

**COMPARATIVE STUDY OF "RESIDUAL JURISDICTION"
IN CIVIL AND COMMERCIAL DISPUTES IN THE EU
NATIONAL REPORT FOR:**

MALTA

PREPARED BY:

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(A) General Structure of National Jurisdictional Rules for Cross-Border Disputes

1. Main legal Sources

Apart from the application of the provisions of the Council Regulation 44/2001/EC, the main legal sources of 'residual' jurisdiction in civil and commercial matters under Maltese law are contained in statute. In the Maltese legal system, contrary to some other jurisdictions within the European Union, court judgements, orders and decrees do not create legal precedent and therefore the principles or grounds of jurisdiction, as in other matters of substantive and procedural law, are not created by case-law but by statute.

The key provisions on jurisdiction of the Maltese courts in civil and commercial matters are contained in the Code of Organisation and Civil Procedure (*Chapter 12 of the Laws of Malta*), and there is also a limited number of jurisdictional provisions in particular matters which are found in other statutes as the Commercial Code (*Chapter 13 of the Law of Malta*) and the Merchant Shipping Act (*Chapter 234 of the Laws of Malta*).

The most basic provision and the prime source of jurisdiction exercised by the Maltese Courts outside the scope of the EC Regulation 44/2001/EC (reproduced in full in the official English Version hereunder in Annex 1) is Article 742 of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta). There is a significant amount of court judgements dealing with the individual grounds listed in this Article and it can safely be said that apart from certain specific grounds of jurisdiction (e.g. bankruptcy and *jurisdiction in rem*) the grounds listed in this Article are the grounds upon which Maltese Courts will base in *personam* jurisdiction. Several other articles in the Code of Organization and Civil Procedure then regulate the internal competences and the distribution of cases between the various sections of the Civil courts (First Hall of the Civil Court, Court of Magistrates etc.) which however fall outside the scope of this review.

In short, the grounds on which Maltese Courts may exercise *in personam* jurisdiction in terms of in Article 742 are the following :-

- (a) Citizens of Malta, provided they have not fixed their domicile elsewhere;
- (b) Any person as long as he is either domiciled or resident or present in Malta;
- (c) Any person in matters relating to property situate or existing in Malta;
- (d) Any person who has contracted an obligation in Malta, but only as regards actions touching such obligation and provided such person is present in Malta;
- (e) Any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta or who has contracted any obligation which must necessarily be carried into effect in Malta, provided in either case such person is present in Malta;
- (f) Any person in regard to any obligation contracted in favour of a citizen or resident in Malta or of a body having a distinct legal personality or association of persons incorporated or operating in Malta, if the judgment can be enforced in Malta;
- (g) Any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the Court.

With respect to jurisdiction *in rem* then, Maltese law, until the end of October 2006, was distinctly influenced by English law, reflecting the British colonial period (1800-1964). Maltese Courts could

assume jurisdiction over vessels in the cases listed in the two British Vice-Admiralty Court Ordinances of 1840 and 1861 which are referred to in Article 370 of the Merchant Shipping Act hereunder quoted in full in Annex 2. The adoption by Malta of the Admiralty Court Acts of 1840 and 1861 was an important point which **still has** enormous influence today. In 1890 when the Colonial Courts of Admiralty Act was passed, Maltese law received in full the concept of *in rem* actions.

The amendments introduced in October 2006 to the Code of Organization aligned the Maltese position with a number of other EU Member States in that it incorporated the grounds of jurisdiction *in rem* contained in the 1952 and 1999 Arrest Conventions. Please refer to Annex 3 with the text of the new provisions on *in rem* jurisdiction (742B to 742D).

As has already been explained above, judgements of the superior and the inferior Courts of Malta are not binding and references to case-law and jurisprudence, though they may assist a judge in a subsequent case, judgement may eventually differ in that there is no doctrine of precedent under Maltese Law.

Naturally there is a vast amount of judgements in which the Courts have interpreted the individual provisions of Article 742 which however fall beside the scope of this question in that they cannot be said to be the source of rules of law.

2. Specific Rules (or Not) for Transnational Disputes

The jurisdictional rules described above are used in transnational disputes or more specifically in disputes containing a 'connecting factor' with another jurisdiction. They regulate the jurisdiction of Maltese Courts in such disputes, i.e. transnational disputes where one particular connecting factor (e.g. citizenship of defendant, place of execution of the contract etc.) refers to a law other than Maltese Law. However there are no specific sets of rules regulating transnational disputes per se and Article 742 is used by the Courts to base jurisdiction in almost all cases, independently of whether there is a connecting factor to another municipal system of law.

