

# **Prorogation of Jurisdiction**

## **Art. 23 of Brussels I.**

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# Prorogation

- Is positive designation of a court/s which should decide on a dispute/s.
- Commonly covers this term also the negative **derogation** (exclusion of jurisdiction of a competent court without specifying the competent one).
- Art. 23: Choice of jurisdiction through agreement between the parties
- Art. 24: Choice of jurisdiction through submission, appearance (the proceeding must have already begun and the defendant has one-sidedly and implicitly accepted the jurisdiction of a court which had originally no jurisdiction over him).

# Purpose of Art. 23

- Is on one hand to ensure that the parties can choose the competent court, on the other to give this freedom reasonable limits.
- It ensures the legal certainty, considerably and foreseeability between the parties.
- Without this agreement is always uncertain which party it will be who sues and therefore which courts will be competent to decide on a dispute.

# Art. 23

- Art. 23 deals with formal and partly also with the material requirements of a jurisdiction agreement.
- The core element: The consensus of the parties
  - must be clearly and precisely demonstrated.
  - Art. 23 tries to ensure that this aim is achieved through the formal requirements, which are stipulated in par. 1 a-c.
  - In this context the ECJ developed a full set of principles on when the jurisdiction agreement/clause are validly agreed upon and incorporated into the main contract.
- Unsettled questions: the borderline between the EU law and the national law

# History of Art. 23

- Predecessor in Art. 17 of the Brussels Convention
- The old text has been in essence retained and only necessary modifications were made (e. g. par. 2 dealing with the electronic communication).
- The old case law as well as the Jenard report and Schlosser Report are still useful.

# The scope of application of Art. 23

- In general – corresponds with that of the Regulation as such.
- **Material:** Civil and commercial matter unless expressly excluded
- **Territorial** is wider as it is not required that the defendant's domicile lies in a Member state.
- **Temporal:** It is not necessary that the jurisdiction agreement had been concluded on or after the "in force dates". Art. 23 applies also to the agreements which were concluded before.
- **Personal:** does not require specific qualifications, neither nationality nor any other.

# Internationality of the relationship

- Necessary for the application of Art. 23, but the precise requirements are still disputed.
- Three different constellations:
  - Cases merely internal
  - At least two different member states
  - Link only to one member state and than to a third country
- Owusu case law
- The widest and also prevailing view: the Art. 23 applies even if the case is connected only with one member state as long as there is any other “True” international element.
- However, purely domestic relation could turn to the international one if e. g. the goods is transferred across the borders.
- But: In case of purely domestic case with no international links whatsoever (no place of performance in another member state) the choice of a court in another member state could not create the international element necessary for the application of Art. 23.

# Relationship to national law

- As far as Art. 23 is applicable it takes preference over national law (mandatory and discretionary provisions).
- Purpose: The uniform and foreseeable application of this provision
- The validity of the jurisdiction agreement do not depend on the objective connection between the chosen court and the dispute even where the national law request such connection.



# Relationship to other provisions of Brussels I.

- The **boundaries** of the jurisdiction agreement:
  - Neither the agreement nor the submission can oust the court's exclusive jurisdiction under Art. 22 nor the protective jurisdiction under Art. 13, 17, 21 of Brussels I.
  - Art. 23 also does not overrule Art. 27 and 28.
  - Thus, the jurisdiction agreement can only oust the jurisdiction under Art. 2, 5, 6.
- The second court seized must stay proceedings until the court first seized has decided on jurisdiction even if the jurisdiction agreement accords the second court exclusive jurisdiction (Compare Erich Gasser GmbH. Case C-116/02)

# Effect of a valid jurisdiction agreement

1. Prorogation
2. Derogation

- **Exclusive v. non-exclusive jurisdiction** agreement (pure addition to the jurisdiction of other courts, which are empowered to decide on a dispute according to the other provisions of Brussels I.)
- The principle of sovereignty does not enable to regulate how the states outside the European Union have to deal with jurisdiction agreement and whether and when their courts have to accept jurisdiction which the parties have chosen.

