Training Material on

Brussels I Recast

ENGLISH VERSION

(case-studies with suggested solutions)
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

JURISDICTION

THE CASE

The facts:

Andreas Häuptling was an eighty-year-old widower residing in Munich. He had seven children, none of whom lives in Germany. Hans, Peter, Martin, James and Michael Häuptling live in the United States, while Wolfgang Häuptling lives in Rome and Rolf Häuptling in Madrid.

On 24 September 2015, as he was taking a walk in Munich, Andreas Häuptling was hit by a police car in pursuit of an alleged terrorist. He was hospitalised immediately, but died of his injuries after two months of intensive care.

On 5 December 2015, his heirs sued the city of Munich and the Federal Republic of Germany before the Munich Landgericht for the death of their father. The court ordered the city of Munich to pay the plaintiffs €100 000 in damages. The city unintentionally paid the plaintiffs’ counsel Jan Schmidt (domiciled in Munich) €100 000 per heir, for a total of €700 000. Jan Schmidt distributed the damages in equal shares to each of the heirs of Andreas Häuptling.

Realising its error, the city of Munich launched a suit before the local court (Munich Landgericht) on 20 January 2016 in order to recover the €600 000 paid erroneously to the heirs of Andreas Häuptling. The suit was launched against Jan Schmidt and Hans, Peter, Martin, James, Michael, Rolf and Wolfgang Häuptling.

Questions:

A. Is the dispute before the Munich court a civil and commercial suit pursuant to Article 1 of Regulation no. 1215/2012?
B. Does the German judge have jurisdiction over Jan Schmidt (i.e. the principal defendant)?
C. Does the Munich court have jurisdiction over the defendants (i.e. the heirs of Andreas Häuptling) not domiciled in Germany?
In particular: does the Munich court have jurisdiction over the defendants domiciled in a third country?
D. What would happen if, during the case, the city of Munich reached a settlement with Jan Schmidt, leading to the charges against him being dropped? Would the German court then cease to have jurisdiction?

Use the following materials:

A) **EUROPEAN LEGISLATION**


B) **CASE LAW**

- CJEU, 11 April 2013, case C-645/11 (ECLI:EU:C:2013:228), *Saphir*
- CJEU, 13 July 2006, case C-539/03 (ECLI:EU:C:2006:458), *Roche Nederland*
- CJEU, 11 October 2007, case C-98/06 (ECLI:EU:C:2007:595), *Freeport*
- CJEU, 21 May 2015, case C-353/13 (ECLI:EU:C:2015:335), *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*
- CJEU, Order 7 March 2013, case C-145/10 (ECLI:EU:C:2011:798), *Painer*
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

SOLUTIONS

○ Question A

Answer: Yes.

In detail: As stated by the CJEU in the sentence of 11 April 2013, case C-645/11 (ECLI:EU:C:2013:228), Saphir, points 37 and 38 of the grounds:

“For the purposes of the recovery of that overpayment, the owner, whether a public or private person, must bring an action against the victims before the civil courts.”

“Likewise, the legal basis for that recovery consists of the rules laid down in Paragraph 812 (1), of the German Civil Code concerning restitution based on unjust enrichment.”

Therefore:

“Article 1 (1) of Regulation no. 44/2001 (currently Article 1 of Regulation no. 1215/2012) must be interpreted as meaning that the concept of ‘civil and commercial matters’ includes an action for recovery of an amount unduly paid in the case where a public body is required, by an authority established by a law providing compensation in respect of acts of persecution carried out by a totalitarian regime, to pay a victim, by way of compensation, part of the proceeds of the sale of land, has, as a result of an unintentional error, paid to that person the entire sale price, and subsequently brings legal proceedings to recover the amount unduly paid.”

○ Question B

Answer: Yes.

In greater detail: The Munich Landgericht has jurisdiction over Jan Schmidt pursuant to Article 4.1 of Regulation no. 1215/2012, since he is domiciled in Munich.

○ Question C
Please note that: it is important to distinguish between Andreas Häuptling’s heirs domiciled within the European judicial area and those domiciled in the USA.

Answer: Based on Regulation no. 1215/2012, the Munich Landgericht has jurisdiction over Andreas Häuptling’s heirs domiciled within the European judicial area, i.e.: Wolfgang Häuptling, domiciled in Rome, and Rolf Häuptling, domiciled in Madrid. However, it is doubtful that the German court would have jurisdiction over the defendants domiciled in third countries, i.e. Hans, Peter, Martin, James and Michael Häuptling.

In detail: As regards Andreas Häuptling’s heirs domiciled in a member State, the Munich Landgericht’s jurisdiction is based on Article 8.1 of Regulation no. 1215/2012, which states:

“Where he is one of a number of defendants in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.”

Article 8.1 of Regulation no. 1215/2012 mentions a criterion attributing jurisdiction for reasons of connection, applicable when:

A) There are several defendants at least one of whom is domiciled in the Member State in which proceedings are pending, and the others are domiciled in different Member States.

B) There is a risk of irreconcilable judgements being issued if they were to be tried separately.

Regarding requirement B), it is important to remember that, as clarified by the Court in the sentence 13 July 2006, case 539/03, Roche Nederland and in the subsequent decision dated 11 October 2007, case C-98/06, Freeport, points 40 and 41:

“in order that decisions may be regarded as contradictory (therefore meeting the requirements of Article 8.1 of Regulation no. 1215/2012), it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact…

It is for the national court to assess whether there is a connection between the different claims brought before it, that is to say a risk of irreconcilable judgements if these claims were determined separately and, in that regard, to take account of all the necessary factors in the case-file, which
may, if appropriate yet without its being necessary for the assessment, lead it to take into consideration the legal bases of the actions brought before that court.”

For a similar ruling, see CJEU, Order 7 March 2013, case C-145/10 (ECLI: EU: C:2011:798), Painer, point 73 of the grounds.

In the case before the Munich Landgericht there is the risk that irreconcilable judgements could be issued if tried separately.

Indeed, as stated by the CJEU in the judgment of 11 April 2013, case C-645/11 (ECLI:EU:C:2013:228), Saphir, points 45 et seq. of the grounds:

“...both the claims in the main proceedings, which are based on recovery of an amount unduly paid...have their origin in a single situation of law and fact, namely the right to compensation which the first .... defendants in the main proceedings ... and the transfer of the disputed sum erroneously made by the Land ... in favour of those defendants”

Therefore (point 48 in the grounds):

“there is a close connection, within the meaning of that provision, between the claims lodged against several defendants domiciled in other Member States in the case where those defendants, in circumstances such as those at issue in the main proceedings, rely on rights to additional compensation which it is necessary to determine on a uniform basis.”

It follows that, because Andreas Häuptling’s heirs are domiciled in Member States of the EU (but not Germany), the German court has jurisdiction pursuant to Article 8.1 of Regulation no. 1215/2012.

With regard to the defendants domiciled in third countries, on the other hand, German jurisdiction cannot be based on Article 8.1 of Regulation no. 1215/2012, even though they are part of a case against multiple defendants which also includes people domiciled in in the EU.

