Transnational Business Law

Part C.3 : CROSS-BORDER LITIGATION

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Powerpoint

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PRESENTATION OUTLINE

I. Cross-border judicial procedures

II. Recognition and enforcement of foreign decisions

III. Litigation in the EU : Practical roadmap

I. Cross-border judicial procedures

A. Three-step jurisdiction filter

1. Article 25 of Brussels I bis : Prorogation of jurisdiction
2. Article 7(1) (2) and (3) of Brussels I bis : Special Jurisdiction
3. Article 4(1) of Brussels I bis : General Rule

B. Additional jurisdiction rules

4. Article 10-16 : matters related to insurance
5. Article 17-19 : consumer contracts
6. Article 20-23 : individual contracts of employment

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1. Prorogation of jurisdiction (art. 25 Brussels I bis)

Article 25 of Brussels I bis Regulation

« 1. 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. The agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing;
(b) in a form which accords with practices which the parties have established between themselves; or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

1. Prorogation of jurisdiction (art. 25 Brussels I bis)

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.

4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 24.

5. An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.
The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid. »

1. Prorogation of jurisdiction (art. 25 Brussels I bis)

- Parties may agree in advance on the court(s) of one or more EU MS for disputes relating to a specific legal relationship (contractual or non-contractual)
- Presumption : exclusive jurisdiction unless agreed otherwise
- Parties may name in general "*the courts of the defendant*"

1. Prorogation of jurisdiction (art. 25 Brussels I bis)

- Scope :
  - Jurisdiction clause is possible even if defendant is not domiciled in the EU
  - Brussels I bis Regulation (vs. previous versions) removed requirement for one party to be domiciled in the EU
  - Solely the court(s) chosen by the parties shall be established in the EU

1. Prorogation of jurisdiction (art. 25 Brussels I bis)

- Form :
  - written / confirmed in writing
  - established practice between parties
  - international trade custom

•Legal autonomy of jurisdiction clause (art. 25 Brussels I bis)

1. Prorogation of jurisdiction (art. 25 Brussels I bis)

- Substantive validity of the jurisdiction clause : governed by the law of the member state of courts designated in the agreement

  → Preamble of Brussels I bis Regulation :

  « Where a question arises as to whether a choice-of-court agreement in favor of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State. »

- Question : How to determine the applicable law to jurisdiction clause under Rome I

Article 2 lit. e) Rome I ("exclusions")

« (…) arbitration agreements and agreements on the choice of court; (…)»

1. Prorogation of jurisdiction (art. 25 Brussels I bis)

- EU case law : CJEU, 27 February 2025, SIL v. Agora (C-537/23) :

  - Facts : **asymmetric clause** → one party may sue only before the designated court whereas the other party may sue before the designated court + « *any other competent court* »

Clause in that case :

"The court of Brescia (Italy) will have jurisdiction over any dispute arising from or related to this contract. [SIL] reserves the right to bring proceedings against the purchaser before another competent court in Italy or elsewhere."

1. Prorogation of jurisdiction (art. 25 Brussels I bis)

- EU case law : CJEU, 27 February 2025, SIL v. Agora (C-537/23):

  - Validity conditions :

    1. Jurisdiction clause must name court(s) of an EU MS / or of a Lugano Contracting State
    2. Jurisdiction clause must provide objective, precise criteria to identify any alternative court
    3. Jurisdiction clause must not breach protective rules (Art. 15, 19, 23) or exclusive jurisdiction (Art. 25)

2. Special jurisdiction (arts. 7(1) and (2) Brussels I bis)

Article 7(1) and (2) of Brussels I bis Regulation

« A person domiciled in a Member State may be sued in another Member State:
(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
—in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
—in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
(c)if point (b) does not apply then point (a) applies;

(…) »

2. Special jurisdiction (arts. 7(1) and (2) Brussels I bis)

Article 7(1) and (2) of Brussels I bis Regulation

« (…)

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur; »

