

Dispute Resolution

(Resolution of Private International Disputes)

Session 3: The European approach to jurisdiction under the Brussels Regulation (BR)

FTU Master Program

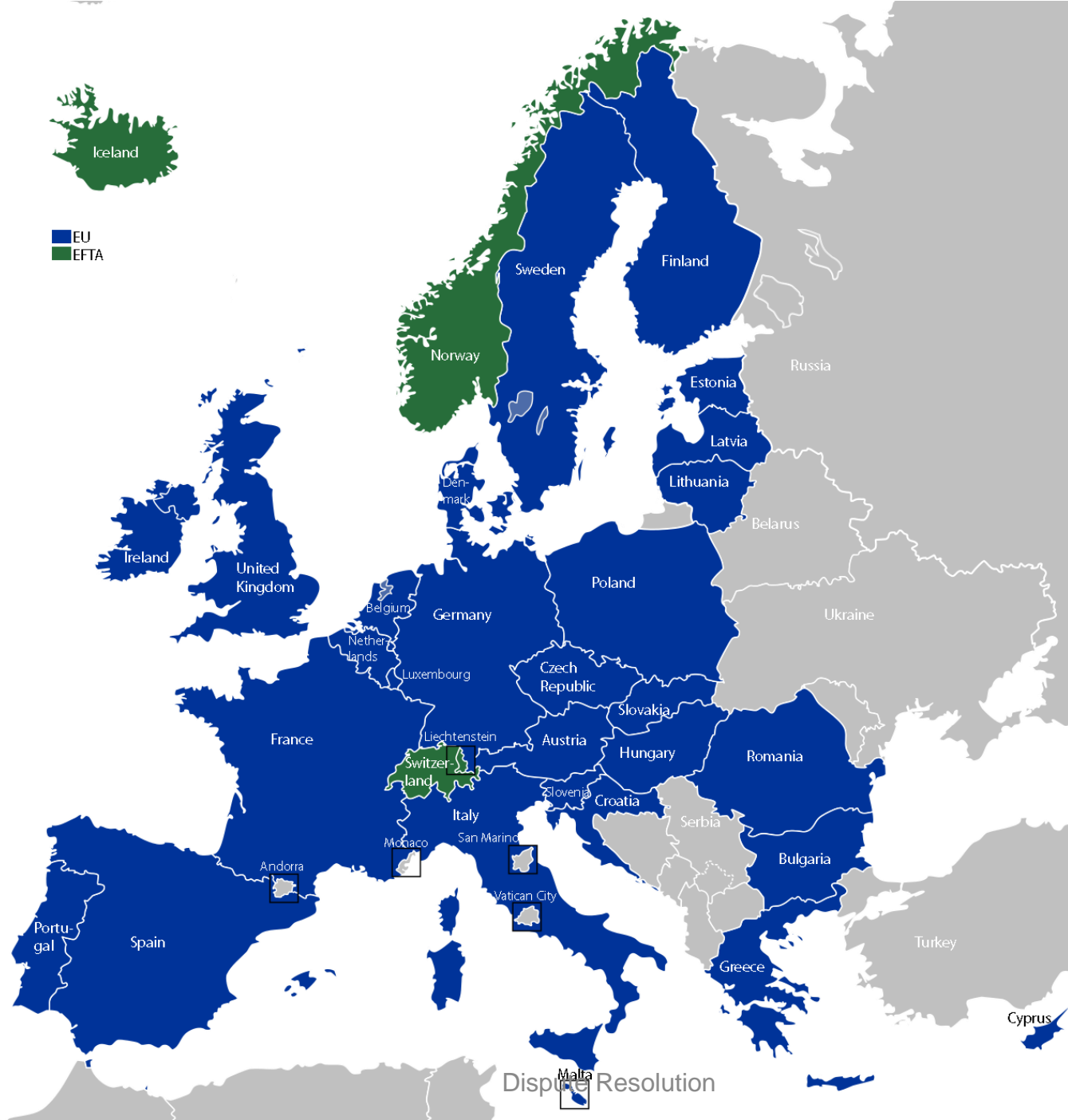
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Introduction



- The European Union is a supranational organization founded in 1957
- Currently: 28 Member States (soon “BREXIT”)
- The EU is based on International treaties, currently (Lisbon-Version):
 - Treaty on the Functioning of the European Union (TFEU)
 - Treaty of the European Union (TEU)



