SUMMARY OF APPLICATION OF REGULATION (EC) No 44/2001 IN ROMANIA AND BULGARIA IN LIGHT OF THE CJEU CASELAW. REGULATION (EU) No 1215/2012 – THE ROAD AHEAD

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INTRODUCTION

The current publication is part of the project "Regulation (EU) No 1215/2012 – What It Offers and How It Works". It was implemented by the Bulgarian Institute for Legal Initiatives Foundation (BILI) in cooperation with the Bulgarian National Institute of Justice (NIJ) and the Romanian National Institute of Magistracy (NIM). The project was financially supported by the Justice Programme 2014 – 2020 of the European Union.

Regulation (EU) No 1215/2012 is a relatively new[1] instrument of the European Union law which aims at a bigger unification of the execution of judgements in civil and commercial matters among the member-states. Moreover, it regulates the removal of the so called "exequatur" – a complex and cumbersome procedure which was often regarded as an obstacle to enter into cross-border transactions. To that end, its main purpose is to increase the opportunities for doing more business in Europe by facilitating the more easy circulation of judgements, thus increasing the access to justice.

The publication presents a snap-shot of the situation related to the implementation of the Regulation in Bulgaria and Romania. It is oriented towards judges, enforcement agents and legal practitioners who would like to get up to date information on the new procedural elements it offers, as well as the legal challenges related to its everyday enforcement.

It is an attempt to provide a practically oriented interpretation of the texts, as well as some relevant examples from the court practice in both countries.

BILI Foundation is an independent nongovernmental and nonpartisan organization working in the area of judicial reform and promotion of the core democratic values – a state build and operating on the rule of law principle; independent judicial system and accountable prosecution.

As part of this particular project BILI organized together with NIJ and NIM trainings for Bulgarian and Romanian judges on the practical application of Regulation (EU) No 1215/2012. It has also carried out a joint bench bar workshop which got together Bulgarian and Romanian judges, attorneys and private enforcement agents providing them with the opportu-

[1] It is applied ex nunc, as of January 10, 2015 to legal proceedings instituted on or after that date, as well as to authentic instruments formally drawn up or registered and to court settlements approved or concluded again on or after this date.

nity to exchange professional opinions on the topic, draw parallels between the two legal systems and network.

At BILI, we believe that cooperation based on a mutual understanding and acceptance of the differences is a key to successful implementation of sustainable reforms in the legal area.

We hope that you will find this publication useful and that it will trigger further discussions on the use of the new legal instrument provided by Regulation (EU) No 1215/2012.

Bilyana Gyaurova-Wegertseder
Director
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CONTEXT OVERVIEW

Jurisdiction in most civil and commercial matters throughout the European Union member-states is governed by a set of uniform rules. However, there were always different complications to the implementation of these rules, the main objective of such regime being the abolition of execution permits (the so called exequatur). It was perceived as a major obstacle in front of the proper functioning of the internal market.

This regulation started with the ***1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*** *(Brussels Convention)*. It was further developed through the ***Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*** *(Brussels I Regulation)*.

The most recent amendments in the matter, made through the adoption of ***Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters***, known as *Brussels II Regulation*, can be perceived as one step further in the unification of jurisdiction legislation. Brussels II was published in the Official Journal of the EU on December 20, 2012 and entered into force on January 10, 2015.

Such legislative development may be defined as a final step towards abolition of the old system of execution permits, granted by the courts. This creates to a certain extent the notion of a *Pan-European judicial area* highlighting altogether the divergence between the legal and judicial systems of the EU-members and the existing difference between their best practices in application of court's decisions.

The system of mutual recognition of court decisions between European Union member-states is quite old but its functioning was hampered to a certain extent by the lack of common procedures for execution of those decisions. One of the main reasons is the close connection between the functioning of the national judicial system and the national sovereignty. Automated acceptance of foreign court's ruling is closely connected with partial refusal of that sovereignty. Moreover, the judicially approved coercion, inherited in any process of execution as a rule, may be enforced only

by local authorities. This led to a collision between the sovereignty and the common market – a collision to be resolved gradually through later acquis.

The first stage of creation of common "judicial" market was given green light on September 27, 1968 with the Brussels Convention based on article 220 of the Treaty of Rome for the establishing of the European Economic Community. The *Brussels Convention* envisaged a two-stage procedure. However, even at the first stage the exequatur was subject to suspension under the "public order" clause or a couple of other explicitly drawn reasons. Furthermore, the respective national court was able to inspect the application of the law by the original court.

At a later stage this power was revoked by *Brussels I Regulation*. A main deficiency of that system was the relatively long period before recognition of the foreign court's ruling.

The parties behind the *Brussels I Regulation* were not bold enough to apply direct recognition of foreign court's rulings but downgraded the procedure of exequatur to a plain procedure of formal control (article 41). The applicant using such a decision was to supply a copy of the ruling together with a special certificate of authenticity, issued by a special authority. Any objections may be taken into account only at the second stage of the process – the appeal. The authors of *Brussels II Regulation* decided to go further abolishing the application of exequatur at all.

The new *Brussels II Regulation* is a continuation of the EU attempts to facilitate the transfer of people and goods through easier, accelerated and more effective access to justice. It is an embodiment of the principle of mutual recognition, which, probably not known to the general public, allows for the recognition and enforcement of court decisions in-between the different EU member-states. The amendments to these acts on jurisdiction and the enforcement of judgments in civil and commercial matters are also a part of the Stockholm programme, which stresses on the need of continuing the "abolishing of all intermediate measures (the exequatur)... At the same time the abolition of the exequatur will also be accompanied by a series of safeguards, which may be measures in respect of procedural law as well as of conflict-of-law rules. Mutual recognition should, moreover, be extended to fields that are not yet covered but are essential to everyday life, for example succession and wills, matrimonial property rights and the property consequences of the separation of couples, while taking into consideration Member States' legal systems, including public policy, and na-

tional traditions in this area."[2] Comments on the specific features of the new *Brussels II Regulation* are provided below.

I. Main features of Regulation (EU) No 1215/2012 – abolition of the exequatur

Taking into account all deficiencies of the previous mechanisms, in 2010 the EU decided to start reforming the main frame for acceptance and enforcement of court rulings from another member-state. Two years later the *Brussels II Regulation* was coined. Apart from other procedural innovations the main feature of the new regulation is the abolition of the exequatur procedure between EU Member States.

1. Partial enlargement of the application of Regulation (EU) No 1215/2012

The question about the enhancement of the application of rules of jurisdiction towards countries non-member states became one of the main issues for disagreement. In the beginning the idea was to create an autonomous jurisdiction system for the entire EU thus excluding the national jurisdiction systems of the member states. This approach met objections from several member-states not willing to give up their national sovereignty in that area. This led only to a partial widening of the application area of *Regulation (EU) No 1215/2012* to defendants, not residing permanently in any EU member state. Through this amendment the Regulation's scope is extended over two new major areas:

– over consumer contracts thus enhancing the consumer's protection mechanisms;

– over personal labor disputes – thus enhancing the protection of the labor force.

In both cases a resident of the EU may claim rights against defendant without permanent relation to any EU member-state.

2. Introduction of new rules for parallel court proceedings and jointly filed claims

The second important feature of *Regulation (EU) No 1215/2012* concerns the introduction of new rules for parallel court proceedings and

[2] The Stockholm Programme — An Open And Secure Europe Serving And Protecting Citizens, 2010/C 115/01, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010XG0504(01).

jointly filed claims. The Regulation introduces the rule of consensual choosing of national court. The rule in a nutshell states that in case between the litigation parties there is some sort of agreement over the chosen forum, any court where the proceeding have been started initially, should stop them and transfer the case to the court as per the above mentioned agreement. The same rule is applied also to jointly filed claims. Thus the Regulation takes into account the European Court of Justice practice and especially the case Gasser v. MISAT (case C-116/02) of 2003. This move gives substantial force to any agreement of jurisdiction over the formal national rules, of course widely opening doors for the so called "forum shopping". However, the main feature here is the possibility of having legal dispute in two countries – EU and non-EU member-states, in which case the court of the EU member states may suspend the hearings in favor of the other court.

3. The abandonment of exequatur

The most prominent feature of the Regulation (EU) No 1215/2012 is the abandoning of exequatur procedures. According to its text "any court's ruling from an EU member-state is to be executed in all other member-states without any additional procedures and requirements". This creates equality between domestic and foreign court's decisions. From now on any party may launch in any enforcer of EU member-state a court's ruling from another member-state together with certificate of authenticity issued by the same court and this is enough to start the respective procedure. Same rule is applicable to temporary or securing measures during a process.

Of course the very procedure of enforcement remains subject to the respective national legislation. In addition, according to article 46 of the Regulation (EU) No 1215/2012 the enforcement may be rejected on grounds of contradiction to the substantive or procedural public order of the country of destination, contradiction to previous ruling between the same parties, contradiction to certain rules of exclusive admissibility. In addition, once a ruling has been issued it may not be subject of substantive revision in a court of any other EU member-state.

Lastly, a remark should be made in respect of article 79 which envisages a periodic (every ten years) revision of the text of the Regulation. This creates the notion of constant evolution aimed at betterment of the access to justice for all citizens of the EU.

APPLICATION OF REGULATION (EC) NO 44/2001 IN BULGARIA

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I. Introduction

Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation (EU) No 1215/2012) comes into effect on January 10th, 2015 thus replacing Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation (EC) No 44/2001) which continues to apply to judgments given in proceedings initiated prior to January 10th, 2015. Regulation (EU) No 1215/2012 remains largely the same if compared to Regulation (EC) No 44/2001, which in turn builds on the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention). Generally, there are no novelties with respect to the rule under the Brussels regime that the competent court is the court of domicile of the defendant. Similarly, special exceptions to this jurisdiction rule for contractual claims remain the same. Likewise, the rules on tort are maintained. The alternative jurisdictional rules on related proceedings, like those with multiple defendants and the claims closely connected, are largely sustained.

The scope of the Regulation (EU) No 1215/2012 also remains largely unchanged, while being fine-tuned (e.g. endeavours to bring more clarity on arbitration exception). A new provision is the exclusion of "maintenance obligations arising from a family relationship, parentage, marriage or affinity" (article 1, paragraph 2, e)), while article 1, paragraph 2, a) relating to the status or legal capacity of natural persons and rights in property arising out of a matrimonial relationship is updated and extended. Additionally, "wills and succession, including maintenance obligations arising by reason of death" are now clarified in article 1, paragraph 2, f).

One of the significant changes concerns the provision on *lis pendens* aiming at addressing the criticism, that Regulation (EC) No 44/2001 is not

effective in preventing parallel proceedings before member-states (MS) courts and inconsistent judgments. This concerns not only proceedings in other MS, but also third country proceedings (article 33–34 Regulation (EU) No 1215/2012).

Another novelty is the abolition of exequatur which existed under Regulation (EC) No 44/2001. Under the new rule (article 36, paragraph 1 and article 39) final decisions do not need declaration of recognition or enforcement by a court in the addressed MS. Same applies to the enforcement of authentic instruments and court settlements (articles 58–59). For the enforcement of a judgment, the interested party needs to present the judgment to the enforcement authority along with a certificate of enforceability issued according to (article 53 and article 60).

The structure of this analysis is clearly identified in the table of content above, striving to address key elements of the EU law, its interface with the national legislation and effectiveness of its application. While emphasizing on important CJEU case-law pertinent to selected provisions, the current section of the review strives to present in a summary selected practice of the application of Regulation (EU) No 1215/2012 (Regulation Brussels I *bis*) from Bulgaria and Romania. As the practice in both countries on the above-mentioned piece of secondary law of EU is yet to grow, the review seeks to explore certain aspects of the pertinent provisions of the now abrogated Regulation (EC) No 44/2001 (Regulation Brussels I), drawing conclusions on the application of those provisions of Regulation (EC) No 44/2001 that are replicated in the current Regulation (EU) No 1215/2015.

Bulgaria and Romania share some similarities on the interaction of the provisions of the Regulation (EC) No 44/2001 with the national legislation. Both Romania and Bulgaria adopted new civil procedure codes following its accession to the EU in 2007. Bulgaria adopted its new Civil Procedure Code in 2007 (and it was enacted in March 2008), Romania in 2013. Both countries changed their legislation that affected recognition of foreign judgements and incorporated provisions on the free transnational movement of judicial decisions among EU member-states. Book VII entitled "The International Civil Trial" of the Romanian Civil Procedure Code and Part VII entitled "Special Rules on the Civil Proceedings in the Application of the EU Law" of the Bulgarian Civil Procedure Code ensure application and execution of EU law, including the aforementioned regulation in the respective national legal order.

