

Civil jurisdiction: the Brussels I (recast) Regulation

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The policy considerations lying behind the allocation of “international” jurisdiction

Mr. A, an Italian national, rented from the B Corp. (a company established in the UK but basically operating in Italy), a villa located in Spain for holiday purposes. In Spain, Mr. A entered the sea, dove into the water, and hit his head against a submerged sand bank, sustaining serious spinal injuries.

The accident rendered him a tetraplegic. Mr. A decided to sue the B Corp., based on a theory of a breach of contract, claiming an implied term of lack of hidden dangers and reasonable safety.

- Connection with the defendant
- Connection with the substance of the claim (evidentiary issues)
- Protection of the weak party

The policy considerations lying behind the allocation of “international” jurisdiction

Let's make things more complicated!

What if...

- the parties had convened that German courts were competent to adjudicate any disputes arising from the contract?
 - Competing policy considerations
 - Free will of the parties
 - Protection of the weak party
- the B Corp. had already sued Mr. A before Spanish courts in order to recover the damages caused to the villa during a party ended with Mr. A's incident?
 - Competing policy considerations
 - Protection of the weak party
 - Need to avoid irreconcilable decisions
 - Expeditionness of the proceedings

The Brussels I (recast) Regulation

A (brief) historical introduction

The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

- A “double instrument” (jurisdiction and recognition/enforcement)
 - Why?*
 - Common rules on international jurisdiction make recognition/enforcement simpler
 - Common (and more generous) recognition/enforcement rules make it possible to eliminate exorbitant jurisdictional grounds which are too plaintiffs-friendly (*e.g.* those based on the mere presence of defendant’s assets in the forum country)
- The success of the Brussels Convention and the application of its principles beyond the EU
 - The EFTA States and the Lugano Conventions (1988 and 2007)
 - The domestic provisions widening the scope of the rules set forth in the Brussels Convention (*e.g.* Art. 3(2) of the Italian Law No. 218/1995)

The Brussels I (recast) Regulation

A (brief) historical introduction

- From the 1968 Brussels Convention to the 2001 Brussels Regulation (Reg. CE 44/2001)
 - Changes in the numbering of the articles
 - No substantial reforms
- From the 2001 Brussels Regulation to the 2012 Brussels Regulation (recast) (Reg. EU 1215/2012)
 - Changes in the numbering of the articles
 - Some substantial reforms, mostly (but not only) in relation to recognition/enforcement

The scope of the Brussels I (recast) Regulation

Ratione temporis

Art. 80: “[The Regulation] shall apply from 10 January 2015”

Mr. A sued the B Corp. on 8 September 2014 before Italian courts, which render a final judgment only on 6 March 2016. It then started an enforcement proceedings in the UK, where the defendants has some assets.

Which of the two Regulations will apply?

Art. 66(2): “Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted [...] before 10 January 2015”

The scope of the Brussels I (recast) Regulation

Ratione personarum

- Legal proceedings where the defendant is domiciled in a Member State (13° preambular paragraph)
- Exceptions (14° preambular paragraph):
 - to ensure the protection of weak parties, and in particular consumers (art. 18) and employees (art. 21(2))
 - to safeguard the jurisdiction of the courts of the Member States which have a strong connection with the dispute (*e.g.* “rights in rem in immovable property” art. 24(1))
 - to respect the autonomy of the parties (“Prorogation of jurisdiction” art. 25)
- Domestic norms widening of the scope of the Regulation :
 - Art. 3(2) of the Italian Law No. 218/1995: application of the 1968 Brussels Convention (and subsequent modifications) also when the defendant is not domiciled in the territory of a Member State

The scope of the Brussels I (recast) Regulation

Ratione materiae

- Legal proceedings concerning “civil and commercial matters” (Art. 1(1))

What does “civil and commercial matters” mean?

- Autonomous (*i.e.* “European”) definition
 - Independent of the corresponding national legal concepts
 - Reference to EU law and the case law of the ECJ
- Negative definition
 - Art. 1(1) Exclusion of proceedings concerning public law matters (“revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority”)
 - Art. 1(2) Exclusion of matters which are regulated by other EU or international legal instruments (family law, succession, insolvency, social security and arbitration)

The general jurisdictional rule: the domicile of the defendant

Art. 4

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.

Exclusion of citizenship as connecting factor

Why?

