II.

Comparative Report

TOBIAS LUTZI, ENNIO PIOVESANI AND DORA ZGRABLJIĆ ROTAR

The following report has been compiled on the basis of the national reports reprinted in chapter three of this book, also taking into account the results of an online workshop held in October 2021 and of the conference held in May 2022 in Dubrovnik. All references to national law have been verified by the respective national reporters, to whom the authors of this report wish to express their heartfelt gratitude.

The Comparative Report follows the same structure as the Questionnaire, reprinted in chapter one of this book.

Questions 1(a) and 1(b)

Broadly speaking, there appear to exist three approaches to international jurisdiction in the EU Member States. While some Member States still adhere to the principle of *'Doppelfunktionalität'* (double-functionality), by which the domestic rules on local jurisdiction (venue) are simply extended to questions of international jurisdiction, a growing number have enacted special acts on private international law that include rules on international jurisdiction. CYPRUS and MALTA are the only two Member States that follow an approach that appears to be distinctly rooted in the Common Law.

Rules on local jurisdiction extended to international jurisdiction (*'Doppelfunktionalität'*)	**Specific rules on international jurisdiction**	**Common Law approach**
- AUSTRIA - FRANCE - GERMANY - GREECE - LATVIA - SWEDEN	- BELGIUM - BULGARIA - CROATIA - HUNGARY - ITALY - LITHUANIA - NETHERLANDS - POLAND - SPAIN	- CYPRUS - MALTA

In the Member States belonging to the first group, where international jurisdiction is generally[1] governed[2] by rules on local jurisdiction, this approach has usually been developed by the courts. While some of the relevant sets of rules (such as the AUSTRIAN *Jurisdiktionsnorm*, in § 27a) nowadays acknowledge the extension to international jurisdiction, others (such as the FRENCH *Code de procédure civile* or the GERMAN *Zivilprozessordnung*)[3] still make no explicit reference to international jurisdiction. Although these systems generally follow the idea that a court with local jurisdiction according to national law necessarily also has international jurisdiction, the FRENCH and SWEDISH reports both emphasise that national courts will not necessarily construct the same norms identically for international and purely domestic cases; in fact, the SWEDISH courts appear to use the rules on local jurisdiction merely as an indication of the necessary connection to Sweden.

It should be noted that the FRENCH government currently considers codifying French private international law,[4] including its rules on international jurisdiction. Interestingly, though, the most recent proposal[5] contains a provision that would enshrine the principle of double functionality[6] and supplement it by more specific provisions.

This is in noticeable contrast to the Member States of the second group, which have often replaced the system of *'Doppelfunktionalität'* in its entirety by specific rules on international jurisdiction (usually as part of some more comprehensive legislation on private international law). With the oldest of these codifications – the POLISH *Kodeks postępowania cywilnego* – dating from 1965, they all tend to be relatively young,[7] especially when compared to the rules on venue still applied in AUSTRIA and GERMANY, which have essentially remained unchanged since 1898 and 1879, respectively. Those specific rules on international jurisdiction naturally require, either implicitly or explicitly,[8] the existence of a cross-border dispute.[9] In some cases

[1] Though Arts 14 and 15 of the FRENCH *Code civil* and Art 3 of the GREEK Κώδικας Πολιτικής Δικονομίας contain some rudimentary rules on international jurisdiction.

[2] See the FRENCH report, Question 1(b), for details on the development of the terminology used by the *Cour de cassation*.

[3] Interestingly, some individual provisions of the GERMAN ZPO and SWEDISH *rättegångsbalken* appear to be applicable only in cross-border cases (see the GERMAN report, Question 1(b), and the SWEDISH report, Question 1(b), for more detail).

[4] See G Cuniberti, 'Towards a French Code of Private International Law?', EAPIL Blog, 11 May 2022, www.eapil.org/2022/05/11/towards-a-french-code-of-private-international-law/.

[5] Available at www.cfdip.fr/offres/file_inline_src/717/717_pj_120422_114420.pdf.

[6] ibid, Art 15.

[7] The youngest comprehensive pieces of legislation appear to be the CROATIAN *Zakon o međunarodnom privatnom pravu* and the HUNGARIAN *törvény a nemzetközi magánjogról*, both from 2017.

[8] See, eg, Art 1(2) of the BULGARIAN *Кодекс на международното частно право*; Art 1 of the CROATIAN *Zakon o međunarodnom privatnom pravu*.

[9] But see the HUNGARIAN report, Question 1(b), and the DUTCH report, Question 1(b), for discussion of some possible extensions to domestic disputes.

(eg ITALY), they are still explicitly supplemented, in (civil and commercial) matters falling outside the material scope of the Brussels Regime, by the extension of rules on local jurisdiction.[10]

Regardless of whether or not a Member State has enacted specific legislation on international jurisdiction, its general rules tend to be supplemented by sectorial legislation governing specific types of disputes such as disputes in labour law,[11] over intellectual property,[12] or class actions.[13]

Finally, a third group of Member States, comprising only CYPRUS and MALTA, follows an approach rooted in the tradition of the English Common Law.[14] As such, they accept international jurisdiction on the basis of service (in the case of CYPRUS) or presence (in the case of MALTA), subject to a *forum (non) conveniens* test.[15]

Question 1(c)

Of the Member States that have enacted specific rules on jurisdiction applicable to non-EU defendants, the clear majority – with the exception of only LITHUANIA and POLAND – have reportedly taken the Brussels Regime[16] into account, either by incorporating it partly (such as ITALY) or even entirely (such as, in particular, CROATIA) through reference, or by using it as an inspiration for the domestic rules (such as BELGIUM, BULGARIA, the NETHERLANDS, or SPAIN). In the case of ITALY, the (partial) incorporation of the Brussels Convention raises the interesting problem of whether or not the references in question must nowadays be understood as references to the Brussels Ia Regulation; it is only recently that the *Corte di cassazione* appears to have answered this question in the positive.[17]

[10] See, eg, Art 3(2), second sentence, of the ITALIAN Law 218/1995. Until recently, CROATIA belonged to that group. Namely, Art 27 of the CROATIAN Civil Procedure Act allowed for jurisdiction of CROATIAN courts when no explicit rule allows it for cases with an international element, but jurisdiction stems from rules of territorial jurisdiction. This indirectly allowed for international jurisdiction in certain cases. In addition, Art 58 of the Civil Procedure Act contained rules of direct international jurisdiction. Both articles were revoked as a part of the legislative amendments of the Civil Procedure Act in 2022. See the CROATIAN report, Question 5(a).

[11] See §§ 4–9 ASGG, the AUSTRIAN *Arbeits- und Sozialgerichtsgesetz*; § 48(1a) of the GERMAN *Arbeitsgerichtsgesetz*.

[12] See Art 86 of the BELGIAN *Wetboek Internationaal Privaatrecht*; § 104(1) of the GERMAN *Urheberrechtsgesetz*.

[13] See Art R 632-2 of the FRENCH *Code de la consommation*.

[14] MALTESE law is in fact inspired by both common-law and civil-law traditions; although being codified, it largely relies on common-law institutions and principles.

[15] Although having codified rules on international jurisdiction, some other Member States (such as LITHUANIA) also accept very broad bases of (general) jurisdiction (such as permanent residence) but without counterbalancing them by a *forum non conveniens* test.

[16] The wording 'Brussels Regime' used in the text refers either jointly or indistinctly to the Brussels Convention, the Brussels I Regulation and/or to the Brussels Ia Regulation.

[17] See the references in the ITALIAN report, Question 1(c).

	Brussels Regime incorporated	Brussels Regime used as inspiration	little or no impact of Brussels Regime
BELGIUM		x	
BULGARIA		x	
CROATIA	x		
HUNGARY		x	
ITALY	x[18]		
LITHUANIA			x
NETHERLANDS		x	
POLAND			x
SPAIN		x	

Of the Member States that are still applying the rules on local jurisdiction to the question of international jurisdiction, many have seen a certain impact of the Brussels Regime and its interpretation by the CJEU on their national rules. While this impact could be most clearly identified for GERMANY and SWEDEN (where the national courts have even reversed their jurisprudence to better align it with the CJEU's interpretation of similar provisions in the Regulation), only the AUSTRIAN courts appear to have continued to interpret the national rules on jurisdiction in complete isolation from their European counterparts. Besides, the idea of transposing at least parts of the Regulation into national law seems to have been discussed in legal scholarship in all Member States.

	Interpretation of domestic rules influenced by the Brussels Regime	Interpretation of domestic rules not influenced by the Brussels Regime
AUSTRIA		x
FRANCE	x[19]	
GERMANY	x[20]	

(continued)

[18] Only to some extent, and with reference to the Brussels Convention.

