

European Civil Procedure

Handout 6

Examination as to jurisdiction under the LC/Brussels I *bis* Regulation

- A starting point for common procedural rules within the European judicial area?
- General principles
 - Contracting States'/Member States' exclusive jurisdiction is protected regardless of whether the defendant submits to the jurisdiction of another court
 - in other cases, a defendant participating in the proceedings must contest the court's jurisdiction to prevent the creation of jurisdiction under Article 24 LC/Article 26 Brussels I *bis* Regulation
 - a passive defendant does not "enter an appearance"
 - a defendant sued before a court that has no jurisdiction over the case can, in principle, leave it to that court to dismiss the claim for lack of jurisdiction without having to invest effort and money to contest jurisdiction
 - but note: if jurisdiction is wrongly assumed, the judgment can circulate under the Lugano Convention/Brussels I *bis* Regulation in most cases (see Article 35 LC/Article 45(1)(e) Brussels I *bis* Regulation)
 - jurisdiction is determined by the object of the claim, not by preliminary or incidental matters and not by the defence submissions raised by the defendant
 - exception: Article 22.4 LC/Article 24.4 Brussels I *bis* Regulation
- Scenarios
 - Scenario 1: a court in another Contracting State/Member State has exclusive jurisdiction under Article 22 LC/Article 24 Brussels I *bis* Regulation
 - regardless of whether the defendant has entered an appearance, the court that does not have exclusive jurisdiction must dismiss the claim *ex officio* (on its own motion) (Article 25 LC/Article 27 Brussels I *bis* Regulation)
 - if several courts have exclusive jurisdiction, the priority principle applies among them (Article 29 LC/Article 31 Brussels I *bis* Regulation)

- Scenario 2: no exclusive jurisdiction of a court in another Contracting State/Member State, defendant domiciled in a Contracting State/Member State
 - Scenario 2a: the defendant does not participate in the proceedings
 - step 1: the court must ascertain that the document instituting the proceedings was transmitted to the defendant in accordance with Article 26(2)-(4) LC/Article 28(2)-(4) Brussels I *bis* Regulation
 - step 2: if, after successful completion of step 1, the defendant (still) does not enter an appearance, the court has to examine its jurisdiction *ex officio* and dismiss the claim if it lacks jurisdiction
 - Scenario 2b: the defendant participates in the proceedings but contests jurisdiction in a timely manner
 - the court must examine its jurisdiction and dismiss the claim if it lacks jurisdiction
 - timely = no later than “the submissions which under national procedural law are considered to be the first defence addressed to the court seised” (ECJ *Elefanten Schuh*)
 - Scenario 2c: the defendant participates in the proceedings and does not contest jurisdiction in a timely manner
 - jurisdiction created by Article 24 LC/Article 26 Brussels I *bis* Regulation, no room for examination of jurisdiction and dismissal for lack of jurisdiction
- Scenario 3: no exclusive jurisdiction of a court in another Contracting State/Member State, defendant domiciled in the forum state or in a third state
 - if the defendant does not contest jurisdiction in a timely manner, jurisdiction is created by Article 24 LC/Article 26 Brussels I *bis* Regulation – no room for examination of jurisdiction and dismissal for lack of jurisdiction
 - if the defendant contests jurisdiction, the procedure concerning the establishment of jurisdiction is governed by the *lex fori*
 - unclear whether the rules contained in Article 26(2)–(4) apply to third-state defendants
- *Ex officio* examination of jurisdiction: frictions/unclear relationship between autonomous requirements derived from the LC/Brussels I *bis* Regulation and national rules on the establishment of jurisdiction
- application of the law regardless of whether the issue is raised by a party
- Establishment of facts
 - where there are indications that the court is obliged to declare that it lacks jurisdiction, it cannot rely on the plaintiff's (or even both parties') factual allegations without requiring proof
 - the court may (or must?) consider all information available to it when examining jurisdiction, including the arguments and submissions put forward by the defendant

- unclear relationship with the “doctrine of doubly-relevant facts” (see below)
- (probably) no obligation to actively investigate the facts *ex officio*
 - i.e.: the court may require the plaintiff to allege and prove the facts on which jurisdiction is based
- German-speaking jurisdictions’ approach to the establishment of facts that are relevant for jurisdiction
 - “singly-relevant facts”: facts that are only relevant for establishing jurisdiction
 - example: facts that are relevant for determining the defendant’s domicile if the plaintiff sues in the general forum under Article 2(1) LC/Article 4(1) Brussels I bis Regulation
 - singly-relevant facts are established at the “admissibility stage”; i.e. if the court comes to the conclusion that such facts are not present, the claim is dismissed as inadmissible
 - “doubly-relevant facts”: facts that are relevant both for establishing jurisdiction and for the merits of the claim
 - example: existence of a contract if the plaintiff sues in the forum at the place of performance [Article 5.1 LC/Article 7.1 Brussels I bis Regulation)
 - doubly-relevant facts are assumed to be true for the purpose of determining the admissibility of the claim; if the court comes to the conclusion that such facts are not present, the claim is dismissed on the merits
 - compatibility with LC/Brussels I *bis* Regulation not entirely clear; see ECJ *Kolassa*: “In the context of the determination of international jurisdiction under Regulation No 44/2001, it is not necessary to conduct a comprehensive taking of evidence in relation to disputed facts that are relevant both to the question of jurisdiction and to the existence of the claim. It is, however, permissible for the court seised to examine its international jurisdiction in the light of all the information available to it, including, where appropriate, the allegations made by the defendant.”