

# Jurisdiction and applicable law

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## ① Introduction to Conflict of Laws

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- European Union

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- Introduction

- Delimitation of the scope of application

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## ③ Application to our tasks

- Design and engineering contract

- The leasing contract

- Joint venture agreement

- Conflict of Laws or Private International Law is the branch of Law that, in relation to a **private situation connected with different jurisdictions**, addresses three paramount questions:
  - a Jurisdiction  $\Rightarrow$  Who is to be competent to settle the disputes which have arisen or may arise out of the situation?
  - b Applicable law  $\Rightarrow$  Which set of rules governs the merits of the case?
  - c Recognition and enforcement  $\Rightarrow$  Will the judgment or arbitral award granted in a State produce effects in another State?

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  - c Recognition and enforcement  $\Rightarrow$  Will the judgment or arbitral award granted in a State produce effects in another State?
- Connection with different jurisdictions does not necessarily mean different States/Countries  $\Rightarrow$  e.g., a marriage between a Navarrese and a Catalanian is a private situation falling within the scope of International Private Law because both are subject to different set of rules.

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- Despite dealing with *international private situations*, traditionally rules concerning Conflict of Laws are mainly **domestic** ⇒ Lack of uniformity: questions concerning a situation might have diverse answers in the connected jurisdictions.
- Nowadays, there is a certain **tendency to promote uniformity** ⇒ e.g., 1956 Convention on the Contract for the International Carriage of Goods by Road, 1971 Convention on the law applicable to traffic accidents, 2019 Convention on the recognition and enforcement of foreign judgments in civil and commercial matters, etc.

# Introduction to the Conflict of Laws

## European Conflict of Laws: Introduction

- Primary source  $\Rightarrow$  Art. 81 of the Treaty on the Functioning of the European Union.
- Aim  $\Rightarrow$  Ensuring the proper functioning of the internal market.
- Advantages  $\Rightarrow$  Uniform rules increases certainty, removes differences in treatment and obstacles for businesses and consumers, reduces costs, etc.
- Disadvantage  $\Rightarrow$  Loss of legal competitiveness and *appealing* of an specific jurisdiction.

# Introduction to Conflict of Laws

## European Conflict of Laws: Framework

- Rules forming the European Conflict of Laws are intended to **prevail over the domestic rules of each Member State** ⇒ Domestic rules have a **limited scope of application**.
- Main Regulations forming the European Conflicts of Laws:

Name	Matters covered
Brussels I Bis	Jurisdiction and recognition and enforcement of judgments in civil and commercial matters
Brussels II Bis	Jurisdiction and the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, as well as international child abduction
Rome I	Law applicable to contractual obligations
Rome II	Law applicable to non-contractual obligations
Rome III	Law applicable to divorce and legal separation
Regulation (EU) 2015/848	Insolvency proceedings



- Unlike other States (e.g., Switzerland), Spain does not have a proper Private International Law Act  $\Rightarrow$  Rules forming the Spanish conflict of laws are dispersed across various Acts.
- The main acts containing rules on Conflict of Laws are:

Act	Matters covered
LOPJ	Jurisdiction (arts. 22-22 nonies)
Civil Code	Law applicable (arts. 9-12)
LAI	International adoption: Jurisdiction and law applicable (arts 14-31)
LCJIMC	Several matters: <i>lis pendens</i> , recognition and enforcement of civil and commercial judgments, etc.
AA	Recognition and enforcement of foreign arbitral awards (art. 46)

- The BIPR regulates the **jurisdiction** and the **recognition and enforcement of judgments** in civil and commercial matters.  
⇒ Therefore, **it does not regulate the applicable law.**
- The BIPR is the successor of:
  - ① The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters; and,
  - ② 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.
- Along with the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, it forms the so-called **Brussels Regime**.

- **Territorial:**

- BIBR: All Member states, save Denmark.
- Impact of 2007 Lugano Convention: EU, Iceland, Norway and Switzerland.

