STUDY ON RESIDUAL JURISDICTION

(Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)

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GENERAL REPORT

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EXECUTIVE SUMMARY

This Study provides an analysis of the issue of "residual jurisdiction", this concept being understood as referring to cases where the European law currently does not provide uniform grounds of jurisdiction, but borrows the rules of national law.

This is essentially the case, *firstly*, in civil and commercial matters, when the defendant is domiciled outside of the European Union (art. 4 of the "Brussels I" Regulation), *secondly*, in matrimonial proceedings, with respect to married couples of Community citizens of different nationalities living in a third State (art. 7 of the new "Brussels II" Regulation), and, *thirdly*, in matters of parental responsibility, with respect to children of EU citizenship who are habitually resident outside the EU (art. 14 of the new "Brussels II" Regulation).

The purpose of the Study, as commissioned by the European Commission, is, on the one hand, to provide a comparative analysis of the current national rules of jurisdiction that govern these cases in the 27 Member States (I) and, on the other hand, to make recommendations for a possible harmonisation of these rules (II).

I. The comparative analysis reflects the great diversity of the national rules of jurisdiction currently in force in the Member States, not only with respect to the sources and general principles that underpin these rules (1), but also with respect to their contents and to the connecting factors that trigger the jurisdiction (2). This raises the issue as to whether such diversity does not jeopardize the application of mandatory Community legislation or of the objectives of the Community (3). Separate issues are raised by the diversity of the jurisdictional rules in matrimonial proceedings and in matters of parental responsibility (4).

(1) The diversity of the national rules of jurisdiction are expressed in different ways. Firstly, while in all but one Member States the law in this matter is statutorily based, in some State the rules are specific to transnational disputes, and in others they are derived mainly from the territorial rules of jurisdiction as applied to internal disputes, under the "double functionality" system.

Secondly, the residual jurisdiction left to national law is sometimes the subject of a specific body of national rules designed to complete the European regime, while in other States this matter is governed by the general rules of jurisdiction.

Thirdly, the influence of the Brussels I regime varies greatly: the uniform rules are sometimes extended or reproduced integrally into national law, sometimes they influence broadly the definition and interpretation of national law, in other cases there is an influence but it is more diffuse, and in still other Member States there is no influence at all of the Brussels I regime.

Fourthly, in certain Member States the national rules of jurisdiction are influenced, albeit incidentally, by general principles such as those of constitutional law, public international law or human rights, while in other States the thinking is centred exclusively around considerations of procedural law.

Fifthly, while the rules of jurisdiction in certain Member States are very recent and based on modern thinking, in other States they have not been modified for decades and still function on the basis of earlier principles.

Sixthly, in certain Member States, mainly newly admitted countries from the former socialist bloc of central Europe, the residual jurisdiction is dominated by bilateral conventions on legal assistance with third State, while in other Member States the number of treaties with third States is fairly limited and the residual jurisdiction is based essentially on national laws.

(2) The Study identifies and compares the general structure and connecting factors used in the 27 Member States with respect to the international jurisdiction of their courts.

As far as the general structure is concerned, some Member States have built a sophisticated and hierarchical jurisdictional system using the same kind of structure as in the Brussels I Regulation, while others rely on a fairly simple structure of territorial connecting factors. Still other States use some form of original systems shaped by their history or the peculiarities of their legal systems, such as the privileged jurisdiction (in France and Luxembourg) or the jurisdiction based on the service of process (in England and Ireland).

The analysis of the national rules of jurisdiction in the matters which correspond to the uniform rules of jurisdiction of the Brussels I Regulation leads to contrasting findings. In certain matters, such as contract, tort, and branch operations, the majority of the Member States have enacted specific rules, in line with the Brussels regime. There are however some exceptions to this finding: for instance, four and three Member States respectively do not have specific rules of jurisdiction in contract matters and in tort matters. When rules do exist in these matters, they are sometimes surprisingly similar to those of the Brussels regime, while in other cases they are not only drafted differently but also rely on totally different connecting factors.

In the matter of ancillary jurisdiction, while virtually all the Member States provide for some form of jurisdiction allowing the consolidation of cases in cross-border disputes, there are great variations as to the scope and conditions for such consolidation, ranging from countries where it is restricted to some very narrow cases (such as Germany) to countries where there is a very broad ground for the consolidation of any related claims (such as Belgium).

In the area of protecting rules of jurisdiction, the differences are still more striking. In some countries, there is no protective rule at all, in any matter, so the jurisdiction for matters such as, e.g., consumer, employment or insurance contracts is subject to the ordinary rules of jurisdiction governing other contracts. In other Member States, protective rules do exist in some areas, but their scope and the conditions of their application vary greatly. In still other countries, protective rules are applied not only with respect to (some of) the three categories of contract that have been mentioned, but also with respect to other matters, such as distribution contracts.

The rules listed in Annex I of the Brussels I Regulation do not apply in the relations between the Member States, but do apply as regards defendants domiciled in third

States. Subject to certain exception, the rules listed in this Annex may be considered as "exorbitant", for they are based on a weak connecting factors in view of the subject matter of the dispute. It appears that the rules rely on five main connecting factors, namely the nationality of the parties, the presence of the defendant within the territory of the forum, the location of assets, the doing business, and the domicile of the plaintiff. While the benefit of these rules is extended to all persons domiciled in the Member States (art. 4(2)), such principle of extension, which is relevant only with respect to the nationality criterion, has seemingly very rarely been applied in practice.

The national jurisdictional rules sometimes serve the purpose not only to give the court the power to entertain a claim but also, when a judgment has been given in a non-EU State, to refuse the enforcement of such judgment for infringement of the local jurisdiction. However, such grounds of "exclusive" jurisdiction are fairly limited in number, and tend in general to coincide with the cases of exclusive jurisdiction under the Brussels I regime.

(3) The Study considers whether the absence of common rules determining jurisdiction for actions against defendants domiciled in third States can jeopardize the application of mandatory Community legislation or the objectives of the Community.

The general answer is that in most Member States, the basic principle is that of the distinction between jurisdiction and applicable law. Thus, as much as the Member States' courts will not decline jurisdiction only because a foreign law applies, they will not in principle exercise jurisdiction only because the subject matter of the dispute is governed by the law of the forum, even it includes a rule of Community law with a mandatory nature or even of public policy. As a consequence, in general, when the Member States' courts lack jurisdiction (under national law) to hear proceedings against a defendant domiciled in a third State, they are required to effectively decline jurisdiction even if the consequence is that the plaintiff will be deprived of the application of mandatory Community legislation.

The comparative analysis shows however that this finding must be qualified to a certain extent. As of today, in court practice, there is little example of cases where a party has been deprived of the right to invoke mandatory Community legislation because of the application of jurisdictional rules in actions against defendants domiciled in third States. The problem may therefore be more theoretical than practical, though the risk clearly exists and cases may arise in the future where such problem will appear.

(4) The comparative analysis of the residual jurisdiction in the matters of the new Brussels II Regulation shows that there is a clear distinction between two categories of Member States. In about half the Member States, the nationality of one spouse or of the child is in principle enough to bring proceedings in the EU, even if the spouses (for matrimonial proceedings) and/or the child (for matters of parental responsibility) are living in a third State. In the other half of the Member States, there is no such ground of jurisdiction, with the consequence that subject to certain exceptions, there is *in practice* no residual jurisdiction under national law in these Member States.

II. The recommendations for the proposed harmonisation of the residual jurisdiction requires again to distinguish between the Brussels I (1) and the Brussels II regime (2).

(1) With respect to the Brussels I regime, the widening of the personal scope of application of the uniform rules of jurisdiction could be achieved through a rather simple change of article 4 of the Regulation (a), but any such change would require additional modifications to be introduced in the Regulation (b).

(a) There would appear to be five basic options for the proposed modification of article 4 of the Brussels I Regulation:

- Option 1: replacement of the condition that the defendant be domiciled in the EU by the condition that the dispute be "intra-Community";
- Option 2: application of the Regulation as soon as either the defendant or plaintiff is domiciled in the EU;
- Option 3: definition of Community disputes by reference to the geographical scope of EU Community law;
- Option 4: definition of new specific connecting factors for claims against non-EU defendants;
- Option 5: extension of the existing jurisdictional rules to claims against defendants domiciled in third States.

Amongst these options, the last one would seem to be preferable, at least as a basic approach, and subject to the qualification below. The main advantage of such option is that it could be implemented easily, and that there would be no need for judges and lawyers to adapt to new rules, since the very same connecting factors that are currently used for actions against defendants domiciled in the EU would also be used to non-EU domiciliaries (this is a reason to reject Option 4). It would certainly not be appropriate to require an intra-community dispute for the uniform rules to apply (Option 1), for the reason, e.g., that this would entail a narrowing of the current scope of application of the uniform rules which today govern cases even when there is a connection with only one Member State. Also, it would probably be unwise to introduce a new set of criteria of applicability derived from the scope of the law of the internal market (Option 4), for this method would prove quite complex and would lead to uncertainties.

There does not seem to be any reason of principle to exclude Option 2: on the contrary, to subject the application of the Brussels regime to one party being domiciled in the EU would seem to be in agreement with the basic objective of the Brussels regime to strengthen the protection of persons established in the Community. However, the connecting factors used to establish jurisdiction under the Regulation create themselves a strong link with the Community, which would justify that jurisdiction be based on Community law irrespective of the domicile of the parties. In addition, the role of any such restriction would, in practice, be extremely limited in practice, for apart from the cases of exclusive jurisdiction (art. 22) which already apply irrespective of the domicile of the parties in the EU, the other disputes where none of the parties are domiciled in the EU will seldom present a relevant connecting factor to trigger the application of national jurisdictional rules.

(b) If it were to be decided to remove the condition of article 4 of the Regulation that the defendant be domiciled in the EU for the uniform rules of jurisdiction to apply, such change should be accompanied by the introduction of at least two other modifications in the Regulation: the creation of additional grounds of jurisdiction to balance the unavailability in the Community of the forum of the defendant's domicile

(i), and the introduction of rules about declining jurisdiction in favour of the courts of third States (ii).

(i) As they currently apply in actions against third parties, the national rules of jurisdiction are in general broader than the uniform rules of European law, in particular because they include exorbitant fora and sometimes the forum of necessity (*forum necessitatis*). These rules currently serve the role of facilitating the access to EU courts for actions against defendants domiciled in third State. Their abolition should therefore not be considered without a replacement, since by definition in this situation the general forum of the defendant's domicile is not available in the EU. This is all the more important since the strict interpretation of the specific rules of jurisdiction (art. 5 and 6 of the Regulation) was devised by the Court of justice in view of the existence of an alternative jurisdiction in another Member State.

This problem could only be addressed by the introduction of additional grounds of jurisdiction for actions against defendants domiciled in third States. It would probably be unwise that these new grounds of jurisdiction be the exact transposition of the existing exorbitant fora under national law. The main reason for this is that the exorbitant fora are intimately related to the political and legal history of each legal system, with the consequence that it would be unfitting to generalise their application throughout the Community. Also, sanctifying exorbitant fora into Community law would likely be regarded as offensive by persons established outside the Community.

Other criteria, based on more generally accepted principles, could on the other hand be considered as additional grounds of jurisdiction for actions against defendants domiciled in third State. Three grounds in particular could be considered:

- firstly, the jurisdiction based on the carrying out of activities in the forum by the defendant domiciled in a third State, provided that the dispute relates to such activities (this ground does not coincide with the exorbitant "doing business" forum because the latter provides jurisdiction even for claims which are not related to the activities) ;
- secondly, the location of assets belonging to the non-EU defendant within the territory of an EU State, provided that the claim relates to such assets (again, this ground does not coincide with the exorbitant "property jurisdiction" because the latter applies even for claim which are not related to the assets);
- thirdly, the *forum necessitatis*, which would allow proceedings to be brought against a defendant domiciled in a third State when there is no jurisdiction in the EU under the other uniform rules nor any forum available outside the EU.

(ii) The absence of any rule dealing with declining jurisdiction in favour of the courts of third State is already a lacuna under the existing Regulation, but the necessity to address this issue would still be much more compelling if the uniform rules of jurisdiction were to be harmonized for claims against defendants domiciled in non-EU States. Indeed, with such a change, the cases where the courts of non-EU States would have a concurrent jurisdiction to the one provided under the Regulation would be dramatically increased.

This issue could *not* be addressed simply by extending the intra-community rules on declining jurisdiction to extra-community relations, for the intra-community rules are based on the principle of mutual trust between the courts of the Member States and on

the assumption that the alternative court has jurisdiction under the Regulation to hear the case. The issue could on the other hand be addressed under either of these two options:

- Option 1: devising new specific rules determining in which cases jurisdiction based on the uniform rules of the Regulation should or could be declined in favour of the courts of non-EU States;
- Option 2: introducing in the Regulation a rule stating that declining jurisdiction in favour of the courts of non-EU States is a matter for national law, subject to certain conditions of Community law.

(2) With respect to the new Brussels II regime, a distinction must be drawn between matrimonial proceedings (a) and matters of parental responsibility (b).

(a) In matrimonial proceedings, the problem that needs to be addressed is much narrower than under the Brussels I regime: it concerns the specific issue of the access to court by Community citizens of different nationalities who live abroad. As indicated, there is residual jurisdiction in this case in only about half the Member States.

It would seem that it would not be suitable to set up a new uniform rule of jurisdiction that would always give such citizens the right to bring proceedings in the courts of the Member State of their citizenship. The Brussels II Regulation is based on the assumption that the citizenship of only one spouse is not as such a strong enough connecting factor to establish a Community wide rule of jurisdiction in intra-community relations. There does not seem to be any reason why the approach should be different in extra-community relations, i.e. in situations which by definition have a weaker relationship with the Community. It is likely that in most cases spouses established and living in third States will be able to access the court of these States to seek a divorce (on the presumption that the last habitual residence of the spouses is considered as a valid ground of jurisdiction in most legal systems).

But one cannot exclude the possibility that in some States or under very specific circumstances no such jurisdiction exists. The text of the Regulation could therefore be modified to ensure an access to court in the EU in such particular situations. The new provision could be drafted in the form of a *forum necessitatis* rule, in the sense that a Community jurisdiction would exist in the Member State of citizenship of one spouse only when no other court has jurisdiction in the European Union or outside the European Union.

(b) In matters relating to parental responsibility, the problem that needs to be addressed is also quite narrow, and concerns the situation of an EU child living in a third State. As indicated, there is residual jurisdiction in that case in only about half the Member States.

While the legal situation therefore appears to be similar to the matter of matrimonial proceedings, there is in fact a difference, which relates to the foundation of the jurisdiction in each of these matters: while in matrimonial proceedings the basic consideration is to provide an effective access to court to spouses seeking to divorce, in matters of parental responsibility the essential concern is to ensure the proper

protection of the child, which is supposed to be best assessed by the Court of the habitual residence of the child.

Such a principle should also be considered as valid in principle when the child is habitually residence in a third State (even when there is no international convention that provides for such a rule). Thus, it would probably not be appropriate to create a Community rule of residual jurisdiction that would, with respect to children having their habitual residence in a non-EU State, give an absolute right to access to the courts of the Member State of the citizenship of the child (even when the parents are in disagreement). But it could be potentially considered to establish a *forum necessitatis* rule to ensure that the courts of the Member State of the citizenship of the child have jurisdiction when no other court in the EU or outside the EU have jurisdiction to decide the case. So the proposed new rule would in the final analysis not diverge much from the one proposed in matrimonial proceedings, with the added difference however that the *forum necessitis* rule in this matter should probably include the principle of the best interest of the child.

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INTRODUCTION

1. This is the General Report of the study commissioned by the European Commission on the Member States' rules concerning the "residual jurisdiction" in civil and commercial matters.

"Residual jurisdiction" is understood as referring to the jurisdiction that is left to be determined by national law pursuant to article 4 of Council Regulation (EC) No 44/2001 on jurisdiction and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation") and articles 7 and 14 of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility which replaced Regulation (EC) No 1347/2000 ("the New Brussels II Regulation").

2. Article 4 of the Brussels I Regulation reads as follows:

> *"1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.*
> *2. As against such a defendant, any person domiciled in a Member State may whatever his nationality avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State".*

It follows from this provision that for claims brought in the EU against defendants domiciled in third States ("non-EU defendants"), the jurisdiction is subject to the national law of the Member States (unless a court of a Member State has exclusive jurisdiction pursuant to either article 22 or 23 of the Regulation). In other words, the uniform rules of jurisdiction of the Brussels I Regulation only apply when the defendant is domiciled in the European Union (and in the two above mentioned cases[1]). If this is not the case, the Regulation borrows the rules of national law.

3. Articles 7(1) and 14 of the New Brussels II Regulation read as follows:

> *Article 7(1)*
> *"Where no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State"*

[1] As a matter of fact, there are still other provisions of the Regulation which seem to apply even when the defendant is domiciled in a third State, including articles 24 (defendant entering an appearance before the court without challenging the jurisdiction of the court) and article 31 (provisional and protective measures).

Article 14

"Where no court of a Member State has jurisdiction pursuant to articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State"

It follows from these provisions that in matrimonial and parental responsibility matters, the jurisdiction of the Member States' courts is subject to national law when none of the rules of the Regulation provide jurisdiction to the courts of a Member State. In practice, the rules of jurisdiction of the new Brussels II Regulation are defined quite broadly, without any general requirement that the defendant be domiciled within the EU, with the consequence that the residual jurisdiction in these matters concerns essentially in practice persons domiciled or habitually resident outside of the EU. The classical examples are respectively (i) for matrimonial proceedings, the case of a married couple of Community citizens of different nationalities living in a third state, and (ii) for parental responsibility proceedings, the case of a child with an EU citizenship habitually resident outside of the EU.

4. The study focuses primarily on the residual jurisdiction pursuant to article 4 of the Brussels I Regulation[2]. The residual jurisdiction under articles 7 and 14 of the New Brussels II Regulation shall be dealt with in this report to a lesser degree of details, for the reasons that the residual jurisdiction under article 7 of New Brussels II has already been covered in another study commissioned by the European Commission[3], to which reference shall be made when appropriate in this report, and the Commission has already taken the policy decision to further harmonize the Community rules on jurisdiction for divorce proceedings so as *"to ensure access to court for EU citizens living in third States"*[4].

5. The purposes of this study, as set out in the project technical specifications[5], are as follows:

- to provide a comparative analysis of Member States' legislation with respect to the national rules on jurisdiction that remain applicable under Articles 4 and 7 of Regulation 44/2001 and Regulation 2201/2003 respectively,
- to ascertain the different connecting factors prevalent in these rules;
- to identify the problems related to the lack of harmonisation of these rules;
- to make recommendations for a possible harmonisation of these rules

[2] As per the instructions given during the preliminary meeting held on 8 February 2006 at the Civil Justice Unit of DG JAI, confirmed by an e-mail of 1 March 2006.
[3] "Study to inform a subsequent impact assessment on the Commission proposal on jurisdiction and applicable law in divorce matters", prepared by EPEC (April 2006).
[4] "New Community rules on applicable law and jurisdiction in divorce matters to increase legal certainty and flexibility and ensure access to court in 'international' divorce proceedings", MEMO/06/287 of 17 July 2006, available on the Commission's website for the area of freedom, security and justice.
[5] Annex I to the Contract, Section II.

6. Following the accession of Bulgaria and Romania to the European Union, it has been decided to include also these two counties in the review. A report has also been prepared for Denmark, although this country is not bound by the Brussels I and New Brussels II Regulation (but it is a contracting party to the 1968 Brussels Convention, which also provides for residual jurisdiction under its article 4). With respect to the United Kingdom, there are two separate reports, respectively for England and Wales, and for Scotland, which have separate jurisdictional regimes.

As a consequence, the study is based on *28 national reports* that are submitted together with this comparative report. Each report describes, following a questionnaire (attached) that was communicated to the reporters, the national rules of jurisdiction as they are applied in practice under article 4(1) of the Brussels I Regulation (and, accessorily, article 14 of the New Brussels II Regulation).

7. The objectives of the General Report, as set out in the project technical specifications[6], are as follows:

> *"The synthesis report must summarise the findings of the comparative analysis. It must identify the connecting factors that determine the competence of national courts if the defendant is domiciled in a third country (Regulation Brussels I) or if no court of a Member State is competent under the rules of New Regulation Brussels II, and list their respective provenance (statute, case law, international treaty). The report should be accompanied with comparative tables indicating the main outcomes of the analysis conducted in the Member States. The synthesis report shall be accompanied by proposals for future Community action. In this respect, the report should particularly focus on the question which connecting factors should be retained if the rules on jurisdiction for defendants domiciled outside the EU were to be harmonized"*.

To that purpose, this General Report shall be divided into two parts.

The first part consists in the comparative analysis of the national reports. The analysis will identify the sources, structure and main characteristics of the rules of residual jurisdiction in all the Member States of the European Union. It will systematize the connecting factors that are used for each kind of disputes, and will compare, where appropriate, the current domestic rules applied in the Member States' practice with the rules of the Brussels I Regulation.

The second part consists in recommendations and proposals for future Community action in this matter. After reviewing the reason for the original decision not to fully

[6] Annex I to the Contract, Section V(2).

harmonize the rules of jurisdiction when the defendant is domiciled in a third State, the Report shall assess the various options that could be pursued for the proposed harmonization and the practical implications of such harmonization.

PART I
COMPARATIVE ANALYSIS OF THE NATIONAL REPORTS

8. According to the project technical specifications[7], the study *"shall consist of a description and analysis of the rules of the 25 Member Stats that determine their residual competences under Regulation 44/2001 and Regulation 2201/2003. The study has to (i) give an exact and exhaustive account of the national rules on jurisdiction that continue to apply under article 4(1) of Regulation I and Articles 7 and 14 of the New Regulation Brussels II respectively, and specify whether these rules are established in national statute law or case law or implement bilateral or multilateral treaties; and (ii) analyse how these rules are applied in practice and which role they play in the respective national legal system, e.g. if the recognition of foreign judgments is regularly refused on grounds of the non-competence of the foreign court in these cases"*.

In keeping with these instructions, the following comparative analysis reviews the source, structure and main characteristics of the rules of residual jurisdiction in all the Member States of the European Union. It identifies the connecting factors that are used for each kind of disputes, and compares, where appropriate, the current domestic rules applied in the Member States' practice with the rules of the Brussels I Regulation.

9. The comparative analysis follows the structure of the questionnaire. For each question, the data gathered in the 28 national reporters is systematized and compared so as to give the general picture of how the national rules of jurisdiction apply in practice today within the European Union.

As a word of caution, it should be noted that while in a number of Member States, the law of international jurisdiction includes a full body of well defined rules (statutorily based or case law based), in other countries the law in this matter, as reported in the national reports, has not (yet) fully developed and/or the matter is subject to very little case law. As a consequence, the data collected for these countries, and the following analysis, can only be tentative, and should be used with care.

[7] Annex I to the Contract, Section III.

(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

(1) Main legal Sources

What is (are) the main legal source(s) of the rules of jurisdiction in the Member States for civil and commercial matters (statute, rules of court, bilateral or multilateral treaties, case law, …), apart from the Brussels I Regulation and Brussels/Lugano Conventions?

10. In all the Members States but one (Ireland), the jurisdictional rules for cross-border cases is statutorily based. In the majority of them, the rules are found in code-type legislation, often the Code of civil procedure (this is the case in 14 jurisdictions), or a Code of private international law (Belgium and Bulgaria). In the rest of the Member States, the rules are found in specific statutes or rules dealing with the organisation of justice (7 jurisdictions) or with private international law (5 jurisdictions).

In Ireland, the jurisdictional rules for actions against defendants domiciled in non-EU states are derived mainly from Order 11 of the Rules of the Superior Courts 2005 and from common law. This approach is also used in England, but the rules have been largely codified in the Civil Procedural Rules (CPR), which govern all civil and commercial actions within England and Wales (but not Scotland).

The major source of the rules of jurisdiction in each of the Member States is identified in Table (A), under question (2) below.

(2) Specific Rules (or Not) for Transnational Disputes

Are the jurisdictional rules specific to transnational disputes or are they derived from those applied in internal disputes?

11. In short, the jurisdictional rules are specific to transnational disputes in the majority of the Member States, while they are derived from those applied in internal disputes in the other Member States, sometimes in combination with a limited number of specific rules of international jurisdiction.

Thus, three main systems are currently used in national law. The first one consists in enacting specific rules dealing with international jurisdiction, which are separate from the rules of internal jurisdiction ("venue rules"). There are therefore two sets of different rules. The rules of international jurisdiction determine when cross-border claims can be brought before the courts of the Member State in general, while the venue rules deal with the internal of allocation of cases between the various courts of that Member State. That does not mean that the connecting factors establishing the

jurisdiction are necessarily different (for instance, the domicile of the defendant is often a rule of jurisdiction both internally and internationally), but only that the two kinds of rules are formally separated and may be found in different legal provisions.

This first system is used in 16 jurisdictions[8]. If there are specific rules of international jurisdiction in all of them, that does not necessarily mean that they are always very detailed. Indeed, while certain countries have enacted a complete and sophisticated set of rules in that matter, others use only a few central rules.

12. The second system consists in using the venue rules to determine the international jurisdiction. Under such system of "double functionality"[9], the application of the jurisdictional rules for the internal allocation of cases is "extended" to international disputes: when the court seized of the claim has territorial jurisdiction under the relevant venue rule, it has also international jurisdiction to hear cross-border disputes.

This system is used in 9 jurisdictions[10]. Amongst them, the law of certain countries (such as the Czech Republic[11]) includes a specific statutory rule that provides that international jurisdiction exists whenever internal jurisdiction is established. But in most countries, there is no statutory basis to that end, and the solution is based on case law. As a matter of fact, in view of the absence of specific rules of international jurisdiction, such reference to the venue rules was the only practical solution that could be followed to address this matter.

13. The third system is based on a combination between the first two. Under this mixed approach, there are specific rules of international jurisdiction, but their scope is too limited to cover all the cases, so the jurisdiction can also be established on venue rules which are extended to international disputes.

This system is used in 5 jurisdictions[12]. Thus, in France and Luxembourg, there is a specific rule of international jurisdiction (the so-called privileged jurisdiction based on the citizenship of plaintiff or defendant), but the jurisdiction can also be based on the connecting factors of the venue rules, which are extended for that purpose to international disputes. In Portugal, the international jurisdiction is organized through an original system based on four basic principles, including the principle of "causality" (the location on the Portuguese territory of any elements of the cause of action), which is very specific to international jurisdiction, and the principle of "coincidence", which implies that when Portuguese courts are competent under the venue jurisdictional rules they are also legally deemed to have international jurisdiction. In the Czech Republic and Lithuania, the jurisdiction can be based either

[8] See below, Table A.
[9] See the Report for Germany.
[10] See below, Table A.
[11] See also the Report for Austria, Questions 2 and 10.
[12] See below, Table A.

on general rules that take into account the international context, *or* on specific rules that determine the venue[13].

14. *Table A: Main source of national rules of jurisdiction and nature of these rules*

Country	Main Sources (translated in English)	Specific rules for Cross-Border Cases	Venue Rules (extension to cross-border cases)	Mixed
Austria	Court Jurisdiction Act (JN)		X	
Belgium	Code of Private International Law	X		
Bulgaria	Code of Private International Law	X		
Cyprus	Courts of Justice Law, No. 14(I)11960; Order 6 of Civil Procedure Code	X		
Czech Rep.	International Private and Procedural Law (Act No. 97/1963 Coll.); Civil Procedure Code (Act No. 99/1963)			X
Denmark	Administration of Justice Act (Part 22)		X	
Estonia	Code of civil procedure	X		
Finland	Code of judicial procedure	X		
France	New Code of Civil Procedure; Articles 14 and 15 Civil Code			X
Germany	Code of Civil Procedure		X	
Greece	Code of Civil Procedure		X	
Hungary	International Private Law – Decree Law No. 13 of 1979	X		
Ireland	Order 11 of the Rules of the Superior Courts 2005	X		
Italy	Private International Law Act (Law No. 218 of 31 May 1995)	X		
Latvia	Civil Procedure Law		X	
Lithuania	Code of Civil Procedure			X
Luxembourg	New Code of Civil Procedure			X
Malta	Article 742 of the Code of Organization and Civil Procedure	X		
Netherlands	Code of Civil Procedure	X		
Poland	Article 1103 of the Civil Procedure Code	X		
Portugal	Civil Procedure Code			X
Romania	Civil Procedure Code		X	
Slovakia	International Private Law Act	X		
Slovenia	Private International Law and Procedure Act	X		
Spain	Organic Law on the Judiciary, 6/1985	X		
Sweden	Code of judicial procedure		X	
UK – England	Civil Procedure Rules (CPR), Part 6.20	X		
UK – Scotland	Schedule 8 of Civil Jurisdiction and Judgments Act 1992	X		

[13] For the Czech Republic, see respectively articles 85-86 and articles 87 and subsequent of the Civil Procedure Code.

(3) SPECIFIC RULES (OR NOT) FOR ARTICLE 4(1) JURISDICTION

Is there a specific set of national rules designed to govern the jurisdiction of courts pursuant to article 4(1) of the Brussels I regulation, or do the traditional rules of jurisdiction for cross-border cases apply?

15. Only one country (Italy) has adopted a specific piece of legislation dealing with the international jurisdiction pursuant to article 4(1) of the Brussels I Regulation. The Italian Act of 31 May 1995 on Private International Law provides that for matters that fall under Sections 2 to 4 of the 1968 Brussels Convention (i.e. the sections on special jurisdiction, insurance matters and consumer matters), the rules of that Convention will also apply when the defendant is not domiciled in a contracting state. The rules are therefore the same irrespective of the location of the domicile of the defendant. The European jurisdictional regime has been statutorily extended so that it applies without any territorial limitation.

In certain other jurisdictions (in particular Estonia and Scotland, but also Belgium), lawmakers have enacted rules that are essentially a copy of the provisions of the Brussels I Regulation for the cases which fall outside of its scope, but without regulating specifically article 4 cases. In practice however, the result is very similar, namely the extension of Brussels I type of jurisdictional rules to actions against non-EU defendants, except that there are sometimes certain particular modifications or derogations from the European model (see further below, Question 4).

(4) INFLUENCE OF EU LAW

Are the application or interpretation of national jurisdictional rules influenced by the Brussels I Regulation and/or the case law of the European Court of Justice? If so, what is the extent of such influence and in which areas does it manifest itself principally?

16. In a large majority of the Member States, the Brussels I regime exercises an influence on the application and interpretation of national jurisdictional rules. It is worth noting that such influence is exercised not only in countries which have specific rules of international jurisdiction, but also sometimes in countries which rely on venue rules[14].

The extent of the influence of the EU regime on national rules varies greatly. The gradation of such impact can be categorized as follows.

17. In some jurisdictions, the jurisdictional rules that apply in article 4 cases are identical to the uniform rules of the Brussels I Regulation. This is the case in Italy,

[14] See, e.g., the Reports for France and Denmark.

where the uniform rules themselves have been statutorily extended to non-EU defendants, and in Scotland, where most of the national rules have been copied from the Brussels I Regulation (with a few limited changes). In both jurisdictions, the law and practice is essentially determined by the case law of the Court of justice.

18. In a second group of countries (the largest for that purpose), the European regime, while not being borrowed as such, is the major source of inspiration of national law and practice (Austria, Belgium, Bulgaria, Estonia, Netherlands, Slovakia, Spain, Sweden). Such influence usually appears firstly at the level the *drafting of the rules* themselves, which are often modelled (without necessarily being a full copy) on the uniform rules. It is interesting to note that some national legislators have introduced in national law the case law itself of the Court of justice (this is the case for instance in Belgium with respect to the jurisdiction for delict and quasi-delict[15]).

The influence of European law often appears also in these countries at the level of the *construction of the national rules*: these rules, even when non identical to the European rules, are interpreted in view of the experience drawn from the application of the Brussels regime. This is the case in particular in Sweden, where the Supreme court has stated that the Brussels/Lugano Conventions express generally accepted international jurisdiction principles that should influence the interpretation of national law[16]. Likewise, in Spain, the courts systematically refer to the case law of the Court of justice either to reinforce one specific interpretation of the national rules or, in certain circumstances, to complete legal vacuum[17].

19. In a third category of countries, the influence of the European regime exists but it is in general quite diffuse, except in a limited number of explicit cases (Denmark France, Hungary, Latvia, Luxembourg, Malta, Poland, Portugal). For instance, in France, some connecting factors used by the New Code of Civil Procedure are similar to those provided under the Brussels I Regulation, and there is a general influence from the European regime, such influence is explicit only in certain specific cases, such as with respect to the binding character of choice-of-court agreements (where ECJ solutions have been borrowed).

20. In the fourth and last category of countries, there is currently no influence at all from the European regime on the national rules. In Germany, the distinctiveness of the national regime, and its impermeability from any European influence, is recognized, asserted, and seemingly unlikely to change. In Finland, there is currently no influence, but the situation may change, for it has been questioned in legal writing whether it is still appropriate to apply to non-EU defendants rules which have been tagged as “exorbitant” in the European regime. All other jurisdictions that belong to this category are newly admitted Member States (Cyprus, Czech Republic, Romania,

[15] See below, Question 12(b).
[16] NJA 1994 p. 81 (see the Report for Sweden, Question 4).
[17] See the Report for Spain, Question 4.

Slovenia), where courts are currently grappling with the process of getting familiarized with the application of the European regime when the defendant is domiciled in the EU (and the uniform rules fully apply). In these countries, it is often noted that the possible EU influence in article 4 cases has simply not yet been tested in court practice.

21. *Table B: Influence of Brussels I regime on national rules of jurisdiction for actions against non-EU defendants*

Influence			**No influence**
EU regime is directly borrowed	**EU regime is the major source of inspiration**	**EU regime is only a diffuse source of influence, except in special cases**	**EU regime does not currently have any influence at all**
Italy Scotland	Austria Belgium Bulgaria Estonia Netherlands Slovakia Spain Sweden	Denmark France Hungary Latvia Luxembourg Malta Poland Portugal	Cyprus Czech Rep. Finland Germany Romania Slovenia

(5) IMPACT OF OTHER SOURCES OF LAW

What is the impact of other sources of law on the application of national jurisdictional rules (such as principles of constitutional law, human rights public international law, etc.)?

22. It is widely recognized in the Member States that rules of international jurisdiction, as any other procedural rule, must be construed and applied in a manner consistent with "superior" legal principles, in particular those of constitutional law, human rights and public international law. However, it is also noted that as of today, there is very little development in the case law in this matter, and that as a consequence the impact of these superior principles remains, in general, rather theoretical. In the rare cases where domestic jurisdictional rules have been challenged on the basis of this kind of principles, the argument has been rejected[18].

On the other hand, fundamental principles of constitutional law and public international law have sometimes affected specific areas or helped shape certain particular rules. The most explicit example is the *forum necessitatis* (on which see below, Question 16). In many countries where this ground is used, it is recognized

[18] For instance, in Italy, the Court of cassation has ruled that the application of article 4 of the Private International Law Act, which validates choice of court agreements, does not jeopardize constitutional principles of equality and right of access to court.

that its development finds its basis either on the right of access to court under article 6 of the European Convention of Human Rights (this is the case in Belgium, France, Netherlands, and Spain) or on the principle of public international law prohibiting the denial of justice (Portugal).

Also, in certain Member States (including Italy and Greece), the principle of non-discrimination is regarded as one of the founding grounds for the application of jurisdictional rules in the same manner to both citizens and non-citizens. In Greece, it is even considered that such principle requires the use of objective territorial connecting factors (as opposed to citizenship) to determine the international jurisdiction of the courts.

Another example of such influence is the recognition in certain Member States of the principle that, pursuant to general principle of public international law, there must be a sufficient connection with the forum ("a genuine link" in Germany, a "sufficient personal or territorial link" in Portugal, a "reasonable connection" in Spain). However, while the principle is firmly established in legal writing, it is rarely relied upon in practice. This is probably due to the fact that, as the German reporter expressly notes, the requirement does not seem very strict and normally, when jurisdiction is established under national law, that means that a sufficient connection with the forum also exists.

(6) OTHER SPECIFIC FEATURES

Are there any other specific feature(s) in your country with respect to the jurisdiction of your courts in cross-border disputes?

23. The national reports show that no domestic jurisdictional regime in the European Union is totally identical to another. As with other procedural rules, the rules dealing with international jurisdiction have been shaped by legal history and judicial experience in each Member State.

The most important features of the Member States' national rules of international jurisdiction shall be analysed and discussed in the questions below.

(7) REFORM

Is there any proposed changes currently contemplated in your country for the rules of jurisdiction applicable in cross-border cases?

24. Legislative proposals to reform this matter are currently being considered in only two Member States (Finland and Poland). In one of them (Poland), where the legislative process seems to be well under way, the proposed reform is quite far reaching since it implies a complete overhaul of the existing rules dating back from

1964. The new rules would put the Polish jurisdictional rules more in line with the European regime, without being a copy of such regime. In Finland, while there has been for some time discussions for a complete revision of the cross-border jurisdictional rules, the legislative work would seem to be only at the early stages.

The Czech Republic legislature has also started very recently to work on a proposed modification of its International Private and Procedural Law, but it is yet unclear whether there will be any change with respect to the matter of international jurisdiction, which is currently dealt with through the principle of extension of venue rules to the international context (see above, Question 2).

It should finally be noted that in some other Member States (including Belgium, Bulgaria, Estonia and Scotland), a complete reform has been adopted in that matter quite recently, which generally tend to put their domestic jurisdictional regimes in line with the Brussels I Regulation.

(B) BILATERAL AND MULTILATERAL CONVENTIONS

(8) CONVENTIONS WITH THIRD STATES

"What are the bilateral and multilateral conventions between your country and third countries that include jurisdictional rules in matters regulated by the Brussels I regulation?"

25. The Member States have entered into a great number of conventions with third states, either on a multilateral or bilateral basis, that include jurisdictional rules in matters covered by the Brussels I Regulation. But amongst these conventions, there is currently only one Treaty that regulates *specifically* this matter: the Lugano Convention.

All the other existing multilateral and bilateral conventions entered between the 27 Member States and third states regulate the issue of jurisdiction *incidentally*, in the sense that the primary purpose of these conventions is not the matter of jurisdiction (in this respect, the existing conventions with third states are not different from those concluded as between the Member States).

26. The various existing conventions can be organized in three categories, depending on their main object.

Firstly, there are *conventions on specific matters* which include, incidentally, jurisdictional rules. This is the case, in particular, in the area of carriage and transport. Most of the 27 Member States are contracting parties to the major multilateral conventions regulating the international transport by air, see, road or railway, which

include jurisdictional rules. Such conventions would qualify as "conventions on specific matters" within the meaning of article 71 of the Brussels I Regulation.

Secondly, some Member States are bound by multilateral and bilateral conventions with third states about the *reciprocal recognition and enforcement of judgments*. Amongst these conventions, many do not include jurisdictional rules, or regulate only the *indirect* jurisdiction, that is to say they do not define in which cases the courts can exercise jurisdiction to hear a claim, but they determine where the recognition and enforcement of judgments can or must be denied for lack of jurisdiction of the foreign court. Some of these conventions however include direct jurisdictional rules. This is the case, inter alia, for *Germany* (with Israel and Norway), and *Italy* (with Switzerland and Kuwait).

Thirdly, there is a great number of bilateral conventions with third states about *judicial cooperation or legal assistance* that also include jurisdictional rules. This is the case in particular in the 12 new Member States, which are often bound by numerous bilateral conventions on legal assistance that include one or several jurisdictional rules. Such conventions have been entered by the *Czech Republic* (with the former USSR, Ukraine, Uzbekistan, Mongolia, Yugoslavia, Cuba, but also Switzerland[19]), *Cyprus* (with China, the Russian Federation, Yugoslavia, Egypt, Syria, Ukraine), *Estonia* (with the Russian federation[20] and Ukraine), *Latvia* (with Kyrgyzstan, the Russian Federation, Moldova, Ukraine, Uzbekistan, Belarus), *Hungary* (Albania, Yugoslavia, Korean Republic, Cuba, Mongolia, Soviet Union, Vietnam), *Lituania* (with Belarus, Ukraine, Russia, Moldova, Uzbekistan, Kazakhstan, China, Azerbaijan, Turkey, Armenia), *Poland* (with Mongolia, Russia, Belarus, Ukraine, Egypt, Turkey, Iraq, China, North Korea, Libya, Tunisia, Syria, Cuba, Morocco, Algeria, Mongolia), *Romania* (with Algeria, Macedonia, Cuba), Slovakia (with Afghanistan, Albania, Algeria, Yemen, Yugoslavia, North Korea, Cuba, Mongolia, Syria, Switzerland, Tunisia, Vietnam, UK and other Commonwealth countries, former USSR countries), *Slovenia* (Bulgaria, Mongolia, former USSR countries).

