THE IMPACT OF CIVIL JURISDICTION RULES ON THIRD STATES (ARTICLE 4)

RADKA CHLEBCOVÁ

Právnická fakulta Masarykovy univerzity, Česká republika

Abstrakt v rodném jazyce
Bruselská úmluva i bruselské nařízení se aplikují i v situacích, které jsou více či méně spojeny se třetími státy, a kdy bychom očekávali aplikaci národního práva. Pro pochopení vztahu národních norem a evropských norem o mezinárodní pravomoci je klíčové znění článku 4 zmíněných norem. Článek 4 je často považován pouze na hranici mezi uvedenými systémy. Dle některých názorů se dá pokládat spíše za ustanovení, které umožňuje inkorporovat národní procesní normy do systému norem evropských. Znamená to, že pravomoc založená na národních ustanoveních je podrobena omezením pramenícím z bruselského nařízení.

Klíčová slova v rodném jazyce
Bruselské nařízení, Bruselská úmluva, třetí státy, extrateritorialita, exorbitatntní pravidla, domicil, prorogace, výlučná pravomoc, alternativní pravomoc.

Abstract
Brussels Convention or Brussels I. Regulation apply also in situations which are more or less connected with third states and where we would expect national law to be applicable. In order to understand the relation between the national and European law on civil jurisdiction, we have to prove the application scope of Article 4 and its relation to other provisions of Brussels I. Regulation. Article 4 is usually considered to be a borderline between the national and European system. Some authors attribute to the Article 4 the role of connection or incorporation link between national and European system. It means that the jurisdiction based on the national rules is subject to the restriction contained in the Brussels I. Regulation.

Key words
Brussels Regulation, Brussels Convention, Third states, Extraterritoriality, Exrobitant rules, Domicile, Prorogation, Exclusive jurisdiction, Alternative jurisdiction.

1. INTRODUCTION

This conference paper deals with the applicability of Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter „Brussels Convention") and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter „Brussels I Regulation, Brussels I.") to third states. To be more precise, this paper deals with the extracommunity cases and with the applicability the Brussels Convention and Brussels I. Regulation to this cases. Article 2 of the mentioned documents, its nature and the interaction of national civil jurisdiction rules and European civil jurisdiction rules should be proven in details. The other provisions of Brussels Convention and Brussels I. Regulation are supposed to be mentioned in the extend which is necessary to understand the nature of Article 2. The application scope of Art. 2 is a very complex issue and therefore is supposed to be left out.

1.1 EXTRATERRITORIAL NATURE OF EUROPEAN JURISDICTION RULES

Although it was no the intention of the drafters of Brussels Convention, the civil jurisdiction rules of Brussels Convention and Brussels I. Regulation are applicable not only in intracommunity cases but also in extracommunity cases. The extend of the application of Brussels Convention and Brussels I. Regulation in these situations is not clear.

If the dispute is connected not only with the territory of Member State of European Union (e. g. because of the defendant's domicile) but also with the territory of a non-Member State (e. g. domicile of one of the parties is in the third state, the place of performance, place where the harmful event occurred or may occur) the Brussels I provides no instructions for allocation of jurisdiction.[1] But it does not mean that the provisions of Brussels Convention or Brussels I. are not applicable to the case. We have to prove its provisions in detail in order to determine when they are regulating the case with third state element.

2. ARTICLE 4: DEFENDANT'S DOMICILE IN A NON-MEMBER STATE

Brussels Convention as well as Brussels regulation use one basic ground for granting jurisdiction in international cases: The domicile of the defendant in the member state of CE. Article 4 on the other hand deals with the defendants who are domiciled outside of EC. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall be determined by the law of that Member State. Article 4 stipulates the only exceptions form its wording. These are Article 22 and 23 - exclusive jurisdiction and prorogation of jurisdiction. Provisions dealing with exclusive jurisdiction and prorogation of jurisdiction are supposed to have priority over the Article 4. One of the reasons could be the importance of these provisions. Other reason might be, that these two provisions seem to be applicable regardless of the domicile. It seems to be so at least at the first sight, because if we prove the application scope of these provisions in detail, the results are not so unambiguous.

2.1 THE REASON FOR THIS PROVISION

Accoring to the Jenard Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter „Jenard Report"), Article 4 was necessary in order to ensure the free movement of judgments. This Article prevents refusal of recognition or enforcement of a judgment given on the basis of rules of internal law relating to jurisdiction. This Article may also perform a function in the case of lis pendens – especially in the situation when the jurisdiction of one court was based on the national civil jurisdiction rules whereas another court of EC has exclusive jurisdiction based on Article 23. In the absence of an article such as Article 4, there would be no rule in the Brussels Convention or Brussels I. Regulation expressly recognizing the jurisdiction of two European courts when the jurisdiction before one of them was based on national law.[2]

If the defendant is not domiciled in a Member State, the jurisdiction should be determined by the national civil jurisdiction rules including the rules specified in Annex 1 (so called exorbitant rules). The civil courts jurisdiction in international cases is usually based on the

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[1] Fentiman, R., Civil Jurisdiction and Third States: **Owusu** and **After**. In: Common Market Law Review, 2006, volume 43 , issue 3 , p. 705-734.

