The European Rules on the Choice of Forum by Individuals: An Elaboration of Law Cases

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Abstract

Transactions among individuals of different residencies are countless and occur on a daily basis worldwide. A key question is at which court the parties shall bring an action. The judicial settlement of disputes arising from a contract is a complex procedure, especially when contracts have foreign elements. The scope of this article is to elaborate on the choice of forum agreements and the legal effects that they have (according to Article 23 of Brussels I Regulation). Results show that although the autonomy of the parties in choosing the competent court is given great priority in the strict system of procedural law rules of the European Union, the autonomy of the parties brings legal effects only when it is expressed according to certain requirements that are set in the European Regulation.

Keywords: Community law, Judicial settlements, International competent forums, Brussels i regulation, Hague convention, Rome I / Rome II regulation

1. Introduction

Transactions among individuals of different residencies are countless and occur on a daily basis worldwide. In the majority of the cases these transactions are contracts between individuals and/or corporations, for example products bought through the internet or contracts between multinational companies. There are, frequently, disputes between parties to a contract as far as the application of it is concerned. The judicial settlement of disputes arising from a contract is a complex procedure, especially when contracts have foreign elements.

A key question is at which court the parties shall bring an action. For example, in the case that there is a contract of sale between the resident of country A and the resident of country B and the delivery of goods has been agreed to take place in country C but one of the parties does not honor the agreement. In which of the three forums will the other party have the right to bring an action? The rules regarding the competency of a court in these cases are set by the national civil procedural law of each country.

After bringing an action to one of the competent forums, certain problems can arise. The most important problem being denial of justice, i.e. when all forums that link to a case refuse to rule on it because under their national rules the court of another state is competent to settle the dispute. Furthermore, there is the possibility that a court does not recognize the judgment issued by the court of another state on the ground that the latter had no jurisdiction over the case. Consequently, the judgment will not be enforced in the latter state in which the winner party has an interest. This party might never fully recover the damage that he suffered from the other party's breach of contract.

The scope of this article is to elaborate on the choice of forum agreements and the legal effects that they have (according to Article 23 of Brussels I Regulation). First, the necessary requirements for the conclusion of such a jurisdiction agreement will be examined. After, the consequences of such an agreement will be described. Lastly there will be a comparison between the rules on choice of court agreements on Article 23 of the Brussels I Regulation and the rules on The International Hague Convention (2005) for the agreements on choice of court,

which regulates the same matter in international level.

2. Historical Background

In the European Union (EU) these complications were first addressed by the proposal of a regional convention which would regulate the jurisdiction on settlement of disputes arising between individuals (or corporations) which reside (or have their headquarters) in different Member States within the EU. This Convention was signed by the six Member States in European Community in 27.9.1968 and entered into force in 1.2.1973. Since then every country that acceded to the European Community was also bound by the Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, also known as the Brussels Convention.

The revision of the Treaty of Amsterdam of 2.10.1997 brought some changes. The issue of judicial cooperation regarding civil cases was transferred from the third pillar of intergovernmental cooperation to the first pillar in which the issues are regulated by acts of secondary Community Law. Following this, the rules of the Brussels Convention were incorporated into the European Regulation 44/2001, also known as the Brussels I Regulation. The Regulation, like the Convention, includes rules on the jurisdiction on civil cases with foreign elements.

The great advantage that these rules bring is the certainty on the competent forum. This means that the litigants are not exhausted financially and do not spend too much time in bringing actions before a number of different courts which could have been competent based on national procedural law. The leading criterion used by the European legislator to determine the competent court in each case is the proximity of the forum to the elements of the case. For example, regarding the sale of goods the competent court is in the Member State where, under the contract, the goods were delivered or should have been delivered (Article 5, Brussels I Regulation). This criterion serves the need for immediate collection and judging of evidence and gives the advantage of faster settlement of disputes.

Regardless of the effectiveness of the above-mentioned rules, during the drafting of the Brussels Convention it was discussed whether these strict rules regarding jurisdiction could be set aside by an agreement between parties. In such an agreement parties decide the competent EU forum for the settlement of disputes between them. The result would have two aspects: prorogation of the international jurisdiction of one forum and derogation from the jurisdiction of the forum designated by the rules of the Convention.

