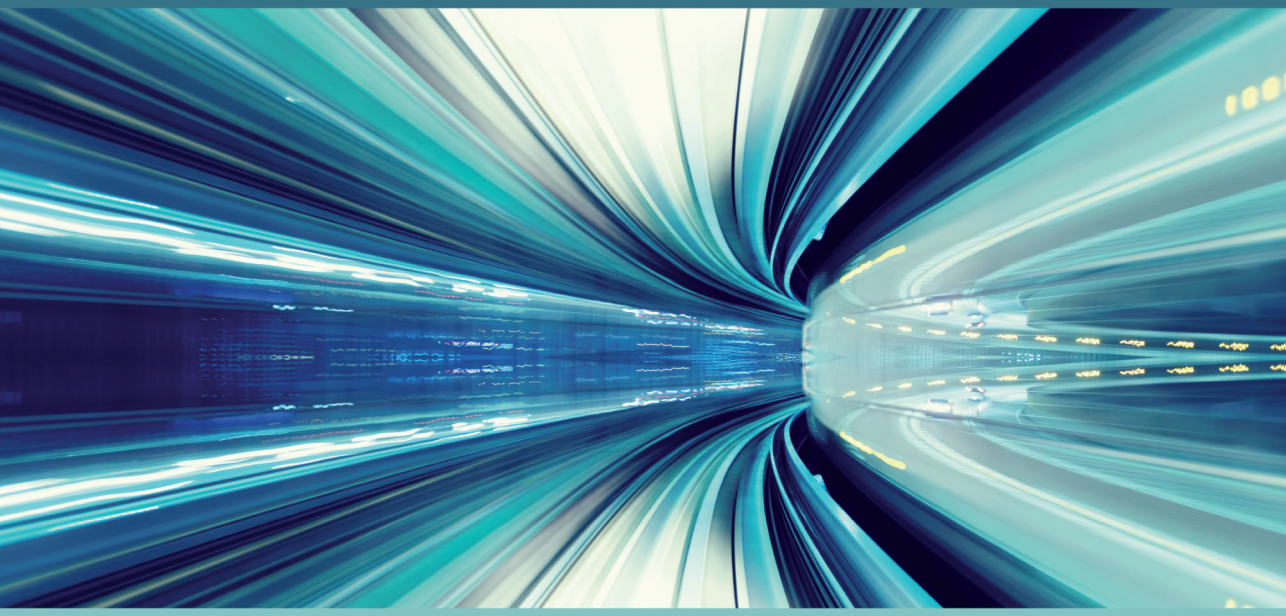
ELENA D'ALESSANDRO (edited by)



"LAW Train" SELF-LEARNING HANDBOOK

on Brussels I Recast and Brussels II bis Regulations

G. Giappichelli Editore

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SELF-LEARNING HANDBOOK
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edited by
Elena D'Alessandro

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VIA PO, 21 - TEL. 011-81.53.111 - FAX 011-81.25.100
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Introduction

The origin of this Handbook for self-learning on Brussels I Recast and Brussels II-bis Regulations lies in the LAWTrain Project: an innovative and interactive cross-border training for lawyers, funded by the European Union (Grant agreement no. 806937 - JUST-AG-2017/JUST-JTRA-EJTR-AG-2) and led by the University of Turin, Aix-Marseille Université, Ludwig-Maximilians-Universität München, Universidad Complutense de Madrid, Universität Passau, Univerza v Mariboru, Uniwersytet SWPS, the Consiglio dell'ordine degli avvocati of Lucca, Consiglio dell'ordine degli avvocati of Turin, Illustre Colegio de Abogados de Madrid, Območnizbor OZS Ljubljana, OIRP Warszawa, Ordre des Avocats du Barreau de Marseille and Rechtsanwaltskammer München.

The entire LAWtrain consortium is very grateful to the European Union for the support it has granted to our free of charge training activities and to the LAWTrain external evaluator, professor Pietro Franzina, for his feedback and suggestions.

May this self-learning Handbook be a valuable assistance to its readers.

Elena D'Alessandro

LAWTrain Project coordinator

https://www.eulawtrain.eu

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List of contributors

EDITOR AND LAWTRAIN PROJECT COORDINATOR

- **D'Alessandro Prof. Dr. Elena (*University of Turin)***

GRAPHIC EDITOR

- **Castagno Dr. Davide (*University of Turin*)**

PROOFREADING OF THE ENTIRE HANDBOOK

- **Giampaolo Benedetti Pearson, Lawyer (*Bar of Lucca*)**

CASE EDITORS

- **Antolak-Szymanski Dr. Katarzyna (*SWPS University of Social Sciences and Humanities)***

Jurisdiction over Child Custody and Abduction Issues, case 1 and case 2

- **Dalla Bontà Prof. Dr. Silvana (*University of Trento)***

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- **D'Alessandro Prof. Dr. Elena (*University of Turin)***

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- **Egea Prof. Dr. Vincent (*University of Aix-Marseille*)**

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- **Gascón-Inchausti Prof. Dr. Fernando (*Complutense University of Madrid)***

Provisional and Protective Measures, case 1, case 2 and case 3

- **Hau Prof. Dr. Wolfgang (*University of Munich)***

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- **Ivanc Prof. Dr. Tjaša *(University of Maribor)***

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- **Rijavec Prof. Dr. Vesna *(University of Maribor)***

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- **Solomon Prof. Dr. Dennis (*University of Passau)***

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Section

1 Brussels I Recast Regulation

Case 1*

Jurisdiction over Cyber Torts

The Italian newspaper "*Nuovo corriere*", published by Delta Editore s.p.a., a company with statutory seat in **Turin (Italy)**, in its Italian digital and printed version, published that Mrs. Mary Stuart, domiciled and habitually resident in **Warsaw (Poland)**, was involved in money laundering for a drug-trafficking network.
The **printed version** of the newspaper was mainly distributed in Italy and had minor circulation in Warsaw, with only 230 copies sold in that city.
The **digital version** was hosted on servers located in Turin, but visible everywhere in Europe.
Mrs. Mary Stuart is now planning to sue Delta Editore s.p.a. for damages, for having spread fake news.
Which Courts have international jurisdiction over the case?

Answer:

A. Find the relevant EU legal sources

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 judgements in civil and commercial matters (hereinafter: the "**Brussels I Recast Regulation**") is the relevant instrument to determine which courts have jurisdiction over the case.
Material scope of application: the Brussels I Recast Regulation applies in "civil and commercial matters" (Article 1), **including** torts and **cyber torts.**
Territorial scope of application: the Brussels I Recast Regulation applies **between all Member States of the European Union** (if the defendant is domiciled in a Member State) **including Italy and Poland**.

* Elena D'Alessandro (University of Turin).

Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings** instituted **on or after 10 January 2015** (Article 66.1).

FOR FURTHER READING on the Brussels I recast Regulation:
https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

B. Find the correct provision

I. General jurisdiction

For actions in civil matters against companies domiciled in a EU Member State, general jurisdiction lies in **any Court of the Member State in which the defendant is domiciled** (cf. Article 4.1 Brussels I Recast Regulation). As **Delta** Editore s.p.a. is **domiciled in Italy** (cf. Article 63.1(a)(b) Brussels I Recast Regulation), **Italy has general jurisdiction over the case**.

> Article 63.1(a)(b) Brussels I Recast Regulation
> 1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its
> (a) **statutory seat**;
> (b) central administration.

II. Special jurisdiction in matters relating to tort

In matters relating to tort, including cyber torts, **Article 7.2 Brussels I Recast Regulation** provides that, in addition to the general place of jurisdiction at the defendant's domicile, the Courts for "**the place where the harmful event occurred**" also have jurisdiction over the case.

> Article 7.2 Brussels I Recast Regulation
> A person domiciled in a Member State may be sued **in another Member State**:
> 2. in matters relating to tort […] in the Courts for the place where the harmful event occurred or may occur.

The provision of Article 7.2 Brussels I Recast Regulation has to be interpreted broadly in accordance with the standards of an autonomous interpretation as held in CJEU, 27 September 1998, C-189/87, *Athanasios Kalfelis v Bankhaus Schröder,*

Münchmeyer, Hengst and Co. and others, ECLI: EU:C:1988:459 (concerning Article 5.3 Brussels Convention 1968):

> CJEU, 27 September 1998, C-189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, ECLI: EU:C:1988:459
> 17. In order to ensure uniformity in all the Member States, it must be recognized that the concept of "matters relating to tort" covers **all actions which seek to establish the liability of a defendant and which are not related to a "contract"** within the meaning of Article 5.1 [Article 7.2 Brussels I Recast Regulation].

FURTHER READING: In CJEU, 17 June 1992, C-26/91, *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA*, ECLI:EU:C:1992:268, the CJEU held that there can only be a contractual relationship when a party has undertaken a contractual obligation towards the other party.

III. "Place where the harmful event occurred"

The CJEU, 30 November 1976, C-21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166 (concerning Article 5.3 Brussels Convention 1968) has clarified that:

> CJEU, 30 November 1976, C-21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166
> 15. […] the place of the event giving rise to the damage no less than the place where the damage occurred can, depending on the case, constitute a significant connecting factor from the point of view of jurisdiction.
> 19. Thus the **meaning of the expression "place where the harmful event occurred"** […] must be established in such a way as to acknowledge that the plaintiff has an option to commence proceedings **either** at the **"place where the damage occurred" or** the **"place of the event giving rise to it".**

IV. "Place where the harmful event occurred" in case of defamation by a printed newspaper

The CJEU, 7 March 1995, C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, ECLI:EU:C:1995:61 (concerning Article 5.3 Brussels Convention 1968) held that, in a case of libel by a printed newspaper article, the words "the place where the harmful event occurred" in Article 7.2 of the Brussels I Recast Regulation means:

a) either "*the place of the event giving rise to the damages*", which is located where the publisher of the defamatory publication is established,
b) or "*the place in which the damages occurred*", which is the place where the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely with respect to the harm caused in the State of the court seised.

CJEU, 7 March 1995, C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, ECLI:EU:C:1995:61
24. In the case of a libel by a newspaper article distributed in several Contracting States, "**the place of the event giving rise to the damage**", within the meaning of those judgments, can only be the **place where the publisher** of the newspaper in question is **established**, since that is the place where the harmful event originated and from which the libel was issued and put into circulation.
25. The Court of the place where the publisher of the defamatory publication is established must therefore have jurisdiction to hear the action for damages for all the harm caused by the unlawful act.
26. **However, that forum will generally coincide with the head of jurisdiction set out in the first paragraph of Article 2 of the Convention**.
27. As the Court held in *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, the plaintiff must consequently have the option to bring proceedings also in the place where the damage occurred, since otherwise Article 5.3 of the Convention would be rendered meaningless.
28. The "**place where the damage occurred**" is the place where the event giving rise to the damage, entailing tortious, delictual or quasi-delictual liability, produced its harmful effects upon the victim.
29. In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the **places where the publication is distributed**, when the victim is known in those places.
30. It follows that the Courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have **jurisdiction to rule on the injury caused in that State to the victim's reputation**.

As the forum of "*the place of the event giving rise to the damages*" will generally coincide with the head of jurisdiction set out in the first paragraph of Article 4 Brussels I Recast Regulation, Mary Stuart cannot refer to Article 7.2 Brussels I Recast Regulation to sue Delta Editore s.p.a. in a Member State other than the Member State of its domicile.

However, as Warsaw (Poland) is the place where the publication was distributed (= "*the place where the damage occurred*"), the **Court of Warsaw** has spe-

cial jurisdiction over the case according to **Article 7.2 Brussels I Recast Regulation**. More precisely, the Court of Warsaw has jurisdiction to rule **solely** in respect of the **harm caused in Poland** by the **printed version** of the newspaper article.

V. "Place where the harmful event occurred" in case of defamation by a digital newspaper

Mary Stuart argues she was also defamated by the digital version of the newspaper "*Nuovo corriere*". In this regard, CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685 applies:

> CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685, operative part
> 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**, which is "**the place of the event giving rise to the damage**",
> – or before the Courts of the **Member State** in which the **centre of his/her interests** is based, which is "**the place where the damages occurred**".
> 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 seised.

Once again, as Italy is "*the place of the event giving rise to the damages*", Mary Stuart cannot refer to Article 7.2 Brussels I Recast Regulation to sue Delta Editore s.p.a. in a Member State other than the Member State of its domicile.

VI. Localization of the "centre of interests" ("the place where the damages occurred")

The CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685 held that:

CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685
49. The place where a person has the centre of his interests **corresponds in general to his habitual residence.** However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.

As Mary Stuart is habitually resident in Warsaw (Poland), which is the **forum actoris, Warsaw** is the place where her centre of interests is based. Thus, Warsaw is "the place where the damage occurred". Therefore, the **Court of Warsaw** has special jurisdiction over the case according to **Article 7.2 Brussels I Recast Regulation**. More precisely, the Court of Warsaw has jurisdiction to rule in respect of the all the **damages caused everywhere** by the **digital version** of the newspaper article.

C. Conclusion

As the below chart illustrates, **Italy** has **general jurisdiction** over the case according to Article 4 Brussels I Recast Regulation, whereas the **Court of Warsaw** (Poland) has **special jurisdiction** over the case pursuant to Article 7.2 Brussels I Recast Regulation, with a restricted power to **rule solely** in respect of the **harm caused in Poland** by the **printed version** of the newspaper article, and a general power to rule in respect of **all the harm caused** by the **digital version** of the newspaper article.

	Italy **Art. 4 Brussels I Recast Regulation**	**Poland** **Art. 7.2 Brussels I Recast Regulation**
International jurisdiction to award damages for **ALL** the harm caused by the defamation by a *printed* newspaper	✓	
International jurisdiction to award damages for **ALL** the harm caused by the defamation by a *digital* newspaper	✓	✓

Case 2*

Scenario I

La Bocca della Verità s.p.a., a company incorporated under **Italian law** with statutory seat in **Turin (Italy)**, included Komunikacja corp., a company incorporated under **Polish law** with statutory seat in **Warsaw (Poland)**, in a blacklist on its website, stating that the company carries out acts of fraud and deceit. Many bad comments were posted on the website.
The information about fraud and deceit of Komunikacja corp. and the relevant bad comments were in **Italian** and not translated into **Polish**.
Komunikacja corp. carries out its main part of economic activities in **Turin**.
Since La Bocca della Verità s.p.a. had refused to remove the alleged defamatory information and comments from its website, Komunikacja corp. is planning to bring the following types of action:
i) **an action for compensation** of the entirety of damage sustained;
ii) **an action for rectification and removal** of the defamatory information.
Which Court has international jurisdiction over these actions?

Answer:

A. Find the relevant EU legal sources

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 judgements in civil and commercial matters (hereinafter: the "**Brussels I Recast Regulation**") is the relevant instrument to determine which Courts have jurisdiction over the case.
Material scope of application: the Brussels I Recast Regulation applies in "civil and commercial matters" (Article 1), **including** torts and **cyber torts.**

* Silvana Dalla Bontà (University of Trento).

Territorial scope of application: the Brussels I Recast Regulation applies **between all Member States of the European Union** (if the defendant is domiciled in a Member State) **including Italy and Poland**.
Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings** instituted **on or after 10 January 2015** (Article 66.1).

FOR FURTHER READING on the Brussels I recast Regulation:
https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

B. Find the correct provision

I. General jurisdiction

In civil matters for actions against companies domiciled in an EU Member State general jurisdiction lies in **any Court of the Member State in which the defendant is domiciled** (cf. Article 4.1 Brussels I Recast Regulation). As **La Bocca della Verità s.p.a.** is **domiciled in Italy** (cf. Article 63.1 (a)(b) Brussels I Recast Regulation), **Italy has general jurisdiction over the case** for both claims.

Article 63.1(a)(b) Brussels I Recast Regulation
1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its
(a) **statutory seat**;
(b) central administration.

II. Special jurisdiction in matters relating to tort

In matters relating to tort, including cyber torts, **Article 7.2 Brussels I Recast Regulation** provides that, in addition to the general place of jurisdiction at the defendant's domicile, the Courts of "**the place where the harmful event occurred**" also have jurisdiction.

Article 7.2 Brussels I Recast Regulation
A person domiciled in a Member State may be sued **in another Member State**:
2) In matters relating to tort […] in the Courts of the place where the harmful event occurred or may occur.

Article 7.2 Brussels I Recast Regulation has to be interpreted broadly in accordance with the standards of an autonomous interpretation as held by the CJEU, 27 September 1998, C-189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, ECLI: EU:C:1988:459 (concerning Article 5.3 Brussels Convention 1968):

> CJEU, 27 September 1998, C-189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, ECLI:EU:C:1988:459:
> 17. In order to ensure uniformity in all the Member States, it must be recognized that the concept of "matters relating to tort" covers **all actions which seek to establish the liability of a defendant and which are not related to a "contract"** within the meaning of Article 5.1 [Article 7.1 Brussels I Recast Regulation].

FURTHER READING: In *Handte*, the CJEU held that there can only be a contractual relationship when a party has undertaken a contractual obligation towards the other party.

CJEU, 17 June 1992, C-26/91, *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA*, ECLI:EU:C:1992:268

III. "Place where the harmful event occurred"

The CJEU, 30 November 1976, C-21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166 (concerning Article 5.3 Brussels Convention 1968) has clarified that:

> CJEU, 30 November 1976, C-21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166
> 15. […] the place of the event giving rise to the damage no less than the place where the damage occurred can, depending on the case, constitute a significant connecting factor from the point of view of jurisdiction.
> 19. Thus the meaning of the **expression "place where the harmful event occurred"** […] must be established in such a way as to acknowledge that the plaintiff has an option to commence proceedings **either** at the **"place where the damage occurred" or** the **"place of the event giving rise to it".**

IV. Special jurisdiction in matters relating to cyber tort

The CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685 held that:

CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685, operative part
"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,** which is the "**place of the event giving rise to the damage**",
– or before the Courts of the **Member State** in which the **centre of his/her interests** is **based,** which is the "**place where the damages occurred"**.
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 seised".

As Italy is "the place of the event giving rise to the damages", Komunikacja corp. cannot refer to Article 7.2 Brussels I Recast Regulation to sue La bocca della Verità s.p.a. in a Member State other than the Member State of its domicile.

V. Notion of "centre of interests"

In CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685, the centre-of-interests-based *forum actoris* refers to a natural person, whereas Komunikacja corp. is a legal person. However, the CJEU, 17 October 2017, C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766, has **extended** the applicability of such centre-of-interests based *forum actoris* to **legal persons**.

VI. Localization of the "centre of interests" of a legal person ("place where the damages occurred")

The CJEU, 17 October 2017, C-194/16, CJEU, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766 held that:

CJEU, 17 October 2017, C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766
41. As regards a legal person pursuing an economic activity […], the **centre of interests** of such a person must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by **reference to the place where it carries out the main part of its economic activities.**

In the case at hand, **Komunikacja corp**. has its **statutory seat in Warsaw (Poland)** but carries out the **main part of its economic activities in Turin (Italy).** Having in mind a similar situation, the CJEU, 17 October 2017, C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766 held that:

> CJEU, 17 October 2017, C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766
> 41. While the **centre of interests** of a **legal person** may **coincide** with the **place** of its registered office when it **carries out all or the main part of its activities** in the **Member State** in which that office is situated and **the reputation** that it enjoys there is consequently greater than in any other Member State, the **location** of that **office** is, **not**, however, **in itself, a conclusive criterion** for the purposes of such an analysis.

According to CJEU, 17 October 2017, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766 the centre of interests of **Komunikacja corp**. is located in Turin (Italy), where **Komunikacja corp.** carries out the main part of its economic activities, and its reputation its greater than in any other Member State (and, therefore, compromised by the offences written in Italian). As Italy is "the place where the damages occurred", Komunikacja corp. cannot refer to Article 7.2 Brussels I Recast Regulation to sue La bocca della Verità s.p.a. in a Member State other than the Member State of its domicile.

C. Conclusion

Italy has **general jurisdiction** over both claims according to **Article 4 Brussels I Recast Regulation.**

ADVANCED

Case 2

Scenario II

Assume that **Komunikacja corp**. carries out the **main part** of its **commercial activities** in **Poland** and that the defamatory information and relevant **comments** were in **Polish**.
Which Courts have international jurisdiction over the two actions (action for compensation and action for rectification)?

Answer:

A. Find the relevant EU legal sources

See Case 2, Scenario I, A

B. Find the correct provisions

I. General jurisdiction

Cf. Case 2, B.1: as **La Bocca della Verità s.p.a.** is **domiciled** in **Italy** (cf. Article 63.1 (a), (b) Brussels I Recast Regulation), **Italy** has **general jurisdiction** over the case for both claims according to Article 4 Brussels I Recast Regulation.

II. Special jurisdiction: "place where the harmful event occurred" and localization of the "centre of interests" of a legal person

Komunikacja corp. has its legal seat in Warsaw (Poland) and carries out the main part of its commercial activities in Poland. Its reputation is greater there than in any other Member State. Therefore, its centre of interests must be located in Warsaw (Poland).

The **Court of Warsaw**, as the Court of "the place where the damages occurred" has **special jurisdiction over the claim** according to **Article 7.2 Brussels I Recast Regulation**. Such a Court has a general power to rule in respect of all the harm caused by the digital defamation.
However, as clarified by the CJEU, 17 October 2017, C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766:

> CJEU, 17 October 2017, C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766
> 48. **An application for** the **rectification** of the former and the **removal** of the latter is a single and indivisible application and can, consequently, only be made **before a Court with jurisdiction to rule on the entirety of an application for compensation for damage** and not before a Court that does not have jurisdiction to do so.

Therefore, not only the Court of Warsaw has a general power to rule in respect of all the harm caused by the digital defamation, but it also has **special jurisdiction over both claims**: the action for compensation and the action for rectification and removal of the defamatory information.

C. Conclusion

As the chart below illustrates, **Italy** has **general jurisdiction** over **both claims** according to Article 4 Brussels I Recast Regulation.
The **Court of Warsaw** (Poland)has **special jurisdiction** over **both claims** according to Article 7.2 Brussels I Recast Regulation.

	Italy **Art. 4 Brussels I Recast Regulation**	**Poland** **Art. 7.2 Brussels I Recast Regulation**
International jurisdiction over both claims	✓	✓

ADVANCED

Case 2

Scenario III

Assume that **Komunikacja corp**. carries out its commercial **activities equally within the EU**.
Which Courts have international jurisdiction over the two actions (action for compensation and action for rectification)?

Answer:

A. Find the relevant EU legal sources

See Case 2, Scenario I, A

B. Find the correct provisions

I. General jurisdiction

Cf. Case 1, B.1: as **La Bocca della Verità s.p.a.** is **domiciled in Italy** (cf. Article 63.1 (a)(b) Brussels I Recast Regulation), **Italy has general jurisdiction over the case** for both claims according to Article 4 Brussels I Recast Regulation.

II. Special jurisdiction: "Place where the harmful event occurred" and localization of the "centre of interests" of a legal person

As Komunikacja corp. has its legal seat in Warsaw (Poland) but carries out its commercial activities equally within the EU, it is extremely hard to localize its "centre of interests", that is the Member State in which its reputation its greater there than in any other Member State.
However, according to CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685, operative part, Komunikacja corp. can bring the action for damages:

> CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685, operative part
> […] **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 seised**.

Komunikacja corp. can sue La bocca della Verità s.p.a. for damages **before the Courts of each Member State where the damage was caused.** Those Courts have **special jurisdiction** over the case according to Article 7.2 Brussels I Recast Regulation **only** in respect of the **damage caused in the territory** of the Member State of the **Court seised**.
According to what held by the CJEU, 17 October 2017, C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766, para 48 (cf. above, Scenario II, B.II), as those Courts cannot rule on the entirety of an application for compensation for damage, they **do not have jurisdiction** to grant an application for the **rectification** and the **removal** of defamatory information and comments.

C. Conclusion

As the chart below illustrates, **Italy** has **general jurisdiction** over **both claims** according to Article 4 Brussels I Recast Regulation, whereas **the Courts of each Member State where the damage was caused** have **special jurisdiction** over the case according to Article 7.2 Brussels I Recast Regulation **only** in respect of the **damage caused in the territory** of the Member State of the **Court seised**. They lack jurisdiction for the actions of rectification and removal.

	Italy Art. 4 Brussels I Recast Regulation	Courts of each Member State where the arm was caused Art. 7.2 Brussels I Recast Regulation
International jurisdiction over both claims	✓	

Case 3*

Scenario I

Winter, a **Polish Corporation** and rightholder of the Polish trademark "Winter", manufactures ski servicing tools and accessories and sells them worldwide. Power, a **German company**, also sells its own ski servicing tools and accessories, but also accessories for tools made by Winter. These "Winter accessories" are neither produced by, nor are they authorised by Winter.
Power had reserved the keyword ("AdWords") "Winter" in the Google advertising system, limited to **Google's German top-level domain** ("google.de"). In consequence, an internet user who enters the keyword "Winter" into the search engine of google.de receives a link to Winter's website as the first search result. However, the search also leads to an advertisement for Power appearing on the right-hand side of the screen. The text of the advertisement bears the heading "Ski workshop accessories" and Power's website address is given. Clicking on the heading "Ski workshop accessories" brings up the "Winter accessories" on offer on Power's website. Power has not entered any advertisement linked to the search term "Winter" in Google's Polish top-level domain ("google.pl").
Winter considers that its trademark has been infringed and wishes to bring an action for damages.
Which Courts have international jurisdiction to decide?

Answer:

A. Find the relevant EU legal sources

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 judgements in civil and commercial matters (hereinafter: the "**Brussels I Recast Regulation**") is the relevant source to determine which Courts have jurisdiction over the case.