Bilateral conventions of this kind *that include (direct) jurisdictional rules* are less numerous in the other "older" Member States, though there are quite a few. Reference can be made, *inter alia*, to *Italy* (with Argentina, Lebanon, Tunisia, and San Marino), *Portugal* (with Cape Verde, Sao Tomé, Guinea-Bissau, Mozambique, Angola), and *Spain* (with El Salvador).

[19] In general, when the non-EU defendant is a national of one of these countries, the international jurisdiction is established pursuant to the provisions of the relevant bilateral convention and not under the domestic rules.
[20] Using a system providing jurisdiction to the State whose law is applicable.

It is to be noted that very often, the bilateral agreements include, in addition to a principle of non-discrimination, a jurisdictional rule based on the principle of the domicile or habitual residence of the defendant.

(9) PRACTICAL IMPACT OF INTERNATIONAL CONVENTIONS WITH THIRD STATES

27. In most of the group of 15 "old" Member States, the practical impact of international conventions with third states on the matter of international jurisdiction is fairly limited. This is because in most of these states, the only claims pursuant to article 4 of the Brussels I regulation which are not subject to the national jurisdictional rules are (i) those which relate to conventions in *specific matters*, mainly claims arising out of travel by air, road, rail and sea; (ii) those which are fall under the very limited number of international conventions (on recognition and enforcement of judgments or on judicial assistance) which include direct jurisdictional rules.

In addition, it is to be noted that even for those cases which fall under the scope of the conventions sub (ii), these conventions are often superseded by the Lugano Convention[21], or their application is in any event influenced by the experience under the Brussels I jurisdictional regime[22].

The situation is different in most of the 12 new Member States, namely the Czech Republic, Cyprus, Estonia, Latvia, Hungary, Lithuania, Poland, Slovakia and Slovenia. All these countries, mainly from Central Europe, are bound by a great number of bilateral conventions on judicial assistance with third states belonging to the former Soviet bloc or other socialist countries (see above, Question 8). There is some divergence as to the extent of the practical importance of these conventions in judicial practice: while some national reporters (such as for the Czech Republic) note that these conventions are applied only in an insignificant number of cases, others (such as for Lithuania) stress that bilateral agreements on judicial assistance are a prime source of law for the international jurisdiction of their courts.

(C) APPLICABLE NATIONAL RULES PURSUANT TO ARTICLE 4 OF THE BRUSSELS I REGULATION

(10) GENERAL STRUCTURE OF NATIONAL JURISDICTIONAL SYSTEMS

"What is the general structure of the rules of jurisdiction for actions against defendants domiciled in non-EU states pursuant to Article 4(1) of the Brussels I Regulation?"

[21] This is the case, *inter alia*, of the Nordic Convention (between Denmark, Finland, Iceland, Norway, Sweden) of 1978 on enforcement and recognition of civil claims, which has lost most of its practical relevance since the ratification of the Lugano Convention by all five contracting states.
[22] See the Report for France, Question 9.

28. While there is a great diversity in the structure of the Member States' jurisdictional rules for cross-border cases, it is still possible to discern some general trends. In general, the structure of the rules is affected by the basic distinction between the Member States which have specific rules of international jurisdiction and those which rely on the venue rules (see above, Question 3).

In the countries which apply the principle of extension of venue rules to cross-border cases (namely the 8 countries identified in table A, under Question 2), the jurisdictional rules usually depend on purely territorial connecting factors. This is not surprising since the allocation of cases within a given sovereign state traditionally obeys to considerations of proper administration of justice, among which is paramount the proximity between the factual elements of the case and the court.

29. In the countries which use specific cross-border jurisdictional rules (in combination or not with venue rules), a sub-distinction can be established between two basic approaches. In a large group of 14 jurisdictions, there is a fairly sophisticated jurisdictional system using the same kind of structure as in the Brussels I Regulation. In these countries, the international jurisdiction can be established by a combination of general connecting factors (often the domicile of the defendant, sometimes also the location of assets) and specific connecting factors for particularly identified matters (such as the place of tort, the place of conclusion or enforcement of contracts, etc.), together sometimes with rules of exclusive jurisdiction (this is the case usually in real property matters: see below, Question 17).

30. In the remaining Member States, the jurisdictional regime is based on various kinds of original structures which focus on discrete connecting factors or mechanisms.

The first of such systems consists in linking the issue of jurisdiction to the *service of the claim form* on the defendant. It is used in England and Ireland, where the jurisdiction is established as of right when proceedings is served on the defendant within the territory of the forum. If the defendant cannot be served with process in the territory, permission must be sought for service out of the jurisdiction.

Another system focuses on the *privileged jurisdiction* based on the citizenship of the parties. It is used in France and Luxembourg, where articles 14 and 15 of the Civil code provide that proceedings can be brought when either the plaintiff or the defendant is a national of the forum state. These rules used to be the exclusive source of international jurisdiction, with the consequence that jurisdiction was excluded for disputes between foreigners. But the case law has evolved, first to admit additional grounds of jurisdiction for actions between foreigners, and next to consider (at least in France) that the "privileged jurisdiction" of articles 14 and 15 only applies on a subsidiary basis, i.e. where the jurisdiction of French courts is not established on the basis of the venue rules as extended to cross-border cases.

In still other Member States, the international jurisdiction depends on the *location of the person or property* within the territory of the State. It is used in Finland and in Poland, where the jurisdictional regime is based on the principle (subject to certain qualifications) that the claim can be brought before the court where the defendant is found or where the defendant owns property (in Poland, jurisdiction can also be based on the location of the factual elements of the dispute in the territory).

Finally, Portugal uses an original system which is based on four basic principles enshrined in the law: the principles of causality (jurisdiction based on the location of any element of the cause of action on the territory), coincidence (extension of venue rules to cross-border cases), domicile (jurisdiction based on domicile of the defendant), and necessity (jurisdiction is established when it is the only court that allows effective protection of the plaintiff' rights).

The various systems and rules will be analysed in more details in the answer to the relevant questions below.

31. *Table C: Structure of national jurisdictional regimes for cross-border cases*

Proximity			**Sovereignty**		
Territorial connecting factors borrowed from venue	**Territorial connecting factors specifically designed for international jurisdiction**		**Service of process in the jurisdiction**	**Privileged jurisdiction (+ territorial factors)**	**Presence of assets or persons in the territory**
Austria Czech Rep. Denmark Germany Greece Latvia Romania	Belgium Bulgaria Cyprus Estonia Hungary Italy Lithuania Malta	Netherlands Slovakia Slovenia Spain + Portugal (original system)	England Ireland	France Luxembourg	Finland Poland

(11) GENERAL JURISDICTION

"Is there any general rule(s) of jurisdiction (i.e. not specific to any particular matter or circumstance discussed below) that apply against defendants domiciled in non-EU states?"

32. In most Member States, the only general rule of international jurisdiction is the domicile of the defendant in the territory. As this rule is not relevant, by essence, for actions against defendants domiciled in third states pursuant to article 4 of the

Brussels I regulation, the international jurisdiction in those states depends only on the specific rules of jurisdiction that are analysed below.

There are however two qualifications to this finding, which have the effect to enlarge the jurisdiction at the defendant's home as compared to the Brussels I regime. First, in some Member States, the defendant may be sued in the forum not only if he is domiciled there, but also if he has his (habitual) residence or his place of stay in the jurisdiction. Thus, in those states, defendants domiciled in third states can be sued, under article 4 of the Regulation, when they have fixed their (habitual) residence in the forum State. But it should be noted that in certain Member States (such as the Netherlands and Scotland), the habitual residence is deemed to be the domicile for the purpose of the application of the jurisdictional rules, with the consequence that articles 2 and 3 (and not 4) of the Brussels I Regulation applies (because under article 59 of the Regulation, the notion of domicile of individuals is determined under domestic law).

Second, in three Member States (Czech Rep., Estonia, Finland and Latvia), when the defendant is domiciled abroad, jurisdiction can also be established at the place of the *last* known domicile, residence or place of stay in the forum[23]. That means, in practice, that persons domiciled in the EU who move their domicile in a third state may still be subject to the jurisdiction of the courts of these countries pursuant to article 4 of the Brussels I Regulation (on this point, see further below, Question 23).

33. Other general grounds of jurisdiction may still be found in some Member States. Though their application is less generalized than the domicile/residence of the defendant, they have a far greater practical importance in civil and commercial matters, for they can be relied upon against defendants domiciled in third states, pursuant to article 4 of the Brussels I Regulation. These rules are based on five main grounds: the citizenship of the parties, the presence of the defendant within the jurisdiction at the time of the service of the claim, the location of assets, the location of activities on the territory of the forum, and the domicile of the plaintiff. These particular grounds of general jurisdiction coincide for the most part with the so-called rules of "exorbitant jurisdiction" listed in Annex I of the Brussels I Regulation, and will be discussed below under Question 15.

(12) SPECIFIC RULES OF JURISDICTION

"What are the specific rule(s) of jurisdiction that apply in actions against defendants domiciled in non-EU states?"

34. In addition to the above-mentioned general rules of jurisdiction, the law of most Member States provides for specific rules of jurisdiction that can be used only in

[23] Provided, in the Czech Republic and in Finland, that the defendant be a citizen of the forum State.

certain categories of disputes. These rules are usually provided mainly for contracts matters and tort matters, respectively. Some countries also provide specific rules for other specific kinds of disputes, including with respect to civil claims arising out of criminal offences, disputes arising out of the operation of local branches, trusts matters, and property disputes. These various matters will be reviewed successively below.

(a) Contract Matters

What are the ground(s) of jurisdiction applicable in contract, i.e. what is (are) the connecting factor(s) used in contract matters (such as place of performance of the contract, place of the residence of a party, place of the cause of action, …) to bring proceeding against a defendant domiciled in a non-EU State?

35. In four Member States (Czech Rep., Finland, Latvia and Poland), there is no specific head of jurisdiction for contractual disputes. That means that in these States, in practice, proceedings cannot be brought against persons domiciled in third states even if the contract was concluded and/or performed within the forum State, unless jurisdiction can be established on another basis (such as the location of property or the temporary presence of the defendant within the jurisdiction).

In all the other Member States, there are specific heads of jurisdiction for contractual disputes. The main connecting factors that are used are the place of performance of the contract and the place where the contract was made, but certain countries also provide jurisdiction at the place where the breach was committed, or when the governing law is the law of the forum.

36. The *place of performance* is the most commonly used basis of jurisdiction. It is applied in 19 Member States, to which one can add the two Member States (England and Cyprus) which allocate jurisdiction at the place of the *breach of the contract*, which will normally (but not always[24]) coincide with the place where the broken obligation was (to be) performed.

In the majority of the Member States which use this jurisdictional basis, there is no precise definition of the place of performance, except that it is sometimes provided that reference must be made to the performance of the *obligation in question* (as opposed to the performance of the *contract* as a whole)[25]. The place of performance is usually defined by reference to the terms of the contract or to the law governing the

[24] See A. Briggs and P. Rees, *Civil Jurisdiction and Judgments* (LLP, 3rd ed.), para. 4.37, who take the example where goods which should have been delivered are wrongfully disposed of in New York: the breach probably takes place in New York (where the breach was committed), and not in England, unless it can be argued that the failure to deliver in London amounts to a breach in London.
[25] See Table D below.

contract. In one country (Hungary), however, it is defined by reference to the *lex fori*. And in Belgium, there is currently some hesitation as to whether the place of performance is to be determined pursuant to the law governing the contract, by analogy with the *Tessili* approach (under article 5(1) of the Brussels Convention), or on the basis of a factual assessment of the circumstances of the case. It has been suggested in legal writing that the latter approach is now to be preferred, for it is in line with the new factual approach used in the new provisions of article 5(1)(b) of the Brussels I[26].

In a sizable number of countries (seven), the place of performance of the contract is defined *in the same way as in article 5(1)(b) of the Brussels I Regulation*: as for contracts for the provision of goods, jurisdiction is provided at the place where the goods were (to be) delivered, and as for contracts for the provision of services, jurisdiction is provided at the place where the service was (to be) provided.

Sometimes, the parallelism with the Brussels I system goes as far as providing also for a fall back rule similar to the one of article 5(1)(a), which means that for contracts not relating to provision of goods or services, jurisdiction is provided at the place where the obligation in question was to be performed. This is the case in Hungary, Slovakia and the Netherlands (but also in Italy where direct reference is made to the Brussels I jurisdictional regime). In Estonia, there is also a fall back rule, but which designates the place of business or residence of the debtor (such rule will coincide with the place of performance of the obligation in question, but only when the payment is to be made at the place where the debtor is established).

It is interesting to note that in two countries (Scotland and Belgium), while the law has been revised in line of the Brussels I regime, the new connecting factors of article 5(1)(b) were *not* introduced. Thus, the jurisdictional rule in Scotland for contract disputes remains the same as in the Brussels Convention, namely, the only jurisdictional basis is the place where the obligation in question was (to be) performed. The reporter for Scotland noted that as yet, it is unclear whether this was a deliberate effort to preserve the ability to sue at the place of payment or whether it was felt that because Scots law it to be interpreted and applied in light of the Regulation, the presumptions contained in the point (b) would be applied in any event and its inclusion in Scots law was unnecessary (see above, Question 4). As for Belgium, it is unclear why the national law has not been fully aligned on article 5(1) (by contrast with the rule for tort matters: see below).

37. The second most often used jurisdictional ground in contractual matters is the *place where the contract was made*. While there is a great diversity in the way this

[26] See the Report for Belgium, Question 12(a).

connecting factor is formulated[27], the common denominator is that jurisdiction is provided at the place where some physical acts relating to the conclusion of the contract were carried out.

The place where the contract was made is a traditional connecting factor in private international law, including for the determination of the law governing the contract. Though it has been abandoned in the Brussels I Regulation, it is still used in no less than nine Member States, including in States which have recently modified their jurisdictional system, such as Belgium.

There is no uniform system to deal with the case where contract is entered into between parties which are not located at the same place. In Belgium, for instance, reference is made to the place where the contract is deemed to have been concluded under the applicable law. By comparison, in Sweden, it seems that this jurisdictional ground cannot be used in this case (in a relatively old case, the Supreme court has rejected the jurisdiction at the place where the contract was made for a contract which was entered into by phone[28]).

38. There are still other heads of jurisdiction for contract matters in some countries, but they are linked to the peculiarities of the legal system in question.

Thus, in England and Ireland, jurisdiction is provided when the contract is governed by the law of the forum. This rule is based on the idea, which is traditional in the common law tradition, that the governing law is a legitimate factor to be taken into account in the jurisdictional analysis. The distinction between jurisdiction and choice of law is less strict than in the civil law tradition: the coincidence between the forum and the applicable law is considered as a perfectly admissible goal, and plays a role also in the *forum conveniens* analysis (on which see below, Question 18). However, it should be noted that the fact that the contract is governed by the local law does not necessarily compel the court to exercise jurisdiction. Under the jurisdictional system used in England and Ireland, permission must be sought before the claim form may be served on the non-EU defendant (see above, Question 10). The exercise of jurisdiction in such case depends on a finding that the court seized is the appropriate forum (the *forum conveniens*) in the case.

In Malta, jurisdiction exists in contractual matters over any person who contracts an obligation in favour of a resident or a citizen of Malta, provided that the judgment can be enforced in Malta. This rule is in line with the approach which consists to link the issue of jurisdiction with the issue of enforcement of the ensuing judgment (see already above, Question 11).

[27] Including the place where the contract was formed, where the contractual obligation arose, where it was contracted, where one party was based when the contract was executed, where the agent through which the contract was executed is established.
[28] See the report for Sweden, Question 12(a).

39. *Table D: Jurisdictional Grounds in Contracts Matters*

Lack of any specific jurisdictional basis for contracts	**Specific jurisdictional basis for contracts**			
	Place of performance (or breach) of contract		**Place where the contract was made**	**Other connecting factors**
Czech Rep. Finland Latvia Poland	*-- place of performance --* Austria Belgium Bulgaria Denmark Scotland Germany Greece Lithuania Malta Portugal Slovenia Spain Romania	*--breach of contract --* Cyprus England *--provision of goods/services---* France Estonia Hungary Luxembourg Netherlands Italy Slovakia	Belgium Cyprus England Greece Ireland Malta[29] Spain Sweden	England Ireland Malta

(b) Tort Matters

What are the ground(s) of jurisdiction applicable in tort, i.e. what is (are) the connecting factor(s) used in tort matters (such as place of tort, place of damage, place of tort and damage, direct or indirect damage, residence of a party, etc.) to bring proceeding against a defendant domiciled in a non-EU State?

40. Out of the 28 jurisdictions covered by this study, only three of them (Finland, Greece and Poland) do not have a specific head of jurisdiction for tort claims. As noted expressly by the Finish reporter, it follows from this situation that the mere fact that a tort was committed by a non-EU defendant in the EU does not constitute ground for the local court to exercise jurisdiction over such a defendant, even if the victim is domiciled or is a citizen of the EU (unless jurisdiction can be based on another ground, such as, in Finland, the presence of property or of the person of the defendant within the territory).

By contrast, in two other Member States (Lithuania and Latvia), there is a very protective regime to the victim who can bring tort proceedings at the place of his own residence[30] (even with respect to tort committed abroad). Thus, in these two countries,

[29] Under the condition that the person upon which jurisdiction is exercised be present in Malta.
[30] But also at the place where the delict is inflicted.

the principle of *forum actoris* applies in tort matters, even if the alleged tort has no connection with the EU, for instance because it has been committed aboard by a tortfeasor domiciled in a third State. In Lithuania, this protective regime covers both claims for personal injury and claims for damage to property. In Latvia, the rule has a somewhat narrower scope of application for it applies to personal injury claims and actions for the recovery of property, but not claims for damage inflicted to property (for which jurisdiction is allocated only at the place where the damage was inflicted).

41. In all the remaining 23 jurisdictions, the claim can be brought *at the place of the tort*, and not at the place of the residence of the injured party, unless of course if it coincides with the place of the tort.

While there is a great convergence of the Member States' legal systems in this matter towards the place of the tort, there is some diversity as to how this place is precisely identified and located. In some Member States, jurisdiction is provided only at the place where the event giving rise to the damage occurred, as opposed to where the damage is sustained. This is the case in Austria[31], Cyprus[32] and, seemingly, the Czech Republic[33] and Malta[34]. By contrast, in other countries, jurisdiction is provided at the place where the damage is sustained by the injured party. This is the case in Lithuania, where jurisdiction is provided at the place where the "damage was done" (in addition to the place of the residence of the injured party, as indicated above).

In most Member States (see the list in Table E below), however, jurisdiction is provided *both* at the place where the causal event occurred and at the place where damage is sustained. In other words, in these Member States, an EU victim can bring proceedings against a non-EU defendant when the causal event is situated in the third State and the harmful consequences are located within the territory of the Member States, or vice versa.

42. This duality of jurisdiction for tort claims is in line with the system of article 5(3) of the Brussels I Regulation. While this provision, covering matters relating to tort, delict or quasi delict, gives jurisdiction to the place where the "harmful event" occurred or may occur, the Court of justice has ruled in *Bier v. Mines de Potasse*

[31] Jurisdiction is established where *"the behaviour occurred which led to the damages"*. See the Report for Austria, Question 12(b).
[32] Jurisdiction is established for "civil wrong committed in" Cyprus. When the wrongful act and the damage do not coincide, reference would seem to be made to the place "where the substance of the cause of action has arisen". In addition, when the tort is located abroad, action can be brought (on another basis of jurisdiction) only under the "double actionability" rule borrowed from (former) English law, which means that the cause of action must be actionable under both the place where the wrong was committed and under local law. See the Report for Cyprus, Question 12(b).
[33] In the Czech Republic, jurisdiction in tort matters is established at the "place where an incident causing damage has occurred". See the Report for Czech Republic, Question 12(b).
[34] In Malta, there is no specific jurisdictional rule for tort claims, but such claims can be brought at the place where the obligation in question has been contracted, this rule being applied both to contract and tort claims. See the Report for Malta, Question 12(b).

d'Alsace[35] that this place must be understood as covering two distinct connecting factors, namely *"the place where the damage occurred"* and *"the place of the event giving rise to it"*. The court ruled that, *"as a result"*, the defendant may be sued in either place *"at the option of the plaintiff"*.

In many Member States, it is expressly acknowledged that the domestic law has been modelled in this matter on the case law of the Court of justice, and that the national rules must be construed in light of this case law. Some Member States have even incorporated in their legal system very specific restrictions introduced by the Court of justice in more recent cases. Thus, in Belgium, the Code of Private International Law[36] provides expressly that the court for the place where the damage is sustained can only deal with the claim relating to the damage that is located in the forum State, as opposed to the court for the place where the causal event occurred, which has jurisdiction to hear the entire claim (solution inspired by the case law of the ECJ in *Shevill*[37]). In France and Germany, jurisdiction is established only at the place where the direct and immediate damage was sustained, and not the indirect economic damage where the victim has lost profits (solution inspired by the *Marinari* case[38]).

43. *Table E: Jurisdictional Grounds in Tort Matters*

Lack of any specific jurisdictional basis for tort	**Specific jurisdictional basis for tort**		
	Place of the tort (without further distinction or on the basis of only one element of the tort)	**Place of the causal event *and* where damage is sustained**	**Place of residence of plaintiff**
Finland Greece Poland	Austria Cyprus Czech rep. Denmark Latvia Lithuania Malta Portugal Romania Slovakia	Belgium Bulgaria Bulgaria England Scotland France Germany Hungary Italy Ireland Luxembourg Netherlands Spain Slovakia Sweden	Latvia Lithuania

[35] ECJ, *Bier*, case 21/76, [1976] ECR 1735.
[36] See article 96(2).
[37] ECJ, *Shevill*, case C-68/93, [1995] ECR I-415.
[38] ECJ, *Marinari*, case C-364/93, [1995] ECR I-2719.

(c) Criminal Proceedings

Is there any specific ground of jurisdiction as regards civil claims or restitution which are based on an act giving rise to criminal proceedings? Is the court seized of a crimination proceedings necessarily competent to hear the civil claim against a defendant domiciled in a non-EU State?

44. In the vast majority of the Member States, the court seized of criminal proceedings has *in principle* jurisdiction to hear the civil claim arising out of the criminal offence, though this principle is often subject to limitations, restrictions or conditions. The only countries where this principle is not recognized are Greece and Malta: in these two Member States, criminal proceedings and civil proceedings are kept entirely separate, in the sense that any civil claim arising out of a criminal offence may only be brought in civil court, the criminal court being incompetent to hear that claim.

In four countries (Scotland, Finland, Italy and Slovakia), there is a specific statutory provision identical or equivalent to article 5(4) of the Brussels I Regulation (under which civil claims based on an act giving rise to criminal proceedings may be brought in the court seized of these proceedings, to the extent that that court has jurisdiction under is own law to entertain civil proceedings)[39].

But in all the other Member States, there does not seem to be any specific statutory ground. It is simply recognized as a matter of practice that civil claims arising out of a criminal offence may be brought before the criminal court seized of the matter also for criminal offences involving foreign elements. It is however usually unclear whether international jurisdiction for the civil claim exists as of right when the criminal court has jurisdiction over the offence, or whether the jurisdiction for the civil claim must still be established under the normal jurisdictional rules. Only two countries mention expressly such condition (Poland and Belgium[40]).

[39] Also, in Denmark, there is a specific territorial rule of jurisdiction, under which compensatory claims may be brought by the victim in the district where the criminal offence has been committed.
[40] See the reports for these countries, Question 12(c).

(d) Secondary Establishment

Is there any specific ground of jurisdiction that allows to bring a claim against a defendant domiciled in a non-EU State on the basis that such defendant has an establishment (or a branch or agency) in your country? If the answer is yes, is the jurisdiction limited to disputes arising out of the operation of the establishment, or can it be used for unrelated claims?

45. There is a large consensus in the Member States that a non-EU defendant may be sued in the EU when such defendant has some kind of secondary establishment within the forum State. There is often a close analogy between such rule and article 5(5) of the Brussels I Regulation, which provides that *"as regards a dispute arising out of the operations of a branch, agency or other establishment"*, proceedings may be brought *"in the courts for the place in which the branch, agency or other establishment is situated"*. A rule of this kind is absent in only two countries, namely Greece and Poland.

There is less unanimity as to the conditions, legal basis, and scope of such jurisdictional ground. Firstly, there are variations as to the kind of structure which is required to be established in the forum State. Certain countries require a branch or permanent establishment there (such as in France, under the so-called *"gares principales"* (principal stations) doctrine). The requirement is looser in other countries, which accept for instance the mere presence in the forum State of a place of business or of a representative (such as in Hungary, Romania).

46. Secondly, in some Member States, the presence of a secondary establishment is not regarded as such as a jurisdictional basis, but it only triggers the application of other jurisdictional grounds, such as the domicile of the defendant (in the Netherlands, non-EU companies having an establishment within the territory are deemed to be domiciled there), physical presence within the State (Malta), or location of property (Finland).

47. Thirdly, the most important divergence which exists amongst the Member States relates to the scope of the jurisdiction. Two different systems are used in practice. The first one consists to restrict the extent of the jurisdiction to disputes arising out or concerned with the operation, undertakings or business of the secondary establishment or representative. Such restriction, used in the majority of the Member States, is analogous and sometimes expressly inspired by article 5(5) of the Regulation, which covers only proceedings relating to disputes *"arising out of the operations"* of the branch, agency or establishment.

The second system consists in subjecting the defendant with an establishment within the forum State to any claim, even if unrelated to the operations of the establishment.

This system is used in five Member States. In general, the reason for such extensive scope of the jurisdiction is that the location of a secondary establishment is associated with *another ground of general jurisdiction*. More particularly, the jurisdiction at the place of secondary establishment can trigger two different kinds of general grounds. The first one is the presence of the defendant within the jurisdiction. Such assimilation is used in Malta and in England: the presence of the branch/agency within the territory allows the defendant to be served within the forum State, with the consequence that jurisdiction is established as of right (even if it is still subject to fine tuning under the *forum non conveniens* doctrine[41]). The second one is the presence of assets within the territory of the forum State. It is used in Finland, where it is considered that the defendant having a business or branch within the territory necessarily owns assets at that place, therefore triggering the application of the general jurisdiction based on property (see above, Question 11).

In the two remaining countries (Czech Rep.[42] and Portugal), however, there is no such assimilation of the "branch jurisdiction" to another ground of general jurisdiction. And still, it is felt that the presence of an establishment within the forum State justifies the right of the claimant to bring any proceedings against non-EU defendants, even if relating solely to activities located outside of the EU.

48. *Table F: Jurisdictional ground at the place of secondary establishment*

Lack of jurisdictional basis at the place of the secondary establishment	**Jurisdictional basis at the place of secondary establishment**		
	Extent of jurisdiction restricted to disputes arising out of the operations of the establishment		**No restriction of jurisdiction**
Greece Poland	Austria Belgium Bulgaria Cyprus Scotland Germany Estonia France Hungary Ireland	Italy Latvia Lithuania Luxembourg Netherlands Romania Slovakia Slovenia Spain Sweden	Czech Rep. England Finland Malta Portugal

[41] On which see below, Question 18.
[42] The Report for the Czech Republic notes that the extensive scope of the jurisdiction is based on a grammatical interpretation of the rule. There is no indication as to whether such interpretation has been upheld or is likely to be upheld in practice.

(e) Trust

"Is there any specific ground of jurisdiction for trusts in actions brought against defendant domiciled in non-EU States?"

49. In most Member States there is no specific rule of jurisdiction for proceedings which are concerned with trusts. This is not surprising, for the concept of trust is generally unknown in civil law jurisdictions, which form the majority of the legal systems in the European Union. That does not necessarily mean that proceedings relating to a foreign trust cannot be brought before these courts, but only that the jurisdiction for such actions is subject, in most Member States, to the ordinary rules of jurisdiction as reviewed above and below. The French reporter notes in that respect that when a trust-related claim is brought before French courts, the jurisdiction is determined in view of how the dispute may be characterized under French legal classifications (such as indirect donation, right *in rem* in property, agency, etc.), so as to identify the relevant jurisdictional ground in that matter under French law.

On the other hand, and always unsurprisingly, there are specific jurisdictional rules for trust matters in four jurisdictions belonging or influenced by the common law (England, Scotland, Malta, Cyprus, but seemingly not Ireland). Interestingly, two civil law countries also provide specific rules in this matter, though they do not recognize the trust in their substantive internal law. In the first one (Italy), this is not the consequence of any willingness to regulate this matter, but only of the reference made to the Brussels I regime (see above, Question 4). On the other hand, in the second one (Belgium), the legislator has taken the original initiative to provide a complete set of rules of private international law for trust matters, including rules of international jurisdiction.

50. Amongst the six above mentioned jurisdictions that regulate this matter, the connecting factors that are used vary greatly. They run, *inter alia*, from the location of the property (Cyprus, Malta, Belgium), the place where the trust is administered (Malta, Belgium), the fact that the trust is governed by the law of the forum (England[43], Malta), the place of domicile/residence of the trustee (Cyprus, Scotland, Malta), and the place of domicile of the trust (Italy).

As one can see, only the latter ground coincides with the head of jurisdiction used in article 5(6) of the Brussels I Regulation (and this is only because of the direct reference to the Brussels I regime in Italy).

[43] It should be noted that it is not required that the property be located in England: see the Report for this jurisdiction, Question 12(e).

(f) Arrest and/or location of property

Is there any specific ground of jurisdiction based on the arrest of property in your country for actions brought against defendants domiciled in non-EU States?

51. In most Member States, the location of property within the jurisdiction is the basis of two separate jurisdictional grounds (leaving aside the ground for enforcement of a foreign judgment on assets located within the forum State). The first is the jurisdiction to order provisional and conservatory measures concerning the asset or property located within the territory. In principle, however, in this situation the jurisdiction would seem to derive from article 31 of the Brussels I Regulation, even when the defendant is domiciled in a non-EU State[44].

The second is the jurisdiction to adjudicate the merits of the claim against the defendant who owns the property located within the jurisdiction. In some Member States[45], this is a ground for *specific jurisdiction*, in the sense that it covers only property claims relating to the asset that is located within the territory. In other countries, this is a basis for *general jurisdiction*, in the sense that it allows to bring any claim against the defendant, even if unrelated to the property (see above, Question 11, and below, question 15).

In some jurisdictions, the jurisdiction to hear proprietary claims is subject to the attachment or arrest of the property. This is the case in Scotland and Hungary.

Finally, in a limited number of countries, including France, Luxembourg, and Romania, the location or arrest of property within the jurisdiction is not *as such* a basis of jurisdiction to adjudicate the merits of the case, even seemingly for claims relating to such property.

(g) Other specific rules of jurisdiction

52. Some national reporters have pointed out the existence of other specific grounds of jurisdiction, in addition to the rules reviewed above. Often, these rules relate to maritime or other transport matters[46].

[44] See above, footnote 1.
[45] Including Austria, Belgium, Bulgaria, Czech Rep., Denmark, England, Scotland, Estonia, Finland, Germany, Hungary, Lithuania, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden.
[46] See in particular the national reports for France and the Netherlands, Question 12(g).

(13) PROTECTIVE RULES OF JURISDICTION

What are the protective rule(s) of jurisdiction (if any) that apply in actions against defendants domiciled in non-EU states for certain particular types of disputes where one of the parties appear to deserve a jurisdictional protection?

53. The current situation in the Member States in this matter is very diversified. In some countries, there is no protective rule at all, in any matter, so the jurisdiction for matters such as, e.g., consumer, employment or insurance contracts is subject to the ordinary rules of jurisdiction governing other contracts. In other Member States, protective rules exist in some areas, but their scope of application and the conditions of their application vary greatly. In still other countries, protective rules are applied not only with respect to (some of) the three categories of contract that have been mentioned, but also with respect to other matters, in particular distribution contracts.

It should be noted that with respect to consumer, employment and insurance contracts, the rules of residual jurisdiction of the Member States shall not apply when the non-EU defendant which is deemed to be "stronger" (i.e. the professional, insurer and employer) has an establishment, branch or agency on the territory of a member State. Indeed, under the Brussels I Regulation, professionals (in their dealings with consumers), insurers and employers domiciled in third States are deemed to be domiciled in the Member State where they have a branch, agency or establishment for any dispute arising out of the operations of such structures[47]. As a consequence, with respect to proceedings brought by an EU "weaker" party against a non-EU "stronger" party, the analysis below concerns only the situations where such stronger party does *not* have a branch, agency or establishment in the EU that was involved in the activities giving rise to the dispute.

(a) Consumer contracts

What are the ground(s) of jurisdiction that apply in consumer contracts, and in particular, under which circumstance(s) can: (i) a consumer domiciled in the EU bring a claim before your courts against a professional domiciled in a non-EU state, and (ii) a professional domiciled in the EU bring a claim before your courts against a consumer domiciled in a non-EU state?

54. Specific jurisdictional rules to protect consumers who enter into cross-border dealings exist in a slight majority of the Member States. On the other hand, in ten countries, such protection would seem to be non existent, at least for ordinary

[47] See article 9(2) for insurance contracts, article 15(2) for consumer contracts, and article 18(2) for employment contracts.

consumer disputes[48]. In these states, the jurisdiction for consumer-related disputes involving non-EU defendants is subject to the ordinary rules of jurisdiction, and in particular the rules in contract matters.

When a jurisdictional protection is provided, it usually includes at least a rule for the purpose of paralysing or restricting the effect of any choice of court agreement that would force the consumer to litigate in a third State, or subjecting the effectiveness of such agreement to certain conditions[49].

Most of these Member States (see the table below) also provide for the right of the consumer to bring proceedings at the place of his domicile or habitual residence. Two categories of systems are used in this respect. In the first one[50], the right to bring proceedings at home is a bare and absolute rule: as soon as the consumer is domiciled or habitually resident in the territory, he is entitled to bring proceedings in the forum State against a non-EU defendant, without any further requirement of connection of any kind with the forum.

The second system consists in subjecting the right of the consumer to bring proceedings in his home State to some kind of connection between the case and the forum (other than the mere residence or domicile of the consumer there). The nature and extent of such connection varies. In a first group of four jurisdictions (Hungary, Netherlands, Italy and Scotland), the condition is identical or very similar to article 15 of the Brussels I Regulation: it must be demonstrated that the professional party has pursued or directed activities towards the State where the consumer is domiciled (or habitually resident).

In another group of four countries (Belgium, Denmark, Luxembourg, Spain), the required connection is defined in line with the older approach of the Brussels Convention (under article 13): it is necessary that the contract be preceded by advertisement or by an offer extended to the consumer in his home State, and/or that the steps necessary for the conclusion of the contract have been taken in that State.

In still another country (Sweden), the requirement is more flexible since it is enough to demonstrate that the dispute has some kind of connection, albeit minor, with the forum State[51].

[48] In certain countries, while consumers do not enjoy a jurisdictional protection of a general application, specific statutes provide *ad hoc* protection. For instance, in Germany, there are specific rules for doorstep transactions and distance learning. In Romania, there is a specific jurisdictional protection for product liability claims.
[49] The existence of such restrictions is noted expressly in the reports for Austria, Belgium, Bulgaria, Denmark, Scotland, France, Italy, Luxembourg, Netherlands, Portugal, Slovenia, Slovakia, Spain.
[50] Which seems to be used in Bulgaria, Estonia, Finland, and Lithuania.
[51] See the Report for Sweden, Question 13(a).

In all these States, the protection afforded to consumers in extra-community relations tends to be similar or even superior to the one provided by the Brussels I regime[52].

55. It should however be noted that the jurisdictional protection is usually reserved to consumers who are domiciled or habitually resident in the forum State. Consumers domiciled abroad, being in another Member State or in a third State, do not usually receive any jurisdictional protection if they are sued as defendant (for instance, for the payment of the price) in a Member State by an EU professional. That means, in practice, that consumers domiciled or resident in third states are normally treated as any other defendants.

There are however a few exceptions to this. In England and Ireland, while there is no specific jurisdictional rules for consumer contracts, the courts will consider, when exercising their discretion as to whether to accept jurisdiction, the concrete impact on the non-EU consumer of being brought to trial within the forum State. Jurisdiction can therefore be declined, when appropriate. Also, in Scotland and Italy, there is a whole set or protective rules borrowed or inspired by the Brussels I regime, which would seem to apply also when the consumer is domiciled in a third State.

Mention should be made also of two other countries (Lithuania and Spain), where the situation of non-EU consumer is expressly being taken into account. In Lithuania, there is a specific rule precluding a professional with its residence in the EU to bring proceedings against a consumer with his residence outside of the EU. In Spain, though there is no statutory basis to that end, it is noted by the reporter that because the Spanish constitution imposes a duty to guarantee the protection of consumer, *"it would be inconsistent to deviate from this objective just because the consumer happens to be domiciled in a foreign State, even though the conditions under which the contract was concluded are similar to those that, according to the Spanish legislator, would justify the consumer only being sued where his/her domicile is located"*. In practice, that means that when the contract was preceded by an offer or advertising in the non-EU State where the consumer is domiciled and the consumer has taken the necessary steps at this place for the conclusion for the contract, Spanish court will not accept that the professional domiciled in Spain brings proceedings in this country. The jurisdictional protection is therefore extended, by "reflexive effect"[53], to the non-EU consumer.

[52] Of course, in the 10 Member States that do not provide any specific rules in that matter, EU consumers do not enjoy the jurisdictional protection in extra-community relations that they are provided in intra-community dealings.
[53] On this concept, which is used usually in respect of the exclusive jurisdiction, see below, Question 19.

56. *Table G: Protective Jurisdictional Grounds in Consumer Contracts*

No specific protective rule for consumer contracts	Specific rules for the jurisdictional protection of consumers		
	Restriction to effect of choice of court agreements[54]	Right of consumer to bring proceedings at home	
		No restriction	Jurisdiction subject to a territorial connection with that State
Cyprus Czech rep. England[55] Germany[56] Greece Latvia Malta Poland Romania[57]	Austria Belgium Bulgaria Denmark Scotland France Hungary[58] Italy Luxembourg Netherlands Portugal Slovenia Slovakia Spain Sweden[59]	Bulgaria Estonia Finland Lithuania	Belgium Denmark Hungary Italy Luxembourg Netherlands Scotland Spain

(b) Employment contracts

What are the ground(s) of jurisdiction that apply in employment contracts, and in particular, under which circumstance(s) can: (i) an employee bring a claim before your courts against an employer domiciled in a non-EU state, and (ii) an employer bring a claim before your courts against an employee domiciled in a non-EU state?

57. The number of Member States that provides a specific jurisdictional protection is slightly higher in this matter than for consumers. Indeed, only 7 Member States (as opposed to 10 in consumer matters) do not have currently some kind of protective rules of jurisdiction for employees.

[54] As no explicit question has been included in the Questionnaire on this specific point, it cannot be excluded that other countries than those herein mentioned also provide restrictions to choice of court agreements in consumer related matters (the countries mentioned in this column are those for which the national reports have volunteered to indicate that there was some restriction of the effect of choice of court agreements).
[55] But when exercising its discretion as to whether to accept jurisdiction, English courts will consider the impact on the non-EU consumer being brought to trial in England.
[56] But there are specific protective jurisdictional rules for doorstep transactions and distance learning.
[57] But there are specific protective jurisdictional rules for product liability claims.
[58] See answer to Question 19 in the national report.
[59] See answer to Question 19 in the national report.

The protection consists, in the vast majority of the Member States (see the table below), to give the right to employees to bring proceedings against non-EU employers at the place where they (habitually) carry out their work[60]. Such principle is in line with the Brussels I regime, which provides that an employer domiciled in a Member State may be sued in another Member State at the place *"where the employee habitually carries out his work in any one country"* or *"for the last place where he did so"*, or if he does not or did not habitually carry out his work in any one country, at the place where the business which engaged the employee is or was situated (art. 19 of the Brussels I Regulation).