This discussion attracted a lot of attention during the drafting of the Convention. On the one hand, a rule on the choice of forum agreements would promote a very basic principle during transactions within EU: the principle of autonomy of parties in a contractual relationship. On the other hand, some Member States voiced the concern that these agreements do not always guarantee the interests of both parties. Also, the forums were reluctant to be deprived of their jurisdiction particularly when the case had a strong link with them according to the general rules of the Convention.

During the discussions it was pointed out that the choice of forum agreements has considerable advantages. One advantage being that parties know in advance at which court they will solve their disputes and therefore can predict which law will apply to the dispute. Secondly, the chances of parallel procedures before different courts are diminished. This saves expenses and time-consuming procedures. Also, parties can agree to a court in which they are more familiar with the procedures and the language used there.

Taking these advantages into consideration, the drafters of the Brussels Convention decided to include the rule on the choice of forum agreements in article 17 of it and later in article 23 of the Brussels I Regulation. Article 23 of the Brussels I Regulation, in its present form, states the following:

"1. If the parties, one or more of whom is domiciled in a Member State, 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.

Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) In writing or evidenced in writing or

(b) In a form which accords with practices which the parties have established between themselves or

(c) In international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of which is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13,17, or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

3. Requirements of a Jurisdiction Agreement

3.1.1 The Scope of Application of Article 23

A necessary requirement for the implementation of a jurisdiction agreement, according to the Brussels I Regulation, is that the dispute falls within the territorial and material scope of Article 23 of the Regulation. Apart from any specific rule set by a provision, the general scope of the Regulation is defined in Art 2 of it. Article 2 states that the Regulation applies to cases in which the defendant has residence in a Member State of the European Union. Following this, the Regulation applies only within the borders of EU.

Despite this general provision, the Article 23 provides a wider territorial scope. The first paragraph provides that it is sufficient if any of the parties (not necessary the defendant, but also the plaintiff) resides in a Member State. This deviation from the general provision is indicated by the need for legal certainty. When parties sign the jurisdiction agreement, they want to be sure that this is valid and applicable. The Regulation sets certain criteria for the validity of the agreement. If the criterion is the residence of the defendant (like in Article 2) the parties can never be sure for the validity of their agreement in case that one of them is resident of a third state. Their agreement is valid only in case that defendant is the resident of a Member State, but parties do not know who the defendant will be in a future dispute when they sign their agreement. This uncertainty is diminished by Article 23. If one of the parties is resident in a Member State, the parties will be sure that their agreement is valid and applicable regardless of who is defendant or plaintiff in the trial.

The material scope of Article 23, though, cannot expand further than the material scope of the Regulation in general. The material scope is defined in Article 1 of the Regulation. In general terms, a jurisdiction agreement can be concluded for civil and commercial law issues except of the matters mentioned in Article 1 paragraph 2 of the Regulation. By definition the disputes with a public law nature are excluded even when they are closely connected to the disputes settled under the Regulation.

Furthermore, family and inheritance law cases, though civil law, are excluded from the scope of application of Article 23. Also, disputes solved under the insolvency law, though commercial law, are excluded. Arbitration agreements are not regulated by the rules of Brussels I Regulation. The reason is that the arbitration agreements are a whole different institution than the jurisdiction agreements following different principles and rules (Kruger, 2010).

3.1.2 Dispute with Foreign Element

Even when the dispute falls in the scope of application of the Regulation, the choice of forum rules apply only to cases that link to more than one Member State. This requirement is not mentioned explicitly in Article 23 of the Regulation. It follows from the nature of the Regulation, which is an EU statute for the settlement of disputes with transnational consequences. The purpose of the Regulation particularly is to unify the procedural provisions on international cases. A mere internal case does not serve the purpose of the Regulation and is not regulated by these rules.

The foreign elements of a case are obvious when the parties reside in two different member states or when they agree the place of performance to be in a different member state. However, there are cases in which the foreign elements are not strong. For example, when the elements of a case are all located in one Member State, but parties nonetheless make a jurisdiction agreement for the courts of another Member State, the question that arises is whether such an agreement forms the international element required for the Regulation to apply.

The prevailing view is that the mere will of parties is not adequate to turn a case into a transnational one (Schockweiler, 1992). The relevant elements of a case are the residence of the parties and the place of performance. Once a court judges that these elements are all located within the Member State in which it is situated, the court shall consider the case as purely internal to which national law applies.

