    - **If Court 2 establishes jurisdiction agreement is invalid, unenforceable or not applicable to dispute and declines, Court 1 may resume case.** Example Gasser: proceeding is initiated before a Court in Rome, Court 1; and then in Austria, Vienna, Court 2. If this scenario occurs today, then the Italian Court has to stay, to wait to see how the Court in Vienna would the determine the issue as to validity of Vienna choice of forum. If the Court in Vienna that has exclusive competence to determine issues as to validity of choice of forum concludes the choice of forum is valid, then the Court

in Vienna is competent, and the Italian Court will convert the initial staying into a dismissal. If the Court in Vienna is satisfied that the choice of forum is not valid, the Court in Vienna declines jurisdiction and then, the Italian Court that had initially stayed the proceedings, has to reactivate proceedings on application of one of the litigants.

- **(2) Exclusive jurisdiction under article 24**

  - **(a) If actions 1 and 2 'come within the exclusive jurisdiction' of both: prior-in-time rule applies** (art. 31(1)

  - **(b) If Court 2 believes it enjoys exclusive jurisdiction and Court 1 does not, Court 2 has no obligation to stay** (*Weber)*.
    Weber Case: two ladies, 78 and 82, co-owners of a property in Munich. One of them has a preemption right. The co-owner sells her share to an Italian in Italy. The Italian buyer starts proceedings before Italian Court saying this is valid. Court 1 is the Italian one. Court 2 is the German, the co-owner alleges infringement of preemption right and files a claim to a Court in Munich. ECJ says that Court of Germany should not stay, but if convinced that she has exclusive jurisdiction, the Court has to go ahead and address the merits. This is the case of a parallel proceedings that could ultimately result in a conflict of judgement. The Italian Court may think that this issue is not an exclusive jurisdiction issue but a contractual issue, so the Italian Court could think to have the responsibility. While Germany could say that's a case for exclusive jurisdiction: rights in rem for an immovable in Munich.

5. Date of seisin: rule partially uniform (art. 32 BRIa)

This article makes a difference between file-and-serve and serve-and-file system

- **(1) With respect to 'file-and-serve' systems (letter a)**
  - **(a)** The claimant **first** has to file the statement of claims and **then the statement of claims has to be served subsequently** to the defendant.
  - **(b) Date of seisin** is the day when document instituting proceeding (=statement of claims) is **lodged** with court, i.e. **day of filing/lodging**
  - **(c)** Provided that claimant has taken **necessary steps it should take under the legislation of country of the court** to have service effected on defendant
    - In some countries (e.g. Switzerland), it's up to court to serve statement of claims filed with the court by claimant. The situation where a claimant files statement of claims in a Court and then refrains or overlooks to do what he or she has to do to make sure the statement of claims is served to the defendant is unrealistic, because for the Court to make sure that once the statement of claims is lodged with court on the defendant.

- **(2) With respect to 'serve-and-file' systems (letter b)**
  - **(a)** Date of seisin is the day when document instituting proceedings **is received by the authority responsible for service**, **i.e. day of *receipt***
    - Which is the **first authority** receiving the document (end of 32.1)
  - **(b) Provided that claimant has taken the necessary steps to have the document lodged with the court. Example:** if one of the proceedings is filed within an Italian Court, the relevant day is the day when the statement of claims is untrusted with the huissier de justice / ufficiale giudiziario so as to be served on to the defendant and then filed to the Court. The relevant day is when the first procedural step has to take place.
  - Example: in Italy at first instance, the statement of claims has first to be served to the defendant and then has to be filed within the court.

- **(3) NEW: provisions to ensure certainty about date (not in CLug)**
  - **(a) Any court seised may ask any other court equally seised to inform it about the date of seisin** (article 29.2)
  - **(b) Court and authorities responsible for service 'shall note' the date of lodging and date of receipt** (article 32.2): so as to prevent any future contestation as to what day a proceeding has been initiated in what Court.

- **(4) When a third State is involved (article 33 BR, not in LC)**
  There are new rules on lis pendens involving a Court of a MS and a Court of a third State.
  - **(a) Scenario**: **Court 1 is third State court and Court 2 is in a MS**
    - ⇒ **And Court 2 has jurisdiction based on general forum** (art. 4) **or alternative jurisdiction** (art. 7) **or derivative jurisdiction** (art. 8)
    - ⇒ **And action before Court 2 is identical** (identity of parties and identify of cause of action) **with action before Court 1.**
      - This is based on the European notion of identity, between an action 2 filed before a Court in a MS, after an action 1 has been filed elsewhere, in a third State. Example: Canada, see notes.

  - **(b) Regime**
    - ⇒ **Applicable only to Court 2** (Brux1 cannot apply to a third State) **may – does not have to – stay proceedings, there is a discretion:**
      - **If it is expected that Court 1** (Canada in our hypothesis) **will render decision 'capable of recognition and, where applicable, enforcement' in that MS** (*Anerkennungsprognose*: cp **Article 9 SPILA**).
        Example: if an action is filed by a Canadian seller before a Court in Canada (contract for the selling of aluminium), alleging the delivery has to take place in Canada whatever the Canadian rules on jurisdiction

are. Court 2 is in Germany: it has jurisdiction for example on the place of assets based on Art. 23 ZPO, but German Court has to apply this Art.23, so Court 2 may stay proceedings. Part of the test that has to be applied by the German Courts is to make sure that the Canadian judgement, once delivered by the Courts in Canada, will be recognizable and implementable in Germany. This is called *Anerkennungsprognose*. It is prognostication on the likelihood of a Canadian judgement being recognized and implementable in Germany. For this, German Court will have to apply the German recognition law because Brux1, in terms of recognition, only applies to recognition within the EU area. When Germany has to determine whether a Court in Canada satisfies the requirements to be recognized and implementable in Germany, German Courts have to apply German domestic recognition law.

AND

- **if Court 2 establishes that a 'stay is necessary for the proper administration of justice**': the language is very loose and subject to controversy. It is a wide marge of discretion conferred to Courts in Germany

⇒ **Court 2 may continue proceedings at any time** (the idea is to avoid that an issue may not find an outcome for a long time because the alternative forum, i.d Court in the Third State, is particularly slow).

- **if proceedings in Court 1 are stayed or discontinued**
- **if proceedings in Court 1 are unlikely to be concluded within reasonable time** (cp. Article 9 LDIP)
- **if continuation required for proper administration of justice**

⇒ **Court 2 shall dismiss proceedings when Court 1 renders a decision which is capable of recognition and proceedings are concluded**. German Courts that had initially stayed the proceedings, will be able to dismiss the proceedings altogether once, if and when, a Canadian judgement is presented for recognition in Germany and the German recognition Court is satisfied, that the Canadian judgement is complying with the recognition is Germany.

3.3 Related actions (Art. 34 BR1)

1. Background (situation and rationale)

Way to coordinate proceedings that are not identical, involving a common issue. The idea is that this common issue, is determined in the same way in the 2 proceedings.

- **(1) Situation:**
  Proceeding 1 brought before Court 1 of MS 1 and proceeding 2 brought before Court 2 of MS 2
  - **Do not involve the same action but two distinct actions**
    - E.g. parties in two proceedings are not the same or the subject-matter is not the same
  - **Though distinct, action 1 and action 2 are 'related' i.e. they bear on a common factual or legal issue:** i.e. 'so closely connected that it is expedient to hear and determine them together to avoid the risk or **irreconcilable judgments** resulting from separate proceedings'
    - **Art. 34 BR1a incorporates the same definition of 'relatedness' as under art. 8.1 BR1a. Difference however in starting point between those articles in their application. Example-case:** there is a car accident in Poland, the driver of a van runs over pedestrians. Two pedestrians do not know each other, they just happened to cross the road at the same time. Pedestrian 1 files an action 1, in Germany before German Courts. The van was German. The German Court is competent because it is the domicile of the defendant, general forum. Pedestrian 2 does not know pedestrian 1 and may be not aware that pedestrian 1 has filed a claim before German Courts. He starts an action in Poland. Polish Courts, place of harmful event, Art. 7§2 Brux1 based on special forum. Both Courts: German Court 1 and Polish Court 2, have competence based on ordinary jurisdictional rules. The two actions are not identical. The parties are different: there is a common party, the company owning the van, but the other party, the claimant in action 1 is pedestrian 1 and in action 2, it is pedestrian 2. They are distinct persons. Therefore, it is not a lis pendens case. At the same time, there is a connection: they share a common issue, who is responsible for the accident? If we allow the two proceedings to result in a substantive judgment, the two judgements will not be mutually exclusive. They will be implemented, but they may be inconsistent, however. **We have to define what are two judgements that are inconsistent but not conflicting, in the narrow sense of the word, and two judgements that are conflicting.**

- **(2) Rationale :**
  - **(a) Avoiding inconsistent judgments rather than conflicting (i.e. mutually exclusive) judgments.**
  - **(b) Judgments are inconsistent albeit not conflicting if**
    - **They can both be separately enforced/implemented at the same time BUT**

- They resolve the **common factual or legal issue** differently, which may be **at odds with the principle of equality and as a consequence unfair** (‘*treat like cases alike*’)

➢ **(c) In our example-case**, the two judgements, German and Polish one, may not be conflicting, they may be perfectly implementable. The German Court may conclude that it is the pedestrian negligence that caused the accident and therefore pedestrian 1 may not receive compensation. The Polish Court, seized by pedestrian 2, may conclude that the cause of the accident lies with the driver of the van and therefore pedestrian 2 must receive compensation. There is no logical, material, practical, impossibility of satisfying implementing both judgements. Both judgements may be enforced. What we feel that is unfair, is that the proceedings share a common issue, the two pedestrians were doing the same thing. So why the first Court would conclude at Pedestrian 1’s fault and the Court 2 not? We must treat like cases alike.

