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## Legal Certainty and Predictability in the EUPILLAR Project's Regulations: An Assessment

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### I. Introduction

The EUPILLAR Project reflects on the development of the European Union (EU) Civil Justice framework through the analysis of the implementation of certain Private International Law (PIL) Regulations by the national courts and the judgments of the Court of Justice of the European Union (CJEU). Both national courts and the CJEU are indispensable agents in the progressive creation of the already considerably evolved area of civil justice. National courts daily administer justice through the application of EU norms playing a crucial institutional role for the EU while the CJEU slowly over time provides a uniform interpretation of these norms. The obviousness of the essential role played by legal certainty in the creation of the EU Civil Justice framework needs no more explanation. It is also self-evident that EU PIL should help increase legal certainty and remove differences in treatment that are a consequence of national laws.<sup>1</sup> This paper aims to assess and reflect on the state of play of legal certainty in the EU concerning the application of the EUPILLAR project's Regulations by the courts in the EU.

### II. Right to Justice and the Concepts of Legal Certainty and Predictability in the EU Legal Framework

The objective of creating a civil justice area within the EU is found in the Treaty on the Functioning of the European Union (TFEU)<sup>2</sup> and is an outworking of the EU value of

<sup>1</sup> See X Kramer et al, *A European Framework for Private International Law: current gaps and future perspectives*, Legal Affairs, Directorate General for Internal Policies, PE.462.487, 2012, p 75, [www.europarl.europa.eu/studies](http://www.europarl.europa.eu/studies).

<sup>2</sup> In the words of the Treaty on the Functioning of the EU (TFEU), consolidated version [2012] OJ C326, '(T)he Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States' Art 67(1)). Regarding judicial cooperation in civil matters see Title V, ch 3 (Art 81).

justice according to the EU Treaty (Article 2) and the EU's commitment to fundamental rights through the EU Treaty (Article 6), the Charter of Fundamental Rights of the European Union (CFREU) (Article 47)<sup>3</sup> and as part of the general principles of EU law the special significance given to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>4</sup> According to the jurisprudence of the European Court of Human Rights (ECtHR), legal certainty constitutes one of the fundamental aspects of the rule of law (the legality principle) on which the interpretation of the right to a fair trial has to rely.<sup>5</sup>

The concept of legal certainty is linked with the protection of the parties' legitimate expectations<sup>6</sup> on the basis of the rule of law. Its role in PIL can encompass the preservation or stability of legal situations when confronted with their internationalisation (enabling security or continuity; therefore, material certainty or acceptability of the decisions) though it is generally understood as the predictability of the results when applying legal norms.<sup>7</sup> Predictability is essential for any administration of justice and, therefore, for the creation of a civil justice system within the EU. However, and without abandoning the rule of law, any legal system cannot anticipate and cover every possible legal case. In addition to the eventual lacunas, when applying the norms national courts have to face the difficulties of international situations and the existence of certain ambiguities in their texts together with the constant changes in the needs of society. All this has argued in favour of a predictability dimension centred in a so-called reasonableness principle<sup>8</sup> under which the judges' role is to balance material justice together with parties' expectations.

EU civil judicial cooperation is trying to achieve effective access to justice in cross-border cases.<sup>9</sup> Conceived as part of the rule of law, it is not surprising that legal certainty or predictability are not, as such, expressly mentioned in the EU Treaties. Nevertheless, the Action Plan Implementing the Stockholm Programme mentions predictability when it refers to

<sup>3</sup> Consolidated version of the Treaty on European Union; and the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, [2012] OJ C 326.

<sup>4</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted at Rome, on 4 November 1950, as amended. [www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf). ('Right to a fair trial'). The CJEU has established the 'special significance' as a 'guiding principle' for its case law of the ECHR. See C-4/73 *Nold* [1974] ECR 491 (para 13).

<sup>5</sup> *Beian v Romania* (no 1), no 30658/05, § 39, ECHR 2007-V; *Okyay and Others v Turkey*, no. 36220/97 § 73. ECHR 2005-VII.

<sup>6</sup> ECHR *Unédic v France*, no 20153/04, § 74, 18 December 2008.

<sup>7</sup> See, for example, E Paunio, 'Beyond Predictability—Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2009) 10 *German Law Review* 1469; J Raitio, 'The Principle of Legal Certainty as a General Principle of EU Law' in U Berniz, J Nergelius, C Cadner (eds), *General Principles of EU Law in a Process of Development* (Alphen aan den Rijn, Kluwer, 2008).

<sup>8</sup> A Lowenfeld, *International Litigation and the Quest for Reasonableness* (Oxford, Clarendon Press, 1996) 229–31. Along this line, FA Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years' (1984) 186 *Hague Collected Courses* 28–29, points that the 'principle of reasonableness ... appears unobjectionable, so long as it is understood that mere political, economic, commercial or social interests are to be disregarded when it comes to weighting which every test of reasonableness implies ... for arbitrariness is substantially the same as unreasonableness.' O Corten, 'The Notion of "Reasonable" in International Law: Legal Discourse, Reason and Contradictions' (1999) 48(3) *International and Comparative Law Quarterly* 613.

<sup>9</sup> See Art 81 TFEU which also contains the following objectives of particular relevance for this chapter: (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction and (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

strengthening people's confidence in the EU Civil Judicial area both from the business and the personal-family perspectives.<sup>10</sup>

### III. Legal Certainty in EUPILLAR's Project Regulations

Of the Regulations under the EUPILLAR project, only the Rome II Regulation (RIIR) (Recital 14) expressly recognises in general terms that '(T)he requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice'.<sup>11</sup> Rome I (RIR)<sup>12</sup> and RIIR (Recital 6 in both) place their focus on the improving 'the predictability of the outcome of litigation' together with the 'certainty as to the law applicable and the free movement of judgments', for which, in the case of these Regulations, the EU needs uniform conflict-of-laws rules regarding contractual and non-contractual obligations.<sup>13</sup>

The Brussels Regulations (concerning jurisdiction and recognition and enforcement of judgments) give much less prominence to legal certainty and predictability in their texts. The Brussels IIa Regulation<sup>14</sup> (BIIaR) does not mention it at all. It only includes one mention to the 'proximity' of the jurisdiction criteria established for matters of parental responsibility (Recital 12).<sup>15</sup> This principle, generally associated with predictability, is absent in the rest of the Regulations. The Brussels I Regulation (BIR/BIaR) refers to predictability only in the context of the jurisdiction rules (Recital 11/Recital 15).<sup>16</sup> Along this line, BIaR has added that legal certainty is ensured with the special jurisdiction grounds since they are founded on the existence of a close connection that guarantees their foreseeability for the defendant (Recital 16).<sup>17</sup> Finally, the Maintenance Regulation mentions legal certainty and predictability as objectives that can be reached by allowing the parties to agree on the

<sup>10</sup> The Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, says: 'Union law can facilitate mobility and empower citizens to exercise their free movement rights. For international couples, it can reduce unnecessary stress when they divorce or separate and can *remove the current legal uncertainty for children and their parents in cross-border situations*. It can help eliminate barriers to the recognition of legal acts and lead to the mutual recognition of the effects of civil status documents. When *citizens* drive to another Member State and are unfortunate enough to have an accident, they *need legal certainty* on the limitation periods of insurance claims', p 4; and 'Union law can help by *increasing businesses' need for legal certainty* and at the same time guaranteeing the highest level of consumer protection', p 5 (emphasis added).

