University of Malta
Faculty of Laws
June 2024 Examination Session

PBL4013 PRIVATE INTERNATIONAL LAW

Date: Wednesday 5th June 2024 **Duration of Examination: 10:00AM – 1:05PM**

INSTRUCTIONS TO STUDENTS:

Answer ANY THREE (3) Questions. All Questions carry 33 marks each. Each question counts for 33% of the final mark and 1% of the final mark will be given on an ex gratia basis.

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1. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome 1) applies in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

Rome 1 provides for a number of exclusions, and the applicable law in the absence of choice.

a) *What are these exclusions?* ***(13 marks)***
b) *Outline and discuss all the instances in article 4 of Rome 1 with respect to the applicable law governing the contract in the absence of choice.* ***(20 marks)***

2. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) applies in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters.

a) *What are the exclusions provided for in Rome II?* ***(9 marks)***
b) *Outline the general rule as per article 4;* ***(9 marks)***
c) *Comment/discuss on the rules as envisaged in Rome II with respect to unjust enrichment, negotiorum gestio and culpa in contrahendo,* ***(15 marks)***

3. Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 deals with jurisdiction and recognition and enforcement of judgments in civil and commercial matters (Brussels Recast).

Explain Brussels Recast, with particular reference to:

(a) general jurisdiction ***(9 marks)***

(b) grounds of special jurisdiction and ***(12 marks)***

(c) exclusive jurisdiction ***(12 marks)***

4. Discuss the recognition and enforcement elements, including the grounds of refusal of recognition and enforcement, of Regulation (EU) number 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 (Brussels Recast).

5. Amir is an Egyptian national. He is a world-class violinist and spends his time travelling across Europe, performing mostly in Vienna, London and Berlin. He owns a property in each of these three cities. He has a daughter from an extra-marital relationship and two sons with his current wife, an Italian soprano. The couple have a home in Milan though they only live there a few weeks each year due to their work travels. He has substantial savings in an investment account with a Viennese bank. Amir passes away while on holiday in New York and is survived by his wife and three children aged 28, 23 and 21. In his will, drawn up before a notary in Milan, he chose Egyptian law to apply to his succession. The two sons live in Milan while the daughter lives in Malta. She is notified with proceedings started by the sons in the civil courts of Milan to claim their share of the estate. Under Egyptian law, a male inherits double the share of a female.

Amir's daughter approaches you for advice on how best to proceed and how the succession of Amir will be managed. Explain in detail your advice to Amir's daughter.

6. Instead of achieving a breakthrough by overcoming the centuries-old contest in Private international law between domicile and nationality as personal connecting factors, the contemporary EU legislative endeavours to highlight 'habitual residence' as the prevailing, autonomous, uniform and unambiguous personal connecting factor has not really succeeded since 'habitual residence' is regularly interpreted quite differently under a number of different EU Regulations as well as within a variety of them from time to time. Discuss.

Question 1(a)

Rome I is solely provided for contracts, unlike Rome II regulation, which deals with non-contractual obligations. The main aim for both regulations is to have an applicable law in place, unlike the Brussels Recast which provides for the choice of court. This choice of law is absolutely free and Cheshire and North state that it can lead to any law and give the example of the law of 'Ruritania', with Article 2 of Rome II admitting the universal scope of the Regulation, meaning that the applicable law can be even that of a 3rd state. Rome I makes a number of exclusions and these are essential in knowing for that the Regulation does not apply to. No definition of contract is given throughout the Regulation, which states that an autonomous meaning should be given. The Jakob Handte case gives the definition of contracts as any obligation freely given between the parties, which is not tortuous. Rome I specifically excludes matters relating to customs, administrative matter and revenue in Article 1.

Additionally, contractual obligations relating to family relationships, matrimonial property, bills of exchange, promissory notes, cheques and the relationship between trustees, settlers and beneficiaries are also excluded from the scope of the regulation. One can note how acta iure imperii are not mentioned in Article 1, unlike Article 1 of Rome II and the Brussels Recast. Interestingly, another exclusion made is contractual obligations arising out of dealings prior to the conclusion of a contract, this can be termed pre-contractual obligations, or as Rome II defines it, 'culpa in contrahendo', specially in Article 12. The Tacconi SpA case states that pre-contractual liability matters are specifically matters relating to tort. Briggs finds this strange as generally pre-contractual liability is a matter relating to tort. Recital 7 in Rome I regulation provides that the scope of such regulation should be in line with Rome II and the Brussels Recast. Cheshire and North state that to a certain extent the exclusions in Rome I mirror those of Rome II, however this is not without any exceptions.

