

# Private international law An Introduction

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# Outline

- The issues
  - Jurisdiction
  - Applicable Rules
  - Cross-border enforcement
- The methods
  - In general
  - Cross-border private situations and the EU

# I. The Issues

## A. Jurisdiction

- Company C doing business from Germany, has supplied large quantity of high end electronic components to company X, established in Belgium
- Company X has failed to pay the invoices
- May Company C issue proceedings before a court in Germany or should/may it bring proceedings in Belgium?

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# I. The Issues

## A. Jurisdiction

- Issue of *jurisdiction* : which court may hear a cross-border dispute and issue a judgement?
- Question not specific to cross-border cases – jurisdiction is also relevant within one legal system or on int'l level (*e.g.* does ICJ have jurisdiction?)
- Special relevance in cross-border disputes : place of litigation has an *impact* on outcome of dispute

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# I. The Issues

## A. Jurisdiction

- Jurisdiction is not the only issue relevant for cross-border disputes:
  - Service of process
  - Taking of evidence
  - Etc.

# I. The Issues

## A. Jurisdiction

- Rules of jurisdiction? *e.g.* :
  - Art. 23 Brussels I Regulation – court chosen by parties has exclusive jurisdiction
  - Art. 77 Belgian Code PIL : in matters of succession, courts in Belgium have jurisdiction if :
    - Deceased habitually resident in Belgium
    - Assets of the deceased located in Belgium

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# I. The Issues

## B. Applicable rules

- Company C doing business from Germany, has supplied large quantity of electronic components to company X, established in Belgium
- Company X, which has failed to pay the invoices, has used the components to manufacture high end consumer music devices
- Company C learns that Company X has been declared *insolvent* by Belgian court

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# I. The Issues

## B. Applicable rules

- Company C would like to rely on the *reservation of title* included in its general conditions
- May Company X rely on provisions of German law according to which a retention of title not only covers the goods sold, but also the finished goods manufactured using the delivered goods? ('*verlängerter Eigentumsvorbehalt*' - section 51(1) *Insolvenzordnung*)



# I. The Issues

## B. Applicable rules

- Question not so much *which court* may hear the dispute, but *which rules* the court will apply
  - Belgian law (doubts whether reservation of title enforceable)
  - or German law (reservation of title valid and enforceable)

# I. The Issues

## B. Applicable rules

- Is the question not *moot* given unification/harmonisation of law?
- Many initiatives to harmonize private law rules:
  - EU – as annex to free market → Art. 114/115 Treaty : measures “*for the approximation of the provisions laid down by laws ... in Member States which have as their object the establishment or functioning of the internal market*”
  - Other organizations – Benelux, Ohada, Uncitral, etc.
  - 'Private' harmonization – e.g. Unidroit Principles, ICC rules, etc.

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# I. The Issues

## B. Applicable rules

- Harmonization : many forms
  - *Minimum* harmonization – e.g. 1986 Consumer Credit Directive 87/102 (art. 15 : “This Directive shall not preclude Member States from retaining or adopting more stringent provisions to protect consumers consistent with their obligations under the Treaty”)
  - *Maximum* harmonization – e.g. 2008 Consumers Credit Agreements Directive 2008/48 (art. 22 : “Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive”).

# I. The Issues

## B. Applicable rules

- Harmonisation of private law rules :  
at what cost?
  - Watering down?
  - Vague provisions? Legal  
certainty?

# I. The Issues

## B. Applicable rules

- Harmonisation of private law rules offers *limited* results
- *E.g.* art. 9 EU Directive on late payment in commercial transactions (2011/7) : MS should enforce retention of title clauses but only “in conformity with the applicable national provisions designated by private international law”
- Art. 2(9) : definition of retention of title : “the contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full” → unclear whether *verlängerter Eigentumsvorbehalt* covered

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# I. The Issues

## C. Cross-border enforcement

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- Company C, doing business from Germany, has supplied large quantity of high quality electronic components to company X, established in Belgium
- Company X has failed to pay the invoices
- C obtains a judgement from a German court, ordering X to pay invoices (and additional amounts, interests, etc.)

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# I. The Issues

## C. Cross-border enforcement

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- Question : may Company C use the judgement in Belgium, *e.g.* to attach assets held by a bank for company X?
- Or should company C first obtain that German judgement is verified/checked?

# I. The Issues

## C. Cross-border enforcement

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- Issue of cross-border enforcement of judgements : does country of enforcement
  - Prohibit enforcement of foreign judgements (absolute sovereignty) – or only if reciprocity?
  - Require that foreign judgements be first verified (cooperation)?
  - Allow unconditional enforcement of foreign judgements (free movement)?



# I. The Issues

## C. Cross-border enforcement

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- Issue not specific to private law – also arises in public law (tax law)
- Special relevance in private law given very intensive trade patterns

## II. The methods

### A. Introduction

- Private international law characterized by:
  - Importance of method/reasoning (as opposed to exclusive focus on *content* of the rules)
  - *Abstract* nature of methods
- Central question (and most difficult) : which *rules* are applicable to cross-border private situation?

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## II. The methods

### B. Which rules apply?

- In order to answer central question, need to address several issues
- *1st question* : are *uniform* rules applicable?
- *e.g.* CISG, EU directives, etc.
- No 'one size fits all' solution – each uniform law has its own applicability criteria

## II. The methods

### B. Which rules apply?

- *e.g.* Regulation 261/2004  
'overbooking' - applicable if (art. 3(1):
  - Point of departure is EU airport
  - Point of departure is outside EU but destination is EU airport - provided European airline and no equivalent protection afforded

## II. The methods

### B. Which rules apply?

- *2nd question* : which solution in the absence of unification/harmonization?
- 1<sup>st</sup> option : apply *local* law
  - Advantage : lowers transactions costs (for local courts/administrations)
  - Downsides :
    - Foreign companies at a disadvantage?
    - Risk of non recognition by other States
    - Negates cross-border dimension

## II. The methods

### B. Which rules apply?

- Application of local law today:
  - In *family* matters (directly or indirectly – through application of the law of the habitual residence)
  - Occasionally – for 'very important rules' → internationally mandatory rules (*e.g.* Belgian Distribution Act 1961)

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## II. The methods

### B. Which rules apply?

- 2<sup>nd</sup> option in the absence of unification/harmonization: selection rules ('*règle de rattachement*'/'*verwijzingsregel*')
- *e.g.* : “... the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs ...” (art. 3 Rome II-Regulation)

## II. The methods

### B. Which rules apply?

- Selection rules : 2 components
  - 1°) *Subject matter* of the rule – questions addressed - characterization problem – *e.g.* Rome I reg. aims at “contractual obligations in civil and commercial matters”



## II. The methods

### B. Which rules apply?

- Selection rules : 2 components
  - 2°) Applicable law : determined by a 'connecting factor' ('*facteur de rattachement*'/ '*aanknopingsfactor*') → designates the applicable law - *e.g.*
    - Divorce matters are governed by the law of the *habitual residence* of the spouses (Rome III Reg.)
    - What name does a child bear? Law of his nationality (art. 37 Belgian Code PIL)

## II. The methods

### B. Which rules apply?

- Selection rules : selection of a national law in light of (ideal of) the 'closest connection'
- Closest connection determined on the basis of :
  - Policy interests (*e.g.* ease of doing business, need to stabilize relationship, etc.)
  - Party interests

## II. The methods

### B. Which rules apply?

- Selection rules are (mostly) 'multilateral' - *e.g.* the estate of deceased is governed by the law of his last habitual residence
- May lead to application of local *or* foreign law (contrast with *applicability* rules : rule determining scope of application of local rule - *e.g.* Belgian tax law is applicable if taxpayer is established in Belgium)
- → Court A may apply law of State B

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## II. The methods

### C. Who decides?

- Cross-border issues – *private* law
- Tension :
  - Private law : remains within the province of States – enforcement of local policy interests through private rules (in family law, but also commercial law)
  - Cross-border situations : *international* nature of the problems
- How to resolve tension?

## II. The methods

### C. Who decides?

- Problem most *visible* when cross-border private issues are dealt with by national rules
- All States adopt their own rules to address cross-border private issues
- *e.g.*
  - EGBGB (Germany)
  - Swiss PIL Act 1987
  - Belgian CODIP 2004
- → national rules of jurisdiction, applicable law and foreign judgments

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## II. The methods

### C. Who decides?

- Advantage of these rules :
  - May be closely modelled on local private law (same 'language')
  - Allow State to pursue own policy interests (*e.g.* favor consumers; protect children in succession matters etc.)

## II. The methods

### C. Who decides?

- Disadvantages :
  - No guarantee of uniformity - *e.g.* State A provides that contract is governed by law of country where it is *concluded*, while State B provides that contract governed by law of country where contract *performed*...
  - Inefficient for some issues - *e.g.*
    - Cross-border enforcement of judgements : States will not go as far as they could if no cooperation (prisoner's dilemma)
    - Jurisdiction : States could claim (concurrent) jurisdiction for same dispute

## II. The methods

### C. Who decides?

- Other option : States adopting *common* rules (not substantive rules – but coordination rules! - contrast CISG and Rome I Regulation)
- *e.g.* all EU States decide that divorce matters
  - May be brought before courts of habitual residence of spouses (art. 3 Brussels II*bis* Reg.)
  - are governed by law of habitual residence of spouses (art. 3 Rome III Reg.)
- 'Natural' method for cross-border issues – but private law concerns → resistance



## II. The methods

### C. Who decides?

- Unification of private international law rules?
- 1<sup>st</sup>) Unified rules of jurisdiction
  - No (or less) overlap between competing courts
  - Level playing field for litigants
  - Make it possible to effectively claim exclusive jurisdiction

## II. The methods

### C. Who decides?

- Unification of private international law rules?
- 2<sup>nd</sup> ) Unified 'selection rules'
- *e.g.* EU Regulations Rome I, II, etc.
- Purpose : ensure that all MS will apply same national law to a given situation
- Contrast with *substantial* unification  
– *e.g.* CISG

## II. The methods

### C. Who decides?

- Unification of private international law rules?
- 3<sup>rd</sup>) Unified rules on cross-border enforcement
- Based on reciprocity → States may go much further in accepting effects of foreign judgements on their territory

## II. The methods

### C. Who decides?

- Various options:
  - *Bilateral* conventions – *e.g.* 1899 Belgian-French convention on jurisdiction and foreign judgements
  - *Multilateral* conventions – *e.g.* art. 31 Convention for the International Carriage of Goods by Road (1956) → rule of jurisdiction (where may customer sue carrier?)