[19] The FRENCH report specifically mentions the inspiration provided by the CJEU's decisions in Cases C-68/93 *Shevill* and C-170/12 *Pinckney* for the treatment of cyber-torts under Art 46 *Code de procédure civile* (FRENCH report, Questions 1(c), 5(b)).

[20] The GERMAN report refers to case law from the Bundesgerichtshof regarding the scope of the heads of special jurisdiction, the localization of the damage resulting from copyright infringements over the internet, and the scope of the national provisions on insurance contracts (GERMAN report, Questions 1(c), 5(a), 5(d)(3)).

(Continued)

	Interpretation of domestic rules influenced by the Brussels Regime	**Interpretation of domestic rules not influenced by the Brussels Regime**
GREECE	x[21]	
LATVIA	x[22]	
SWEDEN	x[23]	

Question 1(d)

Some reports have revealed exorbitant grounds of jurisdiction that have not been notified pursuant to Art 76(1) Brussels Ia – such as jurisdiction based on the location of property or other assets in POLAND. Others have also mentioned grounds that could have been included – such as the *forum arresti* in DUTCH law – but have been more hesitant to definitively qualify them as such.

Interestingly, MALTA, whose jurisdictional rules may be seen as particularly exorbitant due to their common-law origin, has notified its entire jurisdictional regime to the Commission.

Question 2

Even though, as reported *supra* under Question 1, the majority of the Member States have enacted special acts on private international law that include rules on international jurisdiction, and only a minority of the Member States still follow the principle of double-functionality, by which the domestic rules on local jurisdiction are simply extended to questions of international jurisdiction, the majority of member states still use the same definition of domicile for both national and international jurisdiction, while only three Member States have included a special definition of domicile in their respective private international law acts.

[21] The GREEK report refers to an explanatory report from the Greek parliament explicitly allowing the Greek courts to take into account the jurisprudence of the CJEU when interpreting the relevant rule for jurisdiction in tort (GREEK report, Questions 1(c), 5(b)).

[22] The LATVIAN report only refers to one decision on the interpretation of the concept of 'branch'.

[23] The SWEDISH report refers to several decisions by the Högsta domstolen according to which the Brussels and Lugano regimes constitute internationally recognised rules that provide an important inspiration for the interpretation of the equivalent SWEDISH provisions.

Definition of domicile used for national and international jurisdiction	Specific definition of domicile in PILA	Common Law approach
- AUSTRIA - BULGARIA - FRANCE - ITALY - LATVIA - LITHUANIA - NETHERLANDS - GERMANY - GREECE - SWEDEN - POLAND - SPAIN	- BELGIUM - CROATIA - HUNGARY	- CYPRUS - MALTA

The three Member States that do have a definition of domicile of natural and legal persons used exclusively for the purposes of international jurisdiction are the ones with the newest private international law acts in Europe. Namely, domicile of natural and legal persons is defined in Art 4 of the 2004 BELGIAN *Wetboek Internationaal Privaatrecht/Code de Droit International Privé*,[24] in arts 4 and 6 of the 2017 CROATIAN *Zakon o međunarodnom privatnom pravu*[25] and in Art 3 of the 2017 HUNGARIAN *évi XXVIII. törvény a nemzetközi magánjogról*.[26]

In the Member States that use the same definition of domicile for both local and international jurisdiction, the definitions are usually integral parts of the respective Member State's civil code.[27] In AUSTRIA the definition is found in the § 66 of the *Jurisdiktionsnorm*, as the Austrian civil procedure is fragmented insofar as the *Jurisdiktionsnorm* covers the principal rules of when, by whom and under which conditions civil jurisdiction may be exercised, whereas the actual procedure of the court proceedings is set out in the *Zivilprozessordnung*.[28] In SWEDEN, the statutory definition of domicile for natural persons in the area of family law is, by analogy, used for jurisdictional purposes.[29]

However, notwithstanding whether the domicile of natural persons is defined in the Member State's private international law act or in other acts belonging to civil law, civil procedure law or family law, in almost all Member States the definition of the domicile of natural persons embodies two elements that need to be cumulatively present.

[24] The domicile of both natural and legal persons is defined in Art 4 of the BELGIAN *Wetboek Internationaal Privaatrecht/Code de Droit International Privé* (BELGIAN report, Question 2).

[25] The domicile of natural persons is defined in Art 4, while as the domicile of legal persons in Art 6 of the CROATIAN *Zakon o međunarodnom privatnom pravu* (CROATIAN report, Question 2).

[26] Art 3 of the HUNGARIAN *évi XXVIII. törvény a nemzetközi magánjogról* provides a definition of the domicile of natural persons, while it should be interpreted together with the general jurisdictional rule in proprietary matters in Art 92 for a correct definition of the domicile of legal persons (HUNGARIAN report, Question 2).

[27] FRANCE, GREECE, ITALY, LATVIA, LITHUANIA, NETHERLANDS, POLAND, SPAIN and GERMANY.

[28] See the AUSTRIAN report, Questions 1(a) and 2.

[29] See the SWEDISH report, Question 2.

The first one is an objective prerequisite according to which a person has to live at that place (*corpus*) and the second criterion is a subjective one (*animus manendi*) according to which a person has to intend to reside at the place permanently.

Out of all civil law Member States, only three do not follow this definition. Namely, in BELGIUM and SPAIN domicile is defined as the place where the person is registered, while as in BULGARIA there is an ongoing debate whether the domicile of a natural person should be understood as the place where the person is registered or the place where they have their habitual residence.[30]

There are two significant outcomes of the unified definition of domicile of natural persons throughout the EU. Firstly, since the Brussels Ia Regulation does not contain an autonomous definition of domicile of natural persons, but a rule on the applicable law, the unanimity in defining the domicile of natural persons contributes significantly to a unified application of the rules of the Brussels Ia Regulation and, thus, indirectly to achieving the main aims of the Brussels Regime. Secondly, it leads to the conclusion that the majority of Member States do not add new bases of international jurisdiction through broadening the definition of domicile, ie they do not expand the international jurisdiction of their courts indirectly through a broader definition of domicile of natural persons.

However, in the case of the only two predominantly common-law Member States, the opposite might be concluded. Namely, both MALTA[31] and CYPRUS distinguish between two types of domicile of natural persons – domicile of origin and domicile of choice.[32] The domicile of origin does not always coincide with the traditional civil law understanding of the domicile which requires the objective and a subjective element. It is the domicile acquired by birth.[33] Under both systems it is possible to abandon a domicile of origin and acquire a domicile of choice if the person in question has chosen freely a new place as their domicile of choice. However, under both systems the burden of proof of a domicile of choice cannot be met easily. In both Member States it is the courts' decision whether a domicile of origin was abandoned and a domicile of choice acquired, and in both cases the courts have raised the threshold very high.[34]

[30] According to the BULGARIAN report the consensus on a definition of domicile of natural persons has not yet been reached. A summary of this problem may be found (in Bulgarian) in B Musseva, 'Action and Reaction between EU Law and Bulgarian Law in the Application of Brussels I Recast Regulation', in *Annual of the Law Faculty of Sofia University 'St. Kliment Ohridski'*, Sofia, 2019, 397–403 (BULGARIAN report, Question 2).

[31] Domicile is, modelled on ITALIAN law, a jurisdictional basis under Art 742(1)(a) and (b) of the Code of Organisation and Civil Procedure. However, MALTESE courts interpret the concept of domicile according to the jurisprudence of UK Courts. See the MALTESE report, Question 2.

[32] MALTESE courts also recognise the domicile of dependence, devised for minors and persons of diminished capacity as explained in the MALTESE report, Question 2.

[33] According to MALTESE law everybody is assigned her father's domicile at birth, which is the domicile of origin, and according to CYPRIOT law it is the domicile acquired at birth.

[34] In both MALTA and CYPRUS domicile of choice as a concept consists of two elements. The external element refers to the legal and social relationships as well as the activities of a person, and the internal element to the will of a person to establish a new domicile in a country other than the country of its birth. Case law shows that it is particularly difficult to prove the internal element and that clear and solid evidence is required to convince the court that a person wanted a change of permanent domicile and it is, thus, in practice very difficult to abandon one's domicile of origin in order to establish a domicile of choice. See the MALTESE report, Question 2; CYPRIOT report, Question 2.