<sup>11</sup> Reg 864/2007 [2007] OJ L199.

<sup>12</sup> Reg 593/2008 [2008] OJ L177.

<sup>13</sup> The text of the Recitals says: '[there is a need] in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.'

<sup>14</sup> Reg 2201/2003 [2003] OJ L338.

<sup>15</sup> Recital 12: 'The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity.'

<sup>16</sup> Reg 44/2001 [2001] OJ L12, superseded by Reg 1215/2012, [2012] OJ L351. 'The rules of jurisdiction should be highly predictable.'

<sup>17</sup> Recital 16: 'The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen.'

competent court (Recital 19).<sup>18</sup> RIIR associates party autonomy as a choice-of-law criteria to the objective of legal certainty (Recital 31).<sup>19</sup>

As to the acknowledgement of the Regulations' contribution to legal certainty, it is important to note that before the adoption of RIIR there was the same choice-of-law rule in many EU Member States for non-contractual obligations—the *lex loci delicti commissi* principle—but it was not interpreted and applied uniformly. The Regulation aimed to reduce the uncertainty by unifying the choice-of-law rules in the field (Recital 15).<sup>20</sup> In other words, the existence of broadly the same national rules could not provide for legal certainty and the implementation of a uniform EU body of rules—including general, specific and escape norms—was meant to provide legal certainty and predictability.

The Brussels Regulations give less general relevance to legal certainty in the Recitals than the Rome Regulations, particularly RIIR, which resort to this principle more actively. Perhaps this can be explained by the fact that the Rome Regulations are subsequent in time and, therefore, more evolved, but then one would expect more references in the Recitals to Brussels Ia. Another possible explanation is the role played by the German Presidency in the Council in finalising RIIR. However, the next sections will reveal that in the CJEU case law, legal certainty and predictability arguments are made in Brussels I cases.

#### IV. Interpretation, Characterisation and Consistency

One cannot forget that these Regulations are to be applied by national courts as part of the EU civil justice system. In this regard, the general interpretative competence attributed to the CJEU by the preliminary ruling system (Article 267 TFEU) is a basic tool to gradually secure legal certainty and predictability in all EU courts by national courts following the rulings of the CJEU on the interpretation of the Regulations.

It is also clear that, being EU norms, the concepts used by the Regulations, though nurtured from each of the Member States' legal systems, have their own autonomous understanding. The Regulations' Recitals point to this issue<sup>21</sup> and their Articles facilitate definitions. The CJEU has expressly acknowledged that the autonomous concepts of the BIR jurisdiction rules, and particularly their connecting factors, constitute a means to reinforce the legal certainty objective that they pursue.<sup>22</sup> This assertion could be easily endorsed

<sup>18</sup> Recital 19: 'In order to increase legal certainty, predictability and the autonomy of the parties, this Regulation should enable the parties to choose the competent court by agreement on the basis of specific connecting factors.'

<sup>19</sup> Recital 31: 'To respect the principle of party autonomy and to enhance legal certainty the parties should be allowed to make a choice. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case.' (emphasis added).

<sup>20</sup> Recital 15: 'The principle of *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.'

<sup>21</sup> Recitals 11 and 15 (15 BIaR) BIR 'The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction'; 'the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously'. Recitals 11 and 30 RIIR 'Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept'; 'Culpa in contrahendo for the purposes of this Regulation is an autonomous concept'.

<sup>22</sup> As to BIR see C-533/07, *Falco* [2009] ECR I-3327 (para 26): 'In order to reinforce the primary objective of legal certainty which governs the rules of jurisdiction, that criterion of a link is defined autonomously by Regulation 44/2001 ...' (emphasis added).

as to the rest of the PIL Regulations. However, it has been noted that, on certain occasions, the autonomous concepts provided by the Regulations are not easily transferable to Member States practice, leading to disruptive case law that prejudices predictability. For instance, there is no definition of ‘domicile’ in Bulgaria and, when applying BIR (Article 59), courts resort to the habitual residence concept fluctuating between the permanent and the current addresses.<sup>23</sup> It is also relevant noting the difficulties perceived in the use of the habitual residence concept in family litigation under BIIaR—particularly with regard to children—where the CJEU case law shows certain doubts,<sup>24</sup> and under the Maintenance Regulation, where the CJEU in a rather unclear and overly intrusive way attempts to place parameters on the geographical scope of habitual residence within a particular part of a Member State.<sup>25</sup> Interestingly, none of these cases expressly mention legal certainty or predictability.

Like the interpretative criteria established by the Vienna Convention on the Law of Treaties, the CJEU interpretative rules are based on the literal texts, their objective and general scheme, their legislative history, and their context.<sup>26</sup> Following this criteria, as to the EUPILLAR Regulations it is possible to conclude that the Court takes into consideration the proximity of the links to the litigious question and its foreseeability for the parties.

In addition, it is important to recall the fact that the EUPILLAR Regulations are not applied in isolation. On the contrary, it is not unusual that they are applied in combination between themselves, with other EU norms or with international treaties. For legal certainty purposes it is therefore necessary to adopt rules on their relationships and, in case there is no clearly established priority of one over another, to be aware of the need for a consistent interpretation. All EUPILLAR Regulations contain rules setting the relations among different normative instruments—EU<sup>27</sup> and international.<sup>28</sup> However, only the Rome Regulations expressly refer to interpretative consistency in relation to BIR (Recital 7).<sup>29</sup> Nevertheless, the CJEU has only expressly faced this issue regarding RIR. In *Andreas Kainz* the Court established that

[A]lthough it is apparent that the EU legislature sought to ensure the consistency between BIR, on the one hand, and the substantive scope and the provisions of RIR, on the other, that does not mean, however, that the provisions of BIR must for that reason be interpreted in the light of the provisions of RIR. The objective of consistency cannot, in any event, lead to the provisions of BIR being interpreted in a manner which is unconnected to the scheme and objectives pursued by that regulation.<sup>30</sup>

<sup>23</sup> See ch 12 above.