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## II. The methods

### C. Who decides?

- Special option for unification of private international law rules : Hague Conference ([www.hcch.net](http://www.hcch.net))
- Purpose of Conference : provide framework for States to conclude treaties unifying private international law rules – *e.g.*
  - 1965 Service Convention
  - 1971 Traffic Accidents
  - 1980 Hague Abduction Convention
  - 2005 Choice of Court Convention

## II. The methods

### C. Who decides?

- Other option : EU
  - At first limited interest for private international law problems (limited intervention through conventions)
  - Starting in 1990's : renewed interest and own competence
  - 2014 : EU is a *major player* in cross-border private issues

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## II. The methods

### D. Cross-border private situations and the EU

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- Which role for the EU?
- Various roles:
  - 1<sup>st</sup>) Unify private law (*e.g.* Agency Directive; Consumer directives, etc.)
  - 2<sup>nd</sup>) Provide legal framework for cross-border issues in the absence of unification
    - Primary EU law (*e.g.* free provision of services)
    - Secondary EU Law (Regulations)

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## II. The methods

### D. Cross-border private situations and the EU

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- Primary EU law
- *E.g.* ECJ 14.10.2008 *Grunkin Paul II*
- Boy born in DK – father and mother are German citizens
- Birth certificate : boy bears a double name (composed of name of father and mother) – application of Danish law (imposed by Danish private international law)



## II. The methods

### D. Cross-border private situations and the EU

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- German authorities refused to recognize the name of the child – under German law (art. 10 EGBGB), name issues decided by the law of the nationality of the child
- Under German law, no double-barrelled surnames composed of the surnames of father and mother

## II. The methods

### D. Cross-border private situations and the EU

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- ECJ : refusal to recognize the name is a limitation imposed on person who has used freedom to travel and settle in other MS (art. 18 Treaty)
- Limitation not justified
- → EU Treaty limits freedom of MS in private law matters

## II. The methods

### D. Cross-border private situations and the EU

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- EU has adopted many Regulations addressing cross-border issues
- Legal basis?
  - Art. 67(4) TFEU : “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”
  - Art. 81 TFEU (former art. 65) : the Union shall develop “judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments”

## II. The methods

### D. Cross-border private situations and the EU

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- Art. 81 TFUE lists series of questions which may be addressed:
  - Mutual recognition and enforcement of judgements between MS
  - Cooperation in cross-border service of documents and taking of evidence
  - Measures ensuring compatibility of rules concerning the conflict of laws and of jurisdiction
  - Measures eliminating obstacles to proper functioning of civil proceedings

## II. The methods

### D. Cross-border private situations and the EU

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- Overview of EU Regulations addressing cross-border issues:
- 1) Cross-border proceedings:
  - Main instruments (jurisdiction of courts / foreign judgments)
    - Brussels I (44/2001)
    - Brussels II *bis* (2201/2003)
    - EEO (805/2004)

## II. The methods

### D. Cross-border private situations and the EU

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- Overview of EU Regulations addressing cross-border issues:
- 1) Cross-border proceedings:
  - Accompanying measures (aim at facilitating cross border procedures):
    - Service of Process (1397/2007)
    - Taking of Evidence (1206/2001)
    - Judicial Aid (2003/8)

## II. The methods

### D. Cross-border private situations and the EU

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- 2) Applicable law:
  - Rome I – law applicable to cross border contracts (593/2008)
  - Rome II – law applicable to cross border liability (864/2007)
  - Rome III – law applicable to divorce (1259/2010)

## II. The methods

### D. Cross-border private situations and the EU

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- 3) Overall harmonization of specific fields
  - Cross-border insolvency (1346/2000)
  - Cross-border alimony (04/2009)
  - Cross-border successions (650/2012)
  - Cross-border matrimonial relations between spouses (2015?)



## II. The methods

### D. Cross-border private situations and the EU

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- Special position of DK, UK and IRL
  - DK : not bound by Regulations (*no* right to opt in)
  - UK and IRL : right of opt in (opt in for Rome I, II, but not for Succession Reg.)

## II. The methods

### D. Cross-border private situations and the EU

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- Are EU Regulations limited to EU?
- Three different dimensions
- 1) Limited to the EU : not binding outside the EU
- *e.g.* Court in New York will not apply Rome I Regulation to determine which law applies to a contract (even if two parties are established in EU)

## II. The methods

### D. Cross-border private situations and the EU

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- 2) Wide scope : 'universal application'
- Regulations determining applicable law are said to be 'universally' applicable (*e.g.* art. 2 Rome I Reg.)
- → may be applied (by EU court) even if leads to application of law of non MS
- *Rationale* : avoid coexistence of two sets of rules for same questions

## II. The methods

### D. Cross-border private situations and the EU

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- 3) Are EU Regulations limited to 'EU matters'? - *e.g.*
  - May court of MS apply Rome I Regulation to contract between German and US company?
  - May court of MS apply Brussels I Regulation to determine whether it has jurisdiction in dispute between Chinese and Belgian company?

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## II. The methods

### D. Cross-border private situations and the EU

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- No uniform answer – scope of application different in various instruments - *e.g.*
  - Rome I : applies without any consideration of domicile, nationality etc. of parties to the contract
  - Brussels I Regulation : only applicable if defendant is domiciled in EU MS (exceptions)

# Private international law - Contracts (dispute resolution)

Patrick Wautelet

# Outline

- By way of introduction: sketching the issues
- The answers
  - Dispute resolution
    - Choice by the parties
    - Default rules
      - *Forum contractus*
      - Other rules of jurisdiction
  - Applicable rules
    - Choice by the parties
    - Default rules
      - Unified law
      - Which national law?

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## I. By way of introduction

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- Company C (based in Germany), Company B (Belgium), Company A (France) and Company D (England) form a *joint-venture* in order to jointly build and operate a large, capital intensive chemical plant
- JV Contract provides that each company will contribute to the cost of investment and operating costs in proportion to “its share in market for chemicals”



# I. By way of introduction

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- One year after the plant is put in use, C merges with E, a Dutch company
- As a consequence of the merger, C's total share of chemical market increases substantially
- Other parties claim that C's share in operating costs should be increased accordingly
- C disagrees and claims reference should only be made to share of market *at the time* contract was negotiated and signed

# I. By way of introduction

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- How can dispute be solved?
- Can answer be found in the contract?
- Contract may be *self-sufficient* and offer solution for dispute

## I. By way of introduction

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- Contract reads : “ *each party's total share of the European market for Chemical Products*”
- No further elaboration in contract of *time* at which market must be assessed → contract is ambiguous → need for *interpretation*

# I. By way of introduction

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- Interpretation – how?
- Methods of interpretation may vary according to applicable rules
- *E.g.* Swiss law :
  - Interpretation according to the *factual consensus between parties*, not the wording they choose (art. 18 Swiss Code of Obligations) → *subjective* interpretation
  - If actual intention cannot be proven : interpretation according to the principle of *good faith* → determining the meaning that reasonable persons would have given to disputed contract clause

# I. By way of introduction

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- *e.g.* English law :
  - Purposive and commercial approach to construction of contracts
  - Meaning of document is to be found in document itself – court tries to find the "*ordinary and natural meaning*" of the words as they are written, not the intention of parties
  - Investigation of the meaning of wording is *objective* – enquiry does not probe real intentions of parties, but seeks to ascertain contextual meaning of contract based on question what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language

# I. By way of introduction

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- *e.g.* sec. II-8-101 DCFR
  - (1) A contract is to be interpreted according to the *common intention of the parties* even if this differs from the literal meaning of the words.
  - (2) If one party intended the contract, or a term or expression used in it, to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could reasonably be expected to have been aware, of the first party's intention, the contract is to be interpreted in the way intended by the first party.

## I. By way of introduction

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- Contract may not be self-sufficient:
  - Contract provision is *unclear*
  - Contract does not offer solution  
– *lacuna*
  - Issue of *validity* of contract provision arises
- Hence need to call upon 'outside rules' → default rules of law
- Rules must be applied – by whom?

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# I. By way of introduction

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- Two questions:
  - Which court / dispute resolution body? Focus on jurisdiction of *courts*
  - Which rules? (No automatic coincidence between court and rules)



## II. Cross-border contractual disputes

### A. Introduction

- How are cross-border contractual disputes settled?
- *Various methods* available and used
- No 'world court' for business disputes (ICJ; ECHR; ECJ; WTO-panels; ICC, etc.)

## II. Cross-border contractual disputes

### A. Introduction

- 1<sup>st</sup>) Disputes settled by courts of one State
    - *Default solution* in case no other solution selected
    - Advantages : easy access; no cost barrier; direct local enforceability of judgment
    - Drawbacks : does court have jurisdiction/expertise? Speed? Neutrality? Confidentiality?
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# II. Cross-border contractual disputes

## A. Introduction

- 2<sup>nd</sup>) Arbitration
  - Arbitrators : neutral third parties (professionals) who decide the dispute based on rules of law (no Solomonic judgment)
  - Basis : agreement between parties – arbitration not mandated/imposed by law (*caveat* : labour arbitration in US)
  - Arbitration recognized and given effect by law (*e.g.* 1958 NY Arbitration Convention; art. 1676 ff Belgian Code of Civil Procedure, etc.)

## II. Cross-border contractual disputes

### A. Introduction

- 3<sup>rd</sup>) other methods
- *E.g. mediation* (ADR) : third party assists the parties and helps them negotiate an agreement to end a dispute
- Mediator acts as a neutral facilitator and guides parties through process without imposing solution

## II. Cross-border contractual disputes

### A. Introduction

- How to choose between various dispute resolution methods? Various factors
  - Cost
  - Speed of resolution
  - Enforcement
  - Confidentiality
  - Expertise of institutions involved
  - Nature of dispute
  - Personal preferences, etc.

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## II. Cross-border contractual disputes

### A. Introduction

- Focus : resolution of cross-border contractual disputes by *courts*
- Basic question : when do courts have jurisdiction ?
  - 1) Choice by parties
  - 2) Based on default rules
    - *Forum contractus*
    - Other default rules

# II. Cross-border contractual disputes

## A. Introduction

- Which rules?
  - European rules : Brussels I Reg. (2001/2012) - and other Regulations
  - Belgian rules : CODIP (art. 5, 6, 7 and 96) - specific acts
  - Various int'l conventions (*e.g.* CMR-Treaty)
- Hierarchy? How to determine *applicability*?

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# II. Cross-border contractual disputes

## A. Introduction

- 1) Hierarchy?
  - Brussels Reg. (and other EU Reg.) enjoy priority above int'l conventions (art. 69 Brussels Reg.) and national rules (*e.g.* CODIP)
  - Int'l Conventions trump national rules (art. 2 CODIP)



# II. Cross-border contractual disputes

## A. Introduction

- 2) Applicability?
- When is Brussels I Reg. applicable?
  - Civil and commercial matter (*e.g.* proceedings against Belgium to claim damages for wrongs during colonial period) + exclusions (insolvency/arbitration/social security/family law)
  - Regulation only applicable if *defendant* is domiciled in MS (artt. 2-4 Reg.)