▪ **(3) Similarities and differences between ‘relatedness’ under art. 8 and ‘relatedness’ under art. 34 BR1a:**

➢ **(a) Idea is the same**: avoid **inconsistent although not necessarily conflicting judgments**

➢ **(b) Context of application is different**

- **Art. 8 is concerned with related claims made before same court in same proceedings, not separate proceedings**
  - Question is to if claim 2 related to claim 1 can be brought **from the outset** before Court 1 competent to hear claim 1
  - No two pending proc. are involved, no Court 2 is involved
- **Art. 34 is concerned with parallel proceedings involving related actions and is triggered when two proceedings are pending before Court 1 and Court 2 respectively**

➢ **(c) Scope of application is different:**

- **Art. 8 is narrower**: only four typified situations listed in article 8
- **Art. 34 is broader**: any situation of relatedness may be covered by article 8

2. Regime: actions are pending before courts of two MS

- **(1) Court 2 may (including on its own motion) stay proceedings (art. 34.1 BRa)**
  - **(a) Stay is within the discretion** of Court 2 and **not compulsory: how to determine to stay the proceedings or not? See here under:**
  - **(b) Factors to be considered**: degree of advancement of two proceedings, degree of relatedness between two claims, location of evidence, expediency, etc.
  - **(c) Consequences of stay:** Court 2 **resumes** proceedings once Court 1 has adjudicated upon the **common issue**
    - Generally, Court 2 will **take** into account **findings**/determination on common issue reached by Court 1 but has **no** obligation to do so.

      Example: you are Court 2, you want to stay the proceedings and wait for Court 1 to decide. You say to the plaintiff that you will not adjudicate immediately. Generally you might be willing to follow how Court 1 decided although you are not obligated to follow Court 1 determination.

- **(2) Court 2 may decline in favour of Court 1 in limited circumstances, i.e. only if four requirements are cumulatively satisfied**
  - **(a) Court 1 also has jurisd. over claim brought in proceedings 2**
  - **(b) Domestic procedural law** of MS 1 permits consolidation
  - **(c) One party requests dismissal** of action 2 (typically: *defendant*)
  - **(d) Action before Court 1 is pending at first instance**, **not on appeal** (otherwise claimant in proceedings 2, will lose a degree of jurisdiction). So claimant in proceedings 2, if the Court 2 says "it is better for you to bring your claim 2, before Court 1": if proceedings in MS 2 is pending on appeal, then claimant is going to lose a degree of jurisdiction.

- **(3) One action is pending before a third State**
  - **Regime (art. 34) is similar** with *lis pendens* with third State **except for** additional condition of avoiding irreconcilable judgments (lit a)
  - **Only a stay is possible, no dismissal**
  - Court 2 cannot dismiss in favor of Court1, if Court1 is the Court of a MS.

3. Hypothetical example

- **(1) Facts**
  - 2 Parties enter into two distinct contracts. Contract 1 is about selling and purchase of toners. Contract 2 is about the selling and purchase of printers. They have been concluded at the same time and have to be performed in the same location, Germany. There are two documenta but legally, the T&C are essentially the same (same applicable law, place of delivery, warranty etc.) **Let's assume there is a problem.**
  - Party 1 is domiciled in **Hungary** and Party 2 in **Romania**
  - Parties 1 and 2 are party to **two distinct contracts, Contract 1 and Contract 2, concluded under similar circumstances**

- Contract 1 and Contract 2 are **almost identical in content** (incl. applicable law), both to be performed in **Germany** (pl. delivery)

- **(2) Proceedings**
  - **Party 1 sues Party 2 for enforcement of Contract 1** (action for payment) **before German court** (competent because place of performance: art. 7.1): **Court 1** is German Court
  - Party 2 subsequently sues Party 1 for **annulment of Contract 2** before **Hungarian court** (competent because domicile of defendant: art. 4): **Court 2** is Hungarian court
- **(3) The two proceedings/actions are related (art. 34(3)**
  - **If Contract 1 is valid/invalid, it is desirable that, to the extent circumstances are same, Contract 2 be also declared valid/invalid**
    - **justice should be consistent** ('treat like cases alike')
    - **Distinct proceedings because proceeding 1 is for contract 1 and proceeding 2 for contract 2. But they are related,** because if there is an issue for validity, for example Party 2 claims that both contracts are invalid, because of the lack of power of a party, it makes sense to determine validity of the two contracts in the same way. Treat alike cases alike.

  - **German decision ordering performance of Contract 1 based on validity risks being 'inconsistent' (though not conflicting) with Hungarian decision declaring Contract 2 null and void**

- **(4) Hungarian court (Court 2) may, based on art. 34:**
  - **Stay** proceedings until question of **validity/invalidity of Contract 1** is determined by **German court**
  - Then **resume** proceedings taking into account the findings of German court
    - Even if Hungarian court stays proceedings, it does not have necessarily to follow German decision on point of validity

- **(5) Hungarian court could also decline jurisdiction but only if**
  - **One party – normally, defendant before it – so requests ; and**
  - **German court also has jurisdiction with respect to Contract 1 and Contract 2; and**
    - This requirement is here satisfied because place performance of Contract 2 is **also Germany** (art. 7.1 BR)
  - **German procedural law allows consolidation of actions in a single proceeding; and**
    - Article 147 ZPO: yes, to the extent actions are pending before same German court and not different German courts
  - **German proceeding are pending at first instance and not on appeal** (otherwise claimant in proceedings 2 would lose a degree of jurisdiction)

  → If all those 4 requirements are satisfied, proceedings 2 is close and Court 2 invites claimant that initiated the proceedings before it, to press the same claim before the same German court, seized by party 1.

- **(6) German court and Hungarian court are not allowed as law (i.e. BR1a) stands today to**
  - **Agree on German court staying proceedings until Hungarian court has determined common issue** (validity of Contract 1/2)
    - **Only court second seised can stay in favour of court first seised and not conversely**
    - **Regardless of whether court second seized is better equipped to adjudicate upon the common issue**
      - E.g. because law applicable to both contracts is law of the country of the court second seized, here the **Hungarian law.** It is more expedient to have Hungarian law applicable if Hungarian Court are competent, it is easier. But here it is not possible because art. 34 Brux1 provides for staying of Court 2 in favor of Court 1 and not the other way round.
      - Is this satisfactory?
  - **Agree on Hungarian court being better placed to try both actions to the effect that German court dismisses the action:** the coordination of both Courts and agreeing on Hungarian Court to be competent is not possible. **A transfer of jurisdiction is not possible.**

- **(7) In other words:**
  - **An intra-EU** '**transfer of jurisdiction**' is not provided in BR1a (although permissible under BRIIa: slide 163)
  - **Forum non conveniens mechanism is not provided in BR1a** (although familiar to part of the common law world: see following slide)

3.4 Forum non conveniens

1. Background

- **(1) Rationale**
  - **(a) Allowing a court which does have ordinary jurisdiction to stay/decline if a foreign court** (**so-called 'alternative forum**') looks a **more appropriate forum**
    - **Ordinary jurisdiction** may also be based on domicile of defendant [2017] **SGCA** 27 (Singapore/Swiss/Monaco case)
    - **Case SG/CH/Monaco:** Dimitri Rybolobvlev versus Yves Bouvier. Dimitri is Russian, the king of Potassium. He had a lot of money to invest in buying in works of art. He got in touch with Yves Bouvier, CH businessman, in the art-market. He created the "Port-franc de Genève", museum, containing thousands of works of art. Dimitri Rybolobvlev bought through an intermediary agent, 35 paintings to Bouvier. He paid 35 billions. At some point, Dimitri Rybolobvlev thought that Yves Bouvier was lying over the selling prices of those paintings. There were many litigations. Dimitri Rybolobvlev started proceedings in Singapore. Why there? Because in 2012, Yves Bouvier had moved his domicile in Singapore for tax reasons, and also because he wanted to establish Port-franc in Singapore. Singapore was the jurisdiction of the country of domicile of the defendant. But, Singapore follows some principles of common law but Yves Bouvier wanted the Singapore court to stay proceedings and let CH Court to decide on this issue, although at that time there was no CH action filed. Singapore was the only forum seized. It had therefore to decide whether it was *forum conveniens* or not and decided on balance, that it was better for Bouvier to claim in CH. Why? At the time the transactions were completed, the 2 persons were domiciled in CH. Only then, Bouvier moved to CH and Dimitri Rybolobvlev moved to Monaco. Dimitri Rybolobvlev wanted to escape claims for his ex-wife (divorce proceedings) and Bouvier wanted to escape to not pay Swiss taxes (mamma mia che tirchi). Part of those paintings were actually located in Geneva, CH. Based on these reasons, Singapore said "we are forum non conveniens". In the interest of justice, it is better for you to go there.
  - **(b) If two proceedings have already been started, Court 1 (first seised) may stay/decline in favour of Court 2: no prior-in-time rule**

- **(2) Advantages/disadvantage over *prior-in-time* rule**
  - **(a) Advantages:** more flexibility, fairer assessment of which is the country most closely connected, combating 'forum shopping', offsetting favor for plaintiff
  - **(b) Disadvantages:** final determination as to which forum will hear the case difficult to predict (sometimes incredible costs are spent on the

forum non conveniens analysis), risk of **negative conflict of jurisdiction** (both forum say they are not competent).
  - Court 1 and Court 2 each think the other is more appropriate

- **(3) Geographical scope**
  - **(a) Common-law jurisdictions** (UK, US, Singapore, Australia, etc.)
  - **(b) Some civil law jurisdictions** (Japan, Quebec, Panama)
    - Some European Regulations (Brussels IIa) provide for a **similar mechanism**: '**transfer of jurisdiction**'

2. Regime: two-fold test

How the forum non-conveniens work

- **(1) Step 1: initiative of, and burden on, defendant**

  - **(a) Showing to the satisfaction of Court 1 that an alternative forum ('Court 2') is available to claimant**
    - **Claimant is permitted and able to initiate proceedings before Court 2 based on jurisdictional rules prevailing in Country 2**
      - including because defendant undertakes before Court 1 to **submit** to jurisdiction of Court 2
      - Example: in Rybolobvlev vs Bouvier, what Bouvier has to do, is to show that an alternative forum, Swiss forum, is available for Rybolobvlev. So the defendant, must prove that the claimant is permitted and able to initiate proceedings in another forum.
  - **(b) AND Alternative forum is a more appropriate forum for the trial of the action**
    - In the **interests of all the parties and**
    - In the **administration of justice** (**England**, '*Spiliada'* test)
      - **Canada** (without Quebec): alternative forum is '*clearly more appropriate'*
      - **Australia**: forum chosen is '*clearly inappropriate'*
      - **Quebec** (art. 3135 CCQ): '*even though a Quebec authority has jurisdiction to hear a dispute on may **exceptionally** and on application by a party, **decline** jurisdiction if it considers that the authorities of another country are **in a better position to decide'***
        → Whatever the language, the defendant must show that the alternative forum is more appropriate.