* Wolfgang Hau (University of Munich) & Dennis Solomon (University of Passau).

Material scope of application: the Brussels I Recast Regulation applies in "civil and commercial matters" (Article 1), **including torts.**
Territorial scope of application: the Brussels I Recast Regulation applies **in all Member States of the European Union including Germany and Poland**, if the defendant is domiciled in a Member State (Art. 4, 5).
Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings** instituted **on or after 10 January 2015** (Article 66.1).

FOR FURTHER READING on the Brussels I recast Regulation:
https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

B. Find the correct provision

I. General jurisdiction

In civil and commercial matters (cf. Article 1 Brussels I Recast Regulation) for actions against companies domiciled in an EU Member State pursuant to Article 4.1 Brussels I Recast Regulation, in principle, the **Courts of the Member State of the defendant's domicile** have general **jurisdiction over the case**.

As Power is domiciled in Germany (cf. Article 63.1(a)(b) Brussels I Recast Regulation), **Winter can bring its action before German Courts**.

GOOD TO KNOW: Article 24.4 Brussels I Recast Regulation does not prevent this result, since, while that provision refers to proceedings concerning the registration or validity of trademarks, it does not concern actions based on the infringement upon them.

II. Special jurisdiction

If the subject matter of the proceedings is **tort, delict or quasi-delict** or claims arising out of such acts, **Article 7.2 Brussels I Recast Regulation** provides that, **in addition** to the general place of jurisdiction at the defendant's domicile, the **Courts of the place where the harmful event occurred** also have international **jurisdiction**.
The provision has to be interpreted broadly in accordance with the standards of an autonomous interpretation as held by the CJEU, 27 September 1998, C-189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, ECLI: EU:C:1988:459 (concerning Article 5.3 Brussels Convention 1968):

CJEU, 27 September 1998, C-189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others*, ECLI: EU:C:1988:459
17. In order to ensure uniformity in all the Member States, it must be recognized that the **concept of "matters relating to tort, delict and quasi-delict" covers all actions** which seek to **establish the liability** of a defendant and which are not related to a "contract" within the meaning of Article 5.1.

This also includes the claim for damages asserted here due to a trademark infringement.
The international jurisdiction of the Polish Courts under Article 7.2 Brussels I Recast Regulation thus **depends on whether the "place of the harmful event" is located in Poland**. The CJEU ruled on the interpretation of this term in CJEU, 30 November 1976, C-21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166 (concerning Article 5.3 Brussels Convention 1968), stating:

CJEU, 30 November 1976, C-21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166
15. As regards this, it is well to point out that the **place of the event giving rise to the damage** no less than the place where the damage occurred can, depending on the case, constitute a **significant connecting factor** form the point of view of jurisdiction.
[…]
19. Thus the meaning of the expression "**place where the harmful event occurred**" […] must be established in such a way as to acknowledge that the plaintiff has an option to commence proceedings **either at the place where the damage occurred or the place of the event giving rise to it**.

An action by Winter against Power **in Poland** can therefore be considered if either the place where the damage occurred or the place of the action giving rise to it is located there.

III. Place where the damage occurred

Trademark infringements on the Internet can cause damage in **different countries**. Therefore, these are so-called **scattered torts**. The same applies to violations of personality rights through the publication of content on the Internet. There is established case law of the CJEU on these kinds of cases, according to which the place where the damage occurs is located in **all countries** in which the corresponding content can be retrieved. However, the jurisdiction of the courts in question is to be limited to deciding on the damages caused within their **State's territory**.

GOOD TO KNOW: This is the so-called **mosaic theory**, developed by CJEU, 7 March 1995, C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, ECLI:EU:C:1995:61, on personality rights infringements in international press products.

In the present case, this would result in **limited jurisdiction in all States in which the website "google.de" can be accessed**. On the other hand, the CJEU, referring to the necessary legal certainty, assumes a **comprehensive place of jurisdiction at the centre of interests** of the injured party.

FOR FURTHER READING on place of jurisdiction at the centre of interests of the injured party: CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685, also confirmed for the infringement of corporate personality rights in CJEU, 17 October 2017, C-194/16, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, ECLI:EU:C:2017:766; for details see the case study 1 on "Jurisdiction over Cyber Torts".

In the case of **Winter**, the **centre of interests would have to be located in Poland** for lack of other indications and establish the unlimited international jurisdiction of the Courts there.

However, it is questionable, whether the mentioned law on personality rights infringements outlined above can even be applied to **infringements of intellectual property rights** (such as the trademark infringements at issue here). In the present case, the CJEU has answered this question negatively (CJEU, 19 April 2012, C-523/10, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220):

CJEU, 19 April 2012, C-523/10, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220

24. [T]hat assessment, made in the particular context of infringements of personality rights, does not apply also to the determination of jurisdiction in respect of infringements of intellectual property rights, such as those alleged in the main proceedings.

25. Contrary to the situation of a person who considers that there has been an infringement of his personality rights, which are protected in all Member States, the protection afforded by the registration of a national mark is, in principle, limited to the territory of the Member State in which it is registered, so that, in general, its proprietor cannot rely on that protection outside the territory.

26. Nevertheless, the question whether the use, for advertising, of a sign identical to a national mark on a website operating solely under a Country-specific top-level domain

different from that of the Member State in which the trademark is registered in fact infringes that mark falls within the scope of the examination of the substance of the action that the Court having jurisdiction will undertake in light of the applicable substantive law.
27. With regard to jurisdiction to hear a claim of infringement of a national mark in a situation such as that in the main proceedings, it must be considered that both the objective of foreseeability and that of sound administration of justice militate in favor of conferring jurisdiction, in respect of the damage occurred, on the courts of the Member State in which the right at issue is protected.
28. It is the Courts of the Member State in which the trademark at issue is registered which are best able to assess […] whether a situation such as that in the main proceedings actually infringes the protected national mark. Those courts have the power to determine all the damage allegedly caused to the proprietor of the protected right because of an infringement of it and to hear an application seeking cessation of all infringements of that right.
29. Therefore it must be held that an action relating to **infringement of a trademark registered in a Member State** through the **use, by an advertiser, of a keyword identical to that trademark on a search engine website operating under a Country-specific top-level domain of another Member State** may be brought before the **Courts of the Member State in which the trademark is registered**.

In Wintersteiger the CJEU thereby also refers – at least in the case of intellectual property rights for which a constitutive registration requirement exists – to the principle of **national protection of intellectual property rights** in international jurisdictional law. The **place where the damage occurs** can, **in case of a trademark infringement**, only be located in the **State in which the trademark is protected**.

The damage resulting from the infringement of a national trademark consequently always occurs in the registration state. In the present case this is **Poland**, whose courts thus have international jurisdiction according to Article 7.2 Brussels I Recast Regulation.

IV. Place of the event giving rise to the damage

Irrespective of what has been said so far, there is as well a place of tort jurisdiction at the place of the action giving rise to the alleged damage, as the CJEU also states in ***Wintersteiger*:**

CJEU, 19 April 2012, C-523/10, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220
30. As regards, second, the place where the event occurred which gives rise to an alleged infringement of a national mark through **the use of a keyword identical to that trademark** on a search engine operating under a Country-specific top-level domain of another Member State, it should be noted that **the territorial limitation of the protection of a national mark is not such as to exclude the international jurisdiction of Courts other than the Courts of the Member State in which that trademark is registered.**

On the question of where this place of action should be located, the CJEU held:

CJEU, 19 April 2012, C-523/10, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220
34. In the case of an alleged infringement of a national trademark registered in a Member State because of the display, on the search engine website, of an advertisement using a keyword identical to that trademark, it is the activation by the advertiser of the technical process displaying, according to pre-defined parameters, the advertisement which it created for its own commercial communications which should be considered to be the event giving rise to an alleged infringement, and not the display of the advertisement itself.
35. As the Court has already held in the context of interpretation of the directive to approximate the laws of the Member States relating to trademarks, it is the advertiser choosing a keyword identical to the trademark, and not the provider of the referencing service, who uses it in the course of trade (Google France and Google, paragraphs 52 and 58). The **event giving rise to a possible infringement of trademark law** therefore **lies in the actions of the advertiser using the referencing service for its own commercial communications**.
36. It is true that the technical display process by the advertiser is activated, ultimately, on a server belonging to the operator of the search engine used by the advertiser. However, in view of the objective of foreseeability, which the rules on jurisdiction must pursue, the place of establishment of that server cannot, by reason of its uncertain location, be considered to be the place where the event giving rise to the damage occurred for the purpose of the application of Article 5.3 Brussels I Regulation.
37. By contrast, since it is a definite and identifiable place, both for the applicant and for the defendant, and is therefore likely to facilitate the taking of evidence and the conduct of the proceedings, it must be held that the place of establishment of the advertiser is the place where the activation of the display process is decided.

In the present case, the place of the event giving rise to the alleged damage is located **in Germany**. However, **since the general place of jurisdiction of Power is also located there**, **Article 7.2 Brussels I Recast Regulation does not apply** (cf. the introduction before (1): “in another Member State”).

C. Conclusion

German Courts have general jurisdiction over the case pursuant to **Article 4 Brussels I Recast Regulation** (defendant's home jurisdiction).
Alternatively, **Winter may bring an action in Poland**: under **Article 7.2 Brussels I Recast Regulation**, the Polish Courts have special jurisdiction over the case because the place of success of a trademark-infringement in tort is situated in the State in which the trademark was registered.

	Germany **Art. 4 Brussels I Recast Regulation**	**Poland** **Art. 7.2 Brussels I Recast Regulation**
International jurisdiction to award damages for the harm caused by the trademark infringement	✓	✓

ADVANCED

Case 3

Scenario II

Winter has not registered a Polish trademark for its product, but a **European Union Trademark** within the meaning of Regulation (EU) No. 1001/2017. **Power is domiciled in Italy** and sells accessory parts manufactured by Winter by promoting them on its website with an **Italian top-level domain** (Power.it), in German language. The website does not offer any ordering possibility but contains the contact data of Power. Power had given an undertaking to Winter declaring that it would refrain from exporting Winter-branded products to **Germany** or offering them for sale, advertising or marketing them there.
Xeed-GmbH, based in Germany, requests a price list via e-mail to the address given on the website and, after receiving it, orders 150 accessory parts, also by e-mail. Xeed-GmbH commissions a forwarding company to transport the goods from Power to its plant in **Germany**. Winter considers that its European Union Trademark has been infringed because the goods have been sold on the European Union market without its consent and is seeking injunctive relief in **Germany**.
Do German Courts have international jurisdiction over the case?

Answer:

A. Find the relevant EU legal sources

1) 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 judgements in civil and commercial matters (hereinafter: the "**Brussels I Recast Regulation**") is the relevant instrument to determine which Courts have jurisdiction over the case.
Material scope of application: the Brussels I Recast Regulation applies in "civil and commercial matters" (Article 1), **including torts**.

Territorial scope of application: the Brussels I Recast Regulation applies **in all Member States of the European Union including Germany and Italy**, if the defendant is domiciled in a Member State (Art. 4, 5).
Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings** instituted **on or after 10 January 2015** (Article 66.1).

FOR FURTHER READING on the Brussels I recast Regulation:
https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

2) Regulation (EU) No. 1001/2017 of the European Parliament and of the Council of 14 June 2017, on the European Union Trademark (hereinafter: the "**EUTMR**").
Material scope of application: the EUTMR concerns "**a trade mark for goods or services** which is registered in accordance with the conditions contained in this Regulation" (Article 1).
Territorial scope of application: the EUTMR applies **between all Member States of the European Union including Italy, Germany and Poland**.
Temporal scope of application: the EUTMR applies from **1 October 2017** (Article 212).

FOR FURTHER READING on the EUTMR:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R1001

B. Find the correct provisions

The **EUTMR** regulates the international jurisdiction for civil proceedings concerning the infringement of Union trademarks itself in its Article 125:

Article 125 EUTMR – International jurisdiction
1. Subject to the provisions of this Regulation as well as to any provisions of Brussels I Recast Regulation applicable by virtue of Article 122, proceedings in respect of the actions and claims referred to in Article 124 shall be brought before the Courts of the Member State in which the defendant is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.
[…]
5. Proceedings in respect of the actions and claims referred to in Article 124, with the exception of actions for a declaration of non-infringement of an EU trademark, may also be brought before the Courts of the Member State in which the act of infringement has been committed or threatened, or in which an act referred to in Article 11.2 has been committed.

According to Article 125.1 EUTMR, the **Courts of the State in which the defendant is domiciled** have international **jurisdiction**.

Therefore, the Italian Courts have jurisdiction over Power.

The international **jurisdiction of the German Courts** could, however, be based on Article 125.5 EUTMR **if the alleged infringement has been committed or threatened in** Germany. In this context it must be noted that, in contrast to Article 7.2 Brussels I Recast Regulation, the wording of Article 125.5 EUTMR does not alternatively refer to the place of the event giving rise to the damage and the place where the damage occurred, but solely provides jurisdiction at the place of the event giving rise to the damage. As clarified by CJEU, 5 June 2014, C-360/12, *Coty Germany GmbH v First Note Perfumes NV*, ECLI:EU:C:2014:1318 (on the content-similar Regulation in Article 93.5 Regulation (EC) No 40/94 on the Community trademark, hereinafter CTMR 1994):

CJEU, 5 June 2014, C-360/12, *Coty Germany GmbH v First Note Perfumes NV*, ECLI:EU:C:2014:1318

31. With regard to the interpretation of Article 93.5, in the light of the findings in paragraphs 27 and 28 above, the concept of "the Member State in which the act of infringement has been committed or threatened", referred to in that provision, must be interpreted independently of the concept of "the place where the harmful event occurred or may occur" referred to in Article 5.3 Brussels I Regulation.

32. Consequently, **the duality of linking factors, namely the place of the event giving rise to the damage and that where the damage occurred**, accepted by the Court's case-law relating to Article 5.3 Brussels I Regulation (see CJEU, 30 November 1976, C-21/76, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, ECLI:EU:C:1976:166, paragraph 19, and, most recently, CJEU, 16 January 2014, C-45/13, *Andreas Kainz v Pantherwerke AG*, ECLI:EU:C:2014:7, paragraph 23 and the case-law cited), **cannot automatically apply to the interpretation of the concept of "the Member State in which the act of infringement has been committed or threatened" in Article 93.5** [CTMR 1994].

33. In order to determine whether an independent interpretation of the latter provision nevertheless leads to an acknowledgement of such a duality of linking factors, it is necessary, in accordance with the Court's settled case-law, to take into account not only the wording of that provision, but also its context and purpose.

34. **With regard to the wording of Article 93.5 [CTMR 1994],** the concept of "the Member State in which the act of infringement has been committed" implies, as the Advocate General stated in point 31 of his Opinion, that that linking factor relates to active conduct on the part of the person causing that infringement. Therefore, **the linking factor provided for by that provision refers to the Member State where the act giving rise to the alleged infringement occurred or may occur, not the Member State where that infringement produces its effects**.

35. It should also be noted that the existence of jurisdiction under Article 93.5 based on the place where the alleged infringement produces its effects would conflict with the wording of Article 94.2 of that Regulation, which limits the jurisdiction of Community trademark courts under Article 93.5 to acts committed or threatened in the Member State where the court seized is situated.
36. Furthermore, as the Advocate General stated in points 28 and 29 of his Opinion, both the origin and the context of [the CTMR 1994] confirm the intention of the EU legislature to derogate from the rule on jurisdiction provided for in Article 5.3 Brussels I Regulation in the light, in particular, of the inability of the rule on jurisdiction to respond to the specific problems relating to the infringement of a Community trademark.
37. Consequently, jurisdiction under Article 93.5 [CTMR 1994] may be established solely in favour of Community trademark Courts in the Member State in which the defendant committed the alleged unlawful act.

As stated in CJEU, 5 June 2014, C-360/12, *Coty Germany GmbH v First Note Perfumes NV*, ECLI:EU:C:2014:1318, jurisdiction may be established in favour of the Courts in the Member State in which the defendant committed the alleged unlawful act. This raises the question whether Power has caused the infringement by marketing activities that took place in Germany. Such activities could solely be seen in the operation of the German-language website or the sending of the requested price list to Germany. A shipment of the goods to Germany, however, cannot be attributed to Power, since the forwarding agency in charge of the transport was commissioned by Xeed-GmbH.

In the opinion of the German Federal Supreme Court (*Bundesgerichtshof*, hereinafter BGH), which transfers the CJEU-case law (CJEU, 27 September 2017, C-24/16 and C-25/16, *Nintendo Co. Ltd v BigBen Interactive GmbH and BigBen Interactive SA*, ECLI:EU:C:2017:724) on Community designs because of the similarity of content of the relevant rules, the offer on the website in German does not lead to international jurisdiction of the German courts.

BGH, 9 November 2017 – I ZR 164/16 = EuZW 2018, 84 (on Article 97 of Regulation (EC) No. 207/2009 on the Community trademark, hereinafter CTMR 2009, which is identical in content to Article 125 EUTMR)
31. […] The Court of Appeal correctly assumed that the **German-language website of the defendant does not lead to international jurisdiction of the German courts**. However, contrary to the opinion of the Court of appeal, it is not important that the defendant's website does not contain any ordering option and is limited to a general presentation of its business. Even if there was such an ordering option or – as the plaintiff states – commercial perfume buyers in Germany would have been targeted directly by the web site, this would regularly not lead to international jurisdiction of the German courts. This follows from the judgement [CJEU, 27 September 2017, C-24/16 and C-25/16, *Nintendo Co. Ltd v*

BigBen Interactive GmbH and BigBen Interactive SA, ECLI:EU:C:2017:724]. This judgement has been passed on the Regulation (EC) No. 6/2002 on Community designs. However, because of the similarity in content of the relevant Regulations, the ruling of the CJEU can be transferred on European Union Trademarks […].
31. […] If an economic operator offers goods for sale which can be viewed on the screen and ordered via a website which is addressed to purchasers in other Member States, infringing a Community trademark, such conduct falls within the scope of the term using in the course of trade in the sense of Article 9.1 [CTMR 2009]. […] **This is also an event giving rise to damage**. The location of this damaging event in the meaning of Article 97.5 [CTMR 2009] in such a case, however, is not the place, where the website can be accessed, but the **place where the process of publication of the offer on the website was initiated** […]. Even if the defendant's website were to contain an offer of goods, in doubt it would have to be assumed, that the process of publishing the offer had taken place in Italy.

Further, in the opinion of the *Bundesgerichtshof* (BGH, 9 November 2017 – I ZR 164/16 = EuZW 2018, 84, paras. 33 et seq.), sending the price list to Germany is also no sufficient connecting factor:

BGH, 9 November 2017 – I ZR 164/16 = EuZW 2018, 84
33. Contrary to the view of the Court of Appeal, the international jurisdiction of the German Courts […] is not based on the fact that the defendant sent […] a product and price list to Germany by e-mail from Italy.
34. In disputes concerning infringements of intellectual property rights, it is not uncommon for the same defendant to be accused of several acts of infringement and for that reason an event giving rise to the damage to occur in several places. For determining the event giving rise to the damage in cases where the same defendant is alleged to have committed different acts of infringement within the meaning of Article 9.2 [CTMR 2009] in several Member states, **it is not necessary to consider each individual act of infringement** but to make **an overall assessment of the conduct** in order to determine **the place where the original act of infringement** to which the alleged conduct relates **was committed or threatens to be committed** (see CJEU, 27 September 2017, C-24/16 and C-25/16, *Nintendo Co. Ltd v BigBen Interactive GmbH and BigBen Interactive SA*, ECLI:EU:C:2017:724). In this respect, the considerations of the European Court of Justice regarding the interpretation of Article 8 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation), which is linguistically similar to Article 97.5 [CTMR 2009], apply […].
35. The reasoning that the Court seized can easily determine the applicable law on the basis of a uniform connecting factor – the place where the act of infringement was committed or threatened, which is the origin of several acts alleged against a defendant (see CJEU, 27 September 2017, C-24/16 and C-25/16, *Nintendo Co. Ltd v BigBen Interactive GmbH and BigBen Interactive SA*, ECLI:EU:C:2017:724) – also applies to the interpretation of Article 97.5 [CTMR 2009]. The parties and the Court can then easily designate the Member State in which an infringement within the meaning of Article 97.5 [CTMR 2009] has been committed.
36. Thus, **it is not necessary to focus on individual acts of the infringement**, but to make an **overall assessment of the conduct of the defendant** in order to determine **the place**

where the original act of infringement on which the alleged conduct is based, **was committed or threatens to be committed**.
37. If […] there was already an offer executed on the defendant's website, this would have to be regarded as **the event giving rise to the damage**. Sending an e-mail with a product list would then be irrelevant in this context. Anyhow, the place of the event giving rise to the damage in the case of an Internet offer is **the place where its publication was initiated**. Nothing has been established or otherwise ascertained that the publication of the website was initiated in in Germany.
38. If the defendant's website is not regarded as an offer, the event giving rise to the damage lies **in the sending of product and price lists by e-mail**. In this case, the place of the event giving rise to the damage is also not Germany. The application of the principles developed for the cases of orders via the Internet leads to the result that **the place of the event giving rise to the damage in this case is the place where the e-mail is sent**. In the absence of any divergent indications, it can be assumed that this was done in Italy […]. It does not matter, whether the defendant has contacted [X] on its own initiative or on request.

According to the opinion of the *Bundesgerichtshof*, in the case of the **infringement of European Union Trademarks by distribution on the Internet,** a place of jurisdiction pursuant to Article 125.5 EUTMR would therefore **only be** established **at the place from which the website is launched**. Individual sales activities with reference to other Countries, such as the sending of information by e-mail, could not constitute a sufficient connection to establish the international jurisdiction of the local Court. The European Union Trademark proprietor's right to bring an action would therefore normally be limited to the defendants home Country, unlike in the case of national trademarks, where the Country of the trademark registration is seen as the place where the damage occurred which often leads to international jurisdiction of the plaintiff's home Courts. In this respect, the enforcement of the European Union Trademark would be significantly more difficult in comparison with national trademarks. For that reason, the CJEU recently did not share the opinion of the *Bundesgerichtshof*. In CJEU, 5 September 2019, C-172/18, *AMS Neve Ltd and Others v Heritage Audio SL and Pedro Rodríguez Arribas*, ECLI:EU:C:2019:674, a case similar to this one, where a Spanish seller offered audio equipment to customers in the United Kingdom via his website and social media accounts in English language, naming i.a. distributors in the United Kingdom and – by doing so – (potentially) violating the EU trademark of a company from the United Kingdom, it held:

CJEU, 5 September 2019, C-172/18, *AMS Neve Ltd and Others v Heritage Audio SL and Pedro Rodríguez Arribas*, ECLI:EU:C:2019:674 (on Article 97 of Regulation (EC) No. 207/2009 on the Community trademark, hereinafter CTMR 2009, which is identical in content to Article 125 EUTMR)
50. If the wording "Member State in which the act of infringement has been committed", in Article 97.5 CTMR 2009, were to be interpreted as meaning that it refers to the Member

State in the territory of which the person carrying out those commercial acts set up his website and activated the display of his advertising and offers for sale, parties established within the European Union committing an infringement, operating electronically and seeking to prevent the proprietors of infringed EU marks from resorting to an alternative forum, would have to do no more than ensure that the territory where the advertising and offers for sale were placed online was the same territory as that where those parties are established. In that way, Article 97.5 of that Regulation would, in the event that the advertising and the offers for sale are directed to consumers of other Member States, be deprived of any scope constituting an alternative to that of the rule on jurisdiction laid down in Article 97.1.
51. An interpretation of the wording "Member State in which the act of infringement has been committed" as meaning that it refers to the place where the defendant took decisions and technical measures to activate a display on a website is all the more inappropriate given that it may, in many cases, prove excessively difficult, or even impossible, for the applicant to identify that place. As opposed to situations in which proceedings are already pending, a factor in the situation in which the proprietor of the EU trade mark finds himself before the bringing of Court proceedings is that it is impossible to compel the defendant to disclose that place, when no action has been brought before any Court at that stage.
52. In order to maintain the effectiveness of the EU legislature's provision of an alternative forum it is necessary, in accordance with the case-law to the effect, that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must be interpreted having regard to the context of the provision and the objectives pursued by the legislation of which it forms part (see, *inter alia*, CJEU, 3 September 2014, C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, ECLI:EU:C:2014:2132, paragraph 14, and CJEU, 18 May 2017, C-617/15, *Hummel Holding A/S v Nike Inc. and Nike Retail B.V.*, ECLI:EU:C:2017:390, paragraph 22), to give to the wording "Member State in which the act of infringement has been committed" an interpretation which is consistent with the other provisions of Regulation No 207/2009 with respect to infringement.
53. One of those provisions is, in particular, Article 9 CTMR 2009, which lists the acts of infringement which the rightholder of an EU trade mark can contest.
54. Accordingly, the expression "the act of infringement" must be understood as relating to acts, specified in Article 9 CTMR 2009, which the applicant claims to have been committed by the defendant, such as, in this case, acts specified in Article 9.2(b) and (d) of that article, consisting of advertising and offers for sale under a sign identical to the mark at issue, and those acts must be held to have been "committed" in the territory where they can be classified as advertising or as offers for sale, namely where their commercial content has in fact been made accessible to the consumers and traders to whom it was directed. Whether the result of that advertising and those offers for sale was that, thereafter, the defendant's products were purchased is, however, irrelevant.

C. Conclusion

Following the CJEU, German Courts have international jurisdiction over the case based on Article 125.5 EUTMR.