# II. Cross-border contractual disputes

## A. Introduction

- When is Brussels I Reg. applicable?
  - Key element : *domicile*
    - Art. 59 natural persons – reference to national law
    - Art. 60 corporations – 3 alternative criteria (statutory seat, central administration, main place of business)

# II. Cross-border contractual disputes

## A. Introduction

- Consequences
  - Application of Regulation depends on how dispute comes to court – who is plaintiff, who is defendant
  - Regulation does not always follows application of EU law (*e.g.* : Canadian company brings product on EU market – proceedings brought by Belgian company)

## II. Cross-border contractual disputes

### A. Introduction

- *Nuances* to applicability of Brussels I Reg.
- For a number of rules, *extended* applicability
- This applies to
  - Choice of court (art. 23)
  - Exclusive jurisdiction (art. 22)
  - Rules re insurance; consumer; labour contracts

## II. Cross-border contractual disputes

### A. Introduction

- Choice of court rule (art. 23) : when is it applicable?
  - Choice for a court of a MS
  - At least one of the parties is domiciled in a MS (art. 25 new Reg. 1215/2012 : no consideration of domicile of parties)

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

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- Jurisdiction by choice → parties decide and allocate jurisdiction
- *E.g. “All disputes arising out of or in relation with the present Agreement shall be settled by the courts of Frankfurt, Germany”*

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

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- Questions:
  - 1) May parties allocate jurisdiction?
  - 2) Is freedom of parties unlimited?
  - 3) How should parties decide on jurisdiction?
  - 4) What are the consequences of a choice of court clause?

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

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- 1<sup>st</sup> question : may parties decide on which court shall have jurisdiction?
- Is jurisdiction not privilege of courts?  
Issue pertaining to public policy?
- US Supreme Court *Zapata/Bremen*



# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 1. Principle

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- 2014: freedom to choose recognized and confirmed:
  - Belgium (artt. 6/7 CODIP)
  - EU : art. 23 Brussels I Reg.
  - World : 2005 Hague Choice of Court Agreements Convention

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 1. Principle

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- Freedom to choose fairly *large*
- 1<sup>st</sup> example
- *E.g.* Company A (Belgium) and Company B (France) may grant jurisdiction to Swiss courts
- No need to choose court with a link with dispute, contract or parties (*caveat* : outside EU, link may be required; *e.g.* Art. 19 Hague Choice of Court Convention – refusal possible if there is no connection between State of court chosen and the parties or the dispute)

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 1. Principle

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- 2<sup>nd</sup> example
- Choice also possible *outside* contracts
- Art. 23 Brussels I / art. 6 CODIP : not limited to contracts
- *E.g.*
  - Parties involved in a car accident could also select court of their choice
  - Choice of court in *succession* matters (art. 5 Successions Reg. 650/2012); *maintenance* dispute (art. 4 Maintenance Reg. 4/2009)

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 2. Limitations

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- 2<sup>nd</sup> question : unlimited freedom?
- No – clear limitations imposed on possibility for parties to select court of their choice
- **1<sup>st</sup> example** : Limitations for certain type of contracts
- Labour/consumer/insurance contracts → strict limitation of choice of court clauses in order to guarantee application of substantive rules protecting consumers, etc.

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# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 2. Limitations

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- *E.g.* Mr. Chandler, a British engineer, works as senior construction manager for a large construction company based in Paris, which has operations in various countries
- Starting in 2008, Mr Chandler performs his duties in Dubai; in 2011, he moves to Ukraine. During the summer of 2013, he is sent to the Baltic states
- In 2014, Mr Chandler is fired. He wants your advice on where he may sue his ex-employer given that his contract indicates “Disputes will be settled by courts in Paris”

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 2. Limitations

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- Employment (art. 21 Brussels I Reg.) and consumer contracts (art. 17 Brussels I Reg.) : choice of court without effect, unless
  - Agreed by parties after dispute has arisen (*quaere* if choice of court clause is *confirmed* after dispute arises)
  - Gives employee/consumer additional choice (art. 21 Brussels I Reg.)
- Sometimes stricter limitations - *e.g.* art. 97 § 3 CODIP : choice of court in employment and consumer contracts *only* relevant if concluded after dispute has been arisen

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 2. Limitations

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- Additional limitation
- ECJ 27 06 2000 *Oceano Grupo Editorial* : choice of court in B-C contract (sale of encyclopedia on deferred payment terms ...) is an *unfair term* if not individually negotiated and grants exclusive jurisdiction to courts of place where seller is established (art. 3(1) Unfair Terms Directive 93/13)

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 2. Limitations

- **2<sup>nd</sup> example** : discretion of court
- Any discretion for court chosen to accept or decline jurisdiction?
  - EU : no discretion – obligation for court to accept jurisdiction
  - Art. 5(2) Hague Choice of Court Convention – no possibility for court chosen to decline jurisdiction “on the ground that the dispute should be decided in a court of another State”
  - Belgium : limited discretion – court may decline to hear the case even if choice for Belgian courts, if no significant connection with Belgium (art. 6 § 2 CODIP)



# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 2. Limitations

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- **3<sup>rd</sup> example** : *monopoly* of jurisdiction
- For some disputes, States claim monopoly of jurisdiction
- States will not tolerate any deviation by contract from this monopoly

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 2. Limitations

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- *Eg.*
  - EU : rights *in rem* on real estate/tenancy agreements (art. 22(1) Brussels I Reg.)
  - Belgium : disputes re validity and termination of 'Belgian' corporations (art. 115 CODIP)
  - China : disputes arising under co-operative joint venture contracts

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 2. Limitations

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- *E.g.* commercial lease agreement between Dutch company (owns commercial real estate in Liège) and Belgian company active in retail shoe industry – rental of retail commercial space in Liège
- Agreement includes choice for Dutch courts
- If landlord wants to bring proceedings against tenant in order to obtain payment of rental fee, may it bring proceedings in Belgium?

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# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 2. Limitations

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- How are these monopolies enforced?
  - *Direct* enforcement: duty for court to verify its jurisdiction and disregard choice of court clause (*e.g.* art. 25 Brussels I Reg.)
  - *Indirect* enforcement : refusal to enforce judgment issued by court chosen by parties – *e.g.* art. 35 Brussels I Reg. : no enforcement if in violation of rule of exclusive jurisdiction (exception to principle that no review of the jurisdiction of court of origin)

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 2. Limitations

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- Enforcement of exclusive jurisdiction much more difficult if *national* rules of jurisdiction
- *E.g.* CODIP
  - No direct enforcement – Belgian rules cannot bind foreign courts (antisuit injunction)
  - Indirect enforcement : refusal to enforce judgment issued by court chosen by parties (art. 25 § 1-7°)

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- 3<sup>rd</sup> question : how to choose?
- *Formal validity* of choice of court?
- Rules on formal validity serve as *proxy* for rules on agreement between parties → concern that choice of court clauses should be subject of *real agreement* between parties verified through rules on formal validity

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- Different approaches:
  - Uniform rules of jurisdiction :  
*uniform* standards of validity  
(*e.g.* art. 23 Brussels I Reg.)
  - National rules of jurisdiction :  
application of local standards  
(or standards of applicable law)

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- *E.g.* Art. 23 Brussels I Reg.
- 1) *Uniform* standard – European rules on validity
- No possibility to apply local rules (*e.g.* Belgian rules on required language in employment contract)
- Uniform European rules aim to ensure that there has been agreement between parties



## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- 2) Different scenarios
- **1<sup>st</sup> scenario** : choice of court clause included in *written agreement* signed by two parties → validity without doubt
- 'Written' agreement : also includes e-mail and other forms of electronic communication

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- What if incorporation *by reference*?  
Written document signed/accepted by two parties refers to general conditions of one of the parties, including choice of court

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 3. How to choose?

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- Only valid if
  - *i)* Clear *reference* in main document to general conditions (not specifically to choice of court clause) – *e.g.* 'All orders are subject to our terms and conditions of purchasing'
  - *ii)* General conditions made *available* to other party
    - Directly (back-side of paper document)
    - Indirectly (link to online document)
    - *Quaere* remote access – *e.g.* general conditions available at local Chamber of Commerce

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 3. How to choose?

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- **2<sup>nd</sup> scenario** : choice of court clause appears in document prepared by *one of the parties* (e.g. order confirmation, invoice, etc.)
- e.g. Belgian company sends offer to Germany company for delivery of goods; its general conditions are printed on the back of the offer. German buyer replies with short message : '*Thank you for the offer - please deliver on 01.03.2014*'

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- Validity only if:
  - (General) written acceptance by other party (absence of challenge and performance of contract *not sufficient* – compare Art. 25 Belgian Commercial Code and invoices) or
  - Choice of court part of transaction stream between parties, using same choice of court clause – *quaere* when is there a transaction stream?

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- *E.g.* Court of Appeal Liège 18.11.2003 : regular deliveries by Belgian company to Dutch company since 1999
- Belgian company insolvent → insolvency administrator requests payment of unpaid invoices
- Invoices include a reference to general conditions printed on back side- which include choice for Belgian courts – Dutch buyer never challenged general conditions of seller

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- Liège 18.11.2003 : buyer would be acting in bad faith if denied that he agreed or at least falsely created the impression that he agreed that the general conditions of the seller governed their relationships by never challenging those conditions even though they were mentioned in each invoice

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- **3<sup>rd</sup> scenario** : choice of court clause appears in document prepared by one of the parties (*e.g.* order confirmation, invoice, etc.) and *not* part of stream of transactions



## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- Could be held valid if in conformity with:
  - a form which accords with practices which the parties have established between themselves (also presumes stream of transactions between parties)
  - an usage of international trade (analysis in the branch concerned – subjective or objective knowledge of trade usage)

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## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- *E.g.* Commercial Court Hasselt  
22.10.2008:
  - Sale of windows by Belgian seller to Lxbg buyer
  - 10 invoices issued by Seller over the course of 3 years
  - Invoices include a choice for courts of Seller
  - Proceedings to claim payment of unpaid invoices

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- Commercial Court :
  - Two parties established in different countries → international trade
  - Seller contacted 6 other companies active in same business (4 in BE and 2 in NL) : they all use general trade terms which include choice for their own court
- Court concludes : sufficient evidence of usage of international trade (but no analysis of whether buyer knew/should have known about usage)

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- Choice of court : drafting
- A. *Exclusive* of not?
- *E.g.*
  - All disputes shall be settled by the courts of Paris
  - All disputes shall be exclusively settled by the courts of Paris
- Art. 23 Brussels Reg. : clause *presumed* to grant exclusive jurisdiction, unless agreed otherwise

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- B. Choice of court : how *precise* should it be? *e.g.*
  - All disputes shall be settled by the courts of France
  - All disputes shall be settled by the courts of Paris, France
  - “*Jurisdiction : Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business ...*” (ECJ *Corek Maritime*)
- Compromise between precision (at least choice for a country) and flexibility (respect for local rules on venue)

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

### 3. How to choose?

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- C. Choice of court : how *strong* should it be? *e.g.*
  - “*Disputes may be brought before the courts of England*”
  - “*All disputes ... shall be exclusively settled by the courts of England. However, [\_\_\_] reserves the right to bring proceedings before other courts of competent jurisdiction*”
- Optional choice of court clause : weaker solution

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 3. How to choose?

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- What about *substantial* validity of choice of court clause?
  - Uncertainty under Brussels I Reg. - reference to national law or European standard? How much room for substantial validity assessment?
  - Brussels *Ibis* Reg. : art. 25 : “unless the agreement is null and void as to its substantive validity under the law of that Member State”

# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 3. How to choose?