<sup>24</sup> Whilst in *Mercredi* (C-497/10 PPU EU:C:2010:829) it provides a balance between facts and custodial parents’ intent, in *C v M* (C-376/14 EU:C:2014:2268) it seems to rely mostly on the existence of a provisional court decision. P Beaumont and J Holliday, *Recent Developments on the meaning of ‘habitual residence’ in Alleged Child Abduction Cases*, Working Paper Aberdeen Centre for Private International Law, 2015/3 [www.abdn.ac.uk/law/documents/Recent\\_Developments\\_on\\_the\\_Meaning\\_of\\_Habitual\\_Residence\\_in\\_Alleged\\_Child\\_Abduction\\_Cases\\_.pdf](http://www.abdn.ac.uk/law/documents/Recent_Developments_on_the_Meaning_of_Habitual_Residence_in_Alleged_Child_Abduction_Cases_.pdf).

<sup>25</sup> C-400/13 and C-408/13, *Sanders and Huber* EU:C:2014:2461 (para 47) discussed in chs 41 and 44 below.

<sup>26</sup> For a detailed analysis with regard to legal certainty see K Lenaerts and J Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*. EUI Working Papers. AEL 2013/9 AEL\_2013\_09\_DL.pdf.

<sup>27</sup> Arts 67 BIR/BIIaR, 68 Maintenance, 23 RIR, 27 RIIR.

<sup>28</sup> Arts 68–71 BIR/BIIaR, 59–61 BIIaR, 69 Maintenance, 24–25 RIR, 28 RIIR.

<sup>29</sup> Recital 7: ‘The substantive scope and the provisions of this Regulation should be consistent with Regulation 44/2001 and the instruments dealing with the law applicable to contractual / non-contractual obligations.’

<sup>30</sup> It is mentioned in the legal context in, C-45/13, *Andreas Kainz* EU:C:2014:7 (para 8); see also para 20.

Ultimately, the response to the doubts experienced by national courts in the application of EU Regulations is borne by the CJEU through the preliminary rulings proceeding. In one way or another, all the preliminary questions resolve difficulties in order to establish criteria that will improve predictability and certainty in the application of the rules. Consequently, this way the Court contributes to guaranteeing the right to a fair trial for any legal or individual persons subject to them. As to EUPILLAR Regulations and resorting to PIL methodology, it could be said, though it may sound simplistic, that this task fundamentally amounts to the characterisation or classification of their norms.

## V. Particular Issues

The following paragraphs will address the CJEU case law where legal certainty and/or predictability have been at issue. Apart from certain cases regarding the Regulations' scope and choice of law issues, some refer to the compatibility of the Regulations' rules with other normative sources, whilst the vast majority cover jurisdiction issues. There is no relevant reference to legal certainty and/or predictability in the recognition and enforcement field.

### A. The Regulations' Scope and Characterisation Issues

Determining the scope of the Regulations is essential for legal certainty. Whilst the territorial scope of the Regulations seems to be certain, their substantive and temporal scope is what has generated doubts that required the interpretation of the CJEU. In the first case, much of the Court's work entailed the characterisation of different situations in accordance with the autonomous concepts used by the Regulations.

As to the temporal scope of RIIR, the Court established in *Homawoo* that, following Article 31, the Regulation applies to events giving rise to damage occurring after 11 January 2009 since:

[S]uch an interpretation is the only one which ensures, ... the full attainment of the Regulation's objectives, that is to say, the predictability of the outcome of litigation, legal certainty as to the law applicable and the uniform application of that regulation in all Member States.<sup>31</sup>

However, it has been reported that the experience of national courts, particularly Italian, shows confusion about the temporal scope of application that affect the predictability of the system.<sup>32</sup> Though the Court has faced questions relating to the temporal scope of BIR/BlAR, its answers have not expressly resorted to predictability or legal certainty arguments. The Court has given a number of preliminary rulings on the Regulations' substantive scope of application that, at the bottom line, entail the autonomous characterisation of the concepts. In particular, this has been the case for, among others, civil and commercial

<sup>31</sup> C-412/10, *Homawoo* EU:C:2011:747 (para 34). The referring national court, doubted if the date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined by the court seised have no bearing on determining the scope *ratione temporis* of the Reg.

<sup>32</sup> See ch 8 above.

matters,<sup>33</sup> contractual and non-contractual obligations,<sup>34</sup> maintenance obligations, domicile, parental responsibility and child abduction, etc. Although it has been reported that the doubts about these autonomous concepts and, moreover, the lack of adjustment to national legal systems affect legal certainty and predictability,<sup>35</sup> CJEU jurisprudence barely resorts to these principles in preliminary rulings.

For instance, regarding the material scope of the BIIaR, Advocate General Wathelet based his conclusions in *Mikolajczyk* on the predictability objective of that Regulation. The Court was asked whether matrimonial annulment proceedings initiated after the death of one of the partners were covered by the Regulation. He stated that

the objective of BIIaR is to offer EU citizens a high level of predictability and legal clarity as to the jurisdiction, recognition and enforcement of national courts' matrimonial decisions with an international character. Excluding from its scope the matrimonial nullity proceedings in case of decease of one of the partners would be against the spirit and the objectives of this Regulation.<sup>36</sup>

As a general issue, some doubts have been raised as to the determination of the situations' internationality. The diversity and complexity of situations with foreign links in modern life has developed in cases where the relevance of the international element is questioned and, therefore, the application of the Regulations. At present there is a case pending before the CJEU regarding BIR.<sup>37</sup> This uncertainty, expressed by some national legal operators,<sup>38</sup> has particular incidence in French courts' experience.<sup>39</sup>

But it is not only the characterisation of the situations covered by the Regulations that has a significant relevance for legal certainty and predictability. The CJEU case law providing definition of concepts used to establish special jurisdiction rules is very significant, especially regarding BIR/BIaR. The Court's jurisprudence declares the existence of a contract when parties have somehow manifested their mutual consent (Article 5(1)/7(1)). In any other case litigation is to be characterised as non-contractual (Article 5(3)/7(2)). In particular, expressly relying on the legal certainty objective of the Regulation through the unification of highly predictable jurisdiction rules, the Court has established that 'an action for damages founded on an abrupt termination of a long standing business relationship is not a matter of tort if a tacit contractual relationship existed between the parties ...'.

<sup>33</sup> For example, in C-645/11, *Land Berlin* EU:C:2013:228 (para 38), it is established that the concept 'includes an action for recovery of an amount unduly paid in the case where a public body is required by an authority established by a law providing compensation in respect of acts of persecution carried out by a totalitarian regime to pay to a victim by way of compensation part of the proceeds of the sale of land has as the result of an unintentional error paid to that person the entire sale price and subsequently brings legal proceedings seeking to recover the amount unduly paid'.

<sup>34</sup> See above n 21 and ch 33 above.

<sup>35</sup> See ch 8 above.

<sup>36</sup> AG Opinion 16 May 2016, C-294/15, *Mikolajczyk* EU:C:2016:367 (para 30). The Court decision dated 13 October 2016 EU:C:2016:772 has confirmed this approach (paras 32–33). A third person can initiate those proceedings but Art 3(1)(a) does not apply.