Conf. CJEU, judgment of 11 April 2013, case C-645/11 (ECLI:EU:C:2013:228), Saphir, points 55 and 56 of the grounds:

“In order to sue a co-defendant before the court of a Member State on the basis of Article 6(1) of Regulation no. 44/2001 (currently: Article 8.1 of Regulation no. 1215/2012), it is necessary that that person should be domiciled in another Member State... In those circumstances, the answer to
the third question is that Article 6(1) of Regulation no. 44/2001 (currently Article 8.1 of Regulation no. 1215/2012) must be interpreted as meaning that it is not intended to apply to defendants who are not domiciled in another Member State, in the case where they are sued in proceedings brought against several defendants some of whom are also persons domiciled in the European Union.”

Likewise, German jurisdiction cannot be based on Article 7 of Regulation no. 1215/2012 (i.e. on a special venue) since in order to be applied, the rules contemplated by this provision require that the defendant, i.e. all of the defendants be domiciled in a Member State.

So, it is important to verify whether the German court is justified in declaring jurisdiction over the defendants domiciled in a third country based on its own national procedural law. If this is not the case, the Munich Landgericht must declare itself without jurisdiction over the defendants domiciled outside the EU, i.e.: Hans, Peter, Martin, James and Michael Häuptling. In other words: the Munich Landgericht cannot initiate a joinder against all of Andreas Häuptling’s heirs.

Take note: If the case were being tried in Italy instead of Germany, the Italian court would have jurisdiction pursuant to Article 3.2 of Law 218 of 13 May 1995 which refers to the provisions of Title II, Section 2 of the 1968 Brussels Convention. Applicable provisions of the Brussels Convention include Article 6(1).

Law 218 of 1995 extends the application of Article 6(1) of the Brussels Convention to cases in which some of the defendants are domiciled in third countries. In this way, multiple defendants can be tried in Italy even when some of them are not domiciled in the European judicial area but in a third country.

**Question D**

**Answer:** No, in principle, the Munich Landgericht will continue to have jurisdiction for the case against the defendants domiciled in other Member States.

**In detail:** On numerous occasions, the CJEU has stated that Article 6(1), of Regulation no. 44/2001 (currently Article 8.1 of Regulation no. 1215/2012) cannot be applied to allow the plaintiff to sue a defendant domiciled in the Member State of the referring judicial body solely to remove the other defendants from the court of their domicile: *ex multis* CJEU, case C-103/05 (ECLI: EU:C:2006:471), point 32; and CJEU, Order 7 March 2013, case C-145/10 (ECLI: EU:C:2011:798), Painer, point 78 of the grounds.
Nonetheless, the CJEU stated that the referring court may apply Article 8.1 of Regulation no. 1215/2012 without first having to check whether the plaintiff intends to remove one of the defendants from the courts of his/her Member State of domicile: CJEU, 11 October 2007, case C-98/06 (ECLI:EU:C:2007:595), Freeport, point 54 of the grounds.

As stated in CJEU, 21 May 2015, case C-353/13 (ECLI:EU:C:2015:335), Cartel Damage Claims (CDC) Hydrogen Peroxide SA, point 29 of the grounds, it follows that:

“the court seised of the case can find that the rule of jurisdiction laid down in that provision has potentially be circumvented (Article 8.1 of Regulation no. 1215/2012) only where there is firm evidence to support the conclusion that the applicant artificially fulfilled, or prolonged the fulfilment of that provision’s applicability.”

and (point 32):

“simply holding negotiations with a view to concluding an out-of-court settlement does not in itself prove such conclusion. However, it would be otherwise if it transpired that such a settlement had, in fact been concluded, but that it had been concealed in order to create the impression that the conditions of application of Article 6(1), of Regulation no. 44/2001 (currently Article 8.1 of Regulation no. 1215/2012) had been fulfilled.”
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

SCENARIO II

The facts:

Imagine you are counsel for Wolfgang Häuptling, domiciled in Rome, who tells you that he was never served with the claim form initiating proceedings but had learned of the pending case before the Munich Landgericht from his cousin, and that he had been declared in default.

Questions:

A. What would you do to protect your client’s position?

Use the following materials:

A) EUROPEAN LEGISLATION


Answer: The pending proceedings before the Munich Landgericht has an error in the proceeding. Indeed, pursuant to Article 28, par. 1 and 3, of Regulation no. 1215/2012

“Where a defendant domiciled in a Member State is sued in a court of another Member State and does not enter an appearance... the court shall stay the proceedings for as long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.”

Thus, Wolfgang Häuptling may implement the necessary legal initiatives to demonstrate this error in proceeding before the German court.

Co-funded by the Justice Programme of the European Union
Take note: Should Wolfgang Häuptling not take these steps before the German court, the judgement by default will be automatically recognised in Italy and the impediment cannot be invoked under Article 45.1 (b) of Regulation no. 1215/2012, which states:

“On the application of any interested party, the recognition of a judgement shall be refused:

(…)

where the judgement was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgement when it was possible for him to do so”
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

GENERAL BIBLIOGRAPHY:

BIRKS, Private International Law in English Courts, 2014.
GUINCHARD (Edited by), Le nouveau Règlement Bruxelles I bis, Bruxelles, 2014.
MALATESTA (Edited by), La riforma del regolamento Bruxelles I, Milano, 2016.
MAGNUS, MANKOWSKI (Edited by), Brussels I bis Regulation, Cologne, 2016.
NYUT, La refonte du règlement Bruxelles I, Revue critique droit international privé 2013, p. 1 ss.
RAUSCHER, EuZPR-EuIPR, 4 Auflage, München, 2015.
SCHLOSSER, HESS, EuZPR, 4 Auflage, München, 2015.
SALERNO, Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione), Cedam, Milano, 2015.
SCHLOSSER, HESS, EuZPR, 4 Auflage, Beck, München, 2015.

Co-funded by the Justice Programme of the European Union
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

**CHOICE OF COURT AGREEMENT**

**THE CASE**

The facts:

Jean-Marie Le Guen s.à.r.l. (hereinafter: the French company) is a limited-liability company governed by French law with its registered office and principle place of business in Nantes, France. The company sells professional and consumer apps for android smartphones on its website available to all EU Member States. One of these apps is “Smiling Tom”. This app has been so successful that it has become a term to indicate a trendy product and describe a telephone’s high level of functioning.

When signing the individual license for the app—available only in French with an (unofficial) English translation for commercial purposes only—buyers are invited to accept the following clauses with a click:

1. the language of contract is French
2. prorogation of jurisdiction, with the following wording: “All disputes regarding the individual license agreement or any other agreement deriving here from or related hereto will be submitted to the Paris Court, while the French company reserves the right to seise any other competent court.”

Mihael Kregar, a Slovenian consumer domiciled in Maribor, Slovenia, buys the “Smiling Tom” app on the French company’s on-line platform while on holiday in Turkey. He neither speaks nor understands French. After an hour of use, the app permanently and irreparably damages his new and very costly Samsung telephone.

