

Assessing the impact  
of the infringement  
of rules of  
jurisdiction on  
recognition

under Regulation 1215/2012

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Regulation (EU) No 1215/2012 or Brussels I recast to which belong the legal provisions mentioned in this presentation without other reference.  
MS – Member State.



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## The scheme of jurisdiction in 9 points

Let's draw a roadmap...

# Point 1:

The main connecting factor is the domicile of the defendant—Article 4

The courts of the MS **where the defendant is domiciled** shall have jurisdiction whatever his/her nationality.





## Article 5

### Exception:

A defendant domiciled in a MS may exceptionally be sued in the Courts of another MS ONLY by virtue of sections 2 to 7.

**A defendant domiciled in a third State may be sued in the courts of a MS.**

Jurisdiction shall be determined by the law of that MS.

However this is without prejudice of Articles 18(1) and 21(2), (protective regime for consumers and employees), and 24 and 25 (exclusive jurisdiction and choice-of court agreements).



POINT 2: Special  
connecting factors may  
apply alternatively

## In two cases

- x Closer connection with another MS.
- x Protection of weaker parties in  
certain contracts  
(insured/beneficiary/policy holder;  
consumer; employee).





# Special (alternative) jurisdiction

## Closer connection

### Section 2 – Articles 7 to 9

Examples:

- x In contracts, the place of performance of the obligation;
- x In tort, delict or quasi delict, the place where the harmful event occurred or may occur.

## Weaker parties

### Section 3 – Articles 10 to 16:

- x In insurance contracts – the insured, policyholder or beneficiary

### Section 4 – Articles 17 to 19:

- x In consumer contracts – the consumer

### Section 5 – Articles 20 to 23:

- x In employment contracts – the employee



# POINT 3:

Exclusive jurisdiction

## Article 24

The parties are deprived of the choice of forum.

They may be brought before a court which is not that of the domicile of none of them.

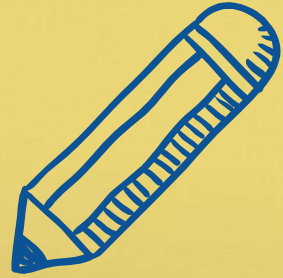
It should not be given a wider interpretation.

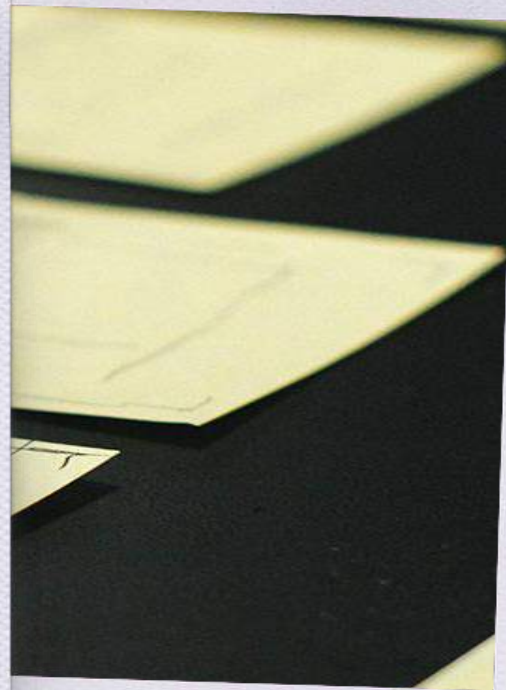
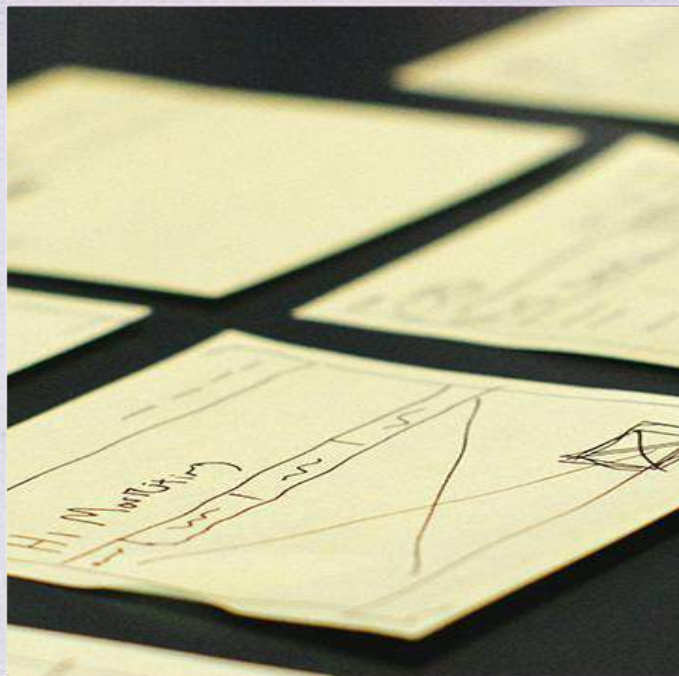




*Article 24 grants exclusive jurisdiction to the courts of a MS other than the specified in Article 4 on the basis of, e.g.:*

- X The location of immovable property in proceedings regarding rights in rem*
- X The seat of a company*
- X An entry in a public register*
- X The place where a judgement is to be enforced*





Point 4: Choice-of-court agreements – Article 25



# Prorogation of jurisdiction

## – Article 25

The parties, regardless of their domicile, may agree that a court or the courts of a MS are to have jurisdiction.