<sup>37</sup> C-136/16, *Sociedade Matropolitana de Desenvolvimento S.A.* removed from the register on 10 March 2017, EU:C:2017:237. For earlier decisions discussing internationality see C-327/10 *Lindner* [2011] ECR I-11543 and C-292/10 *G* EU:C:2012:142.

<sup>38</sup> See ch 9 above.

<sup>39</sup> The Cour de cassation adopted a confusing definition of the concept of internationality, holding that a sub-contract of construction was not international because, but for the German seat of one of the contracting companies, the transaction was entirely connected to France and the intention of the parties was to treat the situation as domestic. Cass civ 1, 4 October 2005, no 02-12.959. See ch 17 above.

‘Demonstration of the existence of this relationship must be based on a body of consistent evidence ...’ and it is for the national ‘referring court to ascertain whether such a body of consistent evidence exists’.<sup>40</sup>

## B. Jurisdiction

BIR/BIaR point to the predictability of their jurisdiction links whilst BIaR only mentions the proximity of the jurisdiction criteria provided for parental responsibility matters and Maintenance makes no reference to this issue. Nevertheless, any legislator designing jurisdiction rules boosts the connecting factors that respond to the predictability principle and, to this end, proximity is a clear input that not only helps from the perspective of the right to justice, but also for the procedural efficiency and economy.

The CJEU has mostly resorted to legal certainty and predictability arguments in the framework of BIR jurisdiction rules. Beyond the cases where the reference to these concepts is limited to recalling Recital 11 within the legal context of its final decision, the case law reflects on this principle regarding the parties’ choice of court, the plurality of defendants’ situations, the special jurisdiction rules and the *lis pendens* cases.

First, the CJEU has clearly stated that it is apparent from its Recitals 2 and 11 (15 BIaR) that BIR ‘seeks to unify the rules of conflicts of jurisdiction in civil and commercial matters by way of rules of jurisdiction which are highly predictable’.<sup>41</sup> Moreover, Recital 11, together with number 12, ‘sets out the relationship between the various rules of jurisdiction and their purpose’.<sup>42</sup> It has also stated that, overall, BIR ‘pursues an objective of legal certainty’ and that this objective ‘consists in strengthening the legal protection of persons established in the EU, by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued’.<sup>43</sup> Therefore ‘the interpretation of BIR norms is done in order to reinforce the primary objective of legal certainty’.<sup>44</sup>

When interpreting the Brussels Convention, the initial references to the legal certainty principle in the CJEU decisions were not limited to the jurisdiction rules, but were expressed in general terms stating that ‘the Court has repeatedly held that the principle of legal certainty is one of the objectives of the Brussels Convention’.<sup>45</sup>

<sup>40</sup> C-196/15 *Granarolo Spa* EU:C:2016:559 (paras 26–28). The evidence may include in particular the existence of a long-standing business relationship, good faith between the parties, the regularity of the transactions and their development over time expressed in terms of quantity and value, any agreements as to prices charged and/ or discounts granted and the correspondence exchanged.

<sup>41</sup> *Granarolo*, *ibid* (para 16); C-175/15, *Taser International Inc* EU:C:2016:176 (para 32); C-381/08, *Car Trim GmbH*, EU:C:2010:90 (para 12); C-533/07 *Falco* [2009] ECR I-3327 (paras 21 and 22), note 22; C-386/05, *Color Drack* [2007] ECR I-3699 (para 19).

<sup>42</sup> *Color Drack*, *ibid*.

<sup>43</sup> *Falco* above n 22 (paras 21–22); *Color Drack* above n 41 (para 20); *Car Trim GmbH* above n 41 (para 26); *Taser* above n 41 (para 32); C-103/05, *Reisch Montage* EU:C:2006:471 (paras 24–25). As to the Brussels Convention, see Case C-383/95 *Rutten* [1997] ECR I-57 (para 13) and C-295/95 *Farrell* [1997] ECR I-1683 (para 13).

<sup>44</sup> *Car Trim GmbH* above n 41 (para 26).

<sup>45</sup> Case 38/81 *Effer* [1982] ECR 825 (para 6); Case C-26/91 *Handte* [1992] ECR I-3967 (paras 11, 12, 18–19); Case C-129/92 *Owens Bank* [1994] ECR I-117 (para 32); Case C-288/92 *Custom Made Commercial* [1994] ECR I-2913 (para 18); Case C-440/97 *GIE Groupe Concorde and Others* [1999] ECR I-6307 (para 23); and Case C-256/00, *Besix SA*, EU:C:2002:99 (para 24).

Regarding preliminary issues, the Court has established that the predictability objective cannot be attained if the application of jurisdiction rules could vary ‘according to whether a preliminary issue, capable of being raised at any time by one of the parties, exists, on the ground that this would alter the nature of the dispute.’<sup>46</sup> Therefore, jurisdiction has to be established on the basis of the initial claim and preliminary issues should be solved by that Court.

### *i. Defendant’s Domicile*

There is no doubt about the legal certainty provided by the defendants’ domicile forum. Plurality of defendants’ cases seised in the Member State where one of them is domiciled (Article 6(1) BIR/8(1) BIaR) do raise predictability concerns. The Court characterises this rule as a special forum that, like other special jurisdiction rules,

must be interpreted, first, in the light of recital 11 ... according to which the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.<sup>47</sup>

Anyhow, for the plurality of defendants’ forum to be applied two conditions have to be met.

First, the defendants have to be domiciled in a Member State; otherwise, the rule is not applicable to them. In *CDC*, where the Court had to face the alleged misuse of the plurality of defendants’ rule due to the ulterior agreement between the claimant and the defendant domiciled in the chosen forum, there is no reference to legal certainty or predictability beyond the inclusion of Recital 11 in the decision’s legal context.<sup>48</sup> Second, the claims have to be so closely connected that there is a risk of irreconcilable judgments resulting from separate proceedings. Whilst in some cases, as in *Land Berlin*—the only one that expressly mentions legal certainty within the legal context—the CJEU rules on the existence of this risk,<sup>49</sup> in others it leaves the national courts to evaluate it.<sup>50</sup>

Legal certainty is also considered, but only in the legal context of the Court’s decision, when interpreting the jurisdiction criteria for third party proceedings (Article 6(2)) to conclude that

it includes an action brought by a third party in accordance with national law against the defendant in the original proceedings and closely linked to those original proceedings ... provided that the action was not instituted solely with the object of removing that defendant from the jurisdiction of the court which would be competent in the case.<sup>51</sup>

<sup>46</sup> C-144/10, *Berliner Verkehrsbetriebe (BVG)* EU:C:2011:300 (para 35).