3. Specific Rules (or Not) for Article 4(1) Jurisdiction

There is no additional specific set of national rules designed to govern the jurisdiction of courts pursuant to Article 4(1) of the Brussels 1 Regulation other than the default rules mentioned above.

Indeed the traditional rules applicable to all cases which have a connecting factor with another jurisdiction, will apply.

4. Influence of EU Law

The interpretation of national 'residual' jurisdictional rules are in fact influenced by the Brussels 1 Regulation or the decisions of the European Court of Justice (ECJ), in particular with respect to issues of choice of jurisdiction clauses (Article 23) and the grounds for exclusive jurisdiction listed in Article 22 of the Regulation and expressly referred to in Article 4.

Maltese Courts, prior to accession to the European Union on 1st May 2004, have consistently retained that they enjoy a discretion to exercise jurisdiction even though the parties would have expressly agreed to refer disputes before a foreign court (jurisdiction clause/ prorogation of jurisdiction). There must be a grave reason for the courts to exercise jurisdiction in these circumstances, but where it is evident for instance that it would be unjust or prejudicial to the plaintiff not to exercise jurisdiction, the Courts will respond and exercise their jurisdiction. In this respect Courts have often quoted the traditional English common law jurisprudence on this issue.

This is however, no longer possible if in terms of Article 23, the parties select the Courts of another EU Member State as their forum. That choice, unless expressly agreed otherwise, shall be deemed exclusive and the Maltese Courts shall decline jurisdiction in terms of the Regulation. The same applies to situations contemplated in Article 22 of the Regulation where Maltese Courts will decline to exercise the residual jurisdiction if a Court in another Member State is vested with exclusive jurisdiction.

5. Impact of Other Sources of Law

Malta has signed and ratified the European Convention on Human Rights and is a signatory to a number of other public international law instruments. These instruments naturally have an influence on the conduct of proceedings but not per se on grounds of jurisdiction in civil and commercial matters.

6. Other Specific Features

There are no additional features specific to the grounds of jurisdiction other than those described above. The general jurisdictional structure under Maltese Law is quite simple and reference to the rules highlighted above is generally made also in specific circumstances.

7. Reform

The Code of Organization and Civil Procedure has in the past months witnessed , and is still currently undergoing, significant changes in the internal procedural rules governing the issue of warrants, the internal competences of the Courts and the various chambers as well as on the mode of proceedings in contentious matters. We are not however aware of any changes relating to the rules of jurisdiction applicable in cross-border cases.

(B) Bilateral and Multilateral Conventions

8. Conventions with Third States

The bilateral and multilateral conventions signed with third countries and ratified by Malta principally relate to matters which fall outside the scope of the Brussels 1 Regulation. Prime examples of bilateral conventions are the double taxation relief treaties concluded with a number of third countries, which are however fiscal in nature and fall outside the scope of the Regulation. With respect to multilateral conventions, reference may be made for instance to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) which is incorporated into Maltese Law.

9. Practical Impact of international conventions with third states

See answer to question 8 above.

(C) Applicable National Rules Pursuant to Article 4 of the Brussels I Regulation

10. Structure

As has already been explained above, the general structure of the rules of jurisdiction for actions against defendants domiciled in non-EU states, is that outlined in Article 742 of the Code of Organization and Civil Procedure.

Maltese Courts will exercise their jurisdiction over citizens of Malta (provided they have not established their domicile outside Malta), over persons domiciled or resident or even present in Malta and in matters relating to property situated in Malta. Article 742 also vests the Maltese Courts with jurisdiction over any person who has contracted any obligation in Malta, but only in regard to actions touching such obligation and provided such person is present in Malta and over any person who, having contracted an obligation in some other country, has nevertheless agreed to carry out such obligation in Malta, or who has contracted any obligation which must necessarily be carried into effect in Malta, provided in either case such person is present in Malta.

Finally, Maltese courts will also exercise jurisdiction in connection with any obligation contracted in favour of a citizen or resident of Malta or of a body having a distinct legal personality or association of persons incorporated or operating in Malta, if the judgment can be enforced in Malta as well as on any person who expressly or tacitly, voluntarily submits or has agreed to submit to the jurisdiction of the court.

11. General Jurisdiction

The general rules of jurisdiction are enshrined in the provisions outlined above, which are also listed as 'exorbitant' grounds of jurisdiction in terms of Annex 1 of the EC Regulation 44/2001.