II. Scope of application of the Regulation (EC) No 44/2001 and Regulation (EU) No 1215/2012

a. Scope of application ratione temporis

At the time of their accession to the EU, courts in both countries encountered the challenge of deciding on the application of Regulation (EC) No 44/2001 to pending cases (article 66 of the Regulation (EC) No 44/2001). Despite the Court of Justice of the EU (CJEU) explicit ruling in Wolf Naturprodukte GmbH, both countries grappled with the concept. In Wolf Naturprodukte GmbH CJEU, in a preliminary ruling procedure, states that "…Article 66, paragraph 1 of Regulation (EC) No 44/2001 provides that the regulation is to apply only to legal proceedings instituted after the entry into force of the regulation. (Emphasis added.) That principle is intended to govern both the question of jurisdiction and the provisions relating to the recognition and enforcement of judgments.… It thus follows both from the history and from the scheme and purpose of article 66 of Regulation (EC) No 44/2001 that the concept of "entry into force" in that provision must be understood as the date from which that regulation applies in both the MS concerned.

The answer to the question referred is therefore that article 66, paragraph 2 of Regulation (EC) No 44/2001 must be interpreted as meaning that, for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the MS of origin and in the MS addressed."

While in both, the courts followed interpretation of the law consistent with that of the CJEU, following are examples that deviate from the rule. It is true that some predate CJEU ruling. In Romania (Decision 456/2014 of the Bucharest Court of Appeal) the reviewing court erroneously reverses correct application of the regulation holding that Regulation Brussels I shall be applicable to pending cases and its regime shall be applicable to other MS judgements issued prior to Romanian accession to the EU. Similarly, in Bulgaria, the Supreme Court of Cassation (SCC) (Decision 486/16.04.2009 on a civil case 99/2011 IV Civil Division) erred in noting the application of Regulation (EC) No 44/2001 depends on the moment in which the Bulgarian court is approached with the request to grant execution of the judicial decision. It rules that the moment the decision of the other MS is issued is irrelevant.

Despite these deviations application in Romania and Bulgaria is consistent with Wolf Naturprodukte GmbH. Bulgarian Supreme Court of Cassation (Writ 214/16.04.2009 on commercial case 156/2009, I Commercial Division) rules that cases prior to Bulgarian accession to the EU shall be regulated by the rule of international competence. Thus, recalling article 66, paragraph 1 of Regulation Brussels I, it states that Bulgarian Code of Private International Law, not Regulation Brussels I shall apply.

Further, Bulgarian courts also encountered cases related to the application of article 66, paragraph 2, b) of Regulation (EC) No 44/2001. The Supreme Court of Cassation confirms Sofia Appellate Court application of the aforementioned provision with respect to a Cypriot judicial decision issued prior to Bulgarian accession to the EU on the ground of a Mutual Legal Assistance in Civil and Criminal Cases Treaty between Bulgaria and Cyprus, into force since 1985. Courts in both countries adhere to the CJEU ruling in the aforementioned Wolf Naturprodukte GmbH. According to the CJEU "[a]rticle 66, paragraph 2) of Regulation (EC) No 44/2001… provides that, as an exception to that principle, the provisions of the regulation relating to the recognition and enforcement of judgments are to apply to judgments made after the entry into force of the regulation in consequence of legal proceedings instituted before that date if, in essence, common rules of jurisdiction applied in the two MS concerned or if the jurisdiction of the court of the MS of origin was founded on rules similar to those provided for in Chapter II of Regulation (EC) No 44/2001."

b. Scope of application ratione materiae

On the scope of the Regulations Brussels I and Brussels I *bis*, the regime is largely the same. According to article 1 of Regulation (EU) No 1215/2012 it is reiterated that the regime concerns civil and commercial matters, except for status or legal capacity of natural persons (updated and extended with the current regulation), rights in property arising out of a matrimonial or relationship having comparable effect, bankruptcy, social security, arbitration and wills and succession. The novelty is introduced in article 1, paragraph 1, "(e) maintenance obligations arising from a family relationship parentage, marriage or affinity". Naturally, the Regulation Brussels I *bis*, as its predecessor, does not apply to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority. As the section on Romania elaborates exten-

sively on the case law of the CJEU on certain aspect of the above provision, these are not discussed here to avoid redundancy.

However, one facet that calls for further consideration is the breadth of the term "civil and commercial matters" in connection with article 1, paragraph 2, d) of the Regulation (EU) No 1215/2012 (arbitration). The provision that repeats the similar one in Regulation (EC) No 44/2001 (article 1, paragraph 2, d)) is allegedly reinforced by novelties in recital 12, paragraph 4 of the Preamble and article 73, paragraph 2 of Brussels I *bis*. Supposedly, it addresses concerns pertinent to issues related to arbitration clauses.

The issue follows CJEU ruling on West Tankers (C-185/07), upholding Erich Gasser GmbH v Misat Srl (C-116/02), which influences the effective application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Concisely, in West Tankers the CJEU addresses the issue of whether the English court could grant an anti-suit injunction because of the fact that the case is referred to arbitration in England, thus barring the litigation in Italy initiated by the defendant. The CJEU rules that the Italian proceedings, as civil proceedings, fall within the scope of the regulation. Thus, the Italian court is to decide whether the dispute is to be arbitrated. The English courts could not grant an anti-suit injunction. The recent Gazprom OAO (C-536/13) decision, upholds West Tankers.

The ruling in West Tankers is considered to be conflicting with earlier CJEU case law on arbitration under Brussels Convention on which the Regulation (EC) No 44/2001 builds, namely Van Uden Maritime BV v Deco-Line (C-391/95) and Marc Rich v Societa Italiano Impianti (C-190/89). In Marc Rich a Swiss company and an Italian company conclude a contract containing an arbitration clause for arbitration in London. As there was a dispute, Impianti commences litigation in Italy and Marc Rich submits for arbitration in London according to the arbitration clause. As the agreements provide for 3 arbitrator panel and Impianti refuses to participate in the arbitration or to appoint an arbitrator, Marc Rich approaches the court in England to do so in lieu of Impianti. Yet, as Impianti is first to initiate proceedings, it claimes that the Italian court is to decide on the validity of the arbitration agreement, pursuant to the Brussels Convention. According to the Brussels Convention, more precisely *lis pendens* rules, the English court is second seised, thus should defer to the Italian to decide on this preliminary matter. The CJEU however does not uphold Impianti argument, instead ruling that the Convention excludes arbitration in

its entirety. It is noteworthy that article 1, paragraph 2, d) Brussels Convention simply provides that arbitration was excluded from its scope.

III. Jurisdiction

III.1 Applicable national rules pursuant to article 4 of the Brussels I Regulation. Changes introduced following entry into force of Brussels I *bis*

According to Annex III, Correlation Table, to Regulation (EU) No 1215/2012, articles 2, 3 and 4 of Regulation (EC) No 44/2001 correspond to articles 4, 5 and 6 of Regulation (EU) No 1215/2012/EU. Henceforth, the judicial practice in both countries on the general competence is relevant.

Empirical analysis demonstrates that Bulgarian judicial practice on the application of Regulation (EC) No 44/2001/EC is primarily based on rulings of the Supreme Court of Cassation and the Sofia City Court. As Regulation Brussels I and Brussels I *bis* grant to the national legal regime to deal with the matter of competence according to the national rules, article 622, para. 1 of the Bulgarian Civil Procedure Code provides that District Courts (second level courts) of the domicile or permanent address of the defendant are competent. If the defendant has no permanent address in Bulgaria, the territorial competence is to the District Court of the plaintiffs domicile/permanent address. If the plaintiff does not have a domicile or a permanent address in Bulgaria, competent is Sofia City Court. Thus, the Bulgarian legislator adopts a nuanced legislative approach on competence of the courts in comparison with the provision of the Code of Private International Law. The competence under Regulation Brussels I and Brussels I *bis* is decentralized, thus differing from the centralized one in international cases per articles 118–119 of the Code of Private International Law.

From practical standpoint, one of the most often matters Bulgarian courts deal with in application of Regulation (EC) No 44/2001 is to determine the competence of a Bulgarian court applying the rules of the regulation. (The other two being recognition and enforcement of judicial acts of other MS and contestation of the measures under articles 31 and 47 of Regulation Brussels I.)

In Romania, it is to be kept into consideration that the Civil Procedure Code is in force as of February, 2013. However, the cases that were initia-

ted before are governed by the Act of Private International Relation regarding procedural matters.

An important note to the jurisdictional rules established under Regulation (EC) No 44/2001 and confirmed (while developed in certain respects) by Regulation (EU) No 1215/2012 is laid down by the CJEU in Wolf Naturprodukte (C-514/10). It reads "that the application of the simplified rules of recognition and enforcement laid down by Regulation (EC) No 44/2001, which protect the claimant especially by enabling him to obtain the swift, certain and effective enforcement of the judgment delivered in his favour in the MS of origin, is justified only to the extent that the judgment which is to be recognised or enforced was delivered in accordance with the rules of jurisdiction in that regulation, which protect the interests of the defendant, in particular by providing that in principle he may be sued in the courts of a MS other than that in which he is domiciled only by virtue of the rules of special jurisdiction in articles 5 to 7 of the regulation."

III.2. Exceptions to the general jurisdiction – special jurisdiction

a. Contract

As evident from Annex III to Regulation (EU) No 1215/2012, the rules of article 5, paragraph 1 of Regulation (EC) No 44/2001 correspond to those of article 7, paragraph 1 of Regulation (EU) No 1215/2015. On this matter, national courts shall recall the established practice of the CJEU on the exercise of competence in instance of diverging legislative solutions in the EU MS. In its rulings in Brogsitter (C-548/12), the CJEU recalls that "jurisdiction in matters relating to a contract is to be determined in accordance with the connecting factors defined in article 5(1)(b) of Regulation (EC) No 44/2001 if the contract at issue in the main proceedings is a contract for the sale of goods or for the supply of services within the meaning of that provision. As provided in article 5(1)(c) of Regulation (EC) No 44/2001, it is in fact only when a contract does not fall within either of those two categories that it is appropriate to determine the competent jurisdiction in accordance with the connecting factor provided for in article 5(1)(a) of Regulation (EC) No 44/2001". Similarly, Falco Privatstiftung and Rabitsch (C-533/07) and Corman-Collins (C-9/12).

b. Tort

Following the rules of special jurisdiction in Regulations Brussels I and Brussels I *bis*, Romanian and Bulgarian legislation provide for the special exception from the general competence. Article 7, paragraph 2 of Regulation (EU) No 1215/2012 establishes special jurisdiction in tort cases, reiterating the rule in Regulation (EC) No 44/2001.

Judicial practice in Bulgaria provides a note to point on the application of the rule by the national court. In Writ 886/09.11.2011 on commercial case 130/2011, the Supreme Court of Cassation addresses the competence matter. The SCC, following a deliberation whether a Bulgarian court is competent to hear a tort case for indemnification of non-material damages from a traffic accident that occurred in another EU MS, which are sought in a follow-up, alternatively joined claim against the National Office of the Bulgarian Insurance Companies domiciled in the Bulgarian capital, grants the motion. The Court, citing the CJEU on the application of *forum loci delicti/damni* on indemnification of damages irrespective of whether they occurred from a tort or quasi-tort, determines that competence lies with the court where the harmful effect of the event occurred or could occur. (See article 5, paragraph 3 of Regulation (EC) No 44/2001 and article 7, paragraph 2 of Regulation (EU) No 1215/2012). The Court notes that the Regulation does not specify harmful effect thus in the case at hand the competence is determined depending either on the place where the harm occurred or could occur. The Court makes specific reference to CJEU case law in B./M. de Porasse d'Elsace (C-21/76), R. europeenne/Splierhoff's Bevrachringskantoor (C-51/97), Henkel (C-167/00) and F. Shevill (C-68/93).

Further, the CJEU also delimitates the scope of application of special jurisdiction on torts and contracts. In the aforementioned Brogsitter case, CJEU rules that civil liability claims under national law, shall be considered as concerning "matters relating to a contract" within the meaning of article 5, paragraph 1(a) of Regulation (EC) No 44/2001, if the conduct may be considered a breach of the contract, considering the purpose of the contract. Although this concept might look obvious – the delineation between the contractual and tort liability – it is noteworthy that the CJEU uses a wording that seems broader – "matters relating to a contract."

c. Criminal proceedings

On the special jurisdiction under article 7, paragraph 3 of the Regulation (EU) No 1215/2012, which corresponds to article 5, paragraph 4 of

Regulation (EC) No 44/2001, both Bulgarian and Romanian legislation provide for seised criminal courts to hear civil claims that arise from the criminal offence.

d. Secondary establishment

CJEU rules in Somafer SA (C-33/78) addressing the issue in the days of the Brussels Convention (1968). The CJEU discusses the meaning of the words "dispute arising out of the operations of a branch, agency or other establishment", which are the basis of the jurisdiction given by article 5 (5) of the Brussels Convention. The special jurisdiction, which the plaintiff may choose, is possible in situations of close connection between the dispute and the court, which may be called upon to hear it. The CJEU is clear that this jurisdictional rule shall not be interpreted widely but as an exception since the justification for it is solely in the interests of due administration of justice. The CJEU states that "[t]he scope and limits of the right given to the plaintiff by article 5 (5) must be determined by the particular facts which either in the relations between the parent body and its branches, agencies or other establishments or in the relations between one of the latter entities and third parties show the special link justifying, in derogation …, the option granted to the plaintiff."