Case 4*

Head, who lives in **Warsaw (Poland),** is a professional architecture photographer and author of illustrated books showing buildings by the well-known **Polish** architect Astrid. Astrid used the photographs of Head to illustrate her work at a conference organised by the **German-based** Agency Ester. After the end of the conference, Ester made these pictures available on its website for retrieval and download without the consent of Head and without stating a copyright designation. Head sees her copyrights infringed and brings action for damages against Ester before the commercial Court of **Warsaw** on the basis of **Article 7.2** Brussels I Recast Regulation. Ester claims that the Courts do not have international jurisdiction, stating that its website is not directed toward **Poland** and that its mere accessibility in Poland is not sufficient to establish the jurisdiction of the **Polish Courts**.
Does the commercial Court of Warsaw have international jurisdiction over the case?

Answer:

A. Find the relevant EU legal sources

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 judgements in civil and commercial matters (hereinafter: the "**Brussels I Recast Regulation**") is the relevant instrument to determine which Courts have jurisdiction over the case.
Material scope of application: the Brussels I Recast Regulation applies in "civil and commercial matters" (Article 1), **including torts**.
Territorial scope of application: the Brussels I Recast Regulation applies **in all Member States of the European Union including Germany and Poland**, if the defendant is domiciled in a Member State (Art. 4, 5).
Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings** instituted **on or after 10 January 2015** (Article 66.1).

* Wolfgang Hau (University of Munich) & Dennis Solomon (University of Passau).

FOR FURTHER READING on the Brussels I recast Regulation:
https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

B. Find the correct provision

I. General jurisdiction

The place of **general jurisdiction** within the meaning of Article 4.1 Brussels I Recast Regulation lies with the **Courts** of the State in which the **defendants' company is domiciled**. Therefore, the German Courts and **not the Polish Courts** have general jurisdiction over Ester.

II. Special jurisdiction

The **Polish Courts may**, however, have **special jurisdiction** over the case pursuant to **Article 7.2 Brussels I Recast Regulation**, **if the place of the action giving rise or the place of success of the alleged copyright infringement**, which constitutes a tortious act within the meaning of the provision, is to be located **in Poland**.
Regarding the relevant act of infringement and the determination of its place in the case of publication of content on the Internet, CJEU, 22 January 2015, C-441/13, *Pez Hejduk v EnergieAgentur.NRW GmbHk*, ECLI:EU:C:2015:28 (concerning Article 5.3 Brussels I Regulation), states:

CJEU, 22 January 2015, C-441/13, *Pez Hejduk v EnergieAgentur.NRW GmbH*, ECLI:EU:C:2015:28
23. In the first place, it must be stated that **the causal event**, defined as the event which gives rise to the alleged damage (see CJEU, 16 July 2009, C-189/08, *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA*, ECLI:EU:C:2009:475, paragraph 28), **is not relevant** for the purpose of attributing jurisdiction to the Court before which a case such as that in the main proceedings has been brought.
24. In a situation such as that at issue in the main proceedings, in which the alleged tort consists in the **infringement of copyright** or rights related to copyright by the placing of certain photographs online on a website without the photographer's consent, **the activation of the process for the technical display of the photographs on that website must be regarded as the causal event**. The event giving rise to a possible infringement of copyright therefore lies in the actions of the owner of that site (see, by analogy, CJEU, 19 April 2012, C-523/10, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220, paragraphs 34 and 35).

25. In a case such as that in the main proceedings, the acts or omissions liable to constitute such an infringement may be localised only at the place where [E] has its seat, since that is where the company took and carried out the decision to place photographs online on a particular website. It is undisputed that that seat is not in the Member State from which the present reference is made.
26. It follows that in circumstances such as those at issue in the main proceedings, **the causal event took place at the seat of that company** and therefore **does not attribute jurisdiction to the Court seized**.

The **place of the event giving rise to the damage** therefore is located **in Germany**. Consequently, the **Court of Warsaw does not have international jurisdiction over the case**.

It remains to be clarified whether its jurisdiction results from the fact that Warsaw is the **place where the damage resulting from the copyright infringement occurred**. To determine this place in the case of the infringement of copyrights by the distribution of works on physical media, the CJEU has referred to its case law on scattered torts in the judgement CJEU, 3 October 2013, C-170/12, *Peter Pinckney v KDG Mediatech AG*, ECLI:EU:C:2013:635 (on Article 5.3 Brussels I Regulation):

CJEU, 3 October 2013, C-170/12, *Peter Pinckney v KDG Mediatech AG*, ECLI:EU:C:2013:635
31. The Court has already interpreted Article 5.3 Brussels I Regulation with respect to allegations of infringements committed via the internet and which may, as a result, produce their effects in numerous places (see CJEU, 25 October 2011, C-509/09 and C-161/10, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, ECLI:EU:C:2011:685 and CJEU, 19 April 2012, C-523/10, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220).
[…]
39. First of all, it is true that copyright, like the rights attaching to a national trademark, is subject to the principle of territoriality. However, copyrights must be automatically protected, in particular by virtue of Directive 2001/29, in all Member States, so that they may be infringed in each one in accordance with the applicable substantive law.
40. In that connection, it must be stated from the outset that the issue as to whether the conditions under which a right protected in the Member State in which the Court seized is situated may be regarded as having been infringed and whether that infringement may be attributed to the defendant falls within the scope of the examination of the substance of the action by the court having jurisdiction (see, to that effect, CJEU, 19 April 2012, C-523/10, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220, paragraph 26).
41. At the stage of examining the jurisdiction of a Court to adjudicate on damage caused, the identification of the place where the harmful event giving rise to that damage occurred for the purposes of Article 5.3 Brussels I Regulation cannot depend on criterias which are specific to the examination of the substance and which do not appear in that

provision. Article 5.3 Brussels I Regulation lays down, as the sole condition, that a harmful event has occurred or may occur.
[…]
43. It follows that, as regards the alleged **infringement of a copyright**, jurisdiction to hear an action in tort, delict or quasi-delict is already established **in favour of the Court seized if the Member State in which that Court is situated protects the copyrights relied on by the plaintiff and that the alleged damage may occur within the jurisdiction of the Court seized**.
[…]
45. However, if the protection granted by the Member State of the place of the Court seized is applicable only in that Member State, **the Court seized only has jurisdiction to determine the damage caused within the Member State in which it is situated**.
46. **If that Court also had jurisdiction to adjudicate on the damage caused in other Member States, it would substitute itself for the Courts of those States** even though, in principle, in the light of Article 5.3 Brussels I Regulation and the principle of territoriality, the latter have jurisdiction to determine, first, the damage caused in their respective Member States and are best placed to ascertain whether the copyrights protected by the Member State concerned have been infringed and, second, to determine the nature of the harm caused.

In the present case, the CJEU also applies these principles to **copyright infringements caused by the publication of protected works on the Internet** (CJEU, 22 January 2015, C-441/13, *Pez Hejduk v EnergieAgentur.NRW GmbH*, ECLI:EU:C:2015:28, on Article 5.3 Brussels I Regulation):

CJEU, 22 January 2015, C-441/13, *Pez Hejduk v EnergieAgentur.NRW GmbH*, ECLI:EU:C:2015:28
29. In that regard, the Court has stated not only that the place where the alleged damage occurred within the meaning of that provision may vary according to the nature of the right allegedly infringed, but also that the likelihood of damage occurring in a particular Member State is subject to the condition that the right whose infringement is alleged is protected in that Member State (see CJEU, 3 October 2013, C-170/12, *Peter Pinckney v KDG Mediatech AG*, ECLI:EU:C:2013:635, paragraphs 32 and 33).
30. With regard to the second aspect, in the case in the main proceedings, [H] alleges infringement of her copyright as a result of the placing of her photographs online on the website of [E]. It is not disputed, as is clear in particular from paragraph 22 above, that the rights on which she relies are protected in Austria.
31. With regard to the likelihood of the damage occurring in a Member State other than the one where [E] has its seat, that company states that its website, on which the photographs at issue were published, operating under a Country-specific German top-level domain, that is to say ".de", is not directed at Austria and that consequently the damage did not occur in that Member State.

32. It is clear from the Court's case-law that, unlike Article 15.1I Brussels I Regulation, which was interpreted in the judgment in Pammer and Hotel Alpenhof (CJEU, 7 December 2010, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller*, C-585/08 and C-144/09, ECLI:EU:C:2010:740), Article 5.3 does not require, in particular, that the activity concerned be "directed to" the Member State in which the Court seized is situated (see CJEU, 3 October 2013, C-170/12, *Peter Pinckney v KDG Mediatech AG*, ECLI:EU:C:2013:635, paragraph 42).
33. Therefore, for the purposes of determining the place where the damage occurred with a view to attributing jurisdiction on the basis of Article 5.3 Brussels I Regulation, **it is irrelevant that the website at issue in the main proceedings is not directed at the Member State in which the Court seized is situated**.
34. In circumstances such as those at issue in the main proceedings, it must thus be held that the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility in the Member State of the referring court, via the website of [E], of the photographs to which the rights relied on by [H] pertain.
[…]
36. However, given that the protection of copyright and rights related to copyright granted by the Member State of the Court seized is limited to the territory of that Member State, **a Court seized on the basis of the place where the alleged damage occurred has jurisdiction only to rule on the damage caused within that Member State** (see, to that effect, CJEU, 3 October 2013, C-170/12, *Peter Pinckney v KDG Mediatech AG*, ECLI:EU:C:2013:635, paragraph 45).

In the case of **copyright infringements**, it is sufficient for the establishment of international and local jurisdiction that the right whose infringement is alleged is **legally protected** in the State of the forum and that the **damage has occurred in the district of the Court seized**.
It is not necessary that the (potentially) infringing activity is directed towards the State of jurisdiction. **The principle of national protection**, on the basis of which, in the case CJEU, 19 April 2012, C-523/10, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220, a restriction of the possible place where a damage can occur from copyright infringements to the state of registration was made for national trademark rights dependant on registration (see above case 3), in this case only has the effect that the **international jurisdiction of the Court at the place where the damage occurred is limited to the damage caused at its State**.

C. Conclusion

The **Commercial Court of Warsaw** (Poland) has **international jurisdiction** over the case according to **Article 7.2 Brussels I Recast Regulation,** as the chart illustrates.

	Poland Art. 4 Brussels I Recast Regulation	Poland Art. 7.2 Brussels I Recast Regulation
International jurisdiction to award damages for the harm caused by the trademark infringement		✓

Case 1*

Choice of Court Agreements and Consumers

Scenario I

John, an **Austrian** salesman domiciled in **Rome (Italy)**, was a Face user.
Face is a social network.
John was banned from the social media site for posting a photo of "My Birth" (Frida Kahlo's painting of a woman giving birth) on his publicly-available Face wall, together with a link to a television program aired on "Arte" (a European channel, promoting programs in the areas of culture and the arts) about the history of Frida Kahlo.
According to the explanation given by Face, John was banned from the social media because, pursuant to the site's community standards, nudity and other explicit content are prohibited from Face.
John decides to file a complaint against Face before the **Court of first instance of Rome**, arguing that the social media was not able to distinguish pornography from art. The European head of Face, whose office is located in **Berlin (Germany)**, is served with the claim form.
John is seeking the reactivation of his Face account as well as € 40,000 in damages.
At the hearing, Face's lawyer argues that the Court of first instance of Rome has no jurisdiction over the case because, in activating his account, John had agreed to the site's terms of service, which specify that:
"*You will resolve any claim, cause of action or dispute you have with us arising out of or relating to Face exclusively in the U.S. District Court for the Northern District of California, and you agree to submit to the personal jurisdiction of such Courts for the purpose of litigating all such claims*".

1. Is John a consumer?
2. Has the Court of Rome international jurisdiction to adjudicate the claim on the merits?

* Elena D'Alessandro (University of Turin).

Answer 1:

A. Find the relevant EU legal sources

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 judgements in civil and commercial matters (hereinafter the "**Brussels I Recast Regulation**") is the relevant instrument to determine whether John is a consumer and which Court has jurisdiction over the case.
Material scope of application: the Brussels I Recast Regulation applies "in civil and commercial matters whatever" (Article 1), **including consumer matters**.
Territorial scope of application: the Brussels I Recast Regulation applies **between all Member States of the European Union including Italy and Germany**.
Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings** instituted **on or after 10 January 2015** (Article 66.1).

FOR FURTHER READING on the Brussels I recast Regulation:
https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

B. Find the correct provision

I. The notion of consumer in the Brussels I Recast Regulation

Article 17.1 Brussels I Recast Regulation, clarifies that a "consumer" is a person concluding a contract "for a purpose which can be regarded as being outside his trade or profession".
The CJEU, 3 July 1997, C-269/95, *Francesco Benincasa v Dentalkit Srl,* ECLI:EU:C:1997:337, para 16 and CJEU, 20 January 2005, C-464/01, *Johann Gruber v Bay Wa AG,* ECLI:EU:C:2005:32, has made clear that:

> CJEU, 20 January 2005, C-464/01, *Johann Gruber v Bay Wa AG,* ECLI:EU:C:2005:32
> 36. The **concept of "consumer"** must be **strictly construed**, reference being made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract and not to the subjective situation of the person concerned, since the same person may be regarded as a consumer in relation to certain supplies and as an economic operator in relation to others.

FOR FURTHER READING on consumer protection under EU Law:
https://ec.europa.eu/info/policies/consumers/consumer-protection_en

John is a salesman domiciled in a Member State. Nevertheless, being a salesman in one's professional life does not mean that one will be considered as professional in all life situations.
In the case at hand, John opened and was using his Face account solely for private purposes.
Hence, as clarified by the CJEU, 25 January 2018, C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, ECLI:EU:C:2018:37 (concerning Articles 15-17 Brussels I Regulation), he is a private Face account user and not a professional.

CJEU, 25 January 2018, C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, ECLI:EU:C:2018:37
31. […] the special rules of jurisdiction in Articles 15 to 17 of Regulation No 44/2001 apply, in principle, only where the contract has been concluded between the parties for the purpose of a use of the relevant goods or services that is other than a trade or professional use […].
32. As regards, more particularly, a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it, the Court has held that he could rely on those provisions only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.
[…]
40. An interpretation of the notion of "consumer" which excluded such activities would have the effect of preventing an effective defence of the rights that consumers enjoy in relation to their contractual partners who are traders or professionals, including those rights which relate to the protection of their personal data. Such an interpretation would disregard the objective set out in Article 169.1. TFEU of promoting the right of consumers to organize themselves in order to safeguard their interests.
41. In the light of all of the foregoing considerations, the answer to the first question is that Article 15 of Regulation No 44/2001 must be interpreted as meaning that the activities of publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement do not entail the loss of **a private Face account user's status** as a "**consumer**" within the meaning of that Article.

John is a consumer for the purposes of the Brussels I Recast Regulation.

C. Conclusion

John is a consumer.

Answer 2:

A. Find the relevant EU legal sources

See Answer 1, A

B. Find the correct provision

I. General jurisdiction (Article 4 Brussels I Recast Regulation)

In civil matters for actions against companies domiciled in a EU Member State general jurisdiction lies in **any Court of the Member State in which the defendant is domiciled** (cf. Article 4.1 Brussels I Recast Regulation). Face is not domiciled within the EU, as it only has an office in Berlin (cf. Article 63.1(a)(b) Brussels I Recast Regulation), therefore **Article 4 Brussels I Recast Regulation cannot apply**.

> Article 63.1(a)(b) Brussels I Recast Regulation
> 1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its
> (a) **statutory seat**;
> (b) central administration.

Article 4 Brussels I Recast Regulation cannot apply.

II. General jurisdiction (*lex fori*)

According to Article **6.1 Brussels I Recast Regulation**, in order to determine whether a Court (in our case: the Court of Rome, Italy) has general jurisdiction over a defendant not domiciled in a Member State, the ***lex fori* applies**.

Article 6.1 Brussels I Recast Regulation
1. If the defendant **is not domiciled in a Member State**, the jurisdiction of the Courts of each Member State shall […] be determined by the law of that Member State.

Pursuant to Article 3.1 of Italian Private International Law Act (Law 31 May 1995, No. 218) Italian Courts have no jurisdiction over a defendant not domiciled or resident in Italy nor having a representative in Italy enabled to appear before an Italian Court.

Therefore, according to the Italian *lex fori,* Italian Courts lacks general jurisdiction over Face.

III. Special jurisdiction in consumer contracts

John is a consumer domiciled in a Member State (Italy), who entered into a service contract with Face. Article 17 Brussels I Recast Regulation provides very protective rules on jurisdiction for consumers, as they are considered "weaker parties" in respect of professionals.
Such protective heads of jurisdiction are applicable even when the professional pursuing commercial and professional activities within the EU is not domiciled in a Member State.

Article 17 Brussels I Recast Regulation
1. In **matters relating** to a **contract** concluded by a person, the **consumer**, for a **purpose** which can be regarded as being **outside his trade or profession**, jurisdiction shall be determined by this Section 4 [Articles 17-19], without prejudice to Article 6 and point 5 of Article 7, if:
[…]
(c) in all other cases, the contract has been concluded with a **person** who **pursues commercial** or **professional activities** in the **Member State** of the **consumer's domicile** or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.
2. Where a consumer enters into a contract with a **party** who is **not domiciled** in a Member State **but** has a **branch, agency** or other **establishment** in one of the **Member States**, that party shall, in disputes arising out of the operations of the branch, agency or establishment, **be deemed** to be **domiciled** in **that Member State**.

Face can be considered "domiciled in Germany" for the purposes of Section 4 of the Brussels I Recast Regulation, as it is a professional with a branch in Germany

pursuing activities directed to multiple States, including the Member State in which the consumer is domiciled (Italy). Therefore, the provisions of Section 4 Brussels I Recast Regulation apply.
In particular, according to Article 18.1 Brussels I Recast Regulation:

Article 18.1 Brussels I Recast Regulation
1. A **consumer may bring proceedings** against the other party to a contract **either in the Courts** of the Member State in which **that party** is **domiciled or**, regardless of the domicile of the other party, **in the Courts** for the place where the **consumer is domiciled**.

According to Article 18.1 Brussels I Recast Regulation the Court of Rome has special jurisdiction over the claim.

However, in the case at hand, Face is challenging the jurisdiction of the Court of Rome, invoking an exclusive choice of Court agreement in favour of the Court of California, which would have the effect of depriving the Court of Rome (Italy) of its jurisdiction over the case.

GOOD TO KNOW: An exclusive choice of Court agreement confers jurisdiction to the Court selected by the parties, at the same time depriving any other Court of the power to adjudicate the case on the merits.

FOR FURTHER READING on the Choice of court agreements under the Brussels I Recast regime:
http://www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf

GOOD TO KNOW: **On the formal validity of a Brussels I Recast choice of Court agreement regulated agreed to via click wrapping.**
CJEU, 21 May 2015, C-322/14, *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH*, ECLI:EU:C:2015:334, held that:
36. The purpose [of Article 25.2 Brussels I Recast Regulation] […], is to treat certain forms of electronic communications in the same way as written communications in order to simplify the conclusion of contracts by electronic means, since the information concerned is also communicated if it is accessible on screen. In order for electronic communication to offer the same guarantees, in particular as regards evidence, **it is sufficient that it is "possible" to save and print the information before the conclusion of the contract**. It follows that the prorogation of jurisdiction clause accepted by the professional who clicked on the contract's general terms and conditions, that can be saved and printed prior to concluding the contract, must be considered formally valid pursuant to Article 25.2.

IV. Effectiveness of the choice of Court agreement in favor of California

Pursuant to Article 19 Brussels I Recast Regulation, the provisions of Article 18.1 may be departed from only by a choice of Court agreement:

> Article 19 Brussels I Recast Regulation
> (1) which is **entered into after the dispute has arisen**;
> (2) which **allows the consumer to bring proceedings in Courts other than those indicated in this Section** [Section 4]; or
> (3) 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.

As none of this requirement has been fulfilled in the case hand, the **choice of Court agreement** in favour of the Court of California included in the site's terms of service is **not effective** and, therefore, it **not deprives the Court of Rome of its jurisdiction over the case** pursuant to Article 18.1 Brussels I Recast Regulation.

C. Conclusion

The **Court of Rome** (Italy) has **special jurisdiction** to adjudicate the claim on the merits according to **Article 18.1 Brussels I Recast Regulation**.

Watch the case on our YouTube Channel "*LAWTrain self-learning*"
https://www.youtube.com/watch?v=hSuFuDsJBn8

ADVANCED

Case 1*

Scenario II

Now assume that, in the case described above, **John** is suing Face for a **total sum** of € 300,000 in damages on the basis of both **his own rights and similar rights** which other four Face users (all of which consumers) have a**ssigned** to him for the purposes of his action against Face.
The four Face users are domiciled in **Italy (Rome), Germany, Argentina** and **Venezuela.**
Can John sue Face in Rome for a total sum of € 300,000 in damages?

Answer:

A. Find the relevant EU legal sources

See Case 1, Scenario I, A

B. Find the correct provision

I. General jurisdiction

Cf. Case 1, Scenario I, B.I and II.

* Elena D'Alessandro (University of Turin) & Silvana Dalla Bontà (University of Trento).

II. Special jurisdiction for consumer contract disputes

John, domiciled in Rome, has brought proceedings in Rome according to **Article 18.1 Brussels I Recast Regulation** for the purpose of asserting his own claims and also claims assigned to him by other consumers, one of them domiciled in Italy (Rome), another domiciled in a Member State (Germany) and the last two domiciled in non-Member countries (Argentina, Venezuela).
In this respect the CJEU, 25 January 2018, C-498/16, *Maximilian Schrems v Facebook Ireland Limited,* ECLI:EU:C:2018:37 (concerning Articles 15-17 Brussels I Regulation) stated that Article 16.1 Regulation No 44/2001 [which corresponds to Article 18.1 Brussels I Recast Regulation] must be interpreted as meaning that:
– it applies to a proceedings brought by a consumer for the purpose of asserting, in the Courts of the place where he is domiciled, his own claims, but
– it **does not apply** to proceedings brought for the **purposes** of **asserting claims assigned by other consumers** domiciled in the same Member State, in other Member States or in non-member countries.

> CJEU, 25 January 2018, C-498/16, *Maximilian Schrems v Facebook Ireland Limited*, ECLI:EU:C:2018:37
> 43. […] that rules on jurisdiction laid down in Section 4 of Chapter II of Regulation No 44/2001 constitute a derogation both from the general rule of jurisdiction laid down in Article 2 of that Regulation [Article 4 Brussels I Recast Regulation], which confers jurisdiction upon the Courts of the Member State in which the defendant is domiciled, and from the rule of special jurisdiction for contracts set out in Article 5.1 [Article 7.1 Brussels I Recast Regulation]. Thus, those rules must necessarily be interpreted strictly.
> 44. [As a matter of fact the rules established in Article 17 et seq. of the Brussels I Recast Regulation are] […] inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, the consumer is protected only in so far as he is, in his personal capacity, the plaintiff or defendant in proceedings. Consequently, **an applicant who is not himself a party to the consumer contract in question cannot enjoy the benefit of the jurisdiction relating to consumer contracts.**

The Court of Rome can only adjudicate John's own claims on the merits pursuant to Article 18.1 Brussel I Recast Regulation.

Conversely, as **Article 18.1 Brussels I Recast Regulation** does not apply to proceedings brought by a consumer in the Court of the place where he is domiciled for the purpose of asserting claims assigned by **other consumers domiciled in the same or different States not "personally participating" in the proceedings**, the Court of Rome **lacks special jurisdiction** over Face **to adjudicate** on the merits the **four claims assigned to John**.

More precisely, as the case of a claim assigned by a consumer to another consumer in respect of a professional having its domicile in a third State (but with a branch, agency or other establishment in one of the Member States) falls outside the scopes of Article 18.1 (special jurisdiction), Italian Courts do **not** have **special jurisdiction to adjudicate on the merits the four claims assigned to John**.

III. *Lex fori* (general and special heads of jurisdiction)

The case at hand also falls outside the scope of the **Italian general jurisdiction rules** (cf. Variation Case I, Scenario 2, B.II).

Nevertheless, is **not clear whether John,** pursuant to the **Italian *lex fori,* can** benefit from a **special head** of **jurisdiction** over Face, **at least** with respect to the claim assigned to John – the formal party of the proceedings – by the **consumer domiciled** in **Rome.**

The doubt arises from the fact that Article 3.2. Italian Private International Law Act (Law 31 May 1995, No. 218) states that:

> Article 3.2 Italian Private International Law Act (Law 31 May 1995, No. 218)
> Italian Courts shall **further have jurisdiction** according to the **criteria** set out in Sections **2, 3 and 4 of Title II** of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters with Protocol, signed in **Brussels** on **27 September 1968**, enforced by Law No. 804 of 21 June 1971, with amendments in force for Italy, including **when the defendant is not domiciled in the territory of a contracting State**, with respect to any of the matters falling within the scope of application of the Convention.

> Article 14, Section 4, Title II, 1968 Brussels Convention
> A **consumer may bring proceedings against the other party** to a contract either before the Courts of the Contracting State in which that party is domiciled or before the Courts of the Contracting **State** in which he is **himself domiciled**.

