UDC: 341.981:341.24(4-672ЕУ)

THE JURISDICTION OF THE CHOSEN JUDGE

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Abstract

In today's private international law, the parties may choose freely the jurisdiction where their dispute shall be resolved. This is usually made through the means of a jurisdiction clause inserted in their contract. The European Law confers exclusive jurisdiction to the chosen judge, which means, in principle, that the parties are not allowed to refer the matter to a court other than the one provided for in the choice of court agreement. In our paper, we will analyse the consequences of this qualification of jurisdiction as exclusive and the means by which it is protected in the European law, under the Brussels I bis Regulation.

The protection of the jurisdiction agreed by the parties previously to the dispute is, nevertheless, not absolute as it has its limits. The European law does not provide remedies for all the situations of breach of jurisdiction that may appear and we will present a couple of situations where the expectations of a party may be infringed by the tactics of its adversary in the dispute.

Keywords: *Choice of court, Regulation no. 1250/2012, exclusive jurisdiction, international lis pendens, recognition and enforcement of foreign awards*

1. Purpose of the research

The autonomy of will is widespread both in the field of determining the applicable law and in international civil litigation. In this paper, we will analyse the effects of the exercise of the parties' will on this second dimension, by weighing up the way in which European law rules protect the jurisdiction of the court chosen by the parties, and thus the enforceability of the clause resulting from their agreement, and the limits of this protection.

In this respect, we will ask what the effects of a choice of jurisdiction clause are and what happens if a court other than the one designated in the parties' agreement is (also) seised in this respect, both in terms of direct jurisdiction and at the time of recognition of a judgment given by the court seised in breach of the clause.

2. Effects of the choice of court agreement

By concluding a choice of court agreement, the parties agree that the courts of a particular State shall, in principle, have exclusive jurisdiction in any dispute between them. Thus those courts, even though they would not normally have jurisdiction or could have jurisdiction on an alternative ground of jurisdiction, will acquire exclusive jurisdiction to settle disputes arising from the contract between the parties or from the legal relationship over which the choice of jurisdiction has been made. In this regard, Article 25 para. 1 of the Brussels I bis Regulation provides that "*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*".

Of course, observing the above-mentioned legal provisions, the question could pertinently be raised whether the parties by their will can establish that the court designated by their agreement does

not have exclusive jurisdiction, but only alternative jurisdiction, complementing the other rules of jurisdiction – common or alternative. Without wishing to analyse this aspect in detail, as it goes beyond the scope of this scientific approach, we would like to point out that we agree with those in the doctrine who support such a possibility for the parties, all the more so as we believe that there is a legal basis for this, as Article 25 para. 1 of the Brussels I bis Regulation expressly states "*Such jurisdiction shall be exclusive* ***unless the parties have agreed otherwise***", but for the sake of our work we will only consider those clauses, let us call them classic, in which the jurisdiction sought by the parties is exclusive.

Thus, from the point of view of the rules of procedure, in particular those on international jurisdiction, an important first effect of the conclusion of a choice of court agreement is, on the negative side, to remove the possibility of the courts normally having jurisdiction to hear the dispute and, on the positive side, to confer international jurisdiction on the courts of another State which would not normally have had a basis for hearing the dispute.

These effects should also have consequences for the conduct of the parties, in particular for the action of the plaintiff, who will have to refer the case to the courts previously agreed with his adversary by the jurisdiction agreement and to devise his entire procedural strategy in the light of the rules of procedure and the conduct of the proceedings before them. Furthermore, the defendant will not be able successfully to plead the argument of lack of jurisdiction before the court seised, in compliance with the choice of jurisdiction clause, by invoking the grounds of jurisdiction provided for by law, perhaps the most advantageous of which for him would be the common law jurisdiction based on his domicile.

In view of these elements, the question arises as to whether the jurisdiction of the judge chosen by the jurisdiction convention is protected. Thus, as has been rightly stated in the doctrine, protecting the jurisdiction of the judge elected by the parties means trying to dissuade them from bringing their case before a judge other than that one; if dissuasion fails, it means trying to prevent this procedure from succeeding; if a judgment is nevertheless rendered, it will ultimately be a matter of limiting its effectiveness, i.e. its circulation (Fulli-Lemaire , 2019, p. 141).