12. Specific Rules of Jurisdiction

a) Contract

As highlighted above a person may bring proceedings for a claim in contract in a Maltese Court and against a defendant domiciled in a non-EU State, where there exist one or more of the following connecting factors:

- i. Maltese citizenship.* The Courts have jurisdiction over Maltese citizens, provided that these have not fixed their domicile elsewhere;
- ii. Domicile, residence or mere presence.* In addition the Courts *will* also exercise jurisdiction over any person as long as that person is domiciled in Malta or is otherwise resident in Malta. Such jurisdiction *will* also be exercised in those cases where a person is merely present in Malta at the time of filing of proceedings;

- iii. *Location of property.* In contract involving property, Maltese courts will base their jurisdiction on the 'location' as a connecting factor. If the dispute concerns issues of property physically located in Malta, both moveable and immovable, then the Maltese Courts will have jurisdiction;
- iv. Place where obligation has been contracted. Similarly if Malta is the place where and obligation has been contracted AND the person upon which jurisdiction is to be exercised is present in Malta, the Maltese Courts will have jurisdiction to hear the merits of the case. In any case however, Maltese Courts will only exercise such jurisdiction in matters concerning such obligation contracted in Malta;
- v. Place of execution of the obligation in question. In cases where an obligation is contracted outside Malta, which however must be carried out in Malta or which the obligation debtor has agreed to perform in Malta, then the Maltese Courts will exercise jurisdiction in connection with disputes *arising* out of such an obligation;
- vi. Status of the obligation creditor. This additional connecting factor, allows Maltese Courts to exercise jurisdiction in contractual matters over any person who contracts an obligation in favour of a resident or a citizen of Malta or an association of persons or corporate body incorporated in Malta, provided that the judgement can be enforced in Malta.
- vii. Forum Prorogatum. Although this ground is generic and not therefore specific to contractual situations, Maltese Courts will naturally exercise jurisdiction in contractual disputes over parties who submit to the jurisdiction of the Courts. Pleas on the merits without objecting to the jurisdiction of the Courts in *limine litis* will tantamount to such submission.

b) Tort

The connecting factors listed in iv and vi above, refer to the place of contraction of the 'obligation in question'. Such obligations can be both contractual and delictual and therefore the same connecting factors aforementioned found the Maltese Courts' jurisdiction in tort.

c) Criminal Proceedings

As a general principle of Maltese Law, and in terms of Articles 3 and 6 of the Criminal Code, (Chapter 9 of the Laws of Malta) criminal proceedings and civil proceedings are in principle inherently distinct and are kept separate throughout.

Contrary to what happens in other EU Member States, for example in France, the Criminal Court ('crimination' proceedings) against the accused is not vested with jurisdiction to determine civil damages arising out of the criminal act upon conviction and any provision of the Criminal Code which provides for restitution orders by the Courts and compensation orders to victims of crime, are completely without prejudice to liquidation of amounts due in terms of a civil action brought by the victim.

d) Secondary Establishment

There is no specific ground of jurisdiction over a defendant based in a non-EU Member State having a branch or agency in Malta. Nevertheless, a company having a branch or other assets in Malta is deemed to have a presence in terms of the jurisdictional provisions of Article 742 of the Code and therefore the Maltese Courts can exercise jurisdiction in such circumstances.

e) Trust

The Trusts and Trustees Act 1988 ("TTA") specifically lays down (under Article 8) four instances where the Courts of Malta shall have jurisdiction, namely where:

- (a) the trust is a Maltese trust; or
- (b) the trustee is resident in Malta or is a trustee authorised by the MFSA, or is otherwise constituted in terms of Maltese law; or
- (c) any trust property is situated in Malta; or
- (d) administration of any trust property is carried on in Malta.

However, the TTA also further provides that notwithstanding the provisions of the Code of Organization and Civil Procedure regulating matters of jurisdiction of the Courts of Malta (Art. 742 et seq.) and subject to the limitations outlined below, where the trust instrument grants jurisdiction to the courts of a country the law of which is the proper law of the trust, the Maltese courts will then stay proceedings in favour of the chosen forum. A request to this effect must be made by any party to the suit- provided the demand is made in *limine litis*.

The following limitations apply to this rule:

Where (1) the trust property consists of immovable property in Malta; or (2) the settlor or the beneficiaries are domiciled and resident in Malta a Maltese court enjoys a discretion as to whether to stay the proceedings commenced in Malta.

The court may in any of the above cases issue any interim orders for the protection of any interested party as it deems appropriate.

f) Arrest and/or location of Property

Please refer to the answer to question 1(a) above in connection with jurisdiction in rem.

13. Protective Rules of Jurisdiction

The concept of jurisdictional protection for certain classes of defendants (or complainants in certain instances) appear to require such protection is alien to the 'residual' rules on assumption of jurisdiction under Maltese Law, i.e. the rules applicable in actions against defendants not domiciled in another EU Member State.