Another question about the internationality of a case is whether the link of a case with a third state is adequate for

the application of Art 23 in a jurisdiction agreement. For example, a Greek resident agrees with an Egyptian resident on the jurisdiction of the Greek courts. According to the letter of the Regulation the case has not a link with at least two Member States which is a requirement for the Regulation to apply. However, the European Court of Justice (ECJ) and the academics support the application of the Regulation in these cases as well. This is what the ECJ ruled on Owusu v. Jackson (Schockweiler, 1992):

"28. Moreover, the rules of the Brussels Convention (today Brussels I Regulation) *on exclusive jurisdiction or express prorogation of jurisdiction are also likely to be applicable to legal relationships involving only one Contracting State and one or more non-Contracting States. That is so,…, under Article 17 of the Brussels Convention* (today Article 23 of the Regulation)*, where an agreement conferring jurisdiction binding at least one party domiciled in a non-Contracting State opts for a court in a Contracting State."*

Also, Magnus (2007), more specifically, states that:

"The ECJ has very clearly expressed that the provisions of the Brussels Convention (today Brussels I Regulation) *do not only concern intra-community conflicts of competence but as well general international conflicts of competence as far as they affect the Community".*

3.1.3 Choice of Court in a Member State

(a) The term "Court in a Member state"

In addition to the above two mentioned implicit requirements, the Article 23 of the Regulation (paragraph 1) includes an explicit requirement for the validity of a choice of court agreement; the court designated by the parties as competent for the dissolution of their dispute should locate in a Member State. This requirement derives from the principle that the Regulation applies only in Member States. If the parties agree on the jurisdiction of court of a third state, this forum cannot be forced to apply the rule of Article 23 since the third state is not bound by the Regulation. The question is what the court of a Member State does when it seizes the case and finds that there is an agreement between the parties for court of a third state. There are two different approaches.

In the first approach the court of the Member State applies the Regulation and tests the jurisdiction agreement according to the requirements of Article 23. Since the designated by the parties court is in a third state, the jurisdiction agreement does not have the legal effects that Article 23 provides. It is important though that the autonomy of the parties will not be ignored. The jurisdiction agreement may be valid under the national law. Therefore, the court of Member State abstains from searching further its jurisdiction under the Regulation and applies its national law instead in order to rule on the validity and effect of the jurisdiction agreement for the third state. Since the requirements for the validity of a jurisdiction agreement under the national law are different and less technical than these of Article 23 of the Regulation, the court of Member State may find the jurisdiction agreement valid and decide to stay the proceedings until the designated court of third state rules on its jurisdiction. This approach was confirmed by the ECJ in Coreck Maritime GmbH v. Handelsveem BV (C-387/98):

"19. As to the second condition, Article 17 of the Convention (today Article 23 of the Regulation) *does not apply to clauses designating a court in a third country. A court situated in a Contracting State must, if it is seised notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits (Report by Professor Schlosser on the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the enforcement of judgments in Civil and Commercial matters and to the Protocol on its interpretation by the Court of Justice, OJ 1979 C 59, p. 71, paragraph 176)."*

The second approach is as follows. Again, the court of a Member State which seizes a case finds that there is a jurisdiction agreement. The court tests the validity of the agreement under the requirements of Article 23. The requirements are not fulfilled because the designated court is in a third state and therefore the jurisdiction agreement is invalid and inapplicable. However, the Court is bound to search further whether it has jurisdiction according to the general rules of the Regulation (Article 2) and, if so, to rule upon the case. The Regulation is mandatory law for the courts of the Member States. When there is a connecting factor of a case with the Member State that the court is situated, the court is bound to apply the Regulation and base its jurisdiction in one of the Regulation's provisions. Only when this fails or the Regulation provides an exception of its application, the Court may apply the national law. This approach was confirmed by ECJ in Owusu v. Jackson:

"37. It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention".

Following the one or the other approach is important, for each of them leads to a different result. At the first

approach the importance of the autonomy of the parties is highlighted and there is the chance, under the national law, that the designated court of the third state seizes the case, whereas at the second approach there is not such a chance since the court of Member State will establish its jurisdiction (on the grounds of Regulation).