  - **(c) Factors to be considered**
    - **General connections** of the dispute with Country 1 and Country 2. In the Rybolobvlev vs Bouvier, the Singapore Court had to see the connections of the dispute, subject-matter, parties, presented with Singapore were greater than the connections with alternative forum, Switzerland e.g.

    - **Location and availability of evidence**

- Potential witnesses that may be inconvenienced if case is tried in the forum
- Documents/records available, need to translate them
  - ⇒ **Saudi-Arabian case**: the plaintiff started action before Cayman Island and the defendant said this was not the appropriate forum, the appropriate one being an alternative one: the Saudi forum. One of the factors relied on by the defendant, was that some females, potential witnesses, are not allowed to testify before a foreign Court. There was another argument: there were thousand of documents written in Arabic that would needed to be translate into English if the proceedings would have continued in Cayman Island and therefore spending a lot of money.

- **Governing law to the action (if law of Country 2, less expensive, easier to apply in alternative forum):** the Swiss court is more familiar with Swiss law than Singapore Court.
- **Connection of action with related actions already pending in alternative forum**
  - If alternative forum has already **some familiarity** with the dispute, chances are proceedings before Court 2 will be less expensive/more expeditious than if matter is tried in Court 1
- **Vexatious reasons motivating filing of suit in Court 1 rather than in Court 2**
- **Comparative costs and duration of proceedings**

- **(2) Step 2: burden of proof shifts on to claimant**

  Lies on the shoulders of claimant. If the defendant has proven that in the interest of justice and in the interest of parties involved, the alternative forum may be better equipped to try the claim, still … :
  - **(a) Claimant may establish that justice requires stay to be refused**
  - **(b) But**: the fact that 'alternative forum' is **less advantageous** to claimant than the forum seized is **not** decisive
  - **(c) Examples of justices requiring stay to be refused**
    - **Weakness of, or severe delays in, foreign legal system**
      - *The Jalakrishna* (1983): five-year delays in alternative forum, **India,** in case of severe personal injuries; **stay refused**
      - *Alberta Inc. v Katanga Min.* (2009): in alternative forum, **Republic of Congo**, injustice was 'widespread and endemic'; **stay refused**
    - **Absence of legal aid or other specialist assistance required**
      - *Connelly v. Rtz Corp* (1998): Mr Connelly wsa UK citizen working in a mine in Namibia, exposed to nuclear radioactivity. He filed a claim in the UK against the Namibian mine company. The defendant

said alternative forum, **Namibia**, where Connelly suffered injury. But the English Court said that the case was too complex to try without legal aid/conditional fee in Namibia. **So the Namibia forum not available in Namibia**: **stay refused.**

- **Racial or political prejudice against the claimaint**
  - *Cherney v. Deripaska* (2009): **Russia** was natural forum, but claimaint would risk assassination or arrest on trumped-up charges if he were compelled to bring his claim before the Courts in Russia: **stay refused.** The proceedings continued before the UK forum.

3. Compatibility with BRIa/LConv.

Essence of this case: to which extent, is the forum non conveniens compatible with Brux1?

- **(1) Owusu case (2005)**
  - Mr Owusu books a travel with Mr Jackson, travel agency. Owusu wanted to go to Jamaica.
  - Mr Owusu, a **UK domiciliary**, was seriously injured in Jamaica (non-EU) by hitting a sand bank when diving.
  - **Mr Owusu brought in England**
    - An action for **breach of contract against Mr. Jackson**, a UK domiciliary, who operated travel agency with which Mr Owusu booked holiday stay in Jamaica
    - An action **in tort against several Jamaican companies** (companies operating resorts and hotels responsible for beach safety)
  - **Mr. Jackson and Jamaican co-defendants sought a stay of English proceedings on grounds of forum non conveniens**
    - Arguing that Jamaica is the **appropriate forum** (most of defendants are Jamaican, place of accident and evidence are in Jamaica, etc.). Governing law is also Jamaican, at least to respect to extra-contractual relationship (so, tort and damages for his physical hurting)
  - **Court of appeal (UK) referred to the ECJ following questions**:
    - **Is it consistent with BR1 to exercise discretionary power to decline jurisdiction, which exists based on art. 2 (domicile of defendant** (today art. 4) **in favour of the court of third State?**
    - **If no other MS than forum seized is involved?**

- **(2) Ruling by the ECJ**
  - **Fact that case involved a single MS (UK) and Third State** (no connection with a second MS) **does <u>not</u> exclude application of BR and particularly article 2** (domicile rule, today art. 4 BRIa)
    - ECJ says that Brux1a applies in this scenario, because even if just one MS is involved, functioning of 'internal market' is already at stake!

- **When they apply, jurisdictional rules of BR are mandatory (cannot refuse, saying that another state is better equipped to do it)** i.e. MS court has an **obligation** to hear dispute, otherwise
  - **Predictability/legal certainty** would be undermined
  - Uniform application of those rules would be **jeopardized**
- **As a consequence, it is not possible for domestic court to rely on domestic law mechanism to exercise discretion**

- **(3) Scope of the forum non conveniens prohibition**

  This prohibition on a MS Court to rely on a forum non-conviens is …
  - **Limited to situations when jurisdiction is based on BR1**
  - **If based on domestic grounds (domicile of def is in non-EU country), forum non conveniens may still be relied on:** Example:
    - Action brought in England against a Canadian domiciliary who is present in England when served based on a jurisdictional rule that is familiar to the English legal system; even if a person has a domicile abroad, if that person physically on the UK at the time of the service, if he may be served while he or she is physically present, even because of a stop-over at the Heathrow Airport during a scale, then the UK jurisdiction is triggered. But the forum non-conveniens may be relied upon on that case because the jurisdictional rule of the UK is domestic as opposed as international jurisdictional rule contained in the Regulation.
    - BRIa does **not** apply and English court may be competent based on **presence at the time of service of process**

  KEEP IN MIND: if Court of third State is seized, and Court in UK (or any other MS) is seized **of same or related matter**, Court in UK (or in MS) **may exercise discretion** as to whether or not to stay (art. 33 and 34 BR1A): factors relevant to analysis are **similar to those of fnc**

3.5 Anti-suit injunctions

1. Background

Other mean to coordinate jurisdiction. It is the opposite as the forum non-conveniens (court seized says it is better for everybody if the claim is tried elsewhere). In the anti-suit injunction, Court 1 is the most appropriate forum and the alternative forum is less appropriate than us. We would like to prevent parallel proceedings to be initiated in the alternative forum, to avoid the defendant having to defend himself into 2 parallel proceedings.

- **(1) Order (=injunction) by a court ('Court 1') issued against defendant in the proceedings brought before Court 1 to**
  - **Discontinue proceedings before a foreign court ('Court 2') if foreign proceedings before Court 2 already pending**
  - **Refrain from initiating foreign proceedings before Court 2 if they are not pending yet**
    - **If disobeyed**: consequences are **'contempt of court'** and **criminal sanctions** (fine or imprisonment) associated with it

- **(2) Rationale**
  - Combating **vexatious/oppressive/frivolous** proceedings (Turner)
  - Preventing **multiplicity of fora** and **parallel litigation**
  - **Protecting choice of court** (as in Skype v. Joltid) **or arbitration agreement** (as in West Tankers)

- **(3) Concerns raised**
  - Even if injunction is not directed at **Court 2** but at **parties** that have initiated or may initiate proceedings before Court 2:
  - **Effect is interference with proceedings in Court 2**, so power to issue anti-suit should be **exercised with great caution**
    - **Rybolovlev v. Rybolovleva Case**: During the proceedings of their divorce, a Court in Cyprus (why in Cyprus: he put money in 2 trusts in Cyprus) was filed a claim. We are talking here about financial consequences of divorce. The Cypriot Court issued an anti-suit order towards **Swiss lawyers (!)** of plaintiff in Swiss proceedings. Indeed, Yelena Rybolovleva had initiated proceedings in Geneva in CH. With respect with some financial issues, a trustee of Rybolovlev started proceedings in Cyprus. The Court in Cyprus issued an anti-suit on the application of a claimant of the Cyprus proceedings. What was weird, was that it was targeting not Yelena Rybolovleva but also her counsels! In that it was targeting counsels, it was preventing the administration of justice doing their course in Switzerland. Anti-suit may impact on friendly relations between States.

2. Compatibility with BR1a: Turner case

- **(1) Facts**
  - Late '80: **Mr Turner, UK national** was recruited by **Chequepoint Group.** Mr Turner served this group
  - Late '80 to 1997: Mr Turner worked in **London and Madrid**
  - February 1998: Mr Turner resigned. Why? Because some high official sot in touch with him and forced him in some dirty dealings. But he did not want.

- **(2) Proceedings**
  - **In England (March 1998)**: Mr Turner sued Chequepoint claiming defendant sought to involve him in **illegal dealings.** He sued the employment Tribunal in the UK.
  - **In Spain (July 1998)**: Chequepoint sued Mr. Turner in Spain, claimed from Mr. Turner equivalent of 7 million CHF for **professional misconduct**
  - **English Court of Appeal**
    - **Granted an anti-suit injunction ordering Chequepoint**
      - Not to continue proceedings in Spain
      - To refrain from bringing other actions against Mr Turner in Spain or elsewhere regarding contract of employment. If you have a problem, then you can file a lawsuit by way of counterclaim, within us, the same tribunal in the UK.
    - **On the ground** that proceedings in Spain were brought in **bad faith** and with a view to **harassing** Mr Turner and forcing him to unfavorable negotiation/settlement

- **(3) Reference for preliminary ruling**
  - **House of Lords** (now UKSC) seised of an appeal by Chequepoint. The House of Lords stayed the proceedings and raises before ECJ question whether anti-**suit injunctions are permissible** under BR (then **BR Conv**.)