Prohibition of discrimination on grounds of nationality (Art. 18 TFEU)

The general jurisdictional rule: the domicile of the defendant

The legal notion of domicile under the Brussels I (recast) Regulation

A) Natural persons (art. 62) => Reference to national law

Two hypotheses (and two distinct conflict rules)

A) Mr. A, who is a French national, sues Ms. B, who is a Spanish national, before German courts, assuming that the defendant is domiciled in the latter State

How it will be determined whether Ms. B is actually domiciled in Germany?

- Art. 62(1) In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply **its internal law**

=> on the basis of the notion of domicile in German law

B) Let us assume that Ms. B objects that German courts have not jurisdiction because she is domiciled in Spain

How it will be determined whether Ms. B is actually domiciled in Spain?

- Art. 62(2) If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law **of that Member State**

=> on the basis of the notion of domicile in Spanish law

The general jurisdictional rule: the domicile of the defendant

The legal notion of domicile under the Brussels I (recast) Regulation

B) Legal persons (art. 63) => Autonomous notion

Three (alternative) notions of domicile

- (a) statutory seat
- (b) central administration
- (c) principal place of business

These three notions do not necessarily coincide

Under B. Corp.'s constitutive instrument, its statutory seat is in London (UK)

In 2011 the corporation moved its headquarters in Germany
Since 2014, it operates eminently in the Italian and Spanish markets

Where the B Corp. can be sued?

Special jurisdictional rules

Overview

- Additional fora
 - => The plaintiff **may choose** one of them, instead of that of the defendant's domicile
- Policy consideration
 - => The close connection between the dispute and the Member State justifies the defendant's inconvenience
- Exceptional character
 - => Extensive interpretation is generally excluded

Special jurisdictional rules

“Matters relating to a contract” (art. 7 n. 1)

- **Autonomous** and **negative** notion

The provision does not cover all those situations “in which there is no obligation freely assumed by one party towards the other” (ECJ, 27 October 1998, *Réunion européenne*)

- Jurisdictional rules

- Art. 7, n. 1(a) The defendant may be sued also in the courts for the place of performance of the obligation in question (*forum solutionis*)

What does “the place of performance of the obligation” mean?

In principle, reference is made to the place of the disputed performance (be it in kind or in money)

- Art. 7, n.1(b), however, clarifies the place of performance in relation to the two most common contracts
 - Sale of goods: the place of delivery of the good(s)
 - Provision of service: the place of provision of the service(s)

Special jurisdictional rules

“Matters relating to tort, delict or quasi-delict” (art. 7 n. 2)

- **Autonomous** and **negative** notion

“[A]ll actions which seek to establish the liability of a defendant and are not matters relating to a contract” (ECJ, 27 October 1998, *Réunion européenne*)

- Jurisdictional rules

- Art. 7, n. 2: The defendant may be sued also in the courts for the place where the harmful event occurred or may occur
- Principle of ubiquity: if the place of the harmful act and that of the resulting damage are not identical, the plaintiff may choose between one of them

Mr. C, a French actor (living and working in France), intends to sue for damages the Sunday Mirror, a UK based tabloid, complaining that he suffered an infringement of the right to his image by an article, published on the tabloid's website, describing his love affair with a (much controversial) music star

Which jurisdiction will be competent?

Let's have a break?

Weak-party disputes

“Consumer contracts” (Section 4)

Notion

- Consumer: a person who concludes a contract “for a purpose which can be regarded as being outside his trade or profession” (art. 17(1))
- Professional: “a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities” (art. 17(2)(c))

Does Section 4 apply to the following hypotheses?

A tourist domiciled in Sweden who is dissatisfied with a purchase made in a shop located in Naples

A consumer domiciled in Italy who bought a pair of shoes from the English website of a company based in Hungary

What if the website is only in Hungarian?

Weak-party disputes

“Consumer contracts” (Section 4)

Consumers’ privileged position

- The consumer may sue the professional *also* in the courts of the Member States in which he/she is domiciled (art. 18(1)), while the consumer may be sued only in his/her *forum domicilii* (art. 18(2))
- (Relative) mandatory nature of art. 18, which may be departed from only by an agreement:
 - which is entered into after the dispute has arisen (Art. 19, n. 1), or
 - which allows the consumer to bring proceedings in additional courts (art. 19, n. 2)
 - which is entered into by parties domiciled in the same Member State and confers jurisdiction on the courts of that State, provided that it is valid according to the law of the latter (art. 19, n. 3)
- Special rule regarding the professional’s domicile (art. 17(2))

When the professional is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, it shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State

Rules on exclusive jurisdiction (art. 24)