[2] Jenard Report, p. 20, 21.

link of the cases and forum. It should be based on reasonableness, fairness and comity.[3] But this is certainly not the case of exorbitant rules where the basis of jurisdiction is unpredictable and surprising. The exorbitant rules on civil jurisdiction are contained in the legal system of majority of European states (except from Spain). Because of their negative impact on the legal certainty the list of these rules was collected in Annex I. The use of these rules for granting civil jurisdiction is forbidden in the framework of Brussels Convention and Brussels I. Regulation.

2.2 BORDERLINE OR LINK FOR INCORPORATION?

Article 4 seems to be only a borderline between the national system of civil jurisdiction rules and the European system. If the defendant is domiciled outside of the EC, the national system of civil jurisdiction rules is supposed to determine whether there is a member state's court responsible for dealing with the action. In reality Art 4 seems to be not only a borderline, but the true connection of national and European civil jurisdiction rules systems. According to some authors[4], the Art. 4 is taking the national rules and incorporating them into the European system. Since the national rules are incorporated into the European system, it seems to be necessary to comply with the restriction for granting international jurisdiction contained in the Brussels I. Regulation.

The civil jurisdiction based on the national civil jurisdiction rules should therefore be compatible not only with exactly mentioned restrictions (Art. 22, 23) but also with all other restrictions imposed on the process of granting jurisdiction.

1. The protective jurisdiction rules (insurance, consumer protection, employee protection).
2. The appearance before the court
3. The lis pendens rules
4. Recognitions and enforcement rules

2.2.1 THE PROTECTIVE JURISDICTION RULES

The reason for priority application of protective jurisdiction follows from the nature of this jurisdiction and from the necessity to protect the weaker party in dispute. Moreover, the wording of all protective grounds for jurisdictions contains a special clause for situation when the stronger party is domiciled outside of the EC:

Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.[5]

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[3] Mansel, P., H., Festschrift für Erik jayme, Band I., München: Sellier. European Law Publishers GmbH. 2004, s. 169 an.

[4] Briggs, A., Rees, P., Civil Jurisdiction and Judments, LLP, 2005.

[5] Compare Art. 9 par. 2, Art. 15 par. 2 and Art. 16 par. 2.

This provision contains a fiction of a domicile. Even if the stronger party was not domiciled in the member state of EC, but has in one of the member states its branch, agency or other establishment, we suggest that this party was domiciled in the member state.

The branch, agency or other establishment is regulated by Article 5 paragraph 5. At this place seems to be necessary to compare the wording of Article 5 paragraph 5 and the wording of Article 9 paragraph 2, Article 15 paragraph 2 and Article 16 paragraph 2. Article 5 deals with the alternative grounds for jurisdiction. In the situation when a party is domiciled in one member state, she or he can also be sued in another member state where the branch, agency or other establishment is situated. As opposite to the Article 5 paragraph 5, where the domicile as well as the branch, agency or other establishment are situated in the EC, the protective grounds for jurisdiction require only the branch, agency or other establishment be situated in the member state. Because the real domicile of the stronger party is situated outside of the EC, it is necessary to interpret this provision as fiction of a domicile.

The problem is that the protective grounds of jurisdiction have mentioned the possibility of fiction of domicile on one hand but at the same time stipulated that the Article 4 still prevails on the other hand. If Article 4 has still the application priority, than we have to look for jurisdiction rule in national law in every cases when the defendant is domiciled outside of the EC. It should not be possible to use the grounds for jurisdiction which are stipulated in the Brussels Convention or in the Brussels I. Regulation, unless they are expressly mentioned in the Article 4. Therefore, is does not seem to be possible to use the fiction of domicile contained in Articles 9 paragraph 2, Article 15 paragraph 2 and Article 16 paragraph 2.

The relation of Article 4 and Article 9 paragraph 2, Article 15 paragraph 2 and Article 16 paragraph 2 is not clear. Nevertheless, the fiction of jurisdiction is often used in order to enable the weaker party to sue before own courts. The necessity to protect weaker parties as well as the importance of this protection leads us to the conclusion, that the list of exceptions provided for in Article 4 is not definitive. We might therefore extend the group of provisions which ask for prior application. This approach could be a brilliant argument for explaining why are the lis pendens rules or the rules for recognition and enforcement of judgments applicable also to the judgments where the jurisdiction was based on the national rule. Nevertheless, it is not able to explain the relation of Art. 4 and Art. 24 (appearance before the court).