Article 3.2 Italian Private International Law Act refers to the special head of jurisdiction for consumer contract disputes listed in Article 14 Brussels Convention (= *forum actoris*) extending its territorial scope of application to professionals domiciled outside the European Union. As a result, a consumer can bring proceedings in the *forum actoris* even when the defendant is not domiciled in a Member State.
Due to **lack** of **case-law**, it is **not clear whether** the reference made to the 1968 Brussels Convention by the Italian Private International Law shall be **interpreted** in

accordance with CJEU, 25 January 2018, C-498/16, ***Maximilian Schrems v Facebook Ireland Limited,*** ECLI:EU:C:2018:37 (even though referred to Article 18.1 Brussels I Recast Regulation), in the sense that John can benefit from the *forum actoris* only in respect of the claims directly related to his Face account.
However, as clarified in CJEU, 18 October 1990, C-297/88 and C-197/89, *Massam Dzodzi v Belgian State,* ECLI:EU:C:1990:360, para 37, where EU law is made applicable by national provisions:

> CJEU, 18 October 1990, C-297/88 and C-197/89, *Massam Dzodzi v Belgian State*, ECLI:EU:C:1990:360
> 37. […] is **manifestly in the interest of the Community legal order** that, in order to forestall future differences of interpretation, every **Community provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied.**

In the light of CJEU, 18 October 1990, C-297/88 and C-197/89, *Massam Dzodzi v Belgian State,* ECLI:EU:C:1990:360*,* any **attempt** to **interpret** the reference to Article 14 Brussels Convention so to allow John to enjoy the benefit of the jurisdiction relating to consumers respect to the claim assigned to him by the consumer domiciled in Rome, **seems** to have a **high risk** to **fail.**

C. Conclusion

As the chart below illustrates, the Court of Rome (Italy) can probably adjudicate only John's own claims, for a total sum in damages, which will be far below the requested € 300,000.

	Italy: International jurisdiction to adjudicate the dispute according to **Article 18.1 Brussels I Recast Regulation (special jurisdiction) or Article 4 Brussels I Recast Regulation (general jurisdiction)**
John's own claims	✓
Claims assigned by the consumer domiciled in **Italy (Rome)** and **Germany**	
Claims assigned by the consumers domiciled in **Argentina** and **Venezuela**	

Case 1*

Provisional and Protective Measures

Scenario I

The **French company** Société de Construction Métallique de la Lorraine (hereinafter: S.C.M.L.) supplies metal pipes to a French construction company, La Maison.
Faced with the non-payment of the latest supplies, S.C.M.L. decides to sue the construction company before the Tribunal de Grande Instance of **Dijon (France)**, where the defendant has its registered office and where the payments should have been made.
Given the evidence that the assets of the defendant in France are very small, S.C.M.L. decides to envisage a provisional seizure of the credit that La Maison has against a **Spanish company**, Fomento de Construcciones y Contratas, for the realization of the cover in a building of Madrid (Spain), a credit that amounts to the sum of 420,000 euros.

1. Can the application to seize the credit be submitted to a Spanish Court, even though the procedure on the merits is already pending in Dijon?

2. Could the application be filed prior to the opening of the main proceedings before a French Court?

Answer 1:

A. Find the relevant EU legal sources

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 judge-

* Fernando Gascón-Inchausti (University Complutense of Madrid).

ments in civil and commercial matters (hereinafter: the "**Brussels I Recast Regulation**") is the relevant instrument to determine when Courts have jurisdiction to grant provisional, including protective measures, and also to rule the relationship between proceedings pending in different Member States.
Material scope of application: the Brussels I Recast Regulation applies "in civil and commercial matters whatever" (Article 1), **including claims for payment of monetary sums.**
Territorial scope of application: the Brussels I Recast Regulation applies **between all Member States of the European Union including Spain and France**.
Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings** instituted **on or after 10 January 2015** (Article 66.1).

FOR FURTHER READING on the Brussels I recast Regulation:
https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

B. Find the correct provision

I. Jurisdiction to grant provisional and protective measures

Any Court having jurisdiction to hear a case on the merits is also empowered to grant interim relief by means of provisional and protective measures as established in its national procedural law. Sometimes, however, provisional and/or protective measures need to be effective in a different Member State, e.g. the assets to be seized are located in a different Member State to that where the case is being dealt with. In such situation, **Article 35 Brussels I Recast Regulation applies**.

Article 35 Brussels I Recast Regulation
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 Member State, **even if the Courts of another Member State have jurisdiction as to the substance of the matter**.

Article 35 Brussels I Recast Regulation allows to separate the **proceedings** to grant **interim relief and** the **proceedings on the merits**, if this is considered convenient by the claimant.

In the case at hand, the Spanish Courts do not have jurisdiction as to the substance of the matter, as the defendant has its registered office in France (general jurisdiction: Article 4 Brussels I Recast Regulation) and the payments should have been made in France (special jurisdiction: Article 7.1 Brussels I Recast Regulation). However, **the mere fact that the Spanish Courts do not have international jurisdiction**

to hear the case on the merits does not bar the creditor from obtaining an interim relief in Spain, due to the fact that, according to the ***lex fori,*** Spanish provisional measures are available (as Spain is the place where Fomento de Construcciones y Contratas has the credit against La Maison).

More precisely, in order to determine **whether** a **Spanish provisional measure** is **available and which Spanish Court** has vertical and territorial competence for **granting such an interim relief**, referral has to be **done to the Spanish procedural rules (*lex fori*)**, and not to the Brussels I Recast Regulation.

II. Meaning of "provisional and protective measures" under the Brussels I Recast Regulation

In the *Reichert* case (concerning Article 24 of the 1968 Brussels Convention), the CJEU defined what was generally to be understood as "provisional, including protective, measures" within the scope of the Brussels I Recast Regulation.

> CJEU, 26 March 1992, C-261/90, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG*, ECLI:EU:C:1992:149
> 34. The expression "**provisional, including protective, measures**" within the meaning of [Article 24 = 35] must therefore be understood as referring to measures which, in matters within the scope of the [Convention = Regulation], are **intended to preserve a factual or legal situation so as to safeguard rights** the recognition of which is sought elsewhere from the Court having jurisdiction as to the substance of the matter.

In the light of CJEU, 26 March 1992, C-261/90, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG,* ECLI:EU:C:1992:149, an application to seize the credit is a "provisional measure" which falls within the scope of Article 35 Brussels I Recast Regulation.

C. Conclusion

According to **Article 35 Brussels I Recast Regulation**, the **application** to **seize** the **credit can be submitted to a Spanish Court,** even though the procedure on the merits is already pending in Dijon and even though France is the Member State having jurisdiction to adjudicate the case on the merits.

Answer 2:

A. Find the relevant EU legal sources

See Case 1, Scenario I, Answer 1, A

B. Find the correct provisions

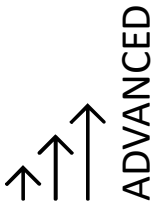
I. The possibility of applying for provisional measures in another Member State before main proceedings are pending before the Court with jurisdiction as to the substance of the matter

Article 35 Brussels I Recast Regulation deals with applications for **interim relief sought** in a Member State **when proceedings on the merits have already been instituted** before a Court having jurisdiction to adjudicate the case located in a different Member State, **and** with applications for interim relief sought **prior to the institution of any proceedings on the merits** (*ante demandam*), when the *lex fori* allows it.
In other words: Article 35 Brussels I Recast Regulation also grants the possibility of applying for provisional measures in another Member State before the institution of the main proceedings in the State having jurisdiction to adjudicate the case on the merits according to the Brussels I Recast Regulation, **if the *lex fori* allows provisional measures *ante demandam***.

Spain allows provisional measures *ante demandam*, at least where the urgency of the case justifies it. However, provisional measures granted prior to proceedings must be followed by commencement of proceedings on the merits within a specific time frame (either *ex lege* or upon request of the defendant). Those proceedings on the merit will commence before the Courts of a different Member State having jurisdiction on the merits according to the Brussels I Recast Regulation.

C. Conclusion

According to **Spanish law,** an **application to seize the credit could be filed in Spain prior to the institution of any proceedings on the merits in France.**



Case 1

Scenario II

Assume that **a provisional seizure of the credit** that Fomento de Construcciones y Contratas has against La Maison has also been requested to a **French Judge**.
Would the Spanish Court grant the provisional seizure?

Answer:

A. Find the relevant EU legal sources

See Case 1, Scenario I, A

B. Find the correct provisions

I. The risk of having two pending applications to grant the same provisional measure before the Courts of different Member States

Article 35 Brussels I Recast Regulation opens the door to a "dissociation" between proceedings on the merit and proceedings to grant provisional measures (See Case 1, Scenario 1, Answer 2). There is, therefore, a risk that the same provisional measure, to protect the same credit, be sought at the same time before the Court hearing the case on the merits and before a Court of another Member State on the basis of Article 35 Brussels I Recast Regulation.

The issue of what would be the appropriate way to proceed if a provisional seizure of the same credit had also been requested to a Spanish and a French Court, is **not specifically addressed by the Brussels I Recast Regulation.** The Regulation does not envisage any sort of direct communication between the Court handling the proceedings on the merits and the Court dealing with the provisional measures (this potential direct communication could be a solution).


However, this situation of two pending applications to grant the same provisional measure to protect the same credit may be not suitable **under Spanish procedural law**, since it entails a **clear abuse of process**. It will be the debtor's burden to seek application of the domestic rules on abuse of process and procedural bad faith.

C. Conclusion

Despite the silence of Brussels I Recast Regulation in this respect, under **Spanish procedural law**, **the possibility to dissociate main proceedings and provisional measures shall not be used** by litigants **in an abusive manner**.

ADVANCED

Case 1

Scenario III

Assume that the **French Court** had **already rejected the provisional seizure** of the **credit** that Fomento de Construcciones y Contratas has against La Maison on the grounds that there is no *periculum in mora* or *fumus boni iuris*.
Would the Spanish Court grant the provisional seizure?

Answer:

A. Find the relevant EU legal sources

See Case 1, Scenario I, A

B. Find the correct provisions

I. The risk of using Article 35 Brussels I Recast Regulation after the Court hearing the case on the merits has already refused to grant the same provisional measure

The "double-door system" allowed by the Brussels I Recast Regulation (see Case 1, Scenario II), to seek provisional measures entails an additional risk: **the temptation to make "a second try"** on the basis of Article 35 Brussels I Recast Regulation, if the Court seized with the case on the merits has refused to grant a provisional measure; a temptation that could be fostered by the expectance of a more lenient approach or maybe less demanding prerequisites to grant provisional measures in the second

Member State.
In the scenario at hand, S.C.M.L. is seeking to seize the credit that Fomento de Construcciones y Contratas has against La Maison through a Spanish Court after the French Court had already rejected granting an equivalent provisional measure to protect the same credit on the grounds that there is no *periculum in mora* or *fumus boni iuris*.
The problem was in the basis of the decision made by the CJEU, 6 June 2002, C-80/00, *Italian Leather SpA v WECO Polstermöbel GmbH & Co*, ECLI:EU:C:2002:342.

> CJEU, 6 June 2002, C-80/00, *Italian Leather SpA v WECO Polstermöbel GmbH & Co*, ECLI:EU:C:2002:342
> 34. [...] a **foreign decision on interim measures ordering** an obligor not to carry out certain acts is **irreconcilable** with a decision on **interim measures refusing to grant** such an order in a dispute between the same parties in the State where recognition is sought.

In CJEU, 6 June 2002, C-80/00, *Italian Leather SpA v WECO Polstermöbel GmbH & Co*, ECLI:EU:C:2002:342, the party had gained in the second Member State a provisional measure that had been previously rejected in the first Member State; she then tried to have that second decision enforced in the first Member State, which led to the preliminary ruling by the CJEU. The focus was put therefore not on the possibility for the second Court to grant a provisional measure, but rather on its further recognition and enforceability: the CJEU denied it, on the basis of the irreconcilability of this second (favorable) decision with the first (non favorable) one.

In the light of CJEU, 6 June 2002, C-80/00, *Italian Leather SpA v WECO Polstermöbel GmbH & Co*, ECLI:EU:C:2002:342, the party against which the measure is sought before the Spanish Court could adduce the previous denial of the measure in France as a ground to sustain her opposition to the motion: direct recognition of the French negative decision to grant the interim relief should be binding on the Spanish Court, provided that the factual situation has not changed, and should impede the Spanish Court to grant the requested provisional relief.

C. Conclusion

The party against which the measure is sought in Spain (Fomento de Construcciones y Contratas) could adduce that the **request should not be granted**, as **French negative decision is recognizable and binding for the Spanish Court**, provided that the factual situation has not changed.

Case 2*

The **Spanish company** Transportodo entered into a **contract** with the **French company** Produits Deluxe, under which Transportodo committed to **transport** from the factories of Produits Deluxe, in France, a certain volume of merchandise to its distribution points in Spain. The contract included a **choice of Court agreement**, according to which any claim arising from the contract should fall within the jurisdiction of the **Spanish Courts** (more specifically, the Commercial Court of Madrid).
Transportodo institutes **proceedings in Madrid (Spain)** pursuant to the agreement, on the ground that Produits Deluxe had failed to pay certain invoices submitted to it by Transportodo.
At the same time, Transportodo files a **request** before the Tribunal de Grande Instance of **Poitiers (France)** – the place where the defendant had its registered office – in order to obtain a ***référé-provision***, that is, an order addressed by the Court to Produits Deluxe to **perform provisional payment** of the amount due.
1. Could a *référé-provision* be considered a "provisional measure" in the sense of Article 35 Brussels I Recast Regulation?
2. In the case of a positive answer: would the French Court be entitled to grant such an order?

Answer 1:

A. Find the relevant EU legal sources

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 judgements in civil and commercial matters (hereinafter: the "**Brussels I Recast Regulation**") is the relevant instrument to determine when Courts have jurisdiction to grant provisional, including protective measures.

* Fernando Gascón-Inchausti (University Complutense of Madrid).

Material scope of application: the Brussels I Recast Regulation applies "in civil and commercial matters whatever" (Article 1), including claims arising from **transport contracts** and claims for **payment of monetary sums.**
Territorial scope of application: the Brussels I Recast Regulation applies **between all Member States of the European Union including Spain and France**.
Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings** instituted **on or after 10 January 2015** (Article 66.1).

FOR FURTHER READING on the Brussels I recast Regulation:
https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

B. Find the correct provision

I. Injunctions to perform payment as "provisional measures" in the sense of Article 35 Brussels I Recast Regulation

In the *Reichert* case (concerning Article 24 1968 Brussels Convention), the CJEU has defined what was generally to be understood as "provisional, including protective, measures".

> CJEU, 26 March 1992, C-261/90, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG*, ECLI:EU:C:1992:149
> 34. The expression **"provisional, including protective, measures"** within the meaning of [Article 24 = 35] must therefore be understood as referring to measures which, in matters within the scope of the [Convention = Regulation], **are intended to preserve a factual or legal situation so as to safeguard rights** the recognition of which is sought elsewhere from the Court having jurisdiction as to the substance of the matter.

In the light of CJEU, 26 March 1992, C-261/90, *Mario Reichert, Hans-Heinz Reichert and Ingeborg Kockler v Dresdner Bank AG*, ECLI:EU:C:1992:149, judicial decisions as the French ***référé-provision*** (also the Dutch *kort geding* or the German *Leistungsverfügung*) **could raise concerns**, since they do not have a strictly preservative nature. Differently, they are suitable to fully satisfy the claimant's interest.
Some national procedural systems, indeed, admit the possibility of granting provisional relief in cases where the claimant's right appears to exist; this provisional relief may lead to provisional satisfaction of a claim to pay or to perform: this is the case of the above mentioned French *ordonnance de référé-provision* (the German *Leistungsverfügung* or the Dutch *kort geding*, among others). **If the defendant does not react or files a statement of opposition, the dispute will probably end there**.

This is why **it has been sometimes controversial if such proceedings can be included within the scope of Article 35 Brussels I Recast Regulation**: if so, a claimant could use this rule to file an application before a non-competent Court on the merits and to overturn the general system to allocate jurisdiction established by the Regulation. As clarified by the CJEU, in the judgment of 17 November 1998, C-391/95, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, ECLI:EU:C:1998:543:

> CJEU, 17 November 1998, C-391/95, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, ECLI:EU:C:1998:543
> 47. Interim payment of a contractual consideration does not constitute a provisional measure within the meaning of [Article 24 1968 Brussels Convention = Article 35 Brussels I Recast Regulation] **unless**, first, **repayment** to the defendant of the sum awarded **is guaranteed** if the plaintiff is unsuccessful **as regards the substance of his claim** and, second, the measure sought **relates only to specific assets of the defendant located or to be located within the confines of the territorial jurisdiction** of the Court to which application is made.

FOR FURTHER READING on Injunctions to perform payment as "provisional measures" in the context of the Brussels I Recast Regulation: CJEU, 27 April 1999, C-99/96, *Hans-Hermann Mietz v Intership Yachting Sneek BV*, ECLI:EU:C:1999:202 and CJEU 12 July 2012, C-616/10, *Solvay SA v Honeywell Fluorine Products Europe BV and Others*, ECLI:EU:C:2012:445

FOR FURTHER READING on *référé-provision* (in French):
https://www.legifrance.gouv.fr/codes/id/LEGISCTA000006149709/2015-10-01/

This approach to provisional and protective measures is rather **flexible**, since qualification as "provisional and protective measures" in the context of the Brussels I Recast Regulation does not **depend** on the content of the measures, but rather on **two procedural issues**:
1) the debtor needs to be entitled to contest the order and have it reviewed, although this does not mean that the creditor has the burden to establish a procedure on the merits within a defined deadline; and
2) there must be a s**pecific link between the provisional measure and the place of the Court seized** by means of Article 35 Brussels I Recast Regulation. The interim order will not need to be enforced abroad (in our case: outside France) since the assets to materialize it have to be located within the confines of the Member State where the application is made.

Both the above-mentioned requirements are fulfilled in the case at hand.

C. Conclusion

The French ***référé-provision*** can be considered a **"provisional measure" in the sense of** Article 35 **Brussels I Recast Regulation.**

Answer 2:

A. Find the relevant EU legal sources

See Case 2, Answer 1, A

B. Find the correct provisions

I. Jurisdiction to grant provisional and protective measures

Article 35 Brussels I Recast Regulation endorses the possibility of applying for provisional measures to the Courts of a Member State different to those having jurisdiction to hear a case on the merits.

> Article 35 Brussels I Recast Regulation
> 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 Member State, even if the Courts of another Member State have jurisdiction as to the substance of the matter.

Article 35 Brussels I Recast Regulation allows to split or separate the proceedings to grant interim relief and the proceedings on the merits (see Case 1, Scenario II). The **mere fact that the French Courts do not have jurisdiction to hear the case on its merits**, due to the choice of Court agreement in favor of the Spanish Court, **should not be an obstacle to grant interim relief**, upon request of the claimant, if what is sought is a "provisional, including protective measure", **in** the sense of **Article 35 Brussels I Recast Regulation.**

However, in order to determine **whether** France has jurisdiction to grant **provisional measures and which French Court** has vertical and territorial competence for **granting such an interim relief**, French **procedural law applies (*lex fori*)**.

C. Conclusion

Whether or not the **French Court has jurisdiction** to issue a *référé-provision* **depends on French procedural law**.

Case 3*

Scenario I

The French Banque de Bretagne commences before the **Commercial Court of Laval (France)** a proceedings against Jean Rabelais, residing in Quimper (France), claiming payment of 2.5 million euros. Within the framework of this proceedings, the Court, after having heard Jean Rabelais, issues a decision authorizing the Bank to proceed with the "***inscription hypothecaire judiciaire provisoire***" **Δ** on certain **properties** that Rabelais has in **Almuñécar (Spain)**, to ensure the effectiveness of a potential favorable judgment.

1. Is the French "*inscription hypothéquaire judiciaire provisoire*" enforceable in Spain?

Δ The "*inscription hypothecaire judiciaire provisoire*" is a provisional measure enabling the **seizure of real estate property** and involving the registration thereof in the land registry.

Answer:

A. Find the relevant EU legal sources

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 judgements in civil and commercial matters (hereinafter: the "**Brussels I Recast Regulation**") is the relevant instrument to determine when Courts have jurisdiction to grant provisional, including protective, measures; it also establishes when decisions granting provisional, including protective, measures can be recognized and enforced in a different Member State.

Material scope of application: the Brussels I Recast Regulation applies "in civil and

* Fernando Gascón-Inchausti (University Complutense of Madrid).

commercial matters whatever" (Article 1), including claims for **payment of monetary sums.**
Territorial scope of application: the Brussels I Recast Regulation applies **between all Member States of the European Union including Spain and France**.
Temporal scope of application: the Brussels I Recast Regulation applies to **legal proceedings** instituted **on or after 10 January 2015** (Article 66.1).

FOR FURTHER READING on the Brussels I recast Regulation:
https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do

B. Find the correct provision

I. On the enforceability of judicial decisions on provisional and protective measures

In general terms, any decision rendered by the Courts of a Member State is automatically enforceable in any other Member State (provided that it falls within the scope of application of Brussels I Recast Regulation).
Decisions on provisional measures, however, deserve a **specific treatment**, at least when they are granted **in *ex parte* proceedings**, *i.e.* in proceedings where only the applicant is heard (*inaudita parte debitoris*). The CJEU, in a quite old judgment given on 21 May 1980, C-125/79, *Bernard Denilauler v SNC Couchet Frères*, ECLI:EU:C:1980:130 (concerning the **1968 Brussels Convention**), made a difference based on how the decision had been made by the national Court:

> CJEU, 21 May 1980, C-125/79, *Bernard Denilauler v SNC Couchet Frères*, ECLI:EU:C:1980:130
> 18. Judicial decisions authorizing provisional or protective measures, which are delivered 00**without the party against which they are directed having been summoned to appear** and which are intended to be enforced without prior service **do not come within the system** of recognition and enforcement" of the Brussels Convention (= Brussels I Recast Regulation).

The CJEU did not want to allow the circulation of such decisions granted in *ex parte* proceedings, even though the "surprise effect" may be of the essence to ensure effectiveness of provisional or protective measures: there would be a high risk that the debtor's legal position would be hindered.
The *Denilauer*'s ruling of CJEU has been transformed into a proper rule by the Brussels I Recast Regulation and was enshrined in Article 2(a).

Article 2(a) Brussels I Recast Regulation
For the purposes of Chapter III, "judgment" includes provisional, including protective, measures ordered by a Court or Tribunal which by virtue of this Regulation has jurisdiction as to the substance of the matter. It does not include a provisional, including protective, measure which is ordered by such a Court or Tribunal **without the defendant being summoned to appear**, **unless the judgment containing the measure is served on the defendant prior to enforcement.**

According to Article 2(a) Brussels I Recast Regulation the **French "*inscription hypothéquaire judiciaire provisoire*" shall in principle be enforced** in Spain, as it was issued after having heard Mr. Rabelais.

II. How to deal with recognition and enforcement of provisional measures that are unknown to the legal system of the requested Member State

Cross-border enforcement of provisional measures has encountered in the past some difficulties stemming from the divergence of national procedural systems. **It is not easy**, for instance, **to include in the Spanish property register an order which is not foreseen by Spanish law** and might not be understood by any other interested party. This was seen on some occasions to amount into a public policy infringement pursuant to Article 45(a) Brussels I Recast Regulation.
The Court of Justice, in CJEU, 12 April 2011, C-235/09, *DHL Express France SAS v Chronopost SA*, ECLI:EU:C:2011:238 addressed this kind of situation in a case that dealt with the enforcement of a coercive measure imposed by the Community trademark Court of a Member State, which needed to be enforced in another Member State where such a coercive measure did not exist.

CJEU, 12 April 2011, C-235/09, *DHL Express France SAS v Chronopost SA*, ECLI:EU:C:2011:238, operative part
Where the national law of one of those other Member States does **not contain a coercive measure similar** to that ordered by the Community trade mark Court, the objective pursued by that measure must be attained by the competent Court of that other Member State by **having recourse to the relevant provisions of its national law** which are such as to ensure that the prohibition is complied with **in an equivalent manner**.

In *DHL Express France SAS v Chronopost SA,* the CJEU held that there is a **duty to reach the highest level of cooperation** in order to ensure cross-border effectiveness of judicial decisions within the European Union. Therefore, the **requested Court shall** make the effort to **"translate"** the **foreign unknown judicial decision into a national one** aiming at **the same purpose**.

The ruling of the CJEU in the decision of 12 April 2011, C-235/09, *DHL Express France SAS v Chronopost SA*, ECLI:EU:C:2011:238 has been transposed into Article 54.1 of the Brussels I Recast Regulation.

Article 54.1 Brussels I Recast Regulation
1. If a **judgment contains** a **measure or an order** which is **not known in the law of the Member State addressed**, that measure or order **shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State** which has **equivalent effects** attached to it and which pursues similar aims and interests.
Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

According to Article 54.1 Brussels I Recast Regulation, if a judgment or a **provisional measure** has an effect which is **not known in the law of the Member State addressed**, that measure or order shall, to the extent possible, **be adapted** to a measure or an order known in the law of that Member State which has equivalent effects attached to it and which pursues similar aims and interests.

The Spanish equivalent to the **French "*inscription hypothéquaire judiciaire provisoire*"** would be the "*embargo preventivo*".

FOR FURTHER information on the *embargo preventivo*:
https://e-justice.europa.eu/content_interim_and_precautionary_measures-78-es-en.do?member=1

C. Conclusion

Spanish Courts should enforce the **French "*inscription hypothéquaire judiciaire provisoire*" as an *embargo preventivo***.

ADVANCED

Case 3

Scenario II

Assume that an **English Court**, having jurisdiction on the merits in a proceedings instituted **within the end of December 2020,** grants a **freezing order** (often referred to as "Mareva injunction") which prohibits Jean Rabelais from disposing of his real estate assets in Spain.
Is the English freezing order enforceable in Spain?

