

Prorogation of jurisdiction

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Prorogation of jurisdiction

- Party autonomy in the sphere of procedural law
 - To determine the way of dispute resolution (court proceedings, arbitration, ADR)
 - To determine the competent forum for a dispute

Prorogation of jurisdiction

- Arts. 23, 24
 - Grant the parties of a legal relationship a wide freedom to determine for themselves the internationally competent forum for any present or future dispute
 - Recognise the parties' autonomy to dispose over procedural matters
 - Art. 23 concerns the choice of jurisdiction agreements
 - Art. 24 regulates the choice of submission

Article 23

■ Purpose

- To ensure that the parties can choose the court where their disputes shall be litigated
- To give this freedom reasonable limits

Article 23

- Relationship to other provisions of the Regulation
 - Art. 23 is overturned by an exclusive jurisdiction under Art. 22
 - Art. 23 mustn't contradict Arts. 13, 17, 21
 - Art. 23 takes precedence over Arts. 2, 5, 6
 - Art. 23 does not overrule Arts. 27, 28 (*„The second court seised must stay proceedings until the court first seised has decided on jurisdiction even if a jurisdiction agreement accords the second court exclusive jurisdiction.“*)

Article 23

- Case C-116/02 Erich Gasser v MISAT
 - Proceedings between Erich Gasser GmbH, a company incorporated under Austrian law, and MISAT Srl, a company incorporated under Italian law
 - Gasser sold for several years children's clothing to MISAT

Article 23

- MISAT brought proceedings against Gasser before the Civil and Criminal District Court in Rome seeking a ruling that the contract between them had terminated *ipso jure* or, in the alternative, that the contract had been terminated following a disagreement between the two companies
- MISAT also asked the court to find that it had not failed to perform the contract and to order Gasser to pay it damages for failure to fulfil the obligations of fairness, diligence and good faith and to reimburse certain costs

Article 23

- Gasser brought an action against MISAT before the Regional Court Feldkirch, Austria, to obtain payment of outstanding invoices
- In support of the jurisdiction of that court, the claimant submitted that it was not only the court designated by a choice-of-court clause which had appeared on all invoices sent by Gasser to MISAT, without the latter having raised any objection in that regard
- According to Gasser, that showed that, in accordance with their practice and the usage prevailing in trade between Austria and Italy, the parties had concluded an agreement conferring jurisdiction within the meaning of Article 17 of the BC

Article 23

- MISAT contended that the court in Feldkirch had no jurisdiction and it also contested the very existence of an agreement conferring jurisdiction
- the court in Feldkirch decided of its own motion to stay proceedings, pursuant to Article 21 of the BC, until the jurisdiction of the court in Rome had been established
- The court in Feldkirch did not rule on the existence or otherwise of an agreement conferring jurisdiction

Article 23

- Gasser appealed against that decision to the Oberlandesgericht Innsbruck
- the Oberlandesgericht Innsbruck referred the following question to the Court for a preliminary ruling:

Article 23

„May a court other than the court first seised review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the BC, or must the agreed second court proceed in accordance with Article 21 of the BC notwithstanding the agreement conferring jurisdiction?“

Article 23

- *It is incumbent on the court first seised to verify the existence of the agreement and to decline jurisdiction if it is established, in accordance with Article 17, that the parties actually agreed to designate the court second seised as having exclusive jurisdiction*
- *In view of the disputes which could arise as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down in Article 17, it is conducive to the legal certainty sought by the Convention that, in cases of lis pendens, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention*

Article 23

- *It is clear from the wording of Article 21 that it is for the court first seised to pronounce as to its jurisdiction*
- *the interpretation of Article 21 flowing from the foregoing considerations is confirmed by Article 19 which requires a court of a Contracting State to declare of its own motion that it has no jurisdiction only where it is seised of a claim which is principally concerned with a matter over which the courts of another contracting State have exclusive jurisdiction by virtue of Article 16*
- *Article 17 is not affected by Article 19*

Article 23

- Any doubt as to the existence, validity or effect of a jurisdiction agreement is for the court first seised to resolve, even if the court second seised is that to whose jurisdiction the parties have purported to agree
- The court second seised cannot proceed to determine and assert jurisdiction under Art. 23 on the ground that any jurisdiction it might have is exclusive

Article 23

- The decision in Gasser is highly controversial
 - It undermines the security of jurisdiction agreements
 - It disrespects party autonomy
 - It defeats the legitimate expectations of contracting parties