Case I: A party seeks the enforcement of a Spanish judgment in France. Does the BIBR or the Lugano Convention apply to the enforcement? ⇒ As France and Spain are both Member states, the Regulation applies.

Case II: A party seeks the enforcement of a Spanish judgment in Switzerland. Does the BIBR or the Lugano Convention apply to the enforcement? ⇒ As the claimant is invoking a judgment from a Member state in a contracting state of the Lugano Convention, the Lugano Convention applies.

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Case II: A party seeks the enforcement of a Spanish judgment in Switzerland. Does the BIBR or the Lugano Convention apply to the enforcement? ⇒ As the claimant is invoking a judgment from a Member state in a contracting state of the Lugano Convention, the Lugano Convention applies.

- **Temporal:**

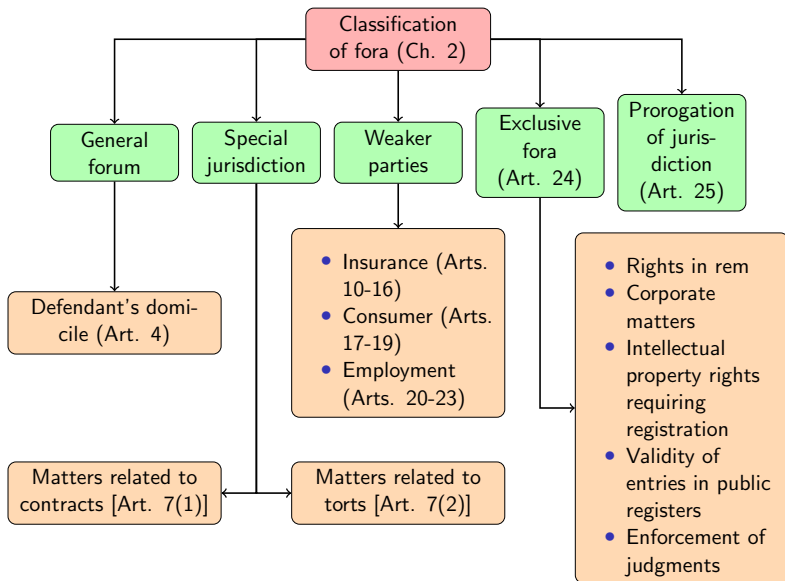
- Adopted on 12 December 2012.
- Entered into force on 10 January 2015.

- **Positive delimitation - Civil and Commercial matters** ⇒ **Autonomous interpretation** ⇒ Case C-29/76, *LTU GmbH & Co. KG v Eurocontrol* [1976] ECR 1541, para 3: *"The concept in question must therefore be regarded as **independent** and must be interpreted by reference, first, to the **objectives and scheme of the Convention** and, secondly, to the **general principles** which stem from the corpus of the national legal systems."*

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- **Negative delimitation**
  - **Acta iure imperii** ⇒ *"Proceedings do not cease to be civil or commercial just because one party is a public authority. The crucial question is whether that authority is basing its claim on the exercise of governmental powers"*. ⇒ e.g., Case C-814/79 *Netherland v Rüffer* [1980] ECR 3807 or Case C-292/05 *Lechouritou & Others v Dimosio tis Omospondiakis Dimokratias tis Germanias* [2007] ERC 1540.
  - Different matters, amongst them **arbitration** ⇒ Recital 12 & Article 73(2) ⇒ 1958 New York Convention.

# Brussels I Bis Regulation

## Basis of jurisdiction: Introduction



- **Domicile of persons** ⇒ Art. 62:
  - Is this person domiciled in my country? ⇒ Application of my domestic law.
  - Is this person domiciled in another Member State? ⇒ Application of that Member State.



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  - Is this person domiciled in another Member State? ⇒ Application of that Member State.
- **Domicile of corporation** ⇒ Art. 63(1) ⇒ Three potential fora:
  - a Statutory seat;
  - b Central administration; or,
  - c Principal place of business.

