

BRUSSELS I REGULATION AND “THIRD STATES”/ BRUSELSKÉ NAŘÍZENÍ A TŘETÍ STÁTY

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Abstrakt

Příspěvek se věnuje vlivu procesních norem Společenství na třetí (nečlenské) státy. Ačkoli to původně nebylo zamýšleno, aplikují se existujících procesní normy, zejména Bruselské nařízení, téměř univerzálně – tedy i v případech, kdy má skutkový stav silné vztahy ke třetím, neevropským státům. Příspěvek se zabývá rozsahem použitelnosti Bruselského nařízení na třetí státy, podmínkami takového použití a problémy, které v této oblasti vznikají.

Klíčová slova

Owusu, Group Josi, Coreck, Bruselské nařízení, třetí státy, domicil, prorogace, derogace.

Abstract

Conference paper deals with the impact of European procedural norms on the third (non-member) states. Although it was not the intention of the drafters of Brussels I regulation, it could, under certain circumstances, apply “universally” also in situations with “third state element”. The extension of application scope of Brussels I at one side leads to the restriction of application scope of national procedural laws at the other side. Conference paper deals with the application of Brussels I to the extra-community cases, circumstances, under which is this approach possible, case law of ECJ and problems resulting from this case law.

Key words

Owusu, Group Josi, Coreck, Brussels I Regulation, third states, non-member state, domicil, jurisdiction agreement, derogation.

This conference paper deals with the requirements for application of Brussels I Regulation¹ (thereinafter “Brussels I”) and discuss especially the crucial question of its application in

¹ Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

situations with “third state element”. 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. Moreover it is doubtful whether the Brussels I is applicable at all or whether the national procedural law of the member states should provide the rules for allocation of jurisdiction between member state and non-member state. This conference paper will analyze the application scope of Brussels I in the light of the last case law of European Court of Justice (thereinafter “ECJ”) and outline the main problems connected with this case law and its interpretation.

The boundary between the European jurisdiction regime and national law is troublesome. The difficulty arises especially in situations with “third state element”, where the courts of a member state have jurisdiction pursuant to the European regime, but the courts of a non-member state also have competence (based on their national procedural laws) to decide on a dispute. As mentioned above, neither the Brussels I nor any other provision of European Private International Law contain provision for ceding jurisdiction of European courts for the benefit of third state’s courts. Such provisions are normally included only in national procedural laws of member states. But in absence of any European mechanism for ceding jurisdiction to third States, are Member States entirely prevented from declining their own jurisdiction in such cases? Are they therefore without exception obliged to apply the Brussels jurisdiction regime? Or is the allocation of jurisdiction in cases with “third state element” under certain circumstances still a matter for national law?

These questions have long provoked academic controversy. There are also different judicial opinions not only of national courts, but of ECJ as well. These questions were very important especially for English courts. According to the national law were the English courts entitled to use doctrine *forum non conveniencie* in order to decline to exercise jurisdiction on the ground that a court in another State, which also has jurisdiction, would objectively be a more appropriate forum for the trial of the action, that is to say, a forum in which the case may be tried more

suitably for the interests of all the parties and the ends of justice². On 1st May 2005 the ECJ issued a judgment in Case C-281/02 Andrew Owusu v N.B. Jackson (thereinafter “Owusu”) and had put an end to the use of this controversial theory of English courts.

This decision targets the application scope of Brussels I in cases where a strong connection with a third State exists, but the reasoning seems to be very controversial - especially in the light of ECJ previous case law, of the factual situation and problems which could arise as a result of strict interpretation of this decision. In order to explain problems concerning the Owusu it seems to be necessary to introduce the earlier cases of ECJ where ECJ addressed different aspects of the same problem: *Group Josi*³ and *Coreck*⁴ case.

Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)

UGIC, an insurance company incorporated under Canadian law, having its registered office in Vancouver, instructed its broker, Euromepa, a company incorporated under French law, having its registered office in France, to procure a reinsurance contract in relation to a portfolio of comprehensive home-occupiers' insurance policies based in Canada. Euromepa offered Group Josi a share in that reinsurance contract. Later, Group Josi refused to pay requested amount of money, essentially on the ground that it had been induced to enter into the reinsurance contract by the provision of information which subsequently turned out to be false. In those circumstances, UGIC brought proceedings against Group Josi before the Tribunal de Commerce (Commercial Court), Nanterre, France.

Group Josi case concerned proceedings initiated in France by a Vancouver-domiciled claimant against a Belgian-domiciled defendant. The defendant argued that it could be sued only in Belgium (his domicile). This case prompted a question whether Article 2 applied, given that the claimant was domiciled in a third state. The court held that the claimant's origin was irrelevant to

² See Judgment of ECJ, Case C-281/02 from 1st May 2005, par. 8 and 9: “An English court which decides to decline jurisdiction under the doctrine of *forum non conveniens* stays proceedings so that the proceedings which are thus provisionally suspended can be resumed should it prove, in particular, that the foreign forum has no jurisdiction to hear the case or that the claimant has no access to effective justice in that forum”.