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- What if contract is *void*?
- *Autonomy* of choice of court agreement – must be assessed *separately* from main agreement
- Principle confirmed by Art. 25 Brussels *Ibis* - “An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract”



## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- 4<sup>th</sup> question : consequences of choice?
- **Consequences *inter partes***:  
*obligation* to seize court chosen
- Court chosen will take up jurisdiction  
– no refusal to exercise jurisdiction
- *Caveat* : room for discretion under  
art. 6 par. 2 CODIP

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- Watch out for *multi-contract* relationship
- *e.g.* contract between A (NL) and B (BE) whereby B is appointed exclusive distributor of products manufactured by A, for Belgium
- Contract includes a choice for Dutch courts

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- Dispute between A and B:
  - Termination of *distribution agreement* : choice of court is relevant
  - Non performance by A of *individual sales contract* concluded in the framework of the distribution agreement : no application of choice of court (but see invoices issued by A)

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- What if contract which includes a choice for courts of country B, falls under *mandatory rule* of country A?
- *e.g.* contract between A (NL) and B (BE) whereby B is appointed exclusive distributor in Belgium of products manufactured by A. Contract includes a choice for Dutch courts
- Distribution agreement falls under Belgian Distribution Act 1961 – internationally mandatory rule protecting distributors
- Belgian courts may *not* rely on 1961 Act to disregard choice of court provision

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- What if party to a contract, initiates proceedings before another court than court chosen?
- Obligation of court seized to verify its jurisdiction?
  - Brussels I Reg. : not *sua sponte*
    - only if other party challenges jurisdiction (art. 25)
  - CODIP : verification *ex officio* (art. 12)

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- Examination of challenge to jurisdiction may take some time...
- May other party in the meantime start proceedings before court chosen?
- Is there a situation of *lis alibi pendens*?
- *Lis alibi pendens* : mechanism to avoid concurrent proceedings.  
Brussels I Reg. : priority to court *first* seized (art. 27)

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- ECJ *Gasser* (2003) : even though parties may have chosen courts of country A, those courts must apply *lis alibi pendens* mechanism
- Practical consequence : court chosen by parties must stay proceedings until the court seized has declined jurisdiction...
- Primacom-scenario

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- *Primacom*: German cable TV business engaged in acquisition strategy
- In 2002, financing obtained from syndicate of banks – financial covenants included choice for exclusive English courts and English law
- 2004 : Primacom's business dries up – Primacom issues proceedings in Germany against some of its lenders, claiming that some of the financial agreements were contrary to German usury law



## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- Primacom argued that the choice of court provision was invalid on the basis of *duress* – provision imposed upon Primacom as a means of avoiding German principles of immoral lending...
- Lenders brought proceedings in England (seeking i.a. an injunction prohibiting sale of assets + declaratory proceedings) – but stayed on *lis alibi pendens* ground – art. 27, with reference to *Gasser* case
- Case settled in 2005

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- Damages? In theory could be possible to claim damages from other party for violation of choice of court clauses
- Difficulty
  - Demonstration that clause was indeed breached
  - Putting a figure on the damage suffered

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## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- Reversal of *Gasser* : new art. 31(2) Brussels *Ibis* Reg. :
- “Where a court of a Member State on which [a choice of court clause] confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.”

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- Consequences of choice of court clause **vis-à-vis third parties?**
- Who is a third party?
- *e.g.* assignment, transfer, merger → no real third party; assignee, transferee, etc. takes the position of original contract party (examination under applicable law)

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- Some third parties are 'real' 3<sup>rd</sup> parties
- **1<sup>st</sup> scenario** : life insurance contract – beneficiary is not the insurance holder
- If beneficiary wants to sue insurance company, is he bound by choice of court clause in life insurance contract?
- If insurance policy includes a valid third party stipulation, third party may *rely* on choice of court clause; disputed whether third party may be *bound* by choice of court clause

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- **2<sup>nd</sup> scenario** : goods shipped by boat to buyer; seller concludes shipment contract with owner (charterer) of the boat; seller receives a *bill of lading* from carrier when handing goods for shipment
- Goods are damaged when opened by buyer
- Is buyer bound by choice of court provision in bill of lading if it wants to bring proceedings against carrier?







## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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de Liège



- ECJ : choice of court in bill of lading may be relied upon vis-à-vis buyer if:
  - Choice of court provision is validly agreed between shipper and carrier
  - *And* third party (buyer), by virtue of relevant national law, succeeds to the shipper's rights and obligations upon acquiring bill of lading

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## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- Belgian court practice :
  - Belgian law applicable to issue of succession if ship leaves from or sails to Belgium (art. 91 Sea Act – mandatory provision)
  - Under Belgian law, buyer does not become vested with all the rights and does not become subject to all obligations mentioned in BL – independent position

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# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 4. Consequences of choice of court ?

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- **3<sup>rd</sup> scenario** : chain of contract
- *E.g.* : sale of compressors by an Italian company (R) to another Italian company (C) and re-sold to a French company (L) which sold them to a French property developer (D)
- Compressors were fitted in work air-conditioning units installed in building renovated by D in France
- AC system does not work – expert finds a defect in the manufacturing of the compressors
- Proceedings in France by D against R, C and L
- R challenges jurisdiction of French courts on the ground that its contract with C includes a choice for Italian courts

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- ECJ (7.02.2013 – *Refcomp SpA v Axa Corporate Solutions Assurance SA* – case C-543/10): choice of court *cannot* be relied by manufacturer on against sub-buyer
- Reasoning? National rules which provide for an exception to the principle of privity of contract (contract are binding only on the parties who have signed them) and hold that where there is a transfer of ownership of goods, sub-buyer obtains, together with ownership, all elements pertaining to it and specifically an accessory right to claim compensation for non-conformity of the goods, directly from original seller, are not relevant since art. 23 must be interpreted *autonomously*

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# II. Cross-border contractual disputes

## B. Jurisdiction by choice

### 4. Consequences of choice of court ?

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- According to ECJ:
  - Jurisdiction clause does not follow goods along chains of successive contracts transferring their ownership since there is no contractual relationship between sub-buyer and manufacturer (see previous case : *Handte*)
  - Relationship of succession between the initial buyer and the sub-buyer is not regarded as the transfer of a single contract or the transfer of all the rights and obligations for which it provides - contractual obligations of the parties may vary from contract to contract

## II. Cross-border contractual disputes

### B. Jurisdiction by choice

#### 4. Consequences of choice of court ?

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- ECJ does not indicate whether sub-buyer may *rely* on choice of court clause against original seller...

## II. Cross-border contractual disputes

### C. Jurisdiction by default

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- Which court has jurisdiction in the absence of a choice of court provision (or if such provision is invalid)?

## II. Cross-border contractual disputes

### C. Jurisdiction by default

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- Jurisdiction could be based on:
  - *General* rules of jurisdiction – applicable to all disputes
  - *Specific* rules of jurisdiction – aiming exclusively at contractual disputes



## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 1. General rules of jurisdiction

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- General rules of jurisdiction?
- Most important one : court of the defendant (*actor sequitur forum rei*)

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 1. General rules of jurisdiction

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- Fall back provision :
  - 'Home game advantage' for defendant
  - Eases out enforcement of future judgment
  - (in principle) ease of application
    - not dependant on lengthy legal reasoning

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 1. General rules of jurisdiction

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- Court of the defendant principle widely recognized within the EU:
  - Art. 2 Brussels I Reg., art. 3 Maintenance Reg., art. 3 Brussels II *bis* Reg., etc.
  - Art. 5 CODIP, art. 2 WBRv (NL) etc.

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 1. General rules of jurisdiction

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- Where is the defendant?
  - *Domicile* (e.g. art. 2 Brussels I Reg.)
    - No European definition – artt. 59 and 60 Brussels I Reg. offer only starting point – companies : registered seat, principal place of business or central administration
    - CODIP: principal place of registration (art. 4)
  - *Habitual residence* (e.g. art. 3 Maintenance Reg.) – which definition?

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 1. General rules of jurisdiction

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- Wide scope of the rule : court of the defendant has jurisdiction for all disputes between parties no matter what legal basis (except : disputes for which another court may claim *exclusive* jurisdiction)

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- Specific rule of jurisdiction aiming only at contractual disputes
- European model : '*forum contractus*'
- Two versions:
  - Place where contract is *concluded* (e.g. art. 96 § 1a CODIP) → difficult to apply
  - Place where contract is *performed* (e.g. art. 5(1) Brussels I Reg.; art. 6(a) W.Burg.Rv NL)

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- Focus on art. 5(1) Brussels I Reg.
- **1<sup>st</sup> question** : when is it applicable?
  - 'Civil and commercial matters'
  - Defendant domiciled in a MS
  - 'In contractual matters' - *e.g.* precontractual liability? Chain of contracts? → autonomous concept of contract. *E.g.* ECJ in *Handte* : no application of art. 5(1) to claim by sub-buyer

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- **2<sup>nd</sup> question** : which court has jurisdiction?
- Two different regimes:
  - *General* regime for all contracts (art. 5(1)(a))
  - *Special* regime for contracts of sales and services agreements (art. 5(1)(b))



# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- **General regime**
- Various steps to determine which court has jurisdiction:
  - 1<sup>st</sup> step : which obligation is relevant?
  - 2<sup>nd</sup> step : where is the place of performance?

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

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- **1<sup>st</sup> step** : which obligation?
  - No single place of performance for the contract *in toto*; contract may give rise to several obligations
  - Which obligation? Relevant obligation is the one on which claim is premised

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- Do not *confuse* contractual obligation and remedy in case of breach – *e.g.* sales contract:
  - Seller claims payment of sales price from buyer : relevant obligation is obligation to pay sales price
  - Buyer claiming damages in case of late delivery : relevant obligation is (contractual) obligation to deliver on time

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

---

- What if *various obligations* at the basis of claim?
- *e.g.* distribution agreement terminated by manufacturer → distributor claims damages (for wrongful termination), unpaid commissions and obligation for manufacturer to repurchase goods

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- ECJ:
  - *Individual* approach – determine place of performance for each obligation individually (*e.g.* court for the place of performance of payment obligation does not necessarily also have jurisdiction for dispute on termination of contract)
  - Unless it is possible to distinguish 'main' obligation from 'secondary' one
    - this must be done under law applicable to contract

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- **2<sup>nd</sup> step** : where is place of performance?
  - To determine place of performance : no uniform, European approach
  - Obligation to identify relevant legal regime - which law governs the contract? (no determination based on 'nature' of contract or of relationship)
    - Uniform law (*e.g.* art. 57 CISG)
    - National law (*e.g.* art. 1247 Belgian Civil Code)

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- Place of performance?
- First principle : at place agreed between parties (*e.g.* art. 6-40 Dutch NBW)

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- ECJ (*Zelger*, § 5): parties may designate competent court through provision on place of performance
- No need to comply with (formal) requirements for choice of court provisions (art. 23)
- Limitation : indirect choice of court through provision on place of enforcement not valid if designated place does not bear a substantial connection with contract (ECJ *Gravières Rhénanes*)



## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

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- What if no agreement between parties on place of performance?
- Second principle : default rule – may vary
  - Debtor's place (*e.g.* art. 1247 Belgian Civil Code)
  - Creditor's place (*e.g.* English law)

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- What if place of performance bears no relation to actual performance of the contract?
- ECJ : not relevant, cannot be used to deprive art. 5(1) court of its jurisdiction (*Custom Made Commercial* 1994)
- This is so even if place of performance as determined by national law, grants plaintiff possibility to seize own courts – even though Regulation is in principle hostile to such *forum actoris*

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

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- **Special regime**
- Special regime created out of frustration with mechanic approach of ECJ to Art. 5(1):
  - Only covers two categories of contracts
  - Direct determination of competent court

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

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- **1<sup>st</sup> step** : which contracts?
- Two categories of contracts covered:
  - Sales contracts – only sale of goods (not immovables, IP, etc.)
  - Contracts for the provision of services
- How to identify whether contract falls within one of these categories?