Introduction (2)

- EU has various bodies, inter alia
 - EU Commission
 - European Council / European Parliament
 - European Court of Justice (ECJ)
- EU is entitled to enact legislation in fields of law laid down in the TFEU
- EU may enact (inter alia)
 - Regulations – important for rules on jurisdiction
 - Directives

Introduction (3)

The court system in Europe (simplified) (referral procedure)

- Each Member State has its “national” court system, including a „Supreme Court“, e.g. *Cour de cassation* (France), *Bundesgerichtshof* (Germany).
- Every national court must not only apply national law but also EU law.
- To ensure that EU law is interpreted throughout the EU in the same manner. Each court may refer „preliminary questions“ to the European Court of Justice (ECJ) in Luxemburg on the interpretation of EU law.
 - In some instances individuals may also seek justice directly before the ECJ (e.g. when they were fined by the EU Commission)
- ECJ’s power confined to interpretation of EU law (not: national law).
- ECJ sends answers to “preliminary” questions back to referring national court. National court then decides the case and renders a judgment.

European Instruments on Jurisdiction

- Council Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (applies to proceedings initiated on or after 10 January 2015) (replaces Regulation 44/2001) (so-called “Brussels Regulation”) (treated in this class)
- Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (not treated in this class)
- Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (not treated in this class)
- Regulation (EU) 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (not treated in this class)

The structure of the Brussels Regulation (BR)



The BR deals with

- Jurisdiction of EU Member States' courts
- Coordination of proceedings within the EU
- Recognition and enforcement of judgments from other EU Member States

General scope of application

In general, three conditions must be met:

1. No arbitration clause (Art II NY Convention) – What is the New York Convention?
2. The defendant must be domiciled in an EU Member State (Arts. 4, 5, 6, 62, 63 BR). (Reg. applies also to Denmark via an int'l treaty) Exceptions:
 - a) Insurers (Art. 11 II BR), employers (Art. 20 II BR) and contract partners of a consumer (Art. 17 II BR) only require a branch.
 - b) Arts. 24, 25 BR have a special scope of application.
3. The matter must be within the substantive scope of the Regulation (Art. 1 BR: “civil and commercial matters”).

Art II New York Convention on Arbitral Awards:

(1) Each Contracting State shall **recognize an agreement in writing under which the parties undertake to submit to arbitration** all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. [...]

(3) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, **refers the parties to arbitration**, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

ECJ, Case C-391/95 - *van Uden*:

“24. Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and **have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention [= Brussels Regulation]. [...].**

25. In such a case, it is only under Article 24 [= Article 35 BR (recast); rule on provisional measures] that a court may be empowered [...] to order provisional measures.”

For which subject matters is the BR applicable?

Art. 1(1) BR: All civil and commercial disputes

- E.g. sale of goods and services, tort liability, employment matters
- BR does not apply if a public authority acted in the exercise of State authority (*acta iure imperii*), even if it acted in a private capacity.

Art. 1(2) BR: Excluded matters

- Legal capacity of natural persons
- Insolvency
- Social security
- Arbitration
- Maintenance obligations
- Wills and successions

For which defendants is the BR applicable?

Art. 5(1) BR

“Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.”

Art. 6(1) BR

“If the defendant is not domiciled in a Member State, the jurisdiction of the courts of the Member States shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.”

For which defendants is the BR applicable?

Consequences for cross-border cases

1. Defendants domiciled in the EU can only be sued in the EU in accordance with the rules of the Brussels Regulation, even if the plaintiff comes from a third state.
2. For defendants domiciled in third states, the Brussels I Regulation does not apply (exception: jurisdiction agreement for EU courts, consumer + employment contracts, exclusive jurisdiction).
3. For third state defendants, national jurisdiction rules apply (eg in Italy the Italian Code of Civil Procedure; in Germany the Code of Civil Procedure etc.). These are sometimes similar to the Brussels I Regulation (in civil law countries), sometimes different.

Jurisdiction checklist: which court has jurisdiction?