Article 23

- At the stage when the question in Gasser arises, the existence, validity and effect of jurisdiction agreement has yet to be determined
- The question in Gasser: which court has responsibility for determining the application of Art. 23?
- If a court is seised, it must determine its own jurisdiction, which may involve examining the role of Art. 23

Article 23

■ Problems of Gasser

- Art. 27 does not merely confirm the power of the first court to determine the effect of Art. 23, it prevents the court named by the parties from addressing the issue
- The first court may determine the effect of Art. 23 differently from the named court – it may conclude that Art. 23 is no bar to its jurisdiction – a decision of the court will be recognised in other MS

Article 23

- Even if the first court decides that the named court has exclusive jurisdiction, the delay and expenses involved in arguing the matter in the first court may make it unlikely that the defendant will recommence proceedings in the named court
- Gasser gifts tactical victory to the claimant in the first proceedings

Article 23

- Relationship to other sources of law dealing with jurisdiction agreements
 - International conventions which regulate particular matters, which are in force in the involved MS and which also govern jurisdiction agreements take precedence over Art. 23 (e.g. Art. 31 CMR) – Art. 71 of the Regulation
 - As far as Art. 23 is applicable it takes precedence over any national rule concerning the same subject (Art. 37 of the Private International and Procedural Law Act)

Article 23

- The relation to the Art. 23 of the New Lugano Convention – where at least one of the parties of an jurisdiction agreement has a domicile in the MS, the Regulation takes precedence
- The relation to the Convention on Choice of Court Agreements – the Convention gives precedence to the rules of a Regional Economic Integration Organisation (like the EC) where at least one of the parties is resident in a MS of such organisation

Article 23

- To be valid a jurisdiction agreement must meet the following conditions:
 - The transaction to which the jurisdiction agreement refers must fall within the scope of application of the Regulation
 - The jurisdiction of a court or courts in a MS must be agreed upon
 - One of the parties must be domiciled in a MS

Article 23

- The agreement must be concerned with a particular legal relationship
- The agreement must be validly concluded
- The agreement must satisfy a specific form

Article 23

- Material scope of application
 - Art. 23 requires that the jurisdiction agreement concerns matters which fall within the material scope of application of the Regulation
 - The Regulation applies only where the case possesses a certain internationality
 - The precise requirements of internationality with respect to Art. 23 are still disputed

Article 23

- The case has links to two or more MS (where the parties have their domiciles in different MS or where they have their domiciles in the same state but confer jurisdiction on the courts of another MS provided that the subject matter as such is international in character as for instance a transboundary delivery)

Article 23

- The case is connected only with one MS as long as there is any other true international element (the parties have their domiciles in different states)
- Purely internal cases – the parties of a purely internal case confer jurisdiction on the courts of another MS – the necessary international element is lacking (a mere choice of a foreign court cannot change the character of a case)

Article 23

- Certainty as to a particular legal relationship
 - It is necessary that the dispute between the parties originates from the legal relationship for which the jurisdiction agreement had been concluded
 - It is a matter of construction to which disputes a jurisdiction agreement shall extend
 - A catch all-clause which covers each and every present and future dispute between the parties - invalid

Article 23

- It appears not to be necessary that is always one single relationship to which the agreement is related (the parties can agree that the jurisdiction agreement refers to several precisely specified legal relationships – each single transaction under a distribution agreement)

Article 23

- The dispute covered by a jurisdiction agreement
 - Dispute that has already arisen when the agreement is concluded
 - Future dispute

Article 23

- Parties of a jurisdiction agreement
 - It is sufficient that one of the parties is domiciled in a MS
 - The procedural role of this party does not matter

Article 23

- Parties domiciled outside MS agree on a forum in a MS (a prorogation from outside)
 - Art. 23 is generally inapplicable
 - The specific provision of Art. 23(3) applies – excludes the possible jurisdiction of the courts of all other MS unless and until the prorogated forum has declined its jurisdiction
 - Validity of such prorogation must be determined according to the national law of the court seised – Art. 23(3) does not require such a prorogation to comply with the formalities of the Regulation

Article 23

- Relevant point in time
 - The time between the conclusion of a jurisdiction agreement and its actual invocation in court may be considerable and circumstances which are relevant for the application of the agreement may have changed in the meantime
 - The change may concern the domicile of the parties, the internationality of the case, the circumstances relevant for the validity of the jurisdiction agreement
 - What point in time is relevant?