2. Special jurisdiction (arts. 7(1) and (2) Brussels I bis)

- " Special" jurisdiction rules : additional / complementary rules to general principle
- Alternative to the defendant's domicile (Art. 4) : "in another member state"
- Condition : defendant domiciled in an EU MS

2. Special jurisdiction (arts. 7(1) and (2) Brussels I bis)

- Choice for claimant :

  - EITHER : Court under art. 4 (domicile of defendant) : general principle

  - OR : Court under art. 7 (closest connection to the dispute) : specific rules
    - 7(1) Contractual dispute
    - 7 (2) Extra-contractual dispute

2. Special jurisdiction (arts. 7(1) and (2) Brussels I bis)

- **Contractual matters – article 7 (1)**

  - **Point (a)** : « *(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question* »

    - Court of the place where the obligation forming the basis of the claim was performed

    - Requires identifying the main obligation and determining the place of performance under the applicable contract law (Rome I Regulation)

2. Special jurisdiction (arts. 7(1) and (2) Brussels I bis)

- **Contractual matters – article 7 (1)**

  - **Point (b)** : « *for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*

    *—in the case of the **sale of goods**, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
    *—in the case of the **provision of services**, the place in a Member State where, under the contract, the services were provided or should have been provided; »*

  - Simplification for two types of contract :
    - **Sale of goods** → place of delivery (in an EU MS)
    - **Provision of services** → place of provision (in an EU MS)

    → **Autonomous definition under EU law** (no reference to national law)

2. Special jurisdiction (arts. 7(1) and (2) Brussels I bis)

- **Contractual matters – article 7 (1)**

  - **Point (b)** : « *for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*

    *—in the case of the **sale of goods**, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
    *—in the case of the **provision of services**, the place in a Member State where, under the contract, the services were provided or should have been provided; »*

  - The role of the INCOTERMS clauses for the determination of the place of delivery of the goods (= transfer of risks)
    - Clause **EXW** (“Ex works”) : **Sellor**’s premises / seat / place of business
    - Clauses F- and C-class: during the transport
    - Clauses D-class (**DAP, DPU, DDP**): at place of destination named by **Buyer**

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Practical case

I. FACTS

A French company (purchaser) concludes a contract with a German company for the purchase of industrial machinery. Under the contract, the machinery must be delivered pursuant to the INCOTERM EXW at the German company's (seller) premises in Germany.

A dispute arises because the French company refuses to pay the full purchase price, claiming that the machinery does not comply with the contract. The German company wishes to bring proceedings against the German company.

II. QUESTION

Which court has jurisdiction to hear the dispute?

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Guiding question

- **Art. 7(1)(b) Brussels I bis:** For a contract concerning the sale of goods, where is the relevant place of performance determined under EU law?

2. Special jurisdiction (arts. 7(1) and (2) Brussels I bis)

- **Contractual matters – article 7 (1)**

  - **Point (c)** : « *if point (b) does not apply then point (a) applies* »

  → If the contract is neither a sale of goods nor a provision of services :

  - Return back to lit. *(a)* as a general rule
  - Determine the <u>place of performance</u> of the obligation forming the basis of the claim pursuant to the <u>law applicable to the contact</u>
    - ✓ Law applicable to the contract : ”*lex causae*” – “*lex contractus*”
    - ✓ Rome I Regulation

2. Special jurisdiction (arts. 7(1) and (2) Brussels I bis)

- **Tort/Delict – article 7 (2)** :

Art 7 (2) Brussels I bis Regulation

« in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur »

- Court where damage occurred or may occur

- Complex events (cause / harmful event vs. place of realization of the damage) :
  → claimant can choose between both connections (*Mines de Potasse d'Alsace*)

3. General rule (art. 4 Brussels I bis)

Article 4(1) of Brussels I bis

« 1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State. »

3. General rule (art. 4 Brussels I bis)

- Universal jurisdiction principle in civil and commercial matters : *actor sequitur rei forum*

- General rule under Brussels I bis Regulation : any person domiciled in an EU MS must be sued before the courts of this State (regardless of nationality)

- Application to non-Europeans : a person with a non-EU nationality domiciled in an EU MS is treated in the same matter as an EU national