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- **Domicile of corporation** ⇒ Art. 63(1) ⇒ Three potential fora:
  - a Statutory seat;
  - b Central administration; or,
  - c Principal place of business.
- **Multiple defendants** ⇒ Art. 8(1): *"A person domiciled in a Member State may also be sued: (...) where he is one of a number of defendants, in the Court for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings"* ⇒ See: Case C-103/05 *Reisch Montage AG v Kiesel Baumaschinen* [2006] ECR 6827.

- Alternative and additional fora to the general one.
- **Matters related to contracts:**
  - *Matters related to contracts:*
    - **Independent concept** ⇒ Case C-26/91 *Jakob Handte & Co. GmbH v TMCS* [1992] ECR 3990, e.g., it does not cover a claim of sub-buyer against manufacturer.
    - **Broad interpretation** ⇒ Case C-38/81 *Effer SpA v Hans-Joachim Kantner* [1982] ECR 825, e.g., It extends to disputes about the existence of the contract itself.
  - *Place of performance of the obligation in question:*
    - **Obligation** ⇒ It refers to the contractual obligation forming the basis of the legal proceedings, not to all obligations arising under the contract (Case C-14/76 *ETS. A. De Bloos v Société en Commandite Par Actions Bouyer* [1976] ECR 1498).

# Brussels I Bis Regulation

Basis of jurisdiction: Special jurisdiction  $\Rightarrow$  Matters related to contracts  $\Rightarrow$  Place of performance of the obligation

- Multiple obligations:
  - **Accessorium sequitur principale**  $\Rightarrow$  Case C-266/85 *Hassan Shenavai v Klaus Kreischer* [1987] ECR 251: Multiple obligations arise under the same contract, **jurisdiction is based on the principal obligation.**
  - **Multiple obligations of equal importance**  $\Rightarrow$  Case C-420/97 *Leathertex Divisione Sintetici SpA v Bodetex BVBA* [1999] ECR 6779: Jurisdiction **cannot be consolidated in a single court unless all obligations share the same place of performance.**
- Place of performance:
  - *Unless otherwise agreed.*
  - Case C-12/76 *Industrie Tessili v Dunlop AG* [1976] ECR 1474  $\Rightarrow$  The concept must be interpreted **in accordance with the law governing the contract.**
  - Default rules:
    - Contract for the sale of goods: **Place of delivery.**
    - Contract for the provision of services: **Place of provision**

Art. 7(2): *The courts for the place where the harmful event occurred or may occur.*

- Case C-21/76 *Bier v. Mines de Potasse d'Alsace S.A.* [1976] ECR 1735 ⇒ Does it refer to the place where the damage occurred (Netherlands) or the place where the event causing the damage originated (France)?
- Case C-68/93 *Shevill v Presse Alliance* [1995] ECR 415 ⇒ Does it cover reputational damages? Must the victim sue in the country where the publisher's establishment is located or in the country of distribution?
- Case C-220/88 *Dumez France & Tracoba v Hessische Landesbank* [1990] ECR 49 ⇒ It refers only to the location where the harmful event directly produced its harmful effects on the immediate victim of the event. Indirect financial damages cannot establish jurisdiction.
- Case C-364/93 *Marinari v Lloyd's Bank* [1995] ECR 2719 ⇒ It does not include locations where only financial losses were felt as a result of a harm originating elsewhere. Jurisdiction requires a direct connection between the harmful event and its immediate consequences.

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  - ❶ It guarantees the freedom of parties to choose where their disputes shall be litigated; and;
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  - ❶ It guarantees the freedom of parties to choose where their disputes shall be litigated; and;
  - ❷ It established some reasonable limits to such freedom.
- Through a jurisdiction agreement, the parties exclude the jurisdiction of the court originally competent under articles 4, 7, and 8, thereby granting jurisdiction to a court that would otherwise lack competence to determine the dispute ⇒ **It cannot oust the jurisdiction under art. 24 (exclusive jurisdiction) and arts. 15, 19 and 23 (specific protection of a weaker party).**

