

Private international law and internet – particularly about jurisdiction 2024-11-13

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Outline of this lecture

- **What is private international law?**
- **Why is private international law important in an online context?**
- **History and idea behind EU jurisdictional rules**
- **A short overview of some jurisdictional law issues**

What is private international law? (1/2)

- 1. Jurisdiction
- 2. Choice of law
- 3. Recognition and enforcement of foreign judgments

What is private international law? (2/2)

- Private international law is national law.
- However: EU regulations and conventions make the rules more international.
- Traditionally courts have been more open to international influence in private international disputes.

When is private international law relevant?

- Cross-border situations
- Concerning private legal subjects (natural and/or juridical persons)

Internet related examples: online contracts (click-wrap agreements), online defamation, intellectual property infringements

Why do we have private international law?

- Substantive law is often designed to be applied in a specific country.
- The predictions of the parties
- International harmony of decisions

How is private international law relevant to data security?

- What standards must be applied?
- What laws do we have to take into consideration?
- How can data be protected?
- Data protection v. personal integrity

Jurisdiction – competent court

Courts in different countries may find that they have jurisdiction in a specific dispute.

- Long arm statutes (positive conflict of jurisdiction)
- *Deni de justice* (negative conflict of jurisdiction)
- *Lis pendens*

Why is jurisdiction important?

- The competent court applies its own choice of law rules + overriding mandatory rules
- The possibility to enforce a judgment is dependent on where it was delivered

History of the EU jurisdictional rules

The free movement of judgments and the foreseeability for defendants was considered important for the European integration

The Brussels/Lugano regime

1968 Brussels Convention

Regulation 1215/2012 (Brussels I Regulation)

Scope of the Brussels I Regulation

Article 1

1. "This regulation shall apply in civil and commercial matters"
2. "This regulation shall not apply to" (exceptions)

Main principles of the Brussels/Lugano regime

- The domicile of the defendant decides what rules to apply (articles 4 and 6)
- Cross-border *litispendens* (article 27 for member state judgments and article 33 for third state judgments)

The construction of the Brussels/Lugano regime

General rule (forum domicilii)

Special jurisdictional rules (alternative to the general rule)

Weak party contracts

Exclusive jurisdictional rules

Prorogation of jurisdiction (choice of court)

General rule (art. 4)

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 that Member State.

Where has a person domicile?

- **Natural persons:**
- Art. 62 BI – according to *lex fori*.
- **Legal persons:**
- Art. 63 BI – EU autonomous interpretation
 - statutory seat,
 - central administration or
 - principal place of business

Special jurisdictional rules (section 2) (alternatives to the general rule in some)

A selection of the most important special jurisdictional rules:

- Article 7.1 "matters relating to contracts" – *forum solutionis*
- Article 7.2 "matters relating to torts, delicts or quasi-delicts" (= non-contractual liability) – *forum delicti*
- Article 7.5 dispute arising out of the operations of a branch, agency or other establishment"
- Article 8 Disputes with more than one defendant

Art. 7.1 *Forum solutionis*

- Jurisdiction "in the courts for the place of performance of the obligation in question"
- Article 7.1 b presumed places for frequently occurring contracts (sale of goods = place of delivery; sale of services = place where the services are provided)

Art. 7.2 *Forum delicti*

Jurisdiction "in the courts for the place where the harmful event occurred or may occur"

Is this the place of the act or the place of the effect?

Art. 7.2 *Forum delicti*

Case 21/76 Bier v. Mines de Potasse d'Alsace

Jurisdiction in the place of the harmful act or in the place where the effect occurred?

CJEU: Both courts have jurisdiction.



Art. 7.2 *Forum delicti*

Case C-68/93 Shevill

Defamation in a French newspaper that was distributed in i.a. UK.

Jurisdiction in the place of effect is limited to only deal with the effects.

Jurisdiction in the place of act can take up the entire case.



Art. 7.2 *Forum delicti*
C-509/09 & C-161/10 eDate/Martinez
C-194/16 Bolagsupplysningen

Defamation online.

Full jurisdiction in the state where
the person has the centre of his/her
interests.

Weak party contracts

Insurance disputes (articles 10-16)

Consumer contracts (articles 17-19)

Individual employment contracts (articles 20-23)

Jurisdiction over consumer contracts – article 17

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if:

- (a) it is a contract for the sale of goods on instalment credit terms;
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in a 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 Member State.

3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 17 only protects certain consumer contracts

- **All other consumer contracts are regulated under the general rules (art. 4 and art. 7)**
- **Consumer protection in substantive law (subject to extensive EU harmonization)**

Active consumer or active business? "directs such activities" (art. 17 p. 1. c)

Case C-585/08 and C-144/09 Pammer & Hotel Alpenhof

- Had the businesses directed activities on the Internet?

Not just by having a website, but the business must have manifested its intention to establish commercial relations with consumers in their member state (para. 75).

Is a Facebook user a consumer in his/her relation to Facebook?

Case C-498/16 Schrems v. Facebook

Schrems wanted to sue Facebook Ireland in Austria.

What court has jurisdiction?

Art. 18

A consumer can choose the courts of his domicile (regardless of where B is domiciled [see also art. 6]) or the courts of the domicile of the business.

A business can only sue a consumer in the state where the consumer is domiciled.

Choice of court in consumer contracts?

Art. 19 = only limited party autonomy

- after the dispute has arisen**
- be more favourable for the consumer (see also art. 26.2)**
- choice of court of common domicile**

Art. 25 Choice of court (in "normal" contracts)

- The parties may choose a member state court
- N.B. the choice of law rules in Rome I are not applicable to such a clause (Art 1(2)(e) Rome I)

Art. 26 Tacit consent to a choice of court

1. 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 24.

2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.

What do we do when the defendant is not domiciled in a member state? (1/2)

Article 6

"If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by **the law of that Member State.**"

What do we do when the defendant is not domiciled in a member state? (2/2)

Is there a convention that is applicable?

If the defendant is domiciled in Norway, Iceland or Switzerland => Lugano Convention

If the defendant is domiciled elsewhere: National jurisdictional rules

National Swedish jurisdictional rules

No codified rules.

“Swedish interest of adjudication” (svenskt rättsskipningsintresse)

GDPR jurisdiction rule

Article 79 Right to an effective judicial remedy against a controller or processor

1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.
2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers

Concluding remarks

- **The private international law concept of territoriality has been hard to apply to online activities (but territoriality might do a come-back with new technology)**
- **A website needs to take several private international law systems into consideration (the physical localisation of the company will be important)**
- **A B2B contract is predictable, a B2C contract is less predictable, an online tort is unpredictable.**