Answer:

A. Find the relevant EU legal sources

See Case 3, Scenario I, A

Territorial scope of application: the **Brussels I Recast Regulation** shall apply between the European Union and the **United Kingdom** to the **recognition and enforcement of judgments** given in legal **proceedings instituted before** the end of the transitional period (**31 December 2020**) by virtue of the **2019 Withdrawal Agreement** between the European Union and the United Kingdom on the terms of the United Kingdom's orderly withdrawal from the EU.

FOR FURTHER READING on the 2019 Withdrawal Agreement:
https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en

B. Find the correct provisions

In this case, Article 54.1 Brussels I Recast Regulation applies.

> Article 54.1 Brussels I Recast Regulation
> 1. If a **judgment contains** a **measure or an order** which is **not known in the law of the Member State addressed**, that measure or order **shall, to the extent possible, be adapted to a measure or an order known in the law of that Member State** which has **equivalent effects** attached to it and which pursues similar aims and interests.
> Such adaptation shall not result in effects going beyond those provided for in the law of the Member State of origin.

Article 54.1 Brussels I Recast Regulation would be applicable, even though the search of an "equivalent" measure to the English freezing order might render its application difficult.
As a matter of fact, the duty to carry on an adaptation might be more tricky when the provisional measure belongs to the common law legal tradition: **unlike the continental provisional measures protecting pecuniary interests which operate *in rem*, freezing orders (also called Mareva injunctions) operate *in personam***, i.e. they do not lead to the attachment of assets. On the contrary, they are orders addressed to defendants and preventing them from disposing of their assets.

> GOOD TO KNOW: English Freezing Orders are orders which stop a party from removing assets located in the jurisdiction or restraining them from dealing with assets located anywhere in the world. Uniquely they take effect from the time they are made, making service of the order of paramount importance. The failure to comply with the order gives rise to contempt of Court proceedings.

However, as the spirit of the Brussels I Recast Regulation is to promote cross-border effectiveness of judicial decisions to the highest possible extent, **probably *in personam* orders from the common law legal tradition should be turned into seizures and attachments (both *in rem*)** when enforced in civil law Member States.

C. Conclusion

The English **freezing order** is **enforceable in Spain** according to the Brussels I Recast Regulation. The Spanish Court, pursuant to Article 54.1 Brussels I Recast Regulation, shall adapt it into a seizure and attachment.

Section

2 Brussels II *bis* Regulation

Case 1*

Jurisdiction in Matrimonial Matters

Scenario I

Adam and Eve are married, but about to get divorced.
Eve is an **Italian national**, Adam is a **Swiss national**.
Both spouses are habitually resident in **Italy**.
Can Eve request divorce before an Italian Court?

Answer:

A. Find the relevant EU legal sources

1) Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *bis* Regulation applies **in all Member States of the European Union, except for Denmark (cf. Article 2.3)**.
Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March

* Wolfgang Hau (University of Munich) & Dennis Solomon (University of Passau).

2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

2) Regulation (EU) No. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter: Brussels II *ter* Regulation).
Material scope of application: the Brussels II *ter* Regulation applies in civil matters of:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *ter* Regulation applies **between all Member States of the European Union**.
Temporal scope of application: the Brussels II *ter* Regulation shall apply from 1 August 2022, with the exception of Articles 92, 93 and 103, which shall apply from 22 July 2019 (Article 105).

FOR FURTHER READING on the Brussels II *ter* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR%3A524570fa-9c9a-11e9-9d01-01aa75ed71a1

B. Find the correct provision

Matrimonial matters between married couples, including matters of divorce, fall within the scope of application of the Brussels II *bis* Regulation (cf. Article 1.1(a)).
The **new Brussels II *ter* Regulation will replace the Brussels II *bis* Regulation**, but **only as regards legal proceedings instituted on or after 1 August 2022** (Article 100.1).
International jurisdiction for claims and counterclaims (Article 4 Brussels II *bis* Regulation) in matrimonial matters is determined by Article 3.1 Brussels II *bis* Regulation, which reads:

Article 3.1 Brussels II *bis* Regulation – General jurisdiction
1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the Courts of the Member State

(a) in whose territory:
– **the spouses are habitually resident**, or
– the spouses were last habitually resident, insofar as one of them still resides there, or
– the respondent is habitually resident, or
– in the event of a joint application, either of the spouses is habitually resident, or
– the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
– the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;
(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

As Adam and Eve are habitually resident in Italy, Italy is the competent forum state according to Article 3.1(a) indent 1 Brussels II *bis* Regulation. As all grounds of jurisdiction listed in Article 3 Brussels II *bis* Regulation are of equal rank, jurisdiction of the Italian Courts is also established by indent 3 and indent 5, which shows that habitual residence of either the applicant or the respondent would also be sufficient in this case.

Since the jurisdiction of the Italian Courts can be based on Article 3.1(a) Brussels II *bis* Regulation, there is neither any possibility nor necessity to fall back upon *national law* in order to determine jurisdiction. The Regulation – as a matter of priority – overrides the national rules on jurisdiction.

C. Conclusion

Eve can request divorce before an Italian Court. As both spouses are habitually **resident in Italy**, **Italy has jurisdiction** over the case according to **Article 3. 1(a) indent 1 Brussels II *bis* Regulation**.

Watch the case on our YouTube Channel "*LAWTrain self-learning*"
https://www.youtube.com/watch?v=RSx4l8hN_4E&list=PLfBAAUqaoG0lvE-vxYm5F-M6sRHbmwot4q&index=1

Case 1

Scenario II

Adam and Eve are married, but about to get divorced.
Eve is an **Italian national**, Adam is a **Swiss national**.
Adam and Eve have lived together in **Germany**.
Eve returns to **Italy** where she immediately files for divorce.
Can Eve request divorce before an Italian Court?

Answer:

A. Find the relevant EU legal sources

Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the court or tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *bis* Regulation applies **in all Member States of the European Union, except for Denmark (cf. Article 2.3)**.
Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

B. Find the correct provision

In this scenario, Eve has not yet acquired habitual residence in Italy. **Article 3 Brussels II *bis* Regulation does therefore not provide for jurisdiction in Italy.**
National (Italian) grounds for jurisdiction however, would provide for international competence of the Italian Courts as Eve is an Italian national and Italian Courts have jurisdiction on divorce matters when one of the spouses is an Italian citizen or the marriage was celebrated in Italy (Article 32 Italian Private International Law Act, Law 31 May 1995, No. 218).

> Article 32 Italian Private International Law Act (Law no 218 of 31 may 1995) – Jurisdiction in divorce matters
> In addition to the cases where there is Italian jurisdiction under art 3, Italian jurisdiction extends to cases of nullity, annulment, separation and dissolution of marriage when **one of the spouses is an Italian citizen** or the marriage was celebrated in Italy.

Italian International Private Statute can nevertheless be **barred** if there is a precise forum in another Member State applying the Brussels II *bis* Regulation. This is especially the case when Article 6 Brussels II *bis* Regulation applies:

> Article 6 Brussels II *bis* Regulation – Exclusive nature of jurisdiction under Articles 3, 4 and 5
> A spouse who:
> (a) **is habitually resident in the territory of a Member State**; or
> (b) is a national of a Member State, or, in the case of the United Kingdom and Ireland, has his or her 'domicile' in the territory of one of the latter Member States,
> may be sued in another Member State only in accordance with Articles 3, 4 and 5.

Since Adam still remains habitually resident in Germany, Article 3.1(a) indent 2 and 3 Brussels II *bis* Regulation provide for jurisdiction in Germany. In consequence Article 6(a) Brussels II *bis* Regulation has to be taken into account which contains a so-called **jurisdictional privilege**: a spouse cannot be sued in a Member State other than the State of his habitual residence in accordance with Article 3-5 Brussels II *bis* Regulation. Consequently, **Eve can only request divorce in Germany** with the German Court having to apply the Brussels II *bis* Regulation.

C. Conclusion

Eve cannot request divorce before an Italian Court. As Eve **has not yet acquired habitual residence in Italy and Adam is still habitually resident in Germany**, she can **only request divorce in Germany** pursuant to Articles 3 and 6 Brussels II *bis* Regulation.

Watch the case on our YouTube Channel "*LAWTrain self-learning*"
https://www.youtube.com/watch?v=RSx4l8hN_4E&list=PLfBAAUqaoG0lvE-vxYm5F-M6sRHbmwot4q&index=1

Case 1

Scenario III

Adam and Eve are married, but about to get divorced.
Eve is an **Italian national**, Adam is a **Swiss national**.
Having lived with Adam in **Switzerland** for years, Eve moves to **France** where she establishes a new habitual residence. Nevertheless, after having lived in France for more than a year, she petitions for divorce in **Italy.**
Can Eve request divorce before an Italian Court?

Answer:

A. Find the relevant EU legal sources

See Case 1, Scenario II, A

B. Find the correct provision

Article 3 Brussels II *bis* Regulation does not render the **Italian Courts** competent.

Instead, according to Article 3.1(a) indent 5 Brussels II *bis* Regulation the **French Courts have international jurisdiction** on this matter because Eve is habitually resident in **France**. International jurisdiction of the Italian Courts again could only be based on Italian rules.
In this case, Article 6 Brussels II *bis* Regulation does not prevent the Italian Courts from applying their national provisions, since Adam is neither habitually resident in

nor a national of any Member State. However, in this scenario Article 7 Brussels II *bis* Regulation comes into play:

> Article 7 Brussels II *bis* Regulation – Residual jurisdiction
> 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.

According to this provision, the fall back on national grounds of jurisdiction is only permissible when no Court of another Member State is competent based on the Brussels II *bis* Regulation. The CJEU confirmed this in its judgement of **29 November 2007, C-68/07, *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo*, ECLI:EU:C:2007:740**.

> CJEU, 29 November 2007, C-68/07, *Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo*, ECLI:EU:C:2007:740
> 18. According to the clear wording of Article 7.1 Brussels II *bis* Regulation, it is **only where no Court of a Member State has jurisdiction pursuant to Articles 3 to 5 Brussels II *bis* Regulation that jurisdiction is to be governed, in each Member State, by the laws of that State**.
> […]
> 21. […], that interpretation is not affected by Article 6 Brussels II *bis* Regulation.
> 22. Admittedly, Article 6, which provides that a respondent having his habitual residence in a Member State or being a national of a Member State can, in view of the exclusive nature of the jurisdiction set out in Articles 3 to 5 Brussels II *bis* Regulation, be sued in the Courts of another Member State only pursuant to those provisions, and consequently not pursuant to the rules of jurisdiction laid down by national law, does not prohibit a respondent who has neither his habitual residence in a Member State nor the nationality of a Member State from being sued before a Court of a Member State pursuant to the rules of jurisdiction provided for by the national law of that State.
> 23. In accordance with Article 7.1 Brussels II *bis* Regulation, that may be the case where no Court of a Member State has jurisdiction pursuant to Articles 3 to 5 thereof, Article 7.2 Brussels II *bis* Regulation providing, in such a situation, that, if the petitioner is a national of a Member State and is habitually resident within the territory of another Member State, he may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State against such a respondent.
> 24. Such an interpretation would in effect be tantamount to ignoring the clear wording of Articles 7.1 and 17 Brussels II *bis* Regulation, the application of which does not depend, as is clear from paragraphs 18 to 20 of this judgment, on the position of the respondent, but solely on the question whether the Court of a Member State has jurisdiction pursuant to Articles 3 to 5 o Brussels II *bis* Regulation.
> 25. That interpretation would, moreover, be contrary to the objective pursued by Brussels II *bis* Regulation. As is clear from Recitals 4 and 8 in the preamble to Regulation No

1347/2000, whose provisions on the jurisdiction to hear questions relating to divorce are essentially repeated in Brussels II *bis* Regulation, the latter Regulation aims to lay down uniform conflict of law rules for divorce in order to ensure a free movement of persons which is as wide as possible. Consequently, Brussels II *bis* Regulation applies also to nationals of non-Member States whose links with the territory of a Member State are sufficiently close, in keeping with the grounds of jurisdiction laid down in that Regulation, grounds which, according to Recital 12 in the preamble to Regulation No 1347/2000, are based on the rule that there must be a real link between the party concerned and the Member State exercising jurisdiction.

In consequence, according to Article 7 Brussels II *bis* Regulation, the Italian Court is not allowed to apply its national (*i.e.* Italian) rules on jurisdiction.

C. Conclusion

Eve cannot request divorce before an Italian Court. As Eve is habitually **resident in France**, **French Courts have international jurisdiction** on this matter according to **Article 3 Brussels II *bis* Regulation.**

Watch the case on our YouTube Channel "*LAWTrain self-learning*"
https://www.youtube.com/watch?v=RSx4l8hN_4E&list=PLfBAAUqaoG0IvE-vxYm5F-M6sRHbmwot4q&index=1

Case 2*

Scenario I

Adam and Eve are habitually resident in **Switzerland**.
Eve, an **Italian national**, wants to file for divorce in **Italy**.
Adam is a **German national**.
Can Eve request divorce before an Italian Court?

Answer:

A. Find the relevant EU legal sources

Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *bis* Regulation applies **in all Member States of the European Union, except for Denmark (cf. Article 2.3)**.
Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

* Wolfgang Hau (University of Munich) & Dennis Solomon (University of Passau).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

B. Find the correct provision

International jurisdiction of the Italian Courts **cannot be based on Article 3 Brussels II *bis* Regulation**, as none of the spouses is habitually resident there.

The **Italian Court cannot apply Italian jurisdictional law either**. This follows from Article 6(b) Brussels II *bis* Regulation which protects the husband by ensuring the application of the jurisdictional law of his home Country.

This shows that, even if none of the Member States is competent under Article 3 Brussels II *bis* Regulation, the Court seised can nevertheless be barred from applying its national rules of jurisdiction.

In this scenario**, Eve could sue in Switzerland**, the Country of residence of both spouses. **Alternatively**, she could sue in **Germany** because the German rules allow a petition for divorce in Germany if the defendant is a German national.

C. Conclusion

Eve cannot request divorce before an Italian Court. Article 3 Brussels II *bis* Regulation does **not confer international jurisdiction to the Italian Courts** and Italian Courts are barred from applying its national rules on jurisdiction by Article 6(b) Brussels II *bis* Regulation.

Watch the case on our YouTube Channel "*LAWTrain self-learning*"
https://www.youtube.com/watch?v=QkqXJQBK8_8&list=PLfBAAUqaoG0lvE-vxYm5F-M6sRHbmwot4q&index=2

Case 2

Scenario II

Adam and Eve are habitually resident in **Switzerland**.
Eve, an **Italian national**, wants to file for divorce in **Italy**.
Adam is a **Dutch national**.
Can Eve request divorce before an Italian Court?

Answer:

A. Find the relevant EU legal sources

See Case 2, Scenario 1, A

B. Find the correct provision

Like in Scenario 1 of this case, Article 3 Brussels II *bis* Regulation **does not provide for jurisdiction in Italy** and Italian Courts are barred from a recourse to national rules on jurisdiction by Article 6(b) Brussels II *bis* Regulation.

A petition for divorce in the Netherlands on the other hand could be possible on grounds of the Dutch rules on jurisdiction, as Adam is a Dutch national. However, **the Dutch rules do not allow a petition for divorce in the Netherlands** because the defendant is a Dutch national.

Thus, the Italian wife Eve could sue neither in Italy nor in the Netherlands but only in **Switzerland**, the **Country of residence of both spouses**. As a matter of consequence, the Brussels II *bis* Regulation refutes the widely held belief that the right to access to justice always requires guaranteeing a forum in the applicant's home Country.

C. Conclusion

Eve cannot request divorce before an Italian Court. Article 3 Brussels II *bis* Regulation **does not confer international jurisdiction to the Italian Courts** and Italian Courts are barred from applying its national rules on jurisdiction by Article 6(b) Brussels II *bis* Regulation.

ADVANCED

Case 2

Scenario III

Adam and Eve are habitually resident in **Switzerland**.
Eve, an **Italian national**, wants to file for divorce in **Italy**.
Adam is a **Swiss national**.
Can Eve request divorce before an Italian Court?

Answer:

A. Find the relevant EU legal sources

See Case 2, Scenario 1, A

B. Find the correct provision

In this scenario, **neither Article 3 nor Article 6 Brussels II *bis* Regulation are applicable**.

Article 7 Brussels II *bis* Regulation allows the **Italian Court** to apply **its national jurisdictional rules**.

C. Conclusion

Eve can request divorce before an Italian Court by virtue of Article 32 Italian Private International Law Act, which provides for their international jurisdiction because of **Eve's Italian nationality** (cf. Case 1 Scenario 2).

Watch the case on our YouTube Channel "*LAWTrain self-learning*"
https://www.youtube.com/watch?v=QkqXJQBK8_8&list=PLfBAAUqaoG0lvE-vxYm5F-M6sRHbmwot4q&index=2

ADVANCED

Case 3*

Eve is an **Italian and French national.**
Adam is a **French national**.
Although both are habitually resident in **Italy** and have not visited France for many years, Eve wants to file for divorce in **France**.
Can Eve request divorce before a French Court?

Answer:

A. Find the relevant EU legal sources

Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *bis* Regulation applies **in all Member States of the European Union, except for Denmark (cf. Article 2.3)**.
Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

* Wolfgang Hau (University of Munich) & Dennis Solomon (University of Passau).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

B. Find the correct provision

Article 3.1(a) Brussels II *bis* Regulation does not provide for jurisdiction of the French Courts, as neither Eve nor Adam habitually reside there.

Before considering Article 6 and 7 Brussels II *bis* Regulation to determine if a recourse to the French rules on international jurisdiction is possible, it has to be examined, whether the Brussels II *bis* Regulation allows a petition for divorce in France because of the French nationality of the spouses. Even though the previous cases clearly show, that the central connecting factor of European family law is habitual residence, nationality becomes relevant as a connecting factor if both partners share a common nationality of a Member State. In those cases, Article 3.1(b) Brussels II *bis* Regulation provides for jurisdiction of the Courts of that Member State.

Here Adam and Eve both are French nationals.

However, Eve also is an Italian national and both spouses are habitually resident in Italy and have not visited France for many years. Therefore, **the question** arises, **if only the nationality** of the **Member State** with which a spouse with dual nationality has the **closest links** – the "most effective" nationality – must be taken into account when determining the jurisdiction based on Article 3.1(b) Brussels II *bis* Regulation, so that the Courts of that State alone have jurisdiction on the basis of nationality, or whether both nationalities are to be taken into account, so that the Courts of those two Member States can have jurisdiction on that basis, allowing the persons concerned to choose the Member State in which to bring proceedings.
In this respect, **CJEU, 16 July 2009, C-168/08, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, ECLI:EU:C:2009:474** states:

CJEU, 16 July 2009, C-168/08, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, ECLI:EU:C:2009:474
51. […] **there is nothing in the wording of Article 3.1(b) Brussels II *bis* Regulation to suggest that only the "effective" nationality can be taken into account in applying that provision**. Article 3.1(b) Brussels II *bis* Regulation, inasmuch as it makes nationality a ground of jurisdiction, endorses a link that is unambiguous and easy to apply. It does not

provide for any other criterion relating to nationality such as, for example, how effective it is.
52. Moreover, no basis can be found in the objectives of that provision or in the context of which it forms part for an interpretation according to which only an "effective" nationality can be taken into consideration for the purposes of Article 3.1 Brussels II *bis* Regulation.
53. First, such an interpretation would restrict individuals' choice of the Court having jurisdiction, particularly in cases where the right to freedom of movement for persons had been exercised.
54. In particular, since **habitual residence would be an essential consideration** for the purpose of determining the most effective nationality, the grounds of jurisdiction provided for in Article 3.1(a) and (b) Brussels II *bis* Regulation would frequently overlap. On the facts, that would amount to establishing, with regard to persons holding a number of nationalities, a hierarchy between the grounds of jurisdiction laid down in Article 3.1, for which there is no basis in the wording of that paragraph. By contrast, a couple holding only the nationality of one Member State would always be able to seize the Courts of that State, even if they had not had their habitual residence in that Member State for many years and even if they had few real links with that State.
55. Secondly, in the light of the **imprecise nature of the concept of "effective nationality"** a whole set of factors would have to be taken into consideration, not always leading to a clear result. The need to check the links between the spouses and their respective nationalities would make verification of jurisdiction more onerous and thus be at odds with the objective of facilitating the application of Brussels II *bis* Regulation by the use of a simple and unambiguous connecting factor.
56. It is true that, pursuant to Article 3.1(b) of Brussels II *bis* Regulation, the Courts of a number of Member States can have jurisdiction where the individuals in question hold several nationalities. However, as the Commission and the French, Hungarian and Slovak Governments pointed out, were the Courts of several Member States to be seised pursuant to that provision, the conflict of jurisdiction could be resolved by applying the rule laid down in Article 19.1 of that Regulation.
57. Finally, it should be acknowledged that Brussels II *bis* Regulation, in so far as it regulates only jurisdiction but does not lay down conflict rules determining the substantive law to be applied, might indeed […] induce spouses to rush into seizing one of the Courts having jurisdiction in order to secure the advantages of the substantive divorce law applicable under the private international law rules used by the court seised. However […], such a fact cannot, by itself, mean that the seizing of a Court having jurisdiction under Article 3.1(b) of that Regulation may be regarded as an abuse. […].

The French Courts have international jurisdiction in this case based on Article 3.1(b) Brussels II *bis* Regulation because both spouses are French nationals. Their jurisdiction especially is not barred by the fact that Eve also holds the – in absence of any other link to France – "more effective" Italian nationality.

C. Conclusion

French Courts have international jurisdiction by virtue of **Article 3.1(b) Brussels II *bis* Regulation**, as both spouses are **French nationals**.

Watch the case on our YouTube Channel "*LAWTrain self-learning*"
https://www.youtube.com/watch?v=qwpkoTNS2tU&list=PLfBAAUqaoG0lvEvxYm5F-M6sRHbmwot4q&index=3

ADVANCED

Case 4*

Scenario I

Adam and Eve are **Italian nationals**.
During their marriage, both have been habitually resident in **Germany**.
After their separation, Adam becomes habitually resident in **Italy** and files for divorce before a competent **Italian Court**.
Eve becomes habitually resident in **France**.
Eve files for maintenance and equalization of the accrued gains before a **French Court** while the divorce proceedings are still pending in **Italy**.
Has the French Court jurisdiction to adjudicate the claims on equalization of the accrued gains and maintenance?

Answer:

A. Find the relevant EU legal sources

1) Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

* Wolfgang Hau (University of Munich) & Dennis Solomon (University of Passau).

Territorial scope of application: the Brussels II *bis* Regulation applies **in all Member States of the European Union, except for Denmark (cf. Article 2.3)**.
Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

2) Regulation (EU) No. 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (hereinafter: Matrimonial Property Regulation).
Material Scope of application: the Matrimonial Property Regulation applies to matrimonial property regimes. It shall not apply to revenue, customs or administrative matters.
Territorial scope of application: the Matrimonial Property Regulation applies between Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, Sweden and Cyprus.
Temporal scope of application: the Matrimonial Property Regulation applies from 29 January 2019, except for Articles 63 and 64, which apply from 29 April 2018, and Articles 65, 66 and 67, which apply from 29 July 2016.

FOR FURTHER READING on the Matrimonial Property Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1103

3) Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (hereinafter: Maintenance Regulation).
Material scope of application: the Maintenance Regulation applies to maintenance obligations arising from a family relationship, parentage, marriage or affinity.
Territorial scope of application: the Maintenance Regulation applies between all the Member States of the European Union, with the exception of Denmark.
Temporal scope of application: the Maintenance Regulation applies from 18 June 2011.

FOR FURTHER READING on the Maintenance Regulation:
https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R0004

B. Find the correct provision

I. Equalization of the accrued gains

In proceedings concerning matrimonial property, which are initiated as of 29 January 2019, the international jurisdiction is determined by the Matrimonial Property Regulation. For cases in which a Court of a Member State is seised to decide on an application for divorce, Article 5 Matrimonial Property Regulation states:

> Article 5 Matrimonial Property Regulation – Jurisdiction in cases of divorce, legal separation or marriage annulment
> 1. Without prejudice to paragraph 2, **where a Court of a Member State is seised to rule on an application for divorce, legal separation or marriage annulment pursuant to Regulation (EC) No 2201/2003, the Courts of that State shall have jurisdiction to rule on matters of the matrimonial property regime arising in connection with that application**.
> 2. Jurisdiction in matters of matrimonial property regimes under paragraph 1 shall be subject to the spouses' agreement where the Court that is seised to rule on the application for divorce, legal separation or marriage annulment:
> (a) is the Court of a Member State in which the applicant is habitually resident and the applicant had resided there for at least a year immediately before the application was made, in accordance with the fifth indent of Article 3.1(a) of Regulation (EC) No 2201/2003;
> (b) is the Court of a Member State of which the applicant is a national and the applicant is habitually resident there and had resided there for at least six months immediately before the application was made, in accordance with sixth indent of Article 3.1(a) of Regulation (EC) No 2201/2003;
> (c) is seised pursuant to Article 5 of Regulation (EC) No 2201/2003 in cases of conversion of legal separation into divorce; or
> (d) is seised pursuant to Article 7 of Regulation (EC) No 2201/2003 in cases of residual jurisdiction.
> 3. If the agreement referred to in paragraph 2 of this Article is concluded before the Court is seised to rule on matters of matrimonial property regimes, the agreement shall comply with Article 7.2.

