



**University of
Zurich^{UZH}**

Faculty of Law

Material scope of application (Article 1 LC)



Scope of application

- two-step test
 - Step 1: Does the lawsuit have as its object a civil or commercial matter?
 - Step 2: Does the lawsuit have as its object a matter excluded from scope under Article 1(2) LC/ Brussels I bis Regulation?



Civil and commercial matters: concept

- explicit exclusions (non-enumerative list)
- autonomous interpretation
- actions between a public authority and a private person are not civil or commercial where
 - the public authority is acting in the exercise of its public powers
- or*
- the claim results from the exercise of public powers
- sovereign immunity is a separate concept governed by public international law



“whatever the nature of the court or tribunal”

- also civil and commercial matters handled by an administrative or criminal court
- arbitral tribunal or other non-state dispute resolution body is not a “court or tribunal”
- an administrative authority can be a “court or tribunal” under the LC (Article 62 LC)
 - under the Brussels I bis Regulation: only specific administrative authorities covered (see Article 3 Brussels I bis Regulation)



Practical application of the concept of “civil and commercial matters”

- determination of the relevant rules of national law
- assessment against the (autonomous) criteria under Article 1(1) LC/Brussels I *bis* Regulation
- test: does one of the parties exercise powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals?
 - to determine this, it is necessary to look at
 - the legal relationship between the parties and the subject matter of the dispute
 - or the basis for the action and the detailed rules applicable to it



Exclusions from scope

- background and rationale
 - existing or envisaged special treaties or special EU legislative acts
 - in some cases, deep divergences between national approaches
- enumerative list in Article 1(2) LC/Brussels I *bis* Regulation



Consequences of inapplicability

- an action or judgment is not outside the scope merely because a matter to which the Convention/Regulation does not apply arises as a preliminary issue
- If the LC/Brussels I *bis* Regulation does not apply
 - jurisdiction, parallel proceedings, and recognition and enforcement governed by other applicable treaties/legislative acts or by national law
 - in case of severability: LC/Brussels I *bis* Regulation may be applicable to a severable part of the action or judgment that does fall within the scope
 - a judgment given in a matter outside the scope of the Convention/Regulation can constitute a ground for refusal of recognition and enforcement under Article 34(3) or 34(4) LC/Article 45(1)(c) or 45(1)(d) Brussels I *bis* Regulation



University of
Zurich^{UZH}

Faculty of Law

Scope of application – Case 1



massacre perpetrated by
German troops (1943)

Does the lawsuit fall within the scope of the Brussels I bis Regulation?



Scope of application – Case 1

- action between a public authority and a private person
- public authority acting in the exercise of its public powers?
 - proceedings “presented as being of a civil nature” (damages claim), no exercise of public powers *in the proceedings*
- claim resulting from the exercise of public powers?
 - powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals

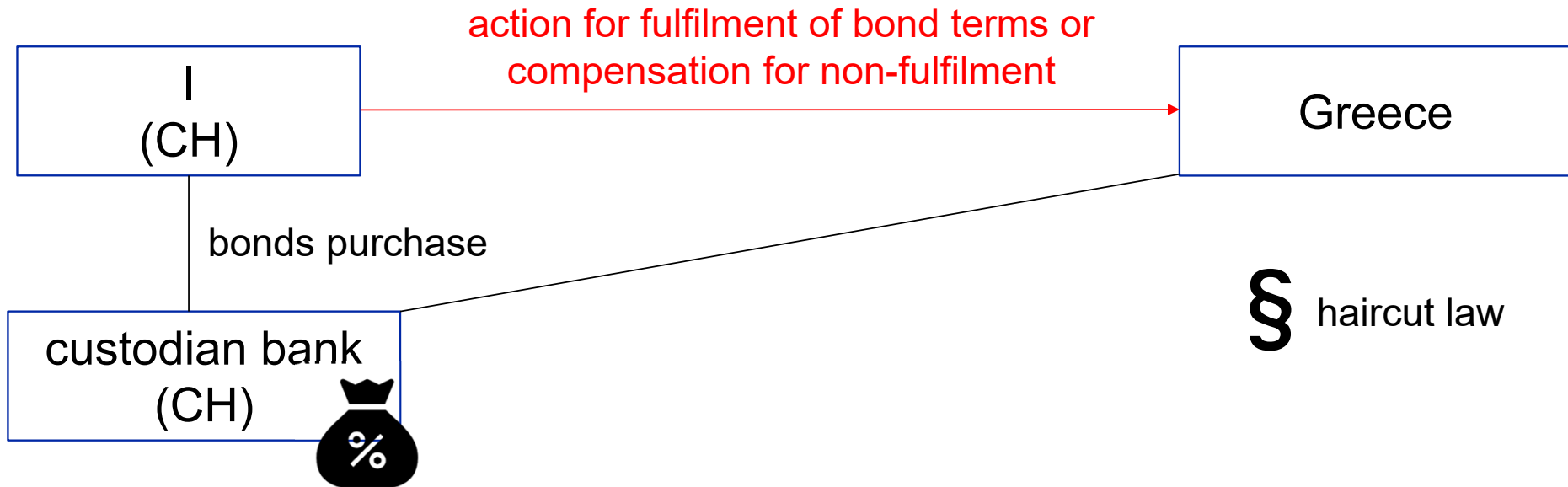


Scope of application – Case 1

- ECJ *Lechouritou*:
 - “there is no doubt that operations conducted by armed forces are one of the characteristic emanations of State sovereignty, in particular inasmuch as they are decided upon in a unilateral and binding manner by the competent public authorities and appear as inextricably linked to States’ foreign and defence policy” (para. 37)
 - “the unlawfulness of such acts cannot justify a different interpretation”, as that would “raise preliminary questions of substance even before the scope of the Brussels Convention can be determined with certainty” (paras. 43 f.)
- explicit exclusion of *acta iure imperii* in (EEO Regulation and subsequently) Brussels I *bis* Regulation
- Note: That does not necessarily mean that such a dispute cannot be brought before a civil court based on national law, but cross-border recognition and enforcement will then often be difficult.



Scope of application – Case 2



Does the lawsuit fall within the scope of the Lugano Convention?



Scope of application – Case 2

- action between a public authority and a private person
- public authority acting in the exercise of its public powers?
 - proceedings for fulfilment of bond terms/compensation, no exercise of public powers *in the proceedings*
- claim resulting from the exercise of public powers?
 - ECJ *Kuhn*: “(H)aving regard to the exceptional character of the conditions and the circumstances surrounding the adoption of Law 4050/2012, according to which the initial **borrowing terms** of the sovereign bonds at issue in the main proceedings were **unilaterally and retroactively amended** by the introduction of a CAC, and to the **public interest objective** that it pursues, the origin of the dispute in the main proceeding stems from the manifestation of public authority and results from the acts of the Greek State in the exercise of that public authority, in such a way that that dispute does not fall within ‘civil and commercial matters’ within the meaning of Article 1(1) of Regulation No 1215/2012.” (para. 42)

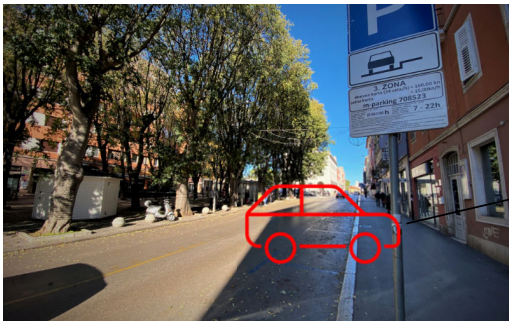


Scope of application – Case 3

P
(Pula, HR)

action for payment of parking fee

T
(CH)



Source: <https://www.pulaparking.hr/usluge>

Does the lawsuit fall within the scope of the Lugano Convention?



Scope of application – Case 3

- action between a private person and a company to which a municipality has delegated the provision of a public service
- exercise of public powers by the company?
 - proceedings for payment of parking fee using “ordinary” procedural rules, no exercise of public powers *in the proceedings*
- claim resulting from the exercise of public powers? ECJ *Pula Parking*:
 - non-punitive parking fee debt based on issued parking ticket is “of contractual nature”
 - the purpose of the action for recovery of the debt is to safeguard private interests and is governed by general rules applicable to relations between private individuals
- Consequence: private law relationship between Pula Parking and T, LC applies