<sup>47</sup> C-616/10, *Solvay* EU:C:2012:445 (para 20); C-145/10, *Painer* EU:C:2011:798 (para 75); C-98/06 *Freeport* EU:C:2007:595 (para 36).

<sup>48</sup> C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA* EU:C:2015:335.

<sup>49</sup> *Land Berlin* above n 33 (para 48).

<sup>50</sup> C-616/10, *Solvay* above n 47 (para 30). Without mentioning legal certainty, it states that proceedings in different Member States against companies accused of committing a European patent infringement with regard to the same products can lead to ‘irreconcilable judgments’.

<sup>51</sup> C-521/14, *Sovag* EU:C:2016:41 (para 47). Action seeking reimbursement of compensation paid by that third party to the applicant in the original proceedings.

In addition to legal certainty and predictability, it seems clear that this approach contributes to procedural efficiency.

## ii. Choice of Court

Regarding party autonomy, legal certainty in situations of express and of implied choice of jurisdiction under BIR has received attention from the Court. Article 24, the submission or implied choice rule, applies despite the existence of a previous express agreement on the jurisdiction. In this regard, citing recitals 11 and 12, in *Taser* the CJEU established that ‘when there is a choice of court agreement but the claim is presented in the defendant’s domicile, if he does not dispute the jurisdiction, it may stem from Article 24’. Moreover the court of the defendant’s seat that has been seised is precluded from declaring that it has no jurisdiction *on its own motion*.<sup>52</sup> However, if a defendant domiciled in a Member State other than that of the court seised is not served with the document instituting proceedings, remains absent and the court appoints a representative *in absentia*, the establishment of the international jurisdiction of the court under Article 24 on the basis of the representative’s appearance ‘cannot be regarded as predictable’. In other words, in the light of Article 47 CFREU, to interpret that a court-appointed representative entering an appearance on behalf of an absent defendant amounts to an appearance being entered by that defendant ‘would not be consistent with the objectives of the rules on jurisdiction’.<sup>53</sup>

Regarding express choice-of-jurisdiction, Article 23 ‘is intended to lay down itself the conditions as to form which jurisdiction clauses must meet, so as to ensure legal certainty and to ensure that the parties have given their consent’.<sup>54</sup> In other words, formal requirements are meant to guarantee the compliance with the substantive requirements; that is, consent and whether the choice-of-court is clear enough; both leading to predictability and legal certainty.<sup>55</sup> Citing Recital 11 (with and without Recital 12) in the Court’s decision’s legal context and, therefore, implying that the predictability requirement would be satisfied, forum selection clauses of Member States’ courts included in contracts’ general terms and conditions are to be admitted if certain conditions are met. In *Höszig Kft* the Court has confirmed that the existence of consent to a jurisdiction clause set in a contract’s general terms and conditions requires, first, that the text of the contract signed by both parties contains an express reference—which can be controlled by a party applying normal diligence—to the general conditions including the jurisdiction clause, and, second, that those general conditions containing the jurisdiction clause were actually communicated to the other contracting party.<sup>56</sup> In addition, following its well-established jurisprudence,<sup>57</sup> it ruled that the clarity requirement is satisfied by designating the jurisdiction of the courts

<sup>52</sup> C-175/15, *Taser International Inc* above n 41 (para 36).

<sup>53</sup> C-112/13, A, EU:C:2014:2195 (paras 57 and 61).

<sup>54</sup> C-222/15, *Höszig Kft*. EU:C:2016:525 (para 32). As to the Brussels Convention see C-159/97, *Castelletti* EU:C:1999:142 (para 34).

<sup>55</sup> In Spanish jurisprudence, expressly acknowledging that the formal requirements of jurisdiction clauses are those established in BIR; that internal law cannot take precedence, and stating that those requirements are meant to provide legal certainty and to guarantee parties’ consent, see, for example, Decree JM Barcelona no 78/2015, 5 March and the Supreme Court judgment of 27 May 2008.

<sup>56</sup> *Höszig Kft* above n 54 (para 40).

<sup>57</sup> Art 23 does not require that the competent court be determined on the jurisdiction clause wording alone. ‘It is sufficient that the clause state the objective factors on the basis of which the parties have agreed to choose a

of a city in a Member State.<sup>58</sup> As to the formal requirements that provide the requested predictability and legal certainty, in *Jaouad El Majdoub*, regarding the communication by electronic means (Article 23(2)), it was established that acceptance of an electronic contract by click wrapping entails that party's consent if the system makes it possible to print and save the text of the terms and conditions of the contract before it is concluded.<sup>59</sup>

On whether jurisdiction clauses agreed in contracts can be relied on against third party sub-contractors, the CJEU initially distinguished between the clauses included in bills of lading for maritime transport and those in other types of contract. Whilst in the first ones the jurisdiction clause incorporated may be relied on against a third party to that contract if it has been adjudged valid between the carrier and the shipper and, by virtue of the relevant national law, on acquiring the bill of lading the third party succeeded to the shipper's rights and obligations;<sup>60</sup> in cases where the clause was inserted in a sales contract, the CJEU established in *Refcomp* that it cannot be used against a third party sub-buyer 'unless it is established that he has actually consented to that clause'. This decision responded to the need to assure the uniformity of the jurisdiction rules since referring to national laws in order to establish whether the clause could be used or not

would give rise to different outcomes among the Member States liable to compromise the aim of unifying the rules of jurisdiction. ... Such a reference to national law would also be an element of uncertainty incompatible with the concern to ensure the predictability of jurisdiction which is, as stated in recital 11 in the preamble to the Regulation, one of its objectives.<sup>61</sup>

However, leaving aside these arguments about legal certainty, the CJEU reversed in *CDC* by stating that

[O]nly where a party not privy to the original contract had succeeded to an original contracting party's rights and obligations in accordance with national substantive law as established by the application of the rules of private international law of the court seised of the matter could that third party nevertheless be bound by a jurisdiction clause to which it had not agreed.<sup>62</sup>

This approach—with case-specific requirements—has been recently followed in *Profit Investment*, where the choice-of-court was claimed by a bonds' insurer against the bonds' issuer (jurisdiction clauses inserted in prospectus).<sup>63</sup>

The legal certainty and predictability of BIR's application has raised concerns regarding asymmetric jurisdiction agreements. Asymmetric agreements—those where the parties have different choices and obligations—have received different consideration in a number

court or the courts to which they wish to submit their disputes. Those factors, which must be sufficiently precise to enable the court seised to ascertain whether it has jurisdiction, may, where appropriate, be determined by the particular circumstances of the case'. Case C-387/98, *Coreck*, EU:C:2000:606 (para 15).

<sup>58</sup> *Höszig Kft.* above n 54 (paras 43 and 47).

<sup>59</sup> C-322/14, *Jaouad El Majdoub* EU:C:2015:334 (para 40).