The disadvantage charged to the first approach is that it does not follow the mandatory application of Regulation in an intra-community case. While the second approach tackles this disadvantage, it was criticized for masking the breach of the jurisdiction agreement by one of the parties and allowing the abusive bringing of the action in court of a Member State based on the general grounds of the Regulation.

However, this is hard to reconcile with the need for legal certainty between parties to a jurisdiction agreement, which is one of the basic aims of the Regulation. Therefore, if one party could easily bypass the agreement and rely on the general rules of the Regulation, parties are never quite sure before which court they need to appear (Briggs, 2007).

The first approach was followed by the courts of Member States and ECJ until 2005. Then the English courts launched the second approach in Owusu v. Jackson and the ECJ confirmed this approach in the relevant case. It is anticipated with great interest whether the national courts and the ECJ will follow in future cases this second approach or Owusu v. Jackson will be the only deviating case.

(b) The term "choice of court"

In some choice of court agreements parties do not designate a court, but they agree that the court competent according to the general rules of the Regulation will not have jurisdiction. There were doubts whether these agreements are according to the spirit of the Article 23, since regularly a choice of court agreement has a double effect, the derogation from the jurisdiction of one court and the prorogation of the jurisdiction of another court (Magnus, 2007).

These agreements are invalid when the exclusion of the jurisdiction of a court or courts leads to the removal of any access to justice. However, the agreements are valid when by excluding the jurisdiction of court in one Member State an implicit prorogation of jurisdiction of court in another Member State occurs, for instance in the case of concurrent jurisdictions.

3.1.4 Domicile of at Least One of the Litigants in a Member State

The requirement of domicile of at least one party in a Member State shows that the European legislator considers the domicile of a person as a strong connecting factor to the state as far as the judicial treatment of this person is concerned. The concept of citizenship, which was used often in the legislation of the Member States, is abandoned by the Regulation.

The definition of the term "domicile" is set in Article 59 for the natural persons and in Article 60 for the legal persons. Article 60 of the Regulation gives an autonomous definition for the domicile of companies or other legal persons. The preamble of the Regulation (no 11) refers:

"The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction".

Article 59, however, refers to the national law for the definition of the domicile of a natural person. This way of determining jurisdiction by a court has certain disadvantages. Firstly, it is a time consuming and paradoxical procedure for a court to get into the substance of each case before deciding on its jurisdiction. Specifically, the court of Member State first has to define the legal relationship and then apply the rules of Rome I / Rome II Regulation for the law applicable to contractual or non-contractual obligations respectively in order to find the applicable law. Also, the court needs to interpret the term "domicile" according to the national law before deciding if one of the parties is domiciled in the Member State that the Court is situated. Secondly, there is no uniform approach to the term "domicile" in the various national laws of the Member States. For example, some of the Member States use the criterion of time spent by the litigant in a particular place, while other Member States use the criterion of developed activities by the litigant in the state. This creates lack of uniformity to the application of the Regulation rules and uncertainty as far as the competent court is concerned.

After the consideration of the requirement of domicile, should the court find that it has no jurisdiction because neither the defendant nor the plaintiff domiciles in a Member State, it follows that the minimum requirement set by Article 2 (the defendant's domicile in a Member State) is not fulfilled either and the Regulation does not apply on the whole. The next step then is for the Court to test the jurisdiction agreement under the national law. The Court of the Member state may deny its competence on grounds of its national law. A frequent example in the Anglo-Saxon countries is the denial of jurisdiction by a court on the ground that it is forum non convenience. The principle of

forum non convenience is known in the common law systems. The court may have grounds to rule upon a case under the national law, but it has also the discretion to deny its jurisdiction because it considers that another court (within the country or not) is more appropriate forum to rule on the case. This principle is not known at the continental law systems where the court cannot deny its jurisdiction if there is ground for it.

The Regulation includes in paragraph 3 of the Article 23 a provision regarding the above mentioned cases when none of the litigants domiciles in a Member State. This is a remarkable provision because it regulates cases that are not within the scope of application of the Regulation. Specifically, paragraph 3 provides that:

"3. Where such an agreement is concluded by parties, none of which is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction".