**Question:**

A. Before which court can Mihael Kregar sue the French company for damages?

**Use the following materials:**

A) **EUROPEAN LEGISLATION**
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

SOLUTIONS

○ Question A

Answer: Mihael Kregar has two possibilities. He can:

1. sue the French company at the Nantes court, the city of its registered office
2. sue the French company before the court of his domicile (forum actoris), i.e. before the Maribor court in Slovenia pursuant to Article 18.1 of Regulation no. 1215/2012

In detail:

N.B.: The fact that the “Smiling Tom” app was purchased in Turkey is irrelevant for the application of Regulation no. 1215/2012. The only significant piece of information for the application of this Regulation is that both the plaintiff and the defendant are domiciled in two Member States (Slovenia and France).

Invalidity of the Choice of Court Clause indicated in the individual license contract:

Mihael Kregar is a consumer and the French company is a company that sells apps on line to professionals and consumers. Its activity is directed to multiple States, including the Member State in which the consumer is domiciled. Consequently, the provisions of Section IV of Regulation no. 1215/2012 apply.

Specifically, according to Article 17.1 (c), the rules under Section 4 apply when:

“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.”

In particular, in this case, Article 19 of Regulation no. 1215/2012 applies, by virtue of which:
“The provisions of this Section [Section IV Regulation no. 1215/2012: on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters] may be departed from only by an agreement:

1) which is entered into after the dispute has arisen
2) which allows the consumer to seise a court other than those indicated in this Section, 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.

It follows that, since the prorogation of jurisdiction clause was included in the individual license contract before the dispute arose, it must be considered invalid.

Article 18.1 of Regulation no. 1215/2012 applies, stating:

“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.”

So, in this case, Mihael Kregar has two possibilities:

1. sue the French company before the Nantes court, as the court of the defendant’s domicile;
2. sue the French company before the court of his domicile (forum actoris), i.e. before the Maribor court in Slovenia pursuant to Article 18.1 1of Regulation no. 1215/2012.
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

**SCENARIO II**

The facts:

Imagine that, in the case described above, the purchaser of the “Smiling Tom” app is a professional domiciled in Maribor, Slovenia, who neither speaks nor understands French.

Question:

A. Before which court can the professional sue the French company for damages?

Use the following materials:

A) EUROPEAN LEGISLATION AND CASE LAW OF THE COURT OF JUSTICE


B) NATIONAL CASE LAW

– Cour de cassation, Première chambre civile, 12 September 2012, case no. 11-26.022, La société Banque privée Edmond de Rothschild Europe v. Mme X
– Cour de cassation, Première chambre civile, 25 March 2015, case no. 13-27.264, ICH v Crédit Suisse
– Cour de cassation, Première chambre civile, 7 October 2015, case no. 14-16.898, Société MJA v. Société Apple Sales international et autres
– Landgericht Mainz, 13 September 2005, 10 HKO 112/04
– Oberlandesgericht Hamm, 20 September 2005, 19 U 40/05

Co-funded by the Justice Programme of the European Union
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

SOLUTIONS

○ Question A

Answer: It depends:
- If the prorogation of jurisdiction clause is considered valid, the professional must seize the Paris court.
- If the prorogation of jurisdiction clause is considered invalid, the professional may seize the court of the jurisdiction of the French company’s registered office, i.e. Nantes.
The question of the validity of the prorogation of jurisdiction clause is controversial.

Take Note: The fact that the “Smiling Tom” app was purchased in Turkey is irrelevant for the application of Regulation no. 1215/2012. The only significant pieces of information for the application of this Regulation are:
1. the fact that the prorogation of jurisdiction is a judicial authority of a Member State (Paris, France)
2. The fact that both the plaintiff and the defendant are domiciled in two Member States (Slovenia and France)

Legal definition of an asymmetrical jurisdiction clause
A choice of court agreement can be defined as asymmetrical when one of the contracting parties is required to seize a specific jurisdiction (in this case, the court of Paris, France), while the other is free to seize any other court having jurisdiction pursuant to Regulation no. 1215/2012 (the French company in this case).

In detail:

The professional and the French company agreed to a prorogation of jurisdiction clause pursuant to Article 25 Regulation no. 1215/2012, which states:

“If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member
State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:

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

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

I. On the formal validity of the prorogation of jurisdiction clause pursuant to Article 25 Regulation no. 1215/2012

a) On the formal validity of the prorogation of jurisdiction clause agreed to via click wrapping

In the case Jaouad el Majdoub v. CarsOnTheWeb. Deutschland GmbH (judgement, 21 May 2015, case C-322/14), the Court of Justice stated that

“The purpose [of Article 25.2 of Regulation no. 1215/2012] therefore, 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.” (Point 36 of the judgement).

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 of Regulation no. 1215/2012.
II. I. On the substantive validity of the prorogation of jurisdiction clause pursuant to Article 25 Regulation no. 1215/2012

a) On the substantive validity of the prorogation of jurisdiction clause written in a language not understood by one of the parties (in this case, the professional)

Article 25.1 of Regulation no. 1215/2012 does not deal with the substantial validity requirements for the prorogation of jurisdiction clause, referring to the point on the substantive law of the Member State of the chosen court (in this case, France).

It follows that in this case, if seised, the French court of Nantes will apply its national law to determine the substantive validity of the prorogation of jurisdiction clause.

Should the French court, based on French law, find that the clause is substantively valid, despite the professional being unable to speak or read French, one might wonder the following:

III. I. On the validity of the so-called asymmetric prorogation of jurisdiction clause pursuant to Article 25 Regulation no. 1215/2012

Premise

Article 25 of Regulation no. 1215/2012 (and Article 23 of Regulation no. 44/2001) does not expressly consider the existence of an asymmetrical prorogation of jurisdiction clause. On the contrary, Article 17.5 of the 1968 Brussels Convention stated:

“If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention.”

So, the question of the validity of the asymmetrical prorogation of jurisdiction clause remains open, given the silence of Article 25 of the Regulation 1215/2012, and the Court of Justice’s failure to address it (to date).

In some Member States, the silence of Article 25 of Regulation no. 1215/2012 is interpreted in line with the old text of Article 17 of the 1968 Brussels Convention. The admissibility of the
asymmetrical prorogation of jurisdiction clause is considered to be so obvious and based on the principles of the parties’ private autonomy. Such kind of clauses are governed in their formal aspects by Article 25 of Regulation no. 1215/2012. In other Member States, however, the silence of Article 25 of Regulation no. 1215/2012 is interpreted as meaning the asymmetrical prorogation of jurisdiction clauses are not allowed.

What is clear is that the national courts will be required to find a solution to this question. In this case, in particular, based on Article 25.1 of Regulation no. 1215/2012, we must refer to the position taken by French case law since the substantive validity of the prorogation of jurisdiction clause will be decided based on French law.