It should be noted that the latter rule, i.e. the one designating in alternative order the place of the business which engaged the employee, is absent in most Member States. The Dutch reporter notes that such alternative rule was voluntarily omitted in the Netherlands because it was felt that it was *"unnecessary"* to provide jurisdiction at such place[61]. Such approach is in line with the Court of justice's interpretation of the above mentioned rule: under settled case law, the employee who carries out his work on the territory of several Member States may still be considered to be habitually working in one Member State, being the effective centre of his working obligations[62] or the place where he performed the essential part of his duties[63]. Such interpretation avoids relying to quickly on the alternative place of the business which engaged the employee, which tends to designates the place where the employer is domiciled.

On the other hand, in a number of Member States, the choice of forum of the employee is wider (or more diversified) than under the Brussels I Regulation. Often, in addition (or instead) to the place where the employee carries out his work, jurisdiction is provided on other grounds, such as the place where the employee is domiciled or has his habitual residence, where the employment contract was made or signed, in the country of the citizenship of the parties, or at the place where the remuneration is or was to be paid (see table below).

58. It should be noted that, as in consumer matters, the application of the jurisdictional protection in employment matters tends to be reserved to "EU" employees, namely employees who carry out their work in the forum State or who are domiciled or resident of that State. In most Member States, there is no specific rule to protect employees who perform their duties in a non-EU Member State for an EU employer. That means in practice that very often, employers domiciled in the EU may rely on the ordinary rules of jurisdiction to bring proceedings in the EU against non-EU employees. Some reporters note that this is not problem in their country, for these

[60] In some countries, such as Germany, the right to bring proceedings at the place where the employee carries out his work is not conceived as such as a protective rule, but is only the application of the ordinary rule in contract matters that designates the place where the contract is performed. See the Report for Germany, Question 13(b).
[61] Report for the Netherlands, Question 13(b).
[62] ECJ, *Rutten*, case C-383/95, [1997] ECR I-57.
[63] ECJ, *Weber*, case C-37/00, [2002] ECR I-2013.

rules are unlikely to provide jurisdiction to the home court of the employer in such situation[64]. But this is not the case in other countries where broader rules of jurisdiction are used (this is the case in particular in the States which use rules such as the citizenship or the domicile/residence of the plaintiff as a jurisdictional basis[65]). In one particular Member State (Romania), the law goes as far as providing a specific jurisdictional ground in employment matters at the place where the plaintiff (employee or employer) is domiciled, which means that local employers have an absolute right to bring proceedings in the forum State against employees working in third States.

By contrast, in a few Member States, the jurisdictional protection is expressly extended to employees domiciled and/or carrying out their work in a non-EU State. This is the case in Scotland and Italy[66], for the reason again that in these jurisdictions the jurisdictional rules are borrowed or identical to the Brussels I regime. This is also the case in Latvia, Luxembourg and Portugal, where a local employer is precluded from bringing proceedings against an employee domiciled and working abroad.

[64] See, e.g., the Report for England.
[65] See above, Question 11.
[66] Reference can also be made to Spain: while there is no statutory protection of non-EU employees, the reporter notes that since the rules (protecting EU employees) in that matter have been designed in view of the employee being the plaintiff, they may require a teleological interpretation so as to ensure that the non-EU employee is also being protected.

59. *Table H: Protective Jurisdictional Grounds in Employment Contracts*

No specific protective rule for employment contracts	**Specific rules for the jurisdictional protection of employees**		
	Restriction to effect of choice of court agreements[67]	**Right of employees to bring proceedings at specific places**	
		At the place where the employee carries out his work	**At other places**
Czech Rep. England[68] Cyprus Denmark France[69] Malta Poland Ireland	Belgium Bulgaria Germany[70] Hungary[71] Finland Italy Netherlands Scotland Slovakia Sweden[72]	Austria Belgium Bulgaria Scotland Finland Estonia France Hungary Italy Lithuania Greece Latvia Luxembourg Netherlands Slovenia Spain Portugal	-- *Domicile/residence of employee*-- Austria Estonia Latvia Netherlands[73] Romania[74] Slovakia Sweden[75] -- *Place where the contract was made/signed*-- Finland France Greece Spain -- *Place of remuneration* -- Austria -- *Country of citizenship* -- Spain

(c) Insurance contracts

What are the ground(s) of jurisdiction that apply in insurance matters, and in particular, under which circumstance(s) can: (i) an insured, policyholder or

[67] As no explicit question has been included in the Questionnaire on this specific point, it cannot be excluded that other countries than those herein mentioned also provide restrictions to choice of court agreements in employment matters (the countries mentioned in this column are those for which the national reports have volunteered to indicate that there was some restriction of the effect of choice of court agreements).
[68] While the UK *Employment Tribunals (Constitution & Rules of Procedure) Regulations 2004* provides specific rules of jurisdiction, these rules do not provide for the possibility for employees employed in England to bring proceedings against employers domiciled outside the EU. See the report for England, Question 13(b).
[69] The Report for France notes that pursuant to the latest case law, choice of court clauses in employment related matters seem to be valid, though the issue is still being discussed in legal writing.
[70] The Report for Germany notes, under Question 22(b), that while there is no general restriction of foreign jurisdiction agreements in employment contracts, such agreements may not have the effect to deprive the right of an employee to bring proceedings in Germany if it is necessary in order to protect the employee.
[71] See answer to Question 19 in the national report.
[72] See answer to Question 19 in the national report.
[73] For petition proceedings, which is often the case in employment cases.
[74] The *forum actoris* is available to both employee and employer.
[75] Provided that there is a connection with the forum, such as work performed there or contract concluded there.

beneficiary bring a claim before your courts against an insurer domiciled in a non-EU state, and (ii) an insurer bring a claim before your courts against an insured, policyholder or beneficiary domiciled in a non-EU state?

60. The jurisdictional landscape in matters relating to insurance contracts is very different from the one in matters relating to consumer and employment contracts. Indeed, as opposed to these matters, the vast majority of the Member States currently do *not* provide any specific rule of jurisdiction for disputes relating to insurance. Thus, in general, the jurisdiction for claims brought by the insured, insurer, beneficiary, policy holder etc. are subject to the ordinary rules of jurisdiction, including the jurisdiction for contract matters and, where appropriate, tort matters. Some national reporters also noted the possibility, when the insured is a natural person, for the application of the protective rules of consumer contracts.

It is noteworthy that even in Scotland, which has in general modelled its domestic rules of international jurisdiction on the Brussels I regime, it was felt that it was not necessary to provide protective measures in insurance matters for cases falling outside the scope of the Brussels I Regulation[76].

A protective rule similar to the Brussels I regime, which allows the insured (or policy holder or beneficiary) to bring proceedings at the place of his own domicile, is however provided in four Member States[77]. Those are France and Luxembourg, where such protective rule is derived from the internal venue rule, Slovakia, where there is a true protective rule of international jurisdiction, and Italy, because of the direct reference to the Brussels I regime.

Also, in some Member States, while there is no specific grounds of jurisdiction that can be relied upon by the weaker party, there is still a rule protecting the insured party against the effect of choice of court agreements that would designate the courts of non-EU States[78].

Finally, some Member States have enacted *ad hoc* rules for certain kinds of insurance disputes, but they are not inspired by the objective of protecting a weaker party, but provide usually jurisdiction at the place where the damaging event took place or where an object is located (see the footnotes in the first column of Table (I) below).

[76] See the Report for Scotland, Question 13(c).
[77] A specific regime is also provided in Portugal, but without *forum actoris*: actions arising out of insurance contracts are subject to the exclusive jurisdiction of Portuguese courts when (i) the contract was entered into in Portugal, (ii) the contracting parties were domiciled in Portugal on the date when the contract was executed or (iii) the contract relates to assets located in Portugal.
[78] This is the case in Belgium : see the Report for this country, Question 13(c).

61. *Table I: Protective Jurisdictional Grounds in Insurance Contracts*

No specific protective rule for insurance contracts		**Specific rules for the jurisdictional protection of insured**	
		Restriction to effect of choice of court agreements[79]	**Right of insured to bring proceedings at home**
Austria[80]	Greece	Belgium	France[91]
Bulgaria	Ireland[85]	France[89]	Italy
Cyprus	Latvia	Italy	Luxembourg
Czech Rep.	Malta	Slovenia[90]	Slovakia
Denmark	Netherlands	Slovakia	
England[81]	Poland		
Estonia[82]	Portugal[86]		
Scotland	Romania		
Finland[83]	Slovenia[87]		
Germany[84]	Spain[88]		
Hungary	Sweden		

[79] As no explicit question has been included in the Questionnaire on this specific point, it cannot be excluded that other countries than those herein mentioned also provide restrictions to choice of court agreements in insurance matters (the countries mentioned in this column are those for which the national reports have volunteered to indicate that there was some restriction of the effect of choice of court agreements).

[80] While there is in Austria a specific rule in insurance matters for the purpose of preserving the right to bring proceedings against a non-EU insurer having a permanent representation in Austria, such rule would seem in any event to be superseded by article 9(2) of the Brussels I Regulation, which provides that non-EU insurers are deemed to be domiciled at the place where they have an establishment, branch or agent for any disputes arising out of the operations of such structures.

[81] But when exercising its discretion as to whether to accept jurisdiction, English courts will consider the impact on the non-EU insured party being brought to trial in England.

[82] But for certain kinds of property insurance, there are specific rules (not specifically "protective" of the weaker party) providing for jurisdiction at the place of the event which caused damage.

[83] The reporter for this country suggests that in order to ensure the application of the local insurance rules, *"one could argue that an insured should always have the right to bring a claim against an insurer domiciled in a non-EU State in the court of the locality where the insured is domicile"*. But it is noted that *"no case law supporting such assumption exists"*.

[84] There is a specific rule providing jurisdiction at the place of the agent who brokered the insurance, but in such case article 9(2) of the Brussels I Regulation should apply.

[85] But when exercising its discretion as to whether to accept jurisdiction, Irish courts will consider the impact on the non-EU insured party being brought to trial in Ireland.

[86] But there is an exclusive rule of jurisdiction for actions arising out of insurance contracts if (i) the contract was entered into in Portugal, (ii) the contracting parties were domiciled in Portugal on the date when the contract was executed or (iii) the contract relates to assets located in Portugal.

[87] But there are specific rules (not specifically "protective" of the weaker party) providing for jurisdiction at the place where the damaging event was committed or where the damaging consequences were sustained.

[88] But there is a specific optional rule (not specifically "protective" of the weaker party) providing for jurisdiction of Spanish courts when both the insurer and the insured are domiciled in Spain.

[89] There is however some discussion on this point. See the answer to Question 19(a) of the Report for France.

[90] See answer to Question 19 in the national report.

[91] Except for insurance relating to immovable property, where jurisdiction is allocated at the place where the insured objects are located.

(d) Distribution contracts

Is there any protective rules of jurisdiction in distribution contracts that apply for claims against parties domiciled in non-EU states, in particular in the following contracts: (i) distributorship agreements; (ii) commercial agency agreements; (iii) franchise agreements ?

62. Out of the 27 Member States, only *three of them* would seem to provide specific jurisdictional rules in distribution contracts matters. Two of them (the Netherlands and Spain[92]) regulate the international jurisdiction only for commercial agency agreements. The third one (Belgium) regulates the jurisdiction for the three categories of contracts that are mentioned, namely distributorship agreements, commercial agency agreements, and franchise agreements and other "commercial partnership agreements", but in the latter case only with respect to disputes relating to the pre-contractual information.

The jurisdictional protection consists, in all cases, to establish a *forum actoris* by providing the right of the distributor, commercial agent, or franchisee to bring proceedings in his "home state", being the place where he is domiciled (commercial agents in the Netherlands and Spain), where he carries out his activities (commercial agent and franchisee in Belgium), or where the contracts produces its effects, meaning at the place where the distribution occurs (distributorship agreements in Belgium).

63. The reason for the introduction of a protective jurisdictional regime is the same in the three countries: the assumption that the distributor/agent/franchisee, as the weaker party in the contractual relationship, needs to be provided the right of access to the local courts for the purpose of ensuring the application of the local mandatory rules in the matter.

Thus, not surprisingly, this *forum actoris* rule is accompanied, in Spain and Belgium, by a provision paralysing the effect of any choice of court agreement that would preclude to invoke such rule. In practice, the restriction can only concern choice of court clauses designating the court of a non-EU Member State (or the allocation of jurisdiction within the forum State[93]), for the clause appointing the court of another Member State would be validated under article 23 of the Brussels I Regulation.

In the Netherlands, while there is no statutory rule preserving the commercial agent from the adverse consequences of a choice of court clause, legal writers still consider that as a matter of principle, any EU agent should necessarily have the right to access EU courts to enforce the rights stemming from Directive 86/653 on Commercial

[92] It should be noted that in Spain, there is some discussion in the literature as to whether the protective rules has a domestic or international scope.
[93] See on this point the Report for Spain, Question 13(d).

Agents[94], irrespective of the existence of a non-EU choice of court clause. Such approach is the transposition in the matter of jurisdiction of the case law of the Court of justice (in the *Ingmar* case) that paralyses the effect of clauses designating as the *governing law* of the contract the law of a non-EU Member State[95].

On the other hand, in the remaining 24 Member States, where the Commercial Agents Directive should also have been implemented, there would not seem to be any restriction against the effect of a forum clause that would appoint the courts of a non-EU Member State, even if such clause would have the effect to deprive the commercial agent of the protection afforded to him by the directive. While the Directive does not include any rule relating to the jurisdiction of courts, it remains an open question for the moment as to whether the *Ingmar* ruling must be extended to the jurisdictional area so that there would be an implied Community restriction to the choice of non-EU courts.

(e) Protective rules in other matters

Is there any other specific matters which are subject to protective rules of jurisdiction?

64. Some national reporters have pointed out the existence of jurisdictional rules designed to protect other categories of persons or interests. This is the case in particular in maritime matters. Thus, in certain countries, there are specific rules designed to protect the holder of a bill of lading, in the form of a restriction to the effectiveness of choice of court agreements[96]. In France, there are also specific rules of international jurisdiction in matters, e.g. of proceedings relating to indebtedness of individuals and requests for reimbursement of securities or coupons issued by foreign companies or territorial entities.

(14) RULES FOR THE CONSOLIDATION OF CLAIMS

What are the rule(s) of jurisdiction, if any, that allow to consolidate related claims before the same court?

65. While virtually all the Member States provide for some form of jurisdiction allowing the consolidation of cases in cross-border disputes, there are great variations as to the scope and conditions for such consolidation, ranging from countries where it is restricted to some very narrow cases (such as Germany) to countries where there is a very broad ground for the consolidation of any related claims (such as Belgium). The main circumstances where jurisdiction is provided for the consolidation of cases under the national law of the Member States are reviewed below.

[94] See the Report for the Netherlands, Question 13(d).
[95] ECJ, *Ingmar*, case C-381/98, [2000] ECR I-9305.
[96] Including Belgium and the Netherlands, but see also Estonia.

(a) Co-defendants

Can a defendant domiciled in a non-EU state be sued before your courts as a co-defendant in a proceedings brought against a defendant domiciled in your country?

66. Claims brought against multiple defendants established in different countries can be consolidated under the national law of 20 Member States. In the remaining 7 Member States[97], the cases can be heard together in the forum State only if the courts of that Member State have jurisdiction, individually, over each of the co-defendants, under the ordinary (or exorbitant) national rules[98].

Quite often, even where the consolidation is possible, there is no explicit rule of international jurisdiction in that matter, and the right to consolidate the cases is derived from a rule of internal jurisdiction or a rule of procedural law (this is the case even in some of the States which do not apply in principle the principle of extension of venue rules to cross-border cases (see above, Question 2).

In other Member States, however, the primary source of inspiration is not internal law but European law. Thus, in five Member States[99], the rule of jurisdiction for multiple defendants is identical or very similar to the wording of article 6(1) of the Brussels I Regulation. And in a sixth Member State (Spain), while there is no express rule, the courts apply by analogy article 6(1).

In most cases, in line with the system of article 6(1), jurisdiction can be consolidated only if one of the defendants ("the primary defendant") is domiciled in the forum State. In Ireland, this condition must seemingly be satisfied not only at the moment proceedings is brought, but also until judgment. Thus, in a case where the claim against the first defendant was dropped after the action was started, while proceedings continued against the co-defendants, an Irish court held that jurisdiction no longer existed against them[100]. This solution would seem to be different from the one generally accepted under article 6(1) of the Brussels I Regulation[101].

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[97] Denmark, Germany, Greece, Finland, Malta, Sweden, Poland. It should be noted that in Sweden, the absence of a specific jurisdictional rule has been qualified by the development in the case law of the principle that a co-defendant can be sued under the condition that there is a minor connection with Sweden, even though the claim against such defendant does not strictly fall under the rules of international jurisdiction.

[98] The rule is sometimes subject to exceptions where consolidation is possible, but they are very narrow and interpreted restrictively. See the examples given in the German Report (which for the most part relate to matters outside the scope of the Brussels I Regulation).

[99] In Scotland and Slovakia, the rule is a word-to-word copy of article 6(1). The same solution applies in Italy be reason of the direct reference to the Brussels I rules. Finally, in Belgium and the Netherlands, the rules are directly inspired and very similar (but not identical) to article 6(1).

[100] See the Report for Ireland, Question 14.

[101] See, e.g., Layton and Mercer, *European Civil Practice*, p. 506, para 15.125.

There seems however to be more flexibility in some other Member States, including in England and Ireland, where it is only required that the defendant be *"within the jurisdiction"* of the court, which does not seem to required that he be domiciled in the forum. Also, in Bulgaria, the courts would seem to have jurisdiction over actions brought against a number of defendants if any ground for jurisdiction exists in respect of one of them.

67. There is a large consensus that for such jurisdiction to exist, there must be some kind of connection between the claims. But there is a great deal of divergences as to the exact nature and extent of such requirement, and it is delicate to draw general conclusions from the national reports. Nevertheless, it is possible to attempt to classify the criteria around four main categories.

The first system is inspired by article 6(1) of the Brussels I Regulation[102]. For the jurisdiction to be proper, the claims must be *"so closely connected that it is expedient to hear and determine them together"*. Reference is made in the countries that use this system to the interpretation of this requirement by the European Court of justice.

The second system relies on the requirement that the co-defendant be *"a necessary and proper party to the action"*[103]. The point of departure *"is to ask whether, if (the co-defendant) were subject to the jurisdiction of the court, it would be appropriate for the claimant to join him to the claim against (the primary defendant) as co-defendant. If the answer is affirmative, he will be a proper party to the claim, bit if there is no pleaded or sustainable claim against (the co-defendant), or the claim against (the co-defendant) is not well founded in fact and law, the present state of the law is that he will not be proper party no matter how closely bound up with the claim against (the primary defendant) he may be"*[104].

The third system consists to require that there is some kind of connection between the objects of the various claims. There are great variations here. While some national reporter refer broadly and generally to a connecting factor/link between the claims, others insists on much more specific criteria, such as the identity of the object of the claims[105] or the fact that they originate from the same legal relationship[106]. In still some other cases the requirement would seem to draw near the concept of "indivisibility".

[102] It is used in Belgium, Italy, the Netherlands, Spain, Scotland, Slovakia.
[103] It is used in Cyprus, England and Ireland.
[104] A. Briggs and P. Rees, *Civil Jurisdiction and Judgments* (LLP, 3rd ed.), para. 4.32.
[105] See the Reports for France, where it is explained that the close connecting link between claims means that the object of the dispute has to be identical, even though causes of action need not. It is not required that the claims arise from the same contract.
[106] See the Report for Hungary, which also notes that the connection can be derived from the fact that the object of the litigation is a common right or a common liability that can be only resolved uniformly, or that the ruling would affect all defendants.

The last system consists to subject the establishment of jurisdiction to the condition that there is a *risk of irreconcilable judgements*[107]. This requirement is often used in conjunction with some of the above mentioned criteria, and in particular with the first one (in line with article 6(1) of the regulation). Also, in France, the risk of irreconcilable judgements plays a role in the specific situation where there is a foreign choice-of-court agreement with one of the co-defendants. When there is a risk of irreconcilable decisions and the claims are indivisible, the French court will entertain proceedings over the co-defendant in spite of the jurisdiction agreement[108].

68. A further condition is sometimes expressed in case law or legal writing: that the jurisdiction not be invoked abusively. In Belgium the rule is enshrined in a statutory provision that is directly inspired by the Brussels I Regulation: jurisdiction will not be entertained if the claim has been instituted "*solely with the objective of removing a defendant from the jurisdiction of his home court*". In France and Romania the case law has developed the similar concept of "*fraudulent choice of jurisdiction*" or "*fictive defendant*". In England and Ireland, there is the requirement that there exists a "*real issue between the claimant and the original defendant*". This requirement is an obstacle to a fictive of fraudulent suit, because the claimant will have to establish a good arguable case against the primary defendant[109].

69. *Table J: Jurisdiction for actions against multiple defendants, one of which at least is domiciled in a non-EU State*

Specific Jurisdictional rule for the consolidation of jurisdiction		**Lack of rule allowing the consolidation of jurisdiction**
Austria	Latvia	Denmark
Belgium	Lithuania	Finland
Bulgaria	Netherlands	Germany
Cyprus	Portugal	Greece
Czech Rep.	Romania	Malta
England	Scotland	Poland
Estonia	Slovakia	Sweden
France	Slovenia	
Hungary	Spain	
Ireland		
Italy		

(b) Third Party Proceedings

Can a defendant domiciled in a non-EU state be sued before your courts as a third party in an action on a warranty or guarantee or in any other third party proceeding?

[107] It is used in Italy, Scotland, Slovakia.
[108] See the Report for France, Question 14.
[109] See the national reports for these countries, under Question 14.

70. With respect to this question, there would seem to be four main kinds of answers in national law. In a first discernable group of countries, the rules are shaped on the provisions of article 6.2 of the Brussels I Regulation[110]. This means that the third party may, in principle, be sued in the court seized of the original proceedings, but subject to the abuse of process safety clause (*"unless the proceedings were instituted solely with the object of removing the third party from the jurisdiction of the court which would be competent in his case"*).

The second answer consists to refer to the solutions adopted in the situations involving multiple defendants. This is in particular the case of England an Ireland, where it is required that the third party, as the co-defendant, be *"a proper and necessary party to the claim"* and there exists *"a real issue to be tried"*. This is also the case in Portugal and Slovenia, where a third party in an action for warranty or guarantee is considered as a co-defendant which may be sued together with a defendant domiciled in this Member State (the reports do not mention the existence of any abuse of process clause though).

For certain Member States, the reference to the solution adopted for multiple defendants means that there is no specific ground of jurisdiction for third party actions. Thus, again, in Denmark, Greece, Finland, Malta and Sweden, the third party must individually and personally be within the jurisdiction of national courts under ordinary rules.

The third group of countries is composed of the Member State providing for some specific solutions to proceedings involving a third party, i.e. solutions different from those applicable in case of co-defendants. Most of the time, these solutions are derived from internal procedural law[111], which generally allows suing a third party in an action on a warranty or in any other third party proceedings before the court seized of the original proceedings. There are however sometimes particular requirements for cross-border cases, such as for instance in France and Romania, where the third party cannot be sued in the forum State if there is a choice of court clause appointing the courts of a non-EU State[112].

Finally, the last group is composed of countries which do not provide for any specific rules in the circumstances envisaged in question 14 (b)[113]. In Poland, the intervening party is not considered as a defendant but as a person notified of the ongoing proceedings. He becomes a "participant", not a "party" to the proceedings, and thus

[110] This is the case in Belgium, Italy, the Netherlands and Scotland, but also, by analogy, Spain.
[111] See the Reports for Bulgaria, Cyprus, France.
[112] It should be noted that the restriction discussed under Question 14 (a) relating to the indivisibility of the claim would not seem to be applicable with respect to third party proceedings.
[113] In addition to Poland and Germany (discussed in the text), see also the Reports for Austria and Slovakia.

the question of (international) jurisdiction is not raised[114]. Similarly, in Germany, instead of an action on a warranty or guarantee, there is simply a third party notice.

(c) Counter-claims

Can a party domiciled in your country that has been sued by a party domiciled in a non-EU state bring a counter claim against the former party before your courts?

71. Save for one single Member State (identified below), the court which has international jurisdiction to hear a claim also has international jurisdiction in principle to entertain a counter-claim. The rationale behind this solution is that a foreign claimant who chooses to sue in a Member State cannot reasonably refuse to discuss also a counter claim in that State. Usually, there is a requirement, coming from internal procedural law, that there exists a connection between the principal claim and the counter claim. This is usually formulated as a condition that the counter claim arises from the same fact/set of facts or act or contract or dispute on which the original claim was based[115].

It has also been observed in some reports[116] that the international jurisdiction would not be entertained for the counter claim in case in the event such claim would fall within the exclusive jurisdiction of a foreign court.

Finally, in Portugal, there would not seem to be any specific head of jurisdiction for counter-claims. In this country, for the court to have jurisdiction over the counter claim, the defendant to the counter claim (claimant in the initial proceedings) must also be within the jurisdiction of the Portuguese courts. Otherwise the counterclaim must be dismissed.

(d) Related claims

Is there any rule allowing a defendant domiciled in a non-EU state to be sued before your courts on the ground that the claim is connected with another claim pending before your courts?

72. An additional catch-all rule of international jurisdiction for the consolidation of related cases would seem to be provided in only two countries, Belgium and Scotland. In these Member States, a court which has jurisdiction over a primary claim may also entertain any related claims, even if the case falls outside the circumstances listed

[114] Similar solution seems to be adopted in Estonia.
[115] See the Reports for Austria, Belgium, Denmark, Estonia, Germany, Scotland, Slovakia, Spain, Romania and Sweden.
[116] See the Reports for Estonia, Germany and Lithuania.

above, and if the court would normally not have jurisdiction with respect to these related claims if they were brought separately in the forum.

In the Brussels I regime, the consolidation of related claims is not possible outside the scope of article 6. The existence of "related claims" is only taken into consideration in the event of parallel proceedings under article 28 of the Regulation, but the application of this provision supposes that the court first seized has jurisdiction to hear all the claims. While some reporters note the existence (or absence) a rule of this in their country, it does not seem, in line with article 28, that such rule represents as such a ground of jurisdiction for the consolidation of claims.

(e) Problems pertaining to the lack of harmonisation

73. While most national reporters stress that there is no case law in their country evidencing problems caused by the lack of harmonisation of the provisions governing the consolidated proceedings, the reporters from a few other Member States raise sometimes interesting issues to that respect.

First, the reporters for Finland and Germany stress the inconvenience flowing from the requirement in these Member States that the co-defendant be also within the jurisdiction of the national court for the jurisdiction to be established[117]. The Finnish reporter observes that, because of the lack of the harmonisation, in a situation involving several defendants, one of whom is domiciled outside the EU and has no property in Finland, (i.e. no jurisdiction of Finnish court over him), the claimant, in order to exercise its rights, is forced in practice to initiate separate proceedings (parallel with the Finnish proceedings) against that defendant in a third State. It was observed that such solution is regrettable, for the consolidation of claims is very useful in cross-border litigation practice.

Conversely, it is noted in Belgium that it is easier to bring proceedings against non-EU defendants than EU defendants. Indeed, the absence of a catch all provision under European law, combined with its presence under Belgian national law (see above, question 14 (c)), results in the consequence that the possibilities to consolidate actions against defendants domiciled outside the EU are much larger that against defendants domiciled in the EU.

Echoing these findings, the reporter for Spain observes that the fact that the lack of coordination among the EU States who follow very different philosophies result in a kind of "*jurisdictional kaleidoscope vis-à-vis third countries which promotes opportunist forum shopping*"[118].

[117] On the basis of a general jurisdiction rule which require that the defendant has assets in the Member State.
[118] See the Report for Spain, Question 14.

Finally, the co-existence of harmonized and non-harmonized rules in that matter has sometimes created complex situations in practice. Thus, the reporter for France notes that in a seemingly unreported case, the Court of cassation of France ruled on a dispute which opposed the insurance of the buyer of goods and two maritime carriers, one domiciled in the Netherlands and the other in Australia. The claim had been brought in France at the place where the goods had been delivered. The Court ruled that, while jurisdiction was established with respect to the Australian defendant (on the basis of national law), there was no jurisdiction as against the other defendant for the conditions for the consolidation of cases under article 6.1 of the Brussels Convention were not satisfied[119].

In another case decided by the Supreme court of Lithuania, the difficulty related to the co-existence of the rules of jurisdiction of national law and of a bilateral agreement[120]. The dispute involved multiple claims originating from a car crash involving a truck driver who worked for a Lithuanian company, while the truck belonged to a Belarus company. Both companies were sued in Lithuania. While the Lithuanian court had jurisdiction as against the Lithuanian defendant, it ruled that under the bilateral agreement with Belarus, the claim against the Belarus defendant had to be brought to the courts of its place of residence. The consolidation was therefore impossible, though both claims related to the same accident involving all the parties whose respective liabilities was to be assessed.

[119] Cass. Com., 16 March 1999, pourvoi n°. 95-12.136.
[120] Decision No 3K-3-640/2003 dated 28 May 2003, discussed in the Report for Lithuania.

(15) RULES OF JURISDICTION PURSUANT TO ANNEX I OF BRUSSELS I

(a) The rules listed in annex I

Is there in your country any rule(s) of jurisdiction listed in annex 1 of the Brussels I regulation, as referred to under article 3(2) of the Brussels I Regulation? If so, what is (are) this (these) rules?

74. Pursuant to article 3(2) of the Brussels I Regulation, as regards persons domiciled in a Member State, *"the rules of national jurisdiction set out in Annex I shall not be applicable"*.

In the latest version of Annex I[121], 24 countries are listed, to which one should add Denmark, which is included in the equivalent list pursuant to article 4 of the Brussels Convention. That makes a total of 25 countries for which rules of jurisdiction are listed for the purpose of the application of article 3(2) (but also 4(2), as discussed below).

In other words, two countries are currently omitted from the list: the Netherlands and Spain, to which one can add Belgium, for which the rules listed in Annex I have now been repelled[122]. The omission from the list is of course not due to the fact that there would not be any national rules of jurisdiction for cross-border cases in these countries (there rules have indeed been reviewed above). The reason for the omission is that the list is not meant to include all the national rules whose application is superseded by the harmonized jurisdictional rules of the Regulation, but only to designate those grounds which are traditionally regarded as "exorbitant"[123], and whose application as against non-EU States is subject to the principle of non-discrimination based on nationality (as provided under article 4(2): see below). While the concept of exorbitant jurisdiction is elusive, it is generally understood as referring to a ground which does not guarantee *"a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action"*[124].

[121] As amended the last time by Council Regulation (EC) No 1791/2006 of 20 November 2006 amending certain regulations and decisions by reason of the accession of Bulgaria and Romania.
[122] Annex I of the regulation still lists today article 15 of the Civil Code and article 638 of the Judicial Code, but these provisions have been repelled at the time of the entry into force on 15 October 2004 of the Code of Private International Law. See the Report for Belgium, Question 15.
[123] See, e.g., H. Gaudemet-Tallon, *Compétence et execution des jugements en* Europe (LGDJ 3rd. ed.), para. 91 ; J. Hill, *The Law Relating to International Commercial Disputes*, LLP, para. 4.2.1.4.
[124] C. Kessedjan, "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters", Preliminary Document No 7 of April 1997, Hague Conference of Private International Law, www.hcch.net. See also P. Struyven, *"Exorbitant Jurisdiction in the Brussels Convention"*, *Jura Falconis*, 1998-1999, p. 521 s.; L.I. De Winter, "Excessive Jurisdiction in Private International Law", 17 *I.C.L.Q.* 706 (1968).

In practice, for most Member States, the rules which are designated in Annex I correspond with this definition, for they single out a few limited and well identified rules which are based on a weak connecting factor in view of the subject matter of the dispute. On the other hand, and quite curiously, for other Member States, Annex I lists a much broader set or rules, including sometimes rules which certainly cannot be regarded as exorbitant for they are identical or similar to the rules used in the Brussels I Regulation. This is the case, for instance, for Malta and Portugal, but also for Italy where, strangely enough, Annex I, in combination with article 3(2) of the Regulation, rules out the application of a provision of Italian law which itself merely refers to the harmonized rules of jurisdiction of the Brussels Convention! (for the purpose of extending the application of these rules to defendants domiciled in third States: see above, Question 4).

75. When reviewing the rules of exorbitant jurisdiction listed in Annex I (and leaving aside in particular the rules which are similar to those of the Brussels I regime), it appears that they can be divided into five main categories.

The first one is the *citizenship of the parties*. It is used in at least seven countries. In France and Luxembourg, the citizenship of either plaintiff or defendant is as such a sufficient connection with the forum to provide jurisdiction. In Bulgaria, the citizenship of only the plaintiff provides jurisdiction, but it is also a ground of general jurisdiction, without any further restrictions.

In the four other jurisdictions (Czech Republic, Finland, Malta and Slovenia), the citizenship can form the basis of jurisdiction only when certain additional conditions are satisfied. Thus, in the Czech Republic and Finland, a citizen can be sued only provided that he has had a residence in the past in the forum State, in which case he can be sued at this last known residence. In Malta, the condition relates to the enforceability of the judgment in the forum: any person can be sued in Malta for obligations contracted in favour of a citizen (or resident) of Malta provided that the judgment can be enforced on the Maltese territory[125]. In Slovenia, there is a condition of reciprocity: jurisdiction is established for actions by a citizen against a foreigner if, under the law of such foreigner, jurisdiction can be established[126].

76. The second one is the *presence of the defendant* in the territory so that he can be served with the claim form within the jurisdiction. This is the traditional basis of jurisdiction in the legal systems based on the English common law, not only in the European Union but also in the rest of the world. Amongst the Member States, it is

[125] In addition, citizenship always provides jurisdiction (irrespective of the enforceability of the judgment) for parties who have not fixed their domicile abroad.
[126] There used to be a similar restriction in Belgium pursuant to articles 636 and 638 of the Judicial Code, which established jurisdiction on the basis of the domicile or residence of the claimant in Belgium, subject to a condition of reciprocity under the law of the foreign defendant. See Report for Belgium, Question 15.

logically used today in England, Ireland, Scotland[127], Malta and Cyprus (the three latter jurisdictions are influenced by the common law, though they are usually regarded as mixed legal systems), but also in Finland, Poland and Slovenia[128].

77. The third one is the *location of assets* belonging to the defendant within the territory of the forum. In many Member States this is the basis of a *specific* jurisdictional rule that allows to bring proceedings for any action regarding the property in question, such as an action for recovery of the ownership or possession (see above, Question 12(f)). It is, in this respect, questionable that such rule be regarded as exorbitant, for in such case the court has a particularly strong connection with the subject matter of the dispute.

But in some Member States, the location of assets is the basis of a *general jurisdiction*, in the sense that it allows to bring proceedings for any claim against the defendant, even if unrelated to the asset or for a value going beyond such asset. This rule is used in a sizable group of countries: Austria, Czech Rep., Denmark, Estonia, Finland, Germany, Lithuania, Poland, Scotland and Sweden.

In some of these States, the case law has developed some restrictions as to avoid the excessiveness of such ground of jurisdiction. Thus, in Germany, the Bundesgerichthof has ruled that for the court to have jurisdiction on the basis of §23 ZPO there must be a *"sufficient national connection"* with Germany. German courts decline jurisdiction if the centre of gravity of the dispute is clearly and distinctly located in a foreign country. On the other hand, jurisdiction is established even if the asset if left behind accidentally, and even, in principle, if it has a small value. However, it is suggested in legal writing (and it was upheld in one case) that if the value of the asset does not even cover the cost of the proceedings, jurisdiction is not proper. The same limitation would seem to apply in Austria[129] and Sweden[130].

78. The fourth category encompasses various kinds of rules which have in common to link the jurisdiction with the *location of certain activities* on the territory of the forum. In one Member State (Cyprus), the fact that a person carries out business on the territory is as such sufficient to establish jurisdiction against such person, without, seemingly, any further restriction[131]. This rule would seem to be analogous to the "doing business" basis of jurisdiction that is used in the United States, under which a company carrying out substantial and continuously activities in the forum establishes

[127] The rule has a much stricter scope of application in this jurisdiction, for it only applies if the defendant has not fixed residence anywhere. See the Report for Scotland, Question 15.
[128] But in this country jurisdiction stems from service of the claim form while the defendant is temporary *resident* (and not simply physical present) on the territory, and is subject to the condition that the defendant does not have any permanent residence (in Slovenia or abroad).
[129] The reporter for Austria notes that *"the value of the domestic property cannot be disproportionately less than the amount of the controversy"*.
[130] See the Report for this country.
[131] See Report for Cyprus, Question 11. While such rule would not appear to be listed in Annex I, it would seem to qualify as an exorbitant rule of jurisdiction under the definition provided above.

a presence there which creates jurisdiction, even for claims which are not related to such activities.

In other Member States, jurisdiction is established when the dispute is situated in the territory (Poland) or when the cause of action (Portugal and, again, Cyprus) is located in the forum. As opposed to the "doing business" jurisdiction, such rules would seem to establish jurisdiction only for claims which are related, albeit indirectly[132], to the activities located on the territory. These rules are therefore not *per se* rules of general jurisdiction, in the sense that they do not allow to bring any claims which are unrelated to the activities in the forum, against the defendant. Though it is therefore doubtless that rules can be characterized as exorbitant in the sense indicated above, they are nonetheless original in that they are subject to be applied in a broad set of disputes, irrespectively of their characterization as contract, tort, etc.

79. The fifth and last ground of jurisdiction that is traditionally regarded as exorbitant refers to the *domicile of the plaintiff*. Such rule is provided in Latvia, but only for claims relating to the return of a personal property or the reimbursement of its value[133]. There is also such a rule listed in Annex I of the Regulation for Belgium (article 638 of the Belgian judicial Code), but as indicated above this rule has now been repelled. The domicile of the plaintiff used to be also a basis of jurisdiction in the Netherlands, but it was abolished (for summons proceedings, but not for petition proceedings) as from 1 January 2002 and the Netherlands are no longer included in the list of Annex I.

[132] See the Report for Portugal (Question 15), taking the example of a case where it was found that the fact that a car was fixed in Portugal can be the basis of jurisdiction though the accident took place abroad.
[133] See the report for this country.

80. *Table K: Main categories of rules listed in Annex I of the Brussels I regulation (other than the rules analogous to harmonized rules of the Regulation)*

Citizenship of the parties	Presence of the defendant on territory at the time of service of claim	Location of assets of defendant on the territory	Cause of action or activities in the territory	Domicile of the plaintiff
-- *Without further conditions*-- Bulgaria[134] France Luxembourg --*With restrictions*-- Czech Rep. Finland Malta Slovenia	-- *Without further conditions*-- England Finland Ireland Malta Poland --*With restrictions*— Scotland Slovenia	-- *Even if unrelated to claim*-- Austria Czech Rep. Denmark England[135] Estonia Finland Germany Lithuania Poland Scotland Sweden -- *Only if related to claim*-- Latvia Slovekia Slovenia	Cyprus Poland Portugal	Latvia[136] --*Repelled*-- Belgium[137] Netherlands[138]

(b) Practical use of the rules listed in Annex I

In which kinds of circumstances are these rules usually or most often applied in practice, and with which consequences?

81. The extent of the use in practice of the rules of jurisdiction listed in Annex I of the Brussels I Regulation is uneven. In some countries, these rules are central to the jurisdictional system. This is the case, for instance, in England and Ireland, where jurisdiction is most of the time established under the basic rule of service of the claim form on the defendant within the territory.

To the contrary, in some other Member States, the rules listed in Annex I are almost never used, or at least are not the subject to any application in the reported case law. It is said in the national reports that this is the case, *inter alia*, in Lithuania and Slovenia.

[134] Citizenship of the plaintiff only.
[135] The presence (or seizure) of assets on the territory does not create jurisdiction as of right. It is still necessary to apply to the courts for permission to serve the defendant out of the jurisdiction. See the Report of England, Question 15.
[136] Only for claims relating to the return of a personal property or the reimbursement of its value.
[137] Jurisdiction based on domicile of the plaintiff has been abolished as from 15 October 2004.
[138] Jurisdiction based on the domicile of the plaintiff has been abolished on 1 January 2002. See Report for the Netherlands, Question 16. But it is still in use for petition proceedings.

Between these two ends of the spectrum, there is a large group of States where the rules listed in Annex I, though not central to the jurisdictional practice, are used now and then, when the circumstances are appropriate, and when none of the ordinary rules of jurisdiction can be relied upon. The is the case, for instance, in Germany with the property jurisdiction of §23 ZPO. In France, also, the "privileged jurisdiction" based on the French citizenship of the parties is no longer the basic ground that is used in practice, through the national reporter notes that it is still relied upon in particular in disputes with US parties.