1. **Exclusive jurisdiction (Art. 24 BR)**
 - What does exclusive jurisdiction mean?
2. **Jurisdiction by appearance (Art. 26 BR)**
 - What does jurisdiction by appearance mean?
3. **Special rules on insurance contracts (Art. 10 et seq. BR), consumer contracts (Art. 17 et seq. BR) & employment contracts (Art. 20 et seq. BR)**
 - Background: protection of weaker parties
4. **Jurisdiction agreement (Art. 25 BR)**
5. If none of the above, the plaintiff has the choice between **general jurisdiction** at the defendant's domicile (Arts. 4, 62 BR) and the **special grounds** of jurisdiction in Art. 7 & Art. 8 BR.
 - What is general and special jurisdiction?
 - What is forum shopping?

General jurisdiction

General jurisdiction (Arts. 4, 59, 60 BR)



Basic rule

- Courts of the domicile of the defendant have jurisdiction (Art. 4 BR).
- General jurisdiction means that a plaintiff can always bring claim before this court (unless exclusive jurisdiction elsewhere by law or agreement)
- Domicile is defined partly in Arts. 62, 63 BR.

Definition of domicile

- The court applies its domestic law to determine whether the defendant is domiciled in the forum State (Art. 62 BR).
 - Domicile differs from nationality, or residence, as it requires a certain factual connection of a person with a state.
 - Often: person must make a particular place her/his sole or main residence, with the intention that it shall continue to be the sole/main residence for an unlimited (or at least long) time.
- Domicile in a third state is determined according to the law of that State.
- Definition of domicile of companies in Art. 63 BR:

“(1) For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

 - (a) statutory seat, **or**
 - (b) central administration, **or**
 - (c) principal place of business.”

General jurisdiction: example

A runs an Internet music download service.

The company has its statutory seat in **Luxembourg**. Its sole executive director, the president, the chief executive officer, the senior vice president and the chief financial officer are all domiciled in the **United Kingdom** and meet regularly in London to discuss the company's strategy and issue instructions to management.

The service itself (particularly the day-to-day operations with customers and subscribers), technical support and the server from which the service is run are located in **Poland**. The majority of customers are found in **Germany**.

Answer

Under Art. 4(1), 63(1) BR, the domicile of company A is located in

- Luxembourg (statutory seat, Art. 63(1)(a) BR),
 - The United Kingdom (central administration as the place where the main internal management decisions are taken, Art. 63(1)(b) BR), and
 - Poland (principal place of business as the place from which the main business activities are conducted, Art. 63(1)(c) BR).
- The courts of all three countries have jurisdiction under Art. 4(1) BR.
- German courts do not have jurisdiction under Art. 4 BR, as the principal place of business does not refer to the place where the main business of the company takes place but rather to the place from which the activities are conducted.

Exclusive jurisdiction

Distinguish exclusive from non-exclusive jurisdiction



Exclusive jurisdiction

- The courts of one state only are competent
- No other courts may decide the case

Non-exclusive jurisdiction

- The courts of different countries are competent
- The plaintiff has the choice
- Every competent court must hear the case when brought before it by the plaintiff.

Exclusive jurisdiction if the object of the proceedings is/are

- Rights in immovable property (Art. 24(1) BR)
- Validity of companies or of the decisions of their organs (Art. 24(2) BR)
- Validity of entries in public registers (Art. 24(3) BR)
- Registration or validity of patents, trade marks, designs or other registered rights (Art. 24(4) BR)
- The enforcement of judgments (Art. 24(5) BR),

**With regard to those claims the courts in one country only are competent
→ The jurisdiction of all other courts is excluded!**

Jurisdiction by appearance

Art. 26 BR

“1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.”

- Without objection, def’d submits to jurisdiction. Why do we need such a rule?
 - Procedural efficiency; otherwise judicial resources might be wasted.
- What is meant by “appearance was entered to contest the jurisdiction”?
- Rule does not apply if another court has exclusive jurisdiction (para. 1).
- To protect “weaker parties” jurisdiction can only be established where the “weak” defendant is informed of his right to contest the jurisdiction (para. 2).

Special jurisdiction (selected bases)

- Besides the general rule of jurisdiction, the BR lays down special rules of jurisdiction (Articles 7-9 BR).
- Special jurisdiction is not mandatory: claimant has the choice where to sue
- As the rules of special jurisdiction deviate from the general rule of jurisdiction, these provisions must be interpreted narrowly.
- Important bases of special jurisdiction are contained in Art. 7 BR
 - No. 1: Contracts: place of performance of the obligation in question.
 - No. 2: Tort claims: place where the harmful event occurred or may occur.