Question 1(b)

With regards to the choice of law, Article 3 of Rome I Regulation provides that the parties may choose the applicable law to govern their contracts. This should be done in either an express manner or clearly demonstrated. Van Calster states that one of the main pillars of the Rome I Regulation is freedom of choice of law and the element of predictability for the parties in the contract to know which law will govern them. Another pillar is the ability of the courts to manoeuvre and choose the closely connected factor if needed. Article 4 specifically states that if the law is not chosen by the parties in accordance with Article 3 (which provides the freedom of choice of law), there is a specific, all-encompassing guide on how and what law will be applicable. Article 4 states that in matter relating to contracts in sale of goods, the choice of law applicable would be the law of the place where the seller has his habitual residence.

In contracts for the provision of services, the choice of law applicable would be the law of the place where the service provider has his habitual residence. In the case of immoveable property, and rights in rem in relation to such immoveable, the lex situs, the law of the place where the immoveable is situated. The exception in relation to tenancies which are less than 6 months, and where the tenant is a natural persona and the landlord and tenant have their habitual residence, the law of such place.

Another element discussed is in relation to franchise agreements, which is the law whereby the franchisee has its habitual residence and in distributorship agreements, the law of the place where the distributor has his habitual residence. In the case of an auction for the sale of goods, in the law of the place where the auction takes place, if such place can be determined. If not, Article 4 of Rome I provides for the possibility of applying the law of the place of the person who carries out the characteristic performance of the contract. Cheshire and North call this the "characteristic performance test". Also, Preamble 19 of Rome I states that the characteristic performance of the contract is where the contract has its "centre of gravity". If this is also not possible, Article 4 provides for another leeway which is when there is another law applicable to the case that other law should apply. If this is also not possible, the law of the country with which it is most closely connected. One should note how the law guides the people who are without any law governing their contract, towards the most reasonable and practical. Taking the examples of the distributor and the franchise, the law applicable should be that whereby the distributor and the franchisee, respectively are located. This makes sense for the sake of efficiency and practicality and the law wants to simplify matters whereby there is already dispute on which law to apply. There are instances whereby the law applicable would be inferred.

The Guiliano Lagarde report states that the law applicable can be inferred in 2 scenarios; one is when the contract has a choice of court agreed to, as in accordance with Article 25 of the Brussels recast. In such a case, if the parties choose a court but do not choose a court, after all circumstances are taken into account, the court may apply its own law once it has jurisdiction as it is more reasonable. In the Olendorf vs. Liberia Corporatio case, the parties were German and Japanese. They chose a court to govern their contract, which was the UK Court. However, they failed to choose a law applicable. The court said that in this case, the law applicable should be English law since the UK courts have jurisdiction.

Preamble 11 status that one of the cornerstones of Rome I is for the parties to have an applicable law. Article 4 does a very good job in establishing and sectoring in each possibility and providing for a solution in all eventualities. The sub-articles providing for the event whereby sub-article 1 of Article 4 does not apply, are there to ensure that an applicable law is chosen for sure, and the number of sub-articles speak for themselves in expressing this assurance. It is always ideal and easier for the courts to have the parties choose between themselves the applicable law, and that is why there is the universal scope as already made reference to prior in this essay. However, the law is reasonable enough in providing that this may not always be possible, and is wide enough in its interpretation to sector in and allocate a law where there is none.

Question 2(a)

Rome II Regulation provides for non-contractual obligations as opposed to Rome I which provides for contracts. Cheshire and North state that to a certain extent the exclusions in Rome I mirror those of Rome II, however this is not without any exceptions. Article 1 specifically excludes matters relating to customs, administrative matter and revenue, and acta iure imperii, which are excluded under the Brussels Recast also in the Luc Baten, Sonntag, KG v. Eurocontrol and Lechouritou case. This exception however was not present in Rome I.