This paragraph does not set a rule whether a court has jurisdiction but it sets a priority rule for the courts of the Member States which have jurisdiction under their national law. In particular, when confronted with a jurisdiction agreement, a court tests the agreement according to the requirements of the Article 23 of the Regulation. If the jurisdiction agreement is not valid the Court proceeds on checking if it has jurisdiction under the general rule of Article 2. If there is no domicile of the defendant in the Member State (according to Article 2 requirement), the Regulation does not apply. The court then applies the national law under which it might be competent to rule on the case. However, according to Article 23(3) the court cannot move to rule on the case because there is a jurisdiction agreement which designates the court of another Member State. Even if this jurisdiction agreement is invalid under the Regulation, the Regulation asks from the court to stay the proceedings until the designated by the agreement court rules on its jurisdiction under its national law.

3.1.5 Particular Legal Relationship between the Litigants

The third explicit requirement of Article 23, the concept of 'particular legal relationship', aims to provide parties with certainty regarding the issues which they can bring to the court designated by their jurisdiction agreement.

The requirement has two aspects. Firstly, the court must check whether there is a legal relationship between the litigants and secondly whether *the particular dispute* comes from this legal relationship for which the parties have designated the court in their agreement. Parties have the discretion to include in their jurisdiction agreement all the disputes arising from a legal relationship.

For the fulfillment of this requirement the court first seeks the wording of the jurisdiction agreement in order to define the legal relationship and the disputes arising from it. In case that the parties do not refer explicitly to the disputes included in their agreement, the court must find the applicable law to the legal relationship. Following the interpretation of the applicable law the court will find if the dispute claimed before it is included in the jurisdiction agreement of the parties. Here, we, also, see that the court needs to assess the agreement in the light of national law before deciding on its jurisdiction.

The requirement of the "particular legal dispute" has certain exceptions. There are disputes with such strong connection between them that common settlement of them by the court designated by the parties provides a unified approach of the case, unless the parties have explicitly excluded this option in their agreement. An example of this is a counter claim brought by the defendant before the court where proceedings regarding the original claim take place. For example, in a contract of sale, the seller sues the buyer for not paying fully the cost. The buyer counter- claims that the seller did not deliver all of the products.

The jurisdiction agreement of the parties includes only disputes regarding the cost. Thus, the jurisdiction on disputes regarding the delivery of products is found by the general rules of the Regulation. However, even if there is no provision on counter-claims in the jurisdiction agreement the counter claim can be brought by the defendant before the court of the original claim if the requirement set by article 6 (paragraph 3) of the Regulation is met:

"*A person domiciled in a Member State may also be sued: … 3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;"*

In the example mentioned above, both the claim and counter-claim come from the same contract of sale.

3.1.6 Form of the Jurisdiction Agreement

The required form of a jurisdiction agreement is described in paragraphs 1 and 2 of Article 23 of the Regulation. This requirement is important because the form of an agreement provides evidence of the will of the parties to prorogate the jurisdiction of a court and derogate from the jurisdiction of the court that would normally be competent. Before proceeding to the different forms of a jurisdiction agreement, it should be highlighted that the jurisdiction agreement is a different contract between the parties than the original contract establishing the legal

relationship between them.

To be more precise the jurisdiction agreement has different nature than the original contract and this is because it is a procedural contract. The term contract is not entirely correct since it does not concern bilateral but unilateral declarations. This means that each party forms a public declaration in which designates the same court of Member State as competent for a dispute. It is important that each of these declarations are formally made and well communicated to the other party (Briggs, 2008).

Many times the jurisdiction agreement is included in the text of the original contract as a clause. In any case the jurisdiction agreement remains autonomous and distinct from the original contract. This is important when considering the validity of the two contracts. Even if the original contract is invalid, the jurisdiction agreement which fulfills the requirements of the Regulation is valid and applies to the disputes arising from this contract and vice versa. For example, if the original contract, though being oral, is valid, the jurisdiction agreement needs to follow the written form in order to be valid.

From the different forms, the oldest is described in subparagraph *(a)"in writing or evidenced in writing"* while the forms of subparagraphs *(b)* and *(c)* are more recent and were added in Article 23 because of developments in international business transactions.

(a) Form provided in subparagraph (a)

Despite the simple wording "in writing", it is not clear whether it is adequate for the jurisdiction agreement to be put in paper by one of the parties or whether each of the declarations of the parties need to be in writing. For example in a contract of sale the seller drafts the original contract and includes in it the jurisdiction clause. The buyer signs the original contract. The original contract is valid. The validity of the jurisdiction clause though is tested separately. It is obvious that the seller makes his declaration regarding the jurisdiction following the appropriate written form. The question is whether this declaration is enough for the validity of the jurisdiction clause or if the declaration of the buyer needs to be in writing too (in the form of signing the particular jurisdiction clause). The ECJ ruled on the matter.