Tort (Art. 7(2) BR)

- Read Art. 7(2) BR
- Definition of tort claims:

“The concept of ‘matters relating to tort, delict and quasi-delict’ covers all actions which seek to establish the liability of a defendant and which are not related to a ‘contract’ within the meaning of [Article 7(1) BR].”

ECJ, Case 189/87 – *Kalfelis v Bankhaus Schröder*

Definition of place of harm

How to locate the “place where the harmful event occurred or may occur”?

ECJ, Case 21/76, [1976] E.C.R. 1735 – *Bier v Mines de Potasse d’Alsace*:

French defendants (Mines de Potasse D’Alsace) had polluted the waters of the Rhine river in France. The polluted Rhine water flowed into the Netherlands, where damage was caused to an agricultural business. The Dutch owners of that business wished to sue in the Netherlands, relying on Art. 7(2) BR (then Art. 5(3) Brussels Convention).

Issue: Is the place where the harmful event occurred the

- place of the event giving rise to the damage, ie place of acting (France) and/or
- place where the damage occurred, ie place of “success” (Netherlands)?

Ruling of the ECJ in *Bier v Mines de Potasse d'Alsace*

Place where the harmful event occurred covers both locations

- Place where the damage occurred +
- Place of the event giving rise to it

Consequence: Plaintiff can choose between the two venues

- French courts have jurisdiction (at the place of the event giving rise to the damage) +
- Dutch courts have jurisdiction (at the place where the damage occurred)

Reasoning of the Court

“(16) Liability in tort, delict or quasi-delict can only arise provided that a causal connection can be established between the damage and the event in which that damage originates.

(17) Taking into account the close connexion between the component parts of every sort of liability, it **does not appear appropriate to opt for one of the two connecting factors** mentioned to the exclusion of the other, **since each of them can**, depending on the circumstances, **be particularly helpful** from the **point of view of the evidence** and of the **conduct of the proceedings**.

(19) Thus the meaning of the expression ‘where the harmful event occurred’ in Article 5(3) must be established in such a way as to acknowledge that the plaintiff **has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it.**”

Why did the ECJ not limit the place of harm to one connecting factor?

Limitation of jurisdiction – *Shevill*

- ***Bier* case: Place where the harmful event occurred or may occur covers both**
 - The place where the damage occurred +
 - The place of the event giving rise to it.
- ECJ introduced a limitation of jurisdiction in ***Shevill*** for publication torts:

“Courts of the place where the damage occurred **have jurisdiction solely in respect of the harm caused in the state of the court seized**, whereas courts of the place of the event giving rise to the damage (which will often be same place as defendant’s domicile) have jurisdiction for all harm caused.”

ECJ, Case C-68/93 – *Shevill*.

Shevill (2)

Fiona Shevill, who is domiciled in England, claimed damages from the owner of the Paris-based newspaper France Soir, for harm caused by the publication of an (allegedly) defamatory article published in this newspaper which portrayed Ms Shevill and her (former) employer as part of a drug-trafficking (money laundering) network.

Ms Shevill commenced proceedings in the High Court of England and Wales (= UK) claiming damages for “libel” in respect of the copies of France-Soir distributed in France and in other European countries including the UK.

France-Soir is mainly distributed in France. The newspaper has a very small circulation in the UK. It is estimated that more than 237,000 copies of the issue of France-Soir in question were sold in France and approximately 15,500 copies distributed in the other European countries, of which 230 were sold in England and Wales (5 in Yorkshire where Ms Shevill resides).

Does the High Court have jurisdiction under Art. 7(2) BR? The court referred this “question” to the ECJ

Reasoning of the ECJ

- In the case of a libel by a newspaper article distributed in several States, the **place of the event giving rise to the damage** can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation. -> Paris
- The place where the **damage occurred** in international libel cases corresponds to the places where the publication is distributed -> France, England, Germany etc....
- Consequences:
 - Ms Shevill could sue in England (place where the damage occurred) even though very few copies of the newspaper were distributed there.
 - Newspapers would face actions in many different countries.

Reasoning of the EJC (2)

Against this background, ECJ set forth a limitation for jurisdiction:

“(31) In accordance with the requirement of the **sound administration of justice**, the basis of the rule of special jurisdiction in Article [7](2) [BR], the courts of each [Member] State in which the defamatory publication **was distributed** and in which the victim claims to have suffered injury to his reputation are territorially the best placed to assess **the libel committed in that State** and to determine the extent of the corresponding damage.