Main features

- **Exclusive**: when they apply, other rules (both on general and special jurisdiction) do not come into play
- **Applicable *ex officio***
- **Mandatory**: they cannot be opted out by mutual agreement
- **Subject to restrictive interpretation**

Jurisdictional rules

- Proceedings which have as their object rights *in rem* in immovable property => the courts of the Member State in which the property is situated (art. 24, n. 1)
- Proceedings concerning the legal life of associations and legal persons (constitution, dissolution, decisions of the organs) => the courts of the Member State in which the association or the legal person has its seat (art. 24, n. 2)
- Proceedings concerning various forms of registration (land, ship, aircraft, patent, trademark, and so on) => the courts of the Member State in which the register is kept (art. 24, nn. 3 and 4)

The prorogation of jurisdiction (or choice-of-court agreement)

Express prorogation (art. 25)

1. 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, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Limitations

- Choice-of-court agreements cannot derogate either from rules on exclusive jurisdiction or from special rules protecting weak parties (art. 25(4))
- General prorogation is not allowed (“in connection with a particular legal relationship”)

The prorogation of jurisdiction (or choice-of-court agreement)

Tacit prorogation (art. 26)

1. If the defendant enters an appearance without contesting the jurisdiction, it will tacitly accept the jurisdiction of the court

Limitations

- Tacit prorogation does not apply in case of exclusive jurisdiction (art. 26(1))
- In case the defendant is a weak party (insured, consumer, employee), the court – before assuming jurisdiction – will “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” (art. 26(2))

Examination as to jurisdiction (arts. 27 and 28)

The court seised may decline jurisdiction on its own motion in two hypotheses:

- In case of exclusive jurisdiction under art. 24 of the court of another State (art. 27)
- Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, unless there is a special ground of jurisdiction (art. 28)

Mr. A, an Italian national, rented from the B Corp. (a company established in the UK but basically operating in Italy), a villa located in Spain for holiday purposes. In Spain, Mr. A entered the sea, dove into the water, and hit his head against a submerged sand bank, sustaining serious spinal injuries.

The accident rendered him a tetraplegic. Mr. A decided to sue the B Corp., based on a theory of a breach of contract, claiming an implied term of lack of hidden dangers and reasonable safety.

Which jurisdiction is competent to entertain Mr. A's claim?

- General rule under art. 4: B Corp.'s domicile
 - Statutory seat (art. 63(a)) => UK
 - Principal place of business (art. 63(c)) => Italy
- Special rules concerning weak parties (art. 18): Mr. A's domicile

What if the parties had convened that German courts were competent to adjudicate any disputes arising from the contract?

- Under art. 19, if the choice-of-court agreement predates the dispute, it cannot affect the applicability of art. 18

What if...

the rental contract was stipulated between B Corp. and a soccer team (Youth FC), whose Mr. A is a top player?

- Special rules protecting consumers are no longer applicable
- Special jurisdictional rule under Article 7, n. 1: Place of the performance of the obligation [to provide reasonable safety] => Spain

before Youth FC initiates proceedings before a UK court, B Corp. has already sued the former before Italian courts in order to obtain a declaration that it has no obligation to provide reasonable safety?

or

Youth FC and Mr. A sue B Corp. before two different jurisdictions, both equally competent (i.e. Spain and UK)?

Lis pendens — Related actions

Lis pendens (art. 29)

First-in-time rule

[W]here proceedings involving **the same cause of action** and **between the same parties** are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established

Lis pendens (art. 29)

How does this mechanism actually work?

- The court first seised will ascertain whether it has jurisdiction
- The other courts seised will stay the proceedings on their own motion (*ex officio*) waiting for the determination of the court first seised
 - If the court first seised declares not to have jurisdiction, the court second seised will revoke the stay of proceedings and will ascertain whether it has jurisdiction, and so on
 - If the court first seised establishes to have jurisdiction, the other courts will declare their lack of jurisdiction
- The first-in-time rule does not apply
 - When one of the court is seised has exclusive jurisdiction under art. 24
 - When one of the court seised is the court designated by the parties under art. 25 (anti-Italian torpedo rule, art. 31(2))

Related actions (art. 30)

- Courts other than the first seised ***may*** stay the proceedings and, on the application of one of the parties, decline its jurisdiction in favour of the court first seised, provided that:
 - The proceedings before the first court is pending in first instance
 - The court first seised has jurisdiction also on the related action
 - The procedural law of the court first seised allows the consolidation
- When does art. 30 apply?
 - When the actions are “so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments” (art. 30(3))