The validity of a **choice-of-court agreement** shall not be assessed by the court by its own motion unless the choice of the forum infringes the rule of exclusive jurisdiction of Article 24.





# Validity of choice-of-court agreements

**Choice-of-court agreements entered into by weaker parties in sections 3, 4 and 5**

Substantial validity is assessed, respectively, in light of the requirements set forth in Articles 15, 19 and 23. Formal validity may be assessed in light of Article 25 (1)(a)(b)(c) and 2.

**Choice-of-court agreements entered into by other parties – article 25**

Substantial validity is assessed in light of the *lex fori* – Article 25(1). Formal validity is assessed according to the requirements set forth in Article 25(1)(a)(b) and 2.

**Examination as to jurisdiction**

The court shall not examine *ex officio* the validity of a choice-of-court agreement unless there is a violation of exclusive jurisdiction according to Article 24.

# POINT 5

Tacit prorrogation of  
jurisdiction – **Article 26(1)**



If the defendant enters an appearance and does not contest jurisdiction the matter is settled: the court of that MS shall have jurisdiction according to Article 26(1).



Article 26(1) shall not apply  
in three cases:

When the  
defendant  
enters an  
appearance  
to contest  
jurisdiction

When  
exclusive  
jurisdiction  
under Article  
24  
is infringed

In case of a  
representative *in  
absentia*  
appointed to the  
defendant who  
had not been  
served with the  
documents  
C-112/13







## POINT 6: examination as to jurisdiction ex officio

Only in two cases

Article 27 – if another court has exclusive jurisdiction

&

Article 28 – after the documents instituting the proceedings are served if the circumstances of Article 28 are met

The COURT shall	declare BY ITS OWN	MOTION that it has	NO jurisdiction
Article 27(1)	Infringement	of exclusive	jurisdiction (Article 24)
Article 28	Defendant domiciled in one MS and + sued in the court of another MS	Not entering an appearance after the service executed + according to Article 28 (3) or (4)	Jurisdiction of the court not derived from the Regulation (including from a choice of court agreement which validity is not assessed ex officio)





# POINT 7: duty to inform the defendant when he/she is the weaker party – **Article 26(2)**

Before assuming jurisdiction under Article 26(1) (tacit prorogation of jurisdiction) **THE COURT SHALL INFORM the defendant of his right to contest jurisdiction and the consequences of entering or not entering an appearance, when the defendant is the policyholder, the insured, the beneficiary of the insurance contract, the injured party, the consumer or the employee – Sections 3, 4 or 5**





# POINT 8: lis pendens situation

Two main situations:

- x Lis pendens involving courts of **different MSs** –  
**Articles 29 to 32 shall apply**
- x Lis pendens involving courts of **third countries and courts of MSs** – **Article 33 shall apply.**



# Let's review some lis pendens situations

## Prior in temporis rule

- ✗ When none of the courts has exclusive jurisdiction – Article 29(1)
- ✗ When all the courts seised have exclusive jurisdiction – Article 31(1).

## Exceptions to the prior in temporis rule

- ✗ When only one court has exclusive jurisdiction – Article 27
- ✗ Choice of court agreement – Article 31(2) and (3).

## Exceptions to Article 31(2) and (3)

- ✗ Notwithstanding the infringement of a choice of court agreement the defendant accepts jurisdiction under Article 26(1)
- ✗ If the choice of court agreement infringes the provisions of Sections 3, 4 or 5 and the applicant is the weaker party – Article 31(4).

As a result the prior in temporis rule may apply again.

## Lis pendens involving courts of MSs and courts of third States

Article 33 of the Regulation offers a solution only if:

- ✗ The court first seised is located in a third State and
- ✗ Jurisdiction of the court of the MS is based on Articles 4, 7, 8 or 9.

If the first court seised is a court in a MS the Regulation does not solve the lis pendens situation.



# POINT 9: provisional including protective measures – **Article 35**

Article 35 allows for a limited prorogation of jurisdiction: a court in a MS different from the one which has jurisdiction for the substance of the matter may order provisional/protective measures available under its national law.





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## Assessing the infringement of rules of jurisdiction at the stage of recognition

The limits set forth in  
Brussels I recast

## Recognition and enforcement in a MS of a decision issued in another MS

- X Abolition of **exequatur** – articles 36(1) and 39(1)
- X The court of origin issues the **certificate** mentioned in Article 53- Annex I
- X The judgement is recognised and enforced in another MS

- X The court or **land register** in another MS **cannot refuse recognition or enforcement ex officio.**
- X Refusal requires an application for refusal from the interested party

- X Additionally, in case of an application for refusal, there are **limited grounds for refusal** of recognition or enforcement: **only** those mentioned in Article 45.