This leads to a conclusion that by widening the notion of domicile, or making it very difficult to abandon the domicile of origin and acquire a domicile of choice, the courts of these two Member States have indirectly added a new connecting factor for establishing international jurisdiction and have added a possibility to retain their jurisdiction in a wider scope of cases.

On the other hand, Art 63 Brussels Ia provides a definition of the domicile of a legal person according to which a legal person is domiciled at the place of its statutory seat, central administration, or its principal place of business. All three connecting factors are defined autonomously. Thus, for the purposes of application of the Brussels Ia Regulation, the courts will determine the domicile of the legal person in cases over an EU defendant in accordance with the definition provided in the Regulation. The definitions of the domicile of legal persons found in national laws of Member States will only be applied in cases over third state defendants.

Even though in CROATIA the rules on jurisdiction of the Brussels Ia Regulation are extended over non-EU defendants, the provision of the CROATIAN *Zakon o međunarodnom privatnom pravu* that extends the application of the Brussels I Regulation does not include the extension of the rules on domicile of natural and legal person. In the CROATIAN private international law act only statutory seat and the place of central administration are accepted as the seat of a legal person, thus the CROATIAN courts will not determine the seat of a legal person situated in a Member State in the same way as the seat of a person situated in a third state.[35]

Most Member States, apart from MALTA, GREECE and SWEDEN, which use only the real or actual seat as the connecting factors, and GERMANY, LATVIA and NETHERLANDS which ordinarily only use the statutory seat as a connecting factor (by reference to substantive law), adhere to a combination of two or three connecting factors, as found in the Brussels Ia Regulation, in their definition of the domicile of the legal person. In POLAND the seat of a legal person is understood as the place where its managing body has the seat.[36] In SWEDEN a legal person is considered to reside at the place where the board has its seat or, if the board has no permanent seat or there is no board, at the place from which the administration is carried out,[37] however, there is a doctrinal stand that the definition of domicile in the Brussels Regime should be applied by analogy instead.[38]

Some of the Member States, eg HUNGARY, BULGARIA and SPAIN use all the connecting factors on equivalent grounds, but most of them specify a clear hierarchical order of application of the two or three connecting factors. In BELGIUM all three connecting factors are applied, but the statutory seat is a subsidiary connecting factor.

In LITHUANIA domicile of a legal person is the registered office which is the place where its permanent governing body is situated, however, according to a decision of the LITHUANIAN Supreme Court, the registered office could also be considered at its

[35] See the CROATIAN report, Question 2.

[36] M Wójcik, 'Comments to Article 1103' in A Jakubecki (ed), *Kodeks postępowania cywilnego Tom II Komentarz do Art 730–1217* (Wolters Kluwer, 2017) 613.

[37] Chapter 10, Section 1, para 3 of the SWEDISH Judicial Code.

[38] P Lindskoug, *Domsrätt och lagval vid elektronisk handel* (Juridiska fakulteten Lund, 2004) 50–53.

actual place of business.[39] In FRANCE the claimant can rely on both the statutory place of the seat and the place of the actual seat to establish national jurisdiction, however, it is uncertain whether this provision applies to international jurisdiction as well.[40]

Question 3

The majority of the Member States provide for additional grounds for international jurisdiction. The only three Member States that do not provide for any other grounds of general[41] international jurisdiction apart from the domicile of the defendant are GREECE, SPAIN and as of 2022 CROATIA,[42] while all others use at least one other connecting factor apart from the domicile of the defendant as grounds to establish international jurisdiction.

	General jurisdiction based on defendant's ...				**General jurisdiction based on claimant's ...**
	habitual residence	**presence/ establishment/ representative**	**property**	**nationality**	**nationality**
AUSTRIA	x	x[43]	x[44]		
BELGIUM	x	x[45]			
BULGARIA	x			x	x

(continued)

[39] Supreme Court of Lithuania, civil case No°3K-3-24/2012.

[40] Cf M Audit, S Bollée and P Callé, *Droit du commerce international et des investissements étrangers* 3rd edn (LGDJ, 2019) 55.

[41] By 'general', we understand rules that are not inherently limited to specific subject-matters (such as claims in contract or for rights in rem), but that apply to a wider range of civil and commercial claims (although not necessarily all of them).

[42] Namely, until 2022, the CROATIAN Civil Procedure Act included a provision that gives jurisdiction to CROATIAN courts when the defendant has property in CROATIA. The term 'property of the defendant' was understood in a very broad way. And under one other provision of the Civil Procedure Act, CROATIAN courts had jurisdiction based on the presence of the defendant on CROATIAN territory. CROATIAN courts were in no way reluctant to base their international jurisdiction on those provisions.

[43] It only applies if the defendant has neither a domicile nor a habitual residence in AUSTRIA or abroad. In these cases, general jurisdiction is granted to the AUSTRIAN courts on whose territory the defendant is physically present at the time when the lawsuit is filed. In the absence of *any* domicile or habitual residence, and only for obligations that arose during their presence, Austrian courts are competent if Austria was the place of last presence. See the AUSTRIAN report, Question 3.

[44] In the absence of general jurisdiction and it is restricted by its material scope: property jurisdiction applies only to monetary or monetarily measurable claims or to claims arising from a monetary relationship. See the AUSTRIAN report, Question 3.

[45] '[A]ctions relating to the exploitation of a secondary establishment of a body with separate legal entity, which has neither its domicile nor its habitual residence in Belgium, if the establishment is located in Belgium when the action is introduced' (Art 5(2) of the BELGIAN *Wetboek Internationaal Privaatrecht/Code de Droit International Privé*).

(Continued)

	General jurisdiction based on defendant's ...				General jurisdiction based on claimant's ...
	habitual residence	presence/ establishment/ representative	property	nationality	nationality
CROATIA					
CYPRUS	x	x[46]			
FRANCE				x	x
GERMANY			x[47]		
GREECE					
HUNGARY		x[48]			
ITALY	x	x			
LATVIA	x	x	x[49]		
LITHUANIA	x	x	x		
MALTA	x	x			
NETHERLANDS	x	x			
POLAND	x		x		
SPAIN					
SWEDEN		x	x		

One of the grounds that is traditionally considered an exorbitant jurisdictional ground is the nationality of the parties. FRANCE and BULGARIA are the only two Member States that allow the court to base international jurisdiction on the claimant's or respondent's nationality. This head of jurisdiction nowadays appears as controversial, especially in FRANCE where acquiring French citizenship is allowed for all descendants of French citizens without further requirement.[50]

Other additional grounds for establishing jurisdiction that are traditionally regarded as exorbitant should in many cases be examined carefully as their interpretation often depends on the respective Member States' courts and legislative interpretation. There are two such jurisdictional grounds still found in the legislation of a considerable number

[46] This head of jurisdiction is balanced out by a *forum non conveniens* test.

[47] In the absence of a domicile in GERMANY and provided that the case is sufficiently closely connected to GERMANY.

[48] '[A] branch or representation in Hungary and the legal dispute is related to their operations, including the case that the contract on behalf of the business having its seat abroad was concluded in Hungary' (Art 96 of the HUNGARIAN *évi XXVIII. törvény a nemzetközi magánjogról*).

[49] Location of immovable property is a subsidiary ground for natural persons only according to the Section 27(2) of the LATVIAN Civil Procedure Law.

[50] FRENCH citizenship can also be acquired when the child is born to foreigners on FRENCH soil, if one of his parents was also born there. Further, in case of dual citizenship, for the purposes of establishing jurisdiction the person shall be considered a FRENCH citizen. See the FRENCH report, Question 3.

of Member States. The mere presence of the defendant is a jurisdictional ground in AUSTRIA, CYPRUS, ITALY, LITHUANIA and MALTA while the existence of the defendant's property on the territory of the Member State of the court in AUSTRIA, GERMANY, LATVIA, LITHUANIA, POLAND and SWEDEN.

In HUNGARY, BELGIUM, LATVIA, SWEDEN and NETHERLANDS courts have jurisdiction over a legal person not situated in their respective Member State, when that legal person has branch or representation there and the dispute is related to the operations of the branch or representation. In ITALY courts have jurisdiction over a legal person that has a representative (with the power to stand in trial) in ITALY.[51]

As to the presence of the defendant on the territory of the Member States' court, there are two groups of Member States. In the first group of Member States that include AUSTRIA and LITHUANIA this jurisdictional ground is interpreted narrowly. Namely, in AUSTRIA the defendant must be present when the lawsuit is filed, and if the defendant is not even present in AUSTRIA, the last presence may be the ground for jurisdiction but limited only to those obligations that came into existence during their presence in AUSTRIA or that must be performed in AUSTRIA. In LITHUANIA jurisdiction can be based on the presence of the defendant, however, given that the courts examine the substantial connection of the case with LITHUANIA proven by the existence of domicile, it could be argued that a brief presence in the country might not be enough to justify the jurisdiction of the courts.