- **(4) Ruling of the ECJ**
  - **Holding**: **BR precludes court of MS from granting an anti-suit injunction with respect to proceedings in another MS**
    - Even when party is acting in bad faith to frustrate proceedings in first MS
    - Proceedings 1 is UK proceeding 2 in Spain. Based on the ECJ ruling, the UK Court is precluded, not permitted, to issue an anti-suit injunction directed at the defendant of the UK proceedings and claimant of the Spanish proceedings, targeting the Spanish proceedings.
  - **Reasons**: '**mutual trust'**, undue **interference** with the jurisdiction of the MS, impairing the **effectiveness** of BR
    - **It is for Spanish court to determine**
      - **If it has jurisdiction** (presumably, if tortious matter, yes, if employment not). **This anti-suit is not directed**

to the Spanish judge, but if there is this anti-suit, then the Spanish judge will not be free to decide over his jurisdiction!

- **If it can stay/dismiss claim or coordinate with English court based on related actions**
  - Spanish proceedings are related based on Art. 34 to English proceedings

3. Compatibility with BR1a: other scenarios

- **(1) Anti-suit aimed at third country proceedings: permissible**
  - **Skype Technologies SA v. Joltid Ltd** [2009] EWHC 2783 (CH)
    - **License agreement between** Luxembourg-based **Skype** and California-based **Joltid** for worldwide license of software key to Skype business. Joltid licensed to Skype a software that was critical for Skype business. Joltid decided to terminate this agreement at a moment. Skype was furious because that software was necessary for the business of Skype.
    - Agreement incorporates **choice of English court** so Skype files a claim to a Court in London.
    - March 2009: Skype initiates proceedings in England seeking declaration that licence agreement continues in force
    - Sept. 2009: Joltid initiates proceedings in California alledging copyright infringement and seeking termination of license agreement
    - On Skype's application, English **court concludes choice-of-court covers the dispute and issues anti-suit restraining Californian proceedings initiated by Joltid, concluding anti-suit is permissible under BR**. → This anti-suit is there to protect the jurisdiction of a Court of a MS. The UK Court has asserted jurisdiction based on Brux1.

- **(2) Anti-suit and arbitration proceedings**
  - **Remember: anti-suit by court of MS 1 targeting court' proceedings before MS 2 to protect arbitration in MS 1**: **non permissible. West Tankers:** the High Court of justice wanted to protect arbitration seated in London, wanted to issue an anti-suit injunction targeting the Italian proceedings, asking Allianz and Generali to discontinue the proceedings initiated before the Court in Italy, Syracuse.
  - **Remember: anti-suit issued by arbitrators sitting in MS 1 against proceedings before court of MS 2 (Gazprom:** Lithuania may not recognize the anti-suit injunction emanating from arbitrators based in Stockholm, based on domestic Lithuanian law. Brux1 does not deal with this, arbitration is outside Brux1).
    - **BRIa does not apply to it (arbitration exception)**
  - **Anti-suit restraining arbitration proceedings,** whether in MS or third State ('*anti-arbitration*' injunctions): **BRIa does not apply to it based (arbitration exception)** (art. 1)

PART 4 – RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS

4.1 Background notions

1. Subject-matter of recognition

- **(1) Foreign court's decisions/judgments/orders concerning (generally) substantive rights and obligations of litigants**

- **(2) Important distinction**
  - Judgments **requiring no performance ('declaratory judg.')**
    - **Judgments which dismiss a claim**
    - **Interim judgments** declaring a conduct to be **unlawful** but **no specification** of damages (*Trade Agency*): are intrinsically incapable of being performed.

  - Judgments **requiring performance,** i.e. some **material acts/conducts** on the part of **defendant/authorities**
    - **To pay**: '**money judgments**', most common type
      - **'**judgment debtor' and 'judgment creditor': the judgement debtor must pay money to the creditor once the judgement is delivered by a Court.
    - **To deliver** something (specific performance: *El Madjoub*). El Majdoub: bought an electric car. He did not want damages, he wanted the car. The German seized Court will require the delivery of the car.
    - **To do something (other than deliver**):
      - demolish a building (*Apostolides*)
      - hand over goods infringing IP to allow seizure by authorities
    - **Not to do something**: injunctions to **stop** using a trademark, not to sell some assets, including shares (*Meroni*)
      - *Bolagsupplysnigen:* stop publishing comments on website. Estonia Court was requested to issue an order requiring to stop publishing defamatory comments on their website.

- **(3) Another distinction: final v. non-final judgments**
  - **Remember**: judgment may be enforceable though not final. The final judgement cannot be contested in the country where delivered.
  - **Remark**: the judgement can be enforceable although not final!

2. Recognition by State B of decision delivered in State A

- **(1) State A is 'State of origin' (or 'State of rendition') and State B is 'State addressed' (or 'requested State' or 'recognition State').**

- **(2) State addressed B is prepared to grant recognition granted from state A, it means it will 'import':**
  - **Rights and obligations between Parties 1 and 2** as determined in **State A**'s decision (typically if claim has been *upheld*)
  - **OR absence of rights/obligations** between Parties 1 and 2 (typically if claim has been *dismissed*)

- **(3) Recognition by State B by judgements delivered by State A, precludes re-litigation before courts of *State B* of the same issues determined by decision delivered in *State A***

  Recognition:
  - **And prevents a 'counter-decision' from being delivered by courts of State B** (remember **Case-Study 2, Part I**: *Neilson* case)
  - **Once recognized in B, decision of A has in principle same effects in B that those attaching to it in A based on law of A** (reach of *res iudicata*). Through recognition, judgement of A cannot produce greater effect that this judgement has in country A. The res judicata is defined by the law of the State that delivered the judgement.
    - what issues were conclusively determined and are foreclosed
    - what parties are bound by the decision and what parties are not

3. Enforcement by State B of State A's decision

- **(1) State B makes available its enforcement authorities who are prepared to take official steps (enforcement steps) including through coercion**
  - When compliance with decision requires performance on the territory of State B. **REMARK**: enforcement is not possible with judgements that do not require performance.
    - **Money judgments**: assets located on the territory of **State B.** If the judgement cannot be implemented in A but can be implemented in B, then the judgement creditor can ask the enforcement!
    - **Subject-matter of claim** is located in State B (physical thing, specific performance, website to be modified, etc.)

4. 'Exequatur': refers both to a procedure and a decision

- **(1) Intermediate procedure in State B whereby recognition and enforceability of decision of A in B is assessed by court of B**
  - **Exequatur = gateway** through which judg. of St. A enters leg. system of St. B
  - **Self-standing** and **autonomus** procedure with
    - **Application:** seeking exequatur/declaration of enforceability
    - **Claimant**:
      - normally **judgment creditor**
      - sometimes action **by debtor** seeking declaration of non-recognition (the exequatur cannot take place because the decision is not recognizable; so the judgement debtor wants to initiate things through an action).
    - **Judge**: **exequatur judge/court** sitting in **State B**
    - **Defendant**: normally judgment debtor (BR1 and CLug: 'person against which enforcement is sought')

  - **Exequatur aims at verifying**
    - **If decision A is enforceable in State A of origin:** no exequatur in B, without enforceability in A. Not enforceable: the beneficiary of the decision cannot have the decision implemented yet. It cannot produce greater effects in B than in A.
    - **If decision A complies with recognition requirements** set by **recognition law** in force in **State B addressed**

  - **Exequatur is either granted/allowed or refused/denied**
    - **Sometimes partial exequatur:** U.S. award of damages, incl. punitive dam, pun. dam. component is not recognized by an EU country, because of public policy e.g., but the remaining may be recognized. Of course you cannot go to another country recognizing those damages to receive them.

  - **If exequatur granted, way is open to actual enforcement**
    - But: once exequatur granted, judgement debtor will often implement judgment by itself; **no 'use of force' by B will then be required**
    - **Enforcement** will normally take place according to **law of State B and subject to same conditions as *local* judgment**
    - **Example-case**: Prof. Romano obtains a decision against Cyril in CH and I had to go through an exequatur proceeding based on CLug and obtained it. It becomes res judicata. Then I don't have to go to law enforcement in CH, because Cyril is going to comply spontaneously with his Spanish judgement, once Romano receives the exequatur judgement. Once exequatur granted, the decision is implemented spontaneously.