2.2.2 THE APPEARANCE BEFORE THE COURT

The second provision we have to prove is Article 24. According to the wording of Article 24, apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Article 24 does not mention ant requirement concerning the domicile of the parties. Therefore, it seems that it is possible to apply this provision even if both of the parties are domiciled in third state.

Article 4 has expressly mentioned only the priority application of Art. 22 and Art. 23. It does not seem to be possible that the authors of the Brussels Convention have on one hand mentioned the Art. 22 and Art. 23 and have forgotten Art. 24 on the other hand. Neither the case law nor the commentary is helpful at this point. Does Art. 24 apply only to the defendant

who is domiciled in the EC or is it possible to extend the application of this provision also to the defendant from third states? And accordingly to the answer at this question, the Article 24 be applied regardless of the wording of Article 4?

The Jenard report has defined the scope of application of Art. 24 only in respect to the defendant domiciled in the EC.[6] Therefore, according to the Jenard Report the Art. 24 should be interpreted restrictively and impact only defendants domiciled in the EC.[7]

To make the issue even more complicated, the European Court of Justice (hereinafter "ECJ") has mentioned the application scope of Art. 24 in the case C-412/98, Group Josi. ECJ came to the conclusion that under Article 18 of the Convention (Art. 24 of the Brussels I. Regulation), the voluntary appearance of the defendant establishes the jurisdiction of a court of a Contracting State before which the plaintiff has brought proceedings, without the place of the defendant's domicile being relevant. However, although the court seised must be that of a Contracting State, that provision does not further require that the plaintiff be domiciled in such a State.[8]

The relation between Article 4 and 24 seems to be unclear and complicated. If it is not possible to extend the application of Article 24 to extracommunity cases, it is not possible to say that Article 24 should have a priory over the Article 4. Then we have to ask whether it is possible to suggest that protective grounds for jurisdiction should prevail although they are not expressly mentioned in the wording of Article 4?

2.2.3 LIS PENDENS AND RECOGNITION AND ENFORCEMENT OF JUDMENT

As far as rules on lis pendens and recognition and enforcement of judgments are concerned, the situation is cleat. Both of these rules apply to the judgments of member state's courts regardless of the basis for jurisdiction (national v. european civil jurisiction rules). The Applicability of rules on lis pendens and recognition and enforcement of judgments follows therefore directly from the Brussels Conventions or Brussels I. Regulation.

2.3 SURVIVAL OF EXORBITANT JURISDICTION RULES

The other result of incorporating the national civil jurisdiction rules into the application scope of the Brussels Convention or Brussels I. Regulation is a persisting impact of exorbitant grounds for jurisdiction. As was already mentioned before, the exorbitant grounds are not based on predictable grounds for granting jurisdiction. Originally, the exorbitant grounds were mentioned in Article 3 of the Brussels Conventions. The second paragraph of Article 3 had contained demonstrative enumeration of these rules. Jenard Report points out that these rules of jurisdiction are not totally excluded. They are excluded only in respect of persons who are domiciled in another Contracting State. Thus they remain in force with respect to persons who are not domiciled within the Community.[9]

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[6] Jenard report, p. 38.

[7] Kruger, T., Civil Jurisdiction Rules of the EU and their Impact on Third States. Oxford: Oxford University Press, 2008, p. 124.

[8] Jugment of ECJ C-412/98, Grouo Josi, p. 44-45.

[9] Jenard Report, p. 19.

Nevertheless, in the situation when the national civil jurisdiction rules are incorporated into the Brussels Convention or Brussels I. Regulation, the judgments from national courts where the jurisdiction was based on the national rule, are recognizable and enforceable in conformity with the Brussels Convention or Brussels I. Regulation. The national ground for jurisdiction is not proved any more and especially it is not reason for rejecting recognition and enforcement of judgments. Therefore, even if the jurisdiction was based on the exorbitant rule, the judgment is free recognizable and enforceable throughout the whole European Union. Exorbitant rules are in this way not only still alive, but profiting from the free movement of judgments.

3. SUMMARY

Article 4 seems to be one of the most important provisions for dealing with situation concerning the third state. It is necessary to prove not only the wording of Article 4 but to prove the relation of Article 4 with other provisions of the Brussels I. Regulation. This is the only way how to understand properly the application sphere of the European procedural law.

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Kontaktní údaje na autora – email:
Radka.chlebcova@law.muni.cz