On the other hand, the second group of Member States that includes CYPRUS and MALTA, where presence is also one of the connecting factors for establishing jurisdiction, traditionally takes a completely different approach by widening this jurisdictional ground. According to MALTESE case law, any presence, even transient, will suffice to establish the court's jurisdiction. The threshold has been set very low in the case *of Angelo Cutajar and Sons Company Ltd v Cremona Anthony Dott*,[52] where the MALTESE First Hall of the Civil Court held that the term 'presence' shall be interpreted widely and would even extend to a situation when a non-MALTESE party has not been physically present in MALTA, but has been represented there by a third person.[53]

Finally, although jurisdiction based on the presence of assets in a Member State is usually listed as one of the exorbitant grounds for jurisdiction, in all Member States this jurisdictional ground is restricted through legislation and case law. According to Art 23 of the GERMAN Civil Procedure Code (*Zivilprozessordnung*), GERMAN courts have jurisdiction over a defendant who owns assets in Germany, regardless of their value, but the *Bundesgerichtshof* has narrowed its interpretation significantly by interpreting it in a way that the case has to be sufficiently closely connected to Germany.[54] In AUSTRIA property jurisdiction applies only to monetary or monetarily measurable

[51] This refers to a 'general representative', whereas representatives appointed for specific transactions or specific tasks cannot stand in trial for the principal, unless this power has not been expressly conferred. See the ITALIAN report, Question 3.

[52] *Angelo Cutajar and Sons Company Limited v Anthony Cremona Dott Et Noe*. First Hall, Civil Court, 16th October 2003.

[53] MALTESE report, Question 3.

[54] See Bundesgerichtshof, 2 July 1991 – XI ZR 206/90, BGHZ 115, 90, sub II.1.b).

claims or to claims arising from a monetary relationship.[55] LITHUANIAN courts interpret this jurisdictional ground narrowly and only retain jurisdiction if the case is connected to LITHUANIA. In POLAND the property or property rights should be of significant value when compared to the value of the object of a dispute.[56] SWEDEN has a rule according to which three criteria must be satisfied for it to apply: the dispute concerns a debt obligation; the defendant is domiciled outside of SWEDEN (and States bound by the Brussels Regime); and the defendant owns property that is located in SWEDEN.[57] However, the courts have narrowed the scope of application of the rule. For instance, minimum value of the assets is not prescribed but the courts have found that the property must have more than mere symbolic value.[58]

Question 4

The possibility that jurisdiction be established in the exceptional case[59] of a 'denial of justice', the so-called *forum necessitatis*,[60] is envisaged in most Member States either in their written law (AUSTRIA; BELGIUM; CROATIA; NETHERLANDS; POLAND; SPAIN)[61] or by their courts (FRANCE; GERMANY; GREECE; ITALY; SWEDEN).[62] In the remaining Member States (BULGARIA; CYRPUS; HUNGARY; LATVIA; LITHUANIA; MALTA), even though it has neither been envisaged in written law nor by national courts so far, *forum necessitatis* is not an entirely alien concept either.[63]

[55] RIS-Justiz RS0045946. Under the last alternative, also declaratory relief may be covered, eg when the declaration of the invalidity of a monetary settlement (RIS-Justiz RS0046841) or of an acknowledgement of debt (OGH 28 February 1989, 10 Ob 501/87) is sought. See the AUSTRIAN report, Question 3.

[56] 2009 Amendments of the Civil Procedure Act. POLISH report, Question 3.

[57] 'In disputes concerning debt obligations, a person with no known residence in the Realm may be sued where property he owns is located' (Chapter 10, Section 3, first sentence of the Judicial Code). See the SWEDISH report, Question 3.

[58] See eg Högsta domstolen (SWEDISH Supreme Court), 15 September 1988, NJA 1988 s 440 (holding that a bill of lading for goods that had already been delivered lacked market value); Högsta domstolen, 10 June 1998 NJA 1998 s 361 (holding that an unprivileged claim in bankruptcy could found jurisdiction unless the defendant can show that the claim is obviously worthless because there will not be any distribution); Högsta domstolen, 30 December 2010, NJA 2010 s 734 (holding that the fact that the value of the asset that formed the basis for jurisdiction depended on the outcome of the claim did not prevent that asset from being a basis for jurisdiction, where the action does not appear to be unfounded).The Supreme Court held that a bank account with 888 crowns (approximately 89 euros) could not be the basis for jurisdiction over a dispute concerning debt of 40 million crowns (approximately 4 million euros) because the value was so limited that it had no practice significance from enforcement perspective (Högsta domstolen, 15 July 2016, NJA 2016 s 779, para 10). See the SWEDISH report, Question 3.

[59] Cf, in particular, the reports on BELGIUM; NETHERLANDS; SWEDEN.

[60] Cf, in particular, the reports on AUSTRIA; BELGIUM; FRANCE; SWEDEN.

[61] In AUSTRIA, § 28 Abs 1 Z 2 of the *Jurisdiktionsnorm*; in BELGIUM, Arts 7 and 11 of the *Wetboek Internationaal Privaatrecht*; in CROATIA, Art 58 of the *Zakon o rješavanju sukoba zakona s propisima drugih zemalja u određenim odnosima*; in the NETHERLANDS, Art 9 of the *Wetboek van Burgerlijke Rechtsvordering*; in POLAND, Art 1099 of the *Kodeks postępowania cywilnego*; in SPAIN, Art 22 *octies* 3 par 2 of the *Ley Orgánica del Poder Judicial*.

[62] It appears that, rather than having established jurisdiction based on *forum necessitatis*, GERMAN and ITALIAN courts have simply considered the existence of that head of jurisdiction so far.

[63] In BULGARIA, *forum necessitatis* is a matter of discussion among legal scholarship; in HUNGARY, the adoption of a rule on jurisdiction based on *forum necessitatis* was considered in the context of the reform which led

In contrast to its prominent position in legal scholarship, though, there appear to exist few reported decisions whereby the courts of the Member States have established jurisdiction (in civil and commercial matters) based on *forum necessitatis*.[64] The lack of practical relevance of *forum necessitatis* may be explained as follows. On the one hand, as mentioned below, a prerequirement of *forum necessitatis* is lack of jurisdiction of the seised court based on other heads of jurisdiction. On the other hand, most Member States envisage jurisdictional heads based on 'weak' links with the forum.[65] Therefore, in order to establish jurisdiction, it is often sufficient for national courts to resort to those exorbitant heads of jurisdiction without resorting to the much more opaque *forum necessitatis*.[66]

The rationale behind *forum necessitatis* of preventing a denial of justice may be traced back to constitutional and even supranational rules (arts 6 ECHR and 47 CFR) enshrining the fundamental rights to a fair trial and to an effective remedy.[67]

The requirements that must be met for a risk of denial of justice to be deemed existent, and thus to establish jurisdiction based on *forum necessitatis*, vary from one Member State to the other and are variously combined together.

As mentioned above, a common pre-requirement is lack of jurisdiction of national courts based on other heads of jurisdiction. In fact, *forum necessitatis* is generally construed as a 'subsidiary' head of jurisdiction.[68]

In addition to that pre-requirement, in most Member States (AUSTRIA; BELGIUM; CROATIA; FRANCE; GERMANY; NETHERLANDS;[69] POLAND; SPAIN; SWEDEN), a first requirement is the existence of a sufficient link with the country of the seised court (which yet would not be sufficient to establish jurisdiction under other heads of jurisdiction).[70] What amounts to a sufficient link is often a matter of debate.[71] For example, in AUSTRIA, a sufficient link exists when the claimant is an EU citizen.[72]

to the *2017. evi XXVIII. törvény a nemzetközi magánjogról*; in MALTA, the head of jurisdiction based on *forum necessitatis* contained in Art 793 of the Code of Organisation and Civil Procedure was repealed in 1995.

[64] Cf, in particular, the reports on BELGIUM; GREECE; NETHERLANDS.

[65] See above Question 3.

[66] Cf the reports on CYPRUS; GERMANY; GREECE; MALTA. This may also explain why, as mentioned above, in some Member States *forum necessitatis* is not envisaged neither in their written law nor by their courts. In fact, for instance, among the latter Member States, in BULGARIA, BULGARIAN nationality of one party is sufficient to establish jurisdiction; in LITHUANIA, jurisdiction may be established based defendant's mere presence in the country at the time of service of the claim; in MALTA, people in need of judicial protection may bring their cases before courts based on their mere presence in the country.