² Forum convenience: a forum having competent jurisdiction

³ Judgment of ECJ, Case C-412/98 from 13 July 2000, Group Josi

⁴ Judgment of ECJ, Case C-387/98 from 9 November 2000, Coreck

the operation of Art. 2: „... It must be concluded that the system of rules on conferment of jurisdiction established by the Convention is not usually based on the criterion of the plaintiff's domicile or seat. Moreover, as is clear from the wording of the second paragraph of Article 2 and the second paragraph of Article 4 of the Convention, nor is that system based on the criterion of the nationality of the parties. The Convention enshrines, on the other hand, the fundamental principle that the courts of the Contracting State in which the defendant is domiciled or established are to have jurisdiction. Title II of the Convention is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State.“⁵

Although this decision does not directly impose the question in *Owusu*⁶, the aim of this decision seems to be clear. A court of a member state has jurisdiction based on the Brussels I regardless of the claimant's country of origin.

Coreck Maritime GmbH v Handelsveem BV and Others⁷

The second important decision concerning the application scope of Brussels I in situations with “third state element” was *Coreck* decision. This decision concerned the effect of jurisdiction agreement which laid down an exclusive jurisdiction of a non-member state. In this case, various bills of lading were issued in respect of the carriage of goods between the parties. These bills of lading contained jurisdiction agreements in favour of a non-member state court. But, as the defendant (*Coreck*) had his habitual residence in a member state (Germany), according to Art. 2 of Brussels I, the courts of this member state were entitled to decide on the dispute as well.

The crucial question for the ECJ was whether Art. 17 of the Brussels Convention governs also the validity of a clause which specifies the forum having jurisdiction to settle disputes, or whether

⁵ See Judgment of ECJ, Case C-412/98 from 13 July 2000, par. 53-61.

⁶ The issue in *Group Josi* was whether a court has jurisdiction under the European Regime where a claimant is domiciled in a third state, not whether a court may stay proceedings where such a jurisdiction is acknowledged.

⁷ Judgment of ECJ, Case Case C-387/98 from 9 November 2000, *Coreck*

it is question for national law to examine the validity of this clause. Only in case the national law will govern the validity of this clause it will be possible to use national procedural law provisions and based on them decline the jurisdiction of member state resulting from Art. 2 of Brussels I.

The ECJ pointed out that Art. 17 „only applies if, first, at least one of the parties to the original contract is domiciled in a Contracting State and, secondly, the parties agree to submit any disputes to a court or the courts of a Contracting State.“⁸ As concerned the above mentioned question, the answer of ECJ was that the validity of such a jurisdiction clause should be governed by the law applicable under the conflicts rules of the forum. „A court situated in a Contracting State must, if it is seized notwithstanding such a jurisdiction clause, assess the validity of the clause according to the applicable law, including conflict of laws rules, where it sits.“⁹

This particular reasoning of ECJ implies that a court must have the power to decline jurisdiction if such an agreement is valid. It means that if such an agreement is valid, the European regime is inapplicable and the court is allowed to decline the jurisdiction under the national law provisions.

Andrew Owusu v N.B. Jackson, trading as ‘Villa Holidays Bal-Inn Villas’ and Others¹⁰

Mr Owusu (‘the claimant’), a British national domiciled in the United Kingdom, suffered a very serious accident during a holiday in Jamaica. Following that accident, Mr Owusu brought an action in the United Kingdom for breach of contract against Mr Jackson, who is also domiciled in that State. Mr Jackson had let to Mr Owusu a holiday villa in Mammee Bay (Jamaica). The defendant argued that the case had closer links with Jamaica and that the Jamaican courts were a forum with jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice (forum convenience).¹¹

This decision concerns situation when the courts of a member states have jurisdiction pursuant to the European regime, but the courts of a non-Member States also have competence (based on its

⁸ Judgment of ECJ, Case Case C-387/98 from 9 November 2000, Coreck, , Summary par. 2.

⁹ Judgment of ECJ, Case Case C-387/98 from 9 November 2000, Coreck, par. 19.

¹⁰ Judgment of ECJ, Case C-281/02 from 1st May 2005

¹¹ See Judgment of ECJ, Case C-281/02 from 1st May 2005, par. 10-15.

national procedural norms) to decide on a dispute. The key question was when is possible, if at all, to stay the proceedings in a Member State for the benefit of the non-Member State proceedings.