(32) Although there are admittedly disadvantages to having different courts ruling on various aspects of the same dispute, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant’s domicile or of the place where the publisher of the defamatory publication is established.”

How to apply Art. 7(2) BR to defamation via the internet? ECJ, Case 509/09 – eDate advertising, Olivier Martinez



The French actor Olivier Martinez initiated proceedings before a court in Paris/France, complaining that an article entitled 'Kylie Minogue is back with Olivier Martinez' posted on the website www.sundaymirror.co.uk included pictures and details of their meetings that interfered with his private life. The website is operated by the British Newspaper Sunday Mirror (domiciled in London). Jurisdiction of the Paris court?

Case joined by ECJ with the following case from Germany (which we do not treat here):

eDate Advertising, domiciled in Austria, operates the website 'www.rainbow.at'. The website had posted until 2007 an article written in German on a murder committed by X, whose full name was mentioned, in 1990. The article also reported on certain appeals X made to be released from jail in Germany.

X files an action before German courts against eDate Advertising. He demands that the website operator refrains from using his full name when reporting about him in connection with the crime committed. eDate Advertising contends that the German courts have no international jurisdiction in the matter because the website was directed only to Austrian recipients.

Reasoning of the ECJ (Martinez case)

- Note: No jurisdiction agreement, no general jurisdiction (Art. 4 BR) of Paris court because website operator is domiciled in UK.
- Tort jurisdiction under Art. 7(2) BR?
- In the case of defamation by means of a newspaper article distributed in several States, the victim may according to *Shevill* bring an action for damages against the publisher either
 - at the place where the publisher of the defamatory publication is established, with this court having jurisdiction to award damages for all of the harm caused by the defamation,
 - or before the courts of each State in which the publication was distributed, which have jurisdiction to rule solely in respect of the harm in the State of the court seized.

Reasoning of the ECJ (2)

- But for infringement of a personality right by **means of the internet**, a person may bring an action in one forum in **respect of all of the damage** caused. Given that the court of the place **where the alleged victim has his centre of interests** is best positioned to assess the potential impact to an individual's personality rights from material placed online, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice.
- The place where a **person has the centre of his interests corresponds in general to his habitual residence**. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.
- Alternatively the plaintiff may file separate actions before the courts of each Member State in which the content of the website is accessible (limited to the damage caused in that jurisdiction).

Contract

- Read Art. 7(1) BR
- “Matters relating to a contract”
 - situation where there is an obligation freely assumed by one party towards another (ECJ, case 26/91 – *Handte*) +
 - the conduct may be considered a breach of contract (by looking at the purpose of the contract) (ECJ, case 548/12 – *Brogstetter*) (Q: Is interpretation of contract indispensable to establish lawful/unlawful nature of contract)

Contract

- Distinguish contractual matters from tort/delict claims
 - Art. 7(2) covers actions for liability which are not related to a contract within the meaning of Art. 7(1) BR.
- Claim both in contract and in tort/delict?
 - ECJ: court competent under Art. 7(1) BR may only deal with contract claim
 - Alternative: both claims may be decided by the court that has jurisdiction under Art. 4 BR

Place of performance – Structure of Art. 7(1) BR



- Art. 7(1)(a) BR = general rule
- Art. 7(1)(b) BR = special rule for contracts of sales + services
- Art. 7(1)(c) BR = superfluous; legislator wrote this rule in BR to make clear that point (a) applies also in cases in which point (b) does not apply because place of performance is located outside EU.

Special rule for sale/service contracts, Art. 7(1)(b) BR

Place of performance for sale of goods + provision of services contracts

- European definition of place of performance (“factual assessment”)
- Sale of goods = jurisdiction exists in a Member State court corresponding to the place, where, under the contract, the goods were delivered or should have been delivered.
- Provision of services = jurisdiction exists in a Member State court corresponding to the place, where, under the contract, the services were provided or should have been provided.

Example

US-based firm sells “I love NY” shirts to firm domiciled in Augsburg/Germany. The goods are delivered to London as prescribed in contract. The buyer claims that products are of low quality and do not conform to the contract.

- Which court has jurisdiction under Art. 7(1)(b) for the buyer’s claim?
- How is the issue decided when the goods were delivered to Augsburg?