(c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

Is there any reported or known case where your courts have applied article 4(2) of the Brussels I Regulation, which provides that as against a defendant not domiciled in a Member State, "any person domiciled in a Member State may whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State"?

82. Article 4(2) of the Brussels I Regulation is a rule of non-discrimination based on nationality that is relevant only in those Member States which use the citizenship of the parties as a ground of jurisdiction as such or as an element of another ground of jurisdiction in civil and commercial matters. As noted above, this would seem to be the case today in seven Member States (France, Czech Rep., Finland, Luxembourg, Malta, Slovenia). In the rest of the Member States, article 4(2) is totally without significance[139], and has therefore naturally not given rise to any case law.

As a matter of fact, among the seven Member States that use citizenship in their national jurisdictional system (in civil and commercial cases), the reporter of only one of them (France) notes some practical application of article 4(2). But even there the case law would seem to be very scarce[140]. The most famous reported case is the Guggenheim dispute, decided by the Court of cassation in 1994[141]. In this case, US citizens domiciled in France had brought proceedings in France against the Guggenheim foundation in New York. The Court of Appeal of Paris ruled that jurisdiction was proper under the combined application of article 14 of the French Civil Code (jurisdiction based on French citizenship of plaintiff) and 4(2) of the Brussels Convention. As this case shows, the benefit of the provision is not reserved to other EU nationals. It can also benefit nationals of non-EU states suing other non-EU nationals, provided that the plaintiff be domiciled in the EU.

[139] As noted by the national reporter for Germany.
[140] The reporter notes expressly that the application of article 4(2) *"rarely occurs"*.
[141] Paris, 17 November 1993, *Rev. crit. DIP*, 1994, p. 115, decision upheld by the Court of cassation by a judgement of 3 July 1996, *J.D.I.*, 1997, p. 1016.

(16) FORUM *NECESSITATIS*

Is there any rule allowing a court to exercise jurisdiction on the basis that there is no other forum available abroad (forum necessitatis*)? If so, what are the conditions for such jurisdiction to exist?*

83. The lack of available or appropriate forum abroad is an autonomous ground of jurisdiction in 10 Member States. It is based on an explicit statutory provision in 6 of them, and on case law in the others (see the table below).

It is worth noting that in two countries where the *forum necessitatis* was introduced recently (Belgium and the Netherlands), such change coincided with the abolition of the exorbitant jurisdiction based on the domicile of the plaintiff in the forum. In the Netherlands, it was expressly felt that such abolition had the effect to restrict the right of access to the local court that needed to be *"compensated"* by the establishment of the *forum necessitatis*[142].

It is traditionally considered, and it was even pointed out during parliamentary discussion in some Member States[143], that this jurisdiction *"of necessity"* is based on, or even is imposed by, the right to a fair trial under article 6(1) of the European Convention on Human Rights[144]. In some countries (including France[145]), reference is also made to the prohibition of "denial of justice", which is a general principle of public international law[146].

In the remaining 17 Member States, there is currently no statutory basis nor case law supporting the existence of such basis of jurisdiction. But that does not mean that the principle of *forum necessitatis* would necessarily be rejected by the court should a relevant case arises. Some national reporters expressly note that while there is currently no practice in their country, it could theoretically not be accepted, under general principles of law, that a party be deprived of the right of access to a court if this is necessary to vindicate his rights[147].

84. In the 10 above mentioned Member States where the *forum necessitatis* is currently recognized, its application is usually subject to two separate conditions. The first one is that there must be some kind of obstacle preventing the plaintiff from obtaining justice abroad. In three Member States (but in one of them the solution is

[142] See report for the Netherlands, Question 16.
[143] See the Reports for Belgium and the Netherlands.
[144] See also the Report for Germany, Question 21.
[145] See the Report for this country, Question 16.
[146] See Ch. De Visscher, « Le déni de justice en droit international », *Rec. des Cours*, 1935-II, t. 52, p. 365 s. ; A. Adede, « A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law", *Can. Year. Int. Law*, t. 14, 1976, p. 73. s.
[147] See in particular the Reports for Finland and Lithuania.

being debated[148]), this necessarily supposes that the plaintiff demonstrates that the foreign court lacks jurisdiction to hear the claim[149], or that this court has already rejected the claim for lack of jurisdiction[150].

In the other Member States, however, there is no need to show an absolute impossibility to bring proceedings abroad. It is enough to demonstrate that it is "unreasonable"[151], "unacceptable"[152], that there is an "unreasonable difficulty" to bring proceedings abroad[153], or that the plaintiff "cannot be expected" to do so[154]. Thus in these Member States, the *forum necessitatis* can be relied upon in two kinds of circumstances. Firstly, when there is a *legal obstacle* to accessing the foreign court, such as because (i) the foreign court lacks jurisdiction under the foreign law or has already dismissed the claim for lack of jurisdiction, (ii) there is no guarantee the parties would get a fair trial abroad[155], or (iii) the foreign judgment could not be enforced in the forum[156] (but it has been noted that it would never be enough to show that the foreign court would declare the plaintiff's claim inadmissible or would dismiss it on the merits[157]).

Secondly, the plaintiff can also show that he is confronted with *factual obstacles* to enforcing effectively his rights abroad. Obstacles that are deemed to be relevant for that purpose include, depending on the Member States, the fact that the plaintiff faces major threats if putting foot on the foreign soil[158], the fact that the foreign country is affected by war, flooding or other disasters[159], or the fact that the cost of bringing proceedings abroad would be "out of proportion" with the financial interests involved in the case, provided that it be established that the plaintiff would be deprived, in practice, from his right of effective access to court if the proceedings had to be brought abroad[160].

85. The second traditional condition of the *forum necessitatis* is that there must be some kind of connection with the forum. There is only one country where such requirement is entirely absent: the Netherlands, where the lack of available forum abroad is the source of a kind of universal jurisdiction since it is not subject to any connection with the Netherlands.

[148] See the Report for Portugal.
[149] See the Report for Poland.
[150] See the Report for Romania.
[151] See Report for Belgium.
[152] See the report for Austria.
[153] See the Report for Portugal.
[154] See the Report for Estonia.
[155] See Report for Belgium.
[156] See the Reports for Germany and France (the issue is debated in the latter country).
[157] See Report for France.
[158] See Report for France.
[159] See Report for the Netherlands.
[160] See the Report for Belgium.

In the Member States where it is used, the required connection is usually not defined very precisely (except in Austria, where it is required in principle that the plaintiff be an Austrian citizen or has his domicile/residence in Austria[161]). Reference is made to flexible concepts such as an "adequate relation"[162], "sufficient connection"[163], "strong linking factor"[164], or "close contacts"[165]. While some of the latter concepts seem literally stricter than the former, that does not necessarily mean that there is a striking difference in practice. For instance, the Belgian reporter notes that the concept of "close contacts" is not understood too strictly for by definition cases which are not subject to the normal jurisdictional rules will most of the time not have a very strong connexion with Belgium.

There is a general consensus that the required connection exists at least when the plaintiff is domiciled or habitually resident in the forum State, or even when he is a citizen of that State. But any other contacts with the forum State may be relevant, depending on the circumstances, such as for instance the presence of assets within the jurisdiction[166]. But of course, in practice, the requirement for such connection for the purpose of the application of the *forum necessitatis* is relevant only in those Member States which do not already consider that the location of assets is a ground of general jurisdiction (this is the case, e.g., in Austria, Germany and Poland, as seen above: Question 15). There is, in this respect, a possible overlapping between the purpose and practical interest of the rules of exorbitant jurisdiction and of the *forum necessitatis*.

86. *Table L: Forum Necessitatis*

Lack of statute or case law supporting the forum *necessitatis*		***Forum necessitatis* recognized as a valid ground of jurisdiction**	
		Statutory based	**Case law based**
Bulgaria Cyprus Czech Rep. Denmark Scotland[167] England Finland Greece Hungary	Ireland[168] Italy Latvia Lithuania Malta Slovakia[169] Slovenia Sweden[170]	Austria Belgium Estonia Netherlands Portugal Romania	France Germany Luxembourg Poland

[161] See Report for Austria, Question 16.
[162] Report for Poland.
[163] Report for Germany.
[164] Report for Portugal.
[165] Report for Belgium.
[166] See the Reports for Belgium and France.
[167] While there is not as such any forum *necessitatis* ground, the reporter notes that the doctrine of *forum (non) conveniens* allows to take into account considerations relating to the accessibility of the foreign court.

(D) NATIONAL JURISDICTION & ENFORCEMENT OF NON-EU JUDGMENTS

(17) NATIONAL RULES OF JURISDICTION BARRING THE ENFORCEMENT OF A NON-EU JUDGMENT

Can the judgement of a non-EU State be denied recognition or enforcement in your country on the basis that the courts of your country have exclusive jurisdiction to entertain the claim? If so, what are the "exclusive" rules of jurisdiction under your domestic law that constitute such a bar against the enforcement of a non-EU judgement?

87. In this matter, the Member States may be divided into four main groups. In the first group, by far the largest (15 Member States: see the list in the table below), there are matters where national rules of jurisdiction are deemed to be exclusive for cross-border disputes and for which there is *an explicit rule* (being statutorily based or case law based) barring the recognition and enforcement of any judgment coming from a third State.

In the second group, while the exclusive jurisdiction of the local courts is not a specific ground barring the recognition of a foreign judgment, it is considered that the same result is obtained by the application of *more general defences against enforcement of foreign judgments*. In particular, in some Member States, the judgment given by a foreign court in a matter subject to the exclusive jurisdiction of local courts is considered to be contrary to public policy or to internationally acceptable principles of private international law/international jurisdiction.

In the third group (only three Member States), there does not seem to be any explicit rule or practice for denying the recognition or enforcement of a foreign judgment on the ground that the local courts have exclusive jurisdiction.

Finally, in the last group (five Member States), there is no system under national law allowing for the enforcement of non-EU foreign judgments. These Member States apply the so-called "Treaty system" under which foreign judgments will only receive effects when they are given by the court of a foreign State with which there is a bilateral or multilateral treaty providing for the reciprocal recognition and enforcement of judgments. However, it is noted that in some of these States, there is a

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[168] While there is not as such any forum *necessitatis* ground, the reporter notes that the doctrine of *forum non conveniens* allows to take into account considerations relating to the accessibility of the foreign court.
[169] While the reporter for this country notes that there are "several rules" allowing Slovak courts to exercise jurisdiction in these circumstances, no specific ground of *forum necessitates* is mentioned, other than the circumstance where jurisdiction of the Slovak courts remains when there is a foreign jurisdiction clause and the foreign court has declined jurisdiction (on which see below, Question 19).
[170] While there is not as such any forum *necessitatis* ground, the reporter notes that the courts will interpret extensively the ordinary jurisdictional rules when no other foreign court has jurisdiction.

"quasi-enforcement" through the route of asking for the *recognition* of the foreign judgment in court and simultaneously asking for a domestic decision with the same contents as the foreign judgment[171].

88. *Table M: Exclusive jurisdiction of local courts as a ground to deny the recognition and enforcement of non-EU judgements*

Exclusive jurisdiction is generally recognized as ground to deny enforcement			**No clear authority to deny enforcement on this ground**	**Non-EU judgments not eligible for enforcement (unless under a Treaty)**
Specific ground		**General grounds**[172]		
Belgium Bulgaria France Germany Greece Hungary Latvia Lithuania	Poland Portugal Romania Slovakia Slovenia Spain Sweden	England Estonia Ireland Luxembourg Scotland	Italy Malta	Austria Cyprus Denmark Finland Netherlands

89. Most of the rules of exclusive jurisdiction in the Member States are to be found in family law and successions matters. In the civil and commercial matters falling within the scope of application of the Brussels I regulation, the rules of exclusive jurisdiction are limited to a few matters which tend to be similar across the Member States.

For the most part, these matters are the same as those which are subject to exclusive jurisdiction under article 22 of the Brussels I regulation. Thus, the courts of the Member States will *often* deny the recognition of non-EU judgements when the case relates an immovable located within the forum[173]. They will also *sometimes* deny the enforcement when the case relates to the registration and validity of intellectual property rights, certain company law matters, and proceedings relating to the validity of entries in public registers and enforcement measures (see the table below).

In most of these cases, article 22 of the Brussels Regulation *would apply* if the case had been brought in the European Union (as the application of article 22 of the regulation does not require that the domicile of the defendant be in the Community). Thus, in practice, the denial of the enforcement of the non-EU judgement under

[171] See in particular the Report for the Netherlands.
[172] Including breach of public policy, infringement of general rules of private international law or internationally acceptable jurisdiction.
[173] However, there are Member States where no formal rule of exclusive jurisdiction for proceedings relating to the rights *in rem* in immovable property exist. See the Reports for Belgium (under Question 19) and for the Netherlands (under Questions 17 and 19 (c)).

national law in these cases only promotes and preserves the Brussels I regime[174]. Conversely, a problem of conformity with the Brussels I system might arise in the Member States where the infringement of an article 22 jurisdiction is seemingly not a ground to deny the enforcement of a non-EU judgment.

It should be noted that in some Member States, the scope of exclusive jurisdiction under national law is *broader* than under article 22 of the Brussels I Regulation. For instance, in a number of Member States, the exclusive jurisdiction for disputes relating to tenancies of immovable property covers all tenancies, even for a period shorter than six months[175]. Another example can be found in the matter company law: in Belgium, judgments from non-EU courts will be denied recognition not only when they concern the validity of the decisions of the organs of companies, but also more generally when they relate to the "functioning" of a company established in Belgium[176].

In these cases, the national rules of jurisdiction serve a dual role: (i) to establish the jurisdiction for actions against non-EU defendants (article 22 would not apply), and (ii) to ensure that any judgment coming from a non-EU State would not be recognized in these matters.

90. The law of some Member States provides rules of exclusive jurisdiction in *other matters* that those relating to the cases provided in article 22. In particular, exclusive jurisdiction is sometimes provided for matters relating to *consumer contracts*, to *employment contracts*, or when the foreign judgement was given in *breach of a choice of forum clause*[177]. For the most part, again, the denial of the recognition of the foreign judgments in these circumstances is in harmony with the Brussels I regime. Article 35(1) of the Brussels I Regulation expressly provides that EU judgments shall not be recognized in the Community when they conflict with the jurisdictional rules in consumer and insurance matters or the voluntary prorogation of courts. On the other hand, there is no such ground of defence in the event of breach of the jurisdictional rules in employment matter, so here the protection provided by national law in extra-community relations goes further than the Brussels I regime.

There are still other cases of exclusive jurisdiction under national law which find no equivalent at all in the Brussels I regime. These include, e.g., certain disputes relating to environmental matters[178], competition matters[179], and securities matters[180].

[174] In particular, it mirrors article 35(1) of the Brussels I Regulation, which provides that judgments (in practice, from other Member States) shall not be recognized if it conflicts with a rule of exclusive jurisdiction.
[175] While article 22(1) excludes from its scope of application most of short term tenancies.
[176] See article 115 of the Belgian Code of Private International Law.
[177] See the Reports for Belgium (where the issue is debated), France, Germany.
[178] See the Report for Germany.
[179] See the Report for Germany.
[180] See the report for Hungary.

91. It follows from the foregoing that in a number of Member States, some national rules of jurisdiction do currently serve an important role as a *tool of defence against the enforcement of non-EU foreign judgments*. In general, the circumstances where they serve such role are similar to those where the same defence exists under the Brussels I regime. However, in some limited cases, the defence against the enforcement of non-EU judgement based on the exclusive jurisdiction of the local courts under national law is broader than under the Brussels I regime.

92. *Table N: Most common grounds of exclusive jurisdiction whose breach can preclude the enforcement of non-EU judgements*

Exclusive jurisdiction in proceeding related with	**Member States**
Rights *in rem*, tenancies of, immovable property located in a Member State	Portugal, Bulgaria, Czech Republic, Scotland, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Romania, Slovakia, Slovenia, Spain, Sweden
Registration and validity of intellectual property rights registered in a Member State	Belgium, France[181],Germany, Hungary, Italy, Slovakia, Slovenia, Spain, Sweden
Company law matters (validity, nullity, revocation of a decision, dissolution or liquidation/voluntary winding up of legal persons) established in Member State	Belgium, Scotland, Estonia, Greece, Hungary, Italy, Luxembourg, Poland, Slovenia, Spain
Validity of entries in public registers in a Member States	Portugal, Scotland, France[182], Hungary, Italy, Poland, Romania, Slovenia, Spain
Enforcement of a non-EU judgement in a Member State	Scotland, France, Hungary, Italy, Poland, Slovenia, Spain
Insolvency and compulsory winding up of companies established in a Member State	Portugal, Hungary, Slovenia
Breach choice of court agreement	France, Germany, Belgium[183]

(E) DECLINING JURISDICTION

(18) FORUM NON CONVENIENS AND SIMILAR CONCEPTS

When the defendant is domiciled in a non-EU State and the jurisdiction is based on domestic law, is there any general rule or practice allowing your courts to decline jurisdiction/stay the proceedings (such as forum non conveniens *or other similar techniques)? If so, is this rule/doctrine used to*

[181] Exclusive jurisdiction conferred upon French courts because of the involvement of the French State or French public service
[182] *Idem.*
[183] The issue is debated in legal writing.

stay proceedings only in favour of the court of the non-EU States or also in favour of EU-States?

93. A concept allowing a court having jurisdiction for a claim not to exercise such jurisdiction for reasons of convenience or inappropriateness of the forum is absent in the majority of the Member States. This is not surprising since in general, the doctrine of *forum non conveniens* is used in common law jurisdictions (England and Ireland) or in legal systems which are influenced by the common law tradition (Cyprus, Malta, Scotland).

The basic condition for a stay of proceedings to be granted under the *forum non conveniens* doctrine, pursuant to English case law, is that the court seized must be satisfied that there is some other available forum, having jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice[184].

The concept of *forum non conveniens* seems also to have found a propitious ground in two recently admitted Member States which are not countries of a common law tradition, namely in Lithuania and Hungary. In Lithuania, the Supreme court has issued guidelines[185] for dealing with cross-border cases, calling for consideration of the kind of elements hat are part of the *forum non conveniens* analysis. According to the Report, *"(i)f the defendant and most evidence are in foreign state, with which no bilateral agreement is concluded, the examination of the case may becomes very difficult, therefore if the dispute does not fall under the exclusive jurisdiction of Lithuanian courts, Lithuanian courts might refuse to examine the case and suggest the plaintiff to bring the claim to the court in which the defendant and most evidence are located*". The report stresses that a *forum non conveniens*-like rule may be derived from national law, which provides that a court may transfer a case for examination to another court if it considers that the latter is better placed to examine the case, because it is closer to the evidence. Legal writings highlight that, in such case, the court may not refuse to hear the case if the parties do not have a real opportunity that it be settled by the foreign court or because the trial of the case abroad would be very unfavourable to the parties. These considerations reflect the two basic components of the *forum non conveniens* doctrine i.e. that there must be another clearly *more appropriate* forum which is also *available*.

There is also some case law in Hungary suggesting that the courts will decline jurisdiction under a technique similar to *forum non conveniens* when the case is only very loosely connected with Hungary[186]. Such kind of technique was also in use in the

[184] See *Spiliada Maritime Corp. v Cansulex*, [1987] AC 460, at 478. See also A. Briggs and P. Rees, *Civil Jurisdiction and Judgments* (LLP, 3rd ed.), para. 4.11 s.
[185] "Summary review of courts practice" in the domain of the private international law, issued by the Supreme Court of Lithuania on 21 December 2001. Under Lithuanian law such summary reviews is not binding on courts but are regarded as recommendations. See Report for Lithuania, Question 18.
[186] See the Report for Hungary, Question 18.

Netherlands until recently, but it has been abandoned as the consequence of the introduction in 2002 reform of new rules of international jurisdiction.

Finally, in three Member States, it is reported that as a matter of principle (and though there is no case law), jurisdiction can be declined in the case of abuse of the right to bring proceedings under the applicable jurisdictional rules (Spain[187] and Belgium[188]), or where the jurisdiction was obtained *"surreptitiously"* and *"in bad faith"* (Germany)[189]. Also, in Belgium, the judges have an inherent power to stay their proceedings for a certain time, provided that such stay does not lead to a denial of justice[190].

94. In *Owusu v Jackson*[191], the Court of justice has ruled on the application of the doctrine of *forum non conveniens* in an extra-community case. The Court has decided that when proceedings is brought in the EU at the place where the defendant is domiciled, the courts cannot decline jurisdiction *"on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action"*.

This was *not* a case of residual jurisdiction, for in the case the defendant was domiciled in the EU and jurisdiction was consequently grounded on article 2 of Brussels I. The Court of justice has not ruled on the applicability of *forum non conveniens* when the defendant is domiciled in a third State and jurisdiction is grounded on national law pursuant to article 4(1) of the Brussels I Regulation. It would seem to appear from the national Reports for England and Scotland that in such situation the doctrine of *forum non conveniens* may still operate. Such solution would seem to be in accordance with the principle that when article 4(1) refers to national law, this must be understood as a reference to the national jurisdictional rules as they are applied in practice, including the limitations imposed to the exercise of such jurisdiction under that law[192].

(19) Declining Jurisdiction when the Defendant is Domiciled in a Third State

When the defendant is domiciled in a non-EU State and the jurisdiction is based on domestic law pursuant to article 4 of the Brussels I regulation, can the courts decline jurisdiction/stay their proceedings in favour on a non-EU court on the grounds that there this court has been appointed in an agreement, that it has already been seized of a parallel proceedings, or that it has "exclusive" jurisdiction to hear the claim?

[187] See the Report for Spain, Question 18.
[188] See A. Nuyts, *L'exception de* forum non conveniens, Bruylant, Brussels, 2003, para. 528 s.
[189] See the Reports for Germany, Question 18.
[190] See the Report for Belgium, Question 18.
[191] Case C-281/02 [2005] ECR I-1383.
[192] See Cheshire and North, *Private International* Law, Butterworths, 13rd ed., p. 266-267; A. Nuyts, *op. cit.*, para. 171.

95. While few Member States entrust their courts with a general power to decline jurisdiction on grounds of inappropriateness (see Question 18 above) , in most of them it is possible for the courts to decline jurisdiction or to stay their proceedings *in specific situations*, mainly because of a choice of court agreement appointing a foreign court (a), because of a parallel proceedings being conducted abroad (b) or, finally, because the proceedings fall under the exclusive jurisdiction of the court of another State (c).

For the purpose of this question, it is supposed that the defendant is domiciled *in a third State*, with the consequence that the jurisdiction falls under the residual jurisdiction of article 4(1) of the Regulation. The next question (No 20) deals with the same questions when the defendant is domiciled in the EU.

(a) Non-EU Jurisdiction Agreements

When the defendant is domiciled in a non-EU State and the jurisdiction is based on domestic law pursuant to article 4 of the Brussels I regulation, can the courts decline jurisdiction/stay their proceedings in favour on a non-EU court on the ground that there is a choice of court clause designating such court?

96. In all the Member States, without exception, choice of court agreements appointing the courts of a third State are in principle respected and enforced by the courts. It is often noted that this solution is grounded, in private international law, on the principle of party autonomy and, in contract law, on the *pacta sunt servanda* principle. It is worth noting that the validity of non-EU choice of court agreements is recognized even in the countries (in particular Denmark and Finland) where the courts refuse to decline jurisdiction because of a foreign parallel proceedings of because of the exclusive jurisdiction of the foreign court[193].

Party autonomy in matters of cross-border jurisdiction may therefore be regarded as a general principle admitted in the procedural laws of all of the Member Sates.

97. While the principle of validity of non-EU choice of court agreements is unanimously recognized, the conditions for the enforcement of such agreements vary greatly from one Member State to another. The conditions established in national law may be roughly classified into four categories relating, respectively, to the agreement itself, to the parties to the agreement, to the foreign proceedings, and to the exclusive jurisdiction of the local court.

[193] The reason for that position is that, in principle, any foreign judgement will not be recognised in these Member States: see below.

Firstly, with respect to the *conditions of validity of the agreement*, the law of most Member States requires that the agreement (aside from being substantially valid) be established in writing or, at least, evidenced in writing. In line with article 23 of the Brussels I Regulation, some member States also allow for the agreement to be concluded following the usage and forms accepted in trade. In one Member State only (the Netherlands), the choice of court agreement may be validated though it was not established in writing.

In some countries, a distinction is made between exclusive and non-exclusive (or alternative) choice of court clauses[194]. The exclusive agreement has a double effect: it confers the jurisdiction to a foreign court and derogates from the jurisdiction of any other the court. The non-exclusive agreement confers the jurisdiction to the designated court but does not preclude bringing proceedings before any another court having jurisdiction under the ordinary rules. In the majority of the Member States the nature of the agreement needs to be determined individually by the court in each particular case. In some Member States a rule similar to the one of article 23 of the Brussels I Regulation has been adopted i.e. the choice of court is considered to be exclusive, unless the parties agreed to the contrary.[195] In others, an opposite solution has been retained[196].

Secondly, there are often *restrictions as to the kind of parties who can enter into choice of court agreements or as to the type of relationship that can be covered*. Such restrictions are often derived from national law, and consist to confine the use of choice of court agreements to certain categories of persons or dealings, such as : (i) contracts between businesses or entrepreneurs[197] ; (ii) dealings where the parties have the free disposition of their rights[198]; (iii) dealings that do not involve "weaker" parties such as consumers, employees or insured parties[199] ; (iv) situations where at least one of the parties is a foreigner (defined as a party "not subject to the general jurisdiction"[200], or as a citizen or legal entity with a registered office abroad[201]); (v) "international" contracts[202].

Thirdly, some Member States include *restrictions with respect to the foreign proceedings*. Thus, in three Member States[203], it is expressly recognized that jurisdiction can only be declined if the judgment from the appointed court is eligible

[194] This distinction is important because, as will be observed below, the scope of the discretion given to the court varies depending on the nature of the agreement.
[195] See the Report for Slovakia, Question 19(a) and for Hungary, Question 20(a).
[196] See the Report for Portugal, Question 19 (a).
[197] See the Reports for Lithuania and Poland. Such limitation also exists in French internal law, but it is not applicable to international contracts.
[198] See the Reports for Belgium, the Netherlands and Portugal.
[199] See above, Question 13.
[200] See Report for Germany.
[201] See Report for Slovenia.
[202] See, e.g., Report for France.
[203] See the Reports for Austria, Belgium, Cyprus.

for recognition and enforcement under the national rules governing the effect of foreign judgments. As by definition the foreign judgment has not yet been given at that time, the court must assess, on the basis of all the circumstances of the case, the prospects that the future judgment will meet the conditions to be recognized and enforced in the forum. To the contrary, in two other Member States[204], the issue of the future recognition of the future judgment is irrelevant for a stay of proceedings in case of a non-EU choice-of-court agreement.

In several other Member States, there is no general assessment of the eligibility for enforcement of the future judgment, but it is still required that the parties have access in the foreign court to a fair trial. In Austria and Cyprus, foreign choice-of-court agreement will not be upheld if civil proceedings abroad seems to be impossible or unacceptable. A similar solution is adopted in Belgium, where the courts will not stay the proceedings if the jurisdiction of Belgian courts is claimed under the *forum necessitatis* rule[205]. In *Germany*, the derogatory effect of a choice-of-court agreement is not admitted if there is no assurance that a proper judgment in accordance with the elementary rule of law will be given. The so-called *"requirements of justice"* is also part of the doctrine of *forum non conveniens* which is used as the ground to decline jurisdiction in favour of the appointed court[206]. Finally, in *Slovakia* the courts may entertain jurisdiction over a dispute if the designated court refuses to act.

Finally, in a large group of Member States[207], the principle of party autonomy only applies if it does not conflict with rules on the *exclusive jurisdiction of the domestic courts*. There is a parallel with the issue analysed under Question 17, namely the denial of enforcement of a foreign judgments because of the infringement of a local rule of exclusive jurisdiction. Since any judgment from a foreign court in a matter which falls within the exclusive jurisdiction of the local courts could not be enforced, it is logical not to give effect to a choice of court clause in such situation. The same solution applies within the Brussels I Regulation.

98. In general, when a non-EU choice of court agreements meets all the conditions to be enforced under national law, the courts are *required* to decline jurisdiction or stay the proceedings[208]. The situation is however different in some Member States, including Austria, Belgium, France, Italy and Slovenia, where the court has a certain discretion as the appropriateness of enforcing the non-EU choice of court agreement in the particular circumstances of the case. In the jurisdictions where the doctrine of

[204] Germany and the Netherlands.
[205] See Question 16.
[206] See the Report for England and Whales Question 18 (2). Following these requirements a stay of proceedings may not be granted in certain circumstances i.e. (a) the foreign judiciary is not independent, (b) the excessive delays in handling of the proceedings abroad, (c) Claimant would be liable to imprisonment if he were to return to the alternative forum, etc.
[207] See the Reports for Finland, France, Greece, Hungary, Lithuania, Luxembourg, Poland, Portugal, Romania and Slovenia.
[208] See the reports for England and Whales, Scotland, Germany, Hungary, Ireland, the Netherlands, Portugal, Slovakia, Spain.

forum non conveniens applies, including England, Ireland and Scotland, there is also in theory some flexibility, though in practice the courts are most reluctant to overturn the parties' choice under such doctrine. But this is true only insofar as the exclusive character of the agreement is clear, if not the courts may continue the proceedings it they have jurisdiction under the domestic rules[209].

(b) Parallel proceedings in Non-EU courts

*When the defendant is domiciled in a non-EU State and the jurisdiction is based on domestic law pursuant to article 4 of the Brussels I regulation, can the courts decline jurisdiction/stay their proceedings in favour on a non-EU court on the ground that this court is seized of a parallel proceeding? If so, is it required for the court to decline jurisdiction that the foreign court be seized before your own national court (*prior tempore *rule)?*

99. As far as parallel proceedings in non-EU countries are concerned, there is somewhat less uniformity in the solutions adopted in the Member States than in the case of non-EU choice-of-court agreements. There is however a general trend to take into account, under several conditions, an international *lis pendens* situation. Nineteen national reports[210] make clear that the courts *must* or *may* stay the proceedings if parallel proceedings involving the same dispute is pending in a non-EU State. In an additional three Member States, while there is no express rule for international *lis pendens*, the reporters note a tendency to apply, under certain conditions, either the internal *lis pendes* rule or, by analogy, the rule of the Brussels I Regulation[211].

On the other hand, *in six Member States*, either there does not seem to be any rule at all that would govern such matter[212], or parallel proceedings will be taken into account only when there is an international treaty obligation to do so[213].

100. In the countries where *lis pendens* is recognized internationally, it is usually subject to strict conditions, which vary from Member State to Member State. While it is delicate to draw general conclusions from the national reports on this point, the main conditions in court practice seem to be the following.

First, except in one single country, it is required that the parallel proceedings involves the same dispute, which generally implies, in line with the Brussels I regime, that the

[209] See the Reports for Scotland Question 19(a), and Portugal, Question 19 (a).
[210] See the Reports for Austria, Belgium, Cyprus, England and Whales, Scotland, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Slovenia, Spain, Sweden.
[211] See the Reports for Bulgaria, the Czech Republic and Slovakia.
[212] See the Report for Romania.
[213] See the reports for Denmark, Finland, the Netherlands, Poland and Portugal.

parties, object and cause of the dispute be the same[214]. The only country where parallel *related* proceedings (as opposed to *identical* proceedings) is taken into consideration is seemingly France (aside from the countries where there exist a general discretion under the *forum non conveniens* doctrine). According to the report for France, if it is shown that it is in the interest of justice to manage and determine together related proceedings in order to avoid the risk of irreconcilable decisions, the court *may* stay its proceedings, even though there is no identity of parties nor of the object of the dispute.

Second, in the majority of the Member States[215], the existence of a foreign parallel action may justify to decline jurisdiction only when it was instituted before the proceedings before the national court. The *prior tempore* rule may therefore be regarded as a general trend in the national law of the Member States. There are however three countries (Austria, England and Ireland) where the timing issue is irrelevant for the stay of proceedings.

Third, in a sizable number of countries (nine), the court must assess the prospects for the recognition and enforcement of the (future) foreign judgement before declining jurisdiction[216]. The stay of proceedings must be refused if the foreign judgement is likely not to be recognized and enforced under the national rules of the forum. As a related condition, in three countries, jurisdiction will not be declined if the proceedings abroad do not grant a proper legal protection[217], if it is not in the interest of proper administration of justice[218], or if it can be anticipated that the foreign court will not settle the dispute within a reasonable time period[219]. The issue of proper legal protection is also examined in the context of the application of the *forum non conveniens* doctrine in those countries which apply it[220].

Finally, some Member States have developed specific conditions relating to the proper jurisdiction of the foreign court. In Malta and in Spain, before staying the proceedings the court must be satisfied that the foreign court has jurisdiction over the dispute, according to the national standards of jurisdiction. In France, conversely, the courts will not grant a stay if the proceedings fall under the exclusive jurisdiction of French courts.

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[214] The distinction between the "object" and the "cause" of proceedings comes from the French law and is known in countries influenced by this legal system. In the context of article 21 of the Brussels Convention establishing the lis pendens rule, the meaning of words "*objet*" and "*cause*" has been explained by the Court of Justice in the ruling of December 6, 1994 *The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj"* [1994] ECR I-5439, paras 39 and 41.
[215] See Reports for Belgium, Bulgaria, Cyprus, Czech Rep., Germany, Greece, Hungary, Luxembourg, Scotland, Slovakia, Slovenia, Spain, Sweden.
[216] See the Reports for Austria, Belgium, Cyprus, Estonia, France, Italy, Slovenia, Spain, Sweden.
[217] See the Report for Germany.
[218] See the report for Belgium.
[219] See the Report for Estonia.
[220] See in particular the Reports for England and Scotland.

101. By contrast with a non-EU choice of court agreement, the existence of non-EU parallel proceedings is usually *not* the ground for a mandatory dismissal of the case. Indeed, in the vast majority of the Member States, it is in the court's discretion whether to stay the proceedings or not in case of ongoing parallel proceedings in a non-EU State.

There are however three Member States (Germany, Greece and Slovenia) where the stay of proceedings is considered to be mandatory. The report for Hungary also refers to a debate in legal writings relating to the scope of discretion of the judge. Finally, in Bulgaria, the *lis pendens* rule of Brussels I is seemingly applied by analogy, but it is unclear whether this analogy also applies with respect to the lack of discretion of the stay under article 27.

102. *Table O: Parallel Proceedings with non-EU courts*

<table>
<tr><th colspan="3">Member States applying the lis pendens rule with non-EU States</th><th>Member States applying the related proceedings plea with non-EU States</th></tr>
<tr><td colspan="3">Austria, Belgium, Cyprus, Czech Republic, England, Scotland, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Slovenia, Spain, Sweden</td><td>France, Cyprus, Ireland, England, Scotland</td></tr>
<tr><td colspan="3">Conditions for the stay</td><td>Conditions for the stay</td></tr>
<tr><td>Prior tempore rule</td><td>Foreign judgement eligible for recognition</td><td>Proper legal protection abroad</td><td rowspan="2">France
- close relation between proceedings
- risk of irreconcilable decisions

Cyprus
England
Scotland
Ireland
- application of appropriateness test of forum non conveniens doctrine</td></tr>
<tr><td>Belgium, Bulgaria
Cyprus
Czech Rep.
Germany
Greece
Hungary
Luxembourg
Netherlands
Slovakia Slovenia
Spain
Sweden
Scotland</td><td>Austria
Belgium
Cyprus
Czech Republic
Estonia
France
Italy
Slovenia
Spain
Sweden</td><td>Estonia
Germany

England
Scotland (application of appropriateness test of forum non conveniens doctrine)</td></tr>
</table>

(c) Subject Matter Closely Related to a non-EU State: "Exclusive" Jurisdiction in a non-EU State

When the defendant is domiciled in a non-EU State and the jurisdiction is based on domestic law pursuant to article 4 of the Brussels I regulation, can the courts decline jurisdiction/stay their proceedings in favour on a non-EU court on the ground that the subject-matter of the dispute is closely related to the foreign State (i.e. the equivalent of "exclusive jurisdiction" under the Brussels I regulation), such as when the dispute relates to a right in rem *in an immovable property or to a registered intellectual property?*

103. It is quite widely recognized that EU courts should not entertain proceedings relating to disputes whose subject matter is closely related to a third State. Thus, in at least twenty Member States (see the table below), the courts *may* or *must* stay the proceeding or dismiss the claim when the dispute concerns, in particular, immovable properties situated abroad. Among these twenty Member States are included the countries which apply the *forum non conveniens* doctrine. It was observed in several reports that even though no clear-cut rule exists to that effect, the courts would rather be reluctant to be involved in that kind of disputes closely related to a foreign territory[221].

There is, however, a small group of Member States where there is no specific obligation to decline jurisdiction because of a close connection of the subject matter of the dispute with a third State. This group includes Denmark, Finland and the Netherlands, and maybe also France[222] and Germany[223], though the issue is less clear for these two countries.

104. When declining jurisdiction is possible on this ground, it usually covers at least matters relating to right *in rem* in an immovable property situated in a third State[224]. In nine Member States, proceedings concerned with the validity or registration of foreign intellectual/industrial property rights are also considered as closely related with a third State and can justify dismissal[225]. On the other hand, in two jurisdictions

[221] See the Report for Ireland and Cyprus.
[222] While no general obligation to decline or the stay the proceedings jurisdiction exists in France, the existence of close links between the dispute and the third State will weight in favour of French courts admitting to either stay the proceedings or decline jurisdiction when so requested on the basis of parallel proceedings.
[223] The issue is discussed in legal writings and it seems difficult to draw a firm conclusion under current law.
[224] See Reports for Austria, Cyprus, Hungary, Ireland, Italy, Latvia, Luxembourg, Poland, Slovakia, Slovenia, Spain, Sweden. This issue is, however, unclear under the Belgian law. It should be noted that in the Czech Republic and Spain the obligation to decline jurisdiction does not follow from national law but from international conventions.
[225] See Reports for Austria, Belgium, Cyprus, Hungary, Latvia, Slovakia, Slovenia, Spain (see, for the latter three Member States, Question 17 of the Reports in connection with Question 19(c) and Sweden. In three countries (Austria, Germany and Sweden) the infringement of foreign intellectual property rights is not considered as falling under the exclusive jurisdiction. But in Austria the courts may decline

(Scotland and Poland) the validity and registration of foreign intellectual property rights is not expressly considered as a subject matter closely related with the country of registration.

In some countries[226], the courts must also declare *ex officio* that they have no jurisdiction over disputes relating to certain company law matters (validity, nullity, functioning, dissolution or liquidation of legal persons having their principal establishment in third State). A few countries apply the same rule in proceedings concerning the validity of the entries in public registers and with enforcement measures[227].

It should be noted that in general, these grounds for dismissing or staying proceedings do not seem to be *not* subject to the demonstration that the foreign court has exclusive jurisdiction under its own rules of jurisdiction. In relation to third States, the assessment seems to be purely unilateral, in view of the law of the forum: when the subject matter is closely related to a foreign country in the situations identified above, this is as such a ground for a dismissal or stay of proceedings.

105. The Member States are quite evenly divided as to whether the dismissal or stay of proceedings is mandatory in the above mentioned situations. Courts in Austria, Belgium, Greece, Hungary, Italy, Scotland, Spain and Sweden, are *required* to decline jurisdiction if, according to their national law, the subject mater of the dispute is considered as closely related to a third State. In such circumstances courts in these Member States are simply considered as not having jurisdiction to entertain the proceedings. On the other hand, courts in Bulgaria, England and Whales, Ireland *may* decline jurisdiction if the subject matter of the dispute is closely related to a third State. No information as to the scope of discretion of the national courts in that domain may be drawn from the other national reports.

jurisdiction in favour of foreign courts if the infringement of intellectual property rights (or acts of unfair competition) does not have a disadvantageous impact on the Austrian market.

[226] Including Belgium, Hungary, Scotland, Slovenia and Spain. In Slovenia and Spain, indirect application is made of national rules on exclusive jurisdiction. See also the Reports for Luxembourg and Poland (under Question 19).

[227] See Reports for Hungary and Scotland, for Poland, Slovenia and Spain (under Question 19 (c) and Question 17).