The ECJ ruled that Brussels I is applicable in each case, when the defendant is domiciled in a Member state¹². Article 2 is applicable in proceedings where the parties before the courts of a Contracting State are domiciled in that State and the litigation between them has certain connections with a third State but not with another Contracting State. Although, for the jurisdiction rules of the Convention to apply at all, the existence of an international element is required, the international nature of the legal relationship at issue need not necessarily derive, for the purposes of the application of that provision, from the involvement of a number of Contracting States. The involvement of a Contracting State and a non-Contracting State would also make the legal relationship at issue international in nature.¹³

According to ECJ there is no space for the application of national procedural rules which enable to exercise jurisdiction on the ground that a court in a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.¹⁴

Critique of Owusu reasoning

This reasoning of ECJ seems to be very controversial. The ECJ has extended the hegemony of Community law norms at the expense of national law in the area of international private law. The European jurisdiction regime should according to the Art. 2 of Brussels I be applicable at each time, when the defendant is domiciled in a Member state. The fact, that a non-Member state has also jurisdiction based on its national procedural norms and that the dispute might have closer connection to a non-Member state, or even that the non-Member state might have an exclusive jurisdiction, does not seem to play any important role. The reasoning is so general that also the

¹² See Art. 2 of Brussels I Regulation

¹³ Summary, par. 1.

¹⁴ See Judgment of ECJ, Case C-281/02 from 1st May 2005.

Coreck case law and the possibility to decline a jurisdiction in case, when there is a valid jurisdiction agreement for the benefit of a non-member court, seems to be prevailed.

But should we really understand this decision in such a broad way? Should we really apply the ruling in Owusu generally and extent it also to the cases which does not share the same pattern as Owusu did? E. g. to the situation, where the defendant is domiciled in the EU, but the parties have agreed to the non-Member state court's exclusive jurisdiction or where the non-Member state court has according to its national procedural norms exclusive jurisdiction to decide on a dispute? Or where a non-Member state court was seized earlier than the Member state court? If the same situations appear between two Member states courts, the Brussels I provides us with a reasonable solution and avoids parallel proceedings. But this is not the case if non-member court is involved. Should the fact that treatment of extra-community cases concerning allocation of jurisdiction is not regulated by the Brussels I leads to the conclusion that the allocation of jurisdiction in a non-member state is impossible at all? Because of this approach it might easy happened, that the non-Member state judgment will not be recognized and therefore enforced at the territory of EU and that the Member states judgment will not be recognized and therefore enforced at the territory of non-Member state. All these tasks were submitted to the ECJ in the second question, but the ECJ refused to answer.¹⁵

Risks resulting from strict interpretation of Owusu

The risks resulting from the strict interpretation of Owusu are really high: e.g. wasteful parallel proceeding, judgments that could not be enforced in the other country, wasteful costs and waste of time, violation of the legal certainty and predictability, unreasonable unequal treatment of purely community and extra-community cases. Taking this risks into the consideration, we should try to distinguish the Owusu case law from other situations which do not share exactly the same pattern. There are many arguments which we could use:

¹⁵ „Is it inconsistent with the Brussels Convention to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State **in all circumstances or only in some and if so which?**“

1. Is the question of declining the jurisdiction governed by the Brussels I at all?
2. The nature of Owusu case
3. Equality of treatment

1. Is the question of declining the jurisdiction governed by the Brussels I at all?

There are many tasks in the Owusu reasoning which are still opened - especially if the matter of declining jurisdiction in favour of a third state falls within the scope of Brussels I. An answer to this question might be assembled from the materials in the judgment.

The ECJ concluded three crucial ideas:

- The wording of Art. 2 is mandatory

“It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention.”¹⁶

If Art. 2 is mandatory provision, it must be respected under each circumstances and without any exception (unless provided for by the convention). Therefore, each time when Art. 2 is touched, the European courts has jurisdiction to decide on a dispute and there is no possibility to decline this jurisdiction based on the national procedural provisions.

- The purpose of Convention was to harmonize the jurisdictional rules of Member states, except presumably in cases where national law is expressly preserved.

If this reasoning is correct, it becomes impermissible to rely upon national rules for ceding jurisdiction, even in cases involving the rival jurisdiction of third states. To allow resorting to national law would inevitably impair the uniform application of the European jurisdictions rules. On the other side it is necessary to point out, that the argument from harmonization ignores a

¹⁶ See Judgment of ECJ, Case C-281/02 from 1st May 2005, par. 37.

very important fact: The legislative history of the Brussels Convention and the terms of its preamble. According to them is harmonization is required only to the extent that the mutual enforcement of judgment would be served.¹⁷

- The uniform application of Convention promotes the functioning of the internal market.