- **(2) If exequatur of decision of State A is not granted by State B:**
  Then judgment creditor may have different options – none of which is likely to look very exciting!
  - **Option 0: forget about** the issue and try to move on in life
  - **Option 1**: **try to file new action as to substance before Courts of State B.**
    - » **Provided Courts of State B have jurisdiction to hear claim (so a new decision on merits, and not for exequatur).** Example: I cannot obtain the exequatur of Spanish judgement (A) in CH (B) because some procedural errors that were involved, so the exequatur authorities in CH say that they cannot recognize it because goes against public policy.
    - » **Provided reason for which exequatur not granted does not make it impossible/unlikely that Courts of B will uphold claim**. Example: punitive damages. If I have a US award of damages and I am not able through an exequatur proceedings an exequatur granting enforceability of punitive damages component, it would make no sense for me to file an action in CH try to obtain punitive damages, because the answer would be the same.
  - **Option 2: try to file application seeking exequatur before Courts of another State C (Gambazzi: Switzerland and Italy)**
    - » Provided that judgement debtor has assets on territory of State C. Gambazzi case: Daimler, judgement creditor, obtain a UK judgement for 100 mio CHF against Gambazzi, lawyer. Initially the judgement creditor tries to obtain enforcement in CH, where Gambazzi had assets, the answer was no: the English decision was against CH public policy. Then, what the judgement creditor wanted to do, was to try to have the decision being enforced in Italy, other country, provided that the debtor had assets not only on territory B, but also on territory C.
  - **Option 3: approach judgement debtor and try to settle for lesser amount that the one set out in non-recognized judgment**
  - **Option 4 try to go back to Courts of State A asking to retry the case and eliminate element on which refusal was based**
    - » if e.g. refusal from State B to recognize judgement from A was based on procedural public policy. Example: not adequate notice was given to the defendant and this could be corrected.
    - » outcome uncertain: State A may say 'this is **res iudicata** for us and we cannot accept case is reargued/relitigated'

- **(3) Exequatur is normally necessary in order for judgment creditor to have decision of State A enforced in State B**
  - ➢ **KEEP IN MIND: if judgement debtor satisfies judgment voluntarily (i.e. by paying sum owed to judg. creditor) then no enforcement (which implies *use of force*), and so no exequatur will be necessary**
    - And everybody is happy: no need to bother authorities of B

- **Exequatur is a judicial procedure that costs time and money (including for *taxpayers* of State B)**, that are added to time and money that were involved in proceedings in State A having resulted in substantive judgment delivered by State A

➢ **KEEP IN MIND:** part of the reason why legal and practical obstacles to cross-border enforcement have been progressively removed (within EU and elsewhere) precisely **in order to promote cross-border voluntary compliance with court's judgments**

- If judgment debtor is a **rational agent** (most of time he/she is: see slide 12), he/she may be willing
  - **To spontaneously comply with judgment of State A** if he/she knows he/she will have **no chance or virtually no chance** of being able to persuade State B not to recognise – and not to lend its support to implementation of – judgment of A on territory of State B
  - **Not to comply voluntarily with judgment** if he/she anticipates that State A may not be willing to recognize and lend support to implement judgment of A ("wait and see": I am not going to comply with the decision to the extent that I am confident, that either State B might deny recognition of exequatur or there is a chance that State B will protect me against the enforcement of the decision delivered against me in State A.)

▪ **(4) Exequatur is necessary to have enforcement by authorities of B BUT: exequatur has been abolished between MSs (BRIa) as a precondition to proceed with enforcement**

➢ **Example-case**: a French judgement enforcement is sought in Italy, the judgement creditor does not have to go through exequatur proceedings before exequatur Courts in Italy. The judgment creditor can go directly to enforcement authorities, the police, in Italy.

➢ **Although grounds allowing non-recognition not abolished in EU:** Abolishment of exequatur does not **mean abolishment of grounds** that may justify for State B (Italian judgement), not to recognize the judgement of State A (French judgement). The French judgement may be enforced by Italian authorities.

Example: if State B ('State addressed') is France and State A of origin is Italy (Germany, Bulgaria, Malta, etc.). Exequatur abolished as of January 2015, consequence: judgment creditor may **directly turn to law enforcement in France** without having to initiate and complete procedure before exequatur courts in France. The judgement debtor may, through an application seeking refusal to recognition before the Italian Courts. But the French judgement may already be enforced and implemented by the Italian law enforcement authorities.

➢ **Switzerland:** like exequatur was abolished among Cantons around 1970

- **In Australia, for inter-state enforcement, almost abolished**: judgement creditor needs to have judgment registered in court of State of enforcement and pay a fee (*Service and Execution Process Act 1992*)
- **Example**: State addressed is France, where recognition is sought. State of origin might be a EU MS, where as said, the exequatur has been abolished. The judgment creditor can directly turn to enforcement agencies is France. Without initiate exequatur proceedings in France. If the judgement emanates from a Swiss Court, the procedure of exequatur exists.
- **State A is Switzerland.** State addressed is France, where recognition is sought: **procedure of exequatur is mostly uniform** and **simplified**: **Lug. Convention applies**
    - First phase *ex parte*: 'declaration of enforceability'
    - second phase: left to the initiative of debtor
- **State A is Canada** (Turkey, Brazil, etc.). State addressed is France, where recognition is sought. Procedure of exequatur is laid down in **French CPC**
    - and in principle *inter partes*, i.e. adversarial

4.2 Background: rationale of recognition

1. Avert international conflict of judgments

- **(1) And avoid adverse consequences flowing from it (see Part 1)**
  - Dispute is not solved and justice is denied
  - No **legal protection** of **substantive rights**
  - Cross-border human activity is **discouraged**

- **(2) Within EU: conflict of decisions at the antipodes of aim to establish 'area of freedom, security and justice' (see Part 1)**
  - On which action of EU is premised
  - Which is a **precondition for** exercice by EU citizens/residents of **fundamental freedoms** (people, services, goods, capitals)

2. To save money, time, energy and favor voluntary compliance

- **(1) The more limited the circumstances on which judgment debtor is permitted by State B not to comply, the more likely he/she is to voluntarily comply (and e.g. pay spontaneously)**
  - Thereby sparing judgement creditor time and money to initiate *exequatur* – another proceeding (!!!):
  - **How frustrating for creditor**, after having gone through one in A (and potentially more than one in A: e.g. if there was an appeal, review by supreme court of A)

3. Some inter-country justifications

- **'Mutual trust' between the States**

- **'Comity among nations' (case-law from common-law world)**

4.3 Brussels 1a Regime

1. Scope of application of Chapter III (Art. 36-57)

- **(1) State of origin (A) and State addressed (B) are EU States**
  - **No European uniform rules with respect to recognition and exequatur of non-MS decisions.** That part of Brux1 exclusively applies intra-community. When State A and B are MS.
  - **Example:** a Canadian decision is presented for recognition in France, France does not apply Brux1 : not only for the abolition of exequatur, but also for the grounds that justify non-recognition by the French exequatur Court of the Canadian judgement.

- **(2) Subject-matter of decision falls within the substantive law areas covered by BR1a (as designated by article 1)**
  - **No decisions on customs, administrative law, tax, family, etc.**
  - Example: a decision rendered in France on these subjects, cannot benefit from Brux1 in order for that decision to be implemented in Italy. → For arbitration, remember recital 12
  - **Is State B bound by characterization made by State A?**
    - If A characterizes claim as contractual, is B bound even if it would characterize claim as inheritance-related?

- **(3) No need for State A to have asserted jurisdiction based on BR Ia**
  - **If decision in A was rendered against a non-EU defendant** (BR1a did not apply to jurisdiction), Chapter III **applies if recognition sought in B.**

    Example: a decision is taken in Germany and is presented for recognition in France. Action started by German company against a Canadian company, the action was started in Germany. The German Court is going to affirm competence based on a domestic law on international jurisdiction. Let's assume the German Court issues a judgement, that fines for the claimant, that orders the Canadian seller of aluminum, to pay compensation for the delay in delivery of the goods provided in the contract. Let's say the Canadian does not have assets in Germany, but it has in France. That German judgment, even if it emanates from a German Court whose jurisdiction is not based on Brux1 but German national rules, may be recognized and enforced in France. Brux1 would apply to recognition and enforcement in France of that German judgement even if that German judgement has been released by a German Court that affirm jurisdiction not based on Chapter 2, but on German rules on international jurisdiction
    - No perfect match between scope of Chapter II on Jurisdiction and scope of Chapter III on Recognition
  - **Example: a Germany company sues Chinese company domiciled in Shanghai before German court based on place of payment**
    - BR1a does **not** apply to jurisdiction of German courts
    - German courts establish jurisdiction based on their own domestic rules (incorporated in ZPO)
    - German decision may be enforced in France based on **BRIa**

- **(4) Notion of decision**
  - **(i) Chapter III applies to decisions.**
  - **(ii) Decisions that resolve a dispute as to substance**: **judgement** (even if they are called decrees, orders, awards…)
  - **(iii) Judgment normally delivered by a judicial authority/court**
    - **Judgment does not have to be final in State A in order to be enforceable in State B, but it must be enforceable in State A to be enforceable in State B**
      - That's an **important difference** relative to bilateral treaties. Many treaties indicated for a condition, for these treaties to apply, that the decision had to be final. Now not anymore.
    - **Default judgements** also qualify as judgments
    - Judgments entered by **consent** also included
    - **Settlements reached by parties before court**: **no decisions per se, but recognition of Court settlement have special rules in Brux1.**
      - **'court settlements':** regime of recognition/enforcement similar to that of decisions (art. 59 referring to art. 58)
  - **(iv) Provisional / interlocutory decisions are included** (*Maersk*)
    - **provisional / protective measures** included only if ordered by court having jurisdiction **over substance** (article 2(a) (*flyLAL*)
    - **Decision declining jurisdiction based on *jurisdiction clause*** is a 'decision' for purposes of article 36 (*Gothaer*) but not in case of arbitration clause (recital 12)
    - **But not orders designed to organise further conduct of proceedings 'decision on exequatur' are excluded:** let's assume there is a Canadian judgement and the judgement creditor presents this judgement in France for recognition and enforcement. Let's assume that French Court that has to apply the French recognition law as opposed as to European law, will grant a recognition after French exequatur proceedings. Let's say that assets located in France are not sufficient to fully implement the judgement. The judgement creditor that obtained partial satisfaction in France is going to trying to seek full satisfaction in Italy for the remaining part. There has already been an exequatur proceeding in France, but this exequatur decision does not qualify under Brux1a for recognition in Italy. The judgement creditor that has obtained a Canadian judgement and a French exequatur decision, cannot pretend that the Italian Court applies Brux1 to recognition of the French exequatur in Italy. The Italian exequatur Court will have to apply Italian recognition law, with respect to the Canadian judgement and not Brux1 with respect to the French exequatur judgement.

2. Grounds for non-recognition

- **(1) Review of jurisdiction of foreign court (Article 45.3)**
  - **Generally: first pre-requirement laid down under recognition law of State addressed B**
  - **Rationale**: make sure State of origin A **affirmed jurisdiction** based on **jurisdictional rules or standards acceptable** for State addressed B, called '**indirect jurisdiction**' rules
  - **Example**: most situations where a country like the US denies recognition for foreign judgement, emanating from EU or other areas, is because the recognition Court concludes that the Court of origin did not comply with rules and standards in terms of jurisdiction. Example: there is a strong possibility that the US recognition Court will deny recognition to a French judgement that has been entered against a US defendant and in favor of a French domiciliary, consumer, because based on US principles of international jurisdiction, in the eyes of the US, French Court had no power to rule internationally over this issue, because in order for a Court to rule on a particular issue, there must be contact between the defendant and that Court. US Court NY may refuse to recognize a French judgement based on a jurisdictional problem, because the French judgment affirms jurisdiction based on European law principle that is not acceptable in the eyes of the US.