General rule, Art 7(1)(a) BR

- Applies to all contracts not covered by point (b) or in which point (b) does not apply for other reasons, for example because the place of performance is located outside the EU (point (c)).
- Place of performance of the obligation in question is determined according to the law applicable to the contract which is determined by the private international law of the forum (so-called “Tessili” rule)
- Consequence: national contract law decides on the place of performance, not EU law.
- Obligation in question = obligation for which non-performance is claimed (either payment or corresponding duty)
- Why is there no truly European rule??

Example

A producer of medical devices in **Vienna (MD)** contracts with **JamesBond GmbH (JB) in London** on the licensing of anti-spy software. JB installs the software in Vienna. A dispute arises on the reach of the licence, which is restricted to 100 computers in the Vienna office + 2 computers in the Paris office of MD. Which court has jurisdiction for a suit against JB?

- Jurisdiction under Art. 4 BR? – London
- Jurisdiction under Art. 7 BR?
 - Art. 7(1)(b) BR, licensing contract is not a sales/service contract (only installation, which is here of minor importance)
 - Art. 7(1)(a) BR
 - Applicable law: Art. 4(2) Rome I Regulation – law of the country in which the licensor (JB) has its habitual residence -> England
 - Obligation in question: Reach of software licence
 - Place of performance under German law? Software shall run mainly on computers in Vienna – good reasons to assume that place of performance is Vienna

MD can sue in either London (Art. 4 BR) or Vienna (Art. 7 no. 1 a) BR)

Jurisdiction to protect weaker parties

Background

- For insurance, consumer and employment contracts, the legislator has enacted jurisdiction rules that aim to protect the weaker party to the contract (e.g. the insured person, consumers, employees)
- These rules
 - Establish bases of jurisdiction favorable to the weaker party +
 - Restrict forum selection clauses to the detriment of the weaker party

Overview

- Jurisdiction over insurance contracts (Arts. 10-16 BR)
- Jurisdiction over consumer contracts (Arts. 17-19 BR)
- Jurisdiction over employment contracts (Arts. 20-23 BR)

Questions, discussion, quick quiz

- Any questions?
- How is general jurisdiction defined under EU law?
- What is special jurisdiction?
- In tort claims, which courts have international jurisdiction under Art. 7(2) BR?
- How do you localise „the place where the event giving rise to the damage took place” and the “place where the damage occurred” in cases of publication torts?
- How do you localise „the place where the event giving rise to the damage took place” and the “place where the damage occurred” in cases of defamation via the internet?

Jurisdiction agreements

(choice of forum, forum selection clauses)

Introduction

- Art. 25 BR allows parties to choose the court which shall have jurisdiction for their disputes (“prorogation of jurisdiction”).
- If they do so, such an agreement is called a
 - Jurisdiction agreement/clause
 - Alternative expressions: forum selection clause, choice of forum clause
- Reasons to conclude such an agreement
 - Increase certainty which court will be competent,
 - Confer jurisdiction upon the court best equipped to resolve the dispute (evidence or experience)
 - May establish an advantage to litigate in the home court

Validity of jurisdiction agreements

General requirements, Art. 25(1) BR

If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction [...]

- Agreement = meeting of minds
- Court or courts = BR allows variety of clauses, eg
 - Jurisdiction: London (= London courts shall have jurisdiction)
 - English and German courts shall have jurisdiction
 - Important: Certainty as to the chosen court(s)
- BR only applies to clauses that confer jurisdiction to Member State courts
 - Prorogation of courts in third States (non-EU States) are judged on the basis of the lex fori of the chosen court.
- In connection with a particular legal relationship = parties have to specify in broad terms the relationship for which the jurisdiction agreement was made

Validity (2)

... unless the agreement is null and void as to its substantive validity under the law of that Member State.

- “null and void” provision applies to substantive grounds of invalidity like fraud, mistake, duress or lack of capacity (not: formal validity)
- Law of that Member State = law of the country of the chosen court(s)

Validity (3)

Form of the agreement (Art. 25(1), (2) BR):

- Read 3rd sentence of paragraph 1 + paragraph 2
- In writing or oral agreement evidenced in writing,
- Form established by the practices of the parties, or
- Form according to international trade usages of which the parties ought to have been aware
- Communication by electronic means which provides a durable record of the agreement shall be equivalent to a 'writing'. (Email, "Click Wrapping" etc.)

If form requirement set forth by EU law is not met

- Clause is null and void!