106. *Table P: Subject matter of dispute closely related to the territory of a non-EU State*

<table>
<tr><th colspan="3">Ground to decline jurisdiction
(mandatory or facultative)</th><th>No specific ground to decline jurisdiction</th></tr>
<tr><td colspan="3">Austria, Belgium, Cyprus, Czech Republic, Hungary, Greece, England and Whales, Ireland, Italy, Latvia, Luxembourg, Malta, Poland, Scotland, Slovakia, Slovenia, Spain, Sweden</td><td rowspan="3">Denmark,
Finland,
Netherlands
France</td></tr>
<tr><td colspan="3">Types of matters where jurisdiction must/may be declined</td></tr>
<tr><td>Action in rem relating to immovable property</td><td>Validity or registration of IP rights</td><td>Certain company law matters</td></tr>
<tr><td>Austria
Cyprus
Hungary
Ireland
Italy
Latvia
Luxembourg
Poland
Slovakia
Slovenia
Spain
Sweden</td><td>Austria
Belgium
Cyprus
Hungary
Latvia
Slovakia
Slovenia
Spain
Sweden</td><td>Belgium
Hungary
Luxembourg
Poland
Scotland
Slovenia
Spain</td><td></td></tr>
</table>

(20) DECLINING JURISDICTION WHEN THE DEFENDANT IS DOMICILED IN THE EU

When the defendant is domiciled in an EU State and the jurisdiction is based on the uniform rules of the Brussels I regulation, can the courts decline jurisdiction/stay the proceedings in favour of a non-EU court on the ground that there this court has been appointed in an agreement, that it has already been seized of a parallel proceedings, or that it has "exclusive" jurisdiction to hear the claim?

107. The only difference between this question and the prior one is that in the latter, the defendant is domiciled in a third State, while in the former, he is domiciled in a Member State of the European Union. As a consequence, the case is no longer governed by article 4(1) of the Brussels I Regulation (defendant domiciled in a third State), but it is subject to the basic provision of article 2(1), which states that *"(s)ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State"*.

The Brussels I regime does not provide any specific rule to deal with the situation where at the same time the defendant is domiciled in a Member State and the case has a special connection with the court of a third State, such as because such court has

been appointed in a choice of court clause, has been seized of a parallel action, or holds an "exclusive" jurisdiction.

In *Owusu v Jackson*[228], the Court of justice has ruled that when proceedings are brought in a Member State at the place where the defendant is domiciled, the courts cannot decline jurisdiction on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action. As already discussed (see Question 18 above), *Owusu* bars any stay of proceedings in favour of a non-EU court under the doctrine *forum non conveniens*. The Court has not ruled on the admissibility of declining jurisdiction in favour of non-EU courts in the specific circumstances mentioned above, that is where the case has a specially strong connection with the third State. It has however been suggested in legal writing that *Owusu* could imply a general bar against declining the jurisdiction provided under the Regulation in favour of the courts of non-EU States[229]. Such proposition had also been made in the Report on the San Sebastian accession Convention to the Brussels Convention, but only with respect to disputes relating to immovable property in a third State[230].

108. The objective of Question 20 was to assess how the courts in the Member States currently deal with this issue in practice: whether they decline jurisdiction or not in these circumstances, and if so, whether they apply national law or the rules of the Regulation pursuant to the so-called "*effet réflexe*" doctrine. The latter consists in an analogous application of the provisions of articles 22, 23 and 27 of the Regulation, which govern respectively the effect of a foreign choice of court clause, parallel proceedings or exclusive jurisdiction. While these provisions only deal with the situation where the alternative forum is in another Member State, the *effet réflexe* doctrine would call for a mirror application of said provisions in relations to third States.

It is important to note from the very beginning that in the majority of the reports, the answers given to Question 20 are based either on legal writings or on a speculative assessment of national practice, as the case law relating to this issue is scarce or often non existent. Therefore, the analysis below is tentative and must be taken with caution.

109. There is a large consensus that in the three circumstances indicated above, the courts of the Member State where the defendant is domiciled are empowered to decline jurisdiction in favour of the non-EU court. In a large majority of States, such stay of proceedings would seem to be based exclusively on *national law*. For the most part, reference is purely made to the national rules that apply when the defendant is

[228] Case C-281/02 [2005] ECR I-1383.
[229] See the discussion in R. Fentiman, "Civil Jurisdiction and Third States: Owusu and After", *Common Market Law Review*, June 2006.
[230] See Report De Almeida Cruz, Desantes Real and Jenard, *OJ*, 28 July 1990, C189, p. 47.

domiciled in a third State (reviewed above, Question 19)[231]. So, in practice most courts would not seem to distinguish between the situation of article 4(1) (defendant domiciled in a third State) and the situation of article 2(1) (defendant domiciled in the EU).

There would seem to be only one country (Spain) where it is plainly admitted that the ground to decline jurisdiction is not national law but *the provisions of the Brussels I Regulation*, applied by analogy under the *effet réflexe* doctrine. Thus, it is reported that Spanish courts would only decline jurisdiction in the specific circumstances and under the specific conditions provided under articles 22, 23 and 27 of the Brussels I Regulation. In a few other Member States it has been suggested to apply by analogy the provisions on exclusive jurisdiction (France and Germany) and on choice of court agreements (in Germany), but not on parallel proceedings (the *prior tempore* rule of article 27 would indeed seem to be intimately linked to the principle of mutual trust in the European judicial area).

The *effet réflexe* doctrine, or the analogous application of the Brussels I regime, are also considered in other national reports, but only to justify *the principle* that jurisdiction can be declined in the three circumstances indicated, while reference is made to national law as to the conditions under which jurisdiction can effectively be declined[232]. In Some Member States, it is however suggested that the reference to the EU regime could be more meaningful, for it could imply that the national rules can only be applied if they do not conflict with the harmonized rules[233]. Thus, in Lithuania, it is felt that jurisdiction could not be declined on the ground of considerations of appropriateness, while in principle in this country the *forum non conveniens* applies. To the contrary, in England and Scotland, it is considered that the courts could decline jurisdiction under the *forum non conveniens* doctrine where there is parallel proceedings in a third State[234].

Finally, in a very limited number of Member States, it has been suggested that since the Brussels I Regulation does not include rules about declining jurisdiction in favour of non-EU courts, such possibility would not exist and the jurisdiction under article 2 would be compulsory. The prohibition to decline jurisdiction would however concern only non-EU parallel proceedings[235] and non-EU exclusive jurisdiction[236], but *not* non-EU choice of court clauses.

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[231] See the Reports for Austria, Bulgaria, Czech Republic, England and Whales, Scotland, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Sweden.
[232] See, e.g., the Report for Austria, Belgium, Germany. See also the Report for Italy. To the contrary, in other Member States, the application of national law is regarded as a form of *rejection* of the *effet réflexe* doctrine. See the Reports for the Netherlands and Portugal.
[233] See in particular the Reports for Slovakia and Lithuania.
[234] See the Reports for England and Scotland (where reference is however made to the possibility to apply other techniques), Question 20.
[235] See the Report for the Netherlands.
[236] See the Report for Germany.

110. As the foregoing demonstrates, the lack of harmonized rules determining the cases where EU courts can decline the jurisdiction provided to them by the Regulation in favour of non-EU courts generates a great deal of confusion and uncertainty in national law.

(F) THE ADEQUATE PROTECTION (OR LACK THEREOF) OF EU NATIONALS AND/OR DOMICILIARIES THROUGH THE APPLICATION OF NATIONAL JURISDICTIONAL RULES

111. The questions of this Section have been introduced with the purpose of testing in practice the propositions included in the Project Technical Specifications, according to which *"the absence of common rules determining jurisdiction of Community courts for actions against defendants outside the EU can jeopardize the application of mandatory Community legislation, for example on consumer protection, commercial agents or product liability"*, and the lack of harmonisation may also *"constitute an obstacle for the proper functioning of the internal market"* and *"undermine one of the key objectives of Brussels I (which is to) protect a Community defendant, (who may happen to be) accidentally outside the EU at the time proceedings is initiated"*[237].

Prior to reviewing whether national jurisdictional rules can *jeopardize* the application of Community legislation and objectives, it has appeared appropriate to test the reverse issue as to whether there is under current national law rules of jurisdiction that can serve to *avoid the risk* that a party be subject to inadequate treatment in a non-EU court.

(21) USE OF NATIONAL JURISDICTIONAL RULES TO AVOID AN INADEQUATE PROTECTION IN NON-EU COURTS

Is there any known case or practice where your courts have exercised jurisdiction on the basis of national rules in circumstances where it was shown that the plaintiff would not get a fair hearing or an adequate protection in the courts of non-EU States? If so, what was the basis of the jurisdiction?

112. While there is little case law in practice on this point, several national reporters note that the jurisdictional rules that are currently used in their country, pursuant to article 4(1) of the Brussels I Regulation, are broad enough to ensure the possibility to access their courts when there is a risk that a party would not get a fair hearing or an adequate protection in the courts of non-EU states.

[237] Annex I to the Contract, Section I.

Such remark has been made in particular by the reporters of the 10 countries whose legal system recognize the *forum necessitatis* (reviewed above, Question 16)[238]. It is noted in these countries that thanks to this rule, an EU plaintiff would in practice always have the right to access EU courts if he can prove that courts in non-EU States would not provide a fair hearing or an adequate protection of his rights. It has been suggested that this would actually be the purpose of the *forum necessitatis*, i.e. to offer an alternative to non-EU fora that ho do not guarantee a fair trial[239]. As is also noted in some reports, when the right to a fair hearing is jeopardized abroad, the courts will not only exercise their jurisdiction, but will also usually refuse (i) the application of the *lis pendens* rule, (ii) to enforce foreign choice of court clauses, and (ii) to recognize and enforce the foreign judgment.

Another reason for the relatively wide access to the courts of the Member States for actions against third States domiciliaries is the existence in most Member States of exorbitant rules of jurisdiction (reviewed above, Question 15). This element has also been expressly characterized as a tool to diminish the risk discussed here[240].

However, the protection of EU parties stemming from the *forum necessitatis* and from the *exorbitant jurisdiction* is by no means harmonized and generalized. In some Member States, these tools are either absent or do not provide an effective remedy. In addition, the forum *necessitatis* and the exorbitant jurisdiction will normally *not* allow to take into account considerations relating to the preservation of EU substantive policies. The forum *necessitatis* is traditionally based only on *procedural* considerations (to guarantee an effective access to justice: see above, Question 16), and the exorbitant jurisdiction depends on the existence, in the actual case, of the specific connecting factor on which it is grounded (citizenship, presence of the defendant within the jurisdiction, location of assets, etc.), irrespective again of considerations of a substantive nature.

Thus, the reporter for a Member State where the *forum necessitates* is used still notes that its courts *"will not retain their jurisdiction only on the basis of an alleged inadequate protection in a non-EU State"*[241].

(22) LACK OF JURISDICTION UNDER NATIONAL RULES HAVING THE EFFECT TO DEPRIVE EU PLAINTIFFS OF AN ADEQUATE PROTECTION

113. The Project Technical Specifications make the proposition, as already noted above, that *"the absence of common rules determining jurisdiction of Community courts for actions against defendants outside the EU can jeopardize the application of*

[238] See e.g. the answer to Question 21 in the Reports for Austria, Belgium, France, Germany, Netherlands, Portugal, Spain.
[239] See e.g. the Report for Belgium.
[240] See e.g. the Report for Finland, under Question 23.
[241] See the Report for Luxembourg, Question 21.

mandatory Community legislation, for example on consumer protection, commercial agents or product liability". It is further stated in this respect that *"the application of mandatory Community rules cannot be guaranteed if Community law does not at the same time guarantee that a Community court is competent to hear the case"*[242].

These propositions have been tested in the practice of the Member States, with respect successively to consumer matters (a), employment matters (b) and any other matters which are the subject of mandatory Community legislation (c).

(a) Claims from EU Consumers against non-EU defendants

Is there any known case or practice where your courts have found not to have jurisdiction or have declined jurisdiction (including on the basis of a foreign choice of court clause) to hear a claim brought by an EU consumer against a professional domiciled in a non-EU state?

114. While again, it appears from the national reports that there is very little case law on this point, a basic distinction needs to be made between two categories of Member States. The first group includes the States which provide in their national jurisdictional regime protective rules, in the form of a right of access of the consumer to his home court and of the prohibition or restriction of the effect of non-EU choice of court clauses. In these countries, which form a bare majority and have already been identified above, the EU consumer already enjoys currently a jurisdictional protection in extra-community relations which is similar or sometimes superior to the protection afforded in intra-community relations under the Brussels I regime (on this point, see above, Question 13(a)). In these States, there does not seem to be any risk of lack of consumer protection because of the reference to national law under article 4(1) of the Brussels I Regulation[243].

The second group includes the Member States which do not afford in their national law a jurisdictional protection to consumers engaged in cross-border dealings. In these States, there is clearly a risk that EU consumers be deprived of the substantive protection provided under consumer legislation, including when stemming from Community texts. Thus, in a case that was decided in Germany, the court declined jurisdiction to hear a claim that had been brought by a local consumer against a defendant domiciled in the USA, on the consideration that the Brussels I regime was not applicable[244] and that there was no jurisdictional protection under German law. Likewise, in the Czech Republic, it is noted that since the ordinary jurisdictional rules

[242] Annex I to the Contract, Section I.
[243] This is noted in some national reports, including those for Austria, Belgium and the Netherlands.
[244] In the case at hand, the US defendant had an establishment in Germany, but it was decided that since this establishment was located in the same State as the domicile of the plaintiff (in Germany), article 13(2) of the Brussels Convention did not apply, for this was a purely internal situation to Germany. See the Report for Germany, Question 22(a).

apply, Czech courts would have to decline jurisdiction if an EU consumer brought proceeding against a non-EU domiciliary[245].

(b) Claims from EU Employees against non-EU Employers

Is there any known case or practice where your courts have found not to have jurisdiction or have declined jurisdiction (including on the basis of a foreign choice of court clause) to hear a claim brought by an employee against an employer domiciled in a non-EU state?

115. The situation in employment-related disputes is very similar to the one in consumer matters. In the Member States which afford a jurisdictional protection to employees in their national law, employees can bring proceedings against non-EU employers and are usually guaranteed to benefit from the application of the local mandatory rules. This usually supposes however that the employee performs his activities in the Member State involved, even if is sometimes sufficient that the employee be domiciled there (see above, Question 13(a)).

On the other hand, in the Member States which do not provide any jurisdictional protection for extra-community disputes, employees are subject to the effect of choice of court clauses appointing the courts of a non-EU Member State, often the State where the employer is domiciled[246]. There is some case law to that end in several Member States, including France, Italy, Spain and Sweden[247]. While in certain of these cases the employee had performed his work outside of the European Union (even if he was domiciled in the EU at the time of the introduction of the action), in other cases the employee was carrying out his work on the territory of a Member State, and the court still declined its jurisdiction pursuant to a foreign choice of court clause appointing the courts of the domicile of the employer in a non-EU State[248].

(c) Claims from EU Plaintiffs in Community Regulated Matters

Is there any known case or practice where your courts have found not to have jurisdiction or have declined jurisdiction (including on the basis of a foreign choice of court clause) to hear a claim brought by a plaintiff domiciled in the EU in Community regulated matters (such as commercial agents, product liability, competition law, etc.)

[245] See the Report for the Czech Republic, Question 22(a).
[246] But only if the employer does not have an establishment in the EU, for an employer domiciled in a third State with an establishment in the EU is deemed to be domiciled at the place where this establishment is situated: see article 18(2) of the Brussels I Regulation.
[247] See the Reports for these countries (and also of the Czech Republic), at Question 22(b).
[248] See in particular the case law cited in the French Report, under Questions 19(a) and 22(b).

116. As several national reporters have stressed[249], one of the basic principles of private international law is the distinction between jurisdiction and applicable law. As much as a court will not decline jurisdiction only because a foreign law applies, a court will not in principle exercise jurisdiction only because the subject matter of the dispute is governed by the law of the forum, even if such law is of a mandatory nature or even of public policy. As a consequence, several national reporters note that when their courts lack jurisdiction (under national law) to hear proceedings against a defendant domiciled in a third State, they are required to effectively decline jurisdiction even if the consequence is that the plaintiff will be deprived of the application of mandatory Community legislation[250].

In addition, even when the national rules of jurisdiction provide a ground for EU plaintiffs to bring proceedings against non-EU defendants (such as under a rule of exorbitant jurisdiction), in general these rules can be derogated from through an agreement appointing the courts of a non-EU Member State. This principle, again, seems also to be valid in general in Community regulated matters. Thus, as already noted above (under Question 13(d)), in disputes involving an EU commercial agent, there would not seem in most Member States to be any restriction against the effect of a forum clause that would appoint the courts of a non-EU Member State, even if such clause would have the effect to deprive the commercial agent of the protection afforded to him by the Commercial Agent directive.

117. These principles need however to be qualified, in three different respects. Firstly, while several national reporters acknowledge that their courts would be required to decline jurisdiction under the applicable rules, it is widely noted that as of today, in court practice, there is little or no example where the courts have effectively declined jurisdiction with the consequence that an EU party was deprived of the right to invoke mandatory Community legislation. The problem may therefore be more theoretical than practical, though the risk clearly exists and cases may arise in the future where such problem will appear.

Secondly, in some Member States, the implementation of Community mandatory legislation is accompanied by specific jurisdictional provisions that give an absolute right of access to the local courts so as ensure the such Community legislation will be applied and respected. As noted above, in matters of commercial agent contracts, this is the case in three countries.

Thirdly, the reporters for a few Member States suggest that the principle of separation between the *forum* and the *jus* may need to be qualified in Community regulated matters. Thus, the reporters for Slovakia and Spain note that the EU policies and principles must be respected by their courts, and that where Community legislation

[249] See the Reports for Belgium, Germany, Luxembourg, Netherlands.
[250] See, e.g., the Reports for France, Germany, the Netherlands (but compare the answer under Question 13(d)), Spain (under Question 22 (c), but compare the answer under Question 24).

establish minimum common standards within the internal market, these standards could not be put in jeopardy only because of the application of domestic jurisdictional rules (but there is no case yet supporting such argument)[251].

In the Netherlands, it is noted that the commercial agent should have access to the Dutch courts, if necessary by breaching a non-EU choice of court agreement, if this is the only way to obtain the protection of the directive[252]. Finally, in Belgium, while the distinction between the *forum* and the *ius* holds in principle, it is sometimes subject to exceptions in matters that are subject to internationally mandatory rules (*"lois de police"*). Thus, in matters of distributorship agreements, in maritime matters, and sometimes in employment matters[253], the courts subject the validity of jurisdiction or arbitration agreements to the condition that their enforcement does not lead to the infringement of substantive mandatory rules of the *lex fori*. While there is not yet any reported cases where such kind of restriction was applied in Community related matters, conversely, there is seemingly not any reported case where the courts would have declined jurisdiction with the consequence that the plaintiff would be deprived of the protection of mandatory rules of Community law[254].

On the other hand, the reporter for France notes that, while some writers have suggested that jurisdiction could be established when it serves to ensure the application of public policy or mandatory rules of French law (including Community), case law does not seem for the moment to be inclined in favour of following that path[255].

(23) Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

Is there any reported or known case where a national of your country has not been able to invoke the protection of Community law or courts because of a transfer of domicile from or to a non-EU State?

118. This question was designed to address the concern raised in the Project Technical Specifications[256], under which *" the lack of national rules in cases where the defendant is domiciled outside the EU can undermine one of the key objectives of Brussels I. Historically, the aim of the Brussels Convention was to protect a Community defendant from the exorbitant fora of the other Member States. However, this protection only operates at the moment the procedure is initiated and any*

[251] See the Reports respectively for Slovakia and Spain, under Question 24 (compare with answer of the Spanish reporter under Question 22(c).
[252] See the Report for the Netherlands, Question 13(d).
[253] It should be noted that as from the entry into force of the Code of private international law, non-EU choice of court agreements are invalidated irrespectively of the application of the mandatory provisions of Belgian law.
[254] See the Report for Belgium, Question 22(c).
[255] Report for France, Question 24.
[256] Annex I to the Contract, Section I.

subsequent change of domicile is ignored. It currently depends on Member States' national law whether an exorbitant forum is used against a Community national who is accidentally outside the EU at the time proceedings are initiated".

As a matter of fact, there are two different problems that can be raised by the transfer of the domicile of a party from a Member State to a third State or vice versa. The first one, which is covered by the above mentioned excerpt, concerns the adequate treatment of the *defendant* who transfers his domicile from a third State to a Member State *after* the proceedings was introduced against him on the basis of an exorbitant rule of jurisdiction.

As noted by several national reporters[257], the jurisdiction is usually assessed on the basis of the situation at the time proceedings was filed with the court, irrespective of any further changes to the connecting factors. This is called the principle of *perpetuatio fori*. Thus, it is correct that the party who is domiciled in a non-EU State will properly be sued in any Member State where there is an exorbitant basis of jurisdiction, for instance because the defendant is a national of the State (France, Luxembourg and four other countries), was present within the territory of the forum when the action was brought (England, Ireland, and five other countries), or had assets located within the jurisdiction (Austria, Germany, and eight other countries). Even if such defendant moves his domicile in the EU after the action was introduced, this should not trigger the application of article 2 of the Brussels I Regulation. Jurisdiction based on the exorbitant ground of national law will remain.

While this conclusions is certain as a matter of principle, it could only be problematic if the defendant transfers his domicile in a Member State (i) other than where proceedings has been started, and (ii) other than where jurisdiction would be proper under the harmonized rules of the Brussels I regulation, for otherwise the exercise of jurisdiction at this place would of course not be objectionable from the perspective of the Brussels I scheme. The situation would therefore seem to be quite exceptional, and there does not seem to be any reported case where this problem was raised in practice.

119. The second issue, which is more likely to arise in practice, concerns the adequate treatment of the EU *plaintiff* who is confronted with a defendant who transfers his domicile from the EU to a third State *before* proceedings was started before the court of a Member State. It has been noted in a national report that, as a corollary to the principle of *perpetuatio fori*, jurisdiction is non-existent if the connecting factor (such as the domicile of the defendant in the EU) is not present at the moment of the introduction of the action, even if such connecting factor existed at an *earlier* stage, for instance when the activities from which the claim arises where carried out or when the dispute arose. This situation has arisen in practice in a case decided by the Higher

[257] See the Reports for Austria, Belgium, France, Germany.

Regional Court of Dusseldorf in Germany. In this case, the defendant had moved his domicile from Germany to Asia just prior to the introduction of the action. The Court found that there was no longer international jurisdiction for German courts to hear the action of the German plaintiff, who was claiming the payment of attorney's fees[258].

In some countries (including the Czech Republic, Estonia, Latvia and Finland), this problem would not arise since the jurisdiction can be established at the place of the *last domicile* of the defendant within the forum State[259]. This problem would not arise either if the jurisdiction can be established on another ground of jurisdiction under national law, such as on an exorbitant forum[260].

[258] Decision of 24 February 2005, case no. 1-2 U 64/03, cited in the Report for Germany, Question 23.
[259] See above, Question 15(a).
[260] This is noted expressly in the Report for France, Question 23.

(24) THE RISK THAT EU RULES AND PRINCIPLES BE PUT IN JEOPARDY BECAUSE OF THE APPLICATION OF NATIONAL JURISDICTIONAL RULES

Is there any other known case or circumstance where the application of domestic jurisdictional rules have led in practice or are likely to lead to jeopardize the application of mandatory Community legislation or the proper functioning of the internal market or the adequate judicial protection of EU nationals and domiciliaries?

120. Here again, the starting point in most Member States is that there is a separation between the issue of jurisdiction and the issue of applicable law (see above, Question 22(c)). Thus, in principle, EU national courts will apply their rules of international jurisdiction irrespectively of the adverse impact on the application of mandatory Community legislation or the proper functioning of the internal market. On the other hand, the issue of adequate judicial protection of EU nationals and domiciliaries may be taken into account, in particular through the application of the *forum necessitatis*, in those Member States where it is used.

There is a general agreement in the national reports that so far, these issues have not given rise to much discussion and that there is little or no case law.

(G) RESIDUAL JURISDICTION UNDER THE NEW BRUSSELS II REGULATION

(25) APPLICABLE NATIONAL RULES PURSUANT TO ARTICLE 14 OF THE NEW BRUSSELS II REGULATION (PARENTAL RESPONSIBILITY)

What are the relevant grounds of jurisdiction that can be used in your country in matters of parental responsibility pursuant to article 14 of the new Brussels II Regulation?

121. Article 14 of the New Brussels II Regulation provides that *"(w)here no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State"*.

Articles 8 to 13 of the New Brussels II Regulation provide for a complex set of jurisdictional rules that distinguish between general jurisdiction, jurisdiction in case of child abduction, return of the child, prorogation of jurisdiction, and jurisdiction based on the child's presence. In general, jurisdiction is provided in the Member State where the child is habitually resident at the time the court is seized (unless the child's habitual residence cannot be established, in which case reference is made to the place where the child is present). When the child has his habitual residence in a third State, jurisdiction can still be established in a Member State in various circumstances, but

always under the condition that all the parties have accepted the jurisdiction and it is in the best interest of the child (article 12).

The consequence, as noted in the Project Technical Specifications[261], is that *"it may well be that a child resident outside the Community has strong links with the Community, e.g. by virtue of its nationality. Currently, the Regulation only provides a Community forum for the dispute in such a case if the parents have agreed upon this"*.

122. The possibility to bring proceedings before an EU court with respect to a child resident outside of the Community, in the event the parents do not agree, is currently subject to the application of the residual jurisdiction, pursuant to the above mentioned article 14 of the New Brussels II Regulation.

Residual jurisdiction is based, in some Member States, on international conventions (within their scope of application), and in particular on the 1961 Hague Convention on Jurisdiction and the Applicable Law on Matters Relating to the Protection of Minors, and on the 1996 Hague Convention on Jurisdiction, the Applicable Law, the Recognition and Enforcement and Cooperation in the Field of Parental Responsibility and Measures for the Protection of Minors.

When these Conventions do not apply, residual jurisdiction depends on the application of national law.

In practice, the review of such rules of residual jurisdiction shows that, in nine Member States, the citizenship of the child is a valid ground of jurisdiction, even if there is no other connection with the forum State. In five additional Member States, jurisdiction can be based on the citizenship of either parent, which will often coincide with the citizenship of the child under the *jus sanguini* system. In practice, that means that for the citizens of 14 Member States (9 + 5), jurisdiction can in general be established in the EU even when the child (and the parents) are habitually resident in a third State.

For the citizens of the remaining 13 Member States, there will only be residual jurisdiction in the EU if the situation presents another relevant connecting factor under national law. These other relevant connecting factors are quite diversified, and do not have any general application. In some Member States, matters of parental responsibility can be submitted to the court which is seized of any matrimonial proceedings (often such jurisdiction exists even if there is no agreement of the parties, which implies an extension of jurisdiction by comparison to the New Brussels I Regulation). But this supposes of course that jurisdiction exists with respect to the matrimonial proceedings and that such proceedings be effectively started in the relevant Member State.

[261] Annex I to the Contract, Section I.

In other Member States, jurisdiction is provided on the ground of the domicile or habitual residence in the forum State of one of the parties (sometimes the plaintiff[262], sometimes the defendant[263], sometimes either of them[264]).

Finally, in other Member States, jurisdiction with respect to a child who is habitually resident in a third State may be established under the *forum necessitatis* ground. In the Netherlands[265], there is a specific provision providing that Dutch courts have jurisdiction when there is a connection of the case with the Dutch legal system and the court considers itself to be in a position to assess properly the best interest of the child. In other countries[266], the general ground of *forum necessitatis* applies (as analysed above, Question 16).

123. *Table Q: Jurisdiction based on citizenship in parental responsibility cases*

Citizenship of the child and/or of either parent *is* a ground of jurisdiction		**Citizenship of the child or of one parent is *not* a ground of jurisdiction**
Citizenship of child	Citizenship of either parent	Cyprus Denmark Finland Germany Latvia Malta Netherlands Portugal Romania Scotland Slovakia Slovenia[267] Sweden
Austria Belgium Czech rep. England Estonia Hungary Ireland Lithuania Poland	Bulgaria France Greece Italy Luxembourg[268] Spain[269]	

(26) APPLICABLE NATIONAL RULES PURSUANT TO ARTICLE 7(1) OF THE NEW BRUSSELS II REGULATION (MATRIMONIAL PROCEEDINGS)

124. Article 7(1) of the New Brussels II Regulation provides that *"(w)here no court of a Member State has jurisdiction pursuant to Articles 3, 4 and 5, jurisdiction shall be determined, in each Member State, by the laws of that State"*

[262] Spain, Denmark (but it should be noted that Denmark is not bound by the New Brussels II Regulation.
[263] Sweden.
[264] Romania.
[265] See the national report for this country, Question 25.
[266] See, e.g., the Report for Belgium, Question 25.
[267] But the citizenship of *both* parents is a ground of jurisdiction
[268] The Report for this country only mentions the specific jurisdictional rules in that matter, but it is assumed that the general grounds of article 14 and 15 also apply (see above, Question 15).
[269] Only the citizenship of the *plaintiff* is a ground of jurisdiction.

Articles 3 to 5 of the Regulation provide for a very wide set of connecting factors that can establish jurisdiction within one or several Member State. In practice, subject to one exception discussed below, these jurisdictional grounds suppose that at least one of the spouses be habitually resident in a Member State (the habitual residence must have been maintained for a duration which goes from zero to one year, depending on the circumstances[270]). Where both spouses are resident in a third State, the Regulation provides jurisdiction in the EU only if the spouses share the same nationality of a Member State, in which case the courts of that Member States can hear the case.

The consequence, as noted in the Project Technical Specifications[271], is that *"under [the New Brussels II] Regulation, Community citizens living in a third State may have difficulties to find a court competent to divorce them. The situation may arise where no court within the European Union or elsewhere is competent to divorce a couple of Community citizens of different nationalities who live in a third State"*.

125. The access to EU courts for Community citizens of different nationalities living in a third State is currently subject to the application of the residual jurisdiction of national law, pursuant to the above mentioned article 7(1) of the New Brussels II Regulation.

In practice, the review of such rules of residual jurisdiction[272] shows that in a slight majority of the Member States (sixteen: see the table below), jurisdiction is provided under national law as soon as *one* of the spouses is a national of the forum State, even if there is no other connecting factor with the forum. A forum will therefore be provided in these States even when the other spouse is a citizen of another State (EU or non-EU) and both spouses lived together abroad and are still living in a third State. In some of these Member States[273], it is even enough that one of the spouse was a citizen *at the time of marriage*, even if none of the spouses is a citizen any more when proceedings is started.

[270] Under indents 1 to 4 of article 3(1)(a), jurisdiction is provided immediately (i.e. without condition of duration) at the place for the habitual residence of both spouses, for the habitual residence of one spouse when this is also the place of the last habitual residence, for the place for the habitual residence of the respondent, and for the place where either spouse resides in the event of a joint application. Under indents 5 and 6 of the same provision, the place where the applicant only is habitually resident is a ground of jurisdiction only when the residence has been maintained six months (if the applicant is a national of the forum State) or one year (if the application is a national of another State).

[271] Annex I to the Contract, Section I.

[272] The following analysis is based: (1) on the data included in Table A5.1 of the Draft Final Report of "Study to Inform a Subsequent Impact Assessment of the Commission Proposal on Jurisdiction and Applicable Law in Divorce Matters" (the "Rome III Study"), at pages 127-142 (Report dated April 2006, authored by the European Policy Evaluation Consortium (EPEC)), available on the Commission's website for the area of freedom, security and justice); (2) on the additional data gathered from the reporters of some Member States.

[273] Austria, Estonia, Germany, Greece.

Thus, in this first group of Member States, there is currently no risk that EU citizens of different nationalities be precluded from bringing proceedings in at least one Member State of EU.

126. In the remaining 13 Member States, the citizenship of one spouse is *not* as such a valid ground of jurisdiction.

In certain of these Member States, however, there are other grounds of residual jurisdiction that could serve to establish jurisdiction for EU citizens of different nationalities living outside the EU. These additional grounds include (i) the *last habitual residence* of the spouses in the forum State[274]: this ground could serve to establish jurisdiction in the (quite unusual) case of spouses of different nationalities who lived together in the forum State, who both left to live outside of the EU after they separated[275]; (ii) the citizenship of at least one of the spouses when in addition the spouses maintain a *"close relationship"* with the forum[276] (iii) the *"close connection"* with the forum State[277]: in one Member State, such close connection is as such a basis of jurisdiction in this matter, sometimes under certain additional conditions; (iv) the fact that the divorce is valid under domestic law but not under the law of the citizenship of the spouses[278]; (v) the *forum necessitatis, as a specific ground for divorce proceedings*: in certain Member States[279], there is a statutory provision providing that an action can be brought in the forum, under certain conditions, when the petitioner cannot institute proceedings abroad or sometimes even when it *"would cause unreasonable inconvenience to the petitioner, and the admissibility of the matter … is justified in view of the circumstances"*[280]; (vi) *the forum necessitatis, as a general ground of jurisdiction*: as already seen[281], in certain Member States the *forum necessitatis* is recognized as a general principle of jurisdiction, which would therefore also seem to apply in matrimonial proceedings.

None of these additional grounds of jurisdiction guarantees that jurisdiction will be established in the EU for citizens of different nationalities living in a third State.

[274] Austria, Belgium, Greece, Luxembourg, Romania (provided in that State that at least one spouse is a Romanian citizen and the spouses do not have a common domicile or a common residence outside Romania), Slovenia (provided in that State that the respondent consents to jurisdiction and the exercise of jurisdiction is in agreement with the foreign law of citizenship).
[275] Under the New Brussels II Regulation jurisdiction is only established at the place of last habitual when on of the spouses still resides there.
[276] Romania.
[277] Finland (jurisdiction is however subject to a *forum necessitatis* style condition: see below, (iii)). Comp. with the information reported for Greece in Draft Final Report of the Rome III Study.
[278] Greece.
[279] Denmark (under the additional condition that the petitioner be a national), Finland, Sweden.
[280] Finland.
[281] Above, Question 16.

127. *Table R: Jurisdiction based on citizenship of only one spouse in matrimonial proceedings*

Citizenship of only one spouse *is* a ground of jurisdiction		**Citizenship of one spouse is *not* a ground of Jurisdiction**	
Austria	Ireland[283]	Belgium	Netherlands
Bulgaria	Italy	Cyprus	Spain
Czech rep.	Lithuania	Denmark[286]	Scotland
England[282]	Luxembourg[284]	Finland	
Estonia	Poland	Greece	
France	Slovakia	Latvia	
Germany	Sweden[285]	Malta[287]	
Greece			
Hungary			

(27) CONVENTIONS WITH THIRD STATES IN MATTERS OF PARENTAL RESPONSIBILITY

What are the international conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility?

127.1. Most of the Member States are contracting parties to international conventions with non-EU countries in the matters of parental responsibility. These conventions are mainly in the form of multilateral conventions or bilateral conventions on mutual assistance or consular relations. Less frequently, there are specific bilateral agreements dealing in particular with this matter.

These various kinds of conventions shall be reviewed below.

(a) 1961 and 1996 Hague Conventions concerning the protection of children

127.2. Amongst the Member States, a slight majority (13) are contracting parties to either the 1961 or to the 1996 Hague Convention concerning the protection of children. Mot of the other Member States have either acceded or signed to one or both

[282] With the criteria of "domicile" as understood in the common law tradition, which under the Regulation is treated as nationality: see art. 3(1) of the New Brussels I Regulation.
[283] With the criteria of "domicile" as understood in the common law tradition, which under the Regulation is treated as nationality: see art. 3(1) of the New Brussels I Regulation.
[284] While jurisdiction based on nationality is not mentioned in The Table of the Rome III study, this Table seems to include only the specific jurisdictional grounds in this matter, while jurisdiction based on nationality can also be grounded on the general jurisdictional rules of articles 14 and 15 of the Civil Code (see above, Question 11 and 15(1)). This is confirmed in the Supplemental Report for Luxembourg of this Study.
[285] Only with the consent of the government.
[286] But the Danish citizenship of the petitioner (not of the respondent) is a ground of jurisdiction when the authorities of the country where the petitioner is living refuse to deal with the divorce proceedings.
[287] Divorces cannot currently be pronounced in Malta.

of these conventions, but they have not yet ratified them so they are currently not in force in these countries.

Amongst the above mentioned 13 Member States, 8 of them are still contracting parties only to the 1961 Convention concerning the powers of authorities and the law applicable in respect of the protection of minors.

The other 5 Member States, all from the states which have acceded to the European Union on 1 May 2004 (Czech rep., Hungary, Latvia, Slovakia and Slovenia), are contracting parties to the 1996 Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

Table S: Status in the EU of the 1961 Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of minors

Ratification		**No ratification yet**	
Austria France Germany Italy Luxembourg Netherlands Portugal Spain		Belgium Bulgaria Cyprus Czech rep Denmark Estonia Finland Greece Hungary	Ireland Latvia (A) Lithuania (A) Malta Poland Romania Slovakia Slovenia Sweden United Kingdom

A= accession

Table T: Status in the EU of the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children

Ratification		**No ratification yet**	
Czech rep Hungary Latvia Slovakia Slovenia		Austria (S) Belgium (S) Bulgaria (A) Cyprus (S) Denmark (S) Estonia (A) Finland (S) France (S) Germany (S) Greece (S)	Ireland (S) Italy (S) Lithuania (A) Luxembourg (S) Malta Netherlands (S) Poland (S) Portugal (S) Romania (S) Spain 5s) Sweden (S) United Kingdom (S)

A= accession S=signature

(b) 1931 Northern Convention

127.3. Three member States (Finland, Sweden and Denmark) are contracting parties to the Convention of 6 February 1931 including provisions or private international law relating to marriage, adoption and guardianship.

This convention binds these three Member States and Norway and Iceland, and includes provisions dealing with matters of parental responsibility.

(c) Bilateral Conventions on mutual assistance or consular relations

127.3. A sizable number of Member States are contracting parties to bilateral conventions on mutual assistance or consular relations that include incidentally provisions dealing with matters of judicial or administration cooperation in relation to parental responsibility.

Such conventions have been concluded by *Belgium* (with USSR, Yugoslavia), *Czech Rep.* (with Albania, Belorussia, Bosnia and Hercegovina/Serbia, Croatia, Cuba, Montenegro, Georgia, Kyrgystan, Macedonia, Moldavia, Mongolia, North Korea, Russia, Ukraine, Uzbekistan, Vietnam), Estonia (with the Russian Federation, Ukraine), *France* (with Djibouti, Egypt, United Arab Emirates, Morocco, Uruguay), *Hungary* (with Albania, Yugoslavia, People's Democratic Republic of Korea, Cuba, Mongolia, Federation of Soviet Socialists Republics, Vietnam), *Latvia* (with Kyrgystan, Russian Federation, Moldova, Ukraine, Uzbekistan, Belarus), *Lithuania* (with Armenia, Azerbaijan, Kazakhstan, Belarus, Moldova, Russian Federation, Ukraine, Uzbekistan), *Poland* (with Russian Federation, Belarus, Ukraine, North Korea, Cuba, Mongolia, Yugoslavia), *Portugal* (with Cape Verde, Sao Tome, Guinea-Bissau, Mozambique, Angola), *Romania* (with Ukraine, Moldavia, Albania), *Slovekia* (with Albania, Yugoslavia, North Korea, Cuba, Mongolia, Vietnam, USSR (remaining applicable to the Russian Federation, Armenia, Azerbaijan, Belarus, Kazakhstan, Moldavia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan), *Slovakia* (with Mongolia, USSR).

(d) Bilateral conventions dealing specifically with matters of parental responsibility and or maintenance of children

127.4. Some Member States are contracting parties to bilateral conventions dealing more specifically with matters of parental responsibility, or at least cooperation in family law matters. This is the case of *France* (with Algeria and Tunisia) and *Italy* (with Lebanon) and *Spain* (with Morocco).

Also, some Member States are contracting parties to bilateral conventions dealing with matters of maintenance for children. They include *Belgium* (with Yugoslavia), *Finland* (with the USA, and the Canadian Province of Ontario), *Portugal* (with Guinea-Bissau, Mozambique, Angola).