- **(2) Solution in BRIa departing from international practice**
  - **(a) Principle**: **no review can be exercised by MS B on whether or not MS A correctly affirmed jurisdiction based on BRIa**
    - **cp. Zurich OG, 27.11.2014 (LugC): no review possible even if Düsseldorf tribunal erred in affirming jurisdiction based on art. 5.3**. **Düsseldorf Case:** A judgement emanating from a Düsseldorf tribunal. It had no power to assert jurisdiction but asserted it, that judgement is presented in Zurich for recognition. The judgement debtor that is respondent at the exequatur proceedings raises the question as to the jurisdictional analysis, say : the German judgement entered against me, was a mistake. Because the German court could not have asserted jurisdiction based on Art. 5§3, so the judgement is wrong because is on a wrong assumption of jurisdiction by the German Court. This is no obstacle per se for the judgement to be recognized in Switzerland. The Court in Zurich said that she cannot do anything for this because the Lugano Convention prevents the Court in Zurich to attach importance to the fact that the German Court has made a mistake or misapplied Art. 5 Brux1 and cannot review the jurisdictional analysis made by the German Court.
    - **Public policy test cannot be applied to rules on jurisdiction**
    - **Even (*semble*) if court of origin failed to decline jurisdiction based on *lis pendens* (French and English case-law, BRIIa)**
  - **(b) Rationale**
    - '**mutual trust**' principle often invoked, but *insufficient*

- **The no-review principle is the principle that operates within the EU.** This has to do with mutual trust. The principle is best explained through the consequences of a MS B, being allowed to refuse the decision of MS A, whatever the mistake committed of MS A in the jurisdiction analysis. Not recognizing it would lead to conflicts. Example: German/Swiss case presented to CH Courts. If the Zurich Courts say "I'm not going to recognize it" : it is super bad. It is res judicata in Germany ! So if a Zurich Court refuses to recognize this German judgment because of a mistake that has been committed by the German court, then the way is open for re-litigation in CH.

- '**lesser evil**': consequences of B failing to recognize decision delivered by A (potential for **intra-EU denial of justice**) are **more inconsistent with justice** than consequences of B recognizing decision by A even if A **had no jurisdiction**
  - Remember: within State B, a decision by a court B1, once it is final, may have to be enforced by court B2 even if B1 **erred in retaining local jurisdiction** or in applying **law of B**

- **(3) BRIa: exceptions to 'no-review of jurisdiction' principle**

  - **(a) In exclusive jurisdiction and protective jurisdiction areas** (Sections 3 to 6, Ch. II), **review is required** (art. 45(1)lit e)
    - **In exclusive jurisdiction** under article 24: see Weber.
    - **In protective jurisdiction**: only if defendant was **weaker party**
    - **But finding of facts on which MS of origin based its jurisdiction are binding on MS addressed (Art. 45.2 BR1)**
      - **Cannot ask to review facts.** If court of MS A concludes that consumer has its domicile in MS A (therefore has jurisdiction) MS B cannot say "I don't agree" or ask to review that **finding of fact.** Even if **legal review is required**, the factual review (location of domicile etc.) is not possible.
      - **What if MS B concludes that, contrary to what MS A determined, contract is not consumer contract?** (**ATF, 5A_177/2018**: TF respected characterization as non-consumer contract made by Italian tribunal). A judgement is entered against a consumer in France, the trader is the judgement beneficiary/creditor and would like to obtain the implementation in Italy of the judgement. Italian Courts must make sure that the FR judgement has not been delivered in the place of performance of the contract because this is a basis that in consumer area, is not wanted. The Italian judgement has to make sure that France was the place of the defendant, consumer, but if the French judgment

concluded that the consumer was domiciled here and therefore France courts have jurisdiction, even if the Italian judgement is persuaded that consumer is and was at that time in Italy, it cannot deny jurisdiction based on this factual element.

- **(b) Exception relating to provisional measures**
  - **If a provisional measure is ordered by court of State A which does not have jurisdiction as to the substance**, **effects confined to territory of A** (Art. 2 lit a), Recital 33, Article 42(2)b)(ii)

- **(c) No exception if Court of A failed to comply with arbitration agreement**: Zurich OG, 14.03.2016 (Norwegian judgment).
  Another example: Norwegian Court that disregarded an arbitration clause, arbitration clause provided in an arbitration in CH, but this was disregarded. The Court in Norway issued a substantive judgement against a CH defendant, the judgement by the Court in Norway was presented for recognition in CH and the respondent at the exequatur proceedings said that there had been a mistake, because the Norwegian Court disregarded without reason the arbitration clause. But the Swiss Court said it would not do anything: Norway is part of Lugano Convention just as Switzerland, and Lugano does not prescribe any review or jurisdictional analysis. As an exequatur court, I am not allowed to review the jurisdictional analysis that let my colleague in Norway to disregard the arbitration clause and assume jurisdiction.

- **(d) Existing treaties with non-EU States requiring review**
  - If MS has undertaken towards a non-EU State to deny recognition of decisions delivered in another MS against domiciliary/resident in that non-EU State, **undertaking is preserved**

- **(4) Manifest incompatibility with publicy policy (art. 45.1.a):**
  Routinely present in recognition law, whether bilateral treaty or multilateral treaty etc.
  - **(a) Definition**: **manifest breach**
    - **Of rule of law** regarded as **essential** in legal order of MS addressed
    - **Of substantive or procedural rule** recognized as **being fundamental** within that legal order (Krombach)

  - **(b) Two kinds of public policy rules or principles**
    - **Substantive** public policy: substantive legal rule or right.
    - **Procedural** public policy: procedural legal rule or right

  - **(c) Regime within Brussels Ia**
    - **Public policy = reason to deny, but may not be used to extend jurisdictional review** (art. 45(3) BRIa)

- You may not regard the violation of a jurisdictional rule as part of your public policy
- Even when court of origin wrongly founded its jurisdiction over a defendant domiciled in State addressed (Krombach)

- **Public policy should operate only in exceptional circumstances: well-established case-law by the ECJ**
  - **Derog. from the 'no-review on the merits' principle (art. 52)**
  - **Example:** the principle is that italy must recognize the judgement of France. Exception: Italian Court is allowed, based on inconsistency of French judgement with Italian public policy, not to recognize.
- **ECJ is allowed to interpret the limits of the concept of public policy** (*Krombach, Apostolides, Diageo Brands*).

- **(5) Substantive public policy (art. 45.1.a)**
  - **(a) 'No review of the merits' principle (art. 52)**
    - **Control of accuracy of findings of law or fact not allowed**
    - **Fact that applicable law in MS A is different from applicable law in MS B is not sufficient:** although this divergence in applicable law is less and less common because the increasing bulk of EU Regulation govern applicable law in uniform way.

  - **(b) Violation/error of EU law** ('**European public policy**')
    - **Insufficient unless fundamental principle of EU law (*Eco Swiss*).**

      Eco Swiss Case: violation of EU substantive law, by the original Court. The question was whether the Case was allowed based on this, to deny the recognition of judgement and the ECJ said that this was insufficient, unless it is a fundamental principle of EU law.
      - Error concerning scope of infringement of national trademark under trademark directive: **not fundamental** (*Diageo Brands*)
  - **(c) Case-law**
    - **BGH (supreme Court in Germany)**: **exemption** from liability of public-school teacher for accidental death of pupil is part of **German public policy** and prevents recognition of **Italian** judgment ordering **him** to pay to parents' victim (Sonntag Case).
    - **Irish court** refused to enforce an **English judgment** for **payment of gambling debts** (*Sporting Index v. O'Shea*, [2015] IEHC 407
      - **ATF 126 III 534** (Swiss judgment) accepted to enforce gambling debt resulting from English judgment
    - **Punitive damages** award may be against substantive public policy: many solutions. Some countries recognize and other

not. Swiss national goes to the USA, buys a product, there is a flaw in this product, and he becomes injured as a result of this hazardous product. He files an action for compensation against the US manufacturer which has branches in CH. This CH domiciliary managed to obtain a judgement in his favor: compensation and punitive! The US defendant has assets in CH. Why would CH deny recognition to a US judgement that has been entered in favor of a Swiss national and domiciliary? This is compatible with justice based on a US vision.

- **French judgment determining astreintes** (penalty for non-compliance with judgment) **may not be recognized in other MS**
- **Swiss judgement requiring payment for services performed by a prostitute (probably) not enforceable in France (based on LConv)**

- **(6) Procedural public policy (art. 45.1.a)**
  - **(a) Recognition may be denied when major violation of right to a fair trial / to be heard** (cp art. **6 ECHR**) occurred
    - **German** defendant was **not** allowed by **French court** to defend himself through counsel because he **refused to appear in person**, German court was justified in denying recognition to French judgment (*Krombach*).

      Krombach Case: a young girl was killed in 1982, the stepfather, German (Mr Krombach) that was a rapist. The biological father (Mr Bamberski) started proceedings in France because the death occurred there. Based on French law. It was criminal proceedings with civil claim also, before Criminal Court. Because the defendant refused to appear before the French Court based on a rule that existed at that time – now abolished – the German defendant could not defend himself as he did not appear in person. An award of damages in favor of the father of the victim, Mr Bamberski, was entered by the French Court. Mr Krombach had no money in France he had some wealth in Germany and therefore Bamberski presented this judgement in Germany for recognition. But the German Court denied recognition because this, in the eyes of procedural public policy of Germany, amounted of a violation of a fair trial (because Mr Krombach did not have a lawyer).
    - **Swiss/Italian** defendant was **excluded** from **English** proceed. for failing to comply with a **disclosure** order
      - **Gambazzi Case:** Daimler/Chrysler launched a lawsuit against him on damages, saying he was responsible for the insolvency of some companies having caused significant damages to Daimler/Chrysler. The English Court ordered him to disclose an information and refused to comply. He was excluded from the proceedings and the UK Court judgement

asked him to pay more than 100 mio CHF. The Daimler/Chrysler sought enforcement in CH, and the TF denied recognition. Then they sought enforcement in Italy: Court in Milano asked the ECJ whether it could rely on public policy to defeat recognition.The ECJ said yes and deny recognition, **only if** 'following a comprehensive assessment of the proceedings and in light of all the circumstances, exclusion measure constitute **manifest and disproportionate infringement of defendant's right to be heard**' (Gambazzi).