Limits to prorogation

Art. 25(4) sets forth limits to prorogation

- Agreement may not deviate from special rules for insurance, consumer and employment contracts (Arts. 15, 19, 23 BR).
- Exclusive jurisdiction Art. 24 BR.

Effect of a jurisdiction agreement

- Parties can agree on the effect of the jurisdiction agreement. For example, they can agree on
 - exclusive jurisdiction or
 - an additional forum
- If not otherwise agreed, jurisdiction agreements confer **exclusive jurisdiction** on the court agreed, i.e. no other court will be competent to hear the case (Art. 25(1) BR).
- Exclusive jurisdiction agreements have two effects: they establish the jurisdiction of the court agreed and they deprive all other courts of their jurisdiction (within the limits described above).

Examples of exclusive jurisdiction clauses

- “The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this contract or its subject matter or formation.”
- “The place of jurisdiction for all disputes arising out of the legal relationship between us and the buyer is the [NAME OF COURT IN VIETNAM].”
- “Each party hereto hereby irrevocably and unconditionally consents and submits to the exclusive jurisdiction of any state court located in the State of Delaware for any actions, suits or proceedings arising out of or relating to this Agreement.”
- “Any proceeding arising out of this Agreement might only be brought in the United States District Court for the Eastern District of Pennsylvania or, if there is no federal subject matter jurisdiction, in any state court of Pennsylvania.”

Example of a non-exclusive jurisdiction clause

- “For the purposes of the resolution of disputes under this Agreement, each party expressly submits itself to the non-exclusive jurisdiction of the courts of England.”

“Unilateral hybrid jurisdiction clause” (exclusive/non-exclusive)

- “The parties irrevocably agree that the courts of England are to have exclusive jurisdiction for the purpose of hearing and determining any suit, action or proceedings. Nothing in this clause shall limit the right of Party A to take proceedings against Party B in any other court of competent jurisdiction.” [note: B does not have the same right as A]

Validity of such clause uncertain, see Cour de Cassation of 26 September 2013 (holding that such a clause in a banking law contract is contrary to the purpose of BR) but same court decided in 2017 that clause is valid in different context.

Example of the application of Art. 25 BR

The Italian national Benincasa concluded a franchise contract with the Italian company Dentalkit with a view to setting up a shop in Munich.

The contract was signed by both parties and included a clause reading:

“The courts of Florence shall have jurisdiction to entertain any dispute relating to the interpretation, performance or other aspects of the present contract.”

Benincasa brought proceedings in Munich where he sought to have the franchising contract declared void on the ground that the whole contract (including the jurisdiction clause) was void under German law.

Jurisdiction?

Answer

- Brussels Regulation applicable: Art. 1, 25 BR.
- Jurisdiction agreement in favor of Italy. Consequence: Art. 25(1) BR: jurisdiction of German courts ousted if agreement valid and dispute falls in the scope of the agreement.
- Agreement valid: Form met (in writing) + no reasons that agreement is invalid on substantive grounds under Italian law
- Forum selection clause invalid for violation of special jurisdiction rules: no, Arts. 24(4), 19 BR do not apply: Benincasa not a consumer because contract concluded for (future) professional activity
- Contract + jurisdiction clause = two agreements, Art. 25(5) BR.
- Scope of agreement: legal certainty requires that agreement also applies if one party claims nullity of contract.

Questions, discussion, quick quiz

- Any questions?
- Why are forum selection clauses so important in international commerce?
- Can all parties agree on forum selection clauses under EU law?
- What is the difference between a forum selection clause and a „choice-of-law-clause“?

Coordination of proceedings

How to coordinate two proceedings that concern identical or similar actions brought before courts in different States?

Distinctions

- Same cause of action between the same parties (*lis alibi pendens*) + related actions
- Where are these proceedings pending? Before courts in the EU or elsewhere?
- Why are these distinctions useful?