Pursuant to Article 5.1 Matrimonial Property Regulation, the Italian Court seised by Adam to rule on his application for divorce has exclusive jurisdiction on Eve's claim for equalization of the accrued gains. As required by Article 5.1 Matrimonial Property Regulation, her claim is connected to the divorce because it also arises from the termination of the marriage.
Furthermore, the Italian Court has international jurisdiction on the divorce proceedings. In cases where this jurisdiction is based on one of the Brussels II *bis* Regulation jurisdictional rules, according to Article 5.2 and Article 5.3 Matrimonial

Property Regulation, it can be extended on the matrimonial property proceedings only if the spouses agree on this.
In this case however, the **jurisdiction** of the **Italian Courts** *inter alia* derives from the common Italian nationality of the spouses (Article 3.1(b) Brussels II *bis* Regulation); this is why such an agreement is not necessary.
The jurisdiction of the Italian Court is extended on the **claim for equalization of the accrued gains**, which – as the wording of Article 6 Matrimonial Property Regulation shows – bars a jurisdiction of the French Courts on other grounds.

Therefore, the seised French Court **does not have jurisdiction to adjudicate on equalization of the accrued gains and maintenance**.

II. Maintenance

The claim for Maintenance falls in the scope of the Maintenance Regulation.
In this case, the international jurisdiction is determined in accordance with **Article 3 Maintenance Regulation**, which reads:

> Article 3 Maintenance Regulation – General provisions
> In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:
> (a) the Court for the place where the defendant is habitually resident, or
> (b) **the Court for the place where the creditor is habitually resident**, or
> (c) **the Court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties**, or
> (d) the Court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

Even though, similar to Article 5(c) Matrimonial Property Regulation renders the Courts having international jurisdiction on status proceedings like a divorce competent for ancillary maintenance matters, the jurisdiction of the French Courts is not barred by this provision.
Different from Article 5 Matrimonial Property Regulation, jurisdiction under Article 3(c) Maintenance Regulation is not exclusive because the creditor is free to choose which Court to be seized.

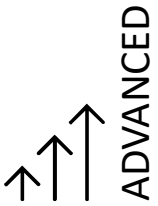
Therefore, the **French Courts** have **international jurisdiction** to **decide** on **Eve's maintenance** claim by virtue of Article 3(b) Maintenance Regulation because she is habitually resident in France.

C. Conclusion

French Courts do **not have international jurisdiction** to adjudicate on **equalization of the accrued gains** according to **Article 5.1 Matrimonial Property Regulation**.

French Courts **have** nevertheless **international jurisdiction on maintenance** by virtue of **Article 3(b) Maintenance Regulation,** as the chart illustrates.

	France Courts Art. 5.1 Matrimonial Property Regulation	France Art. 3(b) Maintenance Regulation
International jurisdiction to adjudicate on equalization of the accrued gains		
International jurisdiction on maintenance claim		✓



Case 4

Scenario II

Adam and Eve are **Italian nationals**.
During their marriage, both have been habitually resident in **Germany**.
After their separation, Adam becomes habitually resident in **Italy** and files for divorce before a competent **Italian Court**.
Eve becomes habitually resident in **France**.
Eve files for maintenance and equalization of the accrued gains before a **French Court** after the divorce proceedings before the Italian Courts have been concluded.
Has the French Court jurisdiction to adjudicate the claims on equalization of the accrued gains and maintenance?

Answer:

A. Find the relevant EU legal sources

See Case 4, Scenario 1, A

B. Find the correct provision

I. Equalization of the accrued gains

After the conclusion of the divorce proceedings, Article 5 Matrimonial Property Regulation does not apply. Instead, Article 6 Matrimonial Property Regulation has to be considered:

Article 6 Matrimonial Property Regulation – Jurisdiction in other cases
Where no Court of a Member State has jurisdiction pursuant to Article 4 or 5 or in cases other than those provided for in those Articles, jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the Courts of the Member State:
(a) in whose territory the spouses are habitually resident at the time the Court is seised; or failing that;
(b) in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the Court is seised; or failing that;
(c) in whose territory the respondent is habitually resident at the time the Court is seised; or failing that;
(d) of the spouses' common nationality at the time the Court is seised.

Since the habitual residence of the creditor is not a relevant connecting factor under that provision, the **French Courts do not have international jurisdiction** on Eve's claim for **equalization of the accrued gains**.

II. Maintenance

With regard to the maintenance claim, there is no difference to scenario I.

The **French Courts have international jurisdiction** to decide on **Eve's maintenance claim** by virtue of **Article 3(b) Maintenance Regulation** because she is habitually resident in France.

C. Conclusion

French Courts do **not have international jurisdiction** to adjudicate on **equalization of the accrued gains** according to **Article 5.1 Matrimonial Property Regulation**.
French Courts **have** nevertheless **international jurisdiction on maintenance** by virtue of **Article 3(b) Maintenance Regulation**, as illustrated by the chart below.

	France Art. 5.1 Matrimonial Property Regulation	France Art. 3(b) Maintenance Regulation
International jurisdiction to adjudicate on equalization of the accrued gains		
International jurisdiction on maintenance claim		✓

ADVANCED

Case 5*

Scenario I

Adam is a **German national.**
Eve an **Italian national**.
Both have been habitually resident in **Germany** during the time of their marriage and have a common child, a **German national**, over which they exercise joint custody.
After their separation, Adam stays resident in Germany and files for divorce before a **German Court**.
Eve lawfully moves to **Italy** with the child, they both establish a new habitual residence there.
Eve applies for sole custody before the **Italian Court**.
Do the Italian Courts have international jurisdiction over the case?

Answer:

A. Find the relevant EU legal sources

Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *bis* Regulation applies **in all Member States of the European Union, except for Denmark (cf. Article 2.3)**.

* Wolfgang Hau (University of Munich) & Dennis Solomon (University of Passau).

Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

B. Find the correct provision

In addition to matrimonial matters, the Brussels II *bis* Regulation also concerns certain matters of parental responsibility. In this respect, the Regulation significantly supersedes national law on jurisdiction: Article 1.1(b) Brussels II *bis* Regulation lists the issues covered:

Article 1.1(b) Brussels II *bis* Regulation – Scope
1. This Regulation shall apply, whatever the nature of the Court or Tribunal, in civil matters relating to:
(b) **the attribution, exercise, delegation, restriction or termination of parental responsibility**.

These matters are further specified in paragraph 2 of Article 2 Brussels II *bis* Regulation.

Article 2.2 Brussels II *bis* Regulation – Definitions
2. The matters referred to in paragraph 1(b) may, in particular, deal with:
(a) **rights of custody** and rights of access;
(b) guardianship, curatorship and similar institutions;
(c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child;
(d) the placement of the child in a foster family or in institutional care;
(e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

Custody proceedings therefore fall in the scope of application of the Regulation. According to Article 8.1 Brussels II *bis* Regulation, the main connecting factor is simply the child's habitual residence:

Article 8 Brussels II *bis* Regulation – General jurisdiction
1. The Courts of a Member State shall have jurisdiction in matters of parental responsibility **over a child who is habitually resident in that Member State** at the time the Court is seised.

Pursuant to **Article 8 Brussels II *bis* Regulation** the Italian Courts have international jurisdiction, as the **child is habitually resident in Italy**.

C. Conclusion

Italian Courts have international jurisdiction over the case because of the habitual residence of the child in their State, according to Article 8 Brussels II *bis* Regulation.

ADVANCED

Case 5

Scenario II

Adam is a **German national.**
Eve an **Italian national**.
Both have been habitually resident in **Germany** during the time of their marriage and have a common child, a **German national**, over which they exercise joint custody.
After their separation, Adam stays resident in **Germany** and files for divorce before a **German Court**.
Eve lawfully moves to **Italy** with the child, both establish a new habitual residence there.
Eve applies for sole custody before the **German Courts**, Adam agrees to that.
Does Germany have international jurisdiction to decide on the custody of the child?

Answer:

A. Find the relevant EU legal sources

See Case 5, Scenario I, A

B. Find the correct provision

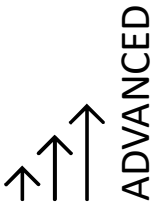
Since the child is habitually resident in Italy, Article 8.1 Brussels II *bis* Regulation does not provide for international jurisdiction of the German Courts in this scenario. However, Article 12.1 Brussels II *bis* Regulation allows the parties to agree on ancillary custody jurisdiction of a Court seised in a matrimonial matter:

Article 12.1 Brussel II *bis* Regulation – Prorogation of jurisdiction
1. The Courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:
(a) **at least one of the spouses has parental responsibility** in relation to the child; and
(b) **the jurisdiction of the Courts has been accepted expressly** or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the Court is seised, and is in the superior interests of the child.

Adam and Eve both **have parental responsibility** in relation to the child and **accept the jurisdiction** of the German Courts which exercise jurisdiction on Adam's application for divorce by virtue of Article 3.1(a) indent 1 and 6 Brussels II *bis* Regulation. Therefore, the **German Courts also have jurisdiction** on the custody matter according to Article 12.1 Brussels II *bis* Regulation, if they hold that this is in the superior interests of the child.

C. Conclusion

Germany has international jurisdiction over the claim on the custody of the common child according to **Article 12.1 Brussels II *bis* Regulation**.



Case 5

Scenario III

Adam is a **German national.**
Eve an **Italian national**.
Both have been habitually resident in **Germany** during the time of their marriage and have a common child, a **German national**, over which they exercise joint custody.
After their separation, Adam stays resident in **Germany** and files for divorce before a **German Court**.
Eve lawfully moves to **Italy** with the child, both establish a new habitual residence there.
Eve applies for sole custody before the **German Courts** after the divorce proceedings in Germany **have been concluded**, Adam agrees to that.
Does Germany have international jurisdiction to decide on the custody of the child?

Answer:

A. Find the relevant EU legal sources

See Case 5, Scenario I, A

B. Find the correct provision

Article 8.1 Brussels II *bis* Regulation does not provide for international jurisdiction of the German Courts in this scenario.

Also, Article 12.1 Brussels II *bis* Regulation does not provide for jurisdiction of the German Courts, since the proceedings on Adam's application for divorce

have been concluded and the application for sole custody therefore is not connected to the matrimonial matter.
However, Article 12.3 Brussels II *bis* Regulation has to be considered:

> Article 12.3 Brussel II *bis* Regulation – Prorogation of jurisdiction
> 3. The Courts of a Member State shall also have jurisdiction in relation to parental responsibility in proceedings other than those referred to in paragraph 1 where:
> (a) **the child has a substantial connection with that Member State**, in particular by virtue of the fact that one of the holders of parental responsibility is habitually resident in that Member State or that the child is a national of that Member State; **and**
> (b) the jurisdiction of the Courts has been accepted expressly or otherwise in an unequivocal manner by all the parties to the proceedings at the time the Court **is seised and is in the superior interests of the child**.

Article 12.3 Brussels II *bis* Regulation allows the parties to agree on custody jurisdiction of the Courts of a Member State in the absence of matrimonial proceedings, if the child has a substantial connection with that Member State. According to Article 12.3(a) Brussels II *bis* Regulation, such a connection can especially be assumed, if one of the holders of parental responsibility is habitually resident in that Member State or the child is a national of that Member State.

As Adam is habitually resident in Germany and the child is a German national, in this scenario the German Courts have international jurisdiction by virtue of Article 12.3 Brussels II *bis* Regulation, **if this is in the superior interests of the child (cf. lit. b).**

C. Conclusion

German Courts have international jurisdiction to decide on the custody of the child by virtue of **Article 12.3 Brussels II *bis* Regulation, if** this is in the **superior interests of the child**.

ADVANCED

Case 5

Scenario IV

Adam is a **German national.**
Eve an **Italian national**.
Both have been habitually resident in **Germany** during the time of their marriage and have a common child, a **German national**, over which they exercise joint custody.
After their separation, Adam stays resident in **Germany** and files for divorce before a **German Court**.
Eve lawfully moves to **Italy** with the child, both establish a new habitual residence there.
Eve applies for sole custody before the **Italian Courts**.
Adam requests a transfer of the proceedings to a **German Court**, which he finds to be better placed to hear the case.
On which grounds would the Italian Courts transfer the proceedings to a German Court?

Answer:

A. Find the relevant EU legal sources

See Case 5, Scenario I, A

B. Find the correct provision

In this scenario, **Italian Courts** have **international jurisdiction** by virtue of **Article 8.1 Brussels II *bis* Regulation,** as the child is habitually resident in Italy.
However, Article 15 Brussels II *bis* Regulation has to be taken in account:

Article 15 Brussels II *bis* Regulation – **Transfer to a Court better placed to hear the case**
1. By way of exception, the Courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a Court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:
(a) stay the case or the part thereof in question and invite the parties to introduce a request before the Court of that other Member State in accordance with paragraph 4; or
(b) request a Court of another Member State to assume jurisdiction in accordance with paragraph 5.
2. Paragraph 1 shall apply:
(a) upon application from a party; or
(b) of the Court's own motion; or
(c) upon application from a Court of another Member State with which the child has a particular connection, in accordance with paragraph 3.
A transfer made of the Court's own motion or by application of a Court of another Member State must be accepted by at least one of the parties.

With due consideration of the **best interests of the child**, Article 15 Brussels II *bis* Regulation seeks to attain justice in each individual case, even if this happens at the expense of clearly defined jurisdictional rules. It might be regarded as a limited application of the Anglo-Saxon doctrine of *forum non conveniens* within the European regime of international litigation. Therefore, despite having international jurisdiction, a Court may even refrain from a decision on the substance of the matter and request a foreign Court to assume jurisdiction instead.
A **transfer of the proceedings** on the grounds of Article 15.1 Brussels II *bis* Regulation **firstly** requires that the **receiving Court** is **better placed to hear the case**. This can be the case, for example, if the receiving Court is better able to take evidence required for dealing with the case.
Secondly there must be a **particular connection of the child to the Member State of the receiving Court**. Article 15.3 Brussels II *bis* Regulation sets out factors in light of which such a connection shall be assumed:

Article 15.3 Brussels II *bis* Regulation – Transfer to a Court better placed to hear the case
3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State
(a) has become the habitual residence of the child after the Court referred to in paragraph 1 was seised; or
(b) is the former habitual residence of the child; or
(c) is the place of the child's nationality; or
(d) is the habitual residence of a holder of parental responsibility; or
(e) is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

Finally, the **transfe**r again has to be **in the best interests of the child**.

If the Italian Court sees these mentioned criteria to be fulfilled, **it can** – upon application from Adam or on its own motion – **stay the case** and **invite** the parties to introduce a request **before the Court of that other Member** State in accordance with paragraph 4 (Article 15.1(a) Brussels II *bis* Regulation) or request the German Courts to assume jurisdiction in accordance with paragraph 5 (Article 15.1(b) Brussels II *bis* Regulation), which state:

> Article 15.4 and 15.5 Brussels II *bis* Regulation – Transfer to a Court better placed to hear the case
> 4. The Court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the Courts of that other Member State shall be seised in accordance with paragraph 1. If the Courts are not seised by that time, the Court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.
> 5. The Courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seizure in accordance with paragraph 1(a) or 1(b). In this case, the Court first seised shall decline jurisdiction. Otherwise, the Court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

C. Conclusion

Italian Courts would transfer the proceedings to the German court **if** the **requirements** listed in **Article 15.3 Brussels II *bis* Regulation** are **fulfilled**.

Case 1*

Lis Alibi Pendens in Matrimonial Matters

Mr and Ms Dupont, **French nationals,** were married in Paris (France) and then moved to Brussels (Belgium). The couple had two children, both born in Brussels. The entire family continued to **reside** in **Brussels** until **January 2020**, when Mr Dupont returned to the former matrimonial home in Paris. From that moment on, Mr Dupont lived in **Paris.**
On **5 September 2020, Mr Dupont** lodged a **request for divorce** before the French Family Court of Paris. **Ms Dupont was served with the request on 20 September 2020.**
On **30 September 2020** Ms Dupont filed a petition for divorce before the Belgian Family Court of Brussels.
Which Court should pronounce the divorce of the spouses Dupont?

Answer:

A. Find the relevant EU legal sources

1) Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *bis* Regulation applies **in all Member States of the European Union (including France** and **Belgium), except for Denmark (cf. Article 2.3).**

* Vincent Egea (University of Aix-Marseille).

Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

2) Regulation (EU) No. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter: Brussels II *ter* Regulation).
Material scope of application: the Brussels II *ter* Regulation applies in civil matters of:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *ter* Regulation applies **between all Member States of the European Union**.
Temporal scope of application: the Brussels II *ter* Regulation shall apply from 1 August 2022, with the exception of Articles 92, 93 and 103, which shall apply from 22 July 2019 (Article 105).

FOR FURTHER READING on the Brussels II *ter* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR%3A524570fa-9c9a-11e9-9d01-01aa75ed71a1

B. Find the correct provision

Matrimonial matters between married couples, including matters of divorce, fall within the scope of application of the Brussels II *bis* Regulation (cf. Article 1.1(a)).
The **new Brussels II *ter* Regulation will replace the Brussels II *bis* Regulation**, but **only as regards legal proceedings instituted on or after 1 August 2022** (Article 100.1).

I. Jurisdiction to pronounce divorce

As Mr and Ms Dupont are habitually resident in Belgium, **Belgium has international jurisdiction to pronounce their divorce** to **Article 3.1(a) indent 2 Brussels II *bis* Regulation.**

Article 3.1(a) Brussels II *bis* Regulation – General jurisdiction
1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the Courts of the Member State
(a) in whose territory:
– the spouses are habitually resident, or
– **the spouses were last habitually resident, insofar as one of them still resides there,** or
– the respondent is habitually resident, or
– in the event of a joint application, either of the spouses is habitually resident, or
– the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
– the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there.

Even France has jurisdiction to **pronounce the divorce** of Mr and Ms Dupont according to **Article 3.1.(a) indent 6 Brussels II *bis* Regulation**, as Mr Dupont, the applicant, resided in France for at least six months immediately before the application and is a French national.

Article 3.1(a) Brussels II *bis* Regulation – General jurisdiction
1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the Courts of the Member State
(a) in whose territory:
– the spouses are habitually resident, or
– the spouses were last habitually resident, insofar as one of them still resides there, or
– the respondent is habitually resident, or
– in the event of a joint application, either of the spouses is habitually resident, or
– the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or
– **the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question** or, in the case of the United Kingdom and Ireland, has his or her "domicile" there.

As **all grounds of jurisdiction** listed in **Article 3 Brussels II *bis* Regulation** are of **equal rank**, we are in presence of **two parallel proceedings of divorce** pending before **two different Courts having jurisdiction over the case** (*lis alibi pendens*).
However, when Ms Dupont seised the Belgium Court, the French Judge had already been seised.

II. *Lis alibi pendens* under Article 19 Brussels II *bis* Regulation

Under Article 19 Brussels II *bis* Regulation, a situation of *lis pendens* exists when the proceedings brought between the **same parties** (here: Mr and Ms Dupont) and relating to petitions for **divorce**, are **pending simultaneously** before the Courts of two **different Member States** (here: Belgium and France).

> Article 19 Brussels II *bis* Regulation – *Lis pendens* and dependent actions
> 1. Where proceedings relating to **divorce** […] between the **same parties** are brought before Courts of **different Member States**, the **Court second seised** shall of its own motion **stay its proceedings until such time as the jurisdiction of the Court first seised is established**.
> […]
> 3. Where the jurisdiction of the Court first seised is established, the Court second seised shall decline jurisdiction in favour of that Court.
> In that case, the party who brought the relevant action before the Court second seised may bring that action before the Court first seised.

The *lis alibi pendens* rule listed in **Article 19 Brussels II *bis* Regulation** operates on a rigid **"prior in tempore" basis**.
The **main goal** of **Article 19 Brussels II *bis* Regulation** is that of **avoiding the risk** of having **two (irreconcilable) judgment** on the **same divorce within the European judicial area**.
On the contrary the risk of having two irreconcilable judgments on the same divorce in the same Member State (here: France of Belgium) is prevented by Article 22 Brussels II *bis* Regulation.

> Article 22 Brussels II *bis* Regulation – Grounds of non-recognition for judgments relating to divorce
> 1. A judgment relating to a divorce […] shall not be recognised:
> […]
> (c) **if it is irreconcilable with a judgment given in proceedings between the same parties in the Member State in which recognition is sought**; or
> (d) if it is irreconcilable with an earlier judgment given in another Member State or in a non-Member State between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

In the case at hand, the Belgian Court, which is the court second seised (on 30 September 2020), shall of its own motion stay its proceedings until such time as the jurisdiction of the French Judge is established.

On the contrary, the **French Court** shall firstly establish its jurisdiction over the case on Article 3.1.(a) indent 6 Brussels II *bis* Regulation (*supra* II) and then **pronounce the divorce of the spouses Dupont.**

III. Seising of a Court: determination of temporal priority

In order to determine the moment when a Court in a Member State is deemed seised for the purposes of the application of the rules on *lis alibi pendens*, **Article 16 Brussels II *bis* Regulation applies.**

> Article 16 Brussels II *bis* Regulation – Grounds of non-recognition for judgments relating to divorce
> 1. A Court shall be deemed to be seised:
> (a) **at the time when the document instituting the proceedings or an equivalent document is lodged with the Court**, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or
> (b) **if the document has to be served before being lodged with the Court**, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the Court.

Article 16 Brussels II *bis* Regulation takes into consideration the two main **modalities** in which the **introductory phase** of the proceedings can be articulated according to the ***lex fori***: (a) that in which the claim form is first lodged with the Court and then served on the defendant – and (b) that where the claim form must be served on the defendant first and then lodged with the Court.
Accordingly, the CJEU, order 16 July 2015, C-507/14, *P v M*, ECLI:EU:C:2015 has clarified that:

> CJEU, order 16 July 2015, C-507/14, *P v M*, ECLI:EU:C:2015
> 43. In the light of all the foregoing, the answer to the question is that Article 16.1 Brussels II *bis* Regulation must be interpreted as a jurisdiction is seised the day of the institution of the proceedings or the day when an equivalent document is lodged with the Court, even if the procedure has been, in the meantime, stayed by the applicant himself who has submitted it without notification to the defendant and without knowledge by the defendant or any type of participation from him, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant.

In the case at hand, whichever of the two modalities applies (depending on French Procedural Law), the **French Court**, for the purpose of Article 19 Brussels II *bis* Regulation, **has been seized first** (either on 5 or on 20 September 2020).

FOR FURTHER READING on divorce in French Procedural Law:
https://e-justice.europa.eu/content_divorce-45-fr-en.do?member=1

C. Conclusion

The **French Court** is the Court which **should pronounce the divorce** of the spouses Dupont.

Case 2*

Mr Gonzalez, a **Spanish national**, lived in **Madrid (Spain)** from 2010 until June 2018 with Ms Bernard, a **French national**. Their relationship resulted in the birth of a **child, Kevin,** born in 2012. The relationship between Mr Gonzalez and Ms Bernard deteriorated during the spring 2018. In June 2018, Mr Bernard moved to Paris (France). Mr Gonzalez and Kevin continued to live in Madrid. In oral agreement with the father, Kevin spent the end of year celebration holidays in France with his maternal family. He moved back to Madrid at the beginning of 2019. The child was supposed to spend in France the months of July and August, according to an oral parental agreement.
On 15 July 2019, Ms Bernard seised the **French Court** to obtain a **provisional measure awarding her exclusive custody** in respect of Kevin during the summer, in order to authorise medical examinations, without a paternal prerogative.
In response, Mr Gonzalez seised the **Spanish Court** on 30 July 2019, to obtain a **judgment on the merits** awarding him the **exclusive custody** of Kevin. In the Spanish proceeding, Ms Bernard objected that, as the same action was pending before the Court in France when the Spanish action was filed, the Spanish Court should stay its proceedings until the French Court has delivered its decision.
Will the Spanish Court stay the proceedings because of the *lis alibi pendens* rule?

Answer:

A. Find the relevant EU legal sources

1) Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;

* Vincent Egea (University of Aix-Marseille).

b) the attribution, exercise, delegation, restriction or termination of parental responsibility;
c) rights of custody.
Territorial scope of application: the Brussels II *bis* Regulation applies **in all Member States of the European Union (**including **France** and **Spain), except for Denmark (cf. Article 2.3).**
Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

2) Regulation (EU) No. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter: Brussels II *ter* Regulation).
Material scope of application: the Brussels II *ter* Regulation applies in civil matters of:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *ter* Regulation applies **between all Member States of the European Union**.
Temporal scope of application: the Brussels II *ter* Regulation shall apply from 1 August 2022, with the exception of Articles 92, 93 and 103, which shall apply from 22 July 2019 (Article 105).

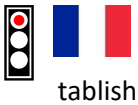
FOR FURTHER READING on the Brussels II *ter* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR%3A524570fa-9c9a-11e9-9d01-01aa75ed71a1

B. Find the correct provision

Matrimonial matters between married couples, including parental responsibility and rights of custody over a child, fall within the scope of application of the Brussels II *bis* Regulation (cf. Article 1.1(b) and 1.2(a)).
The **new Brussels II *ter* Regulation will replace the Brussels II *bis* Regulation**, but **only as regards legal proceedings instituted on or after 1 August 2022** (Article 100.1).

I. French jurisdiction over the substance of the case

As Kevin is habitually resident in Madrid (Spain), **according to Article 8.1 Brussels II *bis* Regulation**, the **French Court does not have jurisdiction to adjudicate on the merits** over the **rights of custody** over him.



The mere summer presence of Kevin in France (*i.e.* for a transitional period), according to an oral parental agreement, is not enough to establish the French jurisdiction.