Whereas for defendants domiciled in the European Union, and in the contractual and delictual instances encompassed under the Regulation, specific protection is afforded for certain classes of people, e.g. consumers, the traditional rules contained in Article 742 *et seq.* of Chapter 12 and the rules listed in Annex 1 to Regulation 44/2001 will apply indiscriminately.

There are strict consumer protection rules contained in consumer legislation (mostly in line with the *acquis*) as well as labour laws for the protection of employees. These specific laws create ad hoc tribunals as the industrial tribunal, the consumer affairs tribunal etc. The laid statutes however, do not specifically grant jurisdictional protection to particular classes of defendants or parties in the context of cross-border disputes or disputes containing a connecting factor with another jurisdiction.

14. Rules for the Consolidation of Claims

a) Co-Defendants

The rule on consolidation of actions enshrined in Article 6(1) of the Regulation has no equivalent in Maltese Law.

The analysis of the grounds for assumption of jurisdiction by Maltese Courts contained in Article 742 of Chapter 12 has to be done individually against every defendant and Maltese Courts will not assume jurisdiction over a second defendant exclusively in virtue of the fact that it has jurisdiction over a co-defendant.

b) Third Party Proceedings

Please refer to a) above.

c) Counter-Claims

The availability of a counterclaim does not depend on the domicile of the parties but the Courts have to be vested with jurisdiction in accordance with the provisions of the articles highlighted above.

d) Related Claims

Please refer to 14(a) above. The Court will have to attest that it has jurisdiction over such defendant independently of the pending connected action.

e) Protective Rules in Other Matters

This system as described above has been in place for some time now and it has not caused significant problems. Naturally however, this scheme may give rise to conflicting judgements which would not be the case in a consolidated set of proceedings against co-defendants.

15. Rules of Jurisdiction Pursuant to Annex I of Brussels I

a) The rules listed in annex I

The rules listed in Annex 1 of the Regulation are the following:

Articles 742, 743 and 744 of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta) and Article 549 of the Commercial Code (Chapter 13 of the Laws of Malta). The Courts base their *in personam* jurisdiction in terms of these provisions in cases generally involving non-EU domiciliaries.

b) Practical use of the rules listed in Annex I

In all civil and commercial cases, in claims based in contract, tort, quasi-contract or quasi-tort.

c) Extension of jurisdiction pursuant to article 4(2) of Brussels I

We are not aware of any case where this Article has been invoked since Malta 's accession to the European Union on 1st May 2004.

16. Forum *necessitatis*

There is no provision on forum *necessitates* in Malta.

(D) National Jurisdiction & Enforcement of Non-EU Judgments

17. National rules of jurisdiction barring the enforcement of a non-EU judgment

The provisions regulating the recognition and enforcement of foreign judgements delivered by Courts of a non-EU State in Malta are contained in Articles 825 *et seq.* of the Code of Organization and Civil Procedure. The general principle therein contained is that any judgment delivered by a competent court outside Malta and constituting a *res judicata* may be enforced by the competent court in Malta, in the same manner as judgments delivered in Malta, upon a writ of summons containing a demand that the enforcement of such judgment be ordered.

The law in Article 826 however lists down the grounds for resisting such recognition and enforcement (reproduced in Annex 3). These grounds are exhaustive and in so far as the ground of exclusive jurisdiction of Maltese Courts is not mentioned, then it is not available as a ground for resisting recognition and enforcement in Malta.

(E) Declining Jurisdiction

18. Forum Non Conveniens

Article 742(2) of the Code of Organization and Civil Procedure contains one such rule.

Indeed where a foreign court has a concurrent jurisdiction with the Maltese Courts, the courts may in their discretion, declare defendant to be non-suited or stay proceedings on the ground that if an action were to continue in Malta it would be vexatious, oppressive or unjust on the defendant. In exercising their discretion, the Maltese Courts embark into an analysis which is very similar to the traditional concept of forum *non conveniens*, but which is markedly more circumscribed.

This analysis may seem conceptually incompatible with the provisions of the Brussels Regulation but there have been no reported cases since Malta's accession to the European Union on this point. In principle 742(2) will also apply even in favour of courts of EU States where jurisdiction is assumed in terms of the default rules.

19. Declining Jurisdiction when the Defendant is Domiciled in a Third State

(a) Non-EU Jurisdiction Agreements

The Courts may decline jurisdiction or stay proceedings in favour of a non-EU Court where there is a valid jurisdiction clause pointing towards such other foreign court.