The discussion above is directly pertinent to Regulation (EC) No 44/2001 and Regulation (EU) No 1215/2015. We shall recall that the CJEU stated in Realchemie Nederland (C-406/09) and Wolf Naturprodukte that it is important to bear in mind that the regime of Regulation (EC) No 44/2001 builds on the Brussels Convention. Further, it notes that interpretation by the Court under Brussels Convention is, in principle, also applicable for Regulation (EC) No 44/2001.

The Romanian Civil Procedure Code (article 109) provides for application of the secondary establishment jurisdictional rules. Similarly, Bulgarian law does allow for secondary establishment. Yet, considering article 17a of the Bulgarian Commercial Law on branches of companies incorporated outside Bulgaria and operating in the country through the branch and article 20 of the Commercial Code which establishes that Bulgarian courts have jurisdiction over cases arising from the operations of the these branches in the country, there is a potential issue in the practical application.

e. Trust

In both Romania and Bulgaria, the legislation does not regulate trusts, as such.

III.3. Protective rules of jurisdiction

a. Consumer contracts

The jurisdiction under article 15 of Regulation (EC) No 44/2001, which corresponds to article 17 of Regulation (EU) No 1215/2012 is an exception to both the general jurisdiction and the special jurisdiction on contracts. (See Pammer and Hotel Apfenhof (C-585/08 and C-144/09)). Therefore, the CJEU explicitly notes in Česká spořitelna, a.s. (C-419/11) that "article 15, paragraph 1 must necessarily be interpreted strictly." Recalling the Court's practice in Ilsinger (Case C-180/06), Pammer and Hotel Alpenhof (C-585/08) and Mühlleitner (C-190/11), CJEU notes that "Regulation (EC) No 44/2001, article 15, paragraph 1, as is clear from recital 13 in the preamble to the regulation, fulfills the same function of protecting the consumer as the weaker party as does the first paragraph of article 13 of the Brussels Convention." The CJEU clearly establishes that jurisdictional rules over consumer contracts serve to ensure adequate protection for the consumer, as the party deemed to be economically weaker and less experienced in legal matters than the other, commercial party to the contract.

Bulgarian legislation has a similar approach to consumer contracts. One example will be the fact that the Commercial Law excludes consumer contracts from its scope of application. This substantive law provision also affects procedural dimensions of such cases as they are excluded from the scope of the special provisions of the Code of Civil Procedure on commercial cases. Currently, consumer contracts are also under discussion in light of potential reform in the scope of application of arbitration.

However, the application of the rules of special jurisdiction laid down to that end by the Brussels Convention should not be extended to persons for whom that protection is not justified (See Shearson Lehmann Hutton (C-89/91)). Thus, the CJEU notes that the fact that there is a physical person is not sufficient to make the consumer protection jurisdictional rules applicable. In Česká spořitelna, a.s. the Court explicitly rules that should the natural person have "close professional links to a company, such as its managing director or majority shareholder, [the person] cannot be considered to be a consumer".

b. Individual employment contracts

Neither regulation contains explicit provision that elaborates what an individual employment contract constitutes. However, the CJEU discusses the matter in Hassan Shenavai v Klaus Kreischer (C-266/85), a case on the Brussels Convention, which is relevant to the current regulations. It notes that "contracts of employment, like other contracts for work other than on a self-employed basis, differ from other contracts – even those for the provision of services – by virtue of certain particularities: they create a lasting bond which brings the worker to some extent within the organizational framework of the business of the undertaking or employer, and they are linked to the place where the activities are pursued, which determines the application of mandatory rules and collective agreements." (Emphasis added.)

Further, with respect to the pertinent CJEU case law, the section on Romania discusses the relevant Mahamdia (C-154/11) case in details, as well as its application in Romania. It is worth recalling here that the CJEU interprets article 21 (2) of Regulation (EC) No 44/2001 (article 23 (2) of Regulation (EU) No 1215/2012) "as meaning that an agreement on jurisdiction concluded before a dispute arises, falls within that provision in so far as it gives the employee the possibility of bringing proceedings, not only before the courts ordinarily having jurisdiction under the special rules … of that regulation". Romanian Tribunal of Constanta was approached with a similar case, adequately applying the rule in civil decision 3788 from 7.10.2013.

Another point worth mentioning is the deliberation of the CJEU in more complex instances such as the interface between special jurisdictions under article 8 of Regulation Brussels I *bis* and the one on individual employment contracts. In Glaxosmithkline (C-462/06), the Luxemburg court is presented with the question whether the rule of special jurisdiction in respect of co-defendants is applicable to the action brought by an employee against two companies established in different MS, which he considers to have been his joint employers. The Court rules that "special jurisdiction provided for in article 6, point 1 of Regulation (EC) No 44/2001, … cannot be applied to a dispute falling under … the jurisdiction rules applicable to individual contracts of employment."

Domestically, individual employment contracts are regulated by the labour codes of both Romania and Bulgaria, containing a number of protection provisions in cases of employment contracts.

c. Insurance contracts

Article 8 *et seq.* of Regulation Brussels I (article 10 *et seq.* of Regulation (EU) No 1215/2012) regulates the matter of insurance contract competence. The regulations do not provide definition of insurance, insurer, etc. The translation of the regulation led to different variations with respect to the beneficiary of the insurance policy. The cases concern various issues related to conclusions, change, execution of insurance contracts, including the payment of damages. Article 11, paragraph 1 in connection with articles 62–63 of Regulation (EU) No 1215/2012 establish the competence in such cases. The plaintiff, as the weaker party is authorized to make the jurisdiction choice.

A Bulgarian high profile case is a note to point on the application of jurisdiction in insurance cases. The case concerns the sinking in Lake Ohrid (Macedonia) of the amusement ship "Ilinden" that resulted in the death of Bulgarian citizens onboard the ship. The Macedonian court issued guilty verdicts that established guilt on behalf of the representative of the German based company that issued the certificate for the aptitude of the ship. Thus, according to the rules under the regulations under discussion the civil claims against the insurer are initiated in Bulgaria.

III.4. Exclusive jurisdiction

The exclusive competence of the courts pursuant to article 24 of Regulation Brussels I *bis* (article 22 of Regulation Brussels I) does not seem to present a problem for the courts. The rule in paragraph 1, a) for example is not alien to the Bulgarian legal system related to the mandatory *ex officio* review of territorial competence of the courts. The issue comes up in case on the competence of Bulgarian courts to hear a case for division of co-owned property in another EU MS (Writ 27/21.01.2012 on a civil case 603/2011 of I Civil Division and Writ 395/09.08.2010 on a civil case 140/2009 of I Civil Division), which the Bulgarian court declined citing article 22, paragraph 1 of Regulation (EC) No 44/2001.

However, courts should take into consideration that "the exclusive jurisdiction of the courts of a Contracting State in which the property is situated does not encompass all actions concerning rights *in rem* in immovable property, but only those which both come within the scope of … Regulation (EC) No 44/2001 and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with

protection for the powers which attach to their interest" (See Weber (C-438/12) and Schneider (C-386/12)).

III.5 International jurisdiction

a. The application of Regulation (EC) No 44/2001 by the court on its own motion

An important point to be made here is the rule reiterated by the CJEU "that where there are parallel proceedings before the courts of different MS, the court second seised must stay its proceedings of its own motion until the jurisdiction of the court first seised is established" (Cartier Perfumes (C-1/13)).

On a separate note, the court shall not terminate proceedings but stay on it in the hypothesis of article 26 Brussels I Regulation (EC) No 44/2001. There are mechanisms which protect defendant rights during the original proceedings in the State of origin. This is prerequisite for the free movement of judgements in the EU, their recognition and enforcement. Thus, the CJEU notes that under article 26, paragraph 2 "the court hearing the case must stay the proceedings so long as it is not shown that the defendant who fails to appear 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." (ASML (C-283/05)).

b. Agreements on jurisdiction

Firstly, according to article 25, paragraphs 1–2 of Regulation (EU) No 1215/2012 for a valid prorogation to exist, there needs to be a transborder element and the timing and the form of the agreement should be adequate. Such agreements cannot contravene protection of weaker party or article 24 of the Regulation (EU) No 1215/2012 rules. The national courts shall examine *ex officio* whether the prorogation clause is unfair or imposed on the weaker party.

It is noteworthy that article 25, paragraph 1 of Regulation (EU) No 1215/2012 does envisage different forms (not exclusively written form) which are permissible. This is a deviation from the rules of the Bulgarian Code of International Private Law. CJEU discusses the matter related to article 23, paragraph 2 Brussels I (article 25, paragraph 2 of Brussels I *bis*) in Jaouad El Majdoub v. CarsOnTheWeb.Deutschland GmbH (C-322/14) and rules that this provision "must be interpreted as meaning that the

method of accepting the general terms and conditions of a contract for sale by "click-wrapping", such as that at issue in the main proceedings, concluded by electronic means, which contains an agreement conferring jurisdiction, constitutes a communication by electronic means which provides a durable record of the agreement, within the meaning of that provision, where that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract."

CJEU, however, clearly establishes that there needs to be a consent between the parties for an agreement on jurisdiction to come into play. In Refcomp SpA (C-543/10) CJEU notes that a jurisdiction clause agreed in the contract concluded between the manufacturer of goods and the buyer of such goods may not be relied on against a third party sub-buyer "who, in the course of a succession of contracts transferring ownership concluded between parties established in different MS, has purchased those goods and wishes to bring an action for damages against the manufacturer." Referring to its pertinent practice under article 17 of the Brussels Convention, the Court reiterates that the validity of a jurisdiction clause is "subject to the existence of an "agreement" between the parties."

The Court further notes that there are exceptions to the above requirement of "agreement". It cites <u>Powell Duffryn</u> (C-214/89) confirming that "the shareholder who subscribes to the statutes of a company is deemed to give his consent to a jurisdiction clause therein, on the ground that subscribing creates a relationship between the shareholder and the company and between the shareholders themselves which must be regarded as contractual." Similarly, in <u>Coreck Maritime GmbH</u> (C-387/98) the Court states that jurisdiction clause incorporated in a bill of lading <u>may be</u> relied on against a third party to that contract if that clause has been adjudged valid between the carrier and the shipper and provided that, by virtue of the relevant national law, the third party, on acquiring the bill of lading, succeeded to the shipper's rights and obligations". (<u>Emphasis added</u>.) Yet, the assessment on the possible application of this rule is assessed by taking stock of the specific nature of bills of laden.

It is noteworthy, however, that agreement could be implicit. If the respondent appears before the court seised, even though the defendant may deem the court does not have jurisdiction to hear the case, article 24 of Regulation Brussels I *bis* (article 22 of Regulation Brussels I) indicates that the defendant implicitly accepted the jurisdiction. This is the case even if the court is seised contrary to the provisions of that regulation, yet entering of an appearance by the defendant may be considered to be an implicit ac-

ceptance of the jurisdiction (See ČPP Vienna Insurance Group (C-111/09)).

In Goldbet (C-144/12) CJEU elaborated on the point. Recalling its judgement under Brussels Convention in Elefanten Schuh (C-150/80), the Court confirms that "the challenge to jurisdiction may not occur after the making of the submissions which under national procedural law are considered to be the first defense addressed to the court seised." However, notes the Court, the situation changes if "arguments on the substance of the case were put forward in the main proceedings in this instance in the context of a statement of opposition to a European order for payment. Such a statement of opposition coupled with those arguments cannot be regarded, for the purposes of determining the court having jurisdiction under article 24 of Regulation (EC) No 44/2001, as the first defence put forward in the ordinary civil proceedings that follow the European order for payment procedure." Romanian Tribunal of Arad encounters such a case and issues civil sentence 95 of 4 February 2015 upholding the procedural motion of the defendant regarding the lack of international jurisdiction of the Romanian courts.