3. Discouraging the plaintiff from applying to a court other than the one agreed by the parties

If the plaintiff brings proceedings in a court other than the one designated by the parties in the choice of court agreement, the defendant has two options. First, he can directly raise defences on the merits of the case, tacitly accepting the jurisdiction of the court to which he has been summoned. In such a situation, the parties will be deemed to have modified the original agreement, traditionally known as mutuus dissensus, and the effects of that agreement will no longer be produced, the parties having chosen by common consent to set aside its effectiveness.

On the other hand, the defendant may oppose to the dispute being raised before a court other than the one chosen by the parties' agreement and may plead for lack of jurisdiction, proving in fact the existence of an agreement between the parties on the international jurisdiction of the courts of another State. In this context, the court before which this exception is raised will have to examine the existence and validity of the choice of jurisdiction convention and, if it finds that the defendant's arguments are well founded, give effect to the convention, and establish its lack of jurisdiction. In this respect, as far as possible, the elected judge should therefore be given priority to rule on his or her own jurisdiction (Fulli-Lemaire , 2019, p. 142).

Moreover, once it has established the validity of the choice of jurisdiction clause, we consider that another court, subsequently seised of the dispute, will not be able to reconsider this issue, in so far as the judgment of the first court is capable of being recognised in the State in which issues relating to the validity of the convention in question are again raised. The Court of Justice of the European Union has also ruled along the same lines (Case C- 456/11, para. 40 and 43), stating that "*Given that the common rules of jurisdiction applied by the courts of the Member States have their source in European Union law, more specifically in Regulation No. 44/2001* [today, Regulation Brussels I bis], *and given the requirement of uniform application referred to in paragraph 39 above, the concept of res judicata under European Union law is relevant for determining the effects produced by a judgment by which a court of a Member State has declined jurisdiction on the basis of a jurisdiction clause*" and that "*Articles*

32 and 33 of Regulation No. 44/2001 [today, Article 2(a) and Article 36 of the Brussels I bis Regulation] *must be interpreted as meaning that the court before which recognition is sought of a judgment by which a court of another Member State has declined jurisdiction on the basis of a jurisdiction clause is bound by the finding – made in the grounds of a judgment, which has since become final, declaring the action inadmissible – regarding the validity of that clause*".

We can therefore observe that a first mechanism for protecting the jurisdiction of the court chosen by the parties' agreement is the possibility of invoking the exception of lack of jurisdiction before the judge seised with the breach of the clause and, respectively, its resolution by admitting the exception and establishing the international jurisdiction of the court, given the exclusive nature of the jurisdiction of the chosen court. Moreover, the impossibility of calling into question the validity of the clause, once it has been determined by a court which has considered the matter, either of its own motion or at the request of one of the parties, is a guarantee against irreconcilable solutions by the courts of different States, for example, where the court seised of a breach of the clause would declare itself to lack jurisdiction, considering the clause valid, but the court designated by the clause would also consider itself to lack jurisdiction, since it would identify a ground for invalidity of the agreement conferring exclusive jurisdiction on it.

However, we will point out a controversial element which may affect the protection of the jurisdiction of the chosen court when analysing the validity of the choice of court agreement, namely whether the foreseeability of the competent court should be analysed as a condition for the validity of the agreement and, consequently, whether its absence may constitute a ground for setting aside the agreement. The analysis is important because the legitimate expectation of at least one of the parties to the dispute could be that the court designated by the agreement would have jurisdiction, so that its jurisdiction would have to be protected. On the other hand, his adversary might consider himself aggrieved by being brought before a court unpredictable to him and might invoke the nullity or ineffectiveness of the agreement by reference to it. In this context, the legitimate question arises as to who should prevail in the conflict between protecting the jurisdiction of the court chosen by the parties and respecting the objective of predictability of the dispute and its conduct?

It has been stated in doctrine that unpredictability is the natural limit to the effectiveness of the jurisdiction clause (Treppoz , 2019, p. 91). Analysing, however, the rules of international jurisdiction in the Brussels I bis Regulation, the author concludes that, technically, foreseeability as the limit to the effectiveness of an attributive clause is struggling to find its place in European law. Politically, it seems that the choice was and remains that of a potentially unpredictable elected judge (Treppoz , 2019, pp. 93-94).