[67] See the BULGARIAN report, referring to Arts 56 of the Constitution of the Republic of Bulgaria, 6 ECHR and 47 CFR; the CYPRIOT report, referring to Art 6 ECHR; the ITALIAN report, referring to the Italian Constitution and Art 6 ECHR.

[68] The subsidiary nature of *forum necessitatis* is underlined – either explicitly or implicitly – in the reports on AUSTRIA; CROATIA; ITALY; NETHERLANDS; POLAND; SPAIN; SWEDEN.

[69] Interestingly, in the NETHERLANDS, a distinction is drawn between two forms *forum necessitatis*: so-called 'absolute' and 'relative' *forum necessitatis*, respectively envisaged in lits b) and c) of Art 9 of the *Wetboek van Burgerlijke Rechtsvordering*. The two forms of *forum necessitatis* apply when trial abroad is respectively impossible and unreasonable. That said, it appears that, a (sufficient) link with the NETHERLANDS is required only with respect to the second (relative) form of *forum necessitatis*.

[70] Only the reports on GREECE and ITALY do not mention a sufficient link as a requirement.

[71] Cf, in particular, the AUSTRIAN report.

[72] Cf the AUSTRIA report; cf also the BELGIAN and GERMAN reports.

In most Member States, a second requirement, which must be met in addition to the first (ie that of a sufficient link), is that trial abroad be impossible.[73] In some Member States (AUSTRIA; BELGIUM; CROATIA; FRANCE; GREECE;[74] NETHERLANDS; POLAND), rather than impossible, trial abroad may 'simply' be unreasonable. As in the case of the requirement of a sufficient link, what amounts to impossibility or unreasonableness is also regularly debated. In any case, impossibility and unreasonableness are generally construed narrowly.[75] A dramatically current example of impossibility is that where the foreign court – which would in principle have jurisdiction over the dispute – belongs to a country whose judiciary is disrupted by armed conflict.[76] As a further and arguably more common example, in some Member States (FRANCE; GERMANY; ITALY; NETHERLANDS;[77] SPAIN),[78] impossibility is deemed to exist when the courts of no foreign country would have jurisdiction over the dispute.[79] However, lack of foreign jurisdiction is not a necessary requirement in all Member States (see AUSTRIA; BELGIUM; GERMANY; GREECE; NETHERLANDS).[80] In fact, as mentioned above, in order to establish jurisdiction based on *forum necessitatis*, rather than impossible, trial abroad may simply be unreasonable. Unreasonableness may be deemed to exist, eg, when the decision by the given foreign court would not be (eligible to be) enforced in the Member State of the seised court.[81] As a further, albeit controversial, example, unreasonableness may be deemed to exist even when trial abroad would entail significant additional legal costs (as compared to trial in the *forum necessitatis*).[82]

[73] Only the GREEK report does not mention – not even implicitly – impossibility as a requirement. Instead, even though the SWEDISH report does not mention explicitly impossibility as a requirement, that report mentions a decision rendered by the SWEDISH Supreme Court establishing jurisdiction based on *forum necessitatis* in a case where, on the one hand, national courts lacked jurisdiction based on other heads of jurisdiction and, on the other hand, the foreign court had previously refused jurisdiction.

[74] For the sake of completeness, the GREEK report does not mention explicitly unreasonableness as a requirement, but rather, more generally, cases where 'the claimant has no real ability to seek recourse before foreign courts'.

[75] Cf, in particular, the AUSTRIAN report.

[76] Cf the POLISH report.

[77] For the sake of completeness, in the NETHERLANDS (see above n 69), absolute *forum necessitatis* may be established when no foreign court has jurisdiction over the dispute. In turn, lack of foreign jurisdiction does not appear to be relevant in cases of relative *forum necessitatis*.

[78] For the sake of completeness, in SPAIN, Art 22 *octies* 3 par 2 of the *Ley Orgánica del Poder Judicial* requires that foreign courts have (previously) refused jurisdiction. However, SPANISH scholars hold that evidence that foreign courts would not have jurisdiction should suffice.

[79] An issue arises as to which law should be applied to determine whether foreign courts lack jurisdiction. That law may be either the *lex fori* of the seised court or that of the given foreign country. Cf the reports on GERMANY and SPAIN.

[80] Notably, in BELGIUM, jurisdiction based on *forum necessitatis* may be established even when a choice-of-court agreement designating a foreign court is applicable. Cf also the reference in the DUTCH report to a court decision, where jurisdiction was established based on (relative) *forum necessitatis* (see above n 68), irrespective of an applicable choice-of-court agreement designating a foreign court.

[81] See the AUSTRIAN report; cf the POLISH report.

[82] See the reports on AUSTRIA and BELGIUM; but see the POLISH report, where it is specified that the financial situation of the claimant alone is irrelevant.

	Requirements of *forum necessitatis*		
	Sufficient link	**Trial abroad ...**	
		impossible	**unreasonable**
AUSTRIA	x	x	x
BELGIUM	x	x	x
CROATIA	x	x	x
FRANCE	x	x	x
GERMANY	x	x	x
GREECE			x
ITALY		x	
NETHERLANDS	x	x	x
POLAND	x	x	x
SPAIN	x	x	
SWEDEN	x	x	

As mentioned above, *forum necessitatis* is envisaged in most Member States and its rationale may be traced back even to supranational rules (which, in the cases of arts 6 ECHR and 47 CFR, bind all Member States). Therefore, in principle, it appears that there would be no major obstacles to the adoption of *forum necessitatis* in a future recast of the Brussels Ia Regulation. In fact, the adoption of *forum necessitatis* within the context of the Brussels Regime was considered twice before, though without any success.[83] However, if the jurisdictional rules of Brussels Ia were (further) extended to non-EU defendants, and, at the same time, national rules on jurisdiction were consequently superseded, the adoption of *forum necessitatis* within the recast Regulation could be deemed appropriate, if not politically necessary. In this respect, during the Dubrovnik Conference Professor Burkhard Hess suggested that any discussion of a recast of the Brussels Ia should consider the adoption of *forum necessitatis*.[84] On the other hand, Professor Ronald Brand stressed that *forum necessitatis* might not be welcome from a non-EU perspective. In particular, in the US, *forum necessitatis* would be considered incompatible with the Due Process Clause of the Constitution. What is more, *forum necessitatis* does not appear to be a jurisdictional filter envisaged in the 2019 Hague Convention. Therefore, if *forum necessitatis* were adopted in the future recast of Brussels Ia,

[83] Cf Art 26 of the European Commission's Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Brussels, 14 December 2010, COM(2010) 748 final, 2010/0383 (COD); Committee on Legal Affairs of the European Parliament's Draft Report with recommendation to the Commission on corporate due diligence and corporate accountability, 2020/2129(NL)); cf also Art 11 Succession Regulation No 650/2012.

[84] Cf B Hess, 'Reforming the Brussels Ibis Regulation: Perspectives and Prospects' (Max Plank Institute Luxembourg for Procedural Law Research Paper Series No. 2021 (4)) 1, 6–7.

this might represent a liability for the coordination between the latter and the 2019 Hague Convention, but might also just be testimony to the exorbitant character of the concept.

Question 5(a)

In some Member States, the rules on jurisdiction in matters relating to contract of the Brussels Regime have been extended by national law to non-EU defendants, or have inspired the national jurisdictional rules applicable in the same matters (CROATIA; ITALY; HUNGARY; NETHERLANDS; SPAIN).[85] In all other Member States, where the Brussels Regime was neither extended nor a source of inspiration, relevant differences (and similarities) exist between the respective national rules on jurisdiction applicable in matters relating to contract. In particular, those differences concern the material scope of, and the connecting factors employed by, the national rules in question.

As concerns the material scope, only in a few Member States (LITHUANIA; MALTA; SWEDEN), there does not exist a special rule on jurisdiction in matters relating to contract; instead, those legal systems have a jurisdictional rule applicable to obligations in general.[86] In all other Member States except LATVIA[87] (ie AUSTRIA; BELGIUM; BULGARIA; CYPRUS; FRANCE; GERMANY; GREECE; POLAND), a special rule on jurisdiction applicable to contractual obligations exists,[88] usually with exceptions for obligations arising from specific contracts (in most cases, involving so-called 'weaker' parties).[89] In some of the latter Member States, the scope of the respective special rule is further limited to specific (contractual) claims (eg, in AUSTRIA, to claims brought by the creditor seeking a declaration on the existence, the performance or the avoidance of the contract, or compensation in cases of defective performance).[90] Incidentally, it is especially in those Member States where a special jurisdictional rule exists that the issue arises which law – either the *lex fori* or the *lex causae* – should determine whether or not the dispute actually concerns a contractual obligation.[91]

[85] Cf above Question 1(c).