Rome II continues by excluding non-contractual obligations relating to wills, succession, family relationships, nuclear damage and defamation. These exceptions are essential in the scope of the regulation. Preamble 7 of the Rome II regulation provides that the scope of such regulation should be in line with Brussels Recast and Rome I. With matters being excluded mentioned, matters which are within the scope of Rome II are outlined in Article 2 which states that a non-contractual obligation is one whereby a damage stems from a non-contractual obligation; tort/delict, negotorium gestio, culpa in contrahendo and unjustified enrichment. Just like contracts, torts are also left without any definition. The only definition is that from caselaw. The Kalfelis case defines torts as any actions which seek to establish the liability of a defendant and is not a contract. Preamble 12 states that there is also no definition of non-contractual obligations as a whole and that an autonomous definition should be given.

Question 2(b)

The general rule in Article 4 of Rome II is the lex loci danni, whereby it is the law of the place where the damage occurred, established in Article 4 sub-article 1. Sub-article 2 provides that if the lex loci danni is not possible, the applicable law would be the habitual residence of the victim of the tort + the person liable for the tort. Sub-article 3 provides that where this is not possible, the law of the country which is most closely connected is established. Cheshire and North provide that in these sub-articles, there is a general rule (sub-article 1), an exception (sub-article 2) and a general provision (sub-article 3).

Preamble 16 states that a balance should be attained between on the one hand the victim of the tort and on the other hand the person liable of the tort. By having the place where the damage occurred established as the place which would govern such a tort, is balanced enough and Cheshire and North state that this is usually more favourable to the victim of the tort, as it is the law of country with which he/she is more closely connected to. However this is not always the case. Preamble 17 states that the law where the damage occurred should not encompass the law of the place where the indirect damage is felt. This is in the case of Antonio Marinari vs. Lloyds bank, whereby the victim of the tort sued in Italy, where his assets were held when the tort happened in the UK, and hence, he had to sue in the UK.

The case of Winrow vs. Hemphill makes reference to all sub-articles of Rome II. The claimant in this case, the victim of the tort was a UK national who was living in Germany due to her husband's work. She was a victim of an accident in a car driven by the defendant who was also a UK national. The court which had jurisdiction on the matter were the UK Courts. However, an issue as to the applicable law came about and the claimant reasoned that the applicable law was UK law, based on Article 4(2) as both her and defendant were habitually resident in the UK. The claimant also alleged that based to article 4(3), the UK law was also indicating that it was the law more closely connected

to the matter since the car was insured in England and the vehicle was registered in the UK. The defendant alleging German law, as the defendant was not a habitual resident in the UK due to her long stay in Germany (8.5 years). Mrs Slade J in deciding the matter held that the defendant was correct in that German law was applicable to the case as the claimant was habitually resident in Germany and not the UK due to the long stay in Germany.

Question 2(c)

Unjustified enrichment, negotorium gestio and culpa in contrahendo are three types of non-contractual obligations whereby as Cheshire states, have a provision dedicated to each one of them. Articles 10,11 and 12, respectively provide for such. Article 10 and 11 both provide that in the event whereby there is a law regulating the relationship and is either one based on contract or tort, the law governing such should be applicable. If this is not possible, the law applicable should be that where the habitual residence of both parties is. If this is also not possible, the place where the unjustified enrichment or negotorium gestio took place. If this is not possible, if there is a law more closely connected than those stated above, the law of such a place.

The 2009 Thesis by James D'Agostino comments on Articles 10 and 11 and states that each of the article has bad drafting and is very vague. The author identifies that since Unjustified enrichment and negotorium gestio are quasi-contracts, they do not qualify under Rome I and hence are placed under Rome II. The author also assimilates Articles 10(4) and 11(4) with Article 4(3), whereby in all cases the law applicable is the law of the country which is more closely connected. Van Calster states that this goes against the EU's mantra on predictability but is one which was foreseen and accepted. Cheshire and North makes a very important observation here, whereby he identifies that in Articles 10(1) and 11(1), "the tort piggy-backs on the choice of law in contracts (Rome I)".

With regards to Article 12, culpa in contrahendo the law applicable at first glance is the law governing the contracts had the contract come into effect, irrelevant if the contract did come into effect or not. The remaining sub-article provides for the possibility where this is not the case, and states that in such a case, the law applicable would be that of the habitual residence of the parties if they are in the same country, or where the event occurred, and if not, the law of the place which is more closely connected.

The Tacconi case confirmed that pre-contractual liability is a matter falling within tort and not contract. Briggs finds this strange as generally pre-contractual liability is a matter relating to tort. Preamble 30 states that since there is no definition of culpa in contrahendo, such a concept is meant to be given an autonomous meaning. James D'Agostino also notes that these type of non-contractual obligations (unjustified enrichment, negotorium gestio and culpa in contrahendo) are not enough to be a contract under Rome I and therefore are placed under Rome II.