The division between national and European law depends on the distinction between validity and lawfulness. If foreseeability relates to validity, then national law is competent. If, on the other hand, the issue relates to the lawfulness of the clause, then European law applies (Treppoz , 2019, p. 96). This is because, according to Article 25 of the Brussels I bis Regulation, the validity of the choice of jurisdiction agreement shall be examined in accordance with the law of the State chosen in the agreement[1], but with regard to the lawfulness of the clause, the reference to national law no longer has any effect, being an element to be determined autonomously, in relation to European law and the principles governing the Regulation.

Thus, in *Corek* judgement (2000), the Court noted that "*it is sufficient for the clause to identify the objective elements on which the parties have agreed" and that "these elements must be sufficiently precise to enable the court seised to determine whether it has jurisdiction*". It has been rightly pointed out that this requirement for precise identification of the chosen judge is merely a particular application of the need for every contract to have a specific object. However, these requirements of determinability or identifiability do not entail a corollary of foreseeability (Treppoz , 2019, p. 99).

[1] We recall the article 25 para. 1 of the Brussels I bis Regulation: "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*".

The identifiable nature of the elected judge does not necessarily entail his foreseeability. The latter should not be assessed on the day the contract is executed, but on the day it is concluded. However, there are identifiable clauses which do not ensure perfect foreseeability on the day the contract is concluded. Linking the *Coreck* ruling to such a requirement of foreseeability may therefore seem fragile (Treppoz , 2019, p. 100).

Nevertheless, after the *Apple Sales International* case (2018), foreseeability would no longer be one of the objectives, but the main one. In this decision, the Court uses precisely the objective of foreseeability to determine the substantial scope of the chosen judge's jurisdiction, limited to "reasonably foreseeable" litigation (para. 24). Foreseeability thus changes from an objective to a condition for the effectiveness of the clause, this time under the pen of the European judge (Treppoz , 2019, p. 105).

4. Protecting the jurisdiction of the chosen court in parallel proceedings

A situation that may arise in practice is where one party brings a case in breach of the choice of court agreement - but most likely in compliance with the rules of ordinary or alternative jurisdiction, while the other, or even the same, party brings a dispute with the same parties, subject matter and cause of action to the court chosen by the parties. In this case, there are two proceedings running in parallel before courts in different countries, having the same coordinates and running the risk of giving rise to judgments on the same issue - possibly irreconcilable. This is what is traditionally called a situation of lis pendens. Its particularity for the present study is to examine whether, in the resolution of the conflict of proceedings, priority should be given to the classic rules in this area - in principle, we are referring here to the prior tempore rule - or whether there is a way of protecting more vigorously the jurisdiction of the court chosen by agreement of the parties, as opposed to a legal jurisdiction that the court might have in a classic conflict of proceedings.

The answer, under current European rules, is in favour of the second view presented. On one hand, in what concern the European lis pendens, i.e. the case where both courts seized belong to a Member State, Article 31 para. 2 of the Brussels I bis Regulation of the rules provides that "*Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement*" which rules out any threat to the elected judge, at the direct proceedings stage at the very least (Fulli-Lemaire , 2019, p. 149).

Thus, the Brussels I bis Regulation will give priority to the chosen court to rule on its jurisdiction, regardless of whether the case was referred to it first or second. This provision is a response to the Court of Justice's ruling in the Gasser case, in which the priority tempore rule defeated the exclusive jurisdiction of a court designated by a choice-of-jurisdiction clause but seized second. This decision, rightly criticized, indirectly encouraged instrumental and abusive seizures in violation of the choice-of-court clause (Blajan, 2021, p. 271). To correct this, Article 31 para. 2 of the Brussels I bis Regulation provides that: "(...) *where a court of a Member State to which a convention referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay its proceedings until such time as the court seised on the basis of the convention declares that it has no jurisdiction by virtue of the convention*"[2].

[2] In the same line, the Recital (22) of the Brussels I bis Regulation provides that "*However, in order to enhance the effectiveness of exclusive choice-of-court agreements and to avoid abusive litigation tactics, it is necessary to provide for an exception to the general lis pendens rule in order to deal satisfactorily with a particular situation in which concurrent proceedings may arise. This is the situation where a court not designated in an exclusive choice-of-court agreement has been seised of proceedings and the designated court is seised subsequently of proceedings involving the same cause of action and between the same parties. In such a case, the court first seised should be required to stay its proceedings as soon as the designated court has been seised and until such time as the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement. This is to ensure that, in such a situation, the designated court has priority to decide on the validity of the agreement and on the*

And, as we can see, the priority rule, which in one sense underlies the prior tempore rule and in another the "anti-Gasser" device and the negative effect of the jurisdiction-competence principle but still in favor of the chosen judge's jurisdiction, is effective in stopping the violation of the forum selection clause, as well as protecting the chosen judge's jurisdiction. Nevertheless, as we will analyse later, it leaves open the question of how to remedy the damage suffered by the defendant (Blajan, 2021, p. 272).