# Refusal of recognition or enforcement

## Limited grounds for refusal:

- X Public policy
- X Failure to ensure the rights of defense
- X Opposition of res judicata
- X Infringement of rules of jurisdiction of Sections 3,4 or 5 if the defendant is the weaker party
- X Infringement of Article 24 (exclusive jurisdiction).

## Need of an application for refusal of:

- X **Recognition** – Article 45(4)
- X **Enforcement** – in enforcement proceedings according Articles 46 to 51.

## Other applications regarding recognition:

- X Application for a decision in another MS that there are no grounds for refusal of recognition – Article 36(2)
- X Incidental question of refusal of recognition raised in proceedings pending in a court of another MB – Article 36(3)



# Enforcement of authentic instruments and court settlements

## Definition of authentic instrument:

- X Article 2(c)

## Abolition of exequatur:

- X Article 58(1)

## Only one ground for refusal:

- X Public policy – Article 58(1)

## Certificate of Annex I

- X Issued by the competent authority of origin – Section 2 of Chapter III applies

## Need of an application for refusal of enforcement by the interested party:

- X Subsection 2 of Section 3 (Articles 46 to 51) and Section 4, of Chapter III apply.

## Definition of court settlement:

- X Article 2(b)

Abolition of exequatur and enforcement under the same conditions as authentic instruments:

- X Article 59

## Certificate of Annex II

- X Issued by the competent authority of origin – Article 60

# Some case law of the Court of Justice of the EU

Regarding the interpretation  
of the notion of *rights in  
rem* in Article 24

## *Action Paulienne: Article 24(1) – exclusive jurisdiction – does not apply*

x C-115/88

The *action paulienne* where a creditor seeks to have a disposition of a *right in rem* in immovable property ineffective as against him, because it was made by the debtor in fraud of the creditor's rights **does not come into the scope of rights in rem.**

x C-261/90

The *action paulienne* does not come into the scope of Articles :

- 7(2) (tort or delict)
- 24(5) (enforcement)
- 35 (provisional/protective measures).



x In this case the immovable property was located in France where the court was seised but the defendant had his domicile in Germany which courts he claimed should have jurisdiction.



## *Termination of co-ownership of immovable property*

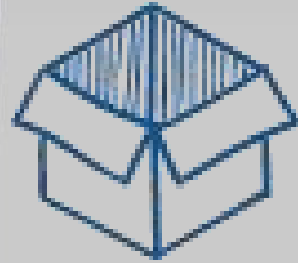
x C-605/14

An action for the termination of co-ownership in undivided shares of immovable property falls within the category of proceedings which have as their object rights in rem in immovable property.

x Article 24 (1) – exclusive jurisdiction – applies.

x In this case the action was brought in Finland where the co-owners had domicile but the immovable property was located in Spain.

x So Spanish courts have exclusive jurisdiction.



## *Right in rem of pre-emption*

x C-438/12

The action seeking a declaration of invalidity of the exercise of a **right of pre-emption attaching to a property** which produces effects with respect to all the parties falls within the category of proceedings which have as their object rights in rem in immovable property – Article 24(1).

x In this case, one co-owner sold her share in the immovable property located in Germany to a third party. The other co-owner claims to have a right of pre-emption and seeks an order before the German court to register the transfer of ownership accordingly. But the third party had brought in first place an action before the Italian court seeking the **invalidity of the exercise of the right of preemption**.

x The German court has exclusive jurisdiction and shall assess that issue *ex officio*.





# Questions

*Under the Portuguese law the action paulienne and the action to exercise a right in rem of pre-emption are subject to an entry in the land register - Articles 2 and 3 of the Portuguese Land Register Code.*

*The same applies to the final judgements in both actions. In the context of this legal framework and of Brussels I recast:*

1 - Could the land register refuse ex officio to register a judgment issued in an *action paulienne* on the ground that it had not been issued by the court of the MS where the defendant was domiciled?

2 - Could the defendant lawfully claim the refusal of recognition of that judgement, for the purpose of contesting its entering in the land registry, on the same ground?





# Questions

3 - Could the land register refuse ex officio to register a judgment regarding a right in rem of pre-emption on the ground that it had not been issued by the court where the immovable property was located?

4- Would you accept to entry in the land register the *action paulienne* on the basis of an authentic instrument produced by the court of another MS together with Annex I, proving that such proceedings had been brought between the parties and were still pending?



# THANK YOU SO MUCH FOR YOUR ATTENTION!

*Paula Pott - 2018*



**Paula Pott**

*Judge at the Court of Appeal of Lisbon*

PORTUGUESE CONTACT POINT OF THE EUROPEAN JUDICIAL NETWORK IN CIVIL AND COMMERCIAL MATTERS

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