IV. Rules for the consolidation of claims

a. Co-respondents

In order to avoid irreconcilable judgments due to separate proceedings, article 6, paragraph 1 of Regulation (EC) No 44/2001 (article 8, paragraph 1 of Regulation (EU) No 1215/2012) provides that a defendant may be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, if the claims are so closely connected that it is practical to hear them together. Because it is an exception to the general jurisdictional rule, CJEU in Solvay SA (C-616/10) mandates the court not to give an interpretation "going beyond the cases expressly envisaged by that regulation".

Applying this rule in Writ 886/09.11.2011 on commercial case 130/2011, the Bulgarian Supreme Court of Cassation, decides on the applicable rule in multiple joined cases against multiple respondents under article 6, paragraph 1 of Regulation (EC) No 44/2001 (article 8 of the Regulation (EU) No 1215/2012). It also considers CJEU rulings in Kalfelis (C-189/87) and Freeport PLC (C-98/06). The Court notes that the aforementioned pro-

vision of Regulation Brussels I applies should there be a need to ensure consistency of the judicial decisions, thus necessitating their joint hearing.

b. Third party proceedings and counter claims

In a number of provisions Regulation (EU) No 1215/2012 establishes that counter claims shall be examined by the court hearing the main proceedings, regardless of the established protective jurisdiction. A note to point is article 22, paragraph 2 of Regulation (EU) No 1215/2012.

With respect to third parties, CJEU, in Draka NK Cables Ltd (C-167/08), a case that should also be recalled with respect to enforceability, is approached with the question whether "a creditor of a debtor may lodge an appeal against a decision on the request for a declaration of enforceability … in which another creditor of that debtor applied for that declaration of enforceability". It rules that such a creditor of a debtor cannot do so if he has not formally appeared as a party in the proceedings in which that declaration of enforceability is issued.

c. Lis pendens

On the point of *lis pendens* it is important to note that article 27, paragraph 2 of Regulation Brussels I (article 29, paragraph 3 of Regulation Brussels I *bis*) finalizes the decision on competence, once made by the first seised court.

Article 27, paragraph 1 of Regulation (EC) No 44/2001 (article 29, paragraph 1 Regulation (EU) No 1215/2012) provides that if proceedings involving the same cause of action and between the same parties were brought in the courts of different MS, the court second seised shall stay its proceedings until the court first seised determines whether it has jurisdiction to hear the claim. This rule applies even if seising of the first seised court is done in breach of a jurisdiction clause (See Eric Gasser GmbH v MISAT Srl (C-116/02)). This first-in-time rule allowed it to be abused by commencing proceedings in the courts of another, slow moving, MS. This tactic is known as the Italian torpedo.

To address this concern article 29 of Regulation (EU) No 1215/2012 reads that the "first-in-time" rule is without prejudice to article 31, paragraph 2. The latter provides that: "… where a court of a MS on which an agreement as referred to in article 25 confers exclusive jurisdiction is seised, any court of another MS 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." Thus, "an exception to the general *lis pendens* rule" is introduced.

Further, Regulation Bussels I *bis*, addresses another concern that followed the CJEU decision in Owusu (C-281/02), in which Luxemburg court holds that a seised court of a MS cannot decline to hear the case for the benefit of a forum outside the EU, should the defendant be domiciled in the jurisdiction. This is the case even if the court outside the EU is "more appropriate" to hear the case, a notion of the Common Law systems. Articles 33 and 34 of Brussels I *bis* provide MS courts with discretion to stay proceedings to take into account proceedings involving the same cause of action and the same parties or related proceedings pending before the courts of a third state. MS courts may dismiss proceedings if third state proceedings "are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State" or could continue regardless of the new international *lis pendens* subject to the conditions in the aforementioned provisions.

Finally, it is to be noted that the aim of the rule on *lis pendens* is also to avoid negative conflicts of jurisdiction. "That rule was introduced so that the parties would not have to institute new proceedings if, for example, the court first seised of the matter were to decline jurisdiction." (Cartier Parfumes.)

VI. Provisional, including protective, measures

On the provision/protective measures the Bulgarian and Romanian courts do not seem to encounter major difficulties. Sofia Appellate Court (Decision 1372/10.11.2009 on civil case 1273/2009) confirms the imposition of freezing measure by the first instance court. The decision of the Dutch court awarding a pecuniary sum was accompanied by a certificate confirming the decision is subject to execution and a copy of a notary invitation for compliance. The Court notes that grounds for recognition and execution of judicial decisions are article 622, paragraph 1 and article 623, paragraph 1 of the Civil Procedure Code. Equivalence exists between the respondent in the case in the other EU MS and the company (sole proprietorship) that are subject to the measures. Thus, the requirements of the law are fulfilled.

VII. Recognition and enforcement

Matters related to recognition and enforcement are arranged in different aspects of provisions in article 33 *et. seq.* of Regulation Brussels I. Practice under Regulation (EC) No 44/2001 is applicable with due account to the changes introduced, including the abolition of exequatur. In that respect, issues that come out of article 34 and 35 of the Regulation (EC) No 44/2001 are prominent. It is apt to recall that according to the Correlation table to Regulation (EU) No 1215/2015, article 34 of Brussels I corresponds to article 45(1), points (a) to (d) Brussels I *bis*, article 35(1) Brussels I corresponds to article 45(1), point (e) Brussels I *bis*, article 35(2) Brussels I corresponds to article 45(2) Brussels I *bis*, article 35(3) of Brussels I to article 45(3) Brussels I *bis* and article 36 of Brussels I corresponds to article 52 of Brussels I *bis*.

On the recognition and enforcement of transnational MS judgements, the CJEU rules in Wolf Naturprodukte GmbH setting the general framework within which Regulation (EC) No 44/2001 is introduced. As noted by the court "[t]he rules on jurisdiction and the rules on the recognition and enforcement of judgments in Regulation (EC) No 44/2001 do not constitute distinct and autonomous systems but are closely linked." This is pertinent to Regulation (EU) No 1215/2012. The effect is that a judgment given in a MS is to be recognized in the other MS without any special procedure being required, which leads in principle to the lack of review of the jurisdiction of courts of the MS of origin (Opinion 1/03 (2006)).

Further, one should recall that recognition and enforcement are distinct from one another. Similarly, Bulgarian Supreme Court of Cassation (Decision 294/13.11.2012 on civil case 33/2012) states that the proceedings under article 622 Code of Civil Procedure (recognition) and article 623 Code of Civil Proceedings (enforcement) of a judicial decision of another MS are two separate proceedings. Sporadically, in judicial acts of Bulgarian courts recognition under article 622 and enforcement under article 623 of the Civil Procedure Code are not clearly delimitated. (See Writ 191/23.02.2010 on civil case 1961/2009, III Civil Division of the Supreme Court of Cassation, Writ 215/9.02.2011 on civil case 678/2010 of IV Civil Division Supreme Court of Cassation).

a. Refusal to recognize and enforce

A judicial decision could neither be recognized, nor enforced in instances of "irreconcilable judgments given by courts of the same MS." In

Salzgitter (C-157/12) the CJEU is approached with a request for preliminary ruling concerning an application for a declaration of enforceability in Germany of a judgment given by a Romanian court by which Salzgitter was ordered to pay a certain amount to Laminorul. The facts of the case, in short, are as follows: the established in Romania Laminorul brought an action seeking payment for a delivery against the established in Germany Salzgitter before the Tribunalul Brăila. On the motion of the defendant that it is not a party on the substantial legal relationship and the action should not be brought against it, Tribunalul Brăila dismisses the action brought by Laminorul by a first judgment. That judgment became final. Laminorul initiates new proceedings against Salzgitter before the same court for the same cause of action. The application is served on Salzgitter's legal representative in the first action, whose authority to act for the company is limited to the first proceedings. Due to this fact Salzgitter does not appear in the second proceedings. Tribunalul Brăila delivers a second judgment against Salzgitter. This second judgment is declared enforceable in Germany. Salzgitter brings an appeal against that enforcement in Germany, while appealing the second judgement of Tribunalul Brăila in Romania. As the legal remedies available in Romania are exhausted, the proceedings in Germany for a declaration of enforceability are resumed. The appeal brought by Salzgitter is dismissed. Salzgitter appeals the latter decision before the German Federal Court of Justice. In a preliminary ruling addressed at this point to the Luxemburg court, the CJEU rules that "article 34, paragraph 4 of Regulation (EC) No 44/2001 (article 45, paragraph 1, c)) must be interpreted as not covering irreconcilable judgments given by courts of the same MS."

Further, recognition or execution under Regulation (EU) No 1215/2012 could be denied on the same grounds – those enumerated in article 45 of the Regulation. (See article 45–46 of Regulation (EU) No 1215/2012.) The Romanian courts address the matter in decision 90F/6.12.2012 of the Court of Appeal Bucharest. It is important to provide some guidance on the application of these rules based on the CJEU case-law. In Trade Agency Ltd (C-619/10) CJEU notes that according to article 42, paragraph 2 of Regulation (EC) No 44/2001 "declaration of enforceability must … be served on the party against whom enforcement is sought, accompanied, if necessary, by the judgment given in the MS of origin if it has not yet been served on that party." (Similarly, Bulgarian Supreme Court of Cassation in Decision 152/28.12.2012 on commercial case 970/2011, I Commercial Division). The declaration of enforceability of a

judgment may be the subject of dispute brought at this point by the defendant. Therefore, in Trade Agency Ltd. the Luxemburg court rules that "where the defendant brings an action against the declaration of enforceability of a judgment … claiming that he has not been served with the document instituting the proceedings, the court of the MS in which enforcement is sought hearing the action has jurisdiction to verify that the information in that certificate is consistent with the evidence."

With respect to refusal of recognition or enforcement of a decision of another MS, the CJEU upholds its ruling under the Brussels Convention regime in Krombach (C-7/98) on *ordre public*. "The Court explained that recourse to a public policy clause can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. The infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order". The case law of the CJEU provides an example of such instances, one being the exclusion of the defendant from the initial proceedings, which is finalized with a decision which recognition and enforcement is sought. In Gambazzi (C-394/07) the CJEU rules that "the court of the State in which enforcement is sought may take into account, with regard to the public policy clause …, the fact that the court of the State of origin ruled on the applicant's claims without hearing the defendant, who entered appearance before it but who was excluded from the proceedings by order on the ground that he had not complied with the obligations imposed by an order made earlier in the same proceedings, if, following a comprehensive assessment of the proceedings and in the light of all the circumstances, it appears to it that that exclusion measure constituted a manifest and disproportionate infringement of the defendant's right to be heard."

b. Recognition

The Code of Civil Procedure in instances of judicial recognition (article 622, paragraph 2) notes that the court issues a writ. The type of writ *(razporezhdane)* suggests that so is done in closed session of the court. The defendant does not receive a copy of the request for recognition and does not participate in the recognition process. At this point, the court does not discuss the ground under articles 34–35 of Regulation (EC) No 44/2001.

The Bulgarian Supreme Court of Cassation encounters issues related to articles 34–35 of Regulation 44/2012 (Decision 152/28.12.2012 on commercial case 970/2011, I Commercial Division). It notes that these provisions shall not be interpreted broadly, thus overruling the claim that the provisions establish the right to claim statute of limitations based on circumstances that occurred after the entry into force of the judgement of another MS.

Further, in the same judgement, the Court notes that article 34 of the Regulation (EC) No 44/2001 does not provide for review of the judgement of the other MS judicial authority by the Bulgarian court, referring also to article 623, paragraph 2 of the Civil Procedure Code. The review under article 622, paragraph 3 of the Civil Procedure Code is limited to the formal requirements for recognition of the judgements of the other MS judgement. (Similarly, Decision 1527/02.12.2009 civil case 2187/2009 of the Sofia Appellate Court, Civil Division, see also Decision 238/19.03.2010 on civil case 3127/2009, VII civil panel of Sofia Appellate Court). The court points out that the review is limited to whether there is a decision certified by the issuing court that the decision is in force. (Similarly, Decision 294/13.11.2012 on civil case 33/2012 citing the rule of article 36 of Regulation (EC) No 44/2001, currently article 52 of Regulation (EU) No 1215/2012).