The case law of the ECJ is conflicting as to when a written jurisdiction agreement is binding to parties. In the case Estasis Salotti v. RUWA (C–24/76) there was a jurisdiction clause on the reverse side of the quittance. The quittance was sent by the seller to the buyer following the contract of sale between them. The quittance included all the terms of the original contract (i.e. the general terms set by the seller) and among them there was a clause on the prorogation of jurisdiction of the court of Member State. The ECJ ruled that:

" 9. Taking into account what has been said above, it should be stated that the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not on its self satisfy the requirements of Article 17(today Article 23 of the Regulation)*, since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction".*

In the case Estasis Salotti v. RUWA the written form of the jurisdiction clause was not followed for both parties and thus the jurisdiction agreement was invalid and inapplicable. The ECJ took the same approach in the case Galeries Segoura sprl v. Firma Rahim Bonakdarian (C–25/76).

However, in a more recent case law the ECJ ruled differently regarding this matter. In Powell Duffryn plc v. Petereit (C–214/89) the British company Powell Duffryn plc was shareholder in the German company IBH – Holding AG. The British company was sued by the liquidator of the German company Mr. Petereit before the German Courts for not paying its share due in respect of the increases in capital of the German company. Powell Duffryn has participated in the proceedings of a general meeting of IBH-Holding A.G. during which, by a show of hands, the shareholders adopted resolutions amending the statutes of IBH, in particular by inserting into them the following clause:

"By subscribing for or acquiring shares or interim certificates the shareholder submits, with regard to all disputes between himself and the company or its organs, to the jurisdiction of the courts ordinarily competent to entertain suits concerning the company".

The German company based the jurisdiction of the German Courts on this clause. The British company argued that it had not signed this clause which meant that it had not made its declaration to such a jurisdiction clause in a written form. Following the previous case law of ECJ the jurisdiction clause should have been rendered invalid due to lack of the written form of declaration of one of the parties. However the ECJ ruled differently in this case. It noted that:

"19. By becoming and by remaining a shareholder in a company, the shareholder agrees to be subject to all the

provisions appearing in the statutes of the company and to the decisions adopted by the organs of the company, in accordance with the provisions of the applicable national law and the statutes, even if he does not agree with some of those provisions or decisions.

20. Any other interpretation of Article 17 of the Brussels Convention (today Article 23 of the Regulation) *would lead to a multiplication of the heads of jurisdiction for disputes arising from the same legal and factual relationship between the company and its shareholders and would run counter to the principle of legal certainty".*

In Powell Duffryn plc v. Petereit the requirement of the written form which safeguards that both parties have actually made their declaration on the jurisdiction was set aside. The certainty that the declaration of the shareholder regarding the jurisdiction is made, is given by his status of being a shareholder. The shareholder is presumed to know and agree with the provisions of the company's statute including the provision for the jurisdiction agreement.

To sum up, according to the ECJ case law, when there are written declarations by both parties regarding the jurisdiction, the requirement of Article 23 paragraph 1a is fulfilled. When there is only one declaration which is a clause in a contract and the other party can be presumed to know this clause, the lack of the written form in the second party's declaration does not entail the invalidity of the jurisdiction clause.

(b) Form provided in subparagraphs (b) and (c)

Next to the traditional written form the need for more flexible ways of choosing a forum developed. In particular, the subparagraphs (b) and (c) of Article 23 provide that:

"An agreement conferring jurisdiction shall be either…(b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with the usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned".

The purpose of these provisions is to facilitate the international transactions. This is clearly described in the Report made by Prof. Schlosser (1979):

"*In particular, the requirement that the other party to a contract with anyone employing general conditions of trade has to give written confirmation of their inclusion in the contract before any jurisdiction clause in those conditions can be effective is unacceptable in international trade. International trade is heavily dependent on standard conditions which incorporate jurisdiction clauses. Nor are those conditions in many cases unilaterally dictated by one set interests in the market; they have frequently been negotiated by representatives of the various interests. Owing to the need for calculations based on constantly fluctuating market prices, it has to be possible to conclude contracts swiftly by means of confirmation of order incorporating sets of conditions. These are the factors behind the relaxation of the formal provisions for international trade in the amended version of Article 17"* (today Article 23 of the Regulation).