# Requirements of a valid jurisdiction agreement

1. The transaction must fall within the scope of application of Brussels I.
2. The jurisdiction of member state courts was agreed upon.
3. One of the parties must be domiciled in a member state (but even if this condition is lacking, the choice of a member state court has an effect on the derogation of the jurisdiction of other Member states).
4. The jurisdiction agreement must be connected with a particular legal relationship.
5. The jurisdiction agreement must be validly concluded.
6. The jurisdiction agreement must satisfy a specific form.
7. The jurisdiction agreement need not contradict Art. 22 or Art. 13, 17, 21.

# Ad 2. Choice of a Member state's court/s

- Courts of a certain member state
- The law of this member state should determine the locally competent court.
- Art. 23 does not contain an additional condition that without the jurisdiction agreement the courts of a Member state must have jurisdiction.
- Art. 23 ignores the procedural role of the parties.
- Despite its wording “court or courts of a Member state” – courts of several member states as well. The claimant is then allowed to chose.
- Art. 23 applies also to jurisdiction agreement which are concluded only for the benefit of one of the parties.

# Choice of place of performance

- An agreement on the place of performance **may in its effect equal to the jurisdiction agreement** (compare Art. 5 par. 1).
- Art. 23 does not extend to agreements concerning the place of performance – it need not to meet any form requirements under the regulation, but are covered by the applicable national law.
- But: Where the agreed place of performance lacks any factual connection to the real place of performance a remains merely abstract of fictions and where such agreement aims only at the foundation of jurisdiction, it is necessary to meet the requirements of Art. 23 – otherwise invalid.

# Ad 3. Domicile of the parties

- **At least one** party is domiciled in a member state where Brussels I. is in force.
- Domicile in Denmark and the domicile of other party lies outside of the EU: Art. 17 of Brussels Convention (based on the same requirements).
- Domicil in the member state of Lugano Convention and outside of the EU: Art. 17 of Lugano Convention (e. g. Switzerland)
- Domicil Denmark or member state of Lugano and EU state: Art. 23 of Brussels I.
- Relevant time for domicile:
  - Domicile requirement has to be fulfilled at the time of the conclusion of the contract irrespective of whether at least one party retains such a domicile until the institution of proceedings.

# Parties' domicile outside a member state (par. 3)

- Art. 23 is **generally inapplicable**
- But: „prorogation from outside“: Art. 23 applies and excludes the possible jurisdiction of other member state courts unless and until the prorogated forum has declined its jurisdiction.
- The aim: The prorogation from outside is dealt with uniformity within all member states.
- The validity: solely according to the national law of the court seized.
- Art 23 gives priority to the prorogated court to decide on this matter – other member states must decline their jurisdiction, irrespective of whether they have jurisdiction under their national law.
  - They may be bound by the final and conclusive findings of the prorogated court in cases, where the jurisdiction agreement was found to be invalid.

# Ad. 4. Particular legal relationship

- “Dispute which have arisen or may arise in connection with the particular legal relationship”.
- Limiting the scope of an agreement
- However, it is always a **matter of construction** to which disputes the jurisdiction agreement shall extend.
- One relationship or several precisely specified legal relationships.
- **No “Catch all clause”**: each and every present and future dispute between the parties. Art. 23 aims at the prevention of such wide jurisdiction agreements.
- The jurisdiction agreement contained in a company’s status: for disputes between the company and its shareholders.



# Ad. 5. Validity

- The validity of a jurisdiction agreement is partly regulated by Art. 23 and partly by the applicable law. The precise borderline is not clear.
- **Material validity:** Should be determined in accordance with the applicable law, then this law decides also at which time the facts relevant for the validity must be present.
  - In general: conclusion of a contract. A later change does not normally affect the validity of jurisdiction agreement.
- **Formal validity:** Regulated by Art. 23 itself. The relevant point in time must be fixed autonomously.
  - The jurisdiction agreement has to comply with the form requirements of Art. 23 at least at the time when the proceedings are commenced.