It is important to underscore that national courts should clearly distinguish between recognition of decisions under the general regime of recognition of foreign courts and trans-border decisions of EU MS. Thus, Decision 242/2011 on civil case 811/2010 of the Supreme Court of Cassation seems to call for application of both, rules pertinent to Regulation Brussels I and those to the general regime of recognition of international decisions from third non-EU MS countries. The court rules that "as the decision of the foreign court is presented to a Bulgarian court, the latter is entitled to rule on its recognition with a specific judicial act under article 623 of the Civil Procedure Code. As part of the proceedings, the court shall take into consideration the provision of article 11, point 4 of the Code of International Private Law, that the decision of the foreign court shall not be recognized if between the same parties and on the same ground a case initiated under the Bulgarian law, pending before a Bulgarian court, is initiated prior to the foreign case on which the decision is issued."

c. Enforcement

Discussing enforcement under article 623 of Bulgarian Code of Civil Procedure, under the regime of enforcement under Regulation (EC) No 44/2001, the Bulgarian Supreme Cassation Court (Decision 294/13.11.2012 on civil case 33/2012) notes that the court that grants execution shall not only inform the defendant, but serve the papers to the party towards which the decision is to be enforced. If so is not done there will be a substantial breach of procedural rules.

A key element into enforcement of the judicial decision of another MS is that of adjusting the decision to the national legal order. In light of this, with respect to enforcement, the Bulgarian Supreme Court of Cassation (Writ 818/22.11.2010 on commercial case 774/2010, Commercial Division, II Commercial Unit) notes that in interpreting and adjusting the judicial decision it is permissible to use the certificate on the arrears calculated by the bailiff of the issuing EU MS. Further, the court notes that the fact that arrears following the decision, which are not part of it coming into being after the decision is issued can be determined by calculation and could be based on such by a bailiff from the respective EU MS. This does not constitute a violation.

Finally, it is noteworthy that some Bulgarian practitioners take issue with the fact that following Regulation (EU) No 1215/2012 that the Bulgarian Civil Procedure Code introduces on direct enforcement, without due consideration of the implications for execution in light of the national legal regime. The claim is that Bulgarian Code of Civil Procedure (article 622a, paragraph 1) does not address potential challenges that are peculiar to the national legal order in its interaction with the Regulations. The point concerns the provision that makes the executive order of the court unnecessary in execution of judicial decisions by bailiffs.

VIII. Conclusion

During the period of application, in both Romania and Bulgaria, of Regulation (EC) No 44/2001 and to a lesser extent Regulation (EU) No 1215/2012, these legal instruments proved to be efficient. Procedure for recognition and enforcement of a judgment in another MS worked properly and the recognition and enforcement of other MS judgments was granted without significant delays.

While the Regulation is considered to work in general successfully, the analysis reveals a number of issues in the national legal regimes and

their application. Some of these are adequately addressed by the court, including the Supreme Cassation Courts, that intervened in order to clarify the interpretation of some notions.

Nevertheless, in both countries the issue of the “Italian torpedo” – the risk to undermine the regime by first seising another MS court that is not competent, in light of the obligation of the court designated by the parties in a choice of court agreement to stay proceedings if another court has been seised first – is identified.

THE APPLICATION OF REGULATION (EC) NO 44/2001 IN ROMANIA

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PART A

I. The jurisdiction, recognition and enforcement of judgements in civil and commercial matters at the moment of entry into force of Regulation (EC) No 44/2001 in Romania

In the pre-accession period, Romania had to adapt its legislative framework in order to prepare it for the new cross-border dimension of relationships and disputes. The Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of judgements in civil and commercial matters, has initially been transposed into the domestic legislation by Law No. 187/2003 on jurisdiction, recognition and enforcement of judgements ruled in civil and commercial matters in the EU member-states (MS). After Romania's accession to the EU, the Council Regulation (EC) No 44/2001 became applicable to Romania in the relations with the other MS.

Subsequently, considering the legal nature of the regulation, namely a community act directly enforceable in all MS, a norm for its transposition into the domestic law being unnecessary (article 249 of the Treaty establishing European Community), Law No. 187/2003, applicable until the moment of accession to the EU on jurisdiction and recognition and enforcement in Romania of judgements in civil and commercial matters set in the MS of the Union, was abrogated by the Government Emergency Ordinance (GEO) No. 119/2006 on necessary measures for applying Community regulations from the date of accession to the EU. Under the provisions of Law No. 191/2007 on approval of Government Emergency Ordinance No. 119/2006 on necessary measures for applying some Community regulations at the date of the accession of Romania to the EU, the competent authority to deal with the applications for recognition as well as for enforcement in Romania of foreign judgements in civil and commercial matters, given in a MS of the EU, is the tribunal. The decision of the tribunal

can be appealed at the Court of Appeal. Regarding the judgements given in Romania for which recognition and enforcement in a different MS of the EU is sought – the competence of emitting the certificate under Annex V belongs to the court where the judgement was given, according to article 54 of Regulation (EC) No 44/2001.

In principle, at the moment of entry into force of Regulation (EC) No 44/2001, the jurisdiction of the national courts was regulated by the Civil Procedure Code (CPC), Book I – Courts jurisdiction, Title I – Jurisdiction depending on the matter, Title II –Territorial jurisdiction, Title III – Special provisions, Title IV – Jurisdiction conflicts. Such legal provisions rule both national cases (the parties are Romanian natural/legal persons) and cross-border cases (the parties are either both foreign natural/legal persons or solely one of them).

The Civil Procedure Code, the common law in the matter, by expressing the principle – *actor sequitur forum rei* – established in article 5 regulates the courts jurisdiction mainly in relation with the defendant's domicile (for the natural persons), respectively the registered office, for the legal persons. In the event that the defendant, natural person is not domiciled in Romania or the known domicile, the competent court shall be that of the plaintiff's domicile. In case the defendant is a legal person, the law establishes the court jurisdiction in relation with its registered office. On the other hand, it must be stated that there was a category of corporate actions in the exclusive jurisdiction of the court of the registered office (article 15 CPC).

As it can be noticed, the legislator establishes the courts jurisdiction in relation with the defendant's/plaintiff's domicile, in principle, the defendant's/plaintiff's nationality being of no consequence as regards the jurisdiction. Exceptionally, the national legislator takes into account the defendant's/plaintiff's nationality when ruling, by the means of Law No. 105/1992 on the regulation of private international law rapports, the cases of exclusive jurisdiction of the national courts. Additionally, the Law No. 105/1992 on the regulation of the international private law relations stipulates the applicable law for cross-border relations, but had also certain procedural provisions. By relating to common law (CPC), such regulation constituted an exception, being applicable solely in cases explictly provided by the law. In the event that there were no special regulations regarding the jurisdiction in the Law No. 105/1992, the provisions of the common law (CPC) became applicable.

In Romania, according to the provisions of the Constitution, the jurisdiction rules are set out by law, in the sense that the ordinary legislator is free to establish the jurisdiction rules, but, as regards the public international law, in case there is a Convention/Treaty concluded/ratified in the field, the ordinary legislator shall abide by it.

According to article 151 of Law No. 105/1992 regarding the international private relations, the Romanian Courts have exclusive jurisdiction in the following situations: a. civil status documents drawn up in Romania and related to persons domiciled in Romania, Romanian citizens or foreigners without citizenship; b. adoption approval if the adoptee is domiciled in Romania and is Romanian citizen or foreigner without citizenship; c. trusteeship and administration if the guarder person is domiciled in Romania, is a Romanian citizen or foreigner without citizenship; d. claim regarding the interdiction of a person domiciled in Romania; e. matrimonial claims, including litigation between spouses, except those relating to immovable property abroad Romania, provided that both spouses domicile in Romania and one of them is a Romanian citizen or a foreigner without citizenship; f. the inheritance left by a person whose last domicile was in Romania; g. immovable property situated on Romanian territory; h. the forced execution of an enforceable title on Romanian territory.

According to the provision of article 168 the recognition and enforcement of the judgement could be denied where the Romanian court has exclusive jurisdiction.

Romania concluded also a number of bilateral or multilateral conventions/treaties in the field at issue with EU MS.

II. Application of Brussels I Regulation in Romania and the relation with the national legal framework.

II.1. Rules of Jurisdiction listed in Annex I of Brussels I

The application of Regulation (EC) No 44/2001 in Romania coexisted for a period of 6 years with Law No. 105/1992 regarding the international private relations, which describes in articles 148 – 157 the cases in which the national courts have jurisdiction. Article 157 of Law No. 105/1992 stipulated that the court notified shall verify, *ex officio*, its jurisdiction to settle the lawsuit in relation to international private law relationships and, if neither the former, nor another Romanian court is determined to have jurisdiction, it shall dismiss the claim for the lack of jurisdiction of the Romanian courts.

At the entry into force of the new Civil Code on October 1, 2011, the main part of Law No. 105/1992 was replaced by the provisions of Book VII, Provisions regarding international private relations of the new Code. But, the provisions regarding jurisdiction and recognition of foreign judgements remained applicable until the entry into force of the new Civil Procedural Code (NCPC) on February 15, 2013. Article 1064 of the NCPC provides that the provisions of Book VII, "The International Civil Trial", will extend to private relations with foreign elements to the extent to which, by the international treaties to which Romania is a party, by the EU Law, or by special laws, it is not stated otherwise.

II.2. Applicable National Rules Pursuant to Article 4 of the Brussels I Regulation

a) Contract

Regarding contract relations the common law (CPC – article 10/ article 107 NCPC) stipulates an alternative jurisdiction for the courts. The right of electing the court for filing the statement of claim belongs to the plaintiff (article 12 CPC/article 116 NCPC). Therefore, as a rule, the plaintiff may choose between the court of the defendant's domicile and the court set out by the contract for the performance, even in part, of the obligation. Moreover, it shall be stated that the latter court may be referred to, solely for the requests regarding a contract performance, cancellation, resolution or termination.

As regards a transportation contract, in addition to the court of the defendant's domicile, the court of the place of departure or arrival of the means of transport is competent as well (article 113 (6) NCPC). The statement of claim related to lease contracts may be referred either to the court of the defendant's domicile or to the court of the area where the building is located.

b) Tort

Similarly to the actions based on a contract, as regards the tort liability, the legislator (article 10 CPC/article 113 p. 9 NCPC) establishes the alternative jurisdiction of the courts. Therefore, the actions deriving from a tort may be referred either to the court of defendant's domicile or to the court of the place where the tort occurred.

c) Criminal Proceedings

Pursuant to article 14 from the Criminal Procedure Code (article 19 in the new Criminal Procedure Code), the person injured by a criminal offence may exercise a civil action within the criminal proceedings, in such case the action being settled by the competent court deciding on the criminal case, but by applying civil rules. The competent court deciding on the criminal action may judge the civil action as well, provided that the injured/ damaged person is a civil party to the criminal proceedings, a fact which requires the observation of certain rules and terms. It shall be mentioned that the civil action may be exercised *ex officio* by the prosecutor solely provided that the injured person lacks or has a limited exercise capacity.

In the circumstance that the injured person has failed to become a civil party to the criminal proceedings, such person may resort to the civil court requesting recovery for the material damage and for the emotional distress ensued from the criminal offence.

d) Secondary Establishment

In case the defendant, apart from the domicile, possesses a constant occupation or one or more agricultural, commercial or industrial establishments, the request may be referred to the court of such establishments or occupations as well, but solely for the requests having as object assets undertakings to be generated or enforced in the respective place (article 6 CPC, article 109 NCPC).

In the event that the defendant, a legal person, has a representative office, the statement of claim may be filed to the court where the representative office is, but solely for undertakings to be enforced in such place or generated by acts concluded by the representative or by actions performed by it (article 7 CPC, article 109 NCPC).

e) Trust

The current Romanian law does not recognize, from a legislative point of view such institution, which means, there are no special provisions regarding courts jurisdiction on the matter.

II.3. Protective Rules of Jurisdiction

a) Consumer Contracts

In the former Civil Procedure Code, in this matter there were no special norms regarding the establishment of courts jurisdiction. According to

article 121 from the new CPC, the actions against a consumer can be brought only at the court of the consumer's domicile.

b) Individual Employment Contracts

Pursuant to the legal provisions (article 284) of the Labor Code (Law No. 53/2003), the claims on labor conflicts are in the jurisdiction of the court of the plaintiff's domicile/residence/registered office.

c) Insurance Contracts

As regards this matter, there are no special norms for establishing courts jurisdiction; therefore, the provisions of the common law (CPC) become incident, provisions regarding the courts jurisdiction on the matter of contracts. In the circumstance that the action filed is grounded on tort liability, the provisions of article 10 of CPC (article 116 (9)) shall apply, in the sense that the plaintiff has the option to choose between the court of the defendant's domicile and the court of the place where the tort occurred.

II.4 Rules for the Consolidation of Claims

a) Co-defendant

Both the former and the current Romanian codes of civil procedure and the former Law No. 105/1992 regarding the private international relations establish the principle of passive procedural co-participation. As a consequence, if the action is brought against several defendants, one of these being domiciled in Romania, the Romanian court shall have jurisdiction.

According to the Romanian law the defendant shall be considered to be domiciled in Romania any time when the legal person has a branch, a subsidiary, an agency or a representative office in Romania. If among the defendants there are also secondary defendants, the jurisdiction shall be determined solely in connection with the principal's defendants.