[86] In LITHUANIA, Art 787 paras 1 and 3 of the *Lietuvos Respublikos civilinio proceso kodeksas*; in MALTA, Art 742 para 1 of the Code of Organisation and Civil Procedure; in SWEDEN, Chapter 10, Section 4 of the Judicial Code.

[87] In LATVIA it is unclear which jurisdictional rule should apply in matters relating to contract (LATVIAN report).

[88] In AUSTRIA, § 88 of the *Jurisdiktionsnorm*; in BELGIUM, Art 96 no 1 lits a) and b) of the *Wetboek Internationaal Privatreect*; in BULGARIA, Art 15 of the *Кодекс на международното частно право*; in CYPRUS, 6.8 (η), (θ) and (ι) of the *Κανονισμοί Πολιτικής δικονομίας*; in FRANCE, Art 46 first indent of the *Code de procedure civil*; in GERMANY, § 29(1) of the *Zivilprozessordnung*; in GREECE, Art 33 of the *Κώδικας Πολιτικής Δικονομίας*; in POLAND, Art 1103 sec 1 of the *Ustawa z 17 XI 1964 r Kodeks postępowania cywilnego*.

[89] See the reports on AUSTRIA; BELGIUM; FRANCE.

[90] See also the CYPRIOT report.

[91] See the BELGIAN report; cf the GREEK report.

Rule on obligations in general	Special rule on contractual obligations
- LITHUANIA - MALTA - SWEDEN	- AUSTRIA - BELGIUM - BULGARIA - CROATIA - CYPRUS - FRANCE - GERMANY - GREECE - HUNGARY - ITALY - NETHERLANDS - POLAND - SPAIN

The connecting factors most frequently employed by the national rules on jurisdiction applicable in matters relating to contract appear to be those of place of performance or of contract (or obligation) formation.[92] In some Member States (BELGIUM; GREECE; LITHUANIA; MALTA), the two connecting factors are alternative. In other Member States, only one of them is employed: in AUSTRIA, BULGARIA, FRANCE, GERMANY and HUNGARY, place of performance; in CYPRUS, POLAND and SWEDEN, contract (or obligation) formation. Differences concerning the scope and determination of the place of performance exist among the Member States. Among such differences is that concerning the precise legal relationship for which this forum is available. In most Member States (BELGIUM; GERMANY; GREECE; LITHUANIA; MALTA), the courts at the place of performance are competent only for the disputed (contractual) obligation arising from the contract in question. The place of performance is determined in accordance with the *lex fori*[93] or with the *lex causae*.[94] In contrast, only in a few Member States, the place of performance is determined by taking into account the relevant contract, rather than the disputed obligation arising from it. For example, in BULGARIA, the only relevant place of performance is that where the contract's characteristic obligation should be performed. Similarly, in FRANCE, akin to Art 7(1) lit b) Brussels Ia, a single forum exists for all obligations arising out of contracts for the sale of goods and provision of services: in the first case, that where the goods were or had to be delivered; in the second case, that where the services were or had to be provided. However, unlike Art 7(1) Brussels Ia, the FRENCH rule on jurisdiction in matters relating to contract is not applicable if the contract is neither a sale of goods nor a provision of services.[95]

[92] For the sake of completeness, some national reports stress that further connecting factors may apply alternatively to those of place of contract formation and/or of performance, eg, that of the place where the defendant is either domiciled, habitually resident or has its place of business (see the reports on AUSTRIA; BULGARIA; FRANCE; POLAND), or where the latter has property or other assets (see the POLISH report).

[93] Cf the reports on GREECE, LITHUANIA, and SPAIN.

[94] Cf the GERMAN and MALTESE reports.

[95] On the other hand, it may be applicable even if the parties are not bound by a contract between them (see the FRENCH report for more detail).

	Most frequently employed connecting factors	
	Contract (or obligation) formation	**Place of performance**
AUSTRIA		x
BELGIUM	x	x
BULGARIA		x
CROATIA		x
CYPRUS	x	
FRANCE		x
GERMANY		x
GREECE	x	x
HUNGARY		x
ITALY		x
LITHUANIA	x	x
MALTA	x	x
NETHERLANDS		x
POLAND	x	
SPAIN		x
SWEDEN	x	

Leaving aside the case of the Member States where the national rules on jurisdiction in matters relating to contract extend or are inspired by the rules of the Brussels Regime, the latter and the related decisions by the CJEU have had a considerable influence on the jurisdictional rules applicable in the same matters of some of the other Member States.[96] For instance, the BELGIAN courts have occasionally determined the place of performance, for the purposes of the relevant national rule on jurisdiction, in line with Art 7(1) lit b) Brussels Ia. By the same token, the FRENCH courts occasionally refer to the decisions of the CJEU when interpreting the national rule on jurisdiction in matters relating to contract – although the FRENCH *Cour de cassation* rejected the contractual characterisation of so-called 'abrupt termination of long-standing business relationship' endorsed by the CJEU in *Granarolo*.[97] In fact, during the Dubrovnik Conference, the FRENCH rapporteur stressed that the extension of the Brussels Ia jurisdictional rule in matters relating to contract would have an impact on the characterisation of the disputes in question by national courts. Of course, the extension would have an even greater impact in those few Member States (AUSTRIA; CYPRUS; GERMANY) where EU law has not had any noticeable influence on the national rules of jurisdiction in matters relating to contract so far.

[96] See, eg, the reports on BELGIUM; FRANCE; HUNGARY; SWEDEN; cf the POLISH report.

[97] See the FRENCH report; see also, most recently, C Maresca, 'La qualificazione della responsabilità derivante da rottura brusca di relazioni commerciali stabili: gli effetti delle sentenze della Corte di giustizia sulla giurisprudenza francese' (2022) *Riv dir in priv proc* 65 et seq.

Question 5(b)

Regarding the *forum delicti*, a distinction can be drawn between (a) those Member States that follow the wide interpretation adopted by the CJEU in *Bier*,[98] vesting jurisdiction both in the courts of the *locus delicti* and the *locus damni*, (b) those that limit jurisdiction to one of those places (such as GREECE (*locus delicti*) or SPAIN (*locus damni*)), and (c) those that have adopted (also) an entirely different connecting factor for torts. This last group consists only of MALTA, whose general rule on obligations appears to be a lot easier to apply to contractual than to non-contractual obligations as it raises the question of how to identify the place where a non-contractual obligation has been assumed or needs to be performed. The practical significance of this provision is drastically reduced, though, by the possibility of basing (general) jurisdiction on the mere presence of the defendant.

Interestingly, all legal systems that appear to distinguish between direct and indirect damage for jurisdictional purposes follow the CJEU[99] in limiting special jurisdiction to the direct or primary damage.[100]

Member State	Connecting factor			
	Locus commissi delicti	*Locus damni*		other
		only direct damage	Direct and indirect damage	
AUSTRIA	x[101]	(x)[102]		
BELGIUM	x	x		
BULGARIA	x	x		
CROATIA	x	x		
CYPRUS	x	x		
FRANCE	x	x		
GERMANY	x	x		
GREECE	x			
HUNGARY	x	x		
ITALY	x	x		
LATVIA	x	x		
LITHUANIA	x	x		
MALTA				x[103]

(continued)

[98] Case 21/76 *Bier*.

[99] See also Case C-364/93 *Marinari*.

[100] Which is in stark contrast to a recent decision by the UK Supreme Court, *FS Cairo (Nile Plaza) LLC v Lady Brownlie (Brownlie II)* [2021] UKSC 45.

[101] Only for damage to persons and physical property.

[102] Only for a small number of specific torts, namely for damage to forests and air pollution.

[103] According to the MALTESE report, claims in tort (and other non-contractual situations) are treated similarly to claims in contract with jurisdiction vested in the courts of the country in which the obligation has been assumed or must be performed.