> Article 8.1 Brussels II *bis* Regulation – General jurisdiction
> 1. The Courts of a Member State shall have jurisdiction in matters of parental responsibility over a **child** who **is habitually resident in that Member State** at the time the Court is seised.

On the contrary, pursuant Article 8.1 Brussels II *bis* Regulation, the **Spanish Courts** have **general jurisdiction in matters on parental responsibility over Kevin**.

II. French jurisdiction to indicate provisional measures on parental responsibility

Article 20 Brussels II *bis* Regulation provides for jurisdiction to indicate provisional measures, explaining that, in urgent cases, a Court of a Member State can take a provisional measure – including on parental responsibility – even if, under this Regulation, the Court of another Member State has jurisdiction as to the substance of the matter.

> Article 20 Brussels II *bis* Regulation – Provisional, including protective, measures
> 1. In urgent cases, the provisions of this Regulation shall not prevent the Courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, **even if, under this Regulation, the Court of another Member State has jurisdiction as to the substance of the matter**.
> 2. The measures referred to in paragraph 1 shall cease to apply when the Court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

However, in order to obtain a provisional measure by the Court of a Member State not having jurisdiction over the substance of the matter, the conditions established by national *lex fori* (for example: the urgency condition) must be fulfilled. In the case at hand, the conditions established by French law must be fulfilled.

If the conditions established by French law are fulfilled, the French Court, even though France is not the State where Kevin is habitually resident, shall order provisional measures.

III. *Lis alibi pendens*

In the light of the aforementioned (II) it must be established whether the *lis pendens* rule listed in Article 19 Brussels II *bis* Regulation applies when the Court first seised is seised only for the purpose of its granting provisional measures, whereas the Court second seised is asked to pronounce obtain final and substantive measures.
In that respect, the CJEU, 9 November 2010, C-296/10, *Bianca Purrucker v Guillermo Vallés Pérez*, ECLI:EU:C:2010:665, held that:

CJEU, 9 November 2010, C-296/10, *Bianca Purrucker v Guillermo Vallés Pérez*, ECLI:EU:C:2010:665
78. […] **if it is evident from the applicant's claims or from the factual background contained in the action** brought before the Court first seised **that**, even where **the action** is directed **to obtaining provisional measures**, the action has been **brought before a Court** which**, *prima facie*, might have jurisdiction** as to the **substance of the matter**, the **Court second seised must stay its proceedings** in accordance with Article 19.2 Brussels II *bis* Regulation until such time as the jurisdiction of the Court first seised is established. According to circumstances and if the conditions of Article 20 of the regulation are satisfied, the Court second seised may take such provisional measures as are necessary in the interests of the child.
[…] On the contrary:
86. The provisions of **Article 19.2 Brussels II *bis* Regulation** are **not applicable** where a **Court** of a Member State **first seised** for the purpose of obtaining measures in matters of parental responsibility **is seised only for the purpose of its granting provisional measures** within the meaning of Article 20 Brussels II *bis* Regulation **and** where a **Court** of **another Member State** which has **jurisdiction as to the substance of the matter** within the meaning of the same regulation **is seised second** of an action directed at obtaining the same measures, whether on a provisional basis or as final measures.

In the case at hand, the French proceeding was brought by the mother only for the purpose of obtaining provisional measures but France does not have international jurisdiction over the substance of the case. The Spanish Court second seised has jurisdiction as to the substance of the matter under Article 8 Brussels II *bis* Regulation. Therefore, Article 19.2 Brussels II *bis* Regulation does not apply.

C. Conclusion

The motion to stay the Spanish proceedings on the basis of *lis alibi pendens* will be dismissed.

Case 1*

Hearing of the Child

Scenario I

Agata is a Greek citizen who lived in Greece until she was 23 years old. At that point, she went to Germany to pursue post-graduate studies. While she was in Germany, she met Frederic, a French co-student. Agata and Frederic started a serious relationship and lived together.

After two years, they got married in Greece. A year later, their first son, Alexander, was born. The next year Kael followed. Both boys have French and Greek nationality. Agata speaks Greek to the children and Frederic French; Agata and Frederic speak German to each other. In years to come, the couple went through difficult times.

Agata realized that she had no serious support from Frederic at home anymore, and it then turned out that Alexander had an autism disorder, and he needed extra help and attention. After that, fights started between the couple, Agata informed Frederic that she wanted to go to Greece to consider what she was going to do with the rest of her life. **Frederic agreed that she would go to Greece and take the boys with her for a period of three months.** The agreement was that Frederic would come to Greece three months later, and then they would discuss things further. However, in the meantime, Frederic consulted a lawyer in France about instituting divorce proceedings there.

At the end of the school year, Agata informed Frederic that she wanted to get divorced. After that, Frederic quickly instituted divorce proceedings in France.

He requested the French Court to grant him sole custody of the children, claiming that Agata was paranoid and, therefore, not a trustworthy mother. He wanted to exercise this sole custody and thus wanted the boys to return. He also instituted return proceedings under the 1980 Hague Child Abduction Convention for the return of his sons to Germany.

A French Court granted the divorce and permanent custody to the child's father, asking the mother to return the child to father and issued a certificate in accordance with Article 42 Brussels II *bis* Regulation.

Agata claims that the boys had become habitually resident in Greece. Additionally, she claims that Frederic was psychologically abusive and that there would be a risk, particularly for the son with autism, to return to Germany.

* Tjaša Ivanc (University of Maribor) & Vesna Rijavec (University of Maribor).

1) Could the event of removing the boys from Germany and placing them to live in Greece be considered as an international wrongful removal or retention of a child?
2) Does the issuance of the Certificate according to art. 42 Brussels II *bis* Regulation guarantee that the child has been heard or has been given the opportunity to be heard in France as Member State of origin?

Answer 1:

A. Find the relevant EU legal sources

1) Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *bis* Regulation applies **between all Member States of the European Union.**
Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003R2201

2) Regulation (EU) No. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter: Brussels II *ter* Regulation).
Material scope of application: the Brussels II *ter* Regulation applies in civil matters of:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *ter* Regulation applies **between all Member States of the European Union**.

Temporal scope of application: the Brussels II *ter* Regulation shall apply from 1 August 2022, with the exception of Articles 92, 93 and 103, which shall apply from 22 July 2019 (Article 105).

FOR FURTHER READING on the Brussels II *ter* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR%3A524570fa-9c9a-11e9-9d01-01aa75ed71a1

3) Hague Convention of 25 October 1980 concerning the **Civil Aspects of International Child Abduction** (hereinafter: the 1980 Hague Convention).
Material scope of application: the 1980 Hague Convention aims to:
a) secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
b) ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
Territorial scope of application: the 1980 Hague Convention applies between the States signatory to the Convention, including **France, Greece and Germany**.
Temporal scope of application: the 1980 Hague Convention applies from 1 December 1983.

FOR FURTHER READING on the 1980 Hague Convention:
https://www.hcch.net/en/instruments/conventions

B. Find the correct provision

Matrimonial matters between married couples, including matters over child custody and abduction issues, fall within the scope of application of the Brussels II *bis* Regulation (cf. Article 1). The **new Brussels II *ter* Regulation will replace the Brussels II *bis* Regulation**, but **only as regards decisions given in legal proceedings instituted on or after 1 August 2022** (Article 100.1).

I. Meaning of wrongful removal or retention of children under Brussels II *bis* Regulation

Article 11 Brussels II *bis* Regulation is headed “return of the child” and addresses cases of **wrongful removal or retention of children**. It establishes a specific EU procedure which complements that indicated by the 1980 Hague Convention with the aim of ensuring a certain procedural unification among EU Member States.

The **distinction** between the **wrongful removal** and **wrongful retention** is important in order to determine the date of unlawful abduction.
If a child is wrongfully removed from one EU Member State to another, the starting point is that the 1980 Hague Convention still applies. However, the Brussels II *bis* Regulation completes the Convention (recitals 17 and 18 and Articles 11 and 60(e) Brussels II *bis* Regulation).

Recital 17 and 18 Brussels II *bis* Regulation
17. In cases of **wrongful removal or retention of a child**, the return of the child should be obtained without delay, and to this end **the 1980 Hague Convention would continue to apply** as complemented by the provisions of this Regulation, in particular Article 11. The Courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, in duly justified cases. However, such a decision could be replaced by a subsequent decision by the Court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.
18. Where a Court has decided not to return a child on the basis of Article 13 of the 1980 Hague Convention, it should inform the Court having jurisdiction or Central Authority in the Member State where the child was habitually resident prior to the wrongful removal or retention. Unless the Court in the latter Member State has been seized, this Court or the Central Authority should notify the parties. This obligation should not prevent the Central Authority from also notifying the relevant public authorities in accordance with national law.

Article 11 Brussels II *bis* Regulation – Return of the child
1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the 1980 Hague Convention, in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.
2. **When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings** unless this appears inappropriate having regard to his or her age or degree of maturity.
3. A Court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law.
Without prejudice to the first subparagraph, the Court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

The definition of an international child abduction is considered as **wrongful removal or retention** of a **child outside the Country of the child's habitual residence**, according to Article 3 of the 1980 Hague Convention and Article 2.11 Brussels II *bis* Regulation:

Article 3 1980 Hague Convention
The **removal or the retention of a child is to be considered wrongful where**:
– **it is in breach of rights of custody attributed to a person**, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
– at the time of removal or retention **those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention**.
The rights of custody mentioned in sub-paragraph *a*) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 2.11 Brussels II *bis* Regulation on the definition of wrongful removal or the retention of a child
11. The term "wrongful removal or retention" shall mean a child's removal or retention where:
(a) it **is in breach of rights of custody acquired by judgment** or by operation of law or by an agreement having legal effect under the law of the Member State where the child was habitually resident immediately before the removal or retention; and
(b) **provided that, at the time of removal or retention, the rights of custody were actually exercised, either jointly or alone, or** would have been so exercised but for the removal or retention. Custody shall be considered to be exercised jointly when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

The CJEU5, 5 October 2010, C-400/10, *J. Mcb. v L.E.*, ECLI:EU:C:2010:582, noted that:

CJEU, 5 October 2010, C-400/10, *J. Mcb. v L.E.*, ECLI:EU:C:2010:582
41 […] the concept of "rights of custody" is an autonomous concept, independent of the law of Member States. It follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question.
Accordingly, for the purposes of applying Brussels II *bis* Regulation, rights of custody include, in any event, the right of the person with such rights to determine the child's place of residence.

However, as clarified by the CJEU in the aforementioned decision, pursuant to Article 2.11 Brussels II *bis* Regulation, the **wrongfulness** of a **removal or retention** is **entirely dependent on the existence of rights of custody**, conferred by the law of the Member State where the child was habitually resident immediately before the removal or retention, in breach of which the removal or retention had taken place.

> CJEU, 5 October 2010, C-400/10, *J. Mcb. v L.E.*, ECLI:EU:C:2010:582
> 42. An entirely separate matter is the identity of the person who has rights of custody. In that regard, it is apparent from Article 2.11(a) Brussels II *bis* Regulation that **whether or not a child's removal is wrongful depends on the existence of rights of custody acquired** by judgment or by operation of law or by an agreement having legal effect **under the law of the Member State** where the child was habitually resident immediately before the removal or retention.

Finally, CJEU, 22 December 2010, C-491/10, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, ECLI:EU:C:2010:828, held that:

> CJEU, 22 December 2010, C-491/10, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, ECLI:EU:C:2010:828
> 44. Brussels II *bis* Regulation starts from the assumption that the wrongful removal or retention of a child in breach of a Court judgment handed down in another Member State is seriously prejudicial to the interests of that child and it therefore lays down measures to enable the return of the child to the place where he or she is habitually resident as quickly as possible. In that regard, that Regulation set up a system whereby, **in the event** that there is a **difference of opinion between the Court where the child is habitually resident and the Court where the child is wrongfully present**, **the former retains exclusive jurisdiction to decide whether the child is to be returned**.

Briefly summarizing: the definition of "wrongful removal or retention" laid down in Article 2.11 Brussels II *bis* Regulation is clearly based on Article 3 of the 1980 Hague Convention. In accordance with both Articles, **the term "wrongful removal or retention" refers to situations where the child is removed or retained in breach of rights of custody** provided that, at the time of removal or retention, those rights were actually exercised, or would have been exercised, had removal or retention not taken place.

According to Article 2.11(b) Brussels II *bis* Regulation, rights of custody may be exercised either jointly or alone. Joint custody takes place when, pursuant to a judgment or by operation of law, one holder of parental responsibility cannot decide on the child's place of residence without the consent of another holder of parental responsibility.

It is for national law to determine the conditions under which the natural father

acquires rights of custody in respect of his child, within the meaning of Article 2.9 Brussels II *bis* Regulation, and which may provide that his acquisition of such rights is dependent on his obtaining a judgment from the national Court with jurisdiction awarding such rights to him.
What is important to note in order to solve our case, is that the CJEU, 5 October 2010, C-400/10, *J. McB. v L.E.*, ECLI:EU:C:2010:582, found that, under the Brussels II *bis* Regulation, the **breach of (existing) rights of custody, conferred by the relevant national law, is a prerequisite in order for a removal to be considered as wrongful**.

> CJEU, 5 October 2010, C-400/10, *J. McB. v L.E.*, ECLI:EU:C:2010:582
> 44. In the light of the foregoing, Brussels II *bis* Regulation must be interpreted as meaning that **whether a child's removal is wrongful for the purposes of applying that Regulation is entirely dependent on the existence of rights of custody**, conferred by the relevant national law, in breach of which that removal has taken place.

C. Conclusion

The case at hand is a case of **wrongful retention (and not removal) of the children**. The father agreed to a temporary residence of the sons in Greece, but not to a non-return of the children.

Answer 2:

A. Find the relevant EU legal sources

See answer 1, A

B. Find the correct provision

I. The hearing of the child under Brussels II *bis* Regulation

The Brussels II *bis* Regulation contains several provisions on the hearing of the child.

Recitals 19 and 20 Brussels II *bis* Regulation
19. The **hearing of the child plays an important role in the application of this Regulation**, although this instrument is not intended to modify national procedures applicable.
20. The hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the Courts of the Member States in the taking of evidence in civil or commercial matters.

Article 11.2 Brussels II *bis* Regulation – Return of the child
When applying Articles 12 and 13 1980 Hague Convention, it shall be ensured that the **child is given the opportunity to be heard during the proceedings** unless this appears inappropriate having regard to his or her age or degree of maturity.
* The 1980 Hague Convention does not explicitly state that a child is to be given the opportunity to be heard in the return proceedings in the State where a child has been wrongfully retained.

II. The hearing of the child as a ground for refusal of recognition and enforcement

Under Article 42.2 Brussels II *bis* Regulation the **enforcement of the return** order is conditional on the **child having been given the opportunity to be heard** during the proceedings.
In addition, Article 23(b) Brussels II *bis* Regulation establishes that the failure to hear a child can be a reason for declining recognition of judgments on parental responsibility.

Article 42.2 Brussels II *bis* Regulation – Return of the child
2. The Judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:
(a) **the child was given an opportunity to be heard**, unless a hearing was considered inappropriate **having regard to his or her age or degree of maturity**;
(b) the parties were given an opportunity to be heard; and
(c) the Court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.
In the event that the Court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.
The Judge of origin shall out of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).
The certificate shall be completed in the language of the judgment.

Article 23(b) Brussels II *bis* Regulation – Grounds of non-recognition for judgments relating to parental responsibility
A judgment relating to parental responsibility shall not be recognised:
(b) if it was given, except in case of urgency, **without the child having been given an opportunity to be heard,** in violation of fundamental principles of procedure of the Member State in which recognition is sought.

Article 42.2(a) Brussels II *bis* Regulation is to be interpreted in accordance with Article 24 of the EU Charter of Fundamental Rights, which does not impose an absolute obligation to hear the child in every single case of abduction.

Article 24 EU Charter of Fundamental Rights – The rights of the child
1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

FOR FURTHER READING on the EU Charter of Fundamental Rights:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT

The child, who is sufficiently capable of forming his or her own views, shall be given the opportunity to be heard unless a hearing is considered inappropriate having regard to his or her age or degree of maturity. Furthermore, where a Court decides to hear the child, it shall take all measures which are appropriate to the arrangement of such a hearing, having regard to child's best interests and the circumstances of each individual case.

However, the Brussels II *bis* Regulation does not establish any common rules on the procedures regarding the hearing of the child, as indicated by its Recital 19.
More precisely, the Brussels II *bis* Regulation does not address procedural issues whether judges are expected to act on their own initiative, that is regardless of whether parties made a reference for instance to Article 11.2 Brussels II *bis* Regulation in their submissions; the minimum appropriate age for hearing a child; the methods and means available to the Court to hear the child, whether the Judge must personally hear the child or whether a hearing by a mandated social worker or other professional suffices.

The issue is regulated by the *lex fori.* The Courts of Member States of origin shall give the child an opportunity to be heard in legal proceedings affecting him or her, if the child is capable of freely forming and expressing his or her own views. The physical presence of the child is not required by the Brussels II *bis* Regulation. The Courts of Member States of origin shall give to child's views the appropriate weight depending on his or her age and maturity and shall record in their judgment and in the annex Certificate their decision on the weight given to the views of the child.

Since the Brussels II *bis* Regulation does not set common minimum standards for all Member States on the procedure to hear children, *in many cases the best interest of the child is not sufficiently considered.*

Article 42.2 Brussels II *bis* Regulation sets out a special procedure which seeks to guarantee the immediate return of the child wrongfully removed or retained, by excluding any appeal against the issuing of a certificate and by precluding parties from opposing its recognition.

Article 42.2 Brussels II *bis* Regulation – Return of the child

2. The Judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the Certificate referred to in paragraph 1 only if:

(a) **the child was given an opportunity to be heard**, unless a hearing was considered inappropriate **having regard to his or her age or degree of maturity**;

(b) the parties were given an opportunity to be heard; and

(c) the Court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 1980 Hague Convention.

In the event that the Court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The Judge of origin shall out of his or her own motion issue that Certificate using the standard form in Annex IV (Certificate concerning return of the child(ren)).

The Certificate shall be completed in the language of the judgment.

Article 42.2 Brussels II *bis* Regulation lays down a number of conditions for issuing the certificate. Thus, the Court in the Country of origin shall issue the certificate for the return of the child referred to in Article 42 of the Regulation by using the standard form set out in Annex IV, provided the following conditions have been satisfied:

– the child and the parties were given the opportunity to be heard and the Court has taken into account the reasons for the non-return judgment issued according to Article 13 of the 1980 Hague Convention and the evidence administered in the process.

Hence, certifying the return order under Articles 11.8 and 42 of the Brussels II *bis* Regulation is conditional upon, *inter alia*, the child having been given the opportunity to be heard during the proceedings, unless the hearing of the child is inappropriate.

The judgment becomes enforceable at the moment of issuing the certificate for the return of the child. Article 42.1 Brussels II *bis* Regulation, paragraph 2, entitles the Court to declare the judgment enforceable without bringing prejudice to any appeal. Issuing the certificate for the return of the child has the following legal consequences and effects: it is no longer required to file for *exequatur* and it is not possible to oppose the enforcement of the judgment in the Member State of enforcement.

Article 42.1 Brussels II *bis* Regulation – Return of the child
1. The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.
Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the Court of origin may declare the judgment enforceable.

Return orders issued in the Member State of the child's habitual residence immediately before his/her wrongful removal or retention on the basis of Article 11.8 Brussels II *bis* Regulation are directly enforceable under the enforcement scheme of Section 4.
Thus, there is no need to obtain a declaration of enforceability for return orders which are certified according to Article 42.2 Brussels II *bis* Regulation in a Member State of origin.
Because of these cases, Member States do not trust the domestic procedures of other Countries and the question arises whether a failure to hear a child may be invoked as a reason for declining recognition and enforcement of judgments.

The CJEU, in the decision of 11 July 2008, C-195/08, *Inga Rinau*, ECLI:EU:C:2008:406, has provided some clarifications as to the interpretation of Articles 42.2 Brussels II *bis* Regulation.

CJEU, 11 July 2008, C-195/08, *Inga Rinau*, ECLI:EU:C:2008:406
68. As regards the effects of certification, once the certificate has been issued, the judgment requiring the return of a child referred to in Article 40.1(b) is to be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition.

C. Conclusion

The **issuance of the Certificate** using the standard form in Annex IV (certificate concerning return of the children) according to Article 42 Brussels II *bis* Regulation **does not guarantee the Member State of enforcement that the child has been heard or has been given the opportunity to be heard**.

Case 1

Scenario II

Now assume that the French Court granted a divorce with permanent custody to the father and asked the mother to return the child to the father. The Court issued a certificate in accordance with Article 42 Brussels II *bis* Regulation. In that time the boys where nine and a-half years old and 11 years and mature, so the mother was of the opinion that their views should be taken into account and be heard.

1) May the Court in Greece decide the non-return of the children? Under what circumstances?

2) If Agata considers that the French Court has issued a Certificate in violation of Article 42.2(a) before which Court should she bring legal proceedings?

Answer 1:

A. Find the relevant EU legal sources

1) Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).

Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:

a) divorce, legal separation or marriage annulment;

b) the attribution, exercise, delegation, restriction or termination of parental responsibility.

Territorial scope of application: the Brussels II *bis* Regulation applies **between all Member States of the European Union.**

Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March

2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX%3A32003R2201

2) Hague Convention of 25 October 1980 concerning the **Civil Aspects of International Child Abduction** (hereinafter: the 1980 Hague Convention).
Material scope of application: the 1980 Hague Convention aims to:
a) secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
b) ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
Territorial scope of application: the 1980 Hague Convention applies between the States signatory to the Convention, including **France, Greece and Germany**.
Temporal scope of application: the 1980 Hague Convention applies from 1 December 1983.

FOR FURTHER READING on the 1980 Hague Convention:
https://www.hcch.net/en/instruments/conventions

B. Find the correct provision

The 1980 Hague Convention establishes procedures to secure the urgent return of children to the State of their habitual residence in cases of abduction, establishing only limited exceptions allowing children's non-return, namely:
1) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention (Article 13.1(a));
2) a grave risk that return will expose the child to harm or place him or her in an intolerable situation (Article 13.1(b));
3) the objection by a mature child (Article 13.2); and
4) the violation of fundamental human rights (Article 20).
The child becoming settled due to the passing of time may play a relevant role in this respect according to the Article 12.2 of the 1980 Hague Convention: **but only if more than one year has elapsed between the abduction and the date when the return application was filed with the Court competent to decide upon it**.

Article 12.2 1980 Hague Convention
2. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Article 13 1980 Hague Convention
Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

In the presence of any of those exceptions the Court of the State to which the child was abducted and is currently located has discretion as to whether to return him or her to the Member State of his or her habitual residence. The exceptions therefore do not apply automatically and do not impose on the Judge a duty to refuse to return the child, but give him or her discretion to decide. In addition, the Court must interpret these exceptions strictly, due to the strong presumption favouring the return of the wrongfully removed or retained child under the 1980 Hague Convention.

Article 11.2 Brussels II *bis* Regulation – Return of the Child
2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

The Brussels II *bis* Regulation explicitly states that a child is to be given an opportunity to be heard in return proceedings in the Member State where a child has been wrongfully removed or retained. This provision may be seen as having a precedent in Article 13.2 of the 1980 Hague Convention, according to which the judicial or administrative authority may also refuse to order the return of the child if it finds

that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In the light of the foregoing, it is clear that non-return decision is in the discretion of the Court in the Member State to which the children were abducted, *i.e.* the Court in Greece. The Court in Greece may decide not to return the children to the Germany only in exceptional cases and pursuant to Article 13 of the 1980 Hague Convention.

C. Conclusion

The Court in Greece may decide not to return the children to the Germany only in exceptional cases and pursuant to Article 13 of the 1980 Hague Convention.

Answer 2:

A. Find the relevant EU legal sources

See answer 1, A

B. Find the correct provision

If one of the parties considers that the Court of the Member State of origin has issued a certificate in violation of Article 42.2(a) Brussels II *bis* Regulation, then it must bring legal proceedings before the Court of that Member State.
It is therefore only for the Courts of the Member State of origin to determine whether the judgment certified pursuant to Article 42 Brussels II *bis* Regulation is violated by an infringement of child's right to be heard.
The CJEU, in the decision of 22 December 2010, C-491/10, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, ECLI:EU:C:2010:828, had to decide whether the enforcement of a judgment in accordance with Article 42 Brussels II *bis* Regulation could exceptionally be opposed on the ground that the Court of origin, despite stating in the accompany Certificate that it had fulfilled its obligation to give the child an opportunity to be heard, had in fact not done so. It is solely for the National Courts of the Member State of origin to examine the lawfulness of that judgment with reference to the requirements imposed, in particular, by Article 24 EU Charter of Fundamental Rights and Article 42 Brussels II *bis* Regulation and state that the Courts in the State of enforcement could not oppose the enforcement.

CJEU, 22 December 2010, C-491/10, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, ECLI:EU:C:2010:828
54. The first subparagraph of Article 42.2 in no way empowers the Court of the Member State of enforcement to review the conditions for the issue of that certificate as stated therein.
55. Such a power could undermine the effectiveness of the system set up by Brussels II *bis* Regulation, as described in paragraphs 44 to 51 of this judgment.
56. It follows that, **where a Court of a Member State issues the Certificate referred to in Article 42, the Court of the Member State of enforcement is obliged to enforce the judgment** which is *so certified,* and it has no power to oppose either the recognition or the enforceability of that judgment.