The case law provides that the plaintiff is not entitled to introduce during litigation a fictive defendant in order to bring in front of the Romanian court a case that is normally not in its jurisdiction.

b) Third party Proceedings and counter claims

The CPC (article 17 and article 123 NCPC) provides that the jurisdiction of the court shall be extended over any incidental or secondary claims. Based on the above mentioned principle a defendant domiciled in a non-EU state can be sued before our courts as a third party in an action on a war-

ranty or in any other third party proceeding, a legal prorogation of jurisdiction operating in those circumstances, unless there is a choice-of court clause conferring jurisdiction upon courts of another state.

c) Related claims

The CPC (article 163 and article 139 NCPC) states the principle of consolidation between closely linked cases pending in front of different courts or different judges at the same time. The article 156 of the Law No. 105/1992 regarding the private international relationship constitutes an exemption from the rule of consolidation of claims.

In the field of private international law the jurisdiction of a Romanian court could not be declined as a consequence of consolidation or *lis pendens* – related actions. Article 153 of the Law No. 105/1992 provided that the Romanian court shall have jurisdiction in any case bring by a Romanian citizen where the action was prior rejected by a foreign court for lack of jurisdiction.

PART B

A review of the Romanian caselaw in the application of Regulation (EC) No 44/2001

I. The scope of application of the Regulation (EC) No 44/2001

I.1. The scope of application *ratione temporis*

Regulation (EC) No 44/2001, which replaced the Brussels Convention between all the MS except the Kingdom of Denmark, entered into force on March 1, 2002, in accordance with article 76 of the Regulation. However, on the territory of states which, like Romania and Bulgaria, acceded to the EU on January 1, 2007, it entered into force only as of that date. From the recital 19 in the preamble to Regulation (EC) No 44/2001 results the need that continuity between the Brussels Convention and the regulation must be ensured. To that end, were adopted the transitional provisions in article 66 of the Regulation.

Article 66 (1) of Regulation (EC) No 44/2001 provides that the regulation is to be applied only to legal proceedings initiated after the entry into force of the Regulation. That principle is intended to govern both the ques-

tion of jurisdiction and the provisions related to the recognition and enforcement of judgements. Article 66 (2) of Regulation (EC) No 44/2001, however, provides that, as an exception to that principle, the provisions of the regulation relating to the recognition and enforcement of judgements are to apply to judgements made after the entry into force of the regulation in consequence of legal proceedings initiated before that date if, in essence, common rules of jurisdiction applied in the two MS concerned or if the jurisdiction of the court of the MS of origin was founded on rules similar to those provided for in Chapter III of Regulation (EC) No 44/2001.

Neither paragraph 1 nor paragraph 2 of article 66 of Regulation (EC) No 44/2001 specifies, however, whether the concept of the "entry into force" of the Regulation, which must be given an uniform interpretation within that article, refers to the entry into force of the Regulation in the State in which the judgement has been given, that is to say the State of origin, or in the State in which recognition and enforcement of that judgement is sought, that is to say the State addressed. This matter was clarified by the European Court of Justice in Case C-514/10, Wolf Naturprodukte GmbH in which the article 66 (2) of the Regulation was interpreted as meaning that, for that Regulation to be applicable for the purposes of the recognition and enforcement of a judgement, it is necessary that at the time of delivery of that judgement the Regulation was enforced both in the MS of origin and in the MS addressed.

In some cases, this interpretation was not followed by the Romanian courts, as it is the case in a judgement, where the Regulation was applied to grant to the claimant the certificate issued under Annex V of the Regulation for a judgement rendered on March 22, 2002. The Bucharest Tribunal, in a decision from October 7, 2013, refused to issue the certificate because the judgement was rendered before the entry into force of the Regulation, but the Court of Appeal of Bucharest revoked the decision and issued the certificate. At the date of March 22, 2002, Romania was not yet a MS, and, in accordance with Case C-514/10, Wolf Naturprodukte GmbH, in order to make applicable this Regulation for the purposes of the recognition and enforcement of a judgement, it is necessary that at the time of delivery of that judgement the Regulation was enforced both in the MS of origin and in the MS addressed. The Court holds that "since Romania joined the EU on January 01, 2007 and this time Regulation 44/2001 became directly applicable, for judgements issued before the entry into force of the Regulation for Romania, the applicants requiring European certificate issued in accordance with Annex V of the Regulation for a judgement on March 22, 2002

shall follow the procedure laid down in Chapter III of the Regulation that implies the European certificate issued under Annex V of the Regulation." (Court of Appeal Bucharest, decision 456/2014)

I.2. The scope of application *ratione materiae*

On the point of view of application ratione materiae of the Regulation, the definition of the scope of application is given by article 1 of the Regulation, as concerning "civil and commercial matters", an autonomous notion that was subject of a rich case law from the ECJ, in the interpretation of it.

There are some exclusions, exhaustively listed. In the first paragraph, there is a general exclusion concerning tax, customs and administrative matters. The second paragraph adds 4 more exemptions:

– Civil status and legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and successions. Among these matters, civil status and capacity are still not subject of EU legislation, but with the entry into force of the Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, the exclusion of wills and successions from the scope of application becomes obvious. As regards rights on property arising out of a matrimonial relationship, a draft is currently being negotiated.

– Insolvency proceedings relating to the winding up of insolvent companies and other legal persons, compositions, and analogous proceedings.

It is for Regulation (EC) No 1346/2000 on insolvency proceedings and for its new successor, Regulation (EU) No 848/2015 to deal with this.

– Social security

– Arbitration: this exclusion created difficulties, and for that reason the European Commission was in favour of putting it aside in the frame of the revision process. Although the point was strongly discussed, the situation remains the same after the entry into force of Regulation (EU) No 1215/2012, that provides only some explanatory guidelines in the recital 12, in order to clarify some points disputed by stakeholders and jurists involved.

– Maintenance obligations: since Regulation (EC) No 4/2009 addresses separately the matter, as for successions, an expressed exclusion of the matter in Brussels I Regulation is no more needed.

The Romanian courts addressed the matter of the scope of application of the Regulation (EC) No 44/2001 in a number of cases. As regards

the matters related to wills and successions, the Romanian Supreme Court of Cassation and Justice (SCCJ) decided, as a matter of principle, in the civil decision 3585 from 18 May 2012 handed down by Civil Section I, in the following terms: "Applications for the annulment of heir certificate and of a declaration of inheritance fall in the competence of the court in whose jurisdiction was the last domicile of the deceased. If the last domicile of the deceased was located abroad, being in the presence of a foreign element in determining the competent court, article 14 Civil Procedure Code can not be applied".

It is to be noted that, as regards the relations of private international law Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters is not applicable, even if the last home is in a MS because, according to article 1 para. (2) a), this Regulation shall not apply "to the status and capacity of natural persons, matrimonial, wills and succession", so that the applicable rules are the ones of article 155 of Law No. 105/1992 on private international law relations."

From the analysis of the jurisprudence of Romanian courts, resulted a rich case law dealing with the distinction between the scope of application of Regulation 44/2001 and the Regulation (EC) No 1346/2000. This matter was addressed by the ECJ in a number of cases that supported the conclusions of the Romanian courts. In its assessment, the Court has taken into account the fact that the various types of actions which it heard were brought in connection with insolvency proceedings.

In this respect, the Court has held that that Regulation and Regulation (EC) No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under article 1(2)(b) of Regulation (EC) No 44/2001, from the application of that Regulation in so far as they come under "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" fall within the scope of Regulation (EC) No 1346/2000. Following the same reasoning, actions which fall outside the scope of article 3(1) of Regulation (EC) No 1346/2000 fall within the scope of Regulation (EC) No 44/2001 (judgement in F-Tex, C-213/10).

The Court also noted that, as *inter alia* recital 7 in the preamble to Regulation (EC) No 44/2001 states, the intention on the part of the EU legislature was to provide for a broad definition of the concept of "civil and commercial matters" referred to in article 1(1) of that Regulation and, con-

sequently, to provide that the article should be broad in its scope. By contrast, the scope of application of Regulation 1346/2000, in accordance with recital 6 in the preamble thereto, should not be broadly interpreted (judgement in German Graphics Graphische Maschinen, C-292/08).

Applying those principles, the Court has found that only actions which derive directly from insolvency proceedings and are closely connected with them are excluded from the scope of Regulation (EC) No 44/2001. Consequently, only these actions fall within the scope of Regulation (EC) No 1346/2000 (judgement in F-Tex).

As regards the application of that distinction, the Court has held that an application to make good a deficiency in the assets, which, under French law, may be taken by the insolvency administrator against the managers of the company in order to have them declared liable, must be considered to be an action which derives directly from insolvency proceedings and is closely connected with them. In order to reach that conclusion, the Court relied, in essence, on the consideration that that action was based on provisions derogating from the general rules of civil law (judgement in Gourdain, 133/78).

The Court has adopted a similar view in relation to an action to set a transaction aside which, in German law, may be taken by the insolvency administrator in order to challenge acts undertaken before the insolvency proceedings were opened which are detrimental to the creditors. It noted, in that context, that the action was based on the national rules relating to insolvency proceedings (judgement in Seagon, C-339/07).

By contrast, the Court has held that an action brought on the basis of a reservation of title clause against an insolvency administrator has only an insufficiently direct and insufficiently close link with insolvency proceedings on the ground, in essence, that the question of law raised in such an action is independent of the opening of insolvency proceedings (judgement in German Graphics Graphische Maschinen, paragraphs 30 and 31). Similarly, an action brought by an applicant on the basis of an assignment of claims granted by an insolvency administrator and relating to the right to have a transaction set aside conferred on the latter by the German insolvency law was considered to be not closely connected with the insolvency proceedings. The Court noted in that respect that the exercise of the right acquired by an assignee of the right acquired is subject to rules other than those applicable in insolvency proceedings (judgement in F-Tex, paragraphs 41 and 42).

All these principles were recalled by the Court in Case (C-157/13), Nickel & Goeldner Spedition GmbH (paragraphs 20–25). Additionaly, in this last case, the Court mentioned that its main concern is with determining on each occasion whether the action at issue derived from insolvency law or from other rules (paragraph 26).

According to paragraph 27 of this judgement, "the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings." This criteria determined the conclusion of the Court that "an action for the payment of a debt based on the provision of carriage services taken by the insolvency administrator of an insolvent undertaking in the course of insolvency proceedings opened in one MS and taken against a service recipient established in another MS comes under the concept of 'civil and commercial matters' within the meaning of that provision."

The same criteria was used by the CJEU in case C-649/13, Nortel Networks SA in order to conclude that: "The outcome of the disputes before the referring court depends, in particular, on how the proceeds from the sale of NNSA's assets are allocated between the main proceedings and the secondary proceedings. As appears to follow from the coordinating protocol, and as the parties to the proceedings before the referring court confirmed at the hearing, those proceeds will in essence have to be allocated by applying Regulation (EC) No 1346/2000, without that protocol or the other agreements at issue before the referring court being intended to modify its content. The rights or obligations on which the actions before the referring court are founded therefore have their source in articles 3(2) and 27 of Regulation (EC) No 1346/2000, so that that regulation is applicable" (paragraph 30).

The Romanian courts made use of this case law, as it is shown in the following examples. In one case, the bankruptcy judge from the Specialized Tribunal of Cluj rejected as inadmissible the application of the claimant for issuing the certificate from article 54 of this Regulation for the civil decision No. 2452/30 May 2012 handed down by the same Tribunal, regarding the annulment of a patrimonial transfer under articles 79–80 of Law No. 85/2006 on insolvency proceedings. The Tribunal concluded that the certificate provided by article 54 of this Regulation can be issued only for

judgements on civil and commercial matters falling within the scope of Regulation (EC) No 44/2001 and from this scope of application, the judgements on insolvency matters are expressly excluded. (Decision (Incheiere) No. 1700/C/2014, Specialised Tribunal of Cluj)

An inconsistent jurisprudence can be noticed on the problem if the judgements regarding the personal liability of the administrator of the company for the insolvency of the company, in accordance with article 138 from Law No. 85/2006 regarding the insolvency proceedings fall in the scope of application of Regulation 44/2001 or, on the contrary, under the exemption stipulated by article 1, para. 2, b of this Regulation and in the scope of application of Regulation (EC) No 1346/2000. For example, the Specialized Tribunal Cluj, in a number of cases, (e.g. Civil decision – "Incheiere" No. 2353/2015, Specialised Tribunal of Cluj) refused to issue the certificate stipulated by article 54 of Regulation (EC) No 44/2001 for the decisions regarding the personal liability of the administrator of the company for the insolvency of the company, in accordance with article 138 from Law No. 85/2006 regarding the insolvency proceedings, on the grounds that this kind of judgements are covered by the exemption stipulated by article 1, para. 2, b of Regulation 44/2001 and falling into the scope of application of Regulation 1346/2000. On the contrary, in another case, the Bihor Tribunal issued the certificate stipulated by article 54 of this Regulation for the decision No. 1705/F/2012, handed down by Bihor Tribunal on July 03, 2012 regarding the personal liability of the administrator of the company for the insolvency of the company, in accordance with article 138 from Law No. 85/2006 regarding the insolvency proceedings, that implies the opposite interpretation that the judgement falls into the scope of application of Regulation (EC) No 44/2001. (e.g. Decision – "Încheiere" no. 3777/F/2013 Bihor Tribunal).