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- *e.g.* Company established in Spain sells clothes in shops all over Europe
- Company contracts with company based in Morocco for the supply of men's shirts
- Shirts must be made according to precise specifications of Spanish company (style, cut, etc.)
- Spanish company also provides fabric (and collar studs etc.) to Moroccan company, with instructions to use only these materials
- Moroccan company is required under contract to organize its work in a certain way, with quality control, packaging, labelling, delivery orders and invoices also organized in detail

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

---

- Is this a *sales contract* or a *contract for provision of services*?
- No clear indication in Art. 5(1)(a)
- ECJ : starting point should be the obligation which *characterises* the contract
- If contract has as its characteristic obligation the supply of goods → sale of goods

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

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- According to ECJ, fact that the goods to be delivered are to be manufactured or produced beforehand : no impact on classification
- One indication : does 'buyer' supply all raw materials? If purchaser supplies all the materials from which the goods are manufactured, indication that contract for provision of services

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

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- Another element : liability
- Is seller responsible for the quality of the goods? If yes, probably a contract for sale of goods
- If seller is liable for correct implementation of instructions, rather contract for provision of services



## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

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- How to spot contracts for supply of services?
- ECJ *Falco Privatstiftung* : dispute concerning payment of royalties arising out of a license contract covering right to market video recordings of a concert in Germany
- Is this a services agreement?

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

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- ECJ : concept of services implies at least that the party who provides the services, carries out a particular activity in return for remuneration
- In case of license agreement, no such activity because the owner of an IP right grants the licensee the right to use that right in return for remuneration
- Only obligation undertaken by owner of IP right : not challenge the use of the right by licensee

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- What about loan agreement :  
services contract or not?

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- **2<sup>nd</sup> step** : which place of performance?
- Art. 5(1)(b) refers not to place of performance of obligation at stake (in dispute) – but to place of performance of *characteristic obligation*
  - Sales contract : obligation to deliver the goods
  - Services contract : obligation to provides services
- This obligation is the only relevant one – even if dispute turns on another obligation (such as payment)

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- 1<sup>st</sup> rule : No determination by reference to applicable law – autonomous determination of place of performance
- ECJ : “the autonomy of the linking factors provided for in Article 5(1)(b) of Reg. No 44/2001 precludes application of the rules of private international law of the Member State with jurisdiction and the substantive law which would be applicable thereunder” (Car Key § 53)

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- 2<sup>nd</sup> rule : parties enjoy possibility to determine place of performance
- See “unless otherwise agreed”
- ECJ, Car Key : “...under Article 5(1)(b) of Reg. No 44/2001, the parties to the contract enjoy a certain freedom in defining the place of delivery of the goods... the parties can come to an agreement concerning the place of performance of the obligation for the purposes of the application of that provision”

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- How to determine place of performance in the contract?
- *e.g.* delivery 'Ex Works'

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- What if seller delivers in another country than country selected by parties?
- Place of *actual* delivery is not relevant if does not coincide with place of *agreed* delivery
- Art. 5(1)(b) : "place... where under the contract the goods were delivered..."



# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- 3<sup>rd</sup> rule : what if no determination by parties of place of performance?
- Two options:
  - Apply art. 5(1)(a)
  - Stick to art. 5(1)(b) and attempt to infer place of performance from general features of contract

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- Second option favored by ECJ
- *Wood Floor* : “... the place of the main provision of services must be deduced, in so far as possible, from the provisions of the contract itself”
- *e.g.* if commercial agency contract, look at place where the agent was to carry out his work on behalf of the principal, consisting in particular in preparing, negotiating and, where appropriate, concluding the transactions for which he has authority

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- If contract does not offer sufficient basis to determine place of performance?
- ECJ : if contract is already performed, appropriate to take account of the place where he has in fact for the most part carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary to the parties' intentions

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- What if several places of performance?
- E.g. ECJ *Color Drackx* : sale of goods between German and Austrian company; seller undertakes to deliver the goods to various retailers of buyer in Austria
- Dispute turns on the alleged non-performance of the obligation to which seller was subject under the contract to take back unsold goods and to reimburse the price to buyer

## II. Cross-border contractual disputes

### C. Jurisdiction by default

#### 2. Specific rule of jurisdiction

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- ECJ:
  - Ruling only applies to the case where there are several places of delivery within a single Member State; no prejudice to the answer to be given where there are several places of delivery in a number of Member States
  - Art. 5(1)(b) may be applied where there is one, but also when there are several places of delivery

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- If there are several places of delivery within one MS? Art 5(1)(b) does not confer concurrent jurisdiction on a court for any place where goods were or should have been delivered
- Where there are several places of delivery of the goods, 'place of performance' means the place with the closest linking factor between the contract and the court having jurisdiction
- Closest linking factor will, as a general rule, be at the place of the principal delivery, which must be determined on the basis of economic criteria

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- If not possible to determine the principal place of delivery, each of the places of delivery has a sufficiently close link of proximity to the material elements of the dispute and, accordingly, a significant link as regards jurisdiction
- Plaintiff may therefore sue the defendant in the court for the place of delivery of its choice

# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- What is several places of supply/delivery in several MS?
- ECJ : first try to identify the "place with the closest linking factor between the contract in question and the court having jurisdiction"
- It may not be possible to identify a central place (*e.g.* provision of air carriage service from A to B)



# II. Cross-border contractual disputes

## C. Jurisdiction by default

### 2. Specific rule of jurisdiction

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- In those cases : “both the place of arrival and the place of departure of the aircraft must be considered, in the same respect, as the place of provision of the services which are the subject of an air transport contract”
- Choice of plaintiff only in exceptional cases

# **Private international law - Contracts – Part II**

**Patrick Wautelet**

# Menu

- 
- Introduction
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    - Dispute resolution
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      - Default rules
        - *Forum contractus*
        - Other rules of jurisdiction
    - Applicable rules
      - Choice by the parties
      - Default rules
        - Unified law
        - Which national law?

# III. Cross-border contracts :

## applicable rules

### A. Introduction

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- Once decided which court decides on a dispute : which rules apply?
- No necessary coincidence between court and applicable rules (*Gleichlauf*)
- Various methods to determine applicable rules

### III. Cross-border contracts : applicable rules

#### B. Choice by parties

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- Principle : contract is governed by law chosen by parties
- *Eg.* “This Agreement is governed by the laws of the Kingdom of the Netherlands”

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Many jurisdictions recognize freedom to choose the law as a fundamental principle of int'l contracts - *e.g.* :
  - Art. 3 EU Rome I Regulation
  - Art. 7 Mexico Inter-American Convention of March 17, 1994
  - Section 1-301(c) § 2 UCC (US)
  - Art. 7 Japanese PIL Law 21 June 2006

### III. Cross-border contracts : applicable rules

#### B. Choice by parties

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- Many contracts are very detailed, spelling out the rights and duties of parties, with as much care for details as possible
- Given the degree of details and the fact that the agreement is the law of parties (*pacta sunt servanda*), is it necessary to include a choice of law?

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Impact of the choice of law is *not as relevant* as that of choice of dispute resolution
- Even without a choice of law, contract is there and may be used as starting point to resolve a dispute
- In fact, in many disputes, key is not so much which law applies, but interpretation of the contract provisions (taking into account parties' intention or not)



# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- However, applicable law remains relevant in 3 respects :
  - Agreement may not be *not complete* (*e.g.* contract concluded on the basis of general conditions)
  - Agreement may not be sufficiently *precise* → room for interpretation
  - Agreement may give rise to doubts as to its validity (invalidity decided by applicable law)

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Even if applicable law is only marginally relevant, why not make use of the opportunity to choose the law in the contract?

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Even more relevant since method to determine applicable law if no choice by the parties may not be the same in all jurisdictions and it may not guarantee predictable result:
  - *Fixed* rule premised on one connecting factor (such as place of contracting or place of performance – Art. 8-1 *Lei de Introdução ao Código Civil Brasileiro*)
  - Closest connection (Art. 7 Mexico Inter-American Convention or s. 188 Restatement Conflicts 2<sup>nd</sup> : “the law of the state which ... has the *most significant relationship* to the transaction and the parties ... ”)

### III. Cross-border contracts : applicable rules

#### B. Choice by parties

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- What to do in case of *deadlock* (each party favors own law)?
  - No choice at all (fall-back provisions; *e.g.* Art. 4 Rome Regulation → legal certainty reduced since escape clause)
  - Choice for a *neutral* law? (Swiss / Sweden → dispute resolution adapted!)

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Other solution : *split* the choice of law and have the Agreement subject to two laws, each for one part of it – so that both parties have comfort of application of their own law for part of the Agreement?
- → 'dépeçage'

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Difference between 2 kinds of '*dépeçage*' : '*partial*' choice of law (refer part of a contract to a specified applicable law and leave the remainder of the contract to be governed by the objectively applicable law) and *split* choice of law (choice for concurrent laws)
- In both cases : caution required (is the red line between the 2 clear enough?)
- In some jurisdictions : validity of *dépeçage* doubtful

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Split choice of law : drafting
- *E.g.* “The present agreement shall be governed by the laws of Belgium. However, if any provision of this agreement were to be invalid or not fully effective under Belgian law, the validity and effectiveness of this provision shall be solely governed by German law” (*rationale* : fear that a specific provision of the contract could be invalid under Belgian law : German law as fall-back law)

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- Split choice of law : drafting
- *E.g.* “The present agreement shall be governed by the laws of Germany and German courts shall have jurisdiction. However, in so far as the mortgage provisions are concerned, French law shall be applicable and French courts shall have jurisdiction” (loan agreement German bank – German company, secured by mortgage on French immovable)



### III. Cross-border contracts : applicable rules

#### B. Choice by parties

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- Other solution in case of deadlock?
- Choice for Unidroit Principles, 'Equity and Fairness' or *lex mercatoria*?
- *E.g.* : Article 32 ICC Model Int'l Franchising Contract : “ *This Agreement is governed by the rules and principles generally recognized in international trade together with the UNIDROIT principles on International Commercial Contracts*”

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- May be upheld by *arbitrators* (see *e.g.* Art. 21 ICC Rules of Arbitration 2012 : “The parties shall be free to agree upon the *rules of law* to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the *rules of law* which it determines to be appropriate.”)
- Caution : general principles of law are just that, not a developed code of law with long history of court practice...

### III. Cross-border contracts : applicable rules

#### B. Choice by parties

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- Rome I Reg. : choice of law only in favor of State law (but not limited to law of EU Member State!)
- What about choice for international uniform regime? - *e.g.* “This Agreement shall be governed exclusively by the 1980 Vienna Sales Convention”

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- Enforceability of choice for int'l uniform regime varies:
  - in some jurisdictions (and arbitration), choice is *upheld*
  - in other, choice is downgraded to mere *incorporation* of the Convention (trumped by mandatory provisions of law objectively applicable)

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- Risk : incomplete legal framework - choice for CISG does not offer complete solution
- CISG = limited legal framework; does not deal with all possible legal questions which could arise out of a contractual relationship (*e.g.* CISG does not deal with ownership issues, title to the goods, etc.)