The approach is more nuanced where the first court seised is the court of a third State. Here, the Article 33 provides that "*Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if: (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice*".

By "reflex effect", the exclusive jurisdiction of a third country based on a choice-of-court clause could prompt the Member State's court to stay proceedings. By providing a basis for the deference that Member States might wish to show to the exclusive jurisdiction of a third-country court based on a choice-of-court clause, this new lis pendens rule thus brings an improvement in the treatment of clauses designating third-country courts. But the improvement remains partial, since it is merely an option which does not eliminate the possibility of a refusal to relinquish jurisdiction from the court of a Member State to that of a third country, even an elected one (Blajan, 2021, p. 273).

There is, on this matter, another important development made by the European Court of Justice. According to the opinion no. 1/03 (2006), where a jurisdiction clause designates the courts of a third State and the defendant is domiciled within the Union, the jurisdiction of the courts designated by Article 2 (4 of the Brussels I bis Regulation) applies notwithstanding the clause designating a foreign court. Consequently, the court of a Member State seised on the basis of Article 4, in breach of a choice-of-court clause, could not decline jurisdiction in favour of the courts of a third State designated by the latter (Blajan, 2021, p. 275).

The question therefore remains controversial as to whether the court seised with a breach of the choice of court convention designating the courts of a third State may decline jurisdiction in their favour. The protection of the legitimate expectations of the parties and the principle of *pacta sunt servanda* would require the conclusion stated earlier in our study, i.e. the option of suspending the proceedings and dismissing the application if the court of the third country were to declare itself competent and deliver a judgment that could be recognised. However, the approach of the Court of Justice of the European Union to extend as far as possible the jurisdiction of the courts of the Member States and to keep disputes with links to the Community area within the Community cannot be ignored. We consider it appropriate to refer to the Court a preliminary question specifically designed to address this issue, in order to have a concrete answer from the Luxembourg judges on this question.

5. Analysis of the jurisdiction of the court designated by agreement in the recognition and enforcement procedure

The question of the existence of an agreement designating a court having exclusive jurisdiction to hear a particular dispute can also be raised in the procedure for recognition and enforcement of a judgment. Thus, if the creditor of a judgment given by a court other than the one designated by the parties' agreement wishes to benefit from the res judicata effect of that judgment or its enforceability, the debtor could oppose the non-compliance with the choice of court agreement, by arguing that the dispute which led to the judgment against him was not brought before the court having jurisdiction, since there was an agreement conferring exclusive jurisdiction to another court - for the sake of charm,

extent to which the agreement applies to the dispute pending before it. The designated court should be able to proceed irrespective of whether the non-designated court has already decided on the stay of proceedings".

we have in mind in particular the situation where the agreement designated the court where recognition or enforcement is sought as the court where the dispute should have been heard.

In this respect, observing the provisions of Article 45 of the Brussels I bis Regulation, which sets out the grounds which may be invoked against the recognition or enforcement of a foreign judgment, we can conclude that the infringement of Article 25, namely of exclusive jurisdiction established by agreement of the parties, is not listed among these grounds. Thus, even if, according to the parties' agreement, the dispute should have been brought before the court of another Member State or even before the court whose recognition or enforcement is sought, that circumstance cannot be relied upon to prevent the judgment from taking effect. This is why it was stated that as far as the Brussels I bis Regulation is concerned, the protection of the chosen court's jurisdiction appears to be lacking, since Article 45 par. 1 does not make the breach of Article 25 a ground for refusing recognition (Fulli-Lemaire, 2019, p. 152).

On this point, we consider is an application of the mutual trust principle, since the Regulation provides that, even where the dispute has been heard by a court in a Member State other than the one which would have had jurisdiction, the judgment given must be presumed to be legitimate and correct, as if it had been given in the Member State indicated in the agreement Similarly, if the parties' choice was made in respect of the court of a non-member State, but the judgment was given by the courts of a Member State, this situation cannot be relied on to prevent recognition or enforcement of the judgment either, since Article 45 does not include a breach of a choice of jurisdiction convention among the grounds listed and, moreover, the Court of Justice has ruled that priority is to be given to the jurisdiction established by the Brussels I bis Regulation, namely Articles 4 or 7, if the debtor is domiciled in a Member State, even if there is a choice of jurisdiction clause in favour of a non-member State.