Question 3(a)

The general jurisdiction under Regulation 1215/2012 is outlined under Article 4. This article states that a person domiciled in a member state must be sued in that member state. Sub-article 2 also provides that a person not national to the member state they are domiciled in may be sued in such a member state. This is the general clause as it is the starting provision in most cases and is an essential provision in Regulation 1215/2012. Gray vs. Hurely provides that where the domicile of a person is not known, the last known domicile should be taken into account. Article 62 provides that the domicile of natural persons is determined by national law. Whereas the domicile of companies, is determined by the place where they have their statutory seat, central administration or principal place of business.

Van Calster comments on these and states that Article 54 TFEU mentions also these 3 requirements but acknowledges that the goals of Article 54 TFEU and Article 63 of the Recast Regulation do not align. Van Calster also mentions the event whereby the three elements; statutory seat, central administration or principal place of business lead to a different law and state that in such a case, the plaintiff would be forum shopping the best jurisdiction to the case at hand. With regards to Article 4, in Italy vs. Council the court mentioned the 'actur sequitur forum rei' which means that one should follow the forum of the thing involved.

Question 3(b)

The grounds of special jurisdiction are outlined in articles 7 till 9 of Regulation 1215/2012. Article 7 states that a person domiciled in a member state may be sued by another member state in the case of contracts, where the place of performance of the obligation may be. In the case of contracts for the sale of goods, where the goods where delivered or should have been delivered, and in the case of a contract for the provision of services where the services were delivered or should have been delivered.

The sub-articles also provide that if it is not a contract for the sale of goods nor a contract for services, it is regulated by the place of performance of the obligation. An example of such was given by Cheshire and North whereby the example given was that of an assignment of intellectual property rights, which is neither a contract for a service nor a good.

An example of a contract of services under the regulation is the Peter Redher vs. Air Baltic Corporation, which stated that the plaintiff could sue both in the place of departure and also in the place of arrival when it comes to a contract for the provision of services and Cheshire confirmed this by establishing that a "service may occur in more than one place". In this case the service was given in both states mentioned hence the plaintiff could sue in both.

In relation to contracts, the case of Peter Martins established that the plaintiff could sue also where the place of performance was, which was in Netherlands. The defendants alleged that the plaintiff had to sue in Germany, their domicile as according to Article 4. However, the court said that the plaintiff could sue both under article 4 and article 7, thanks to the special jurisdiction. The same applied in the De Blood vs. Boyer case.

With regards to torts, delicts and quasi-delicts, one can sue in the place where the harm occurred or may occur. A case in regards to this matter is in Biers vs. Mines D'Al Potasse. In this case the

plaintiff sued the defendants after the damage caused to plaintiffs home, after putting sewage in the Rhine River in France. The plaintiff sued in Netherlands, where the harm occurred and the defendant raised the plea that the courts which have jurisdiction is those in France. However the courts said that the plaintiff could sue both in France and in the Netherlands, thanks to the special jurisdiction requirement. The Fiona Sheville case is also based on the same principles. Cheshire and North states that actions in contract, article 7(1) and torts article 7(2) can not be instituted together and one must choose either one or the other, as made clear in the Kalfelis case that if an action falls within Article 7(1), it can not fall within article 7(2). The remaining sub-articles provide for a civil actions stemming out of criminal actions, which should be instituted in the court seised with the same matter, and this is an example in the Sonntag case and also in cases whereby there is a cultural object found whereby in such a case, the court in the place where the cultural object is found has jurisdiction.

Article 8 provides that where there are many co-defendants in the action, and all of them are closely connected to the claim, the plaintiff can choose one defendant as long as that defendant is domiciled there and drag all other co-defendants to the same place as the main defendant. The Jenard Report states that this is done to obviate the possibility of handing out irreconcilable judgements. Preamble 26 also states that this aids and facilitates the administration of justice. Van Calster - uses the metaphor of an anchor whereby, the plaintiff identifies an anchor defendant and drags all other defendants to the claim whereby all of them are closely connected with the matter. For example if there is a car collision of 3 people and one of them is domiciled in Hungary, the plaintiff may sue all the 3 in Hungary since they are all closely connected with the claim and it would be expedient to hear the claim with them all together in the same court. The case of Istituto per le Operazione di Religione vs Futura Funds provided a case whereby there were 2 defendants who were domiciled in Malta and the rest of them, remaining 4 were not. In this case the issue arose as to whether the other 4 could be sued in Malta. The court in this case confirmed that through Article 8 of the Brussels recast, this was possible in order for all the defendants to be sued in Malta.