Article 23

- 1) Validity of jurisdiction agreement
 - The material validity must be determined in accordance with the applicable law – this law decides at which time the facts relevant for the validity must be present (in general – the time when the agreement is concluded)
 - Formal validity is regulated by Art. 23 itself – an agreement must comply with the form requirements at least at the time proceedings are commenced (Case 25/79 Sanicentral v René Collin)

Article 23

2) Domicile

- Art. 23 applies when the domicile of one of the parties was located in a MS both at the time of the conclusion of the contract and when legal proceedings were instituted (it is unnecessary that it is the same party)
- The domicile requirement is fulfilled if at the time of the conclusion of the jurisdiction agreement one of the parties is domiciled in a MS irrespective of whether at least one of the parties retained such a domicile until the institution of proceedings

Article 23

- If only at the time when proceedings are commenced one of the parties is domiciled in a MS such domicile suffices as well (unless the justified interests of one of the parties stand in the way)

Article 23

- 3) The internationality of the case
 - The time of the conclusion of the contract is decisive
 - It suffices that the case is international in character at the time proceedings are commenced (unless justified interests of one of the parties oppose such a solution)

Article 23

- Choice of court(s) in a MS
 - The choice of a forum in a MS
 - Art. 23 covers agreements which confer jurisdiction on the courts of several MS (Case 23/78 Nikolaus Meeth v Glacetal)
 - Art. 23 does not require any objective connection between the chosen court and the parties or their dispute

Article 23

- The parties can designate jurisdiction either to a certain court in a MS or the courts of a certain MS (locally competent court is determined by national law)
- A change of subject-matter jurisdiction is prohibited

Article 23

- Jurisdiction agreement must designate the chosen court with sufficient certainty
 - It is not necessary that the court is named
 - It is sufficient if the court can be clearly gathered from the parties' contract and intentions and from the circumstances as a whole
 - The jurisdiction clause must state the criteria according to which the competent court is to be determined

Article 23

- Choice of court in a third country
 - Such agreement is not directly dealt with by Art. 23 (as far as the prorogative effect is concerned)
 - Whether Art. 23 is applicable with respect to the derogation effect of such an agreement?
 - Where there is a contact with a MS the prorogation can be at the same time a derogation from an otherwise given jurisdiction of a MS court – from an exclusive jurisdiction or from the protective jurisdiction

Article 23

- Two opinions:
 - > Art. 23 does not apply at all – neither with respect to prorogation effect nor to the derogation effect (Case C-387/98 – Coreck Maritime v Handelsveen)
 - > where the prorogation of a court outside the EC constitutes at the same time a derogation of the jurisdiction of an otherwise competent EC court then, such jurisdiction agreement is also covered by Art. 23 and must comply with requirements of this provision as far as its derogative effect is concerned

Article 23

- Mere derogation
 - Art. 23 is applicable – to secure a uniform treatment of all kinds of jurisdiction agreements

Article 23

- The material and formal validity
 - Can be assessed either according to the standards set by Art. 23 itself or according to the rules of the applicable national law
 - The requirements of a valid agreement should be inferred from the Art. 23 itself to the extent possible
 - Art. 23 itself regulates the form requirements
 - The position is less clear with respect to the material validity

Article 23

- The agreement is the central element for the validity of choice of court clauses
 - Only if the choice is carried by the parties' free and unimpeded consent is the procedural effect of such choice justified
 - Art. 23 imposes upon the court before which the matter is brought the duty of examining whether the jurisdiction clause was in fact subject of a consensus between the parties (Case 25/76 – *Galeries Segoura v Société Rahim Bonakdarian*)

Article 23

- Material validity
 - The basic requirement of the consensus can be inferred from the Art. 23 through autonomous interpretation (needs no redress to the applicable national law) – Case 25/76 – *Galeries Segoura v Société Rahim Bonakdarian*
 - Further questions concerning material validity have to be determined in accordance with the applicable national law (mistake, error, fraud, threat, duress, capacity of the parties)

Article 23

■ Form

- 1) Agreement in writing
- 2) Agreement evidenced in writing
- 3) Agreement shown by practices among the parties
- 4) Agreement shown by international trade usage

Article 23

- In writing
 - Both parties express their consent to a specific jurisdiction clause in written and authorised form
 - Authorisation – the signature of a person making the declaration
 - A single written document signed by all parties
 - Separate documents containing the same jurisdiction clause and signed each by the respective party alone (including the change of letters, faxes, telegrams)