- **English default judgment lacking analysis and lacking grounds other than defendant was in default** (*Trade Agency*)
  - **Lithuania** entitled to deny recognition
  - But **only if** this would lead to **impossibility of bringing** '**appropriate and effective appeal**'
- **English freezing order** affecting third party cannot be denied recognition in **Latvia** against third party based on public policy if third party was entitled to **challenge it** (*Meroni*)

- **(7) Inadequate notice of the original action (Article 45.1.b):**
  If the defendant at the original proceedings was not properly served, the judgement must be given on defaut of appearace.
  - **(a) Protection at recognition stage** before State B that *supplements* protection at **jurisdiction stage** before State A (under Art. 28(2)-(4)
  - **(b) Judgment given in defaut of appearance**
    - **all defendants are protected**, even domiciled in Third States
    - **autonomous** notion of 'default' and 'appearance': examples
      - **if defendant at criminal proceedings**
        - responded to criminal charges but
        - failed to submit defences to civil claim, he is not in default (*Sonntag*)
      - **if defendant was represented by somebody who he did not appoint, he was 'in default'** (*Hendrikman*)
        - even if under national law (German law), decision was not default decision
    - if decision is accompanied by **certificat**e issued by court of origin based on Article 53, court addressed has to verify information **is consistent with evidence** (*Trade Agency*)

- **(8) Inadequate notice of the original action** (art. 45.1.b)
  - **(a) The State-addressed, State B, must make sure that the service of process of** '**document instituting proceedings or equivalent document**' was **not effected...**
    - **...in sufficient time** (autonomous EU standard) → **that's a ground for State B to refuse the recognition of judgement.**

- **What is 'sufficent' depends on circumstances** (if proceedings are in MS other than that of service, if doc. is in foreign language, etc.)
- OLG Düsseldorf (2002) **9 days** between service abroad and first hearing: **too short**
- other rulings (Germany, Belgium): **7 days** sufficient

o **...and in such a way as to enable to arrange its defence**

➢ **(b) Whether or not service rules** (of MS A, of Service Reg., of HagueC...) **have been complied with is not necessarily relevant**

o mere **formal irregularity** in service that does **not** affect rights of defence insufficient to prevent recognition (*ASML*)

➢ **(c) BUT:** if defendant **failed to challenge** in MS of origin when it was possible for him to do so, he/she is **barred from relying on this ground to oppose recognition**

o this presupposes **default judgment** is served on defendant in sufficient time to enable him to challenge it **before higher courts in MS of origin**

o if challenge was raised and rejected by higher court in A, not possible to rely on the inadequate notice defence (*Apostolides*)

o **Example**: Spanish judgement enters in defaut, the defendant of the Spanish proceedings did not appear. The Spanish judgement was served on the defendant. Let's assume the defendant was domiciled in the UK. The defendant was aware of the Spanish judgement and he had the possibility, within 2 months time, to lodge an appeal in Spain, before the Spanish Court of appeal, he failed to do so. It is not possible for him to rely on that inadequate notice, to oppose the recognition of judgement in the UK. If he was offered the opportunity to cause a review, and to lodge an appeal in the country of origin, while it was possible for him to do it, then he is foreclose to rely on this to oppose recognition.

▪ **(9) Irreconcilable decisions: foreign v. local judgment (art. 45(1)(c)**

➢ **(a) Example**: Spanish judgement is in conflict with a judgement that is either a subsequent or prior judgement, then the UK has the possibility of relying on that basis to deny recognition of the Spanish judgement.

➢ **(b) Decision of MS A of origin – 'decision 1' – is irreconcilable with 'decision 2' ('local judgment') of MS B addressed**

o **(i) If parties are the same (cause of action need not be the same): large notion of 'irreconcilability'**

- So as to cover **inconsistent** but **non conflicting** judgments? (unclear: *Hoffmann*)
- Decision 2 needs not to be on the **same matter as decision 1** (nor on matter covered by BR)
  - ex. divorce decree in MS addressed vs. earlier maintenance order in MS of origin (*Hoffmann*)

- **(ii) Decision 1 not (more precisely: need not be, option is left to State addressed) recognized in MS of decision 2**
  - Regardless of whether decision 2 has been made (or has become final) earlier or later than decision 1
  - Regardless of whether proceeding in MS addressed were started earlier or later than proceeding in B
- **(iii) Also applicable to provisional measures**
  - **Interlocutory injunction** prohibiting infringement of trademark in country A irreconcilable with judgment of country B refusing to grant (*Italian Leather*)

- **10. Irreconc. decisions: foreign v. foreign judgment (art. 45(1)(d) [not in the exam]**
  - Decision 1 is irreconcilable with decision 2 made
  - Example: a Syrian man died, and her spouse obtained a French judgement awarding representation of children to her. An uncle of the dead man was able to obtain a Syrian judgement giving representation to him. Credit Agricole CH has some assets of the dead man. The surviving spouse was holding a French judgement, saying she was entitled to hold those assets. The uncle was holding a Syrian judgement saying he was entitled. Prof. Romano advised Credit Agricole to keep the money for the moment and wait to see how things evolved. The mother, tried to obtain exequatur of the French judgement and the uncle by opposition, relied on the Syrian judgement saying that his judgement should have been recognized in CH.
    - **In another MS other than MS of origin A and MS addressed B**
      - three Member States involved: **State A** of origin of decision 1, **State C** of origin of decision 2, **State B: State addressed**
    - **OR in a non-EU State**
  - **Four conditions need to be satisfied to allow MS B not to recognize** decision 1 and priorities decision 2
    - Decision 1 and decision 2 involve the same *parties*
    - Decision 1 and decision 2 involve the same *cause of action*
      - Stricter notion of irreconcilability than in case of conflict between *foreign* decision and *local* decision
    - Decision 1 **has been made *later* than decision 2**: **prior-in-time** principle, **priority given to earlier judgment**
      - which is the **relevant time**? when decision 1 and 2 have been rendered or become enforceable or become final? (*unclear*)
    - Decision 2 qualifies for **recognition** in MS addressed
      - if decision 2 emanates from a **non-EU State**, recognition of decision 2 in MS B assessed based on recognition law of B

3. Enforcement procedure: no exequatur

- **(1) Decision enforceable in A is enforceable in B 'without any declaration of enforceability being required' (art. 39):**
  - **(a) Recital 26**: 'judgement given in another MS should be treated as **if it had been given in the MS addressed**'
    - 'Mutual trust' and aim to 'make cross-border litigation less time-consuming and costly'
    - Purpose: to encourage **voluntary compliance with judgments**
  - **(b) Judgement creditor may directly seek enforcement** from the **enforcement authorities of State B**
    - **no need** for judgment creditor to have
      - Postal address in B
      - Nor an authorized representative in B (unless mandatory **in any case** based on domestic law) (art. 41(3)
  - **(c) It's up to judgement debtor to oppose enforcement through application seeking 'refusal of enforcement' before judicial authorities of State B.**
    - Principle is 'pay first, argue later': decision is **enforced first** and then absence of **grounds for not recognition is verified**
    - Although court competent to hear application for refusal **may stay or limit enforcement**
  - **(d) Judgment creditor may at any time obtain protective measure** to **secure enforcement** (art. 40)
- **(2) Documents to be provided to enforcement authority by the judgement creditor (42(1): two documents:**
  - **(a) Authentic copy of judgment (in original language)(lit a)**
    - Enforcement authority may request a **translation only if** it is 'unable to proceed without' the translation
  - **(b) A certificate issued by court of origin under Article 53** (Form contained in Annex I), **a kind of 'European passeport' of the decision; minimum content (art. 42(1)(lit b)**
    - Certificate should certify decision is **enforceable** in MS A
    - Certificate should contain **an extract** of judgment
    - Certificate should contain information about the **recoverable costs** of the proceedings where appropriate
    - Certificate should contain **calculation of interests**
      - Translation may be required '**where necessary**'

- **(c) In case decision of MS A incorporates a provisional or protective measure**, **certificate should further**
  - Contain a **description o**f the measure
  - Certify that the court which delivered the decision has **jurisdiction over the substance** of the matter
  - **Certify that the decision is enforceable in MS A**
    P.S. judgment creditor should further supply proof of service if protective measure has been ordered ex parte

4. Enforcement procedure: 'refusal application'

- **(1) Abolition of exequatur triggers principle 'pay first, argue later'**
  - **Compare**: systems where a **lower court decision** is already **enforceable** although it may be **later annulled** by a higher court decision

- **(2) Prior to first enforcement measure, judgment debtor has to be served (art. 43 (1)**
  - Both the **certificate** issued by the court of origin
  - **AND**, if not already served, the **foreign judgment**
  - Wherever she or he is **domiciled**

- **(3) Important: translation may be requested by judgement debtor only if**
  - **She/ he is not domiciled in the MS of origin; AND**
  - **Judgment is in a language that is not official in his/her MS of domicile and that he/she does not understand (art. 43(2))**
    - **If creditor proceeds with protective measures**, **translation provisions do not apply** (art. 43(3))
      Example: if the French judgement was entered against an Italian citizen domiciled in France, he is no longer, because he is no longer in Italy, because he has lived in France, he cannot ask a translation.
      Example 2: if the guy was domiciled in Wallonia, he's Italian and a French judgement against him, he cannot ask the translation into Italian.
      Example 3: He is domiciled in Italy and a French judgement against him, but he understands French, he not able to require translation.