# Brussels I Bis Regulation

Basis of jurisdiction: Prorogation of jurisdiction ⇒ Features

- *Regardless of their domicile* ⇒ The Regulation does not require the parties to the agreement to be domiciled in a Member State.
- *A court or the courts of a Member State are to have jurisdiction* ⇒ The Regulation applies provided that the parties have chosen a Court or the Courts of a Member State.
- *Disputes which have arisen or may arise* ⇒ Either actual or potential disputes. Besides, all or part of the disputes.
- *In connection with a particular legal relationship* ⇒ The disputes must be linked to a particular relationship, which besides must fall within the scope of application of the Regulation.
- *That Court or those Courts shall have jurisdiction* ⇒ *Forum Non Convniens* inapplicable
- *Unless the agreement is null and void* ⇒ Confers jurisdiction to the chosen Court as long as such it is valid.
- *Such jurisdiction shall be exclusive unless the parties have agreed otherwise* ⇒ The agreement *prima facie* confers exclusive jurisdiction.



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- At the time of examining the substantive validity, it is necessary to consider:
  - a The autonomous principles enshrined by the ECJ  $\Rightarrow$  e.g., The own concept of consent for the purposes of the Regulation.
  - b Art. 25(1): *the law of the prorogated Member State*  $\Rightarrow$  Legal institutes that can invalidate an otherwise valid agreement (e.g., error, fraud, threat, duress, public order, etc.)
  - c The law governing the contract  $\Rightarrow$  e.g., The position of a successor of one of the parties to the contract under the jurisdiction clause.
  - d Other sets of rules  $\Rightarrow$  e.g., the capacity of a party to enter into the agreement.

# Brussels I Bis Regulation

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- Oral agreements?



- **Separability** ⇒ Art. 25(5): The validity of the agreement cannot be contested solely on grounds concerning the validity of the legal relationship in relation to which it has been concluded ⇒ Though concerning an arbitration clause: *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254.

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- **Effects:**
  - a **Positive effect:** it confers jurisdiction to a Court or the Courts of a Member State which would otherwise lacks jurisdiction; and,
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- **Loss of effectiveness:**
  - a New agreement;
  - b Submission under art. 26; and,
  - c Insolvency?

# Brussels I Bis Regulation

Basis of jurisdiction: Prorogation of jurisdiction  $\Rightarrow$  Methods to protect the effectiveness of the agreement (Torpedo actions)

- **Stay:** The Defendant can invoke the jurisdiction agreement and, therefore, challenge the jurisdiction of the seised court  $\Rightarrow$  Art. 63 of the Spanish Civil Procedural Rules.

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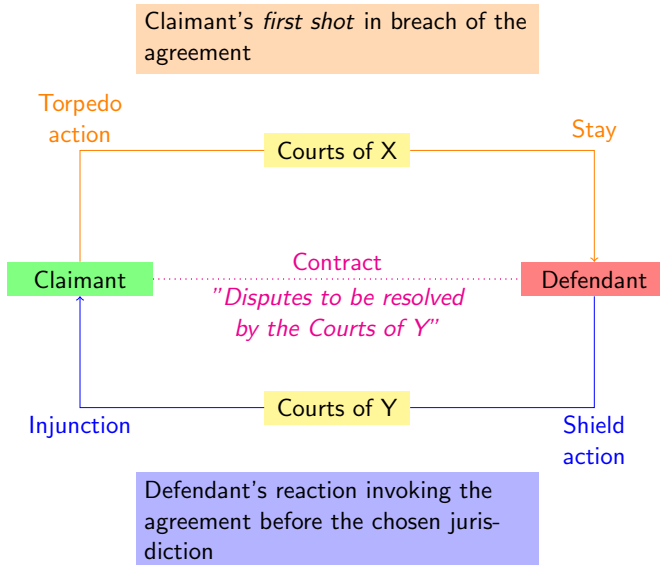
- **Stay:** The Defendant can invoke the jurisdiction agreement and, therefore, challenge the jurisdiction of the seised court  $\Rightarrow$  Art. 63 of the Spanish Civil Procedural Rules.
- **Anti-suit injunctions:** Orders *in personam* that restrains a party to a jurisdiction or arbitral agreement from initiating or continuing legal proceedings in breach of the agreement (Contempt of Court)  $\Rightarrow$  No admitted under the Regulation:
  - In relation to jurisdiction agreements: Case C-159/02 *Turner v Grovit & Others* [2004] ECR 3578;
  - In relation to arbitration agreements: Case C-185/07 *Allianz SpA & Generali Assicurazioni Generali SpA v West Tankers Inc* [2009] ECR 686.