### III. Cross-border contracts : applicable rules

#### B. Choice by parties

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- Solution? Choice for CISG combined with choice for national law - *e.g.*  
“This Contract shall be governed by and construed under the 1980 United Nations Convention on Contracts for the International Sale of Goods, or, in the event the Convention does not settle the rights and obligations of the parties, the laws of Florida shall apply”

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- Practice – recommended to always opt for your 'own' law?
  - In principle yes : makes it easier to manage contracts; familiarity and ease of access with one's own law
  - If choice for its own law is not possible, what choice may be commended?

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- General guidelines:
  - Choice for “developed, stable and commercially sophisticated law” (G.B. Born) (includes ease of access and well developed bar)
  - Choice for a 'favorable' law? “Beauty is in the eye of the beholder” ...
  - Interaction with dispute resolution provision
  - No choice for 'federal' law (“*The present agreement shall be governed by the laws of the United States*”)



# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- Most attractive contract laws in the market?
- Cuniberti 2014 : English law, Swiss law, US, German and French law
- Explanations :
  - Sometimes sophisticated study of merits of different laws
  - Often choice based on tradition / fear of the unknown
  - Sometimes choice for wrong reasons (*e.g.* belief that law of forum should be selected)

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- What about *validity* of choice of law provision?
- Distinction between substantial and formal validity
- 1°) Substantial validity
- “existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid” (art. 10)
- → choice of law is 'pulled up by its own bootstraps'

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

---

- *e.g.* dispute between buyer and seller as to whether they agreed upon a choice of German law to govern the contract
- Application of *German* law to determine whether the parties validly agreed to the choice of law
  - If court finds under German law that parties agreed, then German law governs the contract
  - If court finds that they did not, then the applicable law of the contract must be determined in the absence of a choice under Art. 4 Rome I Reg.

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- 2°) *Formal* validity : liberal regime in art. 11 : validity if choice of law complies with formal requirements of the law
  - Which governs contract under Regulation
  - *Or* law of country where contract is concluded
- *Compare* with art. 23 Brussels I Reg. : self-contained regime

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Limitations to choice by parties?
- 1<sup>st</sup> limitation : purely domestic situations
- Art. 3(3) Rome I Reg. : choice for foreign law in purely domestic contract → 'incorporation' of chosen law; mandatory rules of country where contract is located, remain applicable
- Example of mandatory provision?

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- 2<sup>nd</sup> limitation : purely European situations
- Art. 3(4) Rome I Reg. : choice for law of non EU state in purely EU contract  
→ does not displace EU mandatory rules

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- *E.g.* German company and French company conclude a contract of sales of certain financial instruments – short selling
- Parties include a choice for law of State of NY – in order to avoid application of Regulation 236/2012 on short selling and credit default swaps
- Is this a purely EU situation of financial instruments issued by a sovereign debtor outside EU?

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- 3<sup>rd</sup> limitation : requirement of *link*?
- Sometimes choice of law provision will be enforced, but only with some reservations (*e.g.* not if chosen law has no relevant connection to the contract - sect. 1-105(1) UCC : “reasonable relationship” - what with choice of law of 'neutral' jurisdiction?)



# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- 4<sup>th</sup> limitation : categories of contracts where limited party choice
- *e.g.* individual employment contract : choice of law may not deprive employee of protection offered by mandatory rules of law which would be applicable in absence of choice of law (art. 8 § 1 Rome I Reg.)
- Which law governs contract in absence of choice of law? Law of country where employee habitually works (art. 8 § 2)

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- *E.g.* : Mr Wagner, US citizen, works in Germany for English based company. Employment contract includes a choice for English law
- Mr Wagner is made redundant – under English law entitled to 6 weeks compensation; under German law, entitled to 6 months compensation
- Mr Wagner may request application of German provisions which are more beneficial than English law, provided they are mandatory
- Consequence? Legal relationship torn between 2 laws...

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- 5<sup>th</sup> limitation: internationally mandatory rules
- Art. 9 Rome I Reg. : choice of foreign law does not displace internationally mandatory rules of courts
- What are int'lly mandatory rules? “national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the ... State concerned as to require compliance therewith by all persons present on the national territory of that ... State and all legal relationships within that State” (ECJ, *Arblade*, § 30)

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Intl'y mandatory rules similar to national mandatory rules, but have distinct features:
  - In both cases, *substantive* provisions of a given national law
  - Difference lies in strength of the mandatory rules :
    - Domestic mandatory rules displace any substantive provision of the agreement which runs against them → you cannot *contract out* of these provisions in a domestic contract (*e.g.* prohibition of exclusion of liability for one's wilful negligence)
    - intl'y mandatory rules displace both the content of the contract *and* the law chosen by parties → you cannot contract out of these provisions even in an int'l contract governed by foreign law

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Examples intl'y mandatory rules ?
  - Belgian 1961 Distribution Act (provisions protecting Belgian distributor in case contract is terminated by foreign manufacturer)
  - Provisions protecting national cultural heritage and prohibiting export sales (e.g. Art. 25 of the Law of the PRC on the Protection of Cultural Relics of 19.11.1982 – prohibition of sale of artefacts to foreigners)
  - Provisions prohibiting certain commercial agreements (e.g. Art. 5 of the Tunisian Act nr 91-64 of 29.07.1991 “relative à la concurrence et aux prix” : “Sont prohibés, sauf cas exceptionnels autorisés par le ministre chargé du Commerce après avis du Conseil de la Concurrence, les contrats de concession et de représentation commerciale exclusive.”)

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Mandatory rules trump law chosen by parties and the contract's provisions
- How to determine if mandatory rules apply? → uncertainty - obtain advice from local counsel
- Which mandatory rules? Those of the *court* (and possibly : of third countries) Keep in mind EU rules (*e.g.* EU competition rules applicable to distribution agreements, requirements to enjoy exemption for vertical agreements)

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- Mandatory rules embody strong policy concerns  
→ may only be applied if *substantial link*  
between contract and State
- *e.g.* application of French labour law if  
employment contract concluded between French  
company and French employee, but the latter  
works exclusively in Sénégal?

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

---

- Mandatory rules are national rules – may be put aside on the basis of EU law – 2 illustrations:
- 1°) *E.g.* German bank provides a loan to French customer – with a view to purchase immovable in France
- Loan agreement subject to German law
- May customer rely on provisions of French law (*'loi Scrivener'*) leading to nullity of loan agreement?
- Analysis on the basis of EU rule of reason : public interest, proportionality, etc.



# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- 2°) May EU Member State oppose its own implementation of EU Directive to application of law of EU Member State?
- *e.g.* Agency agreement between Belgian and Bulgarian company, governed by Bulgarian law
- Contract terminated by Bulgarian company → may Belgian agent claim application of Act of 1995 implementing Agency Directive of 1996?
- ECJ 17 10 2013 (*Unamar*) : possibility not excluded, though subject to strong requirements

# III. Cross-border contracts : applicable rules

## B. Choice by parties

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- Final limitation : account should be taken of *scope* of choice of law clause
- Law chosen will only apply to questions falling within scope of choice of law

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- In principle, choice only deals with *contractual issues* (performance, remedies, interpretation, etc.) - see art. 12 Rome I Reg.
- Non contractual issues are not covered : *e.g.* capacity of parties, consequences of representation (contract concluded through agent), issues of procedure (such as admissible evidence, etc.)
- Sometimes difficult to know where one issue falls (*e.g.* statute of limitations, burden of proof, applicable interest rate)

# III. Cross-border contracts :

## applicable rules

### B. Choice by parties

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- Contractual extension of the scope of the law chosen is possible - *e.g.* :
  - “The Agency Agreement and the Bonds and any non-contractual obligations arising out of or in connection with the bonds are governed by, and shall be construed in accordance with, German law”
  - “This Agreement [and the documents to be entered into pursuant to it [save as expressly referred to therein]] shall be governed by and construed in accordance with [English] law”

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 1<sup>st</sup> step

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- What is regime of contract in the absence of choice of law by parties?
- 1<sup>st</sup> step : verify whether there is indeed no choice of law
- Choice by parties may “be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case” (art. 3 Rome I Reg.) → tacit/implicit choice

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 1<sup>st</sup> step

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- When can one infer from terms/circumstances that parties intended to choose a law?
- Difficult exercise : walk a fine line between unexpressed intention and *Hineininterpretierung*...  
*e.g.* :
  - Contract for the sale of real estate located in Belgium, drafted by Belgian notary and with reference to Belgian legal provisions (on tax, urban planning, etc.) → Belgian law?
  - Contract for sale of goods by Italian company to Belgian company, delivery in Belgium and contract negotiated exclusively in Belgium

### III. Cross-border contracts : applicable rules

#### C. No choice by parties - 2<sup>nd</sup> step

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- 2<sup>nd</sup> step : is contract subject to *uniform law regime*?
- Harmonization/approximation of *substantive law*
- Many examples of harmonization process - *e.g.*:
  - CISG 1980
  - CESL 201(?)

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 2<sup>nd</sup> step

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- A) 1<sup>st</sup> question : who harmonizes?
  - Various institutions:
    - Uncitral (*e.g.* CISG) – worldwide reach / commercial law
    - EU (*e.g.* Overbooking Regulation 261/2004) – regional reach / wide scope
    - Ohada (*e.g.* Uniform Act Organizing Securities) – regional reach / commercial law
    - Benelux (*e.g.* 1973 Convention on Daily Penalty Fine) – local reach
- Private International Law - 2014



### III. Cross-border contracts : applicable rules

#### C. No choice by parties - 2<sup>nd</sup> step

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- B) 2<sup>nd</sup> question : what is harmonized?
- Mainly private commercial law - *contract law*
- Very few examples of harmonization in family law or general civil law (*e.g.* rental agreements, etc.) → is family law less amenable to unification?

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 2<sup>nd</sup> step

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- C) 3<sup>rd</sup> question : how are rules harmonized?
  - Maximum harmonization (*e.g.* CISG) → law of Contracting States fully replaced for issues harmonized
  - Approximation (*e.g.* 1986 Agency Directive - setting goals MS must reach - art. 17 : MS may choose between 2 methods of indemnification in case of termination of contract : indemnity for new customers or compensation for damage suffered)
  - 'Soft' harmonization (*e.g.* 2001 Uncitral Model Law on Electronic Signatures)
  - Academic exercises ('Principles of European \_\_\_ Law')

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 2<sup>nd</sup> step

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- Nuance : even in case of 'full harmonization', national law of Contracting State does not disappear entirely
- *E.g.* CISG:
  - Art. 4 : Convention does not provide rules in respect of
    - validity of the contract
    - effect of the contract on the property of the goods
  - Reference to national law in art. 28 CISG – if a party is entitled to specific performance, “a court is not bound to enter a judgement for specific performance unless the court would do so under its own law ...”

