Seminar OWUSU

The Applicability of Brussels I. to the third states

In general: Each norm contains "rules of conduct" and "scope of application rules". – definition of this categories.

Rules of conduct:
- Determine what should be done, limit the freedom of action.
- Require not only application, but also interpretation.
- Should be clearly formulated

Scope of application rules:
- Circumstances, that trigger the application of rules of conduct and will determine whether or not the rules of conduct to which they are attacked come into play.
- Many of scope of application rules do not entail specifically territorial criteria
- Some have a territorial nexus: local or foreign nexus.

What circumstances trigger the application of European procedural norms? – definitions of possible **territorial connections** (nationality of the court, nationality or domicile of the designated party, location of material, evidence, place of relevant activity or event…)

Two kinds of cases: a) community cases and b) non-community cases.

Q: What are community cases and non-community cases? – still an open question.

Brussels Convention (BC) and regulation (BR) stipulate the rules for **1)** jurisdiction and **2)** recognition and enforcement of judgments.

Ad 2) Recognition and enforcement of judgments:
All judgments rendered by a court of a member state will be recognized and enforced in accordance with the BC or BR. The recognition of all other judgments is regulated by national law.

But an **unexpected effect**: Recognized and enforced are all judgments rendered by the EC court notwithstanding the ground for the jurisdiction (it means decisions which were bases on national jurisdiction rules as well as decisions which were bases on EC jurisdiction rules in BC or BR).
Result: Purely **domesic** cases, international cases (**non-community**) typically involving the parties from third state, **exorbitant rules** for jurisdiction are still alive and spread throughout the EU and even the judgment based on this rules could be recognized and enforced according to the BR.

Ad 1) Jurisdiction
As concerns civil jurisdiction and the allocation as well as declining of jurisdiction: BR regulates explicitly the jurisdiction in cases connected with the states concerned and with the Community – in intercommunity cases. There must be a certain territorial connection with the EU in order to apply Brussels I., but the exact form of this connection is not clear. Difficulties has appeared especially in cases where a third state is concern. Neither the BC nor BR provides instruction for this case.

In most of the cases there is strong connection with the third state and at the same time e. g. defendant is domiciled in the member state. Therefore, we have to ask, whether the member states are entirely prevented from ceding jurisdiction to third states (it means whether they are allowed to decline their own jurisdiction and transfer the jurisdiction to the third state)? It this question mattes of Brussels I. or is it matter of national law?

Relevant case-law: Group Josi, Coreck, Owusu.

Q: Could the ECJ change the case-law even if the material circumstances have not changed?

Q: Is Coreck overruled by the Owusu or is Coreck a natural limitation of Owusu case-law?

The core of this problem:

1. *Is the allocation of the jurisdiction between a member state and non-member state within the scope of the European jurisdiction regime?*

2. *Is the declining of the jurisdiction between a member state and non-member state within or outside the scope of the European jurisdiction regime?*

It is necessary to distinguish between the allocation of jurisdiction and declining of jurisdiction – because Coreck as well as Re Harrods (the mentioned English case) suggest that declining may be outside of the BC or BR, even if to assert jurisdiction is not. The reason for this approach follows from Owusu, where the ECJ ruled that the Art. 2 is mandatory provision and therefore in each case when the defendant is domiciled in the Member state the courts of this member state are entitled to decide on the dispute.

Critique of Owusu: This decision extends the hegemony of EC law, alters the landscape of English law, uncertain how it affects the cases which do not share precisely the same pattern.

If we try to find the answer to the key question (*Is the allocation of the jurisdiction between a member state and non-member state within the scope of the European jurisdiction regime?*) we have study the case materials in details (the reason of the Owusu decision as well as the general Advocates opinion. Following statements of ECJ could help us:

a) Art. 2 as a **mandatory** rule and consequences (What does it mean when a provision is mandatory?).
b) Argument from **harmonization** and consequences (compare the wording of Art. 293 of EC Treaty, the recitals of Brussels I. and the scope of this provision). Could the harmonization on its own be understood in such a wide way?
c) Functioning of international market and consequences of this principle (accordin to ECJ is this principle strong and wide to enable inclusion of the situation in Owusu in to the Brussels (compare par. 33 and 34 of the Owusu case)

Q: Great, but what about other cases which do not share the same pattern?

- Exclusive jurisdiction of third states courts
- Jurisdiction agreement
- Lis pendens
- Res iudicata

- Submission (Art. 24)

All of them pose a question similar to the Owusu – the question of allocation and declining of jurisdiction between the member and non-member state. If we entirely decline the jurisdiction of the third state, the consequences could be very serious (wasteful parallel litigations, conflicting judgments, principle of parties autonomy is undermined and the certainty lost).

Q: Is it possible to isolate Owusu from the other cases? How?

Four defining features of Owusu:
(1) No other Member state was implicated,
(2) Jurisdiction of Member state derived from Art. 2 of Brussels I,
(3) the claimant as well as the defendant were domiciled in the same Member state,
(4) the ground for ceding jurisdiction to a third state was discretionary.

When dealing with the defining features we have to come to the conclusion that there is hardly any possibility to isolate Owusu from these cases. But all of these situations are explicitly regulated in the intercommunity relationship. The fact that another 1) court was first seized or that there the court of a member state has 2) an exclusive jurisdiction, or that a 3) jurisdiction agreement exist, as well as 4) Res iudicata or 5) submission according to the Art. 24 are all regulated in intracommunity cases (between EU states).

It seams to be inconsistent to allow this approach between the EU member states and completely prohibit it when a non-member state is involved. Therefore, one of the possible argumentations is argument of **Consistency of treatment of EU states and non-member states** = Equivalency of grounds for declining jurisdiction between the member states as well as in situations concerning the third state.

Q: But: Should we deduce this argument (Consistency of treatment) from the national law provisions or from the EU provisions?

Brussels I. is silent on this issue – it means that is not possible to find any support in the wording of Brussels I. Therefore, we should try to argue that the national norms concerning the allocation of jurisdiction between the EU state and non-member state survive, provided that they replicate the EU rules concerning the allocation of jurisdiction. This approach is also called ***argument from scope***.

Problem: How exactly must the national law provision replicate the EU procedural provision? The same form? The same degree of congruence? Mandatory? Discretionary? Unilateral or Bilateral? The same objective? Adherence to the wording of regulation or only to the spirit and its principles?
This is only suggestion or an idea, not the final solution! Only the ECJ is empowered to provide us with the final solution concerning these questions.

Two questions which remain after Owusu:

1) Do the court's views on the scope of the European jurisdiction regime remove any possibility of declining the jurisdiction in favor of third states?
2) If not, when exactly is this permitted?