Solutions offered by national case law (French and Italian)

a) French case law

Case law has evolved in France. Firsty, the French case law (see Cour de cassation, Première chambre civile, 12 September 2012, case no. 11-26.022, La société Banque privée Edmond de Rothschild Europe v. Mme X) denied the validity of the asymmetrical prorogation of jurisdiction clause, based on the French condition purement potestative doctrine, which would render invalid any agreement subject to it. This condition applies whenever a party to a contract is granted discretionary power to determine the content and means of performance of its obligations. So, the invalidating discretionary nature of the entire agreement would be found in the asymmetrical structure of the prorogation of jurisdiction clause.

This position was subsequently mitigated, not denying the admissibility of the prorogation of jurisdiction clause per se, but just when formulated in such a way as to make it impossible for a party to predict the opposing party’s choice of court (see Cour de cassation, Première chambre civile, 25 March 2015, case no. 13-27.264, ICH v Crédit Suisse, with reference to the Lugano Convention).

A more recent decision refers to Article 23 of Regulation no. 44/2001, based on the argument used in the 2015 judgement ICH v Crédit Suisse, that found the prorogation of jurisdiction clause admissible when formulated in such a way as to make it obvious which court could be chosen by the opposing party (see Cour de cassation, Première chambre civile, 7 October 2015, case no. 14-16.898, Société MJA v. Société Apple Sales international et autres).
b) Italian case law

In Italy, the asymmetrical prorogation of jurisdiction clause is considered valid and effective. Cass., Sez. Un., ord., 8 March 2012, no. 3624 ruled in this sense.

c) British and German case law

British case law follows the same lines as Italian case law (see Mauritius Commercial Bank v. Hestia [2013] EWHC 1328 (Comm)).

German case law considers the clause valid provided the court to be chosen by the opposing party can be clearly identified (see Landgericht Mainz, 13 September 2005, 10 HKO 112/04). This requirement is not met when the opposing party is free to choose jurisdiction (Oberlandesgericht Hamm, 20 September 2005, 19 U 40/05).

IV. In conclusion

Given all of the above, we can identify the following possibilities in our case:

The following might occur if the professional chooses the Paris court under the asymmetrical prorogation of jurisdiction clause:

1. The French court (in Paris) considers the clause to be valid, affirming its jurisdiction and ruling on the matter at hand;
2. The French court (in Paris) considers the clause to be invalid; in this case, it is required to decline its jurisdiction. In this case, the professional may seise the court having jurisdiction, i.e. pursuant to Article 4 of Regulation no. 1215/2012 the court having the general jurisdiction (Nantes).

Once the Nantes court has been chosen, it will be bound by the decision of the Paris court based on the decision of the Court of Justice, 12 November 2012, case C-456/11 (ECLI:EU:C:2012:719), Gothaer Allgemeine Versicherung et al. v. Samskip GmbH, which states:

“Thus, a judgement by which a court of a Member State has declined jurisdiction on the basis of a jurisdiction clause, on the ground that that clause is valid, binds the courts of the other Member States both as regards that court’s decision to decline jurisdiction, contained in the
operative part of the judgement, and as regards the finding on the validity of that clause, contained in the ratio decidendi which provides the necessary underpinning for that operative part.” (Point 41).
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

GENERAL BIBLIOGRAPHY:

HENKE, *La corte di cassazione francese e le clausole di proroga “asimmetrica”*, Int’l Lis 2013, p. 75 ss.
MAGNUS, MANKOWSKI (Edited by), *Brussels I bis Regulation*, Cologne, 2016.
SILVESTRI, Recasting Bruxelles I: il nuovo regolamento n. 1215 del 2012, Rivista trimestrale di diritto e procedura civile 2013, p. 677 et seq.
SALERNO, *Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n. 1215/2012 (rifusione)*, Cedam, Milano, 2015
**European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice**

Associate Partners:

---

**LIS ALIBI PENDENS**

**THE CASE**

The facts:

Tom, domiciled in Turin, works as a commercial agent for Jerry, who is domiciled in Passau, Germany. Claiming default by Tom, Jerry considers their agency contract to be terminated. Not understanding how he was at fault, Tom decides to sue Jerry for damages for unjustified withdrawal from the agency contract.

**Questions:**

A. In which Member State can Tom sue Jerry for damages?
B. Can Tom sue Jerry in both Italy and Germany at the same time?

**Use the following materials:**

A) **EUROPEAN LEGISLATION**


B) **COURT OF JUSTICE AND NATIONAL CASE LAW**

– Cass.(ord), 11 December 2012, no. 22731

---

*Co-funded by the Justice Programme of the European Union*
**SOLUTIONS**

○ **Question A**

**Answer:** Tom may bring his suit in both Germany and Italy.

**In detail:** Tom may bring an action against Jerry before the German court, i.e. before the judicial authorities of Jerry’s domicile (Passau, Germany), pursuant to Article 4.1 of Regulation no. 1215/2012 (“Jurisdiction”).

In order to initiate proceedings in Italy, and namely, before the judicial authorities of Turin, Tom may choose the “special jurisdiction” referred to in Article 7.1 (b) of Regulation no. 1215/2012 which states that, in cases of the provision of services, a person domiciled in a Member State may be sued in the place in a Member State where the services were or should have been provided under the contract (in this case: Turin).

The CJEU clarifies this with its judgement in the case C-19/09 (ECLI:EU:C:2010:137), *Wood Floor Solutions v. Silva Trade*, (current) Article 7.1 (b) of Regulation no. 1215/2012 (in the judgement, Article 5.1 (b) of Regulation no. 44/2001) applies to the provision of services under an agency contract.

If he intends to make use of the jurisdiction criterion referred to in Article 7.1 (b) of Regulation no. 1215/2012 Tom must bring his suit before the Turin court, competence (“competenza”) (“giudice di pace” or “Tribunale”) depending on the value of the claim. Turin is the place in which the services were performed according to Article 7.1 (b) of Regulation no. 1215/2012.

On the other hand, Articles 18 et seq. of the CCP do not apply. Indeed, Article 7 of Regulation no. 1215/2012, as clarified by Cass., (ord.), 11 December 2012, no. 22731:

*“Is not limited to identifying the law in which a transnational dispute may be rooted, but also designates the territorially competent court within it, without leaving space for the provisions of territorial competence dictated by Articles 18 et seq. of the CCP.”*
In other words, Article 7 of Regulation no. 1215/2012 not only designates the State of the judge having jurisdiction in the cross-border dispute, but also the territorial competence of the court in the State having jurisdiction.

○ **Question B**

**Answer:** Yes.

**In detail:** Tom can initiate the same proceedings against Jerry in both Italy and Germany. However, pursuant to Article 29, paragraphs 1 and 3 of Regulation no. 1215/2012, the second judicial authority seised is required to stay proceedings until the jurisdiction of the first court seised has been established. When the jurisdiction of the first judicial authority seised is ascertained, the second judicial authority seised must decline jurisdiction in favour of the first.

To establish which court was seised first, both the Italian and German courts must comply with the uniform criteria established by Article 32 of Regulation no. 1215/2012.