<sup>60</sup> 71/83, *Russ* EU:C:1984:217 (para 24); *Castelletti* above n 54 (para 41); C-387/98 *Coreck* above n 57 (paras 23–27).

<sup>61</sup> C-543/10, *Refcomp SpA* EU:C:2013:62 (para 39).

<sup>62</sup> *CDC* above n 48 (para 65).

<sup>63</sup> C-366/13, *Profit Investment Sim* EU:C:2016:282 (paras 33, 34 and 36). The requirements, that are to be verified by the national court, are: (i) validity of the jurisdiction clause in the relationship between the issuer and the financial intermediary, (ii) that the third party, by acquiring those bonds on the secondary market, succeeded to the financial intermediary's rights and obligations attached to those bonds *under the applicable national law*, and (iii) that the third party had the opportunity to acquaint himself with the prospectus containing that clause.

of Member States. Unlike Spanish Courts,<sup>64</sup> French courts are reluctant to enforce this type of agreement on the basis of, first, their ‘potestativity’ (ie the unenforceability of a contractual promise made subject to a condition precedent left to the discretion of the promisor) and, second, their lack of predictability.<sup>65</sup> When they have admitted them, it was because the clause provided for a limited number of alternative fora for the party that was not bound to sue in the elected court.<sup>66</sup> In Spain, legal certainty and predictability are understood to support the result that favours respect for party autonomy. It seems clear that, for an EU Civil Justice system it is necessary to have a common uniform response. The introduction into BIaR of a choice-of-law rule for substantive validity of a choice-of-court agreement, referring to the law of the chosen court including its private international law rules, leaves open the issue as to whether asymmetry is a question of substantive validity or a question of what constitutes a choice of court agreement falling within Article 25 of the Recast (formerly Article 23 of BIR).

As to parties’ choice of non-Member States’ courts (*derogation fori*), the effect of legal certainty and predictability considerations may be said to be still unclear. The CJEU has not as yet expressly resolved the issue and Member States’ courts have sustained different reactions towards its acceptance in cases where a Member State Court would have jurisdiction according to BIR. In situations where the defendant challenges the Member State’s courts’ jurisdiction—since following *Taser* a court will not do it *ex officio* except in exclusive jurisdiction cases—in favour of that of a third State, legal certainty and predictability would require a common and autonomous response.

### iii. Special and Exclusive Jurisdictions

Turning to the special jurisdiction rules, that is, those founded on the nature of the dispute, the CJEU has established that they must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged. This is also the case for exclusive jurisdiction criteria since ‘a strict interpretation’ of Article 22 BIR ‘which does not go beyond what is required by the objectives pursued by it is particularly necessary because the jurisdiction rule which it lays down is exclusive’. A broad interpretation ‘would be contrary, first, to one of the general aims of the regulation, laid down in recital 11 in its preamble, namely to seek to attain rules of jurisdiction that are highly predictable, and second, to the principle of legal certainty’.<sup>67</sup>

As to contractual disputes, Article 5(1)(b) BIR establishes rules that have the same origin, pursue the same objectives and occupy the same place in the scheme established by that Regulation.<sup>68</sup> The Court acknowledged that Article 5(1)(b) uses as a connecting factor ‘the obligation which characterises the contract in question’ and therefore, to be characterised as a contract falling within Article 5(1)(b), the characteristic obligation of the contract

<sup>64</sup> Madrid Provincial Audience Decree no 147/2013, 18 October 2013 ES:APM:2013:1988A.

<sup>65</sup> Cass 1ère Civ, 26 September 2012, No 11–26.022 (*Rothschild*); Cass 1ère Civ, 25 March 2015 No 13-27.264 (*Crédit Suisse*), and Cass 1ère Civ, 7 October 2015, no 14–16.898 (*Apple*).

<sup>66</sup> *Conflictus legum*. In all these cases it is also questionable that French Courts assessed the substantive validity of the agreement under French *lex fori*.

<sup>67</sup> *Berliner* above n 46 (paras 32–33).

<sup>68</sup> C-9/12, *Corman-Collins* (para 32); C-19/09, *Wood Floor Solutions* [2010] ECR I-2121 (para 26); *Land Berlin* above n 33 (para 32).

must be the supply of a good or the provision of services.<sup>69</sup> Therefore, it is understood that this link aims towards the objective of predictability for the parties. In addition, the Court states that, to fulfil this objective, that criterion must be defined ‘autonomously, in order to reinforce the objectives of unifying of the rules of jurisdiction and predictability’, be it for sales or for service contracts.<sup>70</sup> However, with the exception of the *Falco* case,<sup>71</sup> the CJEU seems determined to characterise all contracts within Article 5(1)(b), even those complex contracts like distribution agreements,<sup>72</sup> that in the advance of a decision from the Court it would be very hard to say have a single characteristic obligation of the supply of a good or the provision of services. One therefore has to question the CJEU’s commitment to predictability for parties in advance of litigation.

The Court recognises in *ÖFAB* that ‘the aim of proximity in the rules of special jurisdiction laid down in Article 5(1) and (3) ... based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred’. When the liability of a member of the board of directors or a shareholder of a company for that company’s debts is claimed, the search for proximity precludes ‘the determination of the court having jurisdiction being dependent on the nature of the debts of the company concerned’ since this could imply ‘multiplying the courts with jurisdiction to hear actions calling into question the same improper conduct’. Moreover, such an interpretation ‘would not have the degree of predictability required by recital 11 in the preamble’ particularly as regards a defendant who is held liable for the debts of another.<sup>73</sup>

As to contracts for which protective fora have been provided, a recent question referred to the CJEU mentions ‘the need for predictability and legal certainty which governs the adoption of the rules on jurisdiction and enforcement of judgments in civil and commercial proceedings’ in a labour law case. The question raises the interpretation of the place where the employee habitually carries out his work (Articles 19(2)–21(2) BIAr) wondering if it is comparable to that of the ‘home base’ defined in the Regulation used to determine which social security legislation applies to workers in the European air navigation sector.<sup>74</sup>

Regarding consumer contracts, predictability is referred to as an objective in assessing the requirement of the professional’s activity being ‘directed to’ the Member State of the consumer’s domicile.<sup>75</sup> This issue is considered among the more problematic in the application of BIR.<sup>76</sup> The Court has established guiding criteria in this respect that

<sup>69</sup> *Corman-Collins*, *ibid* (paras 34–35); *Car Trim* above n 41 (para 31); *Falco* above n 22 (para 54).

<sup>70</sup> *Corman-Collins SA* *ibid* (para 32); C-19/9; *Wood Floor Solutions*, above n 68 (para 23); C-469/12, *Krejci Lager & Umschlagbetriebs GmbH* EU:C:2013:788 (para 22); C-204/08, *Rehder*, EU:C:2009:439 (paras 33 and 36); *Car Trim* *ibid* (para 49); *Color Drack* above n 41 (para 23). Those objectives are the same for Art 5(1)(b) first and second indent ‘since the rules of special jurisdiction provided for contracts for the sale of goods and the provision of services have the same origin, pursue the same objectives and occupy the same place in the scheme established by that Regulation’.