Question 3(c)

Article 24 of the Brussels Recast provides five heads of exclusive jurisdiction, which Cheshire and North state that these are special heads of jurisdiction and they are so strong that they apply regardless of the domicile of the defendant. These are important so much so that a judgement as according to article 45 can be refused from being recognised and enforced. Article 47 also states that if a court is aware that the judgement is one of exclusive jurisdiction and such court is not the competent court to decide the matter, it should not proceed to giving a decision on the matter. The five heads of jurisdiction are mainly; rights in rem in immoveable property, which is the place where the immoveable property is situated, the lex situs.

There is an exception with regards to tenancies whereby if the tenancy is of a duration less than 6 months and the tenant and lessor are both a natural person, the habitual residence is in the same place, the same place would apply. With regards to public registries, cases on such matters should be based where the public registry is situated. In actions of validity, nullity and dissolution of companies, where the company has it seat. In matters relating to trademarks, patents and designs, in the courts where such are registered.

The case of Reichert states that the actio Paulina is not a right in rem falling within the ambit of article 24. The sanders case in 1977 states that giving up possession of the property fell within

article 24. The case of Webb vs. Webb states that a relationship of a trustee who is keeping immoveable property is not within Article 24. The case of Rottwinkel also states that indirect use of the property, which relates to enjoyment of the property is not within the ambits of Article 24. The same applies in the case of Hackler vs. Eurorelais.

This ground of exclusive jurisdiction is so importune that Cheshire and North in the hierarchy of jurisdiction classifies the ground of exclusive jurisdiction as the sos powerful ground, in the first place. The second place is the prorogation of jurisdiction under Article 25. The third is the general jurisdiction in Article 4 with the special jurisdiction right after.

Question 4

The Brussels recast is a double instrument, whereby it deals both with jurisdiction and recognition and enforcement of judgements as Cheshire and North state, who also states that the biggest change in the Recast regulation is the abolition of the exequatur procedure, which is a lengthy process to get judgements to be duly recognised and enforced here. Preamble 26 provides for a less costly and less time consuming measure which was adopted by the predecessor regulation 44/2001 by now having fast and expedient solution which recognises and enforces judgements in a "simple and rapid manner", in a way which is "essential for the sound operation of the internal market".

Article 36 provides for the efficient recognition without any special measures needed. The same with Article 39 which outlines that there is no special declaration needed in order to have a judgement enforced. Therefore, through such fast and automatic procedures, as Cheshire and North classifies them, one is able to enforce a judgement as if it was given in the Member state. For one to oppose the recognition and enforcement of judgements, one must have a sufficient ground under Article 45, which provides for 5 exclusive grounds of refusal of recognition and enforcement of judgements. These are if the judgements are against public policy, if the judgement is given in default of appearance or not enough time given to prepare for a defence, if the judgement to be enforced is irreconcilable with a judgement given between the same parties in the member state addressed or if it is irreconcilable with a judgement in another Member state or a third state.

Article 46 States that if there is any of the grounds mentioned in article 45, the court must refuse recognition and enforcement of the judgement. Article 48 states that the court must decide whether there is recognition and enforcement of a judgement in an expedient manner. The recast also states that in article 49, any party may appeal from a refusal of recognition and enforcement of a judgement.

Judgements relating to this matter on resonation and enforcement are the cases of Dr. Renato Cefai vs. Valletta Freight Services whereby the interest exceeding 8% was not against public policy as the defendant was trying to imply. The judgement of Elf Aquitaine vs. Andre Guelfi stated that Andre Guelfi who misappropriated funds from Elf Aquitaine and refused the recognition and enforcement of judgement from the court of Paris was not right in claiming that the judgement should not be enforced since the judgement was against public policy. Schoeller vs Mario Ellul, stated that the fact that the German courts do not have the separate legal personality in their law is against public policy as such a factor is a crucial element in the legal order of a state. The Krombach case also refused the recognition and enfacement of judgments due to the proceedings have irregularities.

OPTIONAL SIDE NOTE - Mention also Articles 825A, 826, 827, 828 if you have enough time in the exam. But there are optional.