Lis alibi pendens

Definition

- “lis alibi pendens” = (same) dispute pending elsewhere
- Same cause of action between the same persons

Coordination: Priority principle

- Priority principle if two actions are pending before two courts in the EU
- Court second-seized must stay its proceedings until court first-seized has decided on jurisdiction
 - Mutual trust
 - Second court is not in a better position to judge jurisdiction of court first-seized
- Consequence: Race to the court may secure jurisdiction
- Read Art. 29 BR

Lis pendens (2)

Exceptions from priority principle

- Exclusive jurisdiction agreements, read Art. 31(2)-(4) BR
- EU court referred to in the agreement may decide on its jurisdiction, irrespective of whether it was seized first or second.
- But: not in case the agreement violates mandatory rules for the protection of the weaker party to an insurance contract (incl. beneficiary), consumers or employees, Art. 31(4) BR. In such cases the priority principle set forth in Art. 29 BR applies.
- What is the background of this softening of the priority principle?
 - Importance of jurisdiction agreements in commerce
 - Delay of proceedings if one side deliberately files law suit in a court that does not have jurisdiction and works slowly (“torpedo”)

Lis pendens (3)

What is an action between the same parties?

- Principle: Same persons irrespective of their procedural role as plaintiff or defendant

When do two actions have “the same subject-matter”?

- ECJ: prefers wide interpretation.
- Claims do not have to be identical. Two actions concern the same subject matter when they touch upon the same issues.
- Examples of “same actions”
 - Action for purchase price + action for rescission of contract/declaration of nullity
 - Action for damages + action to obtain declaratory judgment that the plaintiff is not liable for damages (ECJ, Case 406/02 – *The Tatry*) – gives potential defendants the possibility to secure convenient forum.

Lis pendens (4)

At which point in time is a court “seized”?

- Issue: two different systems of filing in EU
 - In some Member States plaintiff hands over documents to the court
 - In other Member States plaintiff has to hand over documents to a person/authority that effects service and then lodges the documents with the court.
 - Point in time in which court is deemed seized differs

Solution under the BR

- A court is seized when a document instituting the proceedings is handed over to the first judicial organ (court or authority responsible for service) that shall receive it according to the national procedural laws of the Member State,
- Provided that the claimant takes all needed steps for service to be effected.

What happens if the court first-seized is not in the EU but in a third State?

- Principle of mutual trust does not apply because judiciary in third states may work differently than in EU; strict priority principle is therefore not an option.
- But: international comity demands that pending action may not be ignored entirely -> “soft solution” seems right.
- Example

Dispute between companies in Augsburg and New York. Augsburg Co. claims damages for breach of contract in the US. Some days later the New York Co. files a suit before a court in Augsburg for declaration of the nullity of the contract. Can the Augsburg court proceed?

Lis pendens – proceedings in third States

“Soft” priority principle – Read Art. 33 BR

- Applicable only if court second-seized bases its jurisdiction on general or special jurisdiction (not: in consumer suits etc.)
- Judgment rendered by court in third state is likely to be enforced in EU
- Discretion: stay is necessary for the proper administration of justice

Example 1: If foreign proceeding will not come to an end in the near future, EU court may go ahead and decide action brought before it.

Example 2: How are these principles applied to the dispute between the New York and the Augsburg firms?

Related actions

Definition

- Read Art. 30(3) BR

Coordination of EU cases (Art. 30 BR)

- Very soft priority principle (discretion of court second-seized)
- Court second-seized may stay proceedings if deemed proper (Art. 30(1) BR), or even
- Decline jurisdiction if the court first-seized has jurisdiction over the actions in question and its law permits the consolidation thereof (Art. 30 (2) BR).

Coordination third State cases (Art. 34 BR)

- Art 34 BR = Principles of Art. 30 BR + restrictions of Art. 33 BR

Questions, discussion, quick quiz

- Any questions?
- What does *lis alibi pendens* mean?
- What shall happen if A sues B in London/England for damages (breach of contract) and B later files an action against A in Paris/France for the payment of the purchase price under the same contract that plays a role in the proceeding in London?
- What may the London court do if it becomes aware that a court in Hanoi/Vietnam was first seised and the proceeding in Vietnam concerns the same contractual dispute between the same parties that litigate before the London court?

Summary

- The jurisdiction of European courts is almost entirely regulated by the Brussels Regulation.
- General jurisdiction is at the defendant’s domicile.
- Special jurisdiction is at the place of performance of the obligation in question (contract) or at the place where the harmful act occurred or may occur (tort).
- Special rules exist for insurance, consumer and employment contracts.
- Parties may conclude jurisdiction agreements.
- If a court in Europe has been first seized, all other courts that are seized with regard to the same matter in a dispute between the same parties have to wait for the decision of that court: “race to the court”
 - Exception: exclusive jurisdiction agreements

Thank you very much for your attention!