(Continued)

Member State	Connecting factor			
	Locus commissi delicti	*Locus damni*		other
		only direct damage	Direct and indirect damage	
NETHERLANDS	x			
POLAND	x	x		
SPAIN		x		
SWEDEN	x	x		

As a final remark, it may be noted that several reports – namely those for FRANCE, GERMANY, and SWEDEN – have referred to the treatment of torts committed on the internet, noting both a certain alignment with the CJEU's interpretation of Art 7(2) Brussels Ia (in all three cases) but also significant differences (mainly in the case of GERMANY, where the courts have explicitly rejected the CJEU's centre-of-interests approach to online infringements of personality rights).[104]

Question 5(c)

In most Member States there are rules that are either fully aligned with Art 8(1) Brussels Ia which provides for the jurisdiction based on a close connection between defendants, eg CROATIA and HUNGARY, or can be interpreted as a variant of Art 8(1) of the Brussels Ia Regulation, eg AUSTRIA, BELGIUM, BULGARIA, FRANCE, NETHERLANDS and POLAND.

The member states that do not include a corresponding rule on the jurisdiction based on a close connection between defendants are GERMANY, LITHUANIA, MALTA and SWEDEN. In GREEK law, jurisdiction cannot be based on a close connection between defendants, but on a close connection between claims.

	Same or similar to Art 8(1) Brussels Ia Regulation	No rule on jurisdiction based on connection between the defendants
AUSTRIA	x	
BELGIUM	x	
BULGARIA	x	
CROATIA	x	
CYPRUS	x	

(continued)

[104] For references, see the GERMAN report, Question 5(d). The SWEDISH report refers to a decision by the Svea hovrätt (Svea Court of Appeal) from 18 October 2007, which also deviated from the CJEU's case law with regard to copyright infringements, although in a case that was only concerned with local jurisdiction – it appears unclear if SWEDISH courts would similarly deviate from the CJEU with regard to international jurisdiction.

(Continued)

	Same or similar to Art 8(1) Brussels Ia Regulation	No rule on jurisdiction based on connection between the defendants
FRANCE	x	
GERMANY		x
GREECE		x[105]
HUNGARY	x	
ITALY	x	
LATVIA	x	
LITHUANIA		x
MALTA		x
NETHERLANDS	x	
POLAND	x[106]	
SPAIN	x	
SWEDEN		x

In the Member States that do have a rule aligned with Art 8(1) of Brussels Ia, but not an entirely identical rule, there are different approaches to jurisdiction based on a close connection between defendants.

BELGIUM, for example, has taken a more generous approach for related actions: namely, even though the provision on jurisdiction based on the close connection was inspired by Art 6(1) Brussels I,[107] it does not require a connection between the actions, let alone the risk of irreconcilable judgments, for the BELGIAN courts to have jurisdiction over disputes involving multiple defendants, even though an important condition is that the action must not have been introduced solely to remove a defendant from the jurisdiction of his domicile or habitual residence abroad.[108]

A further example are the FRENCH courts, which make a difference depending on the degree of connection of the claims. For example, if the claims are indivisible, FRENCH courts will take jurisdiction notwithstanding a jurisdiction agreement between the plaintiff and one of the co-defendants giving jurisdiction to a foreign court.[109] If the claims are not indivisible, the foreign jurisdiction agreement constitutes a valid defence against jurisdiction of French courts.[110]

GERMAN law is one of the rare examples of a law that does not contain a general provision like Art 8(1) Brussels Ia. In civil and commercial matters, the rules of this

[105] The GREEK Civil Code of Procedure provides for jurisdiction based on connection of claims, but not based on a close connection between the defendants.

[106] The POLISH rule has a wider scope than Art 8(1) Brussels Ia, as it is not limited to cases when jurisdiction results from the domicile of the defendant: see T Ereciński 'Comments to Article 1103[10]' in T Ereciński (ed) *Kodeks postępowania cywilnego Komentarz Tom VI Międzynarodowe Postępowanie Cywilne Sąd polubowny* (arbitrażowy) (Wolters Kluwer, 2017) 131. See POLISH report, Question 5(c).

[107] Wetsvoorstel houdende het Wetboek van internationaal privaatrecht, Toelichting, *Parl St Senaat* 2003, 3-27/1, 32.

[108] BELGIAN report, Question 5(c).

[109] Cour de cassation, civ 2e, 7 November 1994, 92-20.776, JCP G 1995, IV, 61, L'Alibi: claims 'on the same legal ground and for the same purpose'.

[110] Cour de cassation, soc, 26 June 1991, 88-40.170, D 1991, IR, 212, Sogexpat.

kind only exist for very specific scenarios, but that led some scholars to call for the analogous application of Art 8(1) to cases involving defendants not domiciled in a member state or for the introduction of a similar provision into German domestic law.[111]

Although SWEDEN is also one of the few Member States that do not have a provision on the jurisdiction based on a close connection between defendants, exceptionally, the rule used for domestic jurisdiction[112] can be applied if the reasons of procedural economy outweigh the inconvenience for the defendant.[113]

Question 5(d)

In several Member States (AUSTRIA; BELGIUM; BULGARIA; CROATIA; FRANCE; GERMANY; ITALY; LATVIA; NETHERLANDS; POLAND; SPAIN) there exist special rules on jurisdiction in matters relating to insurance, consumer contracts and/or individual contracts of employment. Those rules apply generally in the matters in question and/or in specific cases relating thereto. For example, in FRANCE, both a general rule on jurisdiction over consumer contracts and a specific rule on consumer class actions exist.[114] In GERMANY, there is no similar general rule, but a specific rule on off-premises contracts specifically focused on consumers.[115] Similarly, in AUSTRIA, there is no general rule in matters relating to insurance, but specific rules applicable in cases of claims brought by the insured against the insurer and arising from insurance contracts conveyed or concluded through an agent of the latter, or arising from contracts for the insurance of motor vehicles.[116]

	National rules on jurisdiction ...		
	in matters relating to insurance	**over consumer contracts**	**over individual contracts of employment**
AUSTRIA	x[117]	x	x
BELGIUM		x	x
BULGARIA		x	x

(continued)

[111] See the GERMAN report, Question 5(c), n 61 and 62.

[112] Chapter 10, Section 14, first sentence, of the SWEDISH Judicial Code. As a rule, the provision cannot be applied *ex analogia* to international jurisdiction and that there should normally be an independent basis for jurisdiction against the defendant: see. See the SWEDISH report; Question 5(c)).

[113] S Dennemark, *Om domstols behörighet i internationellt förmögenhetsrättsliga mål* (PA Norstedt & Söners Förlag, 1961) 220; U Maunsbach, *Svensk domstols behörighet vid gränsöverskridande varumärkestvister – särskilt om Internetrelaterade intrång* (Juridiska fakulteten Lund, 2005) 245–247; C Thornefors, Lagkommentar Rättegångsbalk, (Karnov, 2018) 1942:740. In one case, the SWEDISH Supreme Court found that SWEDISH jurisdiction could be based on the rule when the defendant was domiciled in a third state but was a SWEDISH citizen, a foreign representative of a SWEDISH company and spent three months a year in SWEDEN (Högsta domstolen, 12 December 1986, NJA 1986 s 729). See the SWEDISH report; Question 5(c)

[114] ibid.

[115] See the GERMAN report.

[116] See the AUSTRIAN report.

[117] As mentioned in the text above, in AUSTRIA, there exists no general jurisdictional rule on insurance, but specific rules in matters relating thereto.

(Continued)

	National rules on jurisdiction ...		
	in matters relating to insurance	**over consumer contracts**	**over individual contracts of employment**
CROATIA	x		
FRANCE	x	x	x
GERMANY	x	x[118]	x
ITALY	x	x	x
LATVIA			x
NETHERLANDS		x	x
POLAND	x	x	x
SPAIN	x	x	x

Moreover, in a few Member States, there exist special rules governing jurisdiction over disputes involving weaker parties other than those considered by the Brussels Regime (ie insured, consumers and employees). For instance, in BELGIUM, a special jurisdictional rule concerns commercial agents[119] and, in GERMANY, participants in distance learning.[120]

On the other hand, in a significant number of Member States (CYPRUS; GREECE; HUNGARY; LITHUANIA; MALTA; SWEDEN) it appears that special rules applicable in cases involving weaker parties do not exist at all.