“1 For the purposes of this Section, 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 claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant; 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 claimant has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

The authority responsible for service referred to in point (b) shall be the first authority receiving the document to be served.

2 The court or the authority responsible for service, referred to in paragraph 1, shall note, respectively, the date of the lodging of the document instituting the proceedings or the equivalent document, or the date of receipt of the documents to be served.”
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

SCENARIO II

The facts:

Given the facts described in the case above, let’s assume that Jerry initiates proceedings against Tom in Germany (and, namely, before the Passau court) in order to have ascertained by the court that he cannot claim any compensation from Tom.

Questions:

A. Can the German court decide on the merits of the case or must it decline jurisdiction?
B. While the case is pending in Germany against Tom, can Tom initiate proceedings in Italy requesting compensation from Jerry?
C. If the compensation hearing is begun in Italy and proceeds despite the simultaneous pending of the German proceedings, and concludes with a judgement before the German one, initiated first, will the Italian judgement be automatically recognised in Germany based on Regulation no. 1215/2012?

Use the following materials:

A) EUROPEAN LEGISLATION


B) CASE LAW

– CJEU, 6 December 1994, case C-406/92 (ECLI:EU:C:1994:400), Tatry
– CJEU, 27 April 2004, case C-159/02 (ECLI:EU:C:2004:228), Turner v. Grovit
– CJEU, 9 December 2003, case C-116/02 (ECLI:EU:C:2003:657), Gasser v. MISAT

Co-funded by the Justice Programme of the European Union
**SOLUTIONS**

- **Question A**

  **Answer:** The German court must declare itself as not having jurisdiction.

  **In detail:** Jurisdiction for negative declaratory relief is identified on the same basis as actions for performance (declaratory relief), i.e. applying Article 4 of Regulation no. 1215/2012. Therefore, in this case, *Jerry* should have sued *Tom* before the Italian court, since Tom is domiciled in Turin.

- **Question B**

  **Answer:** Yes, a case like this can happen.

  **In detail:** *Tom* may claim damages from *Jerry* before the Italian court. However, the Italian court seised second (after the German one) must stay proceedings until the German judicial authorities decline jurisdiction pursuant to Article 29 of Regulation no. 1215/2012. Indeed, EU *lis pendens* exists between the negative declaratory proceeding pending in Germany between *Tom* and *Jerry* and the damages proceedings initiated subsequently in Italy between the same parties. Namely, the two cases share the same (i) subject matter, and the same (ii) parties, as required by Article 29 of Regulation no. 1215/2012;

  i) **Same subject matter:** as stated by the Court of Justice in its judgement of 6 December, case C-406/92 (ECLI:EU:C:1994:400), Tatry, the cause of action is the same. Indeed, “As to liability, the second action has the same object as the first, since the issue of liability is central to both actions” (see point 43 of the grounds).

  ii) **Same parties:** in this case, the parties are the same even though in the German case, *Tom* is the defendant and *Jerry* the plaintiff, while the roles are reversed in the Italian case.
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

As shown by the CJEU in the judgment of 6 December 1994, case C-406/92 (ECLI:EU:C:1994:400), Tatry, point 31 of the grounds:

“The question of whether the parties are the same cannot depend on the procedural position of each of them in the two actions, and that the plaintiff in the first action may be the defendant in the second.”

Article 29 of Regulation no. 1215/2012 on lis pendens also applies in cases, like this one, where it seems obvious that the court seised first must declare that it does not have jurisdiction because it is seised in contempt of Article 4 of Regulation no. 1215/2012.

On the same lines, see:

CJEU, 27 April 2004, case C-159/02 (ECLI:EU:C:2004:228), Turner v. Grovit, points 24-36 of the grounds:

“The Convention is necessarily based on the trust which the Contracting States accord to one another’s legal systems and judicial institutions. It is that mutual trust that has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgements in favour of a simplified mechanism for the recognition and enforcement of judgements. It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them. [...] the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State.”

CJEU, 9 December 2003, case C-116/02 (ECLI:EU:C:2003:657), Gasser v. MISAT, point 73 in the grounds, affirms that the law on lis pendens is also applied when “the duration of proceedings before the courts of the Contracting State in which the court first seised is established is excessively long”.

Therefore, in application of Article 29.1 of Regulation no. 1215/2012, the Italian court seised second must stay proceedings until the German court has declined jurisdiction.
Question C

Answer: Yes.

In detail: Failure by the Italian court to observe Article 29.1 of Regulation no. 1215/2012 is conduct that, in itself, does not constitute any obstacle to recognition referred to in Article 45 of the Regulation.
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

**SCENARIO III**

**The facts:**

Given the facts indicated in the aforementioned case, let’s assume that Tom and Jerry’s agency contract includes a jurisdiction clause designating the Italian courts for disputes arising from the contract, and that despite that, Jerry wants to petition the Passau court to declare that no damages are due from him.

**Questions:**

A. Pending Jerry’s negative declaratory action against Tom in Germany (before the Passau court), can Tom ask the court to award compensation from Jerry?

B. Imagine that the jurisdiction agreement was made verbally, in a “form which accords with practices which the parties have established between themselves” pursuant to Article 25.1 (b) of Regulation no. 1215/2012: can Tom bring compensation proceedings in Italy against Jerry while the German proceedings are still pending?

**Use the following materials:**

A) **EUROPEAN LEGISLATION**


B) **CASE LAW**

– CJEU, 9 December 2003, case C-116/02 (ECLI:EU:C:2003:657), Gasser v. MISAT
SOLUTIONS

- **Question A**

**Answer:** Yes, a case like this can happen, but with the following consequences.

**In detail:** Pending Jerry’s negative declaratory action against Tom in Germany (before the Passau court), Tom can sue in Italy against Jerry and the provisions of Regulation no. 1215/2012 governing lis pendens apply.

In this regard, we should highlight a major difference between Regulation no. 44/2001 and Regulation no. 1215/2012.

Under Regulation no. 44/2001, the Italian court, seised second, although having exclusive jurisdiction to rule on the case, should have stayed its ruling until the German judicial authorities decided their own jurisdiction.

See CJEU, 9 December 2003, case C-116/02 (ECLI:EU:C:2003:657), *Gasser v. MISAT*, points 42 and 43 of the grounds:

“In a situation of lis pendens, the court second seised must stay proceeding of its own motion until the jurisdiction of the court first seised has been established and, where it is so established, must decline jurisdiction in favour of the latter [...] not draw any distinction between the various heads of jurisdiction provided for in the Brussels Convention.”

However, application of the principle of priority established by Article 27 of Regulation no. 44/2001 in regard to lis pendens had favoured the use of so-called torpedo actions. This was a dilatory technique in which the party seeking to “postpone” performance of an obligation, in defiance of the jurisdiction clause inserted in the contract that is the source of the obligation, usually sought a negative declaratio of the existence of the obligation in an judgement system in which civil actions were quite long.