<sup>71</sup> *Falco*, above n 22.

<sup>72</sup> *Corman-Collins*, above n 68. See chs 33 and 36.

<sup>73</sup> C-147/12, *ÖFAB, Östergötlands Fastigheter AB*, EU:C:2013:490 (para 41); *Car Trim* above n 41 (para 48); and C-228/11, *Melzer* EU:C:2013:305 (para 26).

<sup>74</sup> C-168/16, *Nogueira, et al C Crewlink Ltd*. Pending; C-169/16, *Moreno Óscar v Ryanair Ltd*. Pending. See below s V.E.

<sup>75</sup> C-297/14, *Rüdiger Hobohm*, EU:C:2015:844 (para 30).

<sup>76</sup> See ch 7 above.

should help to provide legal certainty and predictability<sup>77</sup> and could be said to amount to the characterisation of the requirement. In addition, it has faced a situation where a second contract, associated to the first one, was concluded by a consumer. In this case, ‘with regard to the guarantee of predictability’ if the professional then proposes to conclude and does conclude another contract, which on its own does not come within the scope of the professional activity directed to the Member State of the consumer’s domicile, but which is closely linked to the earlier contract which did come within the scope of that activity, that professional may reasonably expect both contracts to be subject to the same rules of jurisdiction.<sup>78</sup> It is for the national court to determine whether the constituent elements of that link are present.<sup>79</sup>

The special forum provided for non-contractual obligations (Articles 5(3)–7(2) BIAr) leads to the courts where the harmful event occurred or may occur. In *Andreas Kainz*, considering that ‘rules governing jurisdiction should be predictable, in so far as both the manufacturer as defendant and the victim as applicant may reasonably foresee that those courts will be in the best position to rule on a case concerning, inter alia, the finding that the product in question is defective’, it was established that in claims against the manufacturer ‘the place of the event giving rise to the damage (cause) is the place where the product in question was manufactured’.<sup>80</sup> In *Universal Music*, in locating the place of the harmful event through the analysis of the facts of the case, the Court established that the determination of jurisdiction ‘satisfies the requirements of predictability and certainty laid down by the Regulation, since the conferral of jurisdiction ... is justified for reasons of the sound administration of justice and the efficacious conduct of the proceedings’.<sup>81</sup>

Regarding personality rights allegedly infringed online, the determination of the place of the harm has led the Court to implement the concept of ‘centre of interests’ of the prejudiced person that, overall, coincides with his habitual residence. The CJEU believes that this criterion complies with the predictability required by BIR since it ‘allows both the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued’ ‘given that the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the persons who are the subject of that content’.<sup>82</sup> This option is open to the claimant in respect to all the damage experienced in parallel with the possibility of resorting to the courts of each Member State where the content placed online is or has been accessible for local damages only.<sup>83</sup> This approach has received some criticism since it creates a *forum actoris* when previously the CJEU and the legislature have taken the view that the governing principle of *actor sequitur forum rei* should be adhered to and the exceptions to it in the special jurisdictions should be interpreted restrictively.

<sup>77</sup> C-585/08 and C-144/09, *Pammer and Hotel Alpenhof*, EU:C:2010:740 (paras 76–84).

<sup>78</sup> *Hobohm*, above n 75 (para 39).

<sup>79</sup> *Hobohm*, *ibid* (para 40). The elements are ‘in particular whether the parties to both of those contracts are identical in law or in fact, whether the economic objective of those contracts concerning the same specific subject-matter is identical and whether the second contract complements the first contract in that it seeks to make it possible for the economic objective of that first contract to be achieved’.

<sup>80</sup> *Andreas Kainz* above n 30 (para 28).

<sup>81</sup> C-12/15, *Universal Music International Holding BV* EU:C:2016:449 (para 33).

<sup>82</sup> C-509/09 and C-161/10, *e-Date Advertising GmbH* EU:C:2011:685 (para 50); *Falco* above n 22 (para 22).

<sup>83</sup> *e-Date Advertising* *ibid* (para 52).

## C. Procedural Norms

Legal certainty or predictability has not been argued in cases dealing with the control of one Member State's jurisdiction by the courts of another Member State (ie anti-suit injunctions). Famous cases such as *West Tankers*, *Overseas Union Insurance and Others*, *Turner* and *Gasser* base the exclusion of any obstruction to a Member State's exercise of its power to decide by itself on its jurisdiction, on the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction is based, and on the eventual risk of depriving the claimant of the judicial protection to which he is entitled.<sup>84</sup> The CJEU has only expressly resorted to the legal certainty reasoning when facing the *forum non conveniens* doctrine in *Owusu* concluding that, if the court having jurisdiction under the Brussels Convention was allowed to apply it, the legal certainty principle, 'which is the basis of the Convention', would be undermined.<sup>85</sup>

As to procedures pending in different Member States' courts, the Court established that it is conducive to the legal certainty sought by the Convention that, in cases of *lis pendens*, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention.<sup>86</sup>

In the family law area, the CJEU decision in *Aguirre Zárraga*<sup>87</sup> dealt with the hearing of the child in the process leading to the adoption of a return order in the courts of the habitual residence of the child in an abduction case. The intended enforcement of a decision by a Spanish court in Germany under BIIaR was questioned due to the non-hearing of the child in Spain. According to the mutual trust rule established in BIIaR the Court decided in favour of the enforceability in Germany of the Spanish order under the presumption that Member States maintain an equivalent human rights' protection. Although it was not expressly mentioned legal certainty lies at the bottom of this decision. However, this approach, which derives from the BIIaR removal of the public policy exception, has been criticised as giving more weight to legal certainty and mutual trust than to the fundamental rights of the child (Article 24 CFREU) and possibly entailing violations of the ECHR.<sup>88</sup>

## D. Applicable Law

There is almost no express reference to predictability and legal certainty in the Court's Rome Regulations' jurisprudence. In particular, as to the choice of law in consumer

<sup>84</sup> C-185/07 *West Tankers* EU:C:2009:69 (paras 29–31); Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317 (para 23); C-116/02 *Gasser* [2003] ECR I-14693 (para 48); C-159/02 *Turner* EU:C:2004:228 (para 24).

<sup>85</sup> C-281/02, *Owusu* [2005] ECR I-1383 (para 41).

<sup>86</sup> *Gasser*, above n 84 (paras 51 and 72).

<sup>87</sup> C-491/10, *Aguirre Zárraga* EU:C:2010:828.