(28) JURISDICTION AS A GROUND FOR RESISTING THE ENFORCEMENT OF NON-EU JUDGMENTS IN MATTERS OF PARENTAL RESPONSIBILITY

Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these "exclusive" rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)

127.5. The Member States are quite evenly divided on this issue.

In a first group of States (see the table below), the national rules of jurisdiction in matters of parental responsibility play no role in relation to the enforcement of judgments from non-EU States. In other words, in these States, the judgment from a non-EU State relating to matters of parental responsibility cannot be denied recognition or enforcement on the basis that the local courts are the only ones having jurisdiction under national law in this matter. There is no rules of "exclusive jurisdiction" in this matter.

On the other hand, in another group of States, judgments given in non-EU States cannot be recognized and enforced when under national law (or bilateral agreements) the jurisdiction belongs exclusively to the local courts. The grounds of exclusive jurisdiction relate mainly to the citizenship of the child, in the sense that in most of these States a non-EU judgment deciding an issue relating to the parental responsibility of a child who has the citizenship of the forum will not be given any effect in such forum. This is the case in the Czech Republic, Hungary, Romania, and Slovenia.

However, there are sometimes exceptions or qualifications to the principle of non-recognition. So, in Hungary, while there is in principle exclusive jurisdiction when the child is a Hungarian citizen, a non-EU judgment can still be recognized when both the child and the parent whose right of supervision is contemplated have their domicile or residence in the country where the court or authority is located. Similarly, in Slovenia, while the jurisdiction is exclusive for Slovenian citizens, this is not the case if it is established that a body with jurisdiction under the law of the foreign country has issued a decision or adopted measures protecting the personality, rights and interests of the person involved.

In some Member States, the jurisdiction is exclusive when the child and/or the parties are domiciled or habitually resident in the forum. In such case, non-EU judgments will not be recognized. This is the case in the Czech Republic (child), Lithuania (both parties), Poland (both parties, provided that at least one of them is a Polish citizen), Romania (child), Scotland (child), England (if child is both British and habitually resident in England, or has no such connection with the State in which the judgment was given).

Table U: Exclusive jurisdiction of local courts as a ground to deny the recognition and enforcement of non-EU judgements in matters of parental responsibility

No exclusive jurisdiction		**Exclusive jurisdiction**
Austria	Italy	Czech Rep.
Belgium	Latvia	Hungary
Bulgaria	Luxembourg	Lithuania
Cyprus	Malta	Poland
Estonia	Netherlands	Romania
Finland[288]	Portugal	Slovenia
France[289]	Slovekia	Scotland
Germany[290]	Spain	England
Ireland	Sweden[291]	

[288] It should however be noted that a non-EU judgment will not be recognized if at the time proceedings were commenced the child was a Finish citizen or his place of residence was in Finland and no such connection existed with the country rendering the judgment, or the child was a citizen of Finland as well as the country rendering the judgment and his place of residence was in Finland.
[289] It should be noted that the jurisdictional privilege granted to French nationals on the basis of article 15 of the French Civil Code is no longer considered as an exclusive jurisdictional rule as regards parental responsibility matters; but it is also noted that a foreign judgment subjecting a child to educational care measures cannot be enforced in France to the extent that the measure requires the intervention of a French state entity, such as a public rehabilitation centre, for such measure is within the exclusive jurisdiction of each state.
[290] It should however be noted that foreign judgments are not recognized if the court of that foreign state would not be competent according to the German rules on international jurisdiction (under the so-called 'mirror image theory').
[291] It should however be noted that in general foreign judgments relating to matters of parental responsibility are not enforceable in Sweden (but there are exceptions under international conventions, or in relation to specific States such as Norway and Switzerland).

PART II
RECOMMENDATIONS FOR THE PROPOSED FURTHER HARMONISATION OF JURISDICTION

128. The Project Technical Specifications stress that the purpose of the study is to *"prepare the ground for a possible definition of common rules on jurisdiction in cases currently not covered by Community rules"* [292].

In concrete terms, the Commission calls for the study to provide *"recommendations for a possible harmonization of these rules"*, and it requests that *"the report should particularly focus on the question which connecting factors should be retained if the rules on jurisdiction for defendants domiciled outside the EU were to be harmonized"* [293].

129. In keeping with these instructions, this second part of the Report shall review the issues that must be considered in order to achieve the proposed harmonization of the rules of jurisdiction when the defendant is domiciled in a non-EU State. The analysis shall address exclusively the legal aspect of the matter, and not the political discussion as to the appropriateness of extending the scope of the harmonization in this field, or as to the opportunity to preserve some diversity of legal culture in the law of jurisdiction in the EU. In other words, the analysis focuses on *how* further harmonization of the rules of jurisdiction for actions against non-EU defendants could be achieved and the consequences that it would entail, and not on *whether* further harmonization is politically desirable in this matter.

Before assessing the main options that could be pursued for the proposed harmonisation (B), the practical implications of such harmonization (C), and the specific issues relating to the further harmonization under the new Regulation Brussels II (D), it is necessary to review the reason for the original decision no to harmonize the rules of jurisdiction when defendants are domiciled in third States (A).

(A) THE INITIAL OBJECTIVE OF REGULATING JURISDICTION IN "COMMUNITY DISPUTES"

130. The decision to subject, in principle, the application of the uniform rules of jurisdiction to the condition that the defendant be domiciled in the Community was taken back forty years ago by the authors of the 1968 Brussels Convention. The Jenard Report on the Convention is not very explicit about the reason for this restriction, but it does emphasise the need to distinguish between Community litigants and non-Community litigants:

[292] Annex I to the Contract, Section I.
[293] Annex I to the Contract, Sections II and V.2.

> *"Underlying the Convention is the idea that the Member States of the European Economic Community wanted to set up a common market with characteristics similar to those of a vast internal market (…) From this point of view, the territory of the Contracting States may be regarded as forming a single entity: it follows, for the purpose of laying down rules on jurisdiction, that a very clear distinction can be drawn between litigants who are domiciled within the Community and those who are not. Starting from this concept, Title II of the Convention makes a fundamental distinction, in particular in section 1, between defendants who are domiciled in a Contracting State and those who are domiciled elsewhere"*[294]

The Jenard Report also pointed out the inappropriateness of restricting the application of the uniform rules of jurisdiction to community *citizens*. One of the reasons for the rejection of the criterion of nationality was *"to allow foreign nationals domiciled in the Community, who are established there and who thereby contribute to its economic activity and prosperity, to benefit from the provisions of the Convention"*[295].

While this statement justifies that the application of the uniform rules be reserved to *litigants domiciled in the Community*, there is no justification, in the Jenard report itself, for restricting its scope to proceedings where the *defendant* is domiciled in the Community, as opposed to cases where the *plaintiff* is domiciled there.

131. Further light on the rationale pursued by the authors of the Brussels Convention is shed in a scholarly article published by P. Jenard a few years later. The reporter of the working group stated as follows the reasons that triggered the choice not to harmonize entirely this matter:

> *"en insérant dans la convention des pans entiers constitués par les droits nationaux, les auteurs de la convention ont, en effet, voulu faire œuvre pratique, ne pas compliquer la mise en œuvre de la convention, ne pas entraîner un bouleversement général des règles internes de compétence et des normes auxquelles sont habitués les juges et les avocats. Ils ont résisté à la tentation 'd'unifier pour unifier'. En fait, son originalité, la convention la marque – hors les cas de compétence impérative et exclusive – lorsqu'un défendeur domicilié dans un Etat contractant est attrait devant les tribunaux d'un autre Etat contractant et, pour reprendre une heureuse distinction faite par MM. Gothot et Holleaux, lorsque l'on se trouve en présence d'un 'procès européen' "*[296].

[294] Report on the Convention on jurisdiction and the enforcement of judgment in civil and commercial matters, OJ, 5.3.79, C59/1, at p. 13.
[295] *Ibid*., at p. 14.
[296] P. Jenard, « La convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale – Lignes directrices », *Rev. trim. dr. eur.*, 1975, p. 14, at p. 17-18.

The initial objective was therefore not as such to subject certain kinds of litigants (i.e. defendants domiciled in the Community) to the uniform rules because of their procedural position in the dispute, but to define *Community disputes*, as opposed to non-Community disputes that should continue to be subject to national law. The domicile of the defendant was chosen as a territorial connecting fact that could serve to identify such community disputes.

This approach has been explicitly confirmed in the Brussels I Regulation. Pursuant to Recital (8) of the Preamble of the Regulation, *"(t)here must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States"*.

132. But as a matter of fact, the domicile of the defendant in the EU is not the only connecting factor that was considered to be appropriate to define Community disputes.

Two other kinds of connection with the EU can trigger the application of uniform rules of jurisdiction, as is confirmed by article 4 of the Regulation and by the case law of the Court of justice. The first one is the *prorogation of the jurisdiction* of the courts of a Member State. When the prorogation of jurisdiction is based on a choice of court agreement, it is still required in principle that at least one of the parties be domiciled in the EU, not necessarily the defendant[297]. If that condition is not satisfied, the jurisdiction of the designated court cannot be based on the Regulation, though article 23(3) still includes an obligation for the courts of the other Member States not to entertain the case except if the designated court declines jurisdiction[298]. When the prorogation is based on the voluntary appearance by the defendant before the court of a Member State (without challenging the jurisdiction), it seems that the domicile of the parties is not relevant at all[299].

The second additional criterion is the *integration of the dispute with the territory of a Member State* in the circumstances where there is an exclusive jurisdiction under article 22 of the Regulation. In such case, the uniform rules of jurisdiction of article 22 apply even if none of the parties is domiciled in the EU[300] and even also if the

[297] See articles 4(1) and 23 of the Brussels I Regulation. See also *Group Josi*, case C-412/98, [2000] ECR I-5925, at para. 41-42.
[298] In other words, when none of the parties are domiciled in the EU, the choice of court clause has only, under the regulation, a *exclusionary effect* (in that it excludes the jurisdiction of the other courts), but not a *prorogation effect* (in that the Regulation does not create the jurisdiction of the designated court: such effect is subject to national law).
[299] *Cf. Group Josi*, *ibid.*, at para. 44.
[300] See article 4(1) of the Brussels I Regulation.

legal relationships involves only one Member State, in addition to one or more non-Member States[301].

On the other hand, the integration of the dispute with the territory of a Member State in other circumstances than article 22, for instance because the contract is being performed in the EU (article 5(1)) or the harmful even occurred there (article 5(3)), is currently *not* sufficient to trigger the application of the uniform rules of the Brussels I Regulation.

133. It follows from the foregoing that the concept of *Community disputes* is currently defined, for the purpose of the application of the uniform rules of jurisdiction, as referring to disputes where (i) the defendant is domiciled in the EU; (ii) there is a prorogation of jurisdiction of the court of a Member State (subject in principle to one party at least being domiciled in the EU); and (iii) there is an exclusive jurisdiction in a Member State (even if both parties are domiciled in third States).

The proposed further harmonization would consist in widening such definition of Community disputes so that the uniform rules would apply also when the defendant is domiciled in a third State and there is no prorogation of jurisdiction nor exclusive jurisdiction in the EU.

(B) THE MAIN OPTIONS FOR THE PROPOSED HARMONIZATION

134. The widening of the personal scope of application of the uniform rules of jurisdiction could be achieved through various methods. The main ones would appear to be the following:

(1) Replacement of the condition that the defendant be domiciled in the EU by the condition that the dispute be "intra-Community" ;
(2) Application of the Regulation as soon as either the defendant or plaintiff is domiciled in the EU;
(3) Definition of Community disputes by reference to the geographical scope of EU Community law;
(4) Definition of specific connecting factors for claims against non-EU defendants;
(5) Extension of the existing jurisdictional rules to claims against defendants domiciled in third States.

These five main options will be analyzed in turn below.

[301] See *Owusu*, Case C-281/02, [2004] ECR I-1383, at para. 28.

(1) First Option: Application of the Regulation to Intra-Community Disputes

135. The first option would consist to amend Article 3 and 4 of the Regulation to replace the condition that the defendant be domiciled in the EU for the application of the uniform rules with the condition that the case involves an *"intra-Community dispute"*, that is a dispute involving contacts with at least two Member States.

This approach would seem to find some support in an earlier decision from the Court of justice from 1990. In *Kongress Agentur Hagen*[302], the Court ruled that *"the object of the Convention is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters* ***in intra-Community relations****"* (emphasis added).

Under such approach, the regulation should become applicable to claims against defendants domiciled in third States, but only if the case involves contacts with at least two other States in the EU. For instance, a plaintiff domiciled in France could bring proceedings before English courts against a defendant domiciled in New York on the basis of article 5(1) of the regulation, if the dispute relates to the delivery of goods in England (under current law, the Regulation does *not* apply in this case, since the defendant is domiciled in a third State, and the fact that the case involves contacts with two Member States is considered irrelevant).

136. It should be note while this first option would imply an extension of the scope of the uniform rules in the case discussed above, it would also imply a *restriction* of the scope of application of these rules in other circumstances. Indeed, with the change hereby discussed, the uniform rules would no longer apply to international disputes that involve contacts with only one Member State and with one or more non-Member States, even if the defendant is domiciled in the EU.

Under current law, while the above-mentioned ruling in *Kongress Agentur Hagen* suggests that the uniform rules apply only where the question concerns the allocation of jurisdiction between two Member States, the Court of justice has made clear in subsequent case law that it is enough that *one Member State* be involved, if this is the place where the defendant is domiciled.

Thus, in *Group Josi* case, the Court had already ruled that *"the place where the plaintiff is domiciled is not relevant for the purpose of the rules of jurisdiction laid down by the Convention, since that application is, in principle, dependant solely on the criterion of the defendant's domicile being in a Contracting State"*[303].

[302] Case C-365/88, *Rec.*, p. I-1860, at para. 17.
[303] Case C-412/98, [2000] ECR I-5925, at para. 57.

In *Owusu*, the Court further pointed out that *"Article 2 of the Brussels Convention applies to circumstances such as those in the main proceedings, involving relationships between the courts of a single Contracting State and those of a non-Contracting State rather than the relationships between the courts of a number of Contracting States"*[304].

This proposition has been transposed to the Brussels I regulation in the Opinion on the new Lugano Convention, where the Court ruled more generally that *"the regulation contains a set of rules forming a unified system which apply not only to relations between different Member States … but also to relations between a member State and a non-Member State"*[305].

(2) SECOND OPTION: APPLICATION OF THE REGULATION WHEN EITHER DEFENDANT OR PLAINTIFF IS DOMICILED IN THE EU

137. The second option would consist to provide that the regulation applies as soon as one of the parties is domiciled in the EU, irrespective of his/her procedural position (defendant or plaintiff) in the proceedings.

This approach would appear to be supported by the Preamble of the 1968 Brussels Convention, which states that the Convention has for objective *"to strength in the Community the legal protection of persons therein established"* (Recital (2) of Preamble). While this aim was not repeated in the Preamble to the Regulation, it is generally considered that it still forms the foundation of the uniform rules[306].

This extension of the scope of the uniform rules would, in a certain way, reconcile the text of the Regulation with original objective of the drafters of the Brussels Convention, who as shown above wanted to give the benefit of the uniform rules to all persons domiciled in the Community *"who are established there and who thereby contribute to its economic activity and prosperity"* (above, §130).

Also, under the settled case law of the Court of justice, one of the objectives of the Brussels regime is *"the strengthening of the legal protection of persons established in the Community by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued"*[307]. The objective of enabling claimants domiciled in the EU to identify *easily* the court in which they may sue may be seen as being compromised under current law when the

[304] Case C-281/02, [2004] ECR I-1383.
[305] Opinion 1/03 of 7 February 2006.
[306] See e.g. R. Fentiman, "National Law and the European Jurisdictional Regime", in A. Nuyts and N. Watté, *International Civil Litigation in Europe and Relations with Third States*, Bruylant, 2005, p. 83 s., at p. 94 (arguing that the policy has been endorsed by extension in the Brussels Regulation in view of Recital 19 of the Regulation).
[307] ECJ, *Torline*, case C-18/02, [2004] ECR I-1417, at para. 36.

defendant is domiciled in a third State, since the jurisdiction depends on the application of rules of national law which vary from Member State to Member State.

138. In practice, under this second option, the parties who receive a specific jurisdictional protection under the Brussels I Regime (such as consumers, employees, insured parties, maintenance creditors) could benefit from the Community protection also when the defendant is domiciled in a third State, which is not the case today. Likewise, victims or tort or contracting parties domiciled in the EU could bring proceedings against non-EU domicilaries on the grounds of the uniform rules of article 5(3) and 5(1), which is also not the case today (the concrete impact of these changes will be assessed below, §152 s.).

It should be noted that such extension of the scope of the uniform rules would not necessarily imply that defendants domiciled in third States would be treated less favorably than under the existing text of the Brussels I Regulation, since this text currently allows for the use of exorbitant jurisdiction against non-EU domiciliaries, and even provides for an extension of its benefit to all plaintiffs (even non-citizen) domiciled in the forum (under 4(2) of the Regulation; the concrete impact of this rule in the Member States has been assessed above, §82).

139. To state that the domicile of the plaintiff (in addition to that of the defendant) in the EU is a general ground of applicability of the uniform jurisdictional rules could at first sight appear to go against the hostility of the Brussels I regime against according an influence to the plaintiff's domicile. Such hostility is explicit in the case law of the Court of justice, who has stressed that the Brussels I regime *"does not favour"* jurisdiction for the courts of the plaintiff's domicile[308]. In the *Group Josi* case, the Court emphasized that *"it is only in quite exceptional cases that … the Convention accords decisive importance, for the purpose of conferring jurisdiction, to the plaintiff's domicile being in a Contracting State"*[309].

But the hostility against the criterion of the plaintiff's domicile in the case law seems to concern essentially the *attribution of jurisdiction* based on that criterion, in the sense that it is considered to be inappropriate to allow in general litigants to bring proceedings in their home court. Introducing the plaintiff's domicile as a connecting link with the Community for the purpose of triggering the application of the uniform rules would not be equivalent as providing jurisdiction to the plaintiff's home courts.

Thus, even if the option discussed here was introduced in the Regulation, a party domiciled in the Community could not bring proceedings in the Community if none of the jurisdictional grounds provided for under the regulation gives jurisdiction to the courts of a Member State.

[308] See, e.g., *Réunion européenne*, case C-51/97, [1998] ECR I-06511, at para. 29.
[309] Para. 53.

There would therefore not be any contradiction in using the domicile of the plaintiff as a criterion of applicability of the uniform rules but not as a criterion of jurisdiction. Indeed, the two issues are clearly distinct, and reflect different policy considerations. The definition of heads of jurisdiction rely essentially on considerations of procedural fairness and good administration of justice, while the definition of criteria of applicability reflect the requirement of sufficient integration of the situation as a whole with the Community.

As a matter of fact, the option discussed here is *already used* in the Regulation with respect to choice of court agreements. Indeed, as seen above (§132), the uniform rules on the prorogation of jurisdiction based on choice of court agreements (art. 23 of the Regulation) apply as soon as either the claimant or the defendant is domiciled in the Community[310].

140. On the other hand, the connecting factors used to establish jurisdiction under the current text of the Regulation create themselves a strong link with the Community, irrespective of the domicile of the parties (see below, 164). It may therefore be wondered whether it would not be justified to provide that the criteria of applicability coincide with the jurisdiction grounds, or, in other words, to state that as soon as jurisdiction is established under the applicable connecting factors the uniform rules apply.

Also, it should be noted that the extension of the scope of uniform rules to all disputes when either the plaintiff or the defendant is domiciled in the EU would, in practice, reduce the relevance of national law to a very narrow category of cases. Starting from the proposition that the uniform rules on exclusive jurisdiction (art. 22) would continue to apply even when none of the parties are domiciled in the EU (see above, §132), national law would only apply to disputes between two parties domiciled in non-EU States. In practice, theses disputes will seldom present a relevant connecting factor with an EU State that will trigger the application of national jurisdictional rules.

This second Option would therefore, *in practice*, not be very different from the Option consisting in suppression altogether any territorial condition of applicability of the uniform rules of jurisdiction (see below, Option 4).

[310] As discussed above, at §132 (and note), and the note, the *exclusionary effect* of the choice of court agreement applies, under article 23(3) of the Regulation, even when none of the parties are domiciled in the EU.

(3) THIRD OPTION: APPLICATION OF THE REGULATION WHEN THE CASE FALLS WITHIN THE GEOGRAPHICAL SCOPE OF THE LAW OF THE INTERNAL MARKET

141. Under this option, the scope of application of the Brussels I Regulation would be redefined in view of the objectives of the internal market.

The Brussels I Regulation is based on articles 61(c) and 65 of the EC Treaty, which give competence to the Council to adopt measures in the field of judicial cooperation in civil matters "*insofar as necessary for the proper functioning of the internal market*".

It has been suggested in legal writing that this requirement would not be satisfied by the current text of the Brussels I Regulation, in the sense that the domicile of the defendant in the Community would not be relevant for the definition of whether the situation affects the proper functioning of the internal market[311]. Another approach has therefore been advocated, which would ensure the parallelism between the scope of application of the Brussels I regime and that of the law of the internal market[312].

142. In practice, the geographical scope of the law of the internal market varies according mainly to the freedom that is involved (goods, persons, services, etc.) but also to the specific nature of the matter, being understood that there are many particular regimes of applicability in specialized matters.

In general, with respect to *goods*, the application of the rules of the internal market relating to the free movement requires in principle that the goods "*are to be placed on the internal market*"[313]. With respect to *persons and services*, there is in general a requirement of *citizenship* of one of the Member States[314], though it is sometimes enough that the person be established within the Community. In addition, it is usually required that the relationship has "*a sufficiently close link with (the) territory (of the Community)*"[315], for instance because services are offered or activities are carried out in the Community.

The Option herein discussed would imply to align the scope of the rules of jurisdiction on these and other principles relating to the geographical scope of the law of the internal market. A few examples will clarify what this approach would entail[316]. Take the case of a tort claim relating to defective products. The uniform

[311] M. Fallon, « Approche systémique de l'applicabilité dans l'espace de Bruxelles I et Rome I », in J. Meeusen, M. Pertegas and G. Straetmans (ed.), *Enforcement of International Contracts in the European Union*, p. 127 s., at p. 151 s.
[312] *Ibid.*
[313] ECJ, *British American Tobacco*, aff. 491/01, [2002] ECR I-11452, at para. 212.
[314] However, in certain cases, nationals from non-EU State may benefit from certain rules relating to the free movement based on their residence. See M. Fallon, *op. cit.*, p. 143 s.
[315] ECJ, *Prodest*, case 237/83, [1984] 3153, at para. 6.
[316] Most examples are borrowed from M. Fallon, *op. cit.*, p. 153 s.

rules of jurisdiction would apply when the products are placed on the Community market. This would allow a coincidence between the jurisdictional rules and the substantive rules of EC law under the product liability directive, which is not guaranteed under the current system of residual jurisdiction.

Indeed, the product liability claim brought against a non-EU defendant is currently subject to national jurisdictional law, which may, or may not, allow proceedings to be brought in the Community. Conversely, for the moment, the product liability claim from a non-EU domiciliary against an EU defendant relating to a products placed on the non-EU market is subject to the uniform rules, while the underlying dispute does not affect the proper functioning of the internal market.

As for contract claims relating to the provision of services, the uniform rules of jurisdiction would apply when the services are provided by a citizen of a Member State (or at least by a person established in a Member State) and the services are offered in the Community.

With respect to a claim from a commercial agent, the uniform rules of jurisdiction would apply *"where the situation is closely connected with the Community, in particular where the commercial agent carries on his activity in the territory of a Member State"*, in accordance with the principle upheld by the Court of justice in the *Ingmar* case[317].

With respect to maintenance claims, the applicability of the uniform rules would depend on the citizenship of the plaintiff (in accordance with the current criterion of applicability of the freedom of movement of persons), or, as has been advocated, on the habitual residence or other territorial factors than ensure a sufficiently close link with the Community[318].

With respect to traffic accidents, relevant connecting factors could include the habitual residence of the plaintiff, the intra-community travel, or any other relevant criterion demonstrating the existing of a close connecting link with the Community[319].

143. If this Option were to be followed, it could be implemented in at least two ways. The first one would consist to amend the text of the regulation to replace the condition that the defendant be domiciled in the Community by a new set of criteria of applicability inspired by the scope of the law of the internal market[320]. These new criterion could provide a definition of broad categories of litigants or legal situations, and could also refer to existing connecting factors for those relations which are

[317] ECJ, *Ingmar*, case C-381/98, [2000] ECR I-9305.
[318] M. Fallon, *op. cit.*
[319] *Cf.* Fallon, *op. cit.*
[320] In this sense, see M. Fallon, *op. cit.*, p. 157.

subject to existing directives relating to the freedom of movement of services, services, establishment or goods[321].

This method would likely prove very complex, for it would suppose to identify and define precisely for each category of cases the appropriate connecting criterion of applicability, which is already a very difficult task under the law of the internal market. The difficulty would be increased by the fact that the relevant categories of the law of the internal market (persons, services, goods, etc.) do not necessarily coinciding with the heads of jurisdiction under the Brussels regulation (contract, tort, etc.). Also, some disputes affect simultaneously several freedoms: for instance, a traffic accident claim could affect the freedom of movement of persons, of goods, and the provision of services by an insurer[322].

144. The second method would consist in replacing the condition that the defendant be domiciled in the Community by a general requirement that the situation relates to the functioning of the internal market. In other words, there would not be any detailed definition of the various criterion to be used in the various kinds of cases, but only a general principle whose meaning would be left to be determined by the case law.

It should be noted that if this method were to be followed, the scope of the regulation would likely end up being defined quite broadly. Indeed, the Court of justice has already taken a liberal approach when dealing with the argument that it would not be relevant for the functioning of the internal market to regulate jurisdiction in cases which have a relationship with one Member State and one or several non-Member States. While recognizing , in *Owusu* that *"by definition"* the working of the internal market involves *"a number of Member States"*, the Court found that the 1968 Brussels Convention was not intended to apply only to this situation but that it applied to all cases *"with an international element"*. For the Court, the consolidation *"as such"* of the rules of jurisdiction in these cases *"is without doubt intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject"*[323].

This principle remains good law after the transformation of the Brussels Convention into a Regulation, as confirmed by the Court of justice in its Opinion of 7 February 2006 on the Lugano Convention, where the Court ruled that the Community has exclusive competence to conclude the new Lugano Convention. The Court pointed out in that Opinion that *"the purpose"* of the Brussels I Regulation *"is to unify the rules on jurisdiction …not only for intra-Community disputes but also for those which have an international element, with the objective of eliminating obstacles to the*

[321] This method is discussed by M. Fallon, *op. cit.*
[322] It has been suggested that this difficulty could be overcome by determining the relevant connecting factor depending on the particular object of the dispute (M. Fallon, *op. cit.*, p. 157), but this, again, would appear very complex and would also raise delicate issues of frontiers.
[323] *Ibid.*, at para. 34.

functioning of the internal market which may derive from disparities between national legislations on the subject"[324].

This ruling suggests that the Community has a wide competence, under articles 61(c) and 65 of the EC Treaty, to regulate the jurisdiction of the courts of the Member States, even if the underlying claim does not fall within the geographical scope of the freedoms of the internal market, and even if the dispute involves a defendant domiciled in a third State.

As a matter of fact, it should be noted that the introduction of uniform rules for claims against non-EU domiciliaries would not strictly speaking involve an extension of the geographical scope of he Regulation. Indeed, as pointed out by the Court of justice in its Opinion on the Lugano Convention ("the Lugano Opinion"), the current article 4 already *"forms part of the system implemented by (the) regulation"*[325]. Thus, as has been noted in legal writing, the Regulation not only borrows from the rules of national law, but also *"incorporates them into itself by reference, by means of article 4"*[326]. This is confirmed by the fact that the application of such national rules for defendants domiciled outside the EU is extended by virtue of the Regulation, in the sense that any person domiciled in a Member State may, whatever his nationality, avail himself of the rules of jurisdiction in force in that Member State (article 4(2)).

As a consequence, the introduction of uniform rules of jurisdiction for actions against non-EU domiciliaries would not as such imply an enlargement of the scope of the Regulation, but would entail the replacement of a Community rule that incorporates (and modifies) national law into the Regulation by another set Community rules that directly regulate the jurisdiction.

(4) FOURTH OPTION: THE DEFINITION OF SPECIFIC RULES OF JURISDICTION FOR CLAIMS AGAINST NON-EU DOMICILIARIES

145. Another possible avenue would consist to replace the reference to national law in article 4 of the Regulation by a new set of heads of jurisdiction specifically designed for actions against non-EU domiciliaries.

Under such system, the existing connecting factors under sections II to V of the regulation (special jurisdiction and jurisdiction in insurance, consumer and employment matters) would continue to apply only for claims against defendants domiciled in the EU. Another set of connecting factors, to be introduced in replacement of article 4, would determine the cases in which defendants domiciled in third States may be brought in the Community.

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[324] Para. 143.
[325] Opinion of 7 February 2006, *ibid.*, at para. 148.
[326] A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, LLP (3rd ed.), at para. 2.179.

The advantage of such approach is that it would allow to take into account the specificities of the situations currently covered by article 4 of the regulation. In particular, the jurisdiction could be redefined to reflect the absence in the Community of the general ground of jurisdiction based on the domicile of the defendant. Indeed, the Court of justice has often stressed that the jurisdictional provisions which allow a defendant to be sued, against his will, in the court of another state than that of his domicile must be narrowly construed[327].

Such preoccupation to restrict the scope of these jurisdictional rules is precisely based on the availability for the plaintiff, of a general ground of jurisdiction in the Community, under article 2. For instance, in *Shevill*, in support for its decision to restrict the scope of the jurisdiction of the court where the harm occurred to damages located within the forum, the Court noted that "*the plaintiff always has the option of bringing his entire claim before the courts … of the defendant' s domicile*"[328]. Such possibility would not exist, by definition, with respect to claims brought against defendants domiciled in third States.

The widening of the jurisdictional rules for claims against non-EU domiciliaries would also be in line with the current law in most Member States, which allow non-EU domicilaries to be sued on the basis of exorbitant jurisdictional rules or other specific rules (such as the *forum necessitatis*) designed to guarantee the access to their courts (see above, §83, and below, §168).

146. On the other hand, the introduction of new jurisdictional rules for actions against defendants domiciled in third States would certainly bring an additional element of complexity in the Brussels I regime. The existing jurisdictional rules of section II to V of Chapter I of the Brussels I regulation are already well known and are applied daily throughout the Community in actions against defendants domiciled in the EU. Likewise, in most Member States, national jurisdictional systems are quite old and have been applied for decades by national courts (though a few Member States have introduced recently or will soon introduce an overhaul of their jurisdictional rules, often to put them in line with the Brussels I regime: see above, §24).

To replace such national jurisdictional systems by an entirely new set of uniform jurisdictional rules for actions against non-EU domiciliaries would therefore require some arduous adaptations of court practice in all the Member States.

Besides, it would seem that most of the existing rules of jurisdiction under section II to VI of the Brussels I Regulation would also be fit for the determination of the jurisdiction of EU courts in actions against non-EU domiciliaries. This is certainly the

[327] See, e.g., *Kalfelis*, case 189/87, [1988] ECR 5565; *Reichert I*, case 115/88, [1990] ECR I-27; *Dumez*, case C-220/88, [1990] ECR I-49; *Shevill*, case C-68/95, [1995] ECR I-415; *Mariniari*, case C-364/93, [1995] ECR I-2719.
[328] ECJ, *Shevill*, case C-68/95, [1995] ECR I-415, at para. 32.

case of the protective rules of jurisdiction in consumer, insurance and employment matters. Also, special rules of jurisdiction such as in contract matters, which attribute jurisdiction in principle to the courts where goods were delivered or services were provided, would seem to be also relevant irrespective of whether the defendant is domiciled in the EU or in a third State (see further below, §152 s.).

But while the existing rules would in general seem to be suitable for actions against non-EU domiciliaries, that does not mean that there is no need for some *adaptations* to these rules to take into account, as discussed above, the specificities of the situation covered by article 4, and in particular the need to guarantee an effective access to justice. The nature of these adaptations will be discussed below (§166 s.).

(5) FIFTH OPTION: THE EXTENSION OF EXISTING UNIFORM RULES TO DEFENDANTS DOMICILED IN THIRD STATES

147. The last option that could be envisaged would consist to suppress, without any further change, the condition that the defendant be domiciled in a Member State for the uniform rules of jurisdiction to apply. In other words, the scope of the existing uniform rules of Sections II to V of Chapter the Regulation would be extended to claims brought against defendants domiciled in third States.

The main advantage of such approach is that it could be implemented easily, and that there would be no need for judges and lawyers to adapt to new rules, since the very same connecting factors that are currently used for actions against defendants domiciled in the EU would also be used to non-EU domiciliaries.

Such approach would entail, in practice, the full and complete replacement (in civil and commercial matters) of the national systems of jurisdiction by the Brussels I regime. As stated above, the reason for the original decision of the drafters of the Brussels Convention not to harmonize the rules of jurisdiction for actions against non-EU domiciliaries was, according to P. Jenard, *"to avoid introducing a general disruption of the internal rules of jurisdiction and of the (domestic) norms that judges and lawyers are used to apply"* (see above, §130). If this was indeed the reason for leaving some room to national law, such reason has now faded since EU judges and lawyers tend to be at least as much familiar with the rules of the Brussels I regulation as with their national law (to the possible exception of newly admitted Member States), for the reason that with the integration of the national economies in the EU, a great number of disputes, if not the majority, seems today to be subject to the uniform rules because the defendant is domiciled in the Community.

148. The application of the uniform rules to defendants domiciled in third States would not imply any tremendous change in most Member States. Indeed, as seen above, in a large majority of them, the European regime already exercises an

influence on the application and interpretation of national jurisdictional rules (supra, Table B, §21).

There would however be important changes in the national practice of six Member States, i.e. in those Member States whose national law is not influenced at all currently by the EU regime and/or where national rules are based on principles or concepts which are entirely different from the European regime (see above, §20 and 21).

149. In should be noted that in other areas of European law, the rules of jurisdiction have been harmonized irrespective of the location of the domicile of the defendant within or without the Community. This is the case, for instance, in certain matters of intellectual property rights that are subject to Community legislation. Under Article 94(1) of the Community Trade Mark Regulation, Community trade mark courts have jurisdiction *"in respect of infringement committed or threatened within the territory of any of the Member States"*. There is no requirement under this provision that the defendant be domiciled in a Member State[329].

Thus, under existing EC legislation, when a party domiciled for instance in New York has committed an alleged act of infringement of a Community trade mark in England, jurisdiction is provided to the English courts for proceedings against such party, without any need to have recourse to national law. There is no equivalent to article 4 in this matter, where it was found that the harmonization of the rules jurisdiction was appropriate including for proceedings against defendants domiciled outside of the EU.

150. The system consisting in extending fully and entirely the scope of application of the uniform rules to defendants domiciled in third States has already been tested in practice in one Member State. Indeed, as seen above (§17), in Italy, the rules of Section II to IV of Title II of the Brussels Convention have been statutorily extended to non-EU domiciliaries. Thus, in practice, Italian courts have a single set of jurisdictional rules for disputes falling within the subject-matter scope of the Brussels I regime (with the qualification that with respect to disputes against non-EU domiciliaries the relevant uniform rules are those of the Brussels Convention and not of the Brussels I Regulation, though most of the provisions of these two instruments are identical).

It does not appear from the national report for Italy that such extension has created any particularly acute problem of adaptation in the Italian court practice. This would seem to suggest that in general, the jurisdictional rules of the Brussels regime are not as such unfit to be applied to proceedings against non-EU domiciliaries.

[329] See J.J. Fawcett and P. Torremans, *Intellectual Property and Private International Law*, Oxford University Press, at p. 327.

This proposition needs however to be reviewed in more details. So, in the following paragraphs, one shall seek to assess what would be the concrete impact of the extension of the common rules of the Brussels I Regulation to proceedings against defendants domiciled in third States. In the course of this exercise, one shall also take into accounts the specificities of these proceedings, and in particular the fact that the general ground of jurisdiction (domicile of the defendant) is not available in the Community.

(C) PRACTICAL IMPLICATIONS OF THE SUPPRESSION OF THE DISTINCTION BETWEEN EU AND NON-EU DEFENDANTS

151. The suppression of the distinction between defendants domiciled in the EU and defendants domiciled outside of the EU would entail four major consequences. Firstly, the uniform rules of jurisdiction of Sections 2 to 5 of Chapter II of the Regulation would be extended to non-EU defendants (1). Secondly, the national rules of jurisdiction would logically no longer be available to provide access to the local courts in this case (2). Thirdly, the Regulation should include rules about the declination of jurisdiction in favour of the courts of third States (3). Fourthly, the issue of the relations of the Regulation with international conventions between Member States and third States should be considered (4).

(1) EXTENSION OF THE SCOPE OF THE UNIFORM RULES OF JURISDICTION TO NON-EU DOMICILIARIES

152. One shall assess below what would be the concrete impact, in view the current practice in the Member States under national law, of the extension to non-EU domiciliaries of the uniform rules of Sections 2 to 5 of Chapter II of the Brussels I Regulation. The analysis shall review successively three main categories of uniform rules of jurisdiction that currently apply only when the defendant is domiciled in the EU, i.e. (1) special jurisdiction, (2) ancillary jurisdiction, and (3), protective jurisdiction (in insurance, consumer and employment matters).

The analysis does not include the voluntary prorogation of jurisdiction and the exclusive jurisdiction, for in these matters the uniform rules of jurisdiction already govern claims brought against defendants domiciled in third States (see above, §132).

(a) Special jurisdiction (article 5)

153. Article 5 of the Brussels I Regulation provides a number of situations in which a person may be sued in the court of a Member State because there is a factual connection between the forum and the cause of action, such as the location of the

performance of the contract (art. 5(1)), the location of the harmful event (art. 5(3)), or the situation of a branch, agency or other establishment (art. 5(5)).

The Jenard Report explains that the special rules of jurisdiction are justified by the *"close connecting factor between the dispute and the court with jurisdiction to resolve it"*[330].

For instance, with respect to jurisdiction in contract matters, the Court of justice has stressed that the attribution of jurisdiction to the place where the contract is performed (more precisely, the place of delivery of goods or provision of services, or the place of performance of the obligation in question) *"reflects an objective of proximity"*[331].

With respect to tort, delicts and quasi-delicts, jurisdiction at the place where the harmful event occurred *"is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings"* [332].

154. If the basis and justification of the special jurisdiction is the principle of proximity and the sound administration of justice and efficacious conduct of proceedings, it is not clear why its application should be subject to the location of the domicile of the defendant within the Community. Indeed, the fact that the domicile of the defendant is located in another Member State does not seem to reinforce the basis for the jurisdiction[333]. The jurisdiction at the place of performance of a contract, location of a harmful event, etc, would seem to have a justification on its own, irrespective of the location of the domicile of the parties.

As a consequence, there does not seem to be any reason why the connecting factors of article 5 would not be also relevant and appropriate for proceedings against parties domiciled in third States (the special case of maintenance obligations of article 5(2) is discussed below, §165).

155. More importantly, under the current text of the Regulation, the very same dispute integrated to the territory of the Community by one of the connecting factors of article 5, arising between the same parties, will sometimes be subject to the uniform rules of jurisdiction, and sometimes not, depending on which party initiates proceedings.

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[330] JOCE, No C59 of 5.3.79, p. 22.
[331] Decision dated 3 May 2007, Case C-386/05, *Color Drack v. Lexx Int'l Vertriebs*.
[332] ECJ, *Réunion européenne*, case C-51/97, [1998] ECR I-6511, at para. 27.
[333] In that sense, see E. Pataut, « Qu'est)ce qu'un litige 'intracommunautaire' ? Réflexions autour de l'article 4 du Règlement Bruxelles I », in *Mélanges en l'honneur de J. Normand*, éd. Du Juris-classeur, 2003, p. 365 s., at p. 372.

Thus, with respect to the same contract for the sale of goods to be delivered for instance in Finland by a seller domiciled in China, jurisdiction will be provided under the Regulation to the place of delivery in Finland if the Chinese party starts proceedings there, but there will be no jurisdiction under the Regulation if the Finish party wishes to start proceedings. Moreover, the inapplicability of any jurisdictional basis under the Regulation may not be cured by the application of national law since there is no specific jurisdictional basis for contracts under the national law of Finland (see above, Table D, §39).

Given that the connecting factors used in article 5 guarantee the existence of a close connecting factor with the territory of the Community (see the case law cited above), there does not seem to be any compelling reason to make the applicability of this rule varies depending on the procedural position of the parties in the proceedings.