In this way, the creditor, who was forced to take proceedings second to present his case for a judgement on the merits in a Member State having jurisdiction based on the contractual clause, was
forced to wait for the court seised first to decline jurisdiction. However, it could take a long time for such a negative opinion to be issued in systems in which civil actions were “unreasonably” long.

Regulation no. 1215/2012 sought to eliminate so-called *torpedo actions.*

See recital no. 22:

“To enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation in which a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive court-of-choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings.”

Also, see Article 31.2 of Regulation no. 1215/2012:

“Without prejudice to Article 26, where a court of a Member State on which an agreement referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

In application of Article 31 of Regulation no. 1215/2012, the Italian court, having exclusive jurisdiction, is not required to stay proceedings and may issue a judgement on the merits, irrespective of the fact that an (originating) negative opinion is pending before the German court.

**Question B**

**Answer:** Yes, but there might be a problem applying Article 31.2 of Regulation no. 1215/2012:
In detail: Pending Jerry’s negative declaration request against Tom in Germany (before the Passau court), Tom can petition the Italian court for compensation from Jerry. However, at this point, *lis pendens* rules must apply, i.e. Article 31.2 of Regulation no. 1215/2012, application of which might be problematic in this case.

Indeed, Article 31.2 is applicable “where a court of a Member State on which an agreement referred to in Article 25 confers exclusive jurisdiction is seised, any court”. The provision makes no distinction between the form in which the choice-of-court agreement was made, thereby also including in its scope the possibility that it the agreement might be verbal.

However, the party seeking application of Article 31.2 of Regulation no. 1215/2012, albeit sharing this interpretation, must provide proof of the existence of a verbal agreement, as a “form which accords with practices which the parties have established between themselves” (Article 26.1 (b)).

In the absence of such proof, the court cannot apply Article 312 of Regulation no. 1215/2012 neither of its own motion nor on a petition by the interested party.

Co-funded by the Justice Programme of the European Union
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

SCENARIO IV

The facts:

Given the facts indicated in the aforementioned case, let’s assume that, taking advantage of the fact that Tom is in New York to take a master course, Jerry brings an action against him before the New York court seeking a ruling stating that he owes nothing to Tom for his withdrawal from the agency contract.

Question:

A. Upon returning to Italy (let’s say: after 20 January 2015), can Tom file an application for damages against Jerry before the Turin court even though the case is pending in New York?

Use the following materials:

A) EUROPEAN LEGISLATION

– Law 218 of 31 May 1995, reforming the Italian international private and procedural legal system.

B) NATIONAL CASE LAW

– Cass.sez. Un., 28 November 2012, no. 21108

Co-funded by the Justice Programme of the European Union
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

SOLUTIONS

○ Question A

Answer: Yes.

N.B.: Since the Italian proceeding was initiated after 10 January 2015, i.e. after the entry into force of Regulation no. 1215/2012, the case will be governed by Article 33 of Regulation no. 1215/2012, and not by Article 7 of Law 218 of 1995.

In detail: Tom can initiate damages proceedings before the Turin court.

However, the Turin court may suspend proceedings if the conditions indicated in Article 33 of Regulation no. 1215/2012 are met, namely:

- that its jurisdiction is based on Article 4 (general forum) or on Articles 7, 8 or 9 (special jurisdictions) of Regulation no. 1215/2012;

- that in a non-Member State of the EU, i.e. a third country (in this case, the USA, New York State) proceedings are pending having the “same cause of action and the same parties”, in the meaning given to this expression by the Court of Justice with reference to the institution of Community lis pendens;

- that the pending judgement in the third country (USA, New York) concerns the same parties;

- that the pending judgement in the third country (USA, New York) was initiated before the Italian one;

- that the judgement on the merits issued upon the conclusion of the pending proceedings in the third country (USA, New York) is recognised in Italy pursuant to Article 64 of Law 218 of 1995;

- that, in its opinion, suspension is necessary for the proper administration of justice (this is at the court’s discretion, resulting in a discretionary suspension of proceedings).

As for the application of Article 33.2 of Regulation no. 1215/2012, paragraph 4 states:
“The court of the Member State shall apply this article on the application of one of the parties or, where possible under national law, of its own motion.”

So, the Turin court may evaluate *of its own motion* whether the requisites for discretionary suspension of the proceedings pending before it can exist, pursuant to Article 33 of Regulation no. 1215/2012.

In decision 21108 by the Joint Chambers dated 28 November 2012, referring to Article 7 of Law 218 of 1995, the Court of Cassation stated that, within our system, the international *lis pendens* exception can also be applied by the court of its own motion:

“*It [...] should be remembered that, although the wording of the law might imply the need for an objection by one of the parties (“When... previous pending proceedings are stayed”), the court may declare lis pendens of its own motion.”*

The Supreme Court believes that only in this way is it possible to “favour an economy of proceedings and avoid conflict between res judicata”.

“Moreover [...] if one considers the declaration of *lis pendens* subordinate to an objection, it could be without time limit, therefore *secondum eventum litis* could be proposed, with the identification of a clear and unreasonable imbalance between the parties’ positions”.

---

Co-funded by the Justice Programme of the European Union
**Scenario V**

The facts:

Let’s assume that Jerry is domiciled in New York, instead of Passau, while Tom is still domiciled in Turin where he works as a commercial agent for Jerry.

Question:

A. Considering Jerry’s withdrawal unjustified, could Tom take action for compensation against him before the Turin court, even though Jerry had already initiated proceedings in New York with a request for a negative opinion on his liability?

Use the following materials:

A) European legislation

– Law 218 of 31 May 1995, reforming the Italian international private and procedural legal system.
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

SOLUTIONS

○ **Question A**

**Answer:** Yes

**In detail:** Tom can initiate damages proceedings before the Turin court.

However, in this case:

- since Jerry is domiciled in New York (and not in a Member State), the Italian court’s jurisdiction cannot be based on Article 4 (general forum) or on Article 7 (special jurisdiction) of Regulation no. 1215/2012.

Rather, Italian jurisdiction is based on Article 3 of Law 218 of 1995. In this case, Italian jurisdiction is based on Article 3.2 of Law 218 of 1995; which contains a reference to the provisions of Section II Title II of the 1968 Brussels Convention. The applicable provisions include Article 5.1, whereby, in cases of the provision of services, a person may be sued in the court of the place in which the services were or should have been provided according to the contract;

- consequently, Article 33 of Regulation no. 1215/2012 cannot be applied either. Indeed, as we mentioned above, the Turin court may apply Article 33 of Regulation no. 1215/2012 only when its jurisdiction is based on Article 4 (general forum) or Articles 7, 8 or 9 (special jurisdictions) of Regulation no. 1215/2012, i.e. when the defendant is domiciled in a Member State.

Since it is outside the scope of Article 33 of Regulation no. 1215/2012, it might be possible to apply, residually, Law 218 of 1995 and, in particular, Article 7.3.