The judgements for closing the insolvency proceedings and the judgements regarding the admission of claims were constantly considered by the Romanian courts as covered by the exemption stipulated by article 1, para. 2, b of Regulation (EC) No 44/2001 and falling into the scope of application of Regulation (EC) No 1346/2000. (Civil decision "Incheiere" No. 2353/2015, Specialised Tribunal of Cluj)

II. The international jurisdiction

II.1. The application of Regulation (EC) No 44/2001 by the court on its own motion

According to article 1070 of the Romanian CPC, the court seised verifies its international jurisdiction of its own motion proceeding in accordance with internal rules on jurisdiction, and if no rule determines its jurisdiction or the one of another Romanian court, rejects the application, without prejudice to the application of article 1069. The decision of the first instance court can be appealed to a higher court. The lack of international jurisdiction of the court can be invoked at any stage of the process, even directly during the appeal. The provisions of article 1066 remain applicable.

Even if the application of Regulation (EC) No 44/2001 was not taken into consideration by the parties of the dispute, the Romanian courts, in the application of the provisions of Romanian civil procedure code checked *ex officio* the international jurisdiction and made the application of Regulation (EC) No 44/2001, if it was considered applicable in the case. (e.g. civil decision handed down on December 8, 2011 by the court of first instance of Arad).

II.2. The agreements on jurisdiction

The Romanian courts dealt with international jurisdiction according to Regulation (EC) No 44/2001 in matters related mainly to different contracts. Many of these cases were decided on the basis of the agreements on jurisdiction included in the contract by the parties. As regards the form of the agreement on jurisdiction, article 23 of the Regulation stipulates that an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with an 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."

In the meaning of "writing" is included also any communication by electronic means which provides a durable record of the agreement, in accordance with paragraph 2 of the article 23 of the Regulation.

In the application of this text, the Romanian Supreme Court of Cassation and Justice stated, in a very complex case, in civil decision

No. 377 from February 1, 2012 handed down by the Civil Section II, in the following words: “In order to consider as concluded an agreement conferring jurisdiction in accordance with article 23 lit. b) of Regulation (EC) No 44/2001, two conditions must be fulfilled, namely that there is a continuing business relationship between the parties and the use of a jurisdiction clause which regulates the relations between the parties.

These requirements are fulfilled if, in the general conditions of an order – accepted by the contracting parties – was included an agreement on jurisdiction that raised no objections from the parties over the long run trade relations between the parties.”

In another very interesting case, the Romanian SCCJ decided, on the contrary, that: “In accordance with article 23 of Regulation (EC) No 44/2001, “if the parties, one or more of whom is domiciled in a member-state, have agreed that a court or the courts of a MS are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise …”.

Thus, if the service contract signed by the parties provides that the disputes between them are to be settled in the courts from the headquarters of the general contractor, who is in Austria, the court can not appreciate that one party renounced at the agreement on jurisdiction agreed in the contract by filing of the proceedings before the Romanian courts, because simply bringing an action before this court does not have the significance of an agreement of the parties establishing jurisdiction of the Romanian courts, according to article 23 of Regulation (EC) No 44/2001.” (Civil Decision No. 1856 of April 25, 2013, Section II).

In an important number of cases, the Romanian courts granted the efficiency of agreements on jurisdiction stipulated in the contracts by the parties and rejecting the different defenses of the parties refusing the application of the agreement on jurisdiction to the case. Through civil sentence No. 95 of February 4, 2015 handed down by the Tribunal of Arad, the court upheld the objection of lack of international jurisdiction of Romanian courts, based on the existence of an agreement on jurisdiction and dismissed as inadmissible the application concerning the annulment of contract. In the grounds of the judgement, the court rejected all the arguments of the claimant regarding the inapplicability of the agreements on jurisdiction:

“The first instance court held that under article 10.2 of the contract “for what was not expressly provided, any disputes that may arise in con-

nection with this agreement shall be settled in accordance with Italian law and competent court shall be exclusively the courts from Pordenone" and that, under the provisions of article 10.3 of the contract "this contract is drawn up in Italian and Romanian. The language governing this contract is Italian."

The contractual provisions set out in articles 10.2 and 10.3, according to the first instance court can not be interpreted according to the interpretation sustained by the claimant, respectively, that are subject to Italian law only matters not expressly provided in the contract, since the article lists the situations to which it applies Italian law and established exclusive jurisdiction to the courts of Italy or both, for both situations not expressly provided, as well as for the disputes which may arise in relation with the contract and its execution. Moreover, the court pointed out that, in article 10.3, the contract has expressly mentioned that the law applicable to the contract is Italian law and not Romanian.

Regarding the application of Regulation (EC) No 44/2001 (the transposing of which is not needed in accordance with case 39/72 – Slaughtered Cows şi T 138/09 – Munoz and which has priority in front of the nationals provisions, as stated in case 6/64 – Costa vs. E.N.E.L and in accordance with article 148 of the Romanian Constitution and article 4 of CPC), the Tribunal retained as applicable to the case articles 23–26.

Analyzing the contract concluded between the parties, the Tribunal held that they agreed as stated in articles 10.2 and 10.3 of the contract, according to which any disputes arising from the sales contract shall be resolved in accordance with Italian law and the competent court shall be exclusively the court from Pordenone, the contract being governed by Italian law.

This clause has, in the assessment of the tribunal, the nature of an agreement on jurisdiction within the meaning of article 23 of Regulation (EC) No 44/2001 which, according to the same article, has the nature of an exclusive competence.

On the other hand, the tribunal held that this power is not contrary to articles 13, 17 or 21 and does not derogate from the exclusive jurisdiction under article 22 (article 13 of the Regulation concerns the insurance contracts, article 17 refers to jurisdiction in matters of consumer protection, article 21 refers to jurisdiction for labor disputes and article 22 establishes the exclusive jurisdiction for rights *in rem* in immovable property).

The Court also held that in relation to article 24 of the Regulation, should be distinguished between the following situations which may occur when the parties inserted in the contract an agreement of jurisdiction:

– The first situation is that, although the parties inserted in the contract an agreement of jurisdiction, the one initiating the dispute, ignores it, notifying a court other than the agreed jurisdiction and the defendant doesn't enter an appearance or even if entered an appearance does not ask for the application of the agreement of jurisdiction; in this case that, apart from the exclusive competence established by article 22, the court has to retain under article 24, para. 1 thesis (the court of the MS before which a defendant enters an appearance shall have jurisdiction) and

– The second situation, in which, although the parties inserted in the contract an agreement of jurisdiction, the one initiating the dispute ignores it, notifying a court other than the agreed jurisdiction and the defendant doesn't enter an appearance or he enters an appearance and, in both cases, submits a defense based on the agreement of jurisdiction, disputing the choice of jurisdiction made by the applicant at the time when the court was seised; in this case, the court has no jurisdiction, in accordance with the provisions of article 24, para. 1, sentence II. (This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of article 22).

The clause provided for in articles 10.2 and 10.3 of the contract is the result of concerted will of the parties so that it can not be ignored or changed unilaterally without the consent of both parties so that, for these grounds of fact and law, under the provisions of article 132, para. 4 of Civil Procedure Code, the court upheld the objection raised by the defendant regarding the lack of international jurisdiction of the Romanian courts and accordingly dismissed as inadmissible the application." (civil sentence No. 95 of February 4, 2015 handed down by the Tribunal of Arad).

II.3. The protection of the weaker parties and the agreements on jurisdiction

A special attention was paid by the Romanian courts, in relation to insurance, consumer contracts and employment, to the protection of the weaker parties, who, in the light of consideration 13 of the Preamble of the Regulation should be protected by rules of jurisdiction more favorable to their interests than the general rules provide for.

For example, in a very interesting case, the Tribunal of Constanta refused to recognise the efficiency of the clause regarding the agreement on jurisdiction stipulated in a boarding agreement, conferring jurisdiction to

courts from Cyprus, making the application of the ECJ caselaw in case C-154/11, Mahamdia, where the European Court showed that such an agreement must be concluded after the dispute has arisen or, if it was concluded beforehand, must allow the employee to bring proceedings before courts other than those on which those rules confer jurisdiction. Following the same jurisprunce, the Tribunal of Constanta gave a correct interpretation, in accordance with the purpose of article 21 of Regulation (EC) No 44/2001, as meaning that such an agreement, concluded before the dispute arose, must confer jurisdiction over the action brought by the employee on courts additional to those provided for in articles 18 and 19 of Regulation (EC) No 44/2001 and the effect of it is not to exclude the jurisdiction of the latter courts but to extend the employee's possibility of choosing between several courts with jurisdiction. The ECJ also held that provisions cannot be interpreted as meaning that an agreement on jurisdiction could apply exclusively and thus prohibit the employee from bringing proceedings before the courts which have jurisdiction under articles 18 and 19.

The Tribunal of Constanta argued, in consistency with paragraphs 44 and 46 of the judgement in the case C-154/11, Mahamdia, that the objective of protecting the employee as the weaker party to the contract would not be attained if the jurisdiction provided for by articles 18 and 19 in order to ensure that protection could be ousted by an agreement on jurisdiction concluded before the dispute arose. The court noted that "the identification of the place where the employee habitually carries out his work is more difficult.

This difficulty is caused by the nature of the place where the applicant operates, namely a marine platform, which is a movable place, that is moved during its exploitation in the territorial sea of different states with different subsoil resources.

It follows from the grounds submitted by the parties that during the performance of labor relations between the parties, the platform S was located several times in the Romanian territorial waters. Also, the applicant has worked under the same contract for work on other offshore platforms … and barge …, which was brought in Constanta port for repairs.

Also, the place where the contract was concluded and the place of departure for work on the platform was the port of Constanta.

All these elements, in the light of paragraph 13 of the preamble of the Regulation cited above, formed the opinion of the court that the place where the employee habitually carries out his work was located in Romania." (Tribunal of Constanta, civil decision No. 3788 from October 7, 2013).

II.4. Other situations regarding the international jurisdiction of the Romanian courts

A number of judgements handed down by the Romanian courts outlined different situations in which the seised courts refused to accept their international jurisdiction and dismissed the grounds conferring jurisdiction to it in the opinion of the claimant.

On one instance "…the court of first instance of Arad, the court upheld the objection of lack of international jurisdiction raised by the defendant as founded and dismissed the claim against the defendant, as not following in the jurisdiction of courts of Romania.

The court noted that the applicant claimed the reimbursement of EUR 12,000 based on the mandate contract concluded between the parties, the contract that was concluded in Germany, between parties having permanent residence in Germany, the applicant being a German citizen. (…)

The contractual obligation the performance of which tends to be achieved by promoting action, namely the payment to the applicant of the amount of money received by the defendant, issued from a mandate contract, to be executed by the parties in Germany, the State in which both parties domicile. Therefore, the court did not accept the applicant's claim that the place of execution of this obligation is in Romania, since none of the parties live here and the delivery of an amount of money assumes presence of the parties or its transmission at the place where the creditor is located.

The applicant's argument that part of the contract was executed in Romania does not refer to the effective enforcement of contractual obligations *inter partes*, but refers to the conclusion of contracts that made the object of the contract of mandate with third parties. Indeed, given that these contracts were concluded on behalf of the applicant, any dispute which has arisen from these legal contracts would follow in the jurisdiction of Romanian courts. On the contrary, the dispute in the current case did not put into question these contracts concluded with third parties, but only the execution of obligations under the contract of mandate. Therefore it can not be argued that this obligation, which is the subject of the current application, is to be executed in Romania. The fact that the applicant is bound, by his authorized representative, to third parties in Romania, can not determine itself the conclusion that the place of execution of the contract of mandate (the payment of any remuneration) is in Romania. This interpretation is the result of a confusion between the legal relationship between the parties of the contract of mandate and the legal relationship with third par-

ties arising from different legal acts and legal relations concluded by the agent in the name of the principal. Moreover, the court did not establish that the parties agreed to submit the mandate to Romanian legislation, since it was concluded in Germany, and the rights and obligations of the parties shall be governed by the laws of that State." (civil decision handed down on December 8, 2011 by the court of first instance of Arad).