156. The impact of the extension of article 5 jurisdiction to defendants domiciled in third States would be felt quite differently depending on the sub-rule involved and on the Member States where non-EU defendants are sued.

With respect to contract matters (article 5(1)), the impact would appear to be somewhat limited in the majority of the Member States, for under national law jurisdiction is already generally established at the place of performance (or breach) of the contract. There might be slight adjustments to the European rules that may be required, but in general the solutions reached in practice should remain very close, with the added advantage that the rules would be harmonized for all defendants, and throughout all the Member States.

In four Member States, however, the extension would bring a major change in the form of a substantial broadening of the jurisdiction, since for the moment four States lack any specific jurisdictional basis for contracts (see above, Table D, §39).

On the other hand, in another eight Member States, the extension of scope of the uniform rules would bring in practice somewhat a narrowing of the jurisdiction in that matter, for it would have the effect to remove the jurisdiction based on the place where the contract was made (see again Table D). The impact of the latter effect will be assessed below (at §166 s.).

With respect to tort matters (article 5(3)), the impact of the change would also appear to be quite modest in general, for the national law of most Member States already give jurisdiction at the location of the tort. There might also be the need for some adjustments, but they are likely to be still more minor than in matters of contracts (see Table E above, at §43). Major changes would be brought only in the three Member States which do not currently recognize in their national law a specific jurisdictional basis for tort disputes. There would also be a narrowing of the jurisdiction in the two

States which recognize the place of residence of plaintiff as a basis of jurisdiction in tort matters (see above, Table E, §43), which would no longer be available. Again, the impact of the latter change will be discussed below.

With respect to civil claim arising out of criminal offences (article 5(4)), the extension of the Community rule of jurisdiction to defendants domiciled in third State will have the effect to clarify a rule which seems to exist already in most Member States, even if not explicitly (see above, §44).

With respect to disputes arising out of the operation of a branch, agency or other establishment (art. 5(5)), the situation is again similar to that in contract matters, namely that the proposed extension of the scope of the rule would not bring any extraordinary change in most Member States which already recognize jurisdiction on this basis. In this matter, the exception would seem to concern only two Member States which do not currently give jurisdiction at the place of secondary establishment (see above, Table F, at §48). There would also be a narrowing of jurisdiction in the five Member States where jurisdiction on this ground would seem to be wider than under article 5(5) of the Regulation (see again Table F).

With respect to trust (art. 5(6)), the extension of the Community rule of jurisdiction would formally bring a big change since in most Member States (but six), there is no specific jurisdictional basis under national law for disputes relating to trusts. But the change would have very little impact in practice since disputes relating to trusts tend to concentrate in the Member States whose legal system recognize this institution, which themselves coincide in general with the legal systems where jurisdictional grounds are already recognized. On the other hand, it should be noted that in the six Member States which do organize such jurisdictional ground, it often relies on different connecting factors than the one provided for in article 5(6) of the Regulation (see above, §49 and 50).

(b) Ancillary jurisdiction (article 6)

157. Article 6 of the Brussels I Regulation creates situations in which the court of a Member State has jurisdiction over different claims arising out of one set of facts. It allows for the consolidation of various claims before one forum, but only in the limited number of circumstances provided for in this provision.

For these rules of jurisdiction to apply, the claim against the defendant domiciled in another State must have a connection with the claim for which jurisdiction exists in the forum. This is provided for explicitly in the text of the Regulation for actions against multiple defendants (art. 6(1)) and for counter-claims (art. 6(3)). And a

similar condition has been imposed by the Court of justice for the purpose of third party proceedings in actions on a warranty or guarantee (art. 6(2))[334].

It has also been stressed that jurisdiction in this matter is based on the idea that *"it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings"*[335].

158. Here again, if the foundations of the jurisdiction are reasons of expediency and sound administration of justice, it does not seem that there is any compelling reason why such jurisdiction should not cover all proceedings brought in the EU irrespective of the location of the domicile of the defendant. This is also the conclusion that is reached by legal commentators:

> *"l'objectif d'efficacité procédurale semble se suffire à lui-même. Ce qui justifie, en droit commun comme en droit communautaire, l'extension de la compétence, c'est l'étroitesse du lien unissant les différentes demandes … Dans cette mesure, la justification de la règle ne dépend pas tant de la considération du domicile du défendeur que d'un souci de bonne administration de la justice. Ici encore, que la détermination de la compétence dérivée soit régie par une règle communautaire ne semble guère poser de difficulté. Le litige étant par nature lié au territoire de la Communauté, soit en lui-même, soit du fait du lien de connexité qui l'unit à la demande principale, il ne serait guère choquant qu'une règle communautaire vienne statuer sur la compétence du juge d'un Etat de la Communauté"*[336].

This analysis is valid for multiple defendants (art. 6(1)) and third party proceedings (art. 6(2)), but also for counter-claims (art. 6(3)), where the current situation consisting in applying the Regulation only when the defendant (i.e. the original plaintiff) is domiciled in the EU is still probably more incoherent:

> *"Pour l'article 6-3 … la condition de domiciliation est certainement fort peu convaincante. Par hypothèse, en effet, le défendeur à la demande reconventionnelle est le demandeur principal ; c'est donc lui qui a estimé que a compétence du juge saisi était adaptée à la résolution de son litige. Dans cette mesure, l'extension de la compétence du juge saisi à la demande reconventionnelle ne peut guère être considérée comme une atteinte aux droits du défendeur reconventionnel de même qu'il est difficile d'estimer que le litige n'est pas suffisamment ancré sur le territoire de la Communauté, du*

[334] ECJ, case C-365/88, *Kongress Agentur Hagen*, [1990] ECR I-1845, at para. 11.
[335] ECJ, case C-539/03, *Roche Nederland*, at para. 20.
[336] E. Pataut, « Qu'est)ce qu'un litige 'intracommunautaire' ? Réflexions autour de l'article 4 du Règlement Bruxelles I », in *Mélanges en l'honneur de J. Normand*, éd. Du Juris-classeur, 2003, p. 365 s., at p. 377.

fait du lien évident existant entre la demande principale et la demande reconventionnelle"[337].

159. There is an additional reason that renders the distinction between EU and non-EU domiciliaries problematic in this matter. Under the current text of Brussels I, as soon as there are several claims that are brought against both EU and non-EU domiciliaries, the courts of the Member States are required to *combine* the application of the rules of the Brussels I Regulation with the rules of national law. This is a factor of complexity, for the very same issue of international jurisdiction in the very same case will have to be dealt with by reference to different legal provisions which may be based on different concepts and principles.

The combination of EU and non-EU jurisdictional rules may also lead to paradoxical solutions or even to discrimination between similar parties in the same case. Take for instance the *Roche Nederland* case that was decided by the Court of justice on 10 July 2007. In that case, the Court of justice ruled that article 6(1) does not apply in European patent infringement proceedings involving a number of companies established in various contracting states in respect of acts committed in one or more of those States *"even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy elaborated by one of them"*[338]. But this case involved defendants domiciled both in the European Union and defendants domiciled in third States, including the United States. Given the limitation of the scope of article 6(1) to defendants domiciled in the EU, the ruling of the Court of justice dpes not affect the jurisdiction as against the US defendant. Thus, in the case at hand, proceedings could potentially proceed with respect to the US defendant (provided that jurisdiction exist under national law), at the same time that proceedings against all the EU defendants, placed in the same situation, could not be continued.

Conversely, as seen above, in seven Member States, there is no rule allowing for the consolidation of jurisdiction against multiple defendants, even in circumstances where that would be possible under article 6(1) of the Brussels I Regulation. In this case, proceedings can be pursued in the EU against all the EU defendants, but not against those domiciled in third States.

The extension of the scope of application of the uniform rules to defendants domiciled in third States would remedy those inconsistencies, which have already been analysed above in the comparative analysis of State practices (at §73). It would

[337] E. Pataut, « Qu'est)ce qu'un litige 'intracommunautaire' ? Réflexions autour de l'article 4 du Règlement Bruxelles I », in *Mélanges en l'honneur de J. Normand*, éd. Du Juris-classeur, 2003, p. 365 s., at p. 378.
[338] Case C-539/03, 13 July 2006, Operative part.

also avoid what the reporter for Spain has called a *"jurisdictional kaleidoscope vis-à-vis third countries which promotes opportunists forum shopping"*[339].

(c) Protective Jurisdiction (insurance, consumer and employment matters)

160. Sections 3, 4 and 5 of Chapter II of the Brussels I Regulation provide rules dealing with jurisdiction in matters relating to insurance, consumer contracts, and employment law matters. The main objective of these rules is to protect the party who is deemed to be the weaker from the socio-economic point of view, by providing this party, regardless of whether he is the plaintiff or defendant, the option of requiring that the litigation takes place in his own socio-economic sphere.

The requirement of protection is very explicit in the case law of the Court of justice. Thus, in matters relating to insurance, the Court has considered that *"in affording the insured a wider range of jurisdiction than that available to the insurer and in excluding any possibility of a clause conferring jurisdiction for the benefit of the insurer, they reflect an underlying concern to protect the insured, who in most cases is faced with a predetermined contract the clauses of which are no longer negotiable and is the weaker party economically"*[340].

In matters relating to consumer contracts, the Court has interpreted the uniform rules in view of the fact that these rules seek to *"protect the consumer"* and the Court has therefore required, for the protection to be afforded, that the consumer *"personally is the plaintiff or defendant in proceedings"*[341].

Likewise, in matters relating to contracts of employment, the Court has stressed that the interpretation of the rules of jurisdiction "*must take account of the concern to afford proper protection to the employee as the weaker of the contracting parties from the social point of view. Such protection is best assured if disputes relating to a contract of employment fall within the jurisdiction of the courts of the place where the employee discharges his obligations towards his employer, as that is the place where it is least expensive for the employee to commence or defend court proceedings"*[342].

161. Here again, if the objective is the protection of weaker parties by providing these parties the option of requiring that the litigation takes place in their own socio-economic sphere, there does not seem to be any reason why the protection should be subject to a restriction relating to the location of the domicile of the defendant. This is the more so since the weaker tends often to be the claimant in the proceedings, with the consequence that the socio-economic sphere where the jurisdictional protection needs to be afforded is usually within the Community. In other words, there is already

[339] See the Report for Spain, under Question 14.
[340] ECJ, *Group Josi*, case C-412/98, [2000] ECR I-5925, at para. 64.
[341] ECJ, *Shearson Lehmann Hutton*, case C-88/91, [1993] ECR I-139, at para. 23.
[342] ECR, *Pugliese*, case 437/00, [2003] ECR I-3573, at para 18.

a strong connection with the Community which is directly related to the nature of the matter at stake (which is not the case of the additional requirement that the defendant be domiciled in the EU).

Also, it is quite paradoxical that in ordinary civil and commercial disputes, the issues of validity and effect of choice of court agreements is currently subject to the application of the Regulation even when the defendant is domiciled in a third State (this is because article 23 of the Regulation applies fully as soon as one of the parties is domiciled in the EU, being the defendant or plaintiff[343]: see above, §132). On the other hand, in these three particular matters involving a weaker party, the very stringent restrictions to the effect of choice of court agreements designed to protect these parties will apply only when the defendant is domiciled in the EU.

It should however be noted that under the current text of the Regulation, the protection is afforded to the weaker party not only when the defendant is domiciled in the EU, but also when the party who is deemed to be stronger has an establishment, agency or branch on the territory of a Member State (see already above, §53). This qualification to the traditional requirement that the defendant be domiciled in the EU is however not sufficient to ensure that weaker parties established (or working) in the EU will benefit from the jurisdictional protection under the Regulation, since the "stronger" party does not always have an establishment in the EU. For instance, when an employer domiciled outside the EU does not have any establishment, agency or branch in the EU, its employees habitually carrying out their work on the territory of the Member States will normally not benefit from the right under the Regulation to bring proceedings at the place of habitual work. Likewise, a consumer purchasing goods or services on the internet from a website hosted by a non-EU company who directs activities towards the Member State where he is domiciled will not be able to rely on the jurisdictional protection of the Regulation.

162. The problem is reinforced by the fact that jurisdictional protection is often lacking under national law, with the consequences that when the defendant is domiciled outside of the EU, the inapplicability of the Brussels I Regulation leads to the impossibility for the weaker party to bring effectively proceedings. The best example is probably the *Brenner* case[344] decided by the Court of justice. In that case, the plaintiffs, not acting within the scope of their profession or occupation, had commissioned a New York broker with the implementation of commodity future transactions, on a commission basis. The plaintiffs raised the liability of the broker in German courts as a consequence of the loss of large sums of money.

The Court confirmed that since the broker was domiciled in a non-Contracting State, the jurisdiction of the German courts was not governed by the uniform rules but by

[343] As indicated, one of the rules contained in article 23 (the paragraph 3) still applies when none of the parties are domiciled in the EU: see above, §132.
[344] ECJ, case C-318/93, [1994] ECR I-4275.

the law of the Contracting State in which proceedings are brought. The consequence of this finding, which was entirely in accordance with the text of the Brussels Convention (and of the Regulation), was that in this case the plaintiffs were deprived of the right to bring proceedings in Germany, since it appears that there was no basis under national law to provide jurisdiction to the German courts. This is still the case today, as see above (see Table G, at §56).

The result reached in *Brenner* is widely considered to be unsatisfactory[345]. As noted by E. Pataut:

> *"Tout d'abord, la solution peut paraître déséquilibrée et finalement peu protectrice du consommateur. A supposer que la configuration procédurale soit inversée, le professionnel demandeur ne pourrait saisir d'autre tribunal que le tribunal, situé dans un Etat membre, du domicile du consommateur. Un tel déséquilibre se justifie par le caractère fondamental accordé à la règle de compétence du domicile du défendeur. Mais en matière de protection de la partie faible, c'est précisément ce caractère fondamental qui est écarté, puisque l'application de l'article 2 est exclue et que l'ouverture d'un* forum actoris *au profit du consommateur, combinée avec l'obligation pour le professionnel de saisir les tribunaux du domicile du consommateur, conduit à faire basculer l'équilibre général de la disposition vers le for du consommateur, quelle que soit sa position dans le litige. Dans cette mesure, l'exigence posée par le texte et conformée par l'arrêt* Brenner *ne paraît pas entièrement convaincante. Sous l'angle procédural, on comprend mal que la protection du consommateur puisse être subordonnée à un critère aussi aléatoire que la position procédurale des parties, indépendamment de toute considération de localisation de l'opération contractuelle et alors même que le centre de gravité de la règle de compétence se trouve au domicile de la partie faible. On peut d'ailleurs remarquer que, sous l'angle du droit substantiel, le critère d'applicabilité des règles communautaires protectrices tourne en général autour du domicile du consommateur et de la localisation de l'opération économique … »*[346].

163. The impact of the extension of the application of the protective rules of jurisdiction to defendants domiciled in third States would be quite far reaching in many Member States.

In consumer contracts matters, the extension of scope would affect most dramatically the 9 Member States which do not currently afford any specific jurisdictional protection to consumers. But the change would also have a sizable impact on the

[345] See in particular R. Libchaber, *Rev. crit. DIP*, 1995, p. 754.
[346] E. Pataut, « Qu'est)ce qu'un litige 'intracommunautaire' ? Réflexions autour de l'article 4 du Règlement Bruxelles I », in *Mélanges en l'honneur de J. Normand*, éd. Du Juris-classeur, 2003, p. 365 s., at p. 375.

Member States which only provide under their national law a restriction to the effect of choice of court agreement, without creating as such a right of consumer to bring proceedings at home (see Table G, at §56).

In employment contracts matters, the extension of scope would strongly impact the practice in the 8 Member States which do not organize protective rules in that matter, but also in a few other Member States which only provide restrictions to choice of court agreements (see above, Table, H, at §59).

But the most important change would occur in insurance matters. Indeed, in 22 Member States there is currently no specific protective rule of jurisdiction under national law. Only five Member States provide some restrictions to choice of court agreements, and only four of them recognize the right of the insured party to bring proceedings at home (see above, Table I, at §61). The wisdom of this particularly dramatic change is further discussed below, §165).

(d) Provisional Conclusion: the existing rules of jurisdiction usually ensure themselves a strong connecting link with the Community which justify their application to non-EU domiciliaries

164. As the foregoing demonstrates, in most cases, the connecting factors used to establish jurisdiction under the Regulation create themselves a strong link with the Community, *irrespective of the domicile of the plaintiff* (and of the defendant). This is the case in particular with respect to the following matters, where the connecting links with the Community are as follows:

- Contracts (art. 5(1)): the performance of the contract within the Community;
- Tort, delict and quasi)delict (art. 5(3)): the location of the harmful event in the Community;
- Civil claim arising out of criminal proceedings (art. 5(4)): the connection of the claim with the criminal action to be decided by a court in the Community;
- Branch, agency or other establishment (art. 5(5)): the location of the branch, agency or other establishment within the Community;
- matters relating to trusts (art. 5(6)): the domicile of the trust within the Community, which in England supposes that the trust in question has its closest and most real connection with England;
- Wages relating to the salvage of cargo or freight (art. 5(7): the arrest of the cargo or freight within the Community;
- Related claims (art. 6(1) to (4)): the connection of the claim with another claim which is to be decited by a court in the Community;
- Consumer contracts (art. 15(1)(c)): the pursuit or direction of activities towards the Community (except for instalment credit term contracts, on which see below, §165);

- Employment contracts (art. 19): the carrying out of work by the employee in the Community;

It should be noted that since these Community rules ensure the existence of a strong connecting link between the cause of action and the forum, irrespective of the domicile of the parties, their application to defendants domiciled in third States could hardly be seen as excessive or unwarranted for these parties. As a matter of fact, the establishment of jurisdiction under these rules of Community law for actions against defendants domiciled in third States will often appear much more reasonable and restrained than under the rules of national law, which include rules of exorbitant jurisdiction (see also below, §166 s.).

165. On the other hand, in a limited number of cases, the jurisdiction under the uniform rules of the Regulation is or can be established on the basis only of the domicile of the plaintiff within a Sember State, regardless of the existence of any other connecting factor with the forum. This is the case in the following matters:

- matters relating to maintenance (art. 5(2)): jurisdiction is established at the place where the maintenance creditor is domiciled or habitually resident, without any further restriction;
- matters relating to insurance (art. 8 to 14): jurisdiction is established at the place of habitual residence of the policyholder, the insured or the beneficiary, without any further restriction;
- matters relating to instalment credit terms (art. 15(1)(a) and (b)): jurisdiction is established at the place where the consumer is established, without any further restriction.

In these three matters, the extension of Community jurisdiction to parties domiciled in third State may require closer scrutiny, for there is no other connecting link with the Community than the domicile of the plaintiff in a Member State, aside from the domicile of the defendant (which would no longer be in the Community in the situation hereby analysed).

With respect to matters relating to maintenance and instalment credit terms, the need for the protection of persons established within the Community (see above, §137) may appear to be particularly strong and so widely accepted that it could potentially provide a justification *per se* of the application of the uniform rules to defendants domiciled in third States. In other words, to establish jurisdiction at the plaintiff's home in those cases, regardless of the location of the domicile of the defendant, is likely to prove quite uncontroversial. It should be noted that with respect to maintenance claims, the issue of jurisdiction is likely in any event to be subject in the future to a new Community instrument with specific jurisdictional protection (see the Proposal for a Council Regulation on jurisdiction, applicable law, recognition and

enforcement of decisions and cooperation in matters relating to maintenance obligations[347]).

The situation may be different with respect to matters relating to insurance. As seen above, under the national law of the vast majority of the Member States, there is currently no specific regime of jurisdictional protection in insurance matters, which are treated as any other commercial activity. There does not appear to be in this matter the same consensus that jurisdictional protection is required as in matters of consumer contracts and employment contracts. In addition, it is striking that there is no guarantee, as in the latter two matters, that the economic activity will be "integrated" within the economy or market of a Member State for the rule of *forum actoris* to apply. Indeed, there is no equivalent, in insurance matters, to the condition that activities be pursued directed or carried out within the forum State.

As a consequence, the justification for the extension of the *forum actoris* rule to third State domiciliaries may arguably appear less compelling in insurance matters than in other matters. Hence, there may be a case to be made against such extension (except when the dispute arises out of the operations of a branch, agency or establishment of the insurer in a Member State, as already provided for under the current article 9(2) of the Regulation).

It should be noted that the foregoing analysis concerns only the *forum actoris* rule. The other jurisdictional rules in insurance matters that are provided in articles 10 to 14 of the Regulation would appear to ensure generally the existence of a sufficient connecting link with the Community that could justify their extension to proceedings against non-EU domiciliaries.

(2) ABOLITION OF NATIONAL (INCLUDING EXORBITANT) GROUNDS OF JURISDICTION FOR CLAIMS AGAINST NON-EU DOMICILIARIES

166. The suppression of the condition that the defendant be domiciled in the EU for the uniform rules of jurisdiction of the Brussels I Regulation to apply would imply, if no other change is introduced in the Regulation, that the national rules of jurisdiction would no longer be available for actions against non-EU domiciliaries.

The extension of the scope of the uniform rules would therefore, paradoxically, lead in most cases to a *narrowing* of the possibilities to bring proceedings against persons domiciled in third States. This is because the national rules of jurisdiction tend, in many Member States, to be more liberal than the rules of the Brussels I Regulation (even if in certain particular areas, jurisdiction under national is sometimes narrower than under Community law: one such example is the *Brenner* case reviewed above).

[347] Guidelines to be submitted to Coreper/Council, Doc. 8404/07 dated 13 April 2007.

167. There are four main factors that explain why the national rules of jurisdiction tend to be wider than the Community rules of the Brussels I Regulation.

The first one is that while many of the specific rules of jurisdiction of the Brussels I Regulation are also found in national law, their application is frequently subject to laxer conditions than under Community law. The following examples borrowed from the current practice in certain Member States (see the comparative analysis under Part I of this study) may be given:

- in contract matters, jurisdiction is established at the place where the contract was made (see above, Table D);
- in tort matters, jurisdiction is established at the place of residence of the plaintiff (see above, Table E);
- when the defendant has a branch or other establishment in the forum, jurisdiction is established even if the dispute does not relate to the operations of the branch (see above, Table F);
- in consumer contract matters, the consumer can bring proceedings at home regardless of the existence of a territorial connection between the contract or the activities of the professional and his home State (see above, Table G);
- in employment contract matters, the employee may bring proceedings at the place where he is domiciled, where the contract was signed, at the place where the remuneration is paid, or in the country of the citizenship of the employee (see above, Table H);

The second reason is that in certain Member States, the access to local courts is guaranteed in particular matters where it is felt that a jurisdictional protection must be provided. This is the case, for instance, in relation to certain distribution contracts and to certain maritime matters (see above, §62-63 and 64).

The third reason, which is much more wide reaching in practice, is that in the national law of all but three Member States, there are so-called "exorbitant" rules of jurisdiction which allow proceedings to be brought in the forum in circumstances which do not guarantee a close connection between the forum and the parties, the circumstances of the case and the cause or subject of the action. As seen above (§74 s.), these rules of jurisdiction, which tend to coincide with those listed in Annex I of the Regulation, relate to the citizenship of the parties, the temporary presence of the defendant on the territory, the domicile of the plaintiff, the location of assets, and the "doing business".

The fourth and final reason is that in 10 Member States, proceedings can be brought in the forum on the basis that there is no other court of competent jurisdiction available abroad. The *forum necessitatis* rule does not exist in the Brussels I Regulation, and is used mostly, in practice, by EU plaintiffs to bring proceedings

against non-EU defendants when it is impossible or unreasonable to bring proceedings in a non-EU Member State (see above, §74 s.).

(3) THE NEED FOR ADDITIONAL SPECIFIC GROUND(S) OF JURISDICTION FOR ACTIONS AGAINST THIRD STATE DOMICILIARIES

168. The abolition of the national rules of jurisdiction for actions against third parties, as discussed above, might prove problematic, since they would seem to serve currently an essential role under national law. In particular, as noted above, it is usually considered that the rules of exorbitant jurisdiction, which require only some weak connection with the forum, fulfil the purpose of facilitating the right of access to court. This purpose is still much clearer with respect to the *forum necessitatis* rule, which is often considered to be based on or imposed by the right to a fair trial under article 6(1) of the European Convention on Human Rights (see above, §83 s.).

The concern to ensure an effective access to court may exist also when the defendant is domiciled in the EU, but it is much more acute when the defendant is domiciled in a third State. Indeed, by definition, in this situation, the general forum of article 2 of the Regulation is not available, since the Regulation can only provide jurisdiction within the Community, and it is up to the law of the third State where the defendant is domiciled to determine whether jurisdiction can be brought there.

Also, by definition, the principle of mutual trusts between the courts of the Member States is not relevant with respect to third States, while this principle is, according to the case law from the Court of justice, one of the foundations of the allocation of jurisdiction between the courts of the Member States and of the free movement of judgments. This was made clear in the *Turner* case:

> *"it must be borne in mind that the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments"*[348].

As the Court stresses in this case, the principle of mutual trust relates not only to the proper application of the jurisdictional rules, but more generally to "*one another's legal systems and judicial institutions*". Such principle has now been enshrined in the

[348] Case C-159/02, [2004] ECR I-3565, at para. 24.

text of the Brussels I Regulation, whose Preamble refers to the "*mutual trust in the administration of justice in the Community*" (Recital 16). As commentators have pointed out:

> "*C'est sur le justice elle-même, telle qu'administrée dans chacun des Etats members, que porte la confiance réciproque … Cette conception a été renforcée depuis que la Convention de Bruxelles a été communautarisée pour être transformée en un règlement du conseil, lequel s'inscrit dans le cadre de la création d'un 'espace de liberté, sécurité et justice' … On observera que la confiance réciproque dans la justice au sein de l'Union européenne n'est pas le résultat seulement de l'affirmation d'une volonté politique. Elle peut s'appuyer sur un socle commun de garanties juridiques qui s'imposent dans tous les Etats membres. Celles-ci découlent non seulement du régime de la Convention européenne des droits de l'homme auquel renvoie le Traité, mais aussi des principes généraux de l'ordre juridique communautaire*"[349].

These guarantees are not ensured when proceedings are to be brought in the courts of third States which, by essence, are not subject to Community law. The plaintiff who brings proceedings in a third State will usually not be able to rely on the principles of the right to a fair trial under article 6 of the Human Rights Convention (except in these non-EU States which are contracting parties to this Convention). That does not mean that the rules of jurisdiction for actions against non-EU domiciliaries cannot be harmonized. But it does mean that any harmonization of these rules must take into account the unavailability in the Community of the general ground of jurisdiction of the defendant's domicile.

This is all the more important since the current interpretation of the other (than the defendant's home) uniform rules of jurisdiction was devised in view specifically of the existence of the alternative jurisdiction at the place of the defendant's domicile. As already indicated, the Court of justice has stressed repeatedly the following principle:

> "*under the system of the Convention the general principle is that the courts of the Contracting State in which the defendant is domiciled are to have jurisdiction and that it is only by way of derogation from that principle that the Convention provides for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Contracting State. Consequently, the rules of jurisdiction which derogate from that general principle cannot give rise to an interpretation going beyond the cases envisaged by the Convention*"[350].

[349] A. Nuyts, « La fin des injonctions *anti-suit* dans l'espace judiciaire européen », *Journal des tribunaux*, 2005, p. 32 s, at p. 34-35.
[350] ECJ, *Benincasa*, case C-269/95, [1997] ECR I-3767, at para. 13.

169. These developments show that it would be inappropriate to replace the national (including exorbitant) rules of jurisdiction by the existing uniform rules of jurisdiction of the Brussels I Regulation without taking into account the fact that the general forum of the defendant's domicile is unavailable in the EU.

This problem could be addressed in at least four different ways.

(a) Introduction of a complete new set of jurisdictional grounds for actions against defendants domiciled in third States

170. The first option would consist to devise specific jurisdictional rules for actions against non-EU domiciliaries which would be wider than the applicable uniform rules for actions against EU domiciliaries. This approach would have the advantage to answer directly the methodological problem related to the fact that the existing uniform rules have been defined restrictively in view of the availability of an alternative forum within the EU.

However, the solution would trigger the difficulties which have already been discussed above (see Option 4, at §145 s.), in that it would create another set of rules which would operate in parallel to the existing ones with respect to the same categories of disputes (i.e. contracts, tort, trust, insurance, consumer contracts, employment contracts, etc.). It appears preferable, for the reasons discussed above, to have in principle a single set of jurisdictional heads regardless of the location of the domicile of the defendant.

(b) Introduction of additional grounds of jurisdiction only for actions against defendants domiciled in third States

171. The second option would consist in replacing the reference to national law in Article 4 of the Regulation by one or more additional uniform grounds of jurisdiction that would apply only for actions against defendants domiciled in third States. This (or these) ground(s) of jurisdiction would be available *in addition to* (and not in replacement of) the ordinary grounds of jurisdiction under the existing uniform rules of the Regulation, whose application would be extended to non-EU domiciliaries (as discussed above).

Such additional rule(s) of jurisdiction could either be inspired by the exorbitant criteria currently used under national law (1) or by more generally accepted principles (2).

1°) <u>Grounds of jurisdiction inspired by the exorbitant fora under national law pursuant to Annex I of the Regulation</u>

172. As discussed above, under the current version of the Regulation, defendants domiciled in third States may be brought before EU courts on the basis of national

law, including the so-called exorbitant criteria that are referred to in Annex I of the Regulation.

As these grounds of national law would no longer be available, one possible approach would be to introduce in the Regulation itself new heads of jurisdiction inspired by the rules of Annex I.

This could appear at first sight to be a satisfactory solution since it would at the same time harmonize this matter and preserve the possibilities to access EU courts that currently exist for actions against defendants domiciled in third States. In addition, the solution could be justified on the ground that most legal systems in the world also rely on some forms of exorbitant fora, with the consequence that very often persons domiciled in the EU may themselves be sued as defendants in the courts of third States on at least one of the jurisdictional grounds that are included in Annex I of the Regulation. The introduction of some of these jurisdictional rules in the text of the regulation for actions against defendants domiciled in third States might therefore appear as a way to create a level playing field in extra-community civil and commercial litigation.

173. Such approach would however raise very delicate issues. Firstly, as suggested by the negative connotation of the word "exorbitant", the rules that are discussed here are usually considered as being abnormal and excessive in international litigation[351]. This is reflected in the text itself of the regulation whose Article 3 precludes explicitly the use of the rules of Annex I of the Regulation for actions against defendants domiciled in the EU. Of course, and this is the reason for the current system, these rules are considered excessive and undesirable only *from the perspective of the defendant*, while they tend to be very advantageous for the plaintiff. Thus, the transformation of the exorbitant fora of Annex I into Community wide grounds of jurisdiction would prove very valuable for EU plaintiffs, while the adverse consequences would be felt only by non-EU defendants.

But such difference of treatment between EU and non-EU litigants would likely prove very controversial. The current system of Article 4(2) of the Regulation – in that it extends the scope of national exorbitant jurisdiction to all persons domiciled in the EU (see above, §82) – has already been tagged as discriminatory by commentators in third States[352]. As Professor von Mehren noted already in 1983, "*it is most regrettable that, in the Brussels Convention …, the European Economic Community has accepted jurisdictional bases for certain international situations that it rejects as*

[351] See P. Struyven, "*Exorbitant Jurisdiction in the Brussels Convention*", *Jura Falconis*, 1998-1999, p. 521 s.; L.I. De Winter, "Excessive Jurisdiction in Private International Law", 17 *I.C.L.Q.* 706 (1968).
[352] See E. Juenger, « A Shoe Unfit for Globetropping », 28 UC Davies Law Review 1027 (1995), at p. 1044.

exorbitant for situations in which the defendant is closely connected with a member of the Community"[353].

The criticism would certainly be amplified if the national grounds of exorbitant jurisdiction were to be given the status of Community rules with a European wide application. Preserving the application of national laws that include exorbitant rules is already one thing, sanctifying these rules into Community law would seem to go one step (too) farther.

Secondly, under current law, in each Member State, there is usually only one single form of exorbitant jurisdiction. On the other hand, as seen above, the exorbitant criteria of Annex I include five main categories of rules, relating respectively to the citizenship of the parties, to the temporary presence of the defendant within the territory, to the domicile of the plaintiff, to the location of assets, and to the "doing business" (see above, §75 s.). If all such criteria were to be transformed into Community rules of jurisdiction for actions against defendants domiciled in third States, the opportunities of forum shopping and excessive assertion of jurisdiction would be tremendously increased.

Of course, one could consider not to retain all the exorbitant fora listed in Annex I. But, and that would be a third issue, the choice that would need to be made would be very delicate. The exorbitant fora are designed not only as a way to facilitate the access of plaintiffs to local courts[354], but also as a tool to promote political interests of the State concerned[355]. In this respect, the exorbitant criteria are usually intimately related to the political and legal history and peculiarities of each legal system. As a consequence, it would probably be unsuitable to pick one particular criteria, developed in one particular legal system, and to generalize the application of such criteria throughout the Community, including in Member States which have never used such criteria and which might find it excessive or inappropriate.

174. Any attempt to make a choice between the five kinds of exorbitant fora only confirms this point.

The *nationality* is used as a main ground of jurisdiction in only three Member States (in civil and commercial matters falling under the scope of the Brussels I Regulation), and is furthermore relied as an element of the jurisdiction in another four Member States (see above, at §75). This criteria is the expression of the so-called "allegiance theory", under which the administration of justice is viewed as a function of a

[353] See A.T. von Mehren, "Adjudicatory Jurisdiction : General Theories Compared and Evaluated", 63 *Boston U.L. Rev.* 279 (1983), at p. 340, n. 180.
[354] See G. Droz, « Les droits de la demande dans les relations privées internationales », *Trav. Com. Fr. DIP*, 1993-1995, Pedone, 1996, p ; 87 s., at p. 106.
[355] See C. Kessedjan, "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters", Preliminary Document No 7 of April 1997, Hague Conference of Private International Law, www.hcch.net, at para. 138.

personal bond or relation between the sovereign and the subject[356]. This theory is typical of the legal systems influenced by the Romanist tradition. It is totally unknown in some other legal systems such as those of the anglo-american tradition. It would therefore seem to be unsuitable that the criteria of the nationality of the plaintiff be introduced as a ground of jurisdiction for proceedings brought against non-EU defendants, say, in England or Ireland.

The *presence of the defendant* within the territory of the forum at the time proceeding is initiated is used in 7 Member States (see above, §76). It is the expression of the so-called "power theory", under which the administration of justice depends on the existence of an effective hold over the defendant[357]. By contrast with the prior theory, this theory is typical of the legal systems influenced by the English common law, while it is unknown in most other legal systems. Again, it would therefore seem to be inappropriate to transform such rule into a Community principle for actions against defendants domiciled in third States (though such extension would certainly not appear less justifiable than the extension of the nationality criteria in England and Ireland).

The *location of assets* within the territory of the forum is used as a general ground of jurisdiction[358] in 10 Member States (see above, §77). It is also the expression of the power theory, but applied this time to things instead of persons[359]. It is typically used in legal systems influenced by the German legal tradition, but it is also enshrined in other legal systems such as Scotland. On the other hand, it is unknown or has been rejected in a number of other legal systems, such as France. Again, the extension of the rule to such States might appear unbecoming.

The *domicile of the plaintiff* in the forum used to be a general ground of jurisdiction in Belgium and the Netherlands, but it has now been repelled in these States and today it is still used in only one Member State (Latvia), and only with respect to a small category of cases (see above, §79). Unlike the precedents criteria, this one would not seem to be based on a general theory that is intimately related to a particular legal tradition. While such criteria could therefore be easier in principle to transform into a Community principle, this would certainly be unfitting in practice, since it would create a rule of *forum actoris* that goes against a fundamental principle of the Brussels I regime.

Finally, the *doing business* is a ground of general jurisdiction (allowing proceedings to be brought even if the cause of action does not arise out of the activities in the

[356] See A.T. von Mehren, "Adjudicatory Jurisdiction : General Theories Compared and Evaluated", 63 *Boston U.L. Rev.* 279 (1983), at p. 283 ; P. Lagarde, "Le principe de proximité dans le droit international privé contemporain", *Rec. Des Cours*, 1986-I, t. 196, p. 128, No 122.
[357] See von Mehren, *op. cit.*, p. 285.
[358] In the sense that it allows to bring proceedings for any claim against the defendant, even if unrelated to the asset or for a value going veyond such asset : see above, §77.
[359] See von Mehren, *op. cit.*, p. 285.

forum) in – seemingly – only one Member State (Cyprus, see above, §78). As already pointed out, this rule is typical of the jurisdictional system of the United States. It is based on the consideration that when a person or company is engaged in continuous and systematic activities within a State, this warrants a finding of "presence" in the forum, justifying that this person, who benefits from his activities in the forum and has established minimum contacts with it, be subject to general jurisdiction there[360]. This justification is peculiar to the US jurisdictional thinking so that any transposition in the European Community would be delicate.

In addition, the establishment of the doing business criteria as a Community wide jurisdiction rule would be quite paradoxical (even if applied only for certain categories of actions), since in opposition to the United States, most Member States have taken the position, during the lengthy negotiations relating to the Hague Convention project, that such criteria was to be treated as a prohibited ground of jurisdiction (under the so-called "black list", as opposed to the "white list" of the accepted uniform grounds of jurisdiction and to the "grey list" of the accepted grounds by reference to national law)[361].

2°) Grounds of jurisdiction inspired by more generally accepted principles

175. While it would probably be very delicate to transform exorbitant fora taken from Annex I of the Regulation into Community wide rules of jurisdiction for actions against defendants domiciled in third States, other criteria, based on more generally accepted principles, could be considered as additional grounds of jurisdiction.

Inspiration could be drawn in this respect from the tentative agreement reached during the discussions on the Hague Convention project. As is known, the decade long negotiations on this project have reached a stalemate in 2001, at least with respect to the original ambitious goal of drafting a comprehensive convention covering all the rules of jurisdiction and enforcement of judgments in civil and commercial matters[362]. But the draft convention that had been adopted by the Special Commission in August 2000[363] still reflects a tentative agreement on some issues, including with respect to certain jurisdictional grounds.

[360] See M. Twitchell, « Why we keep doing business with doing-business jurisdiction », 2001 U Chi Legal F 171 (2001).
[361] See A.T. von Mehren, "The Case for a Convention-mixte approach to jurisdiction to adjudicate and recognition and enforcement of foreign judgments", 61 Rabels Z 86 (1997); "La rédaction d'une convention universellement acceptable sur la compétence judiciaire internationale et les effets des jugements étrangers: le projet de la Conférence de La Haye peut-il aboutir?", Rev. crit. DIP, 2001, p. 85 s.; A. F. Lowenfeld, "Could a treaty trump Supreme court jurisdiction?", 61 Alb. L. Rev. 1159 (1998).
[362] The negotiations have continued on the more modest goal of drafting a convention dealing only with choice of forum clauses in business-to-business relations. Such negotiations have successfully be completed with the adoption of the 2005 Hague Convention on Choice of Court Agreements.
[363] « Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters and report by P. Nigh and F. Pocar", Prel. Doc. No 11 dated August 2000, www.wcch.net.

176. One such ground presents a particular interest for the purpose of this study: the jurisdiction based on the carrying out of activity in the forum. This ground should not be mixed up with the "doing business" jurisdiction discussed above: while the latter represents a general ground of jurisdiction that allows any claim to be brought in the forum, even if unrelated to the business carried out in the forum, the former is a ground of *specific* jurisdiction that concerns only the claims arising out of the activities located in the forum.

Under the 2000 Draft Hague Convention, such jurisdiction was drafted in the form of a broadening of the jurisdiction based on the location of a branch, agency or other establishment (as is currently found in article 5(5) of the Brussels I Regulation). Under article 9 of the Draft Hague Convention:

> *"Article 9 Branches and regular commercial activity*
>
> *A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, or where the defendant has carried on regular commercial activity by other means, provided that the dispute relates directly to the activity of that branch, agency or establishment or to that regular commercial activity"* [364].

During earlier discussions, the "regular activity" criterion had been considered as a separate ground of specific jurisdiction. Such ground was presented as having a wider scope than the grounds of jurisdiction for contract and torts. As explained in the Synthesis of the word of the Special Commission of March 1998:

> *"The basic idea is that when a person or entity has engaged in activities in a given territory and this activity has given rise to litigation, the person or entity may be brought before the court in that territory with jurisdiction to decide the dispute … It is one of specific jurisdiction, since it is limited to actions directly resulting from the activity in question … Jurisdiction based on activities, like any provision based essentially on factual notions as opposed to legal notions, is a bit more difficult to draft, because it is vaguer, giving the court that has to apply it more room for interpretation and thus, offering the litigants less foreseeability as to what court will have jurisdiction"*[365].