In particular, the Turin court could stay proceedings before it pursuant to Article 7.3 of Law 218 of 1995 if it considers that the New York court’s judgement might have effects in our own system (i.e. be applicable in Italy).
European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Co-funded by the Justice Programme of the European Union

**GENERAL BIBLIOGRAPHY:**

**BERGSON**, *The Death of the torpedo action? The practical operation of the Recast’s reforms to enhance the protection for exclusive jurisdiction agreements within the European Union*, Journal of Private International Law 2015, 1025, 1 ss.


D’ALESSANDRO, *La Corte di cassazione fa chiarezza sui rapporti tra art. 5 Reg. n. 44/2001 e norme interne sulla competenza territoriale* (nota a Cass., ord. 11 dicembre 2012, n. 22731), Int’l Lis 2013, p. 100 ss.

**DICKINSON, LEIN** (Edited by), *The Brussels I Regulation Recast*, Oxford University Press 2015


**FRANZINA**, *Lis Pendens involving a Third Country under the Brussels I-bis Regulation: An Overview*, Rivista di diritto internazionale privato e processuale 2014, p. 28 ss.


**GUINCHARD**, *Le nouveau Règlement Bruxelles I bis*, Bruylant, 2014

European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice

Associate Partners:

LUPOI, La nuova disciplina della litspendenza e della connessione tra cause nel Regolamento UE n. 1215 del 2012, Rivista trimestrale di diritto e procedura civile 2013, p. 1439 ss.
MALATESTA (Edited by), La riforma del regolamento Bruxelles I, Milano, 2016.
MARONGIU BONAIUTI, Litispendenza e connessione internazionale, Jovene, Napoli, 2009.
SALERNO, Giurisdizione ed efficacia delle decisioni straniere nel regolamento (UE) n.1215/2012 (rifusione), Cedam, Milano, 2015.
SCHLOSSER, HESS, EuZPR, 4 Auflage, Beck, München, 2015.

Co-funded by the Justice Programme of the European Union
**FIRST CASE SCENARIO**

**THE FACTS:**

On 1 July 2015, *Sara*, domiciled in Berlin, ordered two laptops on the web from *Beta*, a Slovenian corporation with headquarters in Maribor. The agreed price was €4 500. The following day, *Sara* retracted her order and asked for a refund of the purchase price. She received the refund, but delivery of the laptops as well. She decided not to return the laptops to the sender, *Beta*.

Consequently, on 2 August 2015, *Beta* brought an action against *Sara* before the district court of Berlin to obtain the return of the agreed price of €4 500.

On 30 September 2015, a judgment was issued against *Sara* for the amount of €4 500. However, she refused to pay.

*Sara* owns no real estate in Germany but does own a luxurious villa in Castellina, in the Chianti area (Tuscany, Italy). So, on 29 December, *Beta* sought enforcement of the German judgment (become *res judicata*) in Italy, under the Italian Code of Civil Procedure. Pursuant to Article 615 of the Italian Code of Civil Procedure (*opposizione all’esecuzione*), *Sara* contested the European Enforcement Order, i.e. the German judgment, by way of a defence on the merits, arguing that she had already paid the agreed price of €4 500 on 1 September 2015.

**Questions:**

A. On which EU Regulation can Italian enforcement of the German judgment be based?

B. Does the Italian Court considering the objection to the enforcement ("opposizione all’esecuzione") have jurisdiction over the case? Under which rules?
C. Would Sara’s objection to enforcement ("opposizione all’esecuzione") be successful on the merits or rejected? Why?

D. What would happen if, instead of arguing that she had already paid the €4 500 on 1 September 2015, Sara argued that she had paid the agreed price on 28 February 2016?

E. What would happen if Sara argued that she has already paid the €4 500 on 1 September 2015, and that enforcement in Italy of the German judgment should be refused because it is “manifestly contrary to Italian procedural public policy”? 
Use the following materials:

A) European Legislation


B) Case Law

- BGH, 3 April 2014, IX ZB 88/12, IPRax, 2015, 571

Suggested Solution

○ Question A

Answer: Regulation No. 1215/2012.

In detail: The German judgment is enforceable in Italy with no declaration of enforceability being required (Article 39 of Regulation No. 1215/2012), if Beta obtained the certificate in Annex I from
the German Court (Article 42.1 (b) and Article 53 of Regulation No. 1215/2012) certifying that the judgment is enforceable.

The German judgement can be enforced in Italy in the same way as an Italian decision (Article 41.1 of Regulation No. 1215/2012).

○ **Question B**

**Please note that:** Sara filed an opposition to the enforcement (“opposizione all’esecuzione”) regulated by the Italian Code of Civil Procedure and not a proceeding for non-enforcement provided for in Regulation No. 1215/2012.

**Answer:** Yes, the Italian Court has jurisdiction for the opposition to the enforcement (“opposizione all’esecuzione”) according to Article 24.5 of Regulation No. 1215/2012.

**In detail:** See Article 24.5 of Regulation No. 1215/2012.

“The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

(…)

5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced”.

“Applications to oppose enforcement, as provided for under Paragraph 767 of the German Code of Civil Procedure (which corresponds, more or less, to the Italian opposizione all’esecuzione), fall, as such, within the jurisdiction provision contained in Article 16 (5) of the Brussels Convention (currently: Article 2.5 of Regulation No. 1215/2012)”;

Allowing the debtor to raise substantive objections against a European Enforcement Order in the Member State of enforcement is not contrary to the provisions of Regulation No. 1215/2012 as confirmed by recital 30:

“A party challenging the enforcement of a judgment given in another Member State should, to the extent possible and in accordance with the legal system of the Member State addressed, be able to invoke, in the same procedure, in addition to the grounds for refusal provided for in this Regulation, the grounds for refusal available under national law and within the time-limits laid down in that law”.

As stated by the CJEU, 13 October 2011, Case 139/10 (ECLI:EU:C:2011:653), [2011] ECR I-(Oct 13) Prism Investments BV v Van der Meer, Paras 39-40:

“Recognition of the effects of such a judgment in the Member State in which enforcement is sought.... concerns the specific characteristics of the judgment in question, without reference to the elements of fact and law in respect of compliance with the obligations arising from it. Such a ground may, by contrast, be brought before the court or tribunal responsible for enforcement in the Member State in which enforcement is sought. In accordance with settled case-law, once that judgment is incorporated into the legal order of the Member State in which enforcement is sought, national legislation of that Member State relating to enforcement applies in the same way as to judgments delivered by national courts.”
○ Question C

Answer: Sara’s objection to enforcement (“opposizione all’esecuzione”) must be rejected.

In detail: The time limits of German res judicata (as established by German law) must be observed, according to Article 52 of Regulation No. 1215/2012:

“under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed”.

Consequently, pursuant to the so-called “principle of the preclusion of facts that could have been deduced in the course of the first (German) proceedings” (preclusione del dedotto e del deducibile preventing a defendant from raising any new defence to defeat the enforcement of an earlier judgment) Sara cannot successfully assert the payment made on 1 September 2015. The payment had to be asserted in the German proceedings, at the end of which the condemnatory judgment was issued.