<sup>88</sup> See eg L Walker and P Beaumont, 'Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice' (2011) 7 *Journal of Private International Law* 231. Anyhow, ECtHR, 30 June 2005, *Bosphorus v Ireland*, no 45036/98, doctrine can mitigate the infringement risk though the presumption of compatibility of EU law with ECHR except 'if, in the circumstances of a particular case, it is considered that the protection of the ECHR was manifestly deficient'. See ECtHR 6 December 2012, *Michaud v France* no 12323/11, and 18 June 2013, *Povse v Austria* no 3890/11. For a more

contracts (Article 14 RIR), in *Verein für Konsumenteninformation* the Court only approaches the concept of predictability by mentioning, in the legal context, the ‘reasonable certainty’ required by Articles 10 and 14.<sup>89</sup>

## E. Consistency and Continuity

Consistency of PIL Regulations with other legal instruments, be they EU norms or international conventions, is essential for legal certainty and predictability purposes. The existence of a plurality of EU PIL Regulations, particularly in family matters, is considered as a source of difficulties that affect legal certainty in a number of Member States.<sup>90</sup> Interpretation consistency between PIL Regulations themselves is particularly relevant for legal certainty since they often resort to the same or similar concepts or connecting factors. Recital 7 of both Rome Regulations expressly require a consistent interpretation as to the relationship with BIR and between themselves. Furthermore, the Court has stated that ‘continuity of interpretation is, moreover, consistent with the requirements of legal certainty which dictate that the long standing case law of the court which the community legislature did not intend to alter, should not be called into question.’<sup>91</sup>

Though without expressly relating consistency to legal certainty or predictability, it has called the Court’s special attention to the non-contractual forum of BIR (Article 5(3)/7(2) BIaR) due to its differences from Article 4 RIIR. The place of the harm covers the place of the event giving rise to the damage and the first place of damage in BIR whilst it is limited to the latter under RIIR. In *Wintersteiger* after insisting on an autonomous interpretation of the concept ‘place of the event giving rise to the damage’ and the search for consistency between BIR and ‘the substantive scope and the provisions of’ RIIR, the Court stated

that does not mean, however, that the provisions of [BIR] must for that reason be interpreted in the light of the provisions of [RIIR]. The objective of consistency cannot, in any event, lead to the provisions of [BIR] being interpreted in a manner which is unconnected to the scheme and objectives pursued by that regulation.<sup>92</sup>

Therefore, certain inconsistencies may remain to fulfil the objectives of the Regulations. As long as they comply with these objectives, these inconsistencies do not have to prejudice legal certainty and predictability.

In *ERGO Insurance* the Court was asked how to interpret both Rome Regulations and Directive 2009/13/EC in order to determine the law or laws applicable to an action brought by an insurer of a tractor unit, which compensated a victim for all the harm sustained as a result of the accident involving both the tractor vehicle and the trailer coupled to it, against

comprehensive analysis of how the rights of the child to be heard in child abduction cases under BIaR has been and should be handled see P Beaumont, L Walker and J Holliday, ‘Conflicts of EU Courts on Child Abduction: the Reality of Article 11(6)-(8) Brussels IIa Proceedings across the EU’ (2016) 12 *Journal of Private International Law* 211.

<sup>89</sup> C-191/15, *Verein für Konsumenteninformation* EU:C:2016:612 (paras 8 and 14).

<sup>90</sup> See chs 7, 8 and 9 above.

<sup>91</sup> *Car Trim* above n 41 (para 53).

<sup>92</sup> *Andreas Kainz* above n 30 (para 20).

the insurer of the trailer. The Court, relying on Recital 7 of RIR and RIIR, established that, after acknowledging that Directive 2009/103/EC does not contain any specific conflict-of-laws rule, stated that the Rome Regulations must be interpreted taking into account not only the aim of consistency in their reciprocal application but also in the application of BIR. Hence, the Court's definition of contractual and non-contractual obligations for the Rome Regulations follows what had already been established for BIR.<sup>93</sup>

Legal certainty and predictability is also at stake when it comes to the interaction of EUPILLAR Regulations with specialised international conventions. Furthermore, RIIR allows for the primary application of certain conventions, such as the Hague Convention on the Law applicable to traffic accidents, which is felt by some Member States as a source of uncertainty.<sup>94</sup>

In *TNT Express Nederland*, a case involving the Convention on the Contract for the International Carriage of Goods by Road (CMR), the Court held that even though Article 71 provides for the application of such conventions, they 'cannot compromise the ... principles which underlie judicial co-operation in civil and commercial matters in the EU ...'. In addition, their application cannot undermine the

free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union.<sup>95</sup>

This seems to lead to a case by case analysis. Hence, under this line, in *Nickel & Goeldner Spedition GmbH* the Court held that, although Article 5(1)(b) BIR offers the claimant less choice than Article 31(1) CMR, this 'fact is not such as to affect the compatibility of Article 31(1) of the CMR with principles which underlie judicial cooperation in civil and commercial matters in the EU'. The Court accepted that, in certain circumstances, the applicant may have the choice between the courts of the place of departure and those of the place of arrival. It stated that

such a choice granted to the applicant, apart from respecting the criterion of proximity, also satisfies the requirement of predictability, in so far as it allows the applicant, as well as the defendant, easily to identify the courts before which proceedings may be brought. What is more, it is consistent with the objective of legal certainty, since the applicant's choice is limited to two possible judicial fora within the framework of the second indent of Article 5(1)(b).

To conclude, Article 71 BIR

must be interpreted as meaning that, in a situation where a dispute falls within the scope of both the regulation and the CMR, a Member State may, in accordance with Article 71(1) of that regulation, apply the rules concerning jurisdiction laid down in Article 31(1) of the CMR.<sup>96</sup>

<sup>93</sup> C-359/14 and C-475/14, *ERGO Insurance SE*. EU:C:2016:40 (paras 40–45).

<sup>94</sup> See chs 6 and 9 above.

<sup>95</sup> C-533/08, *TNT Express Nederland BV* EU:C:2010:243 (para 49); C-157/13, *Nickel & Goeldner Spedition GmbH* EU:C:2014:2145 (para 38); C-452/12, *Nipponkoa Insurance Co* EU:C:2013:858 (para 36).

<sup>96</sup> *Nickel & Goeldner Spedition GmbH*, *ibid* (paras 41–42). See also ch 33 above.

## VI. Conclusions

Whilst legal certainty and predictability are marginally mentioned in EUPILLAR Regulations, they are integral parts of the right to justice. The uniform interpretation of the Regulations by the CJEU is essential to comply with these principles by providing clear guidance to national courts and legal operators. Though the Court's express reference to these principles is not frequent, their unmentioned presence in the legal reasoning can often be discerned. The CJEU's interpretative contribution to characterising the concepts in the EUPILLAR Regulations is significant for generating legal certainty after their decisions which may be absent from the texts themselves. However, the CJEU must be careful not to be so keen to create legal certainty for the future that it undermines the will of the legislature or jeopardises the human rights of the people involved in the litigation.