“In fact it is not disputed that the Brussels Convention helps to ensure the smooth working of the internal market. However, the uniform rules of jurisdiction contained in the Brussels Convention are not intended to apply only to situations in which there is a real and sufficient link with the working of the internal market, by definition involving a number of Member States. Suffice it to observe in that regard that the consolidation as such of the rules on conflict of jurisdiction and on the recognition and enforcement of judgments, effected by the Brussels Convention in respect of cases with an international element, is without doubt intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject.”¹⁸

This is probably the most important point in the courts reasoning. The functioning of internal market is the overriding measure of the objectives, and thus the scope of the whole Community law. In the hierarchy of relevant considerations it stands supreme. To say it easy: If it is in the favour of internal market, it is Ok, regardless the consequences.

It follows from this short analysis of the courts decision, that the reasoning in Owusu could easily be understood in a very broad way. It is therefore difficult to find there any restriction of its interpretation based only on the wording of the arguments used by ECJ. Are there any other arguments which allow the restriction of its interpretation?

2. The nature of Owusu case

¹⁷ Compare the wording of Art. 220 EC Treaty as well recitels to the Convention.

¹⁸ Par. 33. 34.

Owusu had four defining features: (1) No other Member state was implicated, no other member state had jurisdiction nor was otherwise connected with the case, (2) Jurisdiction of Member state derived from Art. 2 of Brussels I, domicile of defendant, (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.

In reality, it seems to be very difficult to isolate Owusu from other cases, which do not exactly share the same pattern. It can make no difference in the future if in some future case another Member state is implicated. Before Owusu it was suggested, that in case when two member states and non-member state are involved, there is a higher possibility that European jurisdiction regime will apply than in case of involvement of one single member state (point 1). But as follows from the judgment the ECJ clearly did not share this point of view.

From the wording of the decision as well as from the wording of Brussels I follows that the ruling in Owusu applies irrespective of the ground upon which the jurisdiction is asserted (point 2), and the claimant's country of origin. Also neither the third nor the fourth point could help us to distinguish Owusu from other cases.

3. Equality of treatment - Argument from Consistency

The European regime allows Member state's courts to defer to the paramount jurisdiction of other Member state in certain circumstances. It does so e.g. if another Member state's courts have exclusive jurisdiction and if they are first seized of an identical or related action. But if a non-Member state is involved, the same situations are not regulated. Should it really lead to the conclusion, that the denying of Member state's jurisdiction is entirely prohibited? It seems to be inconsistent to allow national courts to decline jurisdiction in such cases in favour of Member states but not third States. If national courts can not decline jurisdiction in the case of prior proceedings in a third State, wasteful parallel litigation may ensue, with the possibility of conflicting judgments in each court.

It seems to be clear that the overall consistency of European jurisdiction regime requires parity of treatment between Member states and third States in the matter of declining jurisdiction. It is commonly assumed that national courts should be free to cede jurisdiction to third states in two prominent cases: where the parties have agreed an exclusive jurisdiction and where the alternative court of a non-member state has a unique interest in the dispute. To say that national courts may never decline Community jurisdiction in favour of non-member courts risks inconsistency. Especially if this approach is allowed to the member state courts and expressly provided for by the Brussels I. It is inconsistent to allow national courts to decline jurisdiction in cases in favour of Member states but not third states. It is argument from Consistency, which justifies parity of treatment between Member States and third States in the matter of declining the jurisdiction. Certainly, it can not be inconsistent with the European regime to oust jurisdiction opposite to a non-member state on grounds which the regime itself recognizes opposite to a member state.

Argument from Consistency would enable to restrict the reasoning in *Owusu* only to the cases where forum non convenience or other ground for declining of jurisdiction (resulting from national procedural norms) is involved, provided that this ground has no analogy in the European jurisdiction system. Therefore, it will be possible to respect e.g. the jurisdiction agreement of parties or exclusive jurisdiction of non-member state court as well as the fact that an action was already brought before a non-member state court. The argument from Consistency would also enable to respect the previous case law of ECJ, especially the *Coreck* case law, where the ECJ ruled the possibility to decline the jurisdiction following from European jurisdiction regime if a valid jurisdiction agreement exists.

RESUME:

European procedural norms, especially Brussels I, are applicable also in situations with “third state element”. The extent of the application of these norms and the border between European procedural law and national procedural laws is highly controversial. Neither the analysis of the wording of laws, nor the case law of ECJ could provide us with a sufficient clear answer. Moreover, the case law of ECJ seems to contradict each other. The *Owusu* judgment could be understood in a very broad way and therefore widely extends the application scope of Brussels I

and restricts the scope of national laws. Despite this fact, if we consider the practical problems resulting from Owusu case law, we should try to find out a clever argumentation in order to restrict Owusu and establish a viable border between national and European procedural law. In this respect, the argument from Consistency seems to be the right way.

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