

Expertise Areas :

- > New Technologies, Privacy & ICT
- > E-payment, E-finance & Internet Banking
- > Intellectual Property
- > E-health & Telemedicine
- > Cinema, Media, Entertainment, Sport & Gaming
- > Commercial & Company law, Competition law



IN WHICH COUNTRY SHOULD YOU SUE / BE SUED?

www.uly's.net

Legal framework

Basic principle

Special jurisdictions

Special jurisdiction in matters relating to a contract

Special jurisdiction in matters relating to liability for wrongful acts

Special jurisdiction as per consumers

Prorogation of jurisdiction

Lis pendens - related actions

Provisional (including protective) measures

Recognition and enforcement

Etienne WERY
Associé
Avocat au Barreau de Bruxelles
Avocat au Barreau de Paris (toque R 296)
etienne.wery@uly's.net

O. Ref. : 12/00146
Y. Ref. :

Date
26/01/2015

Legal framework

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter.

The regulation lays down rules governing the jurisdiction of courts and the recognition and enforcement of judgments in civil and commercial matters in European Union (EU) countries.

The regulation supersedes the Brussels Convention of 1968, which was applicable between the EU countries before the regulation entered into force. The regulation also lists a number of other conventions, treaties and agreements between EU countries that it supersedes.

On 21 April 2009, the Commission adopted a report on the application of this Regulation. The report concluded that, in general, the operation of that Regulation is satisfactory, but that it is desirable to improve the application of certain of its provisions, to further facilitate the free circulation of judgments and to further enhance access to justice.

Previous text has thus been recast by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The transition between the two texts is something quite complex but, as a summary, one should keep in mind that:

- The new Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to

BRUSSELS

224, av. de la Couronne
1050 Brussels
Tel. + 32 (0)2 340 88 10
Fax + 32 (0)2 345 35 80

Société civile à forme de SCRL
RPM Bruxelles
VAT : BE 0476.702.936

PARIS (succursale)

33, rue Galilée
75116 Paris
Tel. + 33 (0)1 40 70 90 11
Fax + 33 (0)1 40 70 01 38





court settlements approved or concluded on or after 10 January 2015;

- Previous Regulation shall continue to apply to judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.

Please note that some specific rules apply for UK, Ireland and Denmark.

Basic principle

The basic principle is that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of his/her nationality. Domicile is determined in accordance with the domestic law of the EU country where the matter is brought before a court.

If a party is not domiciled in the EU country of the court considering the matter, the court is to apply the law of another EU country to determine whether the party is domiciled in said state.

In the case of legal persons such as companies or firms, domicile is determined by the country where they have their statutory seat, central administration or principal place of business. In the case of trusts, domicile is defined by the court that is considering the case by applying its own rules of private international law.

Special jurisdictions

Apart from the basic principle on jurisdiction, in certain circumstances a defendant may be sued in the courts of another EU country. The regulation lists areas of jurisdiction where this is so: special or exclusive jurisdiction, as well as jurisdiction on matters relating to insurance, consumer contracts and individual contracts of employment.

The reason for these exceptions is that: "in addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice".

In real life, special jurisdiction has been interpreted so widely by national Courts and by the European Court of Justice that it is as important as the basic principle (and maybe more important, especially for matters related to intellectual property and online businesses).





Special jurisdiction in matters relating to a contract

Pursuant to article 5, a person domiciled in a Member State may, in another Member State, be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question.

For the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered¹²,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided³.

In the Falco case the Court has ruled that a contract under which the owner of an intellectual property right grants its contractual partner the right to use that right in return for remuneration is not a contract for the provision of services within the meaning of that provision.

In the Wood Floor case, it has ruled that where services are provided in several Member States, the court which has jurisdiction to hear and determine all the claims arising from the contract is the court in whose jurisdiction the place of the main provision of services is situated. For a commercial agency contract, that place is the place of the main provision of services by the agent, as it appears from the provisions of the contract or, in the absence of such provisions, the actual performance of that contract or, where it cannot be established on that basis, the place where the agent is domiciled.

¹ What happens when more than one good are to be delivered in more than one place? In such a case, the court having jurisdiction to hear all the claims based on the contract for the sale of goods is that for the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice (Color Drack case).

² In the Electrosteel Europe case, the Court has ruled that in the case of distance selling, the place where the goods were or should have been delivered pursuant to the contract must be determined on the basis of the provisions of that contract. In order to verify whether the place of delivery is determined 'under the contract', the national court seized must take account of all the relevant terms and clauses of that contract which are capable of clearly identifying that place, including terms and clauses which are generally recognized and applied through the usages of international trade or commerce, such as the Incoterms drawn up by the International Chamber of Commerce in the version published in 2000. If it is impossible to determine the place of delivery on that basis, without referring to the substantive law applicable to the contract, the place of delivery is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.