# Determination of court

- Clear criteria according to which the competent court is to be determined
- Not necessary exactly, but must be clear from the contract and intentions of the parties and from the circumstances as whole).
- The jurisdiction agreement lacks the necessary precision if the choice of the competent court is entirely left at the claimant's option. The same is true for: "The courts of the Ship's flag State", "the court mutually agreed by the parties", "European courts"
- On the other hand: International Handelsgericht in Brüssel (international commercial court) has been held as sufficiently precise, although there is no international commercial court in Brussels but only national commercial court. !! – national decision.
- The certainty condition does not require the parties to nominate a specific local court (courts of certain country). It is for the national law of civil procedure to determine which local court is to have jurisdiction to decide the dispute.

# Reasonability

- The choice of court should be reasonable and should not misuse the freedom granted by the Art. 23 of regulation.
- The exact position of the ECJ to the reasonability test is still not clear – if it is possible to violate the Unfair contract Terms Directive or not.
- (Case Océano Grupo Editorial SA v. Rocío Murciano Quintero C-240-244/2000 – the ECJ held that the jurisdiction agreement between consumer and a professional was invalid because it violated the provisions of the Unfair contract Terms Directive).

# Agreement of the parties

- Central requirement for the validity of jurisdiction agreement
- Free and independent consent.
- It is the first thing the entitled court has to examine (if the jurisdiction clause was in fact a consensus between the parties).
- This consensus has to be clearly and precisely demonstrated.
- The law applicable to the validity of agreement: Art. 23 (for the formal validity) and national law (for the material validity). But it is not clear which of the two govern the jurisdiction agreement of the parties and to which extent.
- Starting point: the autonomous interpretation of Art. 23.

# Material consent

- Autonomous scope of Art. 23: though the wording of Art. 23 is not supportive, it is widely accepted, that the basic requirements of the consensus can be inferred from the Art. 23 through an autonomous interpretation – the intention of the parties concerning the choice of a court or courts is the same.
- Implicit consensus suffice as long as it complies with the requirements listed in Art. 23 and is clearly and precisely established.
- The requirement of the consensus are determined according to the Art. 23.
- Also the question whether the jurisdiction agreement has been validly incorporated into the contract is regulated in compliance with Art. 23 and without regress to the national law.
- But. Art. 23 is very limited and therefore it is not possible to find there any solution for the material validity of the jurisdiction clause – national applicable law (lex contractus).

# ECJ: matters covered by the national applicable law

- Whether third party has validly succeeded to the rights and obligations of a contract party and is therefore subject to the original jurisdiction agreement.
- Whether a contract for a fixed period of a time is prolonged with the effect that also the accompanying jurisdiction agreement is prolonged.
- Whether later party of a contract (in particular shareholders of an existing company) are bound by the original contract and its jurisdiction clause.
- The jurisdiction agreement which is valid under the Art. 23 is not tainted by the alleged formal invalidity of the main contract.

# Language risk

- The question whether the partner could, or was even obliged to understand the language in which the other party offered the jurisdiction clause – not only question of formal but also a question of material validity.
- Partly it has been advocated that merchants in international trade must always understand English irrespective of whether English is contracting language – it goes too far!
- Jurisdiction agreement contained in standard terms and offered in a language neither known to the other party nor agreed upon as the contractual language becomes binding only if the contract partner has agreed to the contract terms after having been informed in the language understood by him that the terms were part of the contract (national German decision)
- The contract partner must understand at least that the contract is offered on the basis of general conditions.

# Ad. 6) Form

- Art. 23 covers the form requirements and excludes the national law.
- Autonomous interpretation
- Five different forms:
  1. In writing
  2. Evidenced in writing
  3. Practices among the parties
  4. International trade usage
  5. By electronic means

The decisive point for the form requirement is the commencement of the proceedings.



# 1. Meaning of “writing”

- The consent is expressed in written and authorized form.
- Single written document as well as separate documents.
- Expressly stated or at least referring to the same jurisdiction clause and signed by each respective party alone.
- Exchange of letters, faxes, telegrams, constitutes writing
- Emails: if allow durable record: are a full equivalent to writing.
- Where the parties orally prolonged a written contract, which contained a formally valid jurisdiction clause and which expired, the form requirement is complied with.
- Authorization – generally the signature of the person making the declaration

# The form of writing is not fulfilled if:

- Only one party has signed the document even if the document is a standard form document of one party
- The contract obliges only one party who alone has signed it (contract of sureship)
- Jurisdiction agreement was contained in draft contract which remained unsigned though it was later on referred by the parties as a "contract" (oral contract).
- Draft which was deleted before the draft became a contract