Thus, it has been considered that if one of the parties is not dissuaded from bringing the matter before another judge, and the latter does not consider himself incompetent within a reasonably short period of time, positive law offers the other party only insufficient remedies and therefore little dissuasion, creating a vicious circle (Fulli-Lemaire, 2019, p. 153). This is because the party who is dissatisfied with the judgment, sometimes even on the ground that the dispute was heard before a court other than the court chosen by common consent, cannot raise this defence in order to obtain non-recognition or make an opposition to the enforcement of the judgment, and its effects will be produced in the Member State in which the creditor will act by virtue of the rights conferred by the judgment.

Conclusion

In view of the arguments presented, we will highlight some elements that we consider relevant following the analysis carried out. Firstly, we have noted that when the parties agree on the jurisdiction of the courts of a Member State, this jurisdiction is, as a rule, exclusive. This qualification leads to the negative effect of removing the jurisdiction of the courts that would normally have been able to hear the dispute according to objective rules for establishing jurisdiction, such as those of the defendant's domicile or the alternative jurisdiction grounds, correlated with the positive effect of conferring jurisdiction to a court that (probably) would not have had this vocation in the absence of the choice. Moreover, the existence of a choice of court agreement may also influence the behaviour of the parties, discouraging the plaintiff from bringing the case before another court and resisting a defence of bad faith by the defendant who would invoke the plea of lack of jurisdiction, for example because he was not sued at his domicile.

However, the effects on the conduct of the parties will only be fully effective if there is legal protection of the jurisdiction conferred by the parties on the chosen court, which must be analysed both at the level of direct jurisdiction, i.e. at the time of the judgment, and at the time of recognition or enforcement of a judgment given in breach of the parties' agreement.

With regard to the moment of judgment, we have seen how the plea of lack of jurisdiction by the defendant invoking the effects of the choice of court agreement can be a first protective mechanism. However, this entails an analysis of the validity of the agreement by the judge before whom it is invoked, and in this respect, we have noted the controversy over the criterion of foreseeability, which seems today to be taken up by the Court of Justice of the European Union as an element to be considered

in the validity of the choice, and not only in its legitimacy. Whatever the decision on validity, it will have the force of res judicata in the European territory, which means that if the defendant invokes the existence of the agreement and the court seised with the breach of the agreement establishes its validity and rules that it lacks jurisdiction, the other party will not be able to invoke the nullity of the agreement before the court chosen by the parties, as the decision of the first court will have the force of res judicata in view of its pronouncement by a court of another Member State.

If the question of the existence of a choice of court agreement arises in a situation of conflict of proceedings, i.e. where the first court seised would have jurisdiction under the rules of ordinary law or alternative jurisdiction and the second is the court designated by the parties' agreement, the Brussels Ia Regulation establishes a rule derogating from the principle of prior tempore in order to protect the jurisdiction of the chosen court. Thus, the first court will have to stay the proceedings and await the decision of the court chosen by agreement of the parties on its own jurisdiction, and if that decision is in the affirmative, it will have to decline jurisdiction in favour of the latter. This rule takes into account the situation where both courts are from Member States of the European Union. Where the court designated by the parties' agreement is the court of a third State, first seised of the dispute, the court of the Member State has the possibility, but not the obligation, to stay the case and possibly terminate the proceedings before it. Even if it is just optional, this is a mechanism whereby the judge of the Member State seised of the dispute can contribute to the protection of the jurisdiction of the court designated by the parties' agreement, if he or she considers this appropriate for the proper administration of justice and having regard to the likelihood of a recognisable judgment.

Lastly, we have noted that at the stage of recognition and enforcement of a judgment given in breach of the choice of court convention, the Brussels Ia Regulation does not provide an effective remedy, since the judgment given by a court other than the one designated by agreement of the parties does not constitute one of the grounds for non-recognition or non-enforcement listed exhaustively in Article 45. Thus, a party who is dissatisfied with the judgment, and who claims that the exclusive jurisdiction conferred by the parties' agreement has been infringed, would not be able to oppose the effects of the judgment which the other party would like to enjoy in the Member State of recognition or enforcement.

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