○ Question D

Answer: Yes.

In detail: Unlike Question C above, according to the time limits of the German res judicata, Sara can assert successfully the payment made after the German judgment has become final before the Italian court.
Question E

Take note: Sara filed an objection to the enforcement (“opposizione all’esecuzione”) regulated by the Italian Code of Civil Procedure AND, at the same time, proceedings for non-enforcement provided for in Regulation No. 1215/2012.

Answer:

i) Opposition to enforcement (“opposizione all’esecuzione”): According to Article 17 of the Italian Code of Civil Procedure, the competent court for the opposition to enforcement (opposizione all’esecuzione) shall be determined based on the value of the claim (= €4,500). In our case, under Italian Procedural Law, the competent court will be the justice of the peace “Giudice di Pace” of the place of enforcement.

ii) Proceeding for non-enforcement (Article 46 et seq. of Regulation No. 1215/2012: In Italy, the competent court for non-enforcement (Article 46 et seq. of Regulation No. 1215/2012) is the “Tribunale” (Tribunal) of the place of enforcement.

See the Italian Communication to the European Commission ex Article 75 of Regulation No. 1215/2012:

Procedural issues arising in Italy: The above-mentioned discrepancy may create coordination problems if Sara not only raises substantive objections against the European Enforcement Order but also contests the enforceability of the German judgment.
**Feasible solution:** In order to rule on both actions ("opposizione all’esecuzione" and proceeding for non-enforcement under Regulation No. 1215/2012) before the same court (that is: before the “Tribunale”), Article 40.6 of the Italian Code of Civil Procedure may be applied.

See Article 40.6 of the Italian Code of Civil Procedure:

“If an action under the Giudice di Pace’s jurisdiction is related to another case falling under the court’s jurisdiction, the claims may be filed before the court to be decided in the same proceeding”.
SECOND CASE SCENARIO

Given the same facts described in the first case scenario, let’s assume that:
Sara and Beta reached a judicial settlement before the Berlin district court issued a ruling, according to which Sara was to pay Beta €3 500.
Let us suppose that Sara does not pay and, therefore, Beta seeks to have the judicial settlement enforced in Italy.

What can Beta do?

Consider the following questions:

A. On which EU Regulation can Italian enforcement of the German judicial settlement be based?
B. Suppose that, under Article 615 of the Italian Code of Civil Procedure, Sara contests the validity of enforcement by way of substantive objections, arguing that the judicial settlement is void: does the Italian Court have jurisdiction over the objection to enforcement (“opposizione all’esecuzione”)? According to which rules?
C. What would happen if Sara argued that the judicial settlement is void and, in addition, that enforcement in Italy must be refused because it is “manifestly contrary to public policy”?

Use the following materials:

A) EUROPEAN LEGISLATION

European Civil Procedure for Lawyers: Promoting Training to Improve the Effectiveness of Transnational Justice


B) CASE-LAW

– OLG Köln, 21 November 2012, Az 16 U 126/11, IPRax 2015, 158
– OLG Hamburg, 6 February 1988-12 U 16/96, IPRax 1999, 168
– BGH, 3 April 2014, IX ZB 88/12, IPRax, 2015, 571

SUGGESTED SOLUTION

○ Question A

Answer: Regulation No. 1215/2012 or Regulation No. 805/2004.

In detail: The German judicial settlement is enforceable in Italy with no need for any declaration of enforceability, neither according to Article 59 of Regulation No. 1215/2012, if Beta obtained the certificate in Annex II from the German court, nor pursuant to Article 24 of Regulation No. 805/2004 (European Enforcement order for uncontested claims), if Beta obtained the certificate in Annex II from the German court.

○ Question B
**Answer:** Debatable

**In detail:** Regulation No. 1215/2012 establishes general rules governing the jurisdiction of courts in civil and commercial matters, which are also applicable to Regulation No. 805/2004. According to Article 24.5 of Regulation No. 1215/2012:

“The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

(...) 5) in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced”.

Since No. 5) refers only to “proceedings concerned with the enforcement of judgments”, it is doubtful whether this rule is also applicable to judicial settlements and authentic instruments.

As underlined by the CJEU, exclusive rules on jurisdiction must be interpreted strictly. See, *ex multis*, CJEU, 26 March 1992, Case C-261/90, *Reichert II*, Para 25:

“It should be pointed out that Article 16 of the Brussels Convention (currently: Article 24.5, of Regulation No. 1215/2012) must not be given a wider interpretation than is required by its objective, since it results in depriving the parties of the choice of forum which would otherwise be theirs and, in certain cases, in their being brought before a court which is not that of the domicile of any of them”

Therefore, it is debatable whether the Italian Court has jurisdiction over the case.
Feasible solution:

The court of the Member State of the enforcement has jurisdiction over the case, even if the European Enforcement order is a judicial settlement [or an authentic instrument].

See the Jenard’s Report to the Brussels Convention:

Art. 16.5 “means those proceedings which can arise from recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments’

This was also quoted by the OLG Hamburg, 6 February 1998- 12 U16/96, IPRax 1999, 168 (in relation to an authentic instrument).

In the same sense, recently: OLG Köln, 21 November 2012, Az 16 U 126/11, IPRax 2015, 158.

Only if the answer to Question B is affirmative:

○ Question C

Take note: Sara files an objection to enforcement (”opposizione all’esecuzione”) regulated by the Italian Code of Civil Procedure AND, at the same time, a proceeding for non-enforcement provided for in Regulation No. 1215/2012.

Answer:

i) Objection to enforcement (“opposizione all’esecuzione”): According to Article 17 of the Italian Code of Civil Procedure, the competent court for the objection to enforcement (opposizione
all’esecuzione) shall be determined based on the value of the claim (= €4,500). In our case, according to the Italian Procedural Law, the competent court will be the justice of the peace (“Giudice di Pace”) of the place of enforcement.

ii) Proceeding for non-enforcement (Article 46 et seq. of Regulation No. 1215/2012: In Italy, the competent court for non-enforcement (Article 46 et seq. of Regulation No. 1215/2012) is the “Tribunale” (court) of the place of enforcement.

See the Italian Communication ex Article 75 of Regulation No. 1215/2012: https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-it-en.do?init=true&member=1

Procedural issues in Italy: The above-mentioned discrepancy can create coordination problems if Sara not only raises substantive objections against the European Enforcement but also contests the enforceability of the German judgment.

Feasible solution: Article 40.6 of the Italian Code of Civil Procedure may be applied in order to rule on both actions (“opposizione all’esecuzione” and proceeding for non-enforcement under Regulation No. 1215/2012) in the same proceeding brought before the same court (that is: before the “Tribunale”).

See Article 40.6 of the Italian Code of Civil Procedure:

“If a case falling under the justice of the peace’s jurisdiction is related to an action falling under the court’s jurisdiction, the claims may be filed before the court to be decided in the same proceeding”.

Co-funded by the Justice Programme of the European Union
**GENERAL BIBLIOGRAPHY**