Although it was delivered at a time where Malta was not yet a Member State of *the* European Union, in *Reginald Micallef noe vs. Silvio Mifsud noe* (Commercial Appeal 26/11/2006), the Court of Appeal examined this issue in detail. It set out the position under Maltese Law in the sense that unless there are valid and grave reasons for the Maltese Courts to decide otherwise, the expression of the parties' will should not be disturbed and the Maltese Courts will decline jurisdiction even in favour of a non-EU State.

(b) Parallel Proceedings in a non-EU court

The rule contained in Article 742(2) of the Code of Organization and Civil Procedure addresses the issue of parallel proceedings in courts of non-EU States.

The jurisdiction of the Maltese courts of civil jurisdiction is not in principle excluded by the fact that a foreign court is seized with the same cause or with a cause connected with it. Where a foreign court has concurrent jurisdiction however, the rule outlined above (question 18) will apply.

(c) "Exclusive" Jurisdiction in a non-EU State

There is no express rule addressing this issue. However, the general rule explained in the last preceding answer applies to situations where the subject matter of the dispute is closely related to a non-EU state.

20. Declining Jurisdiction When the Defendant is Domiciled in the EU

To our knowledge this issue has not yet arisen in front of Maltese Courts. The answer provided to the last preceding question refers to the analysis made by Maltese Courts in similar circumstances. Although not exactly a *forum non conveniens* test, it allows Maltese Courts discretion to decline from exercising jurisdiction in instances where they are properly vested with jurisdiction in terms of the provisions of domestic law.

(F) The Adequate Protection (or lack thereof) of EU Nationals and/or Domiciliaries through the Application of Domestic Jurisdictional Rules

21. Use of National Jurisdictional Rules to Avoid an Inadequate Protection in Non-EU Courts

There is no known case evidencing such situation.

22. Lack of Jurisdiction Under National Rules Having the Effect to Deprive EU Plaintiffs of an Adequate Protection

There is no case law on this particular topic since Malta's accession to the European Union. Nevertheless, the same principles illustrated above will apply irrespective of whether the plaintiff is an EU domiciliary or otherwise.

23. Lack of Adequate Protection as a Consequence of Transfer of Domicile to or from a Third State

To our knowledge there is no case law to this effect in Malta.

24. The Risk that EU Rules and Principles be Put in Jeopardy Because of the Application of National Jurisdictional Rules

There is no known case evidencing such situation.

(G) Residual Jurisdiction under the new Brussels II Regulation

25. Applicable National Rules Pursuant to article 14 of the New Brussels II Regulation (Parental Responsibility)

Even in specific issues of parental authority, the general default provisions on jurisdiction outlined above apply.

SUPPLEMENTAL REPORT FOR:

MALTA

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26. NA

27. Conventions with Third States in Matters of Parental Responsibility (and maintenance of children)

What are the international (and in particular bilateral) conventions concluded between your country and non-EU countries that include rules of jurisdiction in matters of parental responsibility (and maintenance of children)?

Malta has signed and ratified the **Hague Convention of the 25th October 1980 on the Civil Aspects of International Child Abduction**. This Convention was acceded to on the 30th of January 1995. The provisions of this convention, together with the **European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children** which was signed in Luxembourg on the 20th May, 1980 are enshrined in Maltese Law in Chapter 410 of the Laws of Malta (Child Abduction and Custody Act).

28. Jurisdiction as a Ground for Resisting the Enforcement of non-EU Judgment in Matters of Parental Responsibility

Can the judgment of a non-EU State relating to matters of parental responsibility (for instance, a judgment given the guardianship of a child to one of the parents) be denied recognition or enforcement in your country on the basis that the courts of your country are the only ones who have jurisdiction to entertain the matter? If so, what is (are) the ground(s) of these "exclusive" rules of jurisdiction (e.g., habitual residence of the child in your country, citizenship of one or several of the parties, etc.)

With respect to judgements emanating from Contracting States of the Conventions mentioned above which are not EU Member States the only grounds on the basis of which recognition may be denied are those contained in the Convention.

On the other hand, in terms of the provisions of Chapter 410 concerning the European Convention of 1980, a decision in terms of Articles 7 and 12 of the said Convention made in a Contracting State other than Malta shall be recognised in Malta as if made by a court in Malta but:

a) the Court of Appeal may, on the application of any person appearing to it to have an interest in the matter, declare on any of the grounds specified in Article 9 or 10 of the Convention that the decision is not to be recognised in Malta; and

(b) the decision shall not be enforceable in Malta unless registered in the appropriate court under article 18.

In instances where recognition and enforcement proceedings concern judgements emanating from non-EU states which are also non-contracting states of the two Conventions mentioned above, the default provisions of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta), which have been highlighted in greater detail in the report, will apply.

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