- **(4) Once served, debtor may apply for refusal of enforcement (46)**
  - **If debtor believes one of the grounds for non-recognition is satisfied** (article 46 refers to article 45)
  - **Before the Court designated by each MS** (art. 47)
    - Generally: court of the place where enforcement takes place or court of domicile of judgment debtor
  - **No need for judgment debtor to have a postal address nor an authorised representative**

- **(5) Options available to Court of State B competent to hear application seeking refusal of enforcement of decision of State A *before* ruling on the merits of application (art. 44(1)**
  - Allow full or partial enforcement ('pay first argue later')
  - Limit enforcement to protective measures
  - Make enforcement conditional on security
  - Suspend wholly or partially enforcement
    - enforcement has to be suspended if **enforceability is suspended** in MS of origin (art. 44(2)

- **(6) If an 'ordinary appeal' against the decision is lodged or still possible in MS of origin A (art. 51).**

  Example: there is a French judgement that is enforceable, not final. The judgement creditor has turned to the Italian enforcement authorities in order to have the enforceable judgement enforced in Italy. At the same time, once the debtor has been served with the French judgement as well as with the certificate the judgement debtor has filed with the Italian Courts of Appeal, an application seeking refusal to recognize it. It turns out that the judgement debtor has lodged an appeal in the State of origin. The judgment debtor, wherever his domicile was, has not only filed in Italy, an application seeking refusal of recognition, but also filed on time an application to have an appeal in France (country of origin). If an appeal was filed in France against the judgement, then the Italian Court may decide to stay proceedings. For any reason the judgement looses enforceability in France, then it will also loose it in Italy. The enforcement has to stop if it has already taken place.
  - **Court of B may stay proceeding on application for refusal**
    - discretion and no obligation
    - any appeal available in UK, Cyprus, Ireland, is ordinary
  - **If appeal is still possible, time within which an appeal has to be lodged has to be specified in the decision to stay**

- **(7) Decision on the application for refusal of enforcement**
  - **Taken without delay** (art. 48)
  - **Decision should enquire where a ground for non-recognition under article 45 exists**
  - **Appeal against decision has to be made available by MS B (art. 49)**

5. Enforcement procedure: actual enforcement

- **(1) Adaptation**:
  If decision of A contains 'a measure or order' not known in the law of B, that measure or order shall to the extent possible **be adapted** to a measure or an order known in law of B
  - which has **equivalent effects** attached to it
  - pursues **similar aims** and **interests** (art. 54)

- **(2) Chronology: enforcement**
  - may occur **before** application seeking 'refusal of enforcement' is filed
  - may occur **while** application seeking 'refusal of enforcement' is being examined by competent court in MS B
  - may occur **after** application seeking refusal of enforcement has been dismissed by **competent** (lower court)
  - may occur **after** application seeking refusal of enforcement has been dismissed by **appellate court** in MS B

- **(3) Judgment ordering a payment by way of penalty (eg. astreinte)**
  - shall be enforceable in MS B 'only if the amount of the payment **has been finally determined** by court of origin' (art. 55): example
    - French judgment orders a French builder to demolish a construction in **Italy** that is not consistent with contract of construction
    - French judgment is accompanied by an astreinte 'de 1.000 Euro pour tout jour de retard' (called 'astreinte provisoire')
    - that part of French judgment not enforceable in Italy penalty 'liquidated' through a subsequent French judgment (called 'astreinte définitive')

- **(4) Enforcement takes place according to law of State addressed**

- **(5) Any dispute relating to enforcement itself has to be brought before court of place of enforcement (art. 24(5)**

- **(6) Protective measures:**
  Judgment creditor **may** content him/herself with **protective measure** until decision on application seeking refusal of enforcement **has been conclusively dismissed**
  - Through a '**protective measure**' in B with respect to money judgment delivered in A, creditor does **no**t get the money **yet** but prevent debtor from dissipating that money or transferring them out of B

- **(7) Restitution**
  (unregulated in BRIa, governed by *national* law)
  - **(a)** It may happen that a judgement is enforced in Italy while in the same time, the Italian Court that has been seized by the judgement debtor, establishes that there is a legitimate ground to refuse the recognition. Restitution may happen.

- **(b)** Should enforcement in MS B have taken place, and money have been transferred **by judgment debtor to judgment creditor**, **restitution** from latter to former may occur / be ordered when
  - Competent court in **MS B** has granted application seeking refusal and concluded decision should be denied recognition becaused **one ground for non-recognition is present**
    - as a consequence, enforcement in MS B was, **retrospectively, not legitimate/justified**
  - Appeal in **MS A** have reversed the initial decision which was enforceable so that the enforced decision is **annuled in MS A**
- **(c)** Jurisdiction to **hear restitution claim** (semble) 'courts of MS in which judgment has been or is to be enforced' (art. 24(5)

4.4 Lugano Regime

1. Grounds for non-recognition: almost identical with BR1a

- **(1) Art. 34 LConv (1 to 4) is identical with Art. 45(1) a) to d) BR1a**
  - **Four grounds for non-recognition**
    - public policy
    - lack of sufficient notice in case of default judgment
    - irreconcilability with judgment of SP (= State Party) addressed
    - irreconcilability with earlier judgment of another SP or tS

- **(2) Two differences with regard to review of jurisdiction**
  - **(a) Review is limited to consumer contract protection or insurance**
  - **(b) Art. 35(1) LConv does not refer to jurisdiction with matter to employment** (Section 5) **BUT Art. 45(1)(e) BRIa does**
    - **Example**: if French decision rendered against employee
      - jurisdiction of French decision **cannot be reviewed by Swiss court** if enforcement is requested in Switzerland (LConv applies).
      - jurisdiction of French court **has to be reviewed by Italian court** if enforcement is requested in Italy (BR1a applies)
  - **(c) Specification in BR (45(e)(i) that review of jurisdiction only occurs when protected party 'was defendant'**
    - Is it implicitly required by logic and purpose of LConv?

2. Uniform and simplified exequatur procedure:

Two steps. It is simplified because if a French judgement is presented in CH, there is an exequatur to be done, regulated by CLug.

- **(1) Step 1: required and *ex parte* (no participation of debtor)**
  - **(a) Decision of A is presented by *creditor* (or 'any interested party': art. 38) in B by way of application seeking 'declaration of enforceability', competent 'exequatur court' within State B (art. 39 refers to Annex II):**
    - Place of **domicile** of judg. debtor (if domicile in State B)
    - Place of **enforcement** (**option** for the judgment creditor)
      - in **CH**: '*Tribunal cantonal de l'exécution*'
      - **Geneva**: *Tribunal de première instance*
  - **(b) Documents to be annexed to application**
    - Copy of judgment and **certificate of enforceability issued by court of State A of origin** (art. 53-54)
    - Translation of judgment and certificate '**may**' be required (art. 55)
  - **(c) Applicant has to**
    - **Give address** for service within the area of jurisdiction of court; OR
    - Appoint **a representative** *ad litem* (art. 40)

- **(d) LConv allows** (art. 47), **but does <u>not</u> require, State B to grant protective measure before declaration of enforceability**
  - **Unlike BRIa:** 'an enforceable judgment shall carry with it by operation of law the power to proceed to any protection measures' (art. 40)

- **(e) Court of State B issues a 'declaration of enforceability'**
  - immediately on **completion** of formalities
  - **without any review** of non-recognition grounds (art. 41)
    - may or shall applicability of LConv be reviewed?
  - **<u>debtor not entitled</u> to make any submission** (art. 41)
    - most of the time: s/he is **not even aware** (to preserve the '*effet de surprise*', otherwise s/he may transfer assets abroad)
- **(f) Declaration of enforceability can be limited to <u>parts</u> of the judgment (art. 48)** ('*partial exequatur*')

- **(g) Declaration of enforceability 'carries with it' possibility of obtaining protective measures (art. 47(2)**
  - At this stage, it is an **obligation** for State parties to make available protective measures to judgment creditor
  - CH: ***séquestre***, art. **271.1 ch. 6 and art. 271.3 3 LP** (= 'loi des poursuites', Enforcement Act) has been modified to pay heed to LConv 2007 (in effect as of 1.1.2011)
    - But some requirements under LP (ex. about sufficient evidence of assets in CH: 272 ch 3 LP) are **not compatible** with LConv and should be ignored

- **<u>(2) Step 2: optional and adversarial</u>**
  - **(a) 'Declaration of enforceability' shall**
    - be brought to the **notice** of **applicant/creditor** (art. 42.1)
    - **be served <u>on debtor</u>** (art. 42.2)
      - accompanied by foreign judgment, it not already served

  - **(b) Judgment debtor may appeal against 'declaration of enforceability' and seek its refusal or revocation**
    - **Appeal is lodged** with the court designated **by each State Party (Annex III)**
      - CH: *Tribunal cantonal supérieur*, 327a (1) Swiss CPC, ***Cour de Justice GE*** in Geneva
    - **Time-limit** for lodging appeal (art. 43.5):
      - **1 month** after service: if debtor domiciled in *State Party of enforcement*
      - **2 months**: if debtor domiciled *in another State Party*
        - no extension of time may be granted on account of distance
        - what if debtor is domiciled in a third State? (*unsettled*: either 2 months or left to national law)

- **(c) Court of B examines grounds for non-recognition (art. 45)**
  - no **other grounds** than **art. 34 and 35** can be relied on to refuse or revoke declaration of enforceability
    - fact that judgment has been enforced in SP of origin is not ground to refuse enforceability (*Prism Investment*)

- **(d) Court shall give its decision 'without delay'**

- **(e) Court may (no obligation) (Art. 46)**
  - **Stay proceedings 'on application of one party'**
    - if 'ordinary appeal' has been lodged in **SP of origin**
    - if time for appeal in SP or origin has **not expired**
      - in which case, it may specify time-limit to lodge appeal
  - Alternatively, it may (no obligation)
    - **Continue proceedings ; BUT**
    - **Make enforcement** conditional on **security**

- **(f) Court's determination**
  - Either appeal is granted: **recognition is denied and declaration of enforceability is revoked ; OR**
  - Appeal is dismissed: **recognition and declaration of enforceability is confirmed**