At first glance the provisions described above look flexible in formalities. Nevertheless, this flexibility is balanced by the numerous requirements that these provisions include for the validity of a jurisdiction agreement. For example, there should be a certain amount of transactions between the parties and these transactions should be of the same type. Also, the transactions should continue for a time period since the conclusion of the agreement and the application of it. If the transactions between the parties were interrupted and there were new negotiations before the continuation of the transactions between the same parties, the jurisdiction agreement of the parties at the first instance is not applicable anymore. The parties need to agree on the jurisdiction during the new negotiations, otherwise the general provisions of the Regulation apply.

3.2 Effects of a Jurisdiction Agreement

When a choice of court agreement meets the requirements set by Article 23 of the Regulation, it is valid and applicable. The application of this agreement has two effects. Firstly, the forum designated by the parties has exclusive jurisdiction, which means that, if the parties do not mention otherwise, it is the only forum competent for the dissolution of the dispute between the parties. The second effect is that the other courts of Member States, including the one which was competent under the general rules of the Regulation, have the obligation to stay the proceedings concerning this dispute, if an action is brought before them, until the court designated by the parties rules on its jurisdiction. In case that the designated court finds itself competent, then the other courts need to terminate the proceedings before them (Cheshire & Fawcett, 2008).

It is worth mentioning that the exclusive effect of a jurisdiction agreement is not absolute. The Regulation contains provisions that limit the effects of a jurisdiction agreement. These provisions are given priority over the autonomy of the parties because either one of the parties needs certain legal protection, or the connection of a forum with a case

can not be set aside, or a priority rule among the competent courts is set.

The first limitation comes from the group of Articles 13, 17 and 21 of the Regulation which refer to special types of legal relationships between the litigants such as insurance, consumer and employment contracts respectively. In these types of contracts, the parties are not considered equal during the negotiations. The autonomy of the parties, i.e. leaving parties free to decide as they wish regarding jurisdiction, could lead to unfair results due to the financial power of one of the parties (the insurer, the counterparty of the consumer and the employer). The weak party of these contracts needs protection and the Regulation has special rules to this effect.

An additional limitation to the exclusive effect of Article 23 is set by Article 22. Cases concerning immovable property, the validity of the functioning of a company and patent rights fall within the ambit of Article 22 of the Regulation. In these cases the European legislator decided that the connection of a case with a certain forum is so strong that the parties cannot derogate from the jurisdiction of the competent court by their agreement.

Another limitation to the effects of a jurisdiction agreement is set by Article 24 of the Regulation. Article 24 provides that:

"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 22".

This means that if the plaintiff brings an action to the court of a Member State that has no jurisdiction but the defendant appears before the court and attends the action without objecting to the court's jurisdiction, then there is a tacit jurisdiction agreement between the litigants. The court is regarded competent and the previous jurisdiction agreement made according to Article 23 is inactive. This is the only limitation that does not set aside the autonomy of the parties to decide on jurisdiction, but gives to the different jurisdiction agreements time priority.

A problematic limitation to the effects of a jurisdiction agreement is set by Article 27 of the Regulation. According to this article, in case that the parties bring actions in the courts of different Member States, priority is given to the court that first seized a case. This means that even if one party brings the action before a court without competence and the other party brings an action (for the same dispute) before the court appointed by the valid jurisdiction agreement, the priority is given to the non competent court. This court must decide first on its own non-competency, before the case can be presented before the court designated by the agreement. However, this rule allows abusive behavior by one of the litigants should he wish to impede or delay the hearing of a case. Alternatively, if the court of Member State seized first decides that it has jurisdiction because the jurisdiction agreement does not apply, the validity of the agreement had no chance of being tested by the court designated by the parties or any other court of Member State. The exclusive effect of the jurisdiction agreement that the Article 23 provides and the parties initially aimed for is obviously weakened (Sharman, 2005).

Different solutions have been suggested for the relation between Articles 23 and 27 but these solutions are not without disadvantages. The prevailing solution is an obligation of the courts of Member States when an action is brought before them to stay the proceedings if there is a jurisdiction agreement for the court of another Member State until the designated court rules on its jurisdiction. This suggested rule resembles the rule set by paragraph 3 of Article 23 for the jurisdiction agreements in favor of courts of third States.