On the contrary, the alternative jurisdiction stipulated by the Regulation in different matters, for example regarding the insurance contract, based the conclusion of the international jurisdiction of Romanian courts. For example, the Romanian Supreme Court of Cassation and Justice, stipulated, in the case of a negative conflict of jurisdiction that: "In accordance with article 9b) of Regulation (EC) No 44/2001, an insurer domiciled in a MS may be sued in another MS than the one where he is domiciled, in the case of actions brought by the policyholder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled.

Thus, in the case of an action based on the civil liability for the damages caused to the third by car accidents, the international jurisdiction to hear the case can belong also to the court of the claimant's domicile, where the claimant is the beneficiary of the insurance policy, as a result of the intervention of the insured event." (Decision No. 4156 from October 24, 2012 handed down by Civil Section II).

II.5. Some problems related to the translation of Regulation (EC) No 44/2001

The quality of translation into Romanian of the European legislation, including Regulation (EC) No 44/2001 is a matter of concern, since the use of an appropriate word for the technical and legal content of the terms used is a pre-existing condition in order to properly apply the law.

As regards the transition into Romania of provisions of article 27, paragraph 2 and article 28, paragraph 2 and article 29 of Regulation (EC) No 44/2001, it can be easily noticed the inadequacy of translation, which is likely to lead to practical inconveniences for the activity of the courts.

In accordance with article 27, paragraph 2 of the Regulation, "where the jurisdiction of the court first seised is established, any court other than the court first seised ***shall decline*** jurisdiction in favour of that court".

Article 28, paragraph 2 uses the same words, stipulating that, "where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, ***decline juris-***

diction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof."

In similar wording is written also article 29: "Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall ***decline jurisdiction*** in favour of that court".

The Romanian word used in order to translate these articles of the Regulation from the English version, was: ***"declină competența",*** having not only the meaning that the court denies its own jurisdiction, but also that the file will be sent to foreign court appreciated as having jurisdiction to deal with the dispute.

Or, it can be easily noticed that a translation from the French version of the Regulation, using the term ***"se dessaisit"***, having as Romanian equivalent the term ***"se desesizează"*** would be more appropriate for the purpose of these provisions, that are not to be interpreted as meaning that by the judgements declining jurisdiction the file showed be sent to a foreign court that becomes automatically competent to deal with the dispute, but only as an obligation of the court seised to deny its own jurisdiction in accordance with these articles.

Despite the lack of precision of the translation, most of the courts are aware about the real interpretation to be done to the words ***"declină competența"*** in the context of article 27, paragraph 2, article 28, paragraph 2 and article 29 of Regulation (EC) No 44/2001. (e.g. Civil decision handed down on December 8, 2011 by the court of first instance of Arad).

III. The enforcement of the foreign decisions

III.1. The declaration of enforceability

The analysis of the Romanian jurisprudence showed that the most frequent cases brought before the Romanian courts were dealing with the enforcement of foreign decisions. In accordance with the provisions of paragraph 1 of article 38 of Regulation (EC) No 44/2001, a judgement given in a MS and enforceable in that State shall be enforced in another MS when, on the application of any interested party, it has been declared enforceable there. The declaration of enforceability of such a judgement is governed by the provisions of article 41 of Regulation (EC) No 44/2001, which stipulates that this is done immediately after completing the formalities laid down in article 53 without any review under articles 34 and 35.

According to Law No. 191/2007 approving Government Emergency Ordinance No. 119/2006 on measures necessary for the implementation of

EU regulation from the date of accession to the EU, in the application of Regulation (EC) No 44/2001, applications for recognition and enforcement in Romania of judgements in civil and commercial matters issued in another EU MS are in the competence of the tribunal.

In accordance with article 41 (2) of the Regulation, "the declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgement, if not already served on that party".

The analysis of Romanian jurisprudence regarding the enforcement of Regulation (EC) No 44/2001 allows concluding that the enforcement of foreign judgements in the application of article 38 is easily granted by the Romanian courts and there are no real problems in the interpretation of the text of the Regulation (e.g. Incheiere No. 356 from 21 May 2013 Tribunalul Arad).

III.2. The appeal against the judgement regarding the declaration of enforceability

In accordance with article I index 2 Article 1 paragraph 2 of GEO No. 119/2006, the decision including the declaration of enforceability will be communicated to both parties and in relation with article 43, para. 1 and para. 5 of the Regulation, both sides have the right to exercise an appeal within 30 days from the notification.

Actually, the Romanian word used as correspondent to the English word appeal is, in the Romanian version of the Regulation, the word "***acțiune".***

This time, the correct translation in Romanian of the provisions of article 43 of the Regulation, has to be emphasized. It provides that "The decision on the application for a declaration of enforceability may be appealed against by either party".

In this case, it was correctly translated from the French version the word "***recours"*** by the Romanian word "***acțiune"***. It is a frequent confusion in translating this French legal term by the very similar Romanian word ***"recurs"***. Although the word is very similar to the Romanian one, from a technical and legal point of view, "***recourse"*** as a French legal concept that could be translated as remedy action, is not identical to that of the Romanian legal term ***"recurs",*** that has a much limited meaning, being associated with a specific remedy, precisely, the second appeal. In French, the legal term equivalent to the Romanian legal term ***"recurs"*** is "pourvoi en cassation". The Court of Appeal is the competent court for the appeal against the decision of the Tribunal.

The legal nature of this "***acțiune***" was put in question in a number of cases.

As a matter of principle, the Romanian Supreme Court of Cassation and Justice addressed this question in its civil decision No. 1.54 from 12 of April 2011, handed down by the Commercial Section: "the respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected. (...)

The decision on the application for a declaration of enforceability may be appealed against by either party before the court indicated in the list in Annex III.

In accordance with this Annex III, the Court of Appeal is the competent court for the appeal against the decision of the Tribunal.

According to article 44 of the Regulation, the judgement given on the appeal may be contested only by the appeal referred to in Annex IV for Romania, namely "contestație în anulare" and "revizuire".

Therefore, the only remedy – the action – regulated by article 4, para. 3 of the Regulation which may be brought by the applicant against the decision to reject the application for declaration of enforcement of the Tribunal as a first instance, is covered by the jurisdiction of the Court of Appeal, which issues a final judgement.

So, dealing with this particular remedy, by a final judgement, the Court of Appeal judges in accordance to article 3, pt. 3 of the CPC, in a panel of 3 judges, as for the second appeals, the provisions of the Regulation with direct application being mandatory in this case.

The decisions of the first instance are occasionally appealed before the Court of Appeal, but generally the last court dismisses the appeal and upholds the solution of the first court granting the enforcement. On most frequent grounds for appeal, the Court of Appeal in Bucharest in its decision 90F/6.12.2012 noted "... that the only reasons that allow the court hearing an action to set aside the judgement granting in first instance the enforcement are the situations covered in articles 34 and 35, in relation with the judgement whose enforcement is sought".

In accordance with article 34, a judgement shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the MS in which recognition is sought; 2. where it was given in default of appearance, if the defendant was not served with the document which instituted the pro-

ceedings 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; 3. if it is irreconcilable with a judgement given in a dispute between the same parties in the MS in which recognition is sought; 4. if it is irreconcilable with an earlier judgement given in another MS or in a third State involving the same cause of action and between the same parties, provided that the earlier judgement fulfils the conditions necessary for its recognition in the MS addressed.

According to article 35, a judgement shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in article 72, paragraph 2 stipulates that in its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to, shall be bound by the findings of fact on which the court of the MS of origin based its jurisdiction. In the third paragraph, it is stipulated that, subject to paragraph 1, the jurisdiction of the court of the MS of origin may not be reviewed and the test of public policy referred to in point 1 of article 34 may not be applied to the rules relating to jurisdiction.

… Since the application seeks the enforcement by the confiscation of money and other real estate owed to the debtor by natural and legal persons domiciled or headquartered in Bucharest, and the seizure of the movables and immovable property situated within the jurisdiction of the Bucharest Tribunal, the Court, examining the aforementioned provisions, finds that Bucharest Tribunal had jurisdiction to deal with the application for enforcement. From this perspective, the Regulation grants relevance alternatively to the place where enforcement will take place and to the location of the debtor's domicile, at the choice of the creditor. Regarding the bailiff's competence, the legislator uses similar determination criteria, stipulating that the competence is for the bailiff from the Court of Appeal in whose jurisdiction enforcement is to be made. Since, as it is apparent from the application for enforcement, the proceedings aim to be conducted in Bucharest, the enforcement in the manner previously indicated, the Court holds that the provisions of paragraph 1 of article 373 of Civil Procedure Code were observed. …

As regards the provisions of article 40 of the Regulation, which states that the procedure for making the application shall be governed by the law of the MS in which enforcement is sought; these provisions are not likely to lead to a different conclusion, given that the jurisdiction is expressly checked in all three aspects: general competence, material and territorial.

As regards the grounds related to the violation of article 34, section 2 of the Regulation, the Court finds that the certificate issued in accordance with article 54 of the Regulation and in compliance with the model in Annex V of the Regulation, shows the date when the defendant received the documents regarding the initiation of the proceedings, where judgement was given in default, respectively January 12, 2007. Since the judgement whose enforcement is sought in this case was issued on March 26, 2008, the Court considers that the appellant (in this case) had enough time to prepare his defence and to appear before the court to submit all evidence that could be considered relevant. From this perspective, the Court considers that the complainant's request for supplementing the evidence, by requiring the communication in copy of file in which the judgement to be enforced was given, appears to be unnecessary, given that all data necessary for the current action, under article 45 of the Regulation is provided by the certificate issued under the provisions of article 54 of the Regulation. …

As regards the allegations concerning the manner in which the foreign court conducted the summoning of the defendant, the Court notes firstly that the summoning was done according to the Austrian procedure and the appellant produced no evidence of relevant provisions of law of this country on this issue. From this perspective, the Court notes that the Romanian procedural provisions are not applicable, so the manner in which the summons procedure complies with the Romanian civil procedure appears as irrelevant".

PART C

CONCLUSIONS

As "the matrix of civil judicial cooperation in the European Union" (as it was described in the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), at 3, COM (2010) 748 final (Dec. 14, 2010), Regulation Brussels I is the most frequently used instrument of international cooperation in civil and commercial matters, covering a broad range of matters, and being applicable not only to contractual but also to delictual and immovable property claims.

During the period of nine years of application in Romania, this instrument proved its efficiency in the identification of the most appropriate jurisdiction for solving a cross-border dispute and in ensuring the smooth recognition and enforcement of judgements issued in another Member State.

While the Regulation is overall considered to work successfully, the analysis of the Romanian caselaw revealed a number of deficiencies in the current operation of the Regulation in Romania, which should be remedied.

The delimitation of the scope of application of Regulation (EC) No 44/2001, the failure to translate correctly some terms and the lack of clarity regarding the legal regime and the procedure applicable to the appeal referred to in Annex IV in case of Romania, according to article 44 of the Regulation, to name only a few of these deficiencies, created, occasionally, the premises for an inconsistent jurisprudence.

But, as a general remark, the lack of consistency was properly addressed by the Romanian SCCJ that intervened in order to clarify the interpretation of some notions, such as the one of agreement on jurisdiction, the legal regime and the procedure applicable to the appeal referred to in Annex IV in case of Romania or to solve negative conflicts of jurisdiction submitted by the lower courts.

As a matter of principle, it has to be said that, even the procedure for recognition and enforcement of a judgement in another MS worked properly and the recognition and enforcement of the foreign judgements was granted by Romanian courts without significant delays, following an accelerated speedy procedure, the "exequatur" was still considered as an obstacle to the free circulation of judgements which entails unnecessary costs and delays for the parties involved and deters companies and citizens from making full use of the internal market.

Since Regulation (EC) No 44/2001 was applicable only where the defendant is domiciled inside the EU, the jurisdiction in other cases remained to be governed by national law, namely the new Romanian civil procedure code and, before this, by Law No. 105/1992.

As a general conclusion, the enforcement of mandatory EU law protecting week parties, e.g. consumers, employees or commercial agents was widely guaranteed by the Romanian courts.

The efficiency of choice of court agreements was also protected by the Romanian courts in their jurisprudence.

Nevertheless, the risk to undermine this efficiency was widely recognised, as a result of the obligation of the court designated by the parties in a choice of court agreement to stay proceedings if another court has been seised first, that rule enabling litigants acting in bad faith to delay the resolution of the dispute in the agreed forum by first seising a noncompetent court.

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