### III. Cross-border contracts : applicable rules

#### C. No choice by parties - 2<sup>nd</sup> step

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- D) 4<sup>th</sup> question : when are harmonized rules *applicable*?
- Temptation : look for countries involved and see if these countries are bound by harmonized rules
- Need for a different approach : harmonized *private* law, no necessary coincidence with territories of States concerned

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 2<sup>nd</sup> step

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- Each set of harmonized rules has its *own criteria of applicability*
- *E.g.* 1980 CISG : 80 countries bound by treaty; whether buyer and seller are established in these countries is relevant, but only to certain extent :
  - Both seller and buyer are established in Contracting State (art. 1(1)(a)) – definition of place of business in art. 10
  - If only one, or none of the parties is established in Contracting State : CISG also applicable if contract is governed by law of a Contracting State (art. 1(1)(b))

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 2<sup>nd</sup> step

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- Special approach for EU instruments - *e.g.* 1993 Unfair Contract Terms Directive
  - Directed towards MS - duty to implement Directive's provisions
  - Does it mean that rules of Directive only applicable if law of MS is applicable? No - art. 6 : “MS shall take the necessary measures to ensure that the consumer does not lose the protection [of] this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the MS”
  - Difficulty : implementation of Art. 6 - what does 'close connection' mean?

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 2<sup>nd</sup> step

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- E) 5<sup>th</sup> question : *limits* of harmonization?
  - Not all subjects amenable to harmonization process
  - Harmonization process : loss of legal certainty (vague concepts?) and national traditions?
  - Practical application of harmonized rules : challenge

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 2<sup>nd</sup> step

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- Challenge of practical application of harmonized rules :
  - Best solution : one single central court, with authority over all Contracting States (*e.g.* ECJ)
  - Second best solution : obligation on national authorities to take into account international nature of the text (*e.g.* Art. 7 CISG : “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application ...”)
  - Additional means : meetings of judges, advisory councils (*e.g.* CISG Advisory Council), etc.



# III. Cross-border contracts : applicable rules

## C. No choice by parties - 2<sup>nd</sup> step

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- Overall :
  - Harmonization process is useful
  - However no miracle solution given limits of process

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 3<sup>rd</sup> step

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- What if contract does not include choice of law and no uniform law?
- Applicable law selected by *default rules*
- Variety of default rules – importance of jurisdiction

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 3<sup>rd</sup> step

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- In EU, default rule : art. 4 Rome I Reg.
- Basic principle : contract governed by law of country where the party effecting the *characteristic performance* has his habitual residence - what is characteristic performance? Obligation which is of crucial significance for content of contract
- Never money debt obligation

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 3<sup>rd</sup> step

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- Principle exists in 2 versions:
  - Direct determination of applicable law:
    - Sales contract : law of the seller
    - Services contract : law of the service provider
  - Other contracts : law of debtor of characteristic performance

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 3<sup>rd</sup> step

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- Legal certainty and predictability less guaranteed under default rules than with choice of law:
  - Characteristic performance not always easy to identify
  - Subsidiary rule if law cannot be determined pursuant to general rules → application of the law of the country with which contract is most closely connected (art. 4 par. 4)
  - Escape clause (art. 4 par. 3) : application of a law “manifestly more closely connected” with contract

# III. Cross-border contracts : applicable rules

## C. No choice by parties - 3<sup>rd</sup> step

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- Law declared applicable by default rules also subject to limitations
  - Employees / consumers / insurance takers → special rules (law of the country where 'weak' party resides)
  - Internationally mandatory rules
  - Public policy (art. 21)

# **Private international law - Contracts – case study**

**Patrick Wautelet**

# Goal

- 
- Bringing various elements together based on a (simplified) case



## I. The case

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- VRG, company incorporated and doing business from Germany, manufactures engines for light aircrafts
- Behelman, company incorporated and doing business in Belgium, is appointed exclusive distributor of VRG in 1991 – for Belgium and DR Congo

# I. The case

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- Contract provides that:
  - Behelmann should sell at least 5 motors each year (1 in DR Congo)
  - Contract may be terminated with notice period of 3 months (first 5 years) and 6 months (after 5<sup>th</sup> anniversary)
  - Choice for German law
  - Disputes referred to arbitration – ICC in Paris

## I. The case

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- In dec. 2013, VRG informs Behelman that it wishes to terminate the agreement – no reason given
- Notice period of 6 months provided
- Behelman not satisfied with the termination, nor with the notice period

## I. The case

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- Under German law, termination is valid and distributor entitled to compensation (§ 89b HGB – max. amount is average yearly commission received by distributor over past 5 y.)
- Under Belgian law, termination must comply with Act of 27 July 1961 on the unilateral termination of exclusive distribution agreements of indefinite duration

# I. The case

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- 1961 Act ?
- Applies to distribution agreements under which a principal grants one or more distributors the right to sell, in their own name and for their own account, products manufactured or distributed by the principal
- Act only applies if distribution rights are (1) exclusive, (2) for a territory including (part of) Belgium and (3) for an indefinite duration

# I. The case

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- Under 1961 Act, manufacturer may terminate agreement:
  - In case of serious breach
  - In the absence of serious breach
    - only with “reasonable notice” (in practice between 3 and 36 months...)
    - If no or insufficient notice given : distributor may claim compensation in lieu of notice (Art. 2) – calculation based on semi-gross profits

# I. The case

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- In case of termination without serious breach, distributor also entitled to claim additional compensation (whether or not reasonable notice was given) covering (1) goodwill, (2) costs and investments incurred by the distributor and (3) distributor staff redundancy costs

## II. Proceedings in Belgium?

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- May Behelman bring proceedings in Belgium?
- Distribution contract includes arbitration agreement
- Under normal rules, Belgian court should refer dispute to arbitration (art. 1679 Jud. Code)



## II. Proceedings in Belgium?

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- Art. 4 1961 Act : in case of termination of distribution agreement:
  - Distributor entitled to bring proceedings before a court in Belgium (provided distribution agreement covers Belgian territory)
  - Court shall exclusively apply Belgian law

## II. Proceedings in Belgium?

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- Court practice in Belgium :
  - If agreement is governed by foreign law and arbitrators not bound to apply Belgian Act, court *must* deny the possibility to arbitrate the dispute (Cass *Sebastian Intl* 2010) → refusal to refer parties to arbitration
  - No recognition in Belgium of arbitral award issued by an arbitral tribunal with its seat abroad if arbitrators have not applied Belgian law (Cass 1979) → refusal to recognize arbitral awards

## II. Proceedings in Belgium?

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- If proceedings in Belgium, very likely that court will disregard arbitration agreement (although debate on which law applies to arbitrability of dispute)
- Result would be different if choice for German courts : under art. 23 Brussels I Reg., choice of court must be upheld – choice of court provisions are 'mandatory rules-proof' (+ no possibility to refuse recognition in Belgium of German judgment even if ignores 1961 Act – what with public policy?)

## II. Proceedings in Belgium?

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- Does Belgian court have jurisdiction?
  - Defendant in Germany : Brussels I Regulation
  - Principle : domicile of defendant (art. 2) → Germany
  - May Belgian courts exercise jurisdiction? *Forum contractus* (art. 5(1)) → is distribution agreement a services agreement? (art. 5(1)(a))

## II. Proceedings in Belgium?

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- ECJ in *Maison du Whisky* (Case C-9/12) :
  - Typical distribution agreement not mere addition of sales contracts; rather a framework agreement, which aims to secure supply and provision for the future between 2 economic operators, including specific contractual provisions regarding distribution by distributors
  - Contract of services requires a particular activity in return for remuneration

## II. Proceedings in Belgium?

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- *Activity?* Characteristic service provided by the distributor which, by distributing the grantor's products, is involved in increasing their distribution → distributor enjoys a supply guarantee and may even be involved in commercial planning of manufacturer and as a consequence, he is able to offer clients services and benefits that a mere reseller cannot and thereby acquire, for the benefit of the grantor's products, a larger share of the local market
- *Remuneration?* Not limited to payment of sum of money, but also economic value. For distribution agreements, remuneration consists in competitive advantage enjoyed by distributor because of sole right to sell products for given territory (+ assistance in access to advertising, communication of know how, etc.)

## II. Proceedings in Belgium?

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- Which court has jurisdiction based on on art. 5(1)(b)?
- Services provided by distributor → distribute the manufacturer's products in such a way that latter does not need to set up its own distribution network
- Jurisdiction over whole dispute – not limited to part of it (compare art. 5(1)(a))

### III. Which rules apply in Belgium?

- Contract includes a choice for German law
- Art. 3 Rome I-Reg. : Courts in Belgium should apply German law
- Distribution agreement not a consumer or employment relationship
- *No uniform rules* applicable to distribution disputes (CISG : distinction between framework agreements and sales contracts concluded in the performance of such agreements)



### III. Which rules apply in Belgium?

- 1961 Act is an *internationally mandatory provision* (art. 4 Act)
- Art. 9 Rome I-Reg. : int'lly mandatory rules must be applied over and above law normally applicable → choice of law provision set aside
- 1961 Act only displaces German law for the issues it expressly deals with – remaining issues governed by German law (*e.g.* is distribution agreement valid?)

### III. Which rules apply in Belgium?

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- Is 1961 Act also applicable to contract in so far as it concerns DR Congo?
- Principle : 1961 Act only applicable for 'Belgian' part of the contract
- Distinction difficult to apply in practice
- What if contract only for DR Congo and parties chose Belgian law? No application of 1961 Act (Cass 2006)

### III. Which rules apply in Belgium?

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- May German manufacturer challenge application of 1961 Act on the basis that it constitutes obstacle to free provision of services/free movement of goods?
- ECJ *Arblade* : MS may not rely on 'internationally mandatory' nature of its rules to limit free provision of services - appraisal

# Cross Border Insolvency in the EU

Patrick Wautelet

- The EU Insolvency Regulation :  
a first look
- The main principles of the European  
Insolvency Regulation

# I. The EU Insolvency Regulation : a first look

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- Company established in Spain, selling furnitures all over Europe, comes in troubled waters due to large inventory and fixed costs
- Its Italian supplier of leather has unpaid invoices in excess of 1 Mio EUR
- Insolvency proceedings opened by Spanish court upon request of creditors (under Spanish Act 36/2003) and receiver appointed

# I. The EU Insolvency Regulation : a first look

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- Questions :
  - May the receiver claim furnitures delivered to French client with a reservation of title, but yet unpaid? Will the authority of Spanish receiver be recognized in France?
  - May Italian supplier file a claim in the Spanish insolvency?  
Distribution of assets : Spanish or Italian law?

# I. The EU Insolvency Regulation : a first look

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- Starting point : insolvency law is still to a large extent *national* law
- Important effort to achieve convergence of national laws – *e.g.*
  - World Bank Principles for Effective Insolvency and Creditor Rights Systems
  - UNCITRAL Legislative Guide on Insolvency Law



# I. The EU Insolvency Regulation : a first look

- These efforts are, however, *limited* – intended:
  - To provide a reference tool for national authorities and legislative bodies when preparing new laws or reviewing the adequacy of existing laws – *e.g.* int'l consensus on key objectives, principles and best practices – such as need to emphasize reorganisation before liquidation
  - Not to create uniform texts including detailed rules on all technical questions arising out of insolvency – *e.g.* position of employees and employees' claims in insolvency; debtor-in-possession schemes, etc.