This solution has the advantage that priority is given to the autonomy of the parties, since the jurisdiction agreement is not avoided in any case. The disadvantage, though, is apparent in case that the jurisdiction agreement is invalid. The plaintiff would first need to bring the action before the designated court for it to rule on the validity of the agreement, and then to bring the action to the competent court. It is interesting which solution will be adopted in the future amendment of Article 27 planned by the Commission of the European Communities (COM, 2009, 175).

3.3 Hague Convention (2005) on Choice of Court Agreements

Due to the advantages that choice of court agreements has for the dissolution of disputes with foreign elements, there were suggestions for making a system of rules regulating the choice of court agreements on an international level. The International Convention on choice of court agreements was drafted in order to cover this need. The drafting of the Convention was concluded in 30th June 2005 during the International Conference in Hague on the International Private Law (Beaumont, 2009).

Until 2010, The Hague Convention had been ratified only by Mexico. The European Union and the USA signed the Convention in 2009 but have not ratified it yet. Other states, like Australia, New Zealand and Argentine have expressed their interest in signing it but have not done this so far. The Convention needs to be ratified by at least two states in order to apply to a jurisdiction agreement which appoints the court of a State (member to the Hague Convention (Garnett, 2009).

The brief parallel examination of The Hague Convention and Brussels I Regulation is meant to present the functionality of the rules regulating the jurisdiction agreements in regional and international level. The Hague Convention and the Brussels I Regulation contain similar provisions and there is a mutual influence between them. For example, the Hague Convention regulates the exclusive effect of the jurisdiction agreement. Article 5 of the Convention (paragraphs 1 and 2) provides that:

"1. The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State

2. A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State".

This article means that the court has no discretion to deny its jurisdiction based on a valid jurisdiction agreement. The court is bound by it and has to rule on the case. However, there are differences in the provisions of Hague Convention and Brussels I Regulation. These are the result of the different nature of the two texts. The Hague Convention is an international convention while the Regulation is a regional (European) one. For example, the Hague Convention sets an extra requirement for the validity of a jurisdiction agreement; the Courts, when applying a jurisdiction agreement, should check whether "*giving effect to the agreement would not lead to a manifest injustice or would not be manifestly contrary to the public policy of the State of the court seized*" (article 6c).

This provision could not be part of the European Brussels I Regulation because on this regional level the reservation regarding the public policy of a state does not conform to the Regulation's nature. In the European Union there is a mutual trust in the judicial systems of all the Member States and the invocation of the public policy would be against this fundamental principle (Baumgartner, 2002).

4. Conclusions

The scope of this article is to elaborate on the choice of forum agreements and the legal effects that they have (according to Article 23 of Brussels I Regulation). The judicial settlement of disputes arising from a contract is a complex procedure, especially when contracts have foreign elements.

A necessary requirement for the implementation of a jurisdiction agreement, according to the Brussels I Regulation, is that the dispute falls within the territorial and material scope of Article 23 of the Regulation. The required form of a jurisdiction agreement on individuals of different residencies is described in paragraphs 1 and 2 of Article 23 of the Brussels I Regulation. This requirement is important because the form of an agreement provides evidence of the will of the parties to prorogate the jurisdiction of a court and derogate from the jurisdiction of the court that would normally be competent.

Even when the dispute falls in the scope of application of the Regulation, the choice of forum rules apply only to cases that link to more than one Member State. This requirement is not mentioned explicitly in Article 23 of the Regulation.

The autonomy of the parties in choosing the competent court is given great priority in the strict system of procedural law rules of the European Union. However, the autonomy of the parties brings legal effects only when it is expressed according to certain requirements that are set in the European Regulation.

The aim of these requirements is that none of the litigants is deprived of its rights or of a fair trial. Since the jurisdiction agreements are common in international transactions the study of the requirements and of the effects of jurisdiction agreements is necessary for everyone involved in these transactions.

The International Hague Convention (2005) for the agreements on choice of court regulates the same matter on international level. Although it appears that The Hague Convention and the Brussels I Regulation contain similar provisions and are mutually influenced, there are differences in their provisions. This is due to the fact that The Hague Convention is an international convention while the Regulation is a regional (European) one.

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