The CJEU decision of 22 December 2010, C-491/10, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, ECLI:EU:C:2010:828 concerns the removal of a minor child from Spain to Germany in breach of custody rulings. The CJEU was asked whether the German Court (*i.e.* the Court of the Country the child was removed to) could oppose the enforcement order by the Spanish Court (the Country of origin) on the basis that the child had not been heard, thereby infringing Article 42.2 Brussels II *bis* Regulation and Article 24 Eu Charter of Fundamental Rights. The child had opposed the return when she expressed her views within proceedings before the German Court.
The CJEU reasoned that hearing a child is not an absolute right, but that if a Court so decides it is necessary, it must offer the child a genuine and effective opportunity to express his or her views. It also held that the right of the child to be heard, as provided in the Eu Charter of Fundamental Rights and Brussels II *bis* Regulation, requires legal procedures and conditions which enable children to express their views freely to be available to them, and the Court to obtain those views. The Court also needs to take all appropriate measures to arrange such hearings, with regard to children's best interests and the circumstances of each individual case.
According to CJEU's ruling, however, the authorities of the Country the child had been removed to (Germany) could not oppose a return of the child on the basis of a breach of the right to be heard in the Country of origin (Spain).

C. Conclusion

If Agata considers that the French Court has issued a Certificate in violation of Article 42.2(a), Brussels II *bis* Regulation, **she must bring legal proceedings in France**, before the Court of the **Member State of origin**.

Case 1*

Jurisdiction over Child Custody and Abduction Issues

Scenario I

Maria, a **Spanish** citizen, and Hugo, a **Polish** citizen, met when both of them were students at the University of Warsaw. They married in Warsaw (Poland). Jorge, their **son**, started preschool in Poland, and his **primary language** was **Polish**.
Unfortunately, Maria and Hugo divorced, with the Polish Court ordering shared custody of Jorge and with Jorge residing with his mother, Maria.
As Maria left Poland with Jorge and moved to Madrid (Spain), without noticing him, Hugo instituted an action before the Spanish Courts in Madrid to return Jorge to Poland. Hugo fully participated in the case. However, the Spanish Court ruled that **returning Jorge to Poland** would cause him severe psychological injury and **was not in the child's best interest**. As a result, the Spanish Court denied Hugo's request.
Subsequently, Hugo brought an action before the Polish Court in Warsaw, seeking a declaration that the Polish Court would not recognize the judgment of the Spanish Court.
Is the Polish Court able to deny recognition of the judgment of the Spanish Court, refusing to return Jorge to Poland?

Answer:

A. Find the relevant EU legal sources

1) Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the

* Katarzyna Antolak-Szymanski (SWPS University of Social Sciences and Humanities).

matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *bis* Regulation applies **between all Member States of the European Union including Spain and Poland.**
Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX%3A32003R2201

2) Regulation (EU) No. 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter: Brussels II *ter* Regulation).
Material scope of application: the Brussels II *ter* Regulation applies in civil matters of:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *ter* Regulation applies **between all Member States of the European Union**.
Temporal scope of application: the Brussels II *ter* Regulation shall apply from 1 August 2022, with the exception of Articles 92, 93 and 103, which shall apply from 22 July 2019 (Article 105).

FOR FURTHER READING on the Brussels II *ter* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR%3A524570fa-9c9a-11e9-9d01-01aa75ed71a1

B. Find the correct provision

Matrimonial matters between married couples, including matters over child custody and abduction issues, fall within the scope of application of the Brussels II *bis* Regulation (cf. Article 1).

The **new Brussels II *ter* Regulation will replace the Brussels II *bis* Regulation**, but **only as regards decisions given in legal proceedings instituted on or after 1 August 2022** (Article 100.1).
As a general proposition, Member States should recognize each other's judgements, pursuant to Recital 21 of the preamble to Brussels II *bis* Regulation.

> Recital 21 Brussels II *bis* Regulation
> The **recognition** and enforcement of judgments given in a Member State should be based on the principle of **mutual trust** and the grounds for non-recognition should be kept to the minimum required.

In the area of family law and specifically child custody, Article 23(a) Brussels II *bis* Regulation creates a limited exception to this general rule.

> Article 23(a) Brussels II *bis* Regulation – **Grounds of non-recognition** for judgments relating to parental responsibility
> A judgment relating to parental responsibility shall not be recognized:
> (a) if such recognition is **manifestly contrary to the public policy** of the Member State in which recognition is sought **taking into account the best interests of the child**.

The public policy exception is quite limited. In particular, it does not give a Member State the right to review another Member State Court's jurisdiction to make a judgment, according to Article 24 Brussels II *bis* Regulation.

> Article 24 Brussels II *bis* Regulation – Prohibition of review of jurisdiction of the Court of origin
> The jurisdiction of the Court of the Member State of origin may not be reviewed. The test of **public policy** referred to in Articles 22(a) and 23(a) may **not be applied to the rules relating to jurisdiction** set out in Articles 3 to 14.

Nor can the substance of that judgment be reviewed, according to Article 26 Brussels II *bis* Regulation.

> Article 26 Brussels II *bis* Regulation – Non-review as to substance
> Under **no** circumstances may a judgment be **reviewed as to its substance**.

Moreover, while a Member State's public policy may provide grounds for the non-recognition of another Member State Court's judgment as to custody, the public policy must be related to the best interest of the child and recognizing the judgment

would result in a "manifest breach" of the legal order of the State. The CJEU, 19 November 2015, C-455/15, *P v Q*, ECLI:EU:C:2015:763, states that:

> CJEU, 19 November 2015, C-455/15, *P v Q*, ECLI:EU:C:2015:763
> 39. Recourse to the **public policy** rule in Article 23(a) Brussels II *bis* Regulation should thus come into consideration **only** where, taking into account the **best interests of the child**, recognition of the **judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which recognition is sought**, in that it would infringe a fundamental principle.
> In order to comply with the prohibition laid down in Article 26 Brussels II *bis* Regulation of any review of the substance of a judgment given in another Member State, the infringement would have to constitute a manifest breach, having regard to the best interests of the child, of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognized as being fundamental within that legal order.

C. Conclusion

It is possible for the Polish Court to deny recognition of the Spanish Court's judgment for Jorge to stay in Spain, **so long as the requirements of Article 23(a) Brussels II *bis* Regulation are met. However**, here, it is **unlikely** that **these strict requirements are met**. According to CJEU, 19 November 2015, C-455/15, *P v Q*, ECLI:EU:C:2015:763, in the facts presented, there is no evidence that a "manifest breach" of the rule of law in Poland would occur by recognizing the Spanish judgment.

ADVANCED

Case 1

Scenario II

Assume the Spanish Court's decision was based on the **erroneous conclusion** that it had **jurisdiction** over the case **pursuant to Article 15 Brussels II *bis* Regulation** (*i.e.*, that the case had been "transferred" to it within the meaning of that Article, while in fact no transfer had ever occurred). **Could the Polish Court refuse to recognize the Spanish Court's judgment, on the basis that it had incorrectly applied EU law (specifically, Article 15 Brussels II *bis* Regulation)?**

Answer:

A. Find the relevant EU legal sources

See Case 1, Scenario 1, A

B. Find the correct provision

Article 24 Brussels II *bis* Regulation prohibits a Court from reviewing the jurisdiction of the Court of another Member State. However, it also acknowledges the public policy exception set forth in Article 23(a) Brussels II *bis* Regulation for non-recognition of judgments, and states that the test of public policy referred to in Article 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

Article 24 Brussels II *bis* Regulation – Prohibition of review of jurisdiction of the Court of origin
The **jurisdiction** of the Court of the Member State of origin **may not be reviewed**. The

test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.

Article 15 Brussels II *bis* Regulation, obviously, is not listed, and arguably this could mean that questions about a Court's jurisdiction could be reviewed under the Article 23(a) Brussels II *bis* Regulation process. Fortunately, the CJEU directly addressed this exact argument in the decision of 19 November 2015, C-455/15, *P v Q*, ECLI:EU:C:2015:763. The CJEU concluded that a Member State could not contest another Member State Court's jurisdiction neither under Articles 3-14 nor Article 15 Brussels II *bis* Regulation, explaining that:

CJEU, 19 November 2015, C-455/15, *P v Q*, ECLI:EU:C:2015:763
44. […] it must be noted that Article 15 of Regulation No 2201/2003, which is in Chapter II, entitled "Jurisdiction", supplements the rules of jurisdiction in Articles 8 to 14 of that chapter by introducing a means of cooperation by which a Court of a Member State which has jurisdiction to hear the case under one of those rules may, by way of exception, transfer it to a Court of another Member State which is better placed to hear the case.
45. It follows that, as the Advocate General observes in point 72 of his view, **an alleged breach of Article 15 of that Regulation by a Court of a Member State does not allow a Court of another Member State to review the jurisdiction of that Court**, despite the fact that the prohibition in Article 24 Brussels II *bis* Regulation does not refer expressly to Article 15.
46. Moreover, it must be recalled that the Court of the State in which recognition is sought cannot, without calling into question the purpose of Brussels II *bis* Regulation, refuse to recognise a judgment from another Member State solely on the ground that it considers that national or EU law was misapplied in that judgment.

Therefore, **even if the Spanish Court made an error of EU law by misapplying Article 15 Brussels II *bis* Regulation**, this alone **would not be enough for Poland to refuse recognition of that Court's judgment**.

C. Conclusion

The **misapplication** of **Article 15 Brussels II *bis* Regulation** by the Spanish Court **does not provide a basis** for the **Polish Court** to **refuse recognition** of the Spanish Court's judgment.

Case 1

Scenario III

Assuming that the Polish Court cannot refuse to grant recognition of the judgment of the Spanish Court ruling that returning Jorge to Poland would cause him severe psychological injury and was not in the child's best interest.
Is there any other procedure under the Brussel II *bis* Regulation by which Polish Courts could attempt to order Jorge to return to Poland?

Answer:

A. Find the relevant EU legal sources

1) See Case 1, Scenario 1, A
2) Hague Convention of 25 October 1980 concerning the **Civil Aspects of International Child Abduction** (hereinafter: the 1980 Hague Convention)
Material scope of application: the1980 Hague Convention aims to:
a) secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
b) ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
Territorial scope of application: the 1980 Hague Convention applies between the States signatory to the Convention, including **Poland and Spain**.
Temporal scope of application: the 1980 Hague Convention applies from 1 December 1983.

FOR FURTHER READING on the 1980 Hague Convention:
https://www.hcch.net/en/instruments/conventions

B. Find the correct provision

Pursuant to Article 11.8 Brussels II *bis* Regulation, notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, **any subsequent judgment which requires the return of the child issued by a Court having jurisdiction under this Regulation** shall be **enforceable** in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Article 11.8 Brussels II *bis* Regulation – Return of the child
8. **Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention**, any subsequent judgment which requires the return of the child issued by a Court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Article 13 1980 Hague Convention
Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

The Polish Court has jurisdiction over the question of custody pursuant to Articles 8 and 11.1 Brussels II *bis* Regulation, since Jorge was a habitual resident of Poland at the time of his removal to Spain by his mother, Maria.

Article 8 Brussels II *bis* Regulation – General jurisdiction
1. The Courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the Court is seised.
2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

Article 11.1 Brussels II *bis* Regulation – Return of the child
1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter "the 1980 Hague Convention"), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

As it has jurisdiction over the case according to Articles 8 and 11.1 Brussels II *bis* Regulation the Polish Court could order the return of Jorge to Poland under Article 11.8 Brussels II *bis* Regulation.

However, as clarified by the CJEU in the decision of 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400 and in the decision of 19 November 2015, C-455/15, *P v Q*, ECLI:EU:C:2015:763:

CJEU, 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400
59. It must be borne in mind that, before making that judgment, the Court which has jurisdiction must take into consideration the reasons for and evidence underlying the decision of non-return. The consideration of those matters is one reason why such a judgment, once it is made, is enforceable, in accordance with the principle of mutual trust which underpins the Regulation.

CJEU, 19 November 2015, C-455/15, *P v Q*, ECLI:EU:C:2015:763
52. It must, however, be recalled that, before making that judgment, the Court which has jurisdiction must take into consideration the reasons for the decision of non-return and the evidence on which it is based (judgment in CJEU, 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400, paragraph 59).

C. Conclusion

As it has jurisdiction over the case according to Articles 8 and 11.1 Brussels II *bis* Regulation **the Polish Court may order the return of Jorge to Poland** under Article 11.8 Brussels II *bis* Regulation.

Case 2*

Scenario I

Hector (**Spanish**) and Ania (**Polish**) are a married couple with a daughter, Jadwiga, **living** in **Salamanca (Spain)**. Unfortunately, they are getting a divorce. Pursuant to the Spanish Court's order granting the divorce, Jadwiga will live with Ania, but both parents have custody rights and Ania is prohibited from taking Jadwiga out of the Country.

One day, Ania moves back to Lublin (Poland), with Jadwiga, without giving any notice to Hector. Therefore, Hector files an **action** in the **Polish** Courts, under the **1980 Hague Convention**, requesting that **Jadwiga be returned to Spain**. In the meantime, the Spanish Court revises its original order, and provisionally allows Ania to take Jadwiga outside of Spain and make decisions for her. The **Spanish Court's revised judgment** also gives **Hector custody rights** and orders a social worker to make another evaluation of the situation to see if Hector's parental rights are being respected. The **Polish Court rejects Hector's request**, based in part on the Spanish Court's revised order, and also because returning Jadwiga to Spain would cause her severe psychological harm.

Subsequently, Ania files a case in the Polish Court, seeking full custody of Jadwiga. The Polish Court then requests that the Spanish Court transfers jurisdiction to it under Article 15.5 Brussels II *bis* Regulation. The Spanish Court refuses, and instead issues a new judgment, pursuant to Article 11.8 Brussels II *bis* Regulation that orders Jadwiga to return to Spain, and certifies this judgment under Article 42 Brussels II *bis* Regulation. However, this order is not a final judgment granting Hector full custody, and the Court reserved making a decision on this point until it could evaluate the entire situation once Jadwiga was back in Spain. The Polish Court then grants provisional custody to Ania.

Did the Spanish Court lose international jurisdiction over the case within the meaning of Article 10 Brussels II *bis* Regulation?

* Katarzyna Antolak-Szymanski (SWPS University of Social Sciences and Humanities).

Answer:

A. Find the relevant EU legal sources

1) Regulation (EU) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: Brussels II *bis* Regulation).
Material scope of application: the Brussels II *bis* Regulation applies, whatever the nature of the Court or Tribunal, in civil matters relating to:
a) divorce, legal separation or marriage annulment;
b) the attribution, exercise, delegation, restriction or termination of parental responsibility.
Territorial scope of application: the Brussels II *bis* Regulation applies **in all Member States of the European Union (including Spain and Poland) except for Denmark (cf. Article 2.3)**.
Temporal scope of application: the Brussels II *bis* Regulation applies from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which apply from 1 August 2004 (Article 72).

FOR FURTHER READING on the Brussels II *bis* Regulation:
https://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX%3A32003R2201

2) Hague Convention of 25 October 1980 concerning the **Civil Aspects of International Child Abduction** (hereinafter: the 1980 Hague Convention).
Material scope of application: the1980 Hague Convention aims to:
a) secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
b) ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
Territorial scope of application: the 1980 Hague Convention applies between the States signatory to the Convention, including **Poland and Spain**.
Temporal scope of application: the 1980 Hague Convention applies from 1 December 1983.

FOR FURTHER READING on the 1980 Hague Convention:
https://www.hcch.net/en/instruments/conventions

B. Find the correct provision

Article 10 Brussels II *bis* Regulation provides special rules of jurisdiction in child abduction cases. Essentially, the Court in the Member State where the child habitually lived prior to the abduction retains jurisdiction, unless and until the following events have occurred:

> Article 10 Brussels II *bis* Regulation – Jurisdiction in cases of child abduction
> In case of **wrongful removal or retention of the child**, the **Courts** of the Member State where the **child was habitually resident immediately before the wrongful removal** or retention shall **retain their jurisdiction until the child has acquired a habitual residence in another Member State** and:
> (a) each person, institution or other body having rights of custody has acquiesced in the removal or retention; or
> (b) the child has resided in that other Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met:
> (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained;
> (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i);
> (iii) a case before the Court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11.7;
> (iv) **a judgment on custody that does not entail the return of the child has been issued by the Courts of the Member State** where the child was habitually resident immediately before the wrongful removal or retention.

The CJEU, in the decision of 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400 has clarified the meaning of Article 10(b)(iv) Brussels II *bis* Regulation:

> CJEU, 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400
> 50. […] the answer to the first question is that Article 10(b)(iv) Brussels II *bis* Regulation must be interpreted as meaning that a **provisional measure does not constitute a "judgment on custody that does not entail the return of the child"** within the meaning of that provision, and **cannot be the basis of a transfer of jurisdiction to the Courts of the Member State to which the child has been unlawfully removed**.

In this case, Ania and the Polish Courts would probably rely on Article 10(b)(iv) Brussels II *bis* Regulation to argue that the Spanish Courts lost jurisdiction. By April, 2017, Jadwiga had lived in Lublin, Poland for one year, and the Spanish Court issued an order in March 2016 allowing Ania to leave Spain with Jadwiga and gave Ania decision making rights. This judgment could be construed as a "judgment on custody that does not entail the return of the child" within the meaning of Article 10(b)(iv) Brussels II *bis* Regulation. However, pursuant to the CJEU's decision in *Doris Povse v Mauro Alpago*, an "**Article 10(b)(iv) Brussels II *bis* Regulation judgment" must be a final judgment**. Here, the Spanish Court's decision was clearly provisional, and therefore the requirements of Article 10 Brussels II *bis* Regulation are not met.

Consequently, **Spain retains jurisdiction over the case**.

C. Conclusion

The Spanish Court did not lose international jurisdiction over the case within the meaning of Article 10 Brussels II *bis* Regulation.

Case 2

Scenario II

Given the facts of scenario I, **does the Spanish Court** have the **right to issue a judgment ordering the return of Jadwiga to Spain, before it makes a final decision about custody**?

Answer:

A. Find the relevant EU legal sources

See Case 2, Scenario 1, A

B. Find the correct provision

Spanish Courts have the right to order the return of the child pursuant to Article 11.8 Brussels II *bis* Regulation.

> Article 11.8 Brussels II *bis* Regulation – Return of the child
> 18. **Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention**, any **subsequent judgment** which requires the return of the child issued by a **Court having jurisdiction** under this Regulation shall be **enforceable** in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Article 13 1980 Hague Convention
Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

More precisely, Spain maintained jurisdiction over this case pursuant to Articles 8 and 10 Brussels II *bis* Regulation and, therefore, has the power to order "any subsequent judgement" requiring Jadwiga's return. The expression "Any… judgment" listed in Article 11.8 Brussels II *bis* Regulation is not limited to final judgments which resolve all custody questions.
While Article 11.7 Brussels II *bis* Regulation specifies certain notice requirements for the parties before such an order is made, so that they can weigh in on the issue of custody, this does not mean the subsequent order for the return of the child has to finally resolve all custodial questions, as clarified by the CJEU, 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400.

CJEU, 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400
67. […] Article 11.8 Brussels II *bis* Regulation must be interpreted as meaning that a **judgment of the Court with jurisdiction ordering the return** of the child **falls within the scope of that provision**, **even if it is not preceded by a final judgment of that Court relating to rights of custody of the child**.

C. Conclusion

Spain **maintained jurisdiction** over this case pursuant to Articles 8 and 10 Brussels II *bis* Regulation, and therefore **has the power to order "any subsequent judgement" requiring Jadwiga's return**.

Case 2

Scenario III

Assume that the Spanish Court makes an Article 11.8 Brussels II *bis* Regulation judgment ordering the return of Jadwiga, and certifies it under Article 42 Brussels II *bis* Regulation.
Is there any lawful way for the Polish Courts to refuse to return Jadwiga to Spain? Specifically, does the 1980 Hague Convention give the Polish Courts the right to refuse to return Jadwiga?

Answer:

A. Find the relevant EU legal sources

See Case 2, Scenario 1, A

B. Find the correct provision

Article 11 Brussels II *bis* Regulation provides a precise procedure to order the return of a child, notwithstanding an order of non-return issued under the 1980 Hague Convention. As Recital 17 Brussels II *bis* Regulation explains:

> Recital 17 Brussels II *bis* Regulation
> In cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end **the 1980 Hague Convention would continue to apply** as complemented by the provisions of this Regulation, in particular Article 11. The

Courts of the Member State to or in which the child has been wrongfully removed or retained should be able to oppose his or her return in specific, duly justified cases. However, such a decision could be replaced by a subsequent decision by the Court of the Member State of habitual residence of the child prior to the wrongful removal or retention. Should that judgment entail the return of the child, the return should take place without any special procedure being required for recognition and enforcement of that judgment in the Member State to or in which the child has been removed or retained.

Normally, the 1980 Hague Convention does permit a State to refuse to return a child in an abduction case in certain limited circumstances, particularly where ordering a return would cause severe harm to the child.

Article 13 1980 Hague Convention
Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:
(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
(b) **there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation**.
The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

However, Article 60(e) Brussels II *bis* Regulation provides that, in relations between Member States, the Regulation is to take precedence over, *inter alia*, the 1980 Hague Convention.

Article 60(e) Brussels II *bis* Regulation – Relations with certain multilateral conventions
In relations between Member States, **this Regulation shall take precedence over the following Conventions** in so far as they concern matters governed by this Regulation:
(e) **the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction**.

As clarified by the CJEU, 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400:

CJEU, 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400
20. Article 60 Brussels II *bis* Regulation headed "Relations with certain multilateral conventions", provides that, in relations between Member States, the Regulation is to take precedence over, *inter alia*, the 1980 Hague Convention.

Accordingly, the Polish Courts cannot use an order of non-return under the 1980 Hague Convention to stop or otherwise block a Member State from making a subsequent return order pursuant to Article 11.8 Brussels II *bis* Regulation.

Likewise, **Article 47 Brussels II *bis* Regulation provides no support to Ania or the Polish Courts in this case.**

Article 47 Brussels II *bis* Regulation deals with enforcement of orders within the scope of the Regulation, including those orders certified under Article 42 Brussels II *bis* Regulation (as was the Spanish Court's Article 11.8 Brussels II *bis* Regulation order to return Jadwiga). In pertinent part, Article 47 Brussels II *bis* Regulation contains the following limitation on enforcement:

Article 47 Brussels II *bis* Regulation – Enforcement procedure
[…] a judgment which has been certified according to Article 41.1 or Article 42.1 cannot be enforced if it is irreconcilable with a subsequent enforceable judgment.

In the case at hand, Ania could argue that the Polish Court's judgment granting provisional custody to her is an "irreconcilable… subsequent judgment" within the meaning of Article 47 Brussels II *bis* Regulation, precluding enforcement of the Spanish Court's order of return.
However, the CJEU, 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400, ruled that Article 47 Brussels II *bis* Regulation, was only referring to irreconcilable judgments in the Member State with original jurisdiction, and not such judgments in the enforcing Member State.

CJEU, 1 July 2010, C-211/10, *Doris Povse v Mauro Alpago*, ECLI:EU:C:2010:400
77. Such irreconcilability might arise not only in cases where the judgment was set aside or varied following legal action brought in the Member State of origin. It was observed at the oral hearing that the Court with jurisdiction may, on its own motion or, in some circumstances, at the request of the social services, revisit its own position, when the interests of the child so require, and hand down a fresh enforceable judgment, without expressly withdrawing the first, which would thereby lapse.
78. To hold that a judgment delivered subsequently by a Court in the Member State of enforcement can preclude enforcement of an earlier judgment which has been certified in the Member State of origin and which orders the return of the child would amount to

circumventing the system set up by Section 4 of Chapter III Brussels II *bis* Regulation. Such an exception to the jurisdiction of the Courts in the Member State of origin would deprive of practical effect Article 11.8 Brussels II *bis* Regulation, which ultimately grants the right to decide to the Court with jurisdiction and which takes precedence, under Article 60 Brussels II *bis* Regulation, over the 1980 Hague Convention, and would recognise the jurisdiction, on matters of substance, of the Courts in the Member State of enforcement.
79. Consequently, the answer to the fourth question is that the second subparagraph of Article 47.2 Brussels II *bis* Regulation must be interpreted as meaning that a **judgment delivered subsequently** by a Court in the Member State of enforcement **which awards provisional custody rights and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously** by the Court which has jurisdiction in the Member State of origin and ordering the return of the child.

Since Poland is the enforcing Member State, its judgment in favor of Ania does not qualify as an Article 47 Brussels II *bis* Regulation irreconcilable judgment.
For an order for the return of the Court to be certified under Article 42 Brussels II *bis* Regulation, there are certain minimum requirements that must be met:

Article 42 Brussels II *bis* Regulation – Return of the child
1. The return of a child referred to in Article 40.1(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.
Even if National law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the Court of origin may declare the judgment enforceable.
2. The Judge of origin who delivered the judgment referred to in Article 40.1(b) shall issue the certificate referred to in paragraph 1 only if:
(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;
(b) the parties were given an opportunity to be heard; and
(c) the Court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.
In the event that the Court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the Certificate shall contain details of such measures.
The Judge of origin shall out of his or her own motion issue that Certificate using the standard form set forth in Annex IV (certificate concerning return of the child(ren)).
The Certificate shall be completed in the language of the judgment.

Pursuant to Article 47 Brussels II *bis* Regulation, once the issuing Court determines that these points have been satisfied, and issues a Certification, the order is essentially automatically enforceable in another Member State, without a possibility of appeal. So in this case, **the Polish Courts cannot lawfully block the return of Jadwiga to Spain**.

C. Conclusion

The Polish Courts cannot lawfully block the return of Jadwiga to Spain.

Case-law

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