³ A contract relating to the storage of goods, such as that at issue in the main proceedings, constitutes a contract for the 'provision of services' within the meaning of that provision (Krejci Lager case).





A person domiciled in a Member State may also be sued on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending.

Special jurisdiction in matters relating to liability for wrongful acts

Pursuant to article 5, a person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

An action for a negative declaration seeking to establish the absence of liability in tort, delict, or quasi-delict falls within the scope of that provision (Folien Fischer case).

In the Zuid-Chemie case, the Court has ruled that the words "place where the harmful event occurred" designate the place where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended. It has ruled in addition, in the Andreas Kainz case, that in the case where a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured.

In the Wintersteiger case, it has ruled that an action relating to infringement of a trade mark registered in a Member State because of the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may be brought before either the courts of the Member State in which the trade mark is registered or the courts of the Member State of the place of establishment of the advertiser.

It has also ruled that in the event of alleged infringement of copyrights protected by the Member State of the court seized, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seized. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated (Peter Pinckney case).

The Court has decided, in the Melzer case, that it does not allow the courts of the place where a harmful event occurred which is imputed to one of the presumed perpetrators of damage, who is not a party to the dispute, to take jurisdiction over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seized.

In the landmark eDate case (also called Martinez case), the Court has ruled that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers





that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seized.

In the Football Dataco (Premier League) case, the Court has ruled that the sending by one person, by means of a web server located in Member State A, of data previously uploaded by that person from a database protected by the *sui generis* right under that directive to the computer of another person located in Member State B, at that person's request, for the purpose of storage in that computer's memory and display on its screen, constitutes an act of 're-utilization' of the data by the person sending it (see the chapter on databases). The Court has underlined that that act takes place, at least, in Member State B, where there is evidence from which it may be concluded that the act discloses an intention on the part of the person performing the act to target members of the public in Member State B, which is for the national court to assess.

Eventually, the Court does not preclude the application of Article 5(3) of the regulation to an action for liability arising from the operation of an Internet site against a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seized of the case does not hold firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union (G case, C-292/10).

Special jurisdiction as per consumers

A consumer may bring proceedings against the other party to a contract⁴ either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

Proceedings may be brought against a consumer by the other party to the contract *only* in the courts of the Member State in which the consumer is domiciled.

These provisions shall not affect the right to bring a counter-claim in the court in which the original claim is pending.

The provisions above may be departed from only by an agreement:

⁴ The concept of 'other party to the contract' must be interpreted as meaning, in circumstances such as those at issue in the main proceedings, that it also covers the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled (TUI and lastminute case, C-478/12).





- which is entered into after the dispute has arisen; or
- which allows the consumer to bring proceedings in courts other than those normally competent ; or
- which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Prorogation of jurisdiction

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

- a) in writing or evidenced in writing; or
- b) in a form which accords with practices which the parties have established between themselves; or
- c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

The provisions above may not be used to deprive a consumer from the protection he benefits from.

Lis pendens - related actions

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favor of that court.





It must be underlined that this is solely applicable for proceedings involving (i) the same cause of action and (ii) between the same parties.

In addition and as a general rule, where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings.

It is the judge to assess whether pending actions are 'related' but actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seized shall decline jurisdiction in favor of that court.

Provisional (including protective) measures

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

This is an important issue in matters related to intellectual property where the law provides for some specific provisional measures (see the chapter on IP enforcement).

Recognition and enforcement

A judgment given in an EU country is to be recognized in the other EU countries without any special procedure being required.

Judgment means any judgment given by a court or tribunal of an EU country, whatever the judgment may be called, including a decree, order, decision or writ of execution. Under no circumstances may a foreign judgment be reviewed as to its substance.

A judgment will not be recognized if:

- such recognition is manifestly contrary to public policy in the EU country in which recognition is sought;
- the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his/her defense;
- it is irreconcilable with a judgment given in a dispute between the same parties in the EU country in which recognition is sought;





www.uly.net

- it is irreconcilable with an earlier judgment given in another EU or non-EU country involving the same cause of action and the same parties.

A court in which recognition is sought of a judgment given in another EU country may stay the proceedings, if an ordinary appeal against the judgment has been lodged.

A judgment is to be enforced in another EU country when, on the application of any interested party, it has been declared enforceable there. The parties may appeal against a decision on an application for a declaration of enforceability.