Article 23

- Electronic communication
 - Equivalent to writing
 - The electronic communication can be durably stored (mailbox, disc, usb-stick) – it can be reproduced in its original form at any time
 - E-mails
 - Messages on websites, voice mails, video conferences, SMS

Article 23

- Standard contract terms
 - The question has to be decided autonomously according to Art. 23
 - Jurisdiction clauses are validly incorporated into a written contract if the other party has clearly indicated that the contract terms should apply and if the other party has the reasonable chance to check the terms and the clause (Case 24/76 – Estasis Salotti di Colzani Aimo and Gianmario Colzani v RÚWA Polstereimaschinen)

Article 23

- It is not essential that the jurisdiction clause is in fact part of the text of the contract
- A mere reference to standard contract terms, which is contained in a contract signed by both parties, can suffice (Case 24/76 – Estasis Salotti di Colzani Aimò and Gianmario Colzani v RÚWA Polstereimaschinen)
- The reference must be clear and precise

Article 23

- Evidenced in writing
 - An oral agreement + subsequent written confirmation
 - Oral agreement must include a consensus specifically concerning the jurisdiction of the chosen court (Case 71/83 – Tilly Russ)
- > express consent
- > implicit consent (the oral contract is concluded on the basis of general conditions which were produced or handed over prior to the conclusion of the contract and which contain a jurisdiction clause)

Article 23

- The confirmation must fully comply with the prior agreement
- If the confirmation introduces new conditions they are validly incorporated only if they were in turn accepted by the other party again in written form (Case 25/76 Galeries Segoura)
- The confirmation can be made by either party (Case 71/83 Tilly Russ)
- The confirmation must be made within a reasonable time after the conclusion of the oral agreement

Article 23

- The confirmation is valid if received, and not objected to, by the other party (Case 221/84 – *F. Berghoefer v ASA*)
- The confirmation may take any form of writing

Article 23

- Practices between the parties
 - It is necessary to establish with sufficient certainty the parties' consensus with respect to the jurisdiction of a particular court or courts
 - Practices between the parties require:
 - > the parties used to conduct their transactions regularly in a specific way
 - > the practice had lasted a certain time
 - > the practice had taken place several times

Article 23

- International usage

- Where such an international trade usage exists and where the contract is concluded in accordance with it the consensus on the part of the contracting parties as to the jurisdiction clause is presumed (Case C-106/95 – Mainschiffahrts-Genossenschaft v Les Gravières Rhénanes)

Article 23

- Internatinal trade usage
 - > the parties are or ought to have been aware of it
 - > it is widely known to parties to contracts of the type involved in the particular trade or commerce
 - > it is regulary observed by the parties

Article 23

- The usage must be related to international trade or commerce
- A certain kind of dealing is habitually observed by most of those who are active in the specific branch
- > it is not necessary that the usage is established worldwide or in specific countries
- > in the particular trade or commerce at stake the usage must be well established

Article 23

- The usage must be those which concern the conclusion of contracts (it is not necessary that a usage is established which specifically concerns the conclusion of a jurisdiction agreement)
- The party who claims that an usage exists has to prove it
- If a usage exists a party can rely on it as against the other party only if the usage is one which the other party also knew or ought have known

Article 23

- Where a person is doing business in a certain branch it must be expected of him that he knows the relevant international usages (only widely known usages, local usages need not be known)
- Awareness of specific usage can be presumed where a party had previous trade relations with a party operating under that usage (Case C-106/95 – Mainschiffahrts-Genossenschaft v Les Gravières Rhénanes)

Article 23

- Separate validity of a jurisdiction clause
 - A jurisdiction agreement is generally annexed to a main contract
 - Its validity is to be determined separately
 - Any dispute over the existence of the main contract is to be pursued in the chosen court (Case C-269/95 – Francesco Benincasa v Dentalkit)

Article 23

- A jurisdiction clause confers exclusive jurisdiction onto the chosen court(s), unless the parties have agreed otherwise
 - it depends on the wording and construction of a clause
 - in case of doubt a clause has to be understood as conferring exclusive jurisdiction

Article 23

- Termination and modification of jurisdiction agreements
 - The parties may terminate or modify a jurisdiction agreement at any time
 - After proceedings have been instituted the parties can do so by mere submission under Art. 24
 - Before court proceedings have started the parties may terminate an agreement by mere consent without the observation of any form requirement
 - In a case of modification the form requirements must be satisfied