

Jurisdiction and applicable law module

Outline of the first session

Dr. Javier Perez Font
japerezf@pa.uc3m.es

Madrid, 9 December 2024

1 Presentation

- We have two sessions:
 - Today; and,
 - On 18 December 2024.
- We have three tasks:
 - One concerning the negotiation, drafting and review of a design and engineering contract;
 - Another concerning the breakdown of negotiations of a lease contract and the personal *vendetta* of employees of the Company affected by such breakdown; and,
 - Another concerning the establishment of a Company and the decisions adopted by its governance bodies.
- Each task have questions related to jurisdictional issues and the law applicable to them.
- In this session we are to focus on the analysis of jurisdictional issues. Next session we'll pay attention to the law applicable.
- In case we cannot deal with all the questions or issues during these sessions, we could arrange for a videocall.

2 Introduction to Conflict of Laws

1. Introduction to Conflict of Laws:

- (a) Concept \Rightarrow Branch of Law that, in relation to a **private situation connected with different jurisdictions**, addresses three questions:
 - i. Jurisdiction;
 - ii. Applicable law; and,
 - iii. Recognition and enforcement.

Different jurisdictions does not necessarily mean different States \Rightarrow **Interregional situations**.

(b) Features

- i. Traditionally, mainly domestic rules \Rightarrow **Lack of uniformity**: potential different solutions to the same issue.
- ii. Nowadays, tendency to **promote uniformity**.

2. European Conflict of Laws:

- (a) Introduction \Rightarrow Art. 81 of the TFUE.
- (b) Framework:
 - i. Rules intended to prevail over domestic rules of each Member State \Rightarrow Domestic rules **residual application**.

- ii. Main Regulations:
 - A. Brussels I Bis;
 - B. Brussels II Bis;
 - C. Rome I;
 - D. Rome II;
 - E. Rome III; or,
 - F. Regulation (EU) 2015/848.
- 3. Spanish Conflict of Laws:
 - (a) No proper Private International Law Act.
 - (b) Rules **dispersed across legislation**:
 - i. Arts. 22-22 nonies Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial;
 - ii. Arts. 9-12 Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil;
 - iii. Arts. 14-31 Ley 54/2007, de 28 de diciembre, de Adopción internacional;
 - iv. Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil; or,
 - v. Art. 46 Ley 60/2003, de 23 de diciembre, de Arbitraje.

3 Brussels I Bis Regulation

- 1. Introduction:
 - (a) Regulation on jurisdiction and recognition and enforcement of judgments ⇒ It does regulate the law applicable (Regulations Rome I and Rome II).
 - (b) Successor of:
 - i. 1968 Brussels Convention; and;
 - ii. Regulation Brussels I.
 - (c) Brussels I Bis Regulation + 2007 Lugano Convention ⇒ Brussels Regime.
- 2. Scope of application:
 - (a) Territorial ⇒ All Member States, save Denmark.
 - (b) Temporal ⇒ Adopted on 12 December 2012 and entered into force on 10 January 2015.
 - (c) Substantive:
 - i. Positive delimitation ⇒ **Autonomous interpretation** of the reference to "*civil and commercial matters*":

*"The concept in question must therefore be regarded as **independent** and must be interpreted by reference, first, to the **objectives and scheme of the Convention** and, secondly, to the **general principles** which stem from the corpus of the national legal systems"* [Case C-29/76, *LTU GmbH & Co. KG v Eurocontrol* [1976] ECR 1541].
 - ii. Negative delimitation:
 - A. Art 1(1): *It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).*
 - B. Art.1(2): Enumeration of matters excluded ⇒ Arbitration [paragraph(d)] ⇒ Recital 12 and art. 73(2): NYC.
- 3. Basis of jurisdiction:
 - (a) Defendant's domicile:
 - i. General forum
 - ii. Where is the domicile of Defendant? ⇒ Specific rules:
 - A. Natural persons ⇒ Art. 62.
 - B. Legal persons ⇒ Art. 63.

- iii. Multiple Defendants \Rightarrow Art. 8(1): General rule is relaxed in order to avoid contradictory judgments on closely related claims. \Rightarrow Case C-103/05 *Reisch Montage AG v Kiesel Baumaschinen* [2006] ECR 6827: Does an Austrian court have jurisdiction over a German company in connection with a claim brought against an Austrian co-defendant, in relation to whom the action is deemed inadmissible under Austrian law?
- (b) Special jurisdiction:
 - i. Alternative and additional fora.
 - ii. Different fora in relation to different matters \Rightarrow Amongst them:
 - A. Matters related to contracts \Rightarrow Art. 7(1)(a): "*A person domiciled in a Member State may be sued in another Member State: (...) in matters relating to a contract, in the courts for the place of performance of the obligation in question.*"
 - Meaning of the formula *matters related to contracts*:
 - Autonomous interpretation \Rightarrow Case C-26/91 *Jakob Handte & Co. GmbH v TMCS* [1992] ECR 3990: Does it cover a claim of a sub-buyer against the a manufacturer?
 - Broad interpretation \Rightarrow Case C-38/81 *Effer SpA v Hans-Joachim Kantner* [1982] ECR 825: Does it cover the existence of the contract itself?
 - Meaning of the formula *place of performance of the obligation in question*:
 - Concept of *obligation in question* \Rightarrow Case C-14/76 *ETS. A. De Bloos v Société en Commandite Par Actions Bouyer* [1976] ECR 1498: Does it refer to all obligations under a contract?
 - Multiple obligations:
 - * Unequal importance \Rightarrow *Accessorium sequitur principale* (Case C-266/85 *Shenavai v Kreischer* [1987] ECR 251)
 - * Equal importance \Rightarrow Jurisdiction cannot be consolidated unless all obligations share the same place of performance.
 - Place of performance:
 - * *Prima facie*, the agreed.
 - * In absence of an agreement \Rightarrow Either the **place of delivery of the goods** or the **place of provision of the services**.
 - * Concept to be determined in accordance with the law applicable to the contract (Case C-12/76 *Industrie Tessili v Dunlop AG* [1976] ECR 1474).
 - * Multiple places of delivery (Case C-386/05 *Color Drack GmbH v Lexx International Vertriebs GmbH* [2007] ECR 3727) and of provision (Case C-204/08 *Peter Rehder v Air Baltic Corporation* [2009] ECR 6076).
 - B. Matters related to torts \Rightarrow Art. 7(2): "*A person domiciled in a Member State may be sued in another Member State: (...) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.*"
 - Case C-21/76 