BRUSSELS I REGULATION AND “THIRD STATES”/ BRUSELSKÉ NAŘÍZENÍ A TŘETÍ STÁTY

RADKA CHLEBCOVÁ
Právnická fakulta Masarykovy Univerzity

NADĚŽDA ROZEHNALOVÁ

Key words:
Owusu, Group Josi, Coreck, Brussels I Regulation, third states, non-member state, domicil, jurisdiction agreement, derogation.

This conference paper dealts with the requirements for application of Brussels I Regulation[1] (thereinafter “Brussels I”) and discuss especially the crucial question of its application in situations with “third state element”. If the dispute is connected not only with the territory of Member State of European Union (e. g. because of the defendant’s domicile) but also with the territory of a non-Member State (e. g. domicile of one of the parties is in the third state, the place of performance, place where the harmful event occurred or may occur) the Brussels I provides no instructions for allocation of jurisdiction. Moreover it is doubtful whether the Brussels I is applicable at all or whether the national procedural law of the member states should provide the rules for allocation of jurisdiction between member state and non-member state. Provisions allocating jurisdiction between member- and non-member state are normally included only in national procedural laws of member states. But in absence of any European mechanism for ceding jurisdiction to third States, are Member Stares entirely prevented from declining their own jurisdiction in such cases? Are they therefore without exception obliged to apply the Brussels jurisdiction regime? Or is the allocation of jurisdiction in cases with “third state element” under certain circumstances still a matter for national law?

These questions have long provoked academic controversy. There are different judicial opinions of national courts as well as of ECJ. On 1st May 2005 the ECJ issued a judgment in Case Owusu[2] (thereinafter “Owusu”). This decision targets the application scope of Brussels I in cases where a strong connection with a third State exists, but the reasoning seems to be very controversial. In order to the explain problems concerning the Owusu it

[1] Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
[2] Judgment of ECJ, Case C-281/02 from 1st May 2005, Owusu

seems to be necessary to introduce the earlier cases of ECJ where ECJ addressed different aspects of the same problem: *Group Josi*[3] and *Coreck*[4] case.

Group Josi case concerned proceedings initiated in France by a Vancouver-domiciled claimant against a Belgian-domiciled defendant. The defendant argued that it could be sued only in Belgium (his domicile). This case prompted a question whether Article 2 applied, given that the claimant was domiciled in a third state. The court held that the claimant's origin was irrelevant to the operation of Art. 2. Although this decision does not directly impose the question in Owusu[5], the aim of this decision seems to be clear. A court of a member state has jurisdiction based on the Brussels I regardless of the claimant's country of origin.

The second important decision concerning the application scope of Brussels I in situations with "third state element" was Coreck decision. This decision concerned the effect of jurisdiction agreement which laid down an exclusive jurisdiction of a non-member state. The crucial question for the ECJ was whether Art. 17 of the Brussels Convention governs also the validity of a clause which specifies the forum having jurisdiction to settle disputes, or whether it is question for national law to examine the validity of this clause. The ECJ pointed out that "A court situated in a Contracting State must, if it is seized notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits." [6] If such an agreement is valid, the European regime is inapplicable and the court is allowed to decline the jurisdiction under the national law provisions.

Owusu decision concerns situation when the courts of a member states have jurisdiction pursuant to the European regime, but the courts of a non-Member States also have competence (based on its national procedural norms) to decide on a dispute. The key question was when is possible, if at all, to stay the proceedings in a Member State for the benefit of the non-Member State proceedings. The ECJ ruled that Brussels I is applicable in each case, when the defendant is domiciled in a Member state.

---

[3] Judgment of ECJ, Case C-412/98 from 13 July 2000, Group Josi
[4] Judgment of ECJ, Case Case C-387/98 from 9 November 2000, Coreck
[5] The issue in Group Josi was whether a court has jurisdiction under the European Regime where a claimant is domiciled in a third state, not whether a court may stay proceedings where such a jurisdiction is acknowledged.
[6] Judgment of ECJ, Case Case C-387/98 from 9 November 2000, Coreck, par. 19.

This reasoning of ECJ seems to be very controversial. The ECJ has extended the hegemony of Community law norms at the expense of national law in the area of international private law. The reasoning is so general that also the Coreck case law and the possibility to decline a jurisdiction in case, when there is a valid jurisdiction agreement for the benefit of a non-member court, seems to be prevailed.

But should we really understand this decision in such a broad way? Should we really apply the ruling in Owusu generally and extent it also to the cases which does not share the same pattern as Owusu did? These tasks were submitted to the ECJ in the second question, but the ECJ refused to answer.[7]

The risks resulting from the strict interpretation of Owusu are really high. Taking these risks into the consideration, we should try to distinguish the Owusu case law from other situations which do not share exactly the same pattern. There are many arguments which we could use:

First of all we should ask, whether the question of declining the jurisdiction is governed by the Brussels I al all? In this respect the ECJ concluded three crucial ideas, but no of them help us to answer the first question.

The second possible argument is a nature of Owusu case. Owusu had four defining features, but neither of them is able to distinguish Owusu from other cases, which do not share exactly the same pattern.

Third and the most important argument is argument from Consistency. It seems to be clear that the overall consistency of European jurisdiction regime requires parity of treatment between Member states and third States in the matter of declining jurisdiction. It is inconsistent to allow national courts to decline jurisdiction in cases in favour of Member states but not third states. It is argument from Consistency, which justifies parity of treatment between Member States and third States in the matter of declining the jurisdiction. Therefore, it will be possible to respect e.g. the jurisdiction agreement of parties or exclusive jurisdiction

[7] „Is it inconsistent with the Brussels Convention to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State **in all circumstances or only in some and if so which?“**

of non-member state court as well as the fact that an action was already brought before a non-member state court. The argument from Consistency would also enable to respect the previous case law of ECJ, especially the Coreck case law, where the ECJ ruled the possibility to decline the jurisdiction following from European jurisdiction regime if a valid jurisdiction agreement exists.

Contact – email:
Radka.Chlebcova@law.muni.cz