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- **Damages:** STS 263/2009, 12 de january.

# Brussels I Bis Regulation

## Anti-suit injunctions



- Jurisdiction agreement / Submission agreement  $\Rightarrow$  Disputes which may arise / Disputes which have already arisen.



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- Floating agreement.
- Hybrid agreements:
  - Symmetric or bilateral agreements
  - Asymmetric or unilateral agreements

- Based on **Sul América Cia Nacional de Seguros SA and Others v Enesa Egenharia SA and Others [2012] 1 Lloyd's Rep 671:**

*"If any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to litigation, they will seek to have the Dispute resolved amicably by mediation. (...)*

*The mediation may be terminated should any party so wish by written notice to the appointed mediator and to the other party to that effect. Notice to terminate may be served at any time after the first meeting or discussion has taken place in mediation.*

*If the Dispute has not been resolved to the satisfaction of either party within 90 days of service of the notice initiating mediation, or if either party serves written notice terminating the mediation under this clause, then either party may refer the Dispute to litigation.*

*In case the Insured and the Insurer(s) shall fail to agree as to the amount to be paid under this Policy through mediation as above, such dispute shall then be decided by the English courts".*

- Based on **Star Shipping AS v China National Foreign Trade Transportation Corporation (The “Star Texas”)** [1993] 2 Lloyd’s Rep 445:  
*“Any dispute arising under the charter shall be determined by the Courts of Beijing or London in defendant’s option”.*
- Based on **Kwasny Company v Acryliccon International Ltd E.D. Michigan (No. 09-13357, 11 de junio de 2010)**:  
*“Any controversy or claim arising out of or relating to this Agreement, including any controversy or claim relating to the validity, interpretation or performance of this Agreement, shall be finally settled by the courts of the State of Michigan, in the United States, or in London, United Kingdom, and in each case under the substantive law applying in the country, county or state where the actual dispute or breach of this Agreement occurred”.*

- **Eastern Europe v. Transportmaschinen Exp. 658 F. Supp. 612 (S.D.N.Y. 1987):**

*"1. In case of conflicts arising from this contractual relationship the law prevailing in the country of the complainant will be applied.*

*2. All conflicts in connection with or arising from this contract will be settled by the Arbitration Court in Geneva — Switzerland or by the competent court an [sic] the main place of business of defendant, according to choice of the complaining party"*

- **The "Dai Yun Shan" [1992] SGHC 51:**

*"Jurisdiction: All disputes arising under or in connection with this bill of lading shall be determined by Chinese law in the courts of, or by arbitration in, the People's Republic of Singapore".*

## **NB Three Shipping Ltd. v Harebell Shipping Ltd [2004] EWHC 2001 (Comm)**

*"47.01 This Charterparty shall be governed by, and construed in accordance with, English law.*

*47.02 The Courts of England shall have jurisdiction to settle any disputes which may arise out of or in connection with this Charterparty but the owner shall have the option of bringing any dispute hereunder to arbitration.*

*47.09 The charterer shall have the same right to bring proceedings against the owner in relation to the performance of its obligations hereunder, limited to bringing proceedings in the courts of England (...).*

*47.10 Any dispute arising from the provisions of this Charterparty or its performance which cannot be resolved by mutual agreement which the owner determines to resolve by arbitration shall be referred to arbitration in London or, at owner's option, in another city selected by the owner by two arbitrators, one appointed by the owners and one by the charterers who shall reach their decision by applying English law. If the arbitrators so appointed shall not agree they shall appoint an umpire to make such decision".*



- **Parties:**

- **XYZbis LLC:** Incorporated in Abu Dhabi and constituted in accordance with UAE law  $\Rightarrow$  Non-EU Member State.
- **ENGIN:** Domiciled in Lisbon (Portugal)  $\Rightarrow$  EU Member State.