In general terms, where existent, national rules on jurisdiction in cases involving weaker parties differ considerably from one Member State to the other, in particular as concerns their personal scope of application and the connecting factors employed. However, in equally general terms, as concerns the connecting factors employed, it appears that national rules may benefit the weaker parties by allowing them to sue the so-called 'stronger' parties in other fora, in addition to those made available under other (national) rules on jurisdiction.[121] For example, in the case of disputes arising from consumer contracts, these additional fora are those of the place where the consumer is domiciled and/or resident, or habitually resident.[122] In addition, the rules in question may also protect the weaker parties, by limiting the fora where they may be sued by the stronger party.[123] Incidentally, in AUSTRIA, national rules do not provide the weaker parties with additional fora, but only protect them from being sued by the stronger party before other fora.[124] For the sake of completeness, the protective nature of the jurisdictional rules in question also emerges in cases where of choice-of-court agreements

[118] As mentioned in the text above, in GERMANY, there exists no general jurisdictional rule on consumer contracts, but only a rule on off-premises contracts specifically focused on consumers (§ 29c ZPO).
[119] Also see the *DUTCH report*; *cf* the reports on GREECE and SPAIN.
[120] See the GERMAN report.
[121] See, eg, the reports on BELGIUM; BULGARIA; FRANCE; GERMANY.
[122] ibid.
[123] See, eg, with respect to jurisdiction over actions arising out of off-premises contracts, the GERMAN report.
[124] See the AUSTRIAN report.

apply. In fact, similar agreements are often deemed invalid when they purport to derogate jurisdiction from the forum or fora where the weaker party may sue the stronger party,[125] and/or when they are concluded before the relevant disputes have arisen.[126]

The Brussels Regime appears to have had a twofold impact on the national rules on jurisdiction over disputes involving weaker parties. On the one hand, the extension brought about by Brussels Ia of the EU-uniform rules on jurisdiction over consumer contracts and individual contracts of employment to non-EU defendants has superseded in most part, if not in full, the national rules of the Member States applicable in the same matters.[127] On the other hand, in any case, the national rules in question often appear to be close to, if not clearly inspired by, those of the Brussels Regime.[128]

Arguably, an extension of the rule on jurisdiction in matters of insurance of Brussels Ia to non-EU defendants would have a major impact in those (many) Member States where a similar rule does not exist (AUSTRIA,[129] BELGIUM, BULGARIA, CYPRUS, GREECE, HUNGARY, LATVIA, LITHUANIA, NETHERLANDS, SWEDEN). Moreover, if the extension entailed the abrogation of national rules on jurisdiction, the same extension would have an impact also in those Member States where special rules on jurisdiction apply to disputes involving weaker parties other than those considered by Brussels Ia.

Question 6

The answers to Question 6 are not reproduced in the national reports reprinted in this book, since they can be readily summarised as follows.

The national reports mention the following multilateral treaties in force between the Member States and third States, and containing so-called 'direct' jurisdictional rules in matters regulated by Brussels Ia:

- the (1868) Revised Convention for the navigation of the Rhine;[130]
- the (1951) Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces;[131]
- the (1952) International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision;[132]

[125] ibid.

[126] See the reports on BELGIUM and GERMANY.

[127] In this respect, it is illustrative comparing ITALY and CROATIA. In 1995, in ITALY, the scope of the jurisdictional rules of the Brussels Convention in matters relating to insurance (Arts 7 et seq), consumer contracts (Arts 13 et seq) and individual contracts of employment (Art 5 no 1) were extended by national law to non-EU defendants. That reference, however, was later partially superseded by the above-mentioned extension brought by the Brussels Ia with respect to jurisdiction in matters relating to consumer contracts and individual contracts of employment. In turn, in 2017, in CROATIA, the rules of the Brussels Ia were extended by national law to non-EU defendants, the legislature deemed it unnecessary to also extend the rules on jurisdiction in matters of consumer contracts and individual contracts of employment; only the rules of the same Regulation in matters relating to insurance were extended.

[128] Cf the reports on BELGIUM, the NETHERLANDS and POLAND.

[129] See above n 164.

[130] Adopted 17 October 1868. The text of the treaty can be consulted at www.ccr-zkr.org/11020200-en.html.

[131] Adopted 19 June 1951, entered into force 23 August 1953, 1999 UNTS 67.

[132] Adopted 10 May 1952, entered into force 14 September 1955, 439 UNTS 217.

- the (1952) International Convention relating to the Arrest of Seagoing Ships;[133]
- the (1956) Convention on the Contract for the International Carriage of Goods by Road (CMR);[134]
- the (1960) Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation;[135]
- the (1960) Convention on Third Party Liability in the Field of Nuclear Energy;[136]
- the (1973) Convention on the Grant of European Patents (European Patent Convention);[137]
- the (1974) Athens Convention relating to the Carriage of Passengers and their Luggage by Sea;[138]
- the (1980) Convention concerning International Carriage by Rail (COTIF);[139]
- the (1999) Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention);[140]
- the (2001) International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention).[141]

As the number of contracting Member States varies from treaty to treaty and the data published online[142] has turned out not to be entirely reliable, we have decided not to include tables reflecting the state of adoption for each instrument. The only treaties that we have found to be in force in all Member States are: the European Patent Convention, the CMR,[143] the Bunker Convention,[144] the Montreal Convention,[145] and the COTIF.[146]

[133] Adopted on 10 May 1952, entered into force 24 February 1956, 439 UNTS 193.
[134] Adopted 19 May 1956, entered into force 2 July 1961, 399 UNTS 189.
[135] Adopted 13 March 1960, entered into force 13 September 1966, 572 UNTS 133.
[136] Adopted 29 July 1960, entered into force 1 April 1968, 956 UNTS 251.
[137] Adopted on 5 October 1973, entered into force 7 October 1973, 1065 UNTS 199.
[138] Adopted 13 December 1974, entered into force 28 April 1987, 1463 UNTS 19.
[139] Adopted 9 May 1980, entered into force 1 May 1985, 1396 UNTS 2, 1397 UNTS 2.
[140] Adopted 28 May 1999, entered into force 4 November 2003, 2242 UNTS 309.
[141] Adopted 23 March 2001, entered into force 21 November 2008, [2002] OJ L 256/9.
[142] The status of the (1868) Revised Convention for the navigation of the Rhine may be consulted at www.ccr-zkr.org/13020300-en.html#04, whereas that of the (1951) Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, of the (1952) International Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision, of the (1952) International Convention relating to the Arrest of Seagoing Ships, (1960) Convention on Third Party Liability in the Field of Nuclear Energy, of the (1960) Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation, and of the (1974) Athens Convention relating to the Carriage of Passengers and their Luggage by Sea at www.treaties.un.org/.
[143] See Opinion of Advocate General Kokott, delivered on 28 January 2010 – Case C-533/08, *TNT Express Nederland BV v AXA Versicherung AG*, ERC 2010 I-04107, para 3.
[144] Cf status at www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx, accessed 18 October 2021.
[145] 2001/539/EC: Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention), OJ L 194, 18 July 2001, p 38.
[146] Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, OJ L 51, 23 February 2013, pp 8 et seq.

As concerns bilateral treaties concluded between the Member States and third States, and containing direct heads of jurisdiction in matters regulated by Brussels Ia, similar treaties are in force in BULGARIA, CYPRUS, GERMANY, HUNGARY, LATVIA, LITHUANIA, POLAND and SPAIN.[147] In some of the latter Member States, the bilateral treaties in question even appear to have some practical relevance.[148] In contrast, in a significant number of Member States (AUSTRIA, BELGIUM, CROATIA, FRANCE, GREECE, ITALY, MALTA, NETHERLANDS, SPAIN and SWEDEN) it appears that similar bilateral treaties do not exist.[149]

Most of the treaties mentioned above were concluded by the Member States before the date of entry into force of Brussels I. Considering the persistence of these treaties, it appears that subordination clauses such as those contained in Arts 71–73 of the latter Regulation should be maintained in a future recast of the Regulation in order to adequately address the issue relating to the interface between treaties in question and the recast Regulation.

[147] In particular, the bilateral treaties are concluded between: BULGARIA, on one side, and a number of unspecified third States, on the other side; CYPRUS, on one side, and, respectively, Ukraine and China, on the other side; GERMANY and Norway; HUNGARY, on one side, and former Yugoslavian countries (namely, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia and Serbia), on the other side; LATVIA, on one side, and, respectively, Belarus, Kyrgyzstan, Moldova, Russia, Ukraine and Uzbekistan, on the other side; LITHUANIA, on one side, and, respectively, Armenia, Azerbaijan, Belarus, China, Kazakhstan, Moldova, Russia, Turkey, Ukraine and Uzbekistan, on the other side; POLAND, on one side, and, respectively, Belarus, Russia, Ukraine, Vietnam, and former Yugoslavian countries (namely, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia), on the other side; SPAIN and El Salvador.

[148] The LITHUANIAN report mentions the existence of court decisions concerning the application of the bilateral treaty with Russia.

[149] Some of the reports on the latter Member States (AUSTRIA; BELGIUM; ITALY) stress the existence of bilateral treaties with third States containing 'indirect', rather than direct, jurisdictional rules in matters regulated by Brussels Ia.