If a rule based on the location of activities indeed provides less foreseeability than the specific rules of jurisdiction for contracts, tort and branches that are included in article 5 of the Regulation, it also clearly implies *a widening of such jurisdiction.* As discussed above, this is precisely what is necessary for actions against defendants

[364] *Ibid.*
[365] C. Kessedjian, « Synthesis of the work of the Special Commission of March 1998 on international jurisdiction and the effects of foreign judgments in civil and commercial matters », Prel. Doc. No 9 dated July 1998, www.hcch.net, para. 69 and 71.

domiciled in third States: the unavailability of the forum of the defendant's domicile in the Community implies that jurisdiction cannot rest solely on the strictly defined heads of jurisdictional of article 5.

As a consequence, the Regulation could be modified to provide that in addition to the other grounds of jurisdiction under the Regulation, actions against defendants domiciled in third States may be brought before the court of the place where the defendant has engaged in activities, provided that the dispute relates directly to such activities. It could either be required that the activities be carried out in a regular and/or systematic way, or simply that activities be carried out without any further requirement, in which case a single activity carried out on the EU territory by a defendant domiciled outside the EU would give rise to jurisdiction at that place.

177. There is at least another specific criterion that could be considered as an additional ground of jurisdiction for actions against defendants domiciled in third States: the location of assets within the territory of a Member State. Again, such jurisdictional ground would be specific: as discussed above, it would probably be unsuitable to create a "German-style" property jurisdiction that would allow claims to be brought at the place where an asset belonging to the defendant is located even if the claim is unrelated to such asset. The proposed ground discussed here concerns the possibility to bring proceedings at the place where a property is located *with respect to a claim relating to such property* (for instance, an action for the recovery of the ownership or possession of the property).

Under the Brussels I Regulation, this is not a ground of jurisdiction. While this is arguably acceptable when the defendant is domiciled in the EU, as the plaintiff can always bring proceedings in the Member State of such domicile (under article 2), the situation is different when the defendant is domiciled in a non-EU State and the article 2 jurisdiction is not available. For instance, the EU plaintiff who wishes to recover the ownership of objects (such as pieces of art, certificates of securities, etc.) located within the territory of the EU might not find a forum in the EU if the defendant is domiciled in a third State (except if it can be shown that the location of the object coincides with the location of a harmful event under article 5(3) of the Regulation).

For the moment, in at least 20 Member States, such defendant domiciled in a third State could be brought to court on the basis of national law, thanks to the reference included in article 4 of the Regulation (see above, §51).

If such reference were to be abolished, the text of the Regulation should therefore be modified to create such a jurisdictional ground based on the location of property, at least for the purpose of actions against defendants domiciled in third States.

(c) Preservation of a (true) rule of residual jurisdiction by reference to national law

178. Another alternative approach would consist in leaving in the Regulation a provision to the effect that with respect to actions against defendants domiciled in third States, in case no court of a Member State has jurisdiction pursuant to the uniform rules of jurisdiction (whose application would be extended to non-EU defendants), jurisdiction shall be determined in each Member State, by the laws of that Member State.

This solution would, in other words, imply the introduction of a rule of residual jurisdiction similar to the one provided under articles 7 and 14 of the new Brussels II Regulation (see above, §3 and §121 s.). It should be noted that for the moment, article 4 of the Brussels I Regulation cannot be properly seen as a rule of residual jurisdiction since it does not allow proceedings to be brought in the EU on a subsidiary basis when no court has jurisdiction under the uniform rules. Article 4 is, to the contrary, a provision that exempts from the application of the uniform rules a large category of cases, i.e. those where the defendant is domiciled in a third State, even when there is a close connection with the Community (for instance because the cause of action is localized there and the plaintiff is domiciled in the EU). The extension of the uniform rules to defendants domiciled in third States would create a situation similar to the one under the new Brussels II Regulation, where a complete set of jurisdictional rules is provided. The rule of residual jurisdiction would only serve to ensure national law still applies when none of the uniform rules designate the court of a Member State.

The advantage of such approach is that it would allow the Member States to keep their national law of jurisdiction in civil and commercial matters, if only for the purpose of their application on a residual basis when none of the uniform rules of jurisdiction apply.

The difficulty with this solution is that it would open up the possibilities to bring proceedings against defendants domiciled in third States. Indeed, in practice, this solution would consist to give the right to plaintiffs to bring proceedings against non-EU domiciliaries either on the basis of the Brussels I regime or, when it does not provide jurisdiction in the EU, under national law. The possibilities for forum shopping would therefore be increased. In addition, the criticism (already reported above) that the Brussels I regime discriminates against persons domiciled in third States[366] would still be given more ground.

(d) Introduction of a forum **necessitatis** *rule*

[366] See E. Juenger, « A Shoe Unfit for Globetropping », 28 UC Davies Law Review 1027 (1995), at p. 1044.

179. The fourth and final possible option, which could be or not combined with the foregoing, would consist to devise a specific rule of jurisdiction for action against non-EU domiciliaries that would ensure effective access to justice if every other rule of jurisdiction fails, inside and outside the Community. The rule would be based on the idea of *forum necessitatis* and would provide, in essence, that in case no court of the Member States have jurisdiction under the Regulation, proceedings may be brought in the Member State having a connection with the case when there is no other forum available outside of the EU, including at the place where the defendant is domiciled.

Thus, the *forum necessitatis* rule, already used in 10 Member States (see above, §83) would be transformed into a rule of Community law for all the 27 Member States.

The advantage of such approach is that it would at the same time (i) put an end to the controversial use of exorbitant rules of jurisdiction against non-EU domiciliaries, and (ii) ensure that there is no denial of justice when the relatively strict uniform rules of the Regulation do not give jurisdiction to court in the EU.

In this respect, the change would seem to find support in the experience of two Member States (Belgium and the Netherland)s where the *forum necessitatis* was introduced at the same time the exorbitant rules of jurisdiction were abolished. As already noted (§83), it was expressly felt that such abolition had the effect to restrict the right of access to the local courts which needed to be *"compensated"* by the establishment of the *forum necessitatis*.

This drafting of this new rule of Community law could take into account the existing experience under the law of the Member States where it is used. As noted above (§84 s.), the *forum necessitatis* is usually subject to two separate conditions. The first one is that there must be obstacles preventing the plaintiff from obtaining justice abroad. This is usually the case not only where the foreign court lacks jurisdiction to hear the claim, but also where it is unreasonable to require the plaintiff to bring proceedings abroad. Any Community rule on this matter could rely on the European standard of the right to an effective access to court under article 6 of the Human Rights Convention: in other words, the fist condition would be that it be demonstrated that there is no effective access to court outside the EU.

The second classical condition of the *forum necessitatis* is that there must a connection with the forum. Since by definition, in this situation, no court of the Member States would have jurisdiction under the uniform rules of the Regulation, the requirement of connection should not be devised too strictly. It should be enough that the case have a connection with the forum, without any further restriction (the current experience under the national law of the Member States supports that proposition: see above, §85).

(4) DECLINING JURISDICTION IN FAVOUR OF THE COURTS OF THIRD STATES

180. As discussed above (§107), the Brussels I regime does not currently provide any rule about the issue as to whether and under which conditions the courts of the Member States may decline jurisdiction in favour of the courts of third States. The rules about declining jurisdiction included in the Regulation only concern the cases where jurisdiction is declined in favour of the court of another Member State, either because this court has exclusive jurisdiction under the Regulation (art. 22), because it has been appointed by the parties (art. 23), of because it was seized first of the same or of a related dispute (*lis pendens* and related claims, article 27 and 28).

As seen also above, the general understanding in the Member States it to consider that despite the silence of the Regulation, jurisdiction *may be declined* in the three circumstances indicated above, even when the alternative forum is situated in a non-EU State (§109). In most Member States, jurisdiction may be declined in this case on the basis of *national law*, while in Spain jurisdiction is declined on the analogical application of the rules of the Brussels I regulation, under the so-called *effet réflexe* theory (see above, §109).

181. The absence of any rule dealing with the declination of jurisdiction in favour of third State courts may already appear to be a lacuna under the existing text of the Regulation. Indeed, when the defendant is domiciled in the EU, the Regulation is generally understood to determine exhaustively the cases where jurisdiction must be exercised or declined. This proposition finds support in the *Owusu* case, which for the purpose of ruling out the possibility to decline jurisdiction in favour of third State courts on the basis of the *forum non conveniens* doctrine, the Court of justice stressed that *"Article 2 of the Brussels Convention is mandatory in nature and … according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention"*[367].

So, it would already be useful to include some language in the Regulation to make clear on which legal basis (national law or uniform rules) and under which conditions jurisdiction can be declined when the defendant is domiciled in the EU but a court outside the EU has exclusive jurisdiction, or has been appointed by the parties, or is seized of parallel proceedings.

182. The necessity to address this issue would still be much more compelling if the uniform rules of jurisdiction were to be harmonized for claims against defendants domiciled in non-EU States. Indeed, with such a change, the cases where the courts of non-EU States would have a concurrent jurisdiction to the one provided under the Regulation would be dramatically increased. When the defendant is domiciled in a non-EU State, it is much more likely that the courts of that State might have

[367] *Owusu*, Case C-281/02, [2004] ECR I-1383, at para. 37.

jurisdiction in the three circumstances described above. For the moment, in that situation, jurisdiction depends on the application of national law (under article 4), and national law logically determines also when jurisdiction is to be declined.

But if the Brussels I regulation were to seek to regulate entirely the jurisdiction of the courts of the Member States in civil and commercial matters, irrespective of the location of the domicile of the defendant, it should also logically address the issue as to when jurisdiction provided under the uniform rules may or must be declined. Otherwise, the uncertainties that already exist in that matter (see above, §109) would be expanded.

183. To harmonize the rules determining when jurisdiction is to be declined in favour of non-EU courts is however a delicate task.

To start with, it would seem to be inappropriate to simply extend the application of the existing intra-community rules about declining jurisdiction to relations with third State courts. As has been noted:

> *"l'extension pure et simple du régime européen de déclinatoire de compétence aux relations internationales est difficilement admissible. A l'instar des règles européennes qui établissent la compétence, celles qui organisent un déclinatoire de compétence s'inscrivent dans une perspective particulière : celle de la création d'un espace judiciaire européen, fondé sur la confiance mutuelle et l'équivalence des tribunaux des Etats membres. Dans cette perspective, il est évident que la limitation dans l'espace des règles relatives au déclinatoire de compétence n'est pas le fruit du hasard : si les Etats membres ont accepté, lors des négociations, de renoncer dans certains cas à la compétence de leurs tribunaux dérivant de règles uniformes, c'est en raison du fait que le déclinatoire avait lieu* en faveur du tribunal d'un autre Etat membre, *qui partage les mêmes conceptions fondamentales de la justice"*[368].

It would clearly be unsuitable to extend as such the drastic *lis pendens* rule of article 27 of the Regulation to parallel proceedings with the courts of non-EU States:

> *"Le mécanisme européen de dessaisissement automatique en faveur du tribunal premier saisi du litige, qui n'est même pas subordonné au contrôle de la reconnaissance prévisible du jugement qui doit être rendu à l'étranger, est trop lié au climat de confiance mutuelle entre les Etats membres pour pouvoir être transposé tel quel dans les relations extra communautaires"*[369].

[368] A. Nuyts, « La théorie de l'effet réflexe », in G. de Leval and M. Storme (ed.), *Le droit processuel & judiciaire européen*, la charte – die keure (2003), p. 73, at p. 80-81.
[369] A. Nuyts, op. cit., p. 81.

The same analysis would seem to be valid with respect to the Community regime of choice of court agreements. Indeed, the very powerful rule under article 23 of the Regulation, requiring to give effect without any qualification to foreign choice of court agreements, seems, again, to be intimately linked to the principle of mutual trust between the courts of the Member States.

At first sight, the situation would seem to be different with respect to the "exclusive jurisdiction" of non-EU courts. It has already been suggested in legal writing to extend as such, under the *effet réflexe* theory, the application of article 22 of the Regulation in relation to third States, in the sense that the courts of the Member States could or should decline jurisdiction in the cases and under the conditions provided by article 22 when the subject matter of the dispute is connected with the territory of a non-EU State (for instance, when the dispute relates to a right *in rem* in an immovable property located outside the EU)[370]. In reality, the rule requiring a court to decline jurisdiction in this matter is, again, founded on the assumption that the court of exclusive jurisdiction is one of another Member State, which is bound itself by article 22. It would be unwise to extend as such the application of the absolute obligation to decline jurisdiction to the case where the alternative court is located in a third State, where article 22 of the Regulation does not apply[371]. Indeed, many legal systems do not go as far as article 22 of the Regulation in providing rules of exclusive jurisdiction[372]. There would therefore be the risk that an EU court would decline jurisdiction on the assumption that exclusive jurisdiction exists in a non-EU State, while under the laws of that State there would actually not be exclusive jurisdiction, or potentially no jurisdiction at all.

184. In view of the foregoing, there would seem to be a choice to be made between two major options.

The first one would consist to devise new specific rules determining in which cases jurisdiction based on the uniform rules of the Regulation should or could be declined in favour of the courts of non-EU States. Such task would be quite delicate, for it would imply to create a system for declining jurisdiction which would operate in parallel to the existing intra-community system. This could potentially be seen as discriminatory in foreign legal systems.

If this approach were still to be preferred, the definition of the new rules could be inspired by the current experience under national law. As has been seen, while there is no unanimity in this field, general tendencies can still be drawn. Reference is made to that end to the analysis undertaken above at §95 to 106.

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[370] In this sense, see H. Gaudemet-Tallon, "Les frontières extérieures de l'espace judiciaire européen: quelques repères", in *Liber Amicorum Georges A. Droz*, Martinus Nijhof Pub. (1996), p. 85, at p. 95-96.
[371] See A. Nuyts, op. cit., p. 82, referring to the analysis of G.A. Droz, *Compétence judiciaire et effets des jugements dans le March Commun*, Dalloz (1972), at para. 165 and 168.
[372] This is the case even within the Member States of the European Union : see above, §xxx.

185. The other option would consist not to harmonize the rules for declining jurisdiction in favour of the courts of non-EU States, so as to leave that matter for national law.

In that case, in order to avoid the current uncertainties in this matter, the application of national law should be made explicit in a new provision analogous to the current article 4 of the Brussels I Regulation that would refer the issue of declination of jurisdiction in favour of third States to national law.

It should be noted that if the Regulation were simply to provide in the Regulation that the jurisdiction provided for under the Regulation can be declined in favour of non-EU courts under national law, that would amount, in substance, to overturn the decision in *Owusu*. Indeed, as has been seen (§107), the Court of justice has barred in that case the possibility for English courts to decline jurisdiction conferred by article 2 in favour of non-EU courts on the basis of the English common law doctrine of *forum non conveniens*.

In order to preserve the ruling in *Owusu*, one could imagine to provide that the application of national rules for declining jurisdiction is restricted to cases where the defendant is domiciled in a third State (therefore limiting the new rule about declining jurisdiction to the new situation where the uniform rules of jurisdiction is extended).

However, such solution would appear to be unfortunate for it would still leave open the issue as to when and on which basis the courts of the EU can decline an article 2 (or 5, 6, etc.) jurisdiction when the non-EU court has exclusive jurisdiction, has been seized of a parallel proceedings, or has been appointed by the parties.

The best approach would thus probably consist to provide a general reference to national law for declining jurisdiction in favour of non-EU courts, irrespective of the ground of jurisdiction. But such rule should be accompanied by the principle that jurisdiction can be declined under national law only when the court of another EU-State has exclusive jurisdiction, has been seized of a parallel proceedings, or has been appointed by the parties.

That would not necessarily imply that all the conditions to decline jurisdiction under the Brussels I regime should have to be satisfied before jurisdiction be declined in favour of non-EU courts. The Community restriction, designed to preserve the solution in *Owusu*, could imply that jurisdiction can be declined only in the three circumstances identified above, while the specific conditions for such jurisdiction to be declined would be subject only to national law (and not to the Brussels I regime). Under that approach, for instance, an English court could decline jurisdiction in favour of a non-EU court even if the latter court has been seized of proceedings only

after proceedings were instituted in England (because this is the rule under national law: see above, §100).

But it should also probably be provided that jurisdiction cannot be declined under national law when it would have the effect to deprive a party from the application of the protective rules of jurisdiction of Sections 3 to 5 of the Regulation (insurance, consumer contracts and employment contracts matters). For instance, if a consumer domiciled in France brings proceedings in French courts in a case where the other party has directed activities towards France, jurisdiction should not be open to be declined under national law in favour of a non-EU court (it should be noted that such a case is for the moment *not* governed by the Brussels I Regulation, as discussed above, §162).

Alternatively, the Regulation could provide that jurisdiction can be declined in favour of the courts of non-EU states only when declining jurisdiction fulfils, *firstly*, all the condition provided for when the alternative forum is in another Member State and, *secondly*, all the conditions provided for under national law. Under that approach, this matter would be subject to the combined application of the European regime (which is quite liberal since it is based on mutual trust) and of national law (which tends to be stricter in most Member States).

(5) AGREEMENTS WITH THIRD STATES

186. The extension of the uniform rules of jurisdiction of the Brussels I Regulation to proceedings brought against defendants domiciled in third States logically raises the issue as to how these rules would then interact with the rules of jurisdiction contained in agreements between Member States and third States. One shall examine below the impact of the proposed extension on the Lugano and Brussels Convention (a), on the 2005 Hague Convention on Choice of Court Agreements (b), and on other bilateral and multilateral agreements with third States (c).

(a) Relations with Lugano and Brussels Conventions

187. If not further specific provision is included in the Brussels I Regulation with respect to the relationship with the Lugano and Brussels, the extension of the scope of application of the uniform rules of the Regulation to proceedings brought against defendants domiciled in third States would have the effect to create a conflict with the rules of these conventions.

Indeed, under current law, when the defendant is domiciled in Iceland, Norway or Switzerland, the jurisdiction is determined by application of the Lugano Convention, including in the courts of the Member States which are bound by the Brussels I

Regulation (unless the jurisdiction of such court is established under a choice of court agreement or under a rule of exclusive jurisdiction)[373].

Similarly, when the defendant is domiciled in a territory of the Member States where the 1968 Brussels Convention applies but where the Brussels I Regulation does not apply (such as certain French and Dutch overseas territories), the jurisdiction is determined by application of the Brussels Convention, including in the courts of the other Member States which are bound by the Brussels I Regulation (again, unless the jurisdiction of such courts is established under a choice of court agreement or a rule of exclusive jurisdiction).

188. As a consequence, in order to preserve the application of the Lugano and Brussels Convention in their current personal scope of application, it would be necessary to introduce in the Regulation a rule preserving the application of these instruments when the defendant is domiciled in a contracting party to these conventions which is not bound by the Regulation.

(b) Relations with 2005 Hague Convention on Choice of court agreements

189. The extension of the uniform rules of jurisdiction to defendants domiciled in third States would not affect the relationship with the 2005 Hague Convention on Choice of Court Agreements, since this convention already includes a specific provision dealing with its relationship with instruments from Regional Economic Integration Organizations such as the Brussels I Regulation (see article 29 of the Hague Convention).

(c) Relations with other bilateral and multilateral agreements with third States

190. As is shown by the comparative analysis above (§25 s.), some Member States are currently bound by agreements with third States that govern the jurisdiction of their courts in civil and commercial matters. This is the case in particular (but not only) in the 12 new Member States, mainly from Central Europe, which are often bound by numerous bilateral agreements on judicial assistance with third states belonging to the former Soviet bloc, which include rules of (direct) jurisdiction.

Currently, the Brussels I Regulation only contains rules dealing with its relations with conventions as between Member States (art. 69), and with conventions as between member States and/or third States *"in relation to particular matters"* (art. 71). There is no rule in the Regulation dealing its relations with conventions with third states of a general application (such as agreements on judicial assistance).

[373] See article 54 of the Lugano and H. Gaudemet-Tallon, *Compétence et exécution des jugements en Europe*, LGDJ (3rd. ed.), at para. 484.

191. The harmonisation of the rules of jurisdiction for actions against defendants domiciled in third States would not *necessarily* require that a new provision be introduced in the Regulation to deal with agreements with third countries. Indeed, as pointed out by the Court of justice, the current text of the Regulation already *"contains a set of rules forming a unified system which apply not only to relations between different Member States … but also to relations between a member State and a non-Member State"*[374].

As a consequence, the Regulation already governs the jurisdiction in disputes which may also fall within the scope of agreements with third States that contain rules on jurisdiction. And as indicated, the Regulation does not include any provision to deal with the relation between these agreements (unless they relate to "*particular matters"*) and the Regulation. However, it is clear that even if these conventions are not addressed (nor even listed) in the Regulation, in accordance with Article 307 of the EC Treaty, "*the Regulation cannot, any more than the Brussels Convention could, properly abrogate any pre-existing treaty or other international instruments which related to jurisdiction and the recognition of judgments"*[375].

The situation after any harmonization of the rules of jurisdiction for actions against defendants domiciled in third States would therefore not be different from the current one.

It does not appear therefore necessary to list all the agreements made by the Member States with third States, since in any event the Regulation could not legally abrogate or replace these conventions. In other words, the Regulation could not include for conventions with third States a provision equivalent to article 69 of the Regulation, which provides that the conventions as between Member States that are listed in the provision are superseded by the Regulation.

192. However, while there is no requirement to include a provision covering this matter in the Regulation, it would still be useful to clarify this issue at the occasion of any extension of the scope of the Regulation. Indeed, by definition, the extension of the scope of the uniform rules to defendants domiciled in third States will *increase dramatically* the number of cases where the issue of jurisdiction will fall within the scope of agreements with third States dealing with jurisdiction. Indeed, many of these agreements are based on the principle that jurisdiction is established at the place where the defendant is domiciled or habitually resident (see above, §26).

This matter should of course be dealt with in view of the decision of the Court of justice in the Lugano Opinion, where it was ruled that the Community has exclusive

[374] Opinion 1/03 of 7 February 2006.
[375] A. Briggs and P. Rees, *Civil Jurisdiction and Judgments*, LLP (3rd ed.), at para. 2.31.

competence to conclude conventions with third States that relates to the matters governed by the Regulation (see above, §136).

(D) FURTHER HARMONIZATION OF JURISDICTION UNDER BRUSSELS II

193. The issues pertaining to the new Brussels II Regulation are quite different from those that have just been analysed under the Brussels I Regulation.

There are several reasons for the difference between the two regimes, including the following. First, the current level of harmonization of jurisdiction is not the same in the two matters. Under Brussels I, as already discussed, a large category of disputes (those where the defendant is domiciled in a third State) is currently entirely excluded from the scope of the uniform rules, even though they may have a close connection with the Community, for instance because the claimant and the dispute are located there. There is no exclusion of this sort under the Brussels II Regulation, which provides a comprehensive set of jurisdictional rules that covers most situations that have a close connection with the EU, with the limited exception of spouses of different nationalities living in a third State (for matrimonial proceedings) and children habitually resident in a third State (for matters of parental responsibility).

Second, while there is currently no rule as such of "residual jurisdiction" under Brussels I (see above, §xxx), there is such a rule under Brussels II: under article 7 and 14 of this text, proceedings to be brought in the EU under national law each time there is no other court in the EU having jurisdiction under the harmonized rules.

Third, unlike the Brussels I Regulation, the new Brussels II Regulation does not establish a hierarchy between the jurisdictional rules (at least with respect to matrimonial proceedings), with the consequence, *inter alia*, that there is no need to take into account the possibility that a rule of jurisdiction higher in the hierarchy designates a court outside of the European Union (but situations may still arise where jurisdiction could be declined in favour of third States: see below).

194. In line with the analysis carried out above with respect to the Brussels I Regulation, one shall successively review how the rules of residual jurisdiction could be further harmonised with respect to matrimonial proceedings (1) and matters of parental responsibility (2), before assessing briefly the issue of declining jurisdiction in favour of the courts of third States in these matters (3).

(1) MATRIMONIAL PROCEEDINGS : THE SITUATION OF EU CITIZENS OF DIFFERENT NATIONALITIES LIVING IN A THIRD STATE

195. As has been seen above (§124 s.), under the current text of the new Brussels II Regulation, jurisdiction to seek divorce is provided to a court in the EU under the

condition either (i) that at least one of the spouses be habitually resident in a Member State for a certain length, or (ii) when both spouses are resident in a third State, that they share the same nationality of a Member State.

On the other hand, the new Brussels II Regulation does not contain any rule of jurisdiction for divorce proceedings relating to Community citizens of different nationalities living in a third State. The access of such citizens to the courts of an EU State therefore depends on the application of national law under the rule of residual jurisdiction (art. 7).

The analysis that has been carried out above shows that there is a great divergence between the applicable rules of jurisdiction under national law. The most important difference is that in about half the Member States (sixteen), the citizenship of one spouse is as such sufficient to establish jurisdiction in the State of such citizenship, while this is not the case in the other half. While in some of the latter States, there are other grounds of residual jurisdiction that may in some circumstances allow an action to be brought in the EU, there is no guarantee to that end (see above, §126).

As a consequence, the reference to national jurisdictional law leads to a difference in treatment between community citizens. The spouses who hold the citizenship of one of the "group of 16" will have the guarantee to access at least one EU court (and possibly two if the law of the citizenship of both spouses provides for such a jurisdiction based on nationality). On the other hand, the spouses who hold the citizenship of one of the 11 other Member States will not enjoy the same protection.

196. As noted in the Project Technical Specifications[376], the consequence is that *"under [the New Brussels II] Regulation, Community citizens living in a third State may have difficulties to find a court competent to divorce them. The situation may arise where no court within the European Union or elsewhere is competent to divorce a couple of Community citizens of different nationalities who live in a third State"*.

This issue has already been covered and researched in a separate study commissioned by the European Commission, entitled "Study to inform a subsequent impact assessment on the Commission proposal on jurisdiction and applicable law in divorce matters"[377]. On the issue of residual jurisdiction, the conclusion of this study was that *"article 7 could be revised to ensure that EU citizens living outside the EU would have access to a court in the EU in case they want to get divorced"* [378].

Further to the release of this study, the Commission has issued a Communication dated 17 July 2006 on *"New Community rules on applicable law and jurisdiction in divorce matters to increase legal certainty and flexibility and ensure access to court*

[376] Annex I to the Contract, Section I.
[377] Study prepared by EPEC, April 2006 version..
[378] *Ibid*., at para. 105.

in 'international' divorce proceedings"[379]. With respect to the goal of ensuring access to court for international divorce proceedings, the Commission announced the following proposal:

> *"the proposal improves access to court in divorce proceedings for spouses of different nationalities who live in a third State. The current rules do not effectively ensure that a court of a Member State is competent in divorce matters for EU citizens who live in a third State, but leaves this to national law. However, the national rules are based on different criteria and do not always effectively ensure access to court for EU nationals living in third States. This may lead to situation where no jurisdiction in the EU or in a third State has jurisdiction to deal with a divorce application. The proposal introduces therefore a uniform and exhaustive jurisdiction rule to ensure access to court for EU citizens living in third States"*.

197. It is delicate to assess whether the current difference of treatment between the citizens from the "group of 16" and from the "group of 11" mentioned above amounts to a discrimination that is prohibited under Article 6 of the EC Treaty. The impact of the principle of equality and non-discrimination in the area of private international law has been the subject to much debate recently, but no clear answers emerge yet[380].

Irrespective of this debate, however, it would seem in the present case that there is no discrimination as such that would seem to be prohibited under the Treaty, since the difference of treatment arises in non-harmonized situations, and only because of the divergence between national laws as to the appropriateness of recognizing the citizenship of one spouse as a sufficient connecting factor to establish jurisdiction[381]. The uniform rules themselves of the Brussels II regime do not treat the citizenship of one spouse as an appropriate ground of jurisdiction, so the fact that the law of 11 Member States are o in the same way should probably not be seen as discriminatory against the citizens of these States.

198. In fact, the problem that is raised by the current text of Brussels II concerns, as pointedly expressed in the Communication of the Commission quoted above, *"the situation where no jurisdiction in the EU or in a third State has jurisdiction to deal with a divorce application"*. This is not as such an issue of discrimination between EU citizens, but an issue of *effective access to court*, which has already been discussed above and is guaranteed under Article 6 of the European Convention on

[379] MEMO/06/287 of 17 July 2006, available on the Commission's website for the area of freedom, security and justice.
[380] On this subject, see M.P. Puljak, *Le droit international privé à l'épreuve du principe communautaire de non-discrimination en raison de la nationalité*, PUAM, Aix-Marseille, 2003.
[381] The analysis of the issue of discrimination could be different with respect to the difference in Article 3(1) between the requirement of a year of residence for the spouse who is not a national of the Member State where proceedings is brought and the requirement of only 6 months when the spouse is a national of that State.

Human Rights (and under Article 21 of the European Charter on Fundamental Rights).

It is submitted that in view of this objective, it would not be suitable to set up – as seemingly suggested in the above mentioned study – a new uniform rule of jurisdiction that would always give EU citizens of different nationalities living in third States the right of access to a court in the EU in case they wish to divorce. Again, the Brussels II Regulation is based on the assumption that the citizenship of only one spouse is not as such a strong enough connecting factor to establish a Community wide rule of jurisdiction in intra-community relations. There does not seem to be any reason why the approach should be different in extra-community relations, i.e. in situations which by definition have a weaker relationship with the Community. As a matter of fact, it is likely that in most cases spouses established and living in third States will be able to access the court of these States to seek a divorce (on the presumption that the last habitual residence of the spouses is considered as a valid ground of jurisdiction in most legal systems).

But one cannot exclude the possibility that in some States or under very specific circumstances no such jurisdiction exists. This could be the case if the spouses live in a country where the rules of jurisdiction in this matter are based exclusively on the citizenship of the spouses or, more realistically, if the spouses live in different non-EU States where the residence of only one spouse is not enough to establish jurisdiction and where jurisdiction is not provided at the last habitual residence of the spouses, for instance when no spouse resides at this place any longer.

The text of the Regulation could be modified to ensure an access to court in the EU in such exceptional cases. The new provision could be drafted in the form of a *forum necessitatis* rule, in the sense that a Community jurisdiction would exist in the Member State of citizenship of one spouse only when no other court has jurisdiction in the European Union or outside the European Union. The rule could be formulated in line with the propositions discussed above in relation to the Brussels I Regulation.

199. Any such change would leave open the question as to whether, in addition to this *Community rule* of residual jurisdiction, it would still be necessary or useful to provide the possibility for the application of *national rules* of residual jurisdiction, in line with the current Article 7. In other words, the issue is whether it should still be possible to bring proceedings as of right (i.e. even if there is also a court of competent jurisdiction in a third State, for instance at the place where the spouses reside) in the group of 16 Member States where the citizenship of only one spouse is a ground of jurisdiction.

It is submitted that if a Community rule of residual jurisdiction were to be introduced in the regulation, it would be preferable to remove the possibility to exercise jurisdiction on the basis of national law. Three reasons at least could be invoked in

favour of this solution. First, since the objective of ensuring Community citizens of different nationalities living abroad an effective access to court is attained, there does not appear to be any pressing need to preserve the application of a national rule such as the one of the "group of 16", in view especially of the fact that it goes against the basic assumption under the regulation that the citizenship of only one spouse is not a valid ground of jurisdiction.

Second, allowing spouses of different citizenship living in third States to bring proceedings under national rules of jurisdiction creates the risk of excessive forum shopping: indeed, the choice of forum is likely to be not only as between the forum of the habitual residence(s) of the spouses in third State(s) and the forum of the citizenship in the EU, but also potentially as between two different fora in the EU in case the spouses are citizens of two different Member States where the citizenship of only one spouse is a ground of jurisdiction (admittedly, this risk already exists under the current text of the new Brussels II Regulation, but this could be an occasion to address this situation).

Third, to maintain the application of national rules of residual jurisdiction in matters where the rules of jurisdiction are comprehensively harmonized is a factor of unnecessary complexity.

(2) PARENTAL RESPONSIBILITY : THE SITUATION OF AN EU CHILD LIVING IN A THIRD STATE

200. As has been seen above (§121 s.), under the current text of the new Brussels II Regulation, jurisdiction in matters of parental responsibility is in principle subject to the condition that the child is habitually resident in a Member State at the time the court is seized. When the child has his habitual residence in a third State, jurisdiction can still be established in a Member State, but under the condition that the parents have accepted the jurisdiction and it is in the best interest of the child (article 12).

In the event the parents do not agree, the possibility to bring proceedings before an EU court with respect to a child resident outside of the Community currently depends on the application of national law under the rule of residual jurisdiction (art. 14).

The analysis that has been carried out above shows that there is, again, a great divergence between the applicable rules of jurisdiction under national law. The most important difference is, here again, that in about half the Member States (fourteen), the citizenship of the child (or of either parent, which will often coincide with the citizenship of the child) is as such sufficient to establish jurisdiction in the Member State of such citizenship, while this is not the case in the other half. While in some of these States, there are other grounds of residual jurisdiction that may in some circumstances allow an action to be brought in the EU, there is no guarantee to that end (above, §122).

201. As noted in the Project Technical Specifications[382], the consequence is that *"it may well be that a child resident outside the Community has strong links with the Community, e.g. by virtue of its nationality"*, and yet, currently *"the Regulation only provides a Community forum for the dispute in such a case if the parents have agreed upon this"*.

The legal situation appears therefore to be very similar to the one described above in matters of matrimonial proceedings: for Community citizen(s) living in third States, the system of residual jurisdiction by reference to national law leads to a difference in treatment between nationals of Member States where jurisdiction can be established on the basis of citizenship and nationals of Member Stares where this is not the case. And this difference of treatment, while probably not amounting to a prohibited discrimination under Article 6 of the EC Treaty, raises at least an issue of proper access to justice.

In fact, however, there is an important difference between the two matters which needs to be considered before considering if the solution discussed above with respect to matrimonial proceedings can be transposed to matter of parental responsibility. This difference relates to the very foundation of the jurisdictional system in each of these matters: while in matrimonial proceedings the basic consideration is to provide an effective access to court to spouses seeking to divorce, in matters of parental responsibility the essential concern is to ensure the proper protection of the child.

This is reflected in the difference between the regulation system for matrimonial proceedings, which is based on a wide set of heads of jurisdiction (art. 3), and the regulation system for matters of parental responsibility, which is based on the principle of the jurisdiction at the place of the habitual residence of the child, save when the parents agree to bring proceedings before a limited number of other fora, and subject to the condition that it is in the best interest of the child (see art. 8 s.).

The same approach based on the priority of the forum of the habitual residence of the child is expressed in other international instruments, including the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children (see art. 5 s.).

202. Such a widely recognized principle should also be held as valid in principle when the child is habitually residence in a third State (even when there is no international convention that provides for such a rule). Thus, it would probably not be appropriate to create a Community rule of residual jurisdiction that would, in respect of children having their habitual residence in a non-EU State, give a right to access to

[382] Annex I to the Contract, Section I.

the courts of the Member State of the citizenship of the child (when the parents are in disagreement).

On the other hand, it could be potentially considered to establish a *forum necessitatis* rule to ensure that the courts of the Member State of the citizenship of the child have jurisdiction when no other court in the EU or outside the EU has jurisdiction to decide the case. However, the need for such a rule may appear less pressing in view of the widely accepted principle of jurisdiction at the place where the child is habitually resident. In any event, any such a Community rule of residual jurisdiction should subject the exercise of the jurisdiction by the court of a Member State when the child is habitually resident in a third State to the condition that this is in the best interest of the child.

(3) DECLINING JURISDICTION IN FAVOR OF THE COURTS OF THIRD STATES

203. As the Brussels I Regulation, the Brussels II Regulation does not currently provide any rule about whether the courts of the Member States may decline jurisdiction in favour of the courts of third States and in the affirmative, the conditions to do so. The only rule about declining jurisdiction of the Brussels II Regulation relates to the existence of parallel proceedings in another Member State (art. 19) or to the transfer to the court of another Member State better placed to hear the case (art. 15, only with respect to parental responsibility).

As with the Brussels I regime, this silence of the new Brussels II Regulation would seem to be a lacuna, since these instruments are generally understood to prescribe the courts to exercise the jurisdiction provided under the Regulation, except in the cases expressly provided for by the texts[383]. On the other hand, the suggestion that the courts of the Member Stats having jurisdiction under the new Brussels II Regulation should always disregard any parallel proceedings in third States may appear as particularly unappealing (see the discussion above with respect to the Brussels I Regulation).

Again, as with the Brussels I regime, it would therefore be useful to address this issue together with the possible reform of the rules of residual jurisdiction, so as to make clear in which cases and under which conditions jurisdiction can be declined in favour of the courts of third States. Reference is made to the discussions above as to the various options that could be considered in this respect.

[383] *Cf. Owusu*, Case C-281/02, [2004] ECR I-1383.

CONCLUSIONS

204. It follows from the foregoing analysis that the proposed harmonization of the rules of "residual" jurisdiction under article 4 of the Brussels Convention and articles 7 and 14 of the New Brussels II Regulation could be achieved as follows.

With respect to Brussels I, the Regulation could be modified to remove the condition that the defendant be domiciled in the EU for the uniform rules of Sections 2 to 5 of Chapter II of the Regulation to apply. Change to that end would need to be made in articles 3 and 4 of the Regulation and in all the other provisions of Sections 2 to 5 of Chapter II which mention the condition that the defendant be domiciled in the EU (with the possible exception of the *forum actoris* rule of article 9(b) of the Regulation, which may seem unsuitable to extension to insurers domiciled in third States[384]).

There would appear to be five basic options to carry out such change:

- Option 1: replacement of the condition that the defendant be domiciled in the EU by the condition that the dispute be "intra-Community";
- Option 2: application of the Regulation as soon as either the defendant or plaintiff is domiciled in the EU;
- Option 3: definition of Community disputes by reference to the geographical scope of EU Community law;
- Option 4: definition of new specific connecting factors for claims against non-EU defendants;
- Option 5: extension of the existing jurisdictional rules to claims against defendants domiciled in third States.

Amongst these options, it is submitted that, on balance, the last one is to be preferred or, possibly, the second one.

Under either of the five options, the suppression of the condition that the defendant be domiciled in the EU for the uniform rules to apply should be accompanied by the introduction of at least two other modifications in the Regulation. The first one should be the creation of additional grounds of jurisdiction to balance the unavailability in the Community of the forum of the defendant's domicile. Three grounds in particular could be considered:

- firstly, the jurisdiction based on the carrying out of activities in the EU by non-EU defendants, provided that the dispute relates to such activities ;
- secondly, the location of assets belonging to the non-EU defendant within the territory of an EU State, provided that the claim relates to such assets;

[384] See above, §165.

- thirdly, the *forum necessitatis*, which would allow proceedings to be brought against non-EU defendants before the court of a Member State which has a connection with the situation when there is no court having jurisdiction under the Regulation in the EU and proceedings cannot be effectively brought outside the EU.

Alternatively, the Regulation could maintain a rules of residual jurisdiction, under which jurisdiction could be asserted on the basis of national law for actions against non-EU domiciliaries when no court has jurisdiction in the EU under the uniform rules.

Secondly, the Regulation should provide rules about declining jurisdiction in favour of the courts of third States. This matter could be addressed in two different ways:

- Option 1: devising new specific rules determining in which cases jurisdiction based on the uniform rules of the Regulation should or could be declined in favour of the courts of non-EU States (these rules could *not* be simply the transposition of the intra-Community rules in this matter);
- Option 2: introducing in the Regulation a rule stating that declining jurisdiction in favour of the courts of non-EU States is a matter for national law, subject to certain conditions of Community law.

205. With respect to the new Brussels II regime, the Regulation could be modified to replace the rules of national residual jurisdiction under articles 7 and 14 by two new rules of Community residual jurisdiction:

- for matrimonial proceedings, jurisdiction would be provided in the Member State of citizenship of either spouse or in the Member State which has a connection with the situation when no other court has jurisdiction in the EU or outside the EU;
- in matters relating to parental responsibility, jurisdiction would be provided in the Member State of the citizenship of the child or in the Member State which has a connection with the situation when no other court has jurisdiction in the EU or outside the EU and the exercise of the jurisdiction in the best interest of the child.

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