- **Legal relationship:** A design and engineering contract  $\Rightarrow$  Is it a contract for the provision of services, for the sale of goods, etc.?  $\Rightarrow$  Is the relationship *civil and commercial* for the purposes of the Regulation?

- **Actions**

- ❶ **XYZbis vs ENGIN:**

- Could jurisdiction be established under any of the exclusive fora?
    - Could jurisdiction be established under the general forum?  $\Rightarrow$  Could it be established in more than one Member State under special jurisdiction rules?

- ❷ **ENGIN vs XYZbis:**

- Could jurisdiction be established under any provision of the Regulation?

*"The Parties to this Agreement shall not [be] authorised to bring any dispute relating to this Agreement before the courts of the United Arab Emirates".*

### Questions:

- 1 Where should disputes be litigated?
- 2 Could the Courts of a Member State examine this clause in the light of the Regulation?
- 3 In case of breach of the clause by XYZbis, what could ENGIN do? ⇒ Would the Regulation apply to the recognition and enforcement of Emirati judgment? Would the breach preclude XYZbis from obtaining the recognition and enforcement of such judgment?
- 4 Would you recommend this wording?

- **Parties:**
  - **XYZbis LLC:** Incorporated in Abu Dhabi and constituted in accordance with UAE law  $\Rightarrow$  Non-EU Member State.
  - **BADLEASING:** Domiciled in Turin (Italy)  $\Rightarrow$  EU Member State.
- **First action: Breakdown of contractual negotiations**
  - XYZbis vs BADLEASING.
  - Could jurisdiction be established under any of the exclusive fora contained in the Regulation?
  - Could jurisdiction be established under the general forum of the Regulation?  $\Rightarrow$  Could it be established in more than one Member State under special jurisdiction rules?

- **Second action: Violation of duty of disclosure**
  - BADLEASING vs XYZbis.
  - Could jurisdiction be established under any provision of the Regulation?
- **Third action: Vendetta of XYZbis' employees**
  - Is XYZbis vicariously liable for the actions of its employees?
  - Could jurisdiction be established under any provision of the Regulation?
- Could jurisdiction in relation to these actions be established under a prorogation agreement in accordance with Art. 25 of the Regulation?

- **Parties:**
  - **A company of the consortium:** No data about its domicile
  - **XYZbis LLC** (other members of the Consortium):  
Incorporated in Abu Dhabi and constituted in accordance with UAE law  $\Rightarrow$  Non-EU Member State.
- **Legal relationship:** Memorandum of Association  $\Rightarrow$  Disproportionate contribution to the capital  $\Rightarrow$  Is a contractual or a corporate matter?  $\Rightarrow$  Is the subject-matter of this action "*civil and commercial*"?
- **Main question: Could a Spanish Court settle the dispute?**
  - Could the jurisdiction be established under any provision of the Regulation?
  - Could the jurisdiction be established under Domestic rules?

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  - **A company of the consortium:** No data about its domicile
  - **XYZbis LLC:** Incorporated in Abu Dhabi and constituted in accordance with UAE law  $\Rightarrow$  Non-EU Member State.
- **Legal relationship:** Memorandum of Association  $\Rightarrow$  Invalidity of a decision adopted by the General Assembly  $\Rightarrow$  Is the subject-matter of this action "*civil and commercial*"?
- **Main question: Could a Spanish Court settle the dispute?**
  - Could the jurisdiction be established under any provision of the Regulation?
  - Could the jurisdiction be established under Domestic rules?