# I. The EU Insolvency Regulation : a first look

- Within EU, need to have a legal framework for cross-border insolvency, coping with diversity of laws and national preferences
- Policy choice : who controls insolvency when several MS concerned?
  - Each MS where assets/activities are located?
  - One single MS - and if yes, which one?

# I. The EU Insolvency Regulation : a first look

- First model : division of insolvency and assets along national lines, each State remains fully responsible for the elements of insolvency on its territory (debtor's assets, operations, employees, etc.)
  - Advantages : each State may retain its own preferences (liquidation / salvaging business; creditors / stakeholders, etc.)
  - Drawbacks : no coordination, may lead to a 'race to the assets', equality among creditors may come under pressure

# I. The EU Insolvency Regulation : a first look

- Second model : one MS takes the lead
  - Model makes more sense from efficiency point of view - centralization
  - Model difficult to implement because of strong reluctance of States to give up control - reluctance is understandable given that insolvency law remains national - can only be adopted in its purest form in very *strong* federal systems

# I. The EU Insolvency Regulation : a first look

- EU Insolvency Regulation based on a *compromise* between the 2 models
- *Principle* : one single MS is responsible for the insolvency of a debtor with cross-border activities
  - its courts have overall responsibility
  - its law applies (including for distribution of assets)
  - Includes assets in all MS – pan European effects (*eg* : stay)
  - Receiver may freely operate in all MS

# I. The EU Insolvency Regulation : a first look

- *Nuances* :
  - other MS may intervene whenever debtor has an *establishment* on territory – and take control of this part of the insolvency
  - Exceptions to application of law of MS taking the lead in insolvency
  - Strong obligation for MS and all insolvency practitioners to cooperate

## II. The main principles of the EU Insolvency Regulation Case 1

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- English investment fund buys a major office building in Paris – investment financed through debt
- For tax reasons, office tower owned by Luxembourg company (Luxco) – set up to benefit from favorable tax regime (no taxation of dividends paid within group)
- Only activity of Luxco : receive rental fees and distribute them among shareholders

## II. The main principles of the EU Insolvency Regulation Case 1

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- Office rental market collapses in France  
→ tenants terminate lease  
anticipatively
- Which country takes the lead in case of  
insolvency?
- Allocation of primary responsibility:  
crucial because defining for all aspects  
of insolvency (applicable law, courts,  
etc.)



## II. The main principles of the EU Insolvency Regulation Case 1

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- 'Life' of a company may, however, be situated at various places simultaneously :
  - Corporate life (strategic decisions, management)
  - Actual operations
  - Relations with 3<sup>rd</sup> parties – *e.g.* creditors

## II. The main principles of the EU Insolvency Regulation Case 1

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- EIR : choice for original concept : *Centre of Main Interests* (COMI) – art. 3 Ins.Reg
  - New concept - no recycling of 'real seat'
  - No definition in EIR – but guidance in Recital 13 of the Preamble : « The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties »

## II. The main principles of the EU Insolvency Regulation Case 1

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- Where is the *Centre of Main Interests* (COMI)?
  - Even with 'definition' of Recital 13, concept remains rather evasive – probably on purpose, to allow room for variety of situations
  - Article 3(1) introduces a rebuttable presumption in favour of the « *place of the registered seat* »

# II. The main principles of the EU Insolvency Regulation

## Case 1

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- Where is the COMI of Luxco?
  - Starting point : in Luxembourg, where the registered seat is located
  - Presumption may be overturned if it is clear for everyone (and 3<sup>rd</sup> parties) that the company conducted the administration of its interests from England
  - Formally speaking, business is conducted from Luxbg - board of administration meets there, and take decisions, and corporate housekeeping done in local jurisdiction, with required publicity (*Official Gazette*, registrar of the court, Companies House, etc.)
  - But in practice, actual management of tax vehicle / SPV exercised from another jurisdiction... Overturning presumption for a pure letterbox company

# II. The main principles of the EU Insolvency Regulation

## Case 1

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- See new Recital 13a (proposal Commission 2012): presumption in favor of registered seat may be rebutted:
  - Only on the basis of a *comprehensive assessment* of all the relevant factors, taking into account what third parties know
  - Only if company's actual centre of management and supervision and of the management of its interests is located another MS
  - Not possible to rebut the presumption if management and supervision bodies are in the same place as its registered office and the management decisions are taken there in a manner ascertainable by third parties

## II. The main principles of the EU Insolvency Regulation Case 2

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- German business active in IT-services, with operations all over Europe
- Local operations in other MS : sometimes directly through German company, sometimes local company incorporated (*e.g.* in Austria)
- Group is in bad shape - large inventories and high fixed costs

## II. The main principles of the EU Insolvency Regulation Case 2

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- May German court open proceedings not only for company incorporated in Germany but also for Austrian subsidiary?
- Argument : subsidiary is 100 % owned by the German group, local management did not act independently, it negotiated debt directly with Munich etc., so that Austrian subsidiary's COMI is located in Germany
- Advantage : one single proceedings, and insolvency administrator may try to sell group as going concern

## II. The main principles of the EU Insolvency Regulation

### Case 2

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- Principle : COMI of each separate legal person must be assessed on its own
- However, accepted (by very abundant case law) that subsidiary's COMI may be located at seat of corporate parent
- Mere fact that a corporation is part of a group is not sufficient to overturn presumption in favor of statutory seat (ECJ in *Eurofood* at § 36)
- Difficulty : no agreement on nature of evidence / circumstances needed to overturn presumption in favor of subsidiaries' registered seat



## II. The main principles of the EU Insolvency Regulation Case 2

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- *Quaere* for the Austrian subsidiary?
- If all important decisions are taken in Germany, no strategic or operational autonomy and third parties (banks, suppliers, employees etc.) are aware of this → possible to hold that COMI is located in Germany
- *Consequence* : one insolvency administrator appointed, which oversees all group

## II. The main principles of the EU Insolvency Regulation Case 2

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- If court decides that Austrian subsidiary's COMI located in Austria : independent insolvency proceedings
- Coordination with insolvency proceedings for parent company in Germany? Not under current text EIR

# II. The main principles of the EU Insolvency Regulation

## Case 2

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- Coordination of insolvency proceedings within a group : proposal Commission 2012:
  - Duty for liquidators appointed for various companies of the same group to cooperate “to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interests” (art. 42a)
  - Duty to communicate between courts (art. 42b)
  - Possibility to request stay of foreign proceedings (art. 42d)

## II. The main principles of the EU Insolvency Regulation Case 3

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- Greek airlines is in trouble – cash strapped and no further financing possible
- Files for special insolvency proceedings under Greek law – open to large companies
- Insolvency trustee finds out that the company had a small office in the Netherlands – 4 employees handling flights, reservations etc. from Amsterdam airport
- What is the fate of these employees?

## II. The main principles of the EU Insolvency Regulation Case 3

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- Principle : employees fall within insolvent estate →
  - Application of Greek law – art. 4 EIR (insolvency as automatic termination of employment contracts?)
  - Decisions taken by Greek trustee (possibility to keep employees active if Dutch operations are really necessary?)

## II. The main principles of the EU Insolvency Regulation

### Case 3

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- Nuances to the monopoly of Greek law and Greek
- 1<sup>st</sup> nuance : art. 10 EIR : consequences of the insolvency on employment contracts governed solely by the law of MS applicable to the contract of employment
- Which law applies to contracts of employment? Art. 8 Rome I Regulation – most probably Dutch law

## II. The main principles of the EU Insolvency Regulation Case 3

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- 2<sup>nd</sup> nuance : possibility to request opening of 'secondary proceedings' – separate insolvency proceedings for local part of insolvent estate, governed by local law (art. 3(2) EIR)
- Advantage for employees:
  - Dealing with local administrator
  - Application of local law to issue of ranking of claims and distribution of proceeds

## II. The main principles of the EU Insolvency Regulation Case 3

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- Secondary proceedings only possible if debtor has an '*establishment*' (art. 3 § 2)
- Establishment : any place of operations where the debtor carries out a non-transitory economic activity with human means and goods
- Mere bank account / assets or transient activity (a few contracts) not sufficient



## II. The main principles of the EU Insolvency Regulation Case 3

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- Secondary proceedings are in principle *autonomous*:
  - Local receiver has full jurisdiction on local assets (what are 'local' assets?)
  - Local law applicable (art. 28)
  - Local court supervises secondary proceedings

## II. The main principles of the EU Insolvency Regulation Case 3

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- Secondary proceedings do not, however, operate in full independence : various coordination mechanisms between main and secondary proceedings
  - Receiver of main proceedings may intervene and request a *stay* of local proceedings (art. 33)
  - Assets left over in secondary proceedings after all local claims have been met, must be *transferred* to the liquidator of the main proceedings (art. 35)

## II. The main principles of the EU Insolvency Regulation Case 3

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- General principle of *cooperation* between receivers of main and secondary proceedings (art. 31) : guideline more than detailed and enforceable rule
- New Art. 31 (Commission Proposal 2012) : beefed up cooperation
- See European Communication and Cooperation Guidelines for Cross-Border Insolvency Proceedings (Wessels/INSOL)

## II. The main principles of the EU Insolvency Regulation Case 4

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- German bank lends money to Dutch business operating in Germany through local establishment – two security mechanisms:
  - Mortgage over immovable located in Luxbg
  - Pledge over all receivables owed by German customers

## II. The main principles of the EU Insolvency Regulation Case 4

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- German bank worries about possible default of Dutch business
- What will happen if insolvency proceedings opened in the Netherlands in respect of Dutch business ?

## II. The main principles of the EU Insolvency Regulation

### Case 4

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- Principle : law of the MS where COMI is located – governs all issues related to insolvency – part of the 'monopoly' granted to the COMI (art. 4 EIR)
- In this case : if insolvency proceedings opened in the Netherlands in respect of Dutch business, application of Dutch law to determine whether mortgage/pledge may be opposed to administrator

## II. The main principles of the EU Insolvency Regulation Case 4

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- May German bank in some way challenge application of Dutch law?
- Several exceptions in Artt. 5 ff. EIR - meant to protect legitimate expectations of creditors
- Art. 5 : if creditor has a right *in rem* on asset located outside jurisdiction where main proceedings were opened, right *in rem* remains subject to local law and avoids application of insolvency law

# II. The main principles of the EU Insolvency Regulation

## Case 4

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- How does Art. 5 work?
  - Mortgage on immovable and pledge on receivables qualifies as a right *in rem*
  - Can security be exercised without consideration of Dutch law?
    - Mortgage : yes, because asset located in France
    - Pledge on receivables : where are underlying assets located? Claims are deemed to be located in the MS where the debtor has its COMI (art. 2 letter *g* – 3<sup>rd</sup> indent) → pledge on receivables owed by German customers → German law applies



### III. The EU Insolvency Regulation : a modest appraisal

- Good compromise between need for efficiency and concern of MS to keep some say on insolvency affecting their economy
- Biggest shortcoming : no specific rules for groups of companies; however, practice has shown *de facto* consolidation is possible
- Possible improvements following revision process initiated in 2012