# “Writing” and standard contract terms

- ECJ has developed rules for incorporation of standard terms into the contract: “jurisdiction clauses are validly incorporated into a written contract and hence validly agreed upon only if the other party has clearly indicated that contract terms – with the jurisdiction clause – should apply and if the other party has the reasonable chance to check the terms and the clause”. (Estasis Saloti, ECJ 24/76)
- Mere reference to the standard contract terms which is contained in a contract signed by both of the parties can suffice.
- Contract or at least the offer has to contain an express reference to the standard terms.
- Standard terms had to be communicated to the other party together with the offer in order the party can check them if exercising the reasonable care.

# National courts decisions

- National courts have in consequence of the statements of the ECJ decided that in cases where no further practices of the parties nor international trade usage play a role it is insufficient:
  - Jurisdiction agreement is printed on the back of invoices sent after the contract had been concluded as such.
  - Standard terms are only handed over or attached without any express reference to the fact, that they should become part of a contract.
  - A party accepts in writing the written offer of the other party but attaches the own standard terms with the jurisdiction clause.
  - Contract contains special reference to the Jurisdiction agreement, but in fact it is an arbitration clause.

# Requirement of “writing” has been complied with

- Where the Jurisdiction agreement appears on the front page of the contract signed by both of the parties
- Where a party signs specifically (“read and accepted”) the general contract terms
- Where was a clear reference to the contract terms on the front page of the contract to attached general conditions.
- Where the parties refers to the general conditions and this refers to other general conditions containing the Jurisdiction agreement
- Where parties conclude a contract which on the front page contains a clear reference to general conditions – but below the signature.

## 2. Evidence in writing

- Mere oral agreement does not suffice, certain writing is still necessary.
- A written consent of one party satisfies the necessary form, if it confirms a preceding oral agreement.

1. **Oral agreement**
2. **Confirmation in writing**

# Oral agreement

- Special consensus concerning the jurisdiction of the chosen court.
- Implicit consent is sufficient (e. g. where oral contract is concluded on the basis of general conditions)
- Not satisfied: Subsequent notification of general conditions containing a Jurisdiction agreement is not capable to alter the terms agreed between the parties – unless the practices between the parties or international trade usage exists which provide that oral consent or mere silence suffice.

# Confirmation in writing

- There must exist a prior agreement! If no agreement had been reached there is nothing to confirm.
- The confirmation must comply with the prior agreement. If it contains new conditions they are validly incorporated into the contract only if they were in turn accepted by the other party – again in written form.
- A mere invoice does not constitute a valid confirmation.
- The confirmation can be made by either party
- Within a reasonable time after the conclusion of the oral contract
- The other party may raise objections but can do it only within a reasonable time after the receipt of confirmation.
- Confirmation may take any form of writing including fax or email.
- A party who claims that a prior oral agreement has been concluded must prove it.



# Practices between the parties

- That the parties have implicitly agreed on the Jurisdiction of certain court.
- Necessary to establish with sufficient certainty the parties consensus with respect to the jurisdiction of a particular court or courts. A practice alone does not substitute an agreement.
- Only continuing business relationship where the party never objected to the other party.
- Practices v. Usage

# International usage

- Form habitually used in international trade and commerce:
- Particular course of conduct is generally and regularly followed by operators in that branch
- = well established, widely known, habitually observed, by a majority, parties are or should have been aware of it (subjective element - protects the parties) but no formal publication is required
- Cross-border element (X nationality), autonomous terminology, related to intl trade and commerce
- consensus on jurisdiction clause is presumed
- modeled after the art. 9/2 of CISG
- silence on a commercial letter of confirmation containing general conditions with a jurisdiction clause amounts to consent where international usage exists and the parties ought to have been aware of it (C-106/95)
- claimant has to prove the existence of the usage!
- Bills of lading – final holder is bound

# Electronic communication

- Art. 23/2
- Equivalent to writing if reproducible in durable form = the recipient should have the choice to store the message
- Email must be authorized – signed with the printed name – a qualified signature is not required
- (not for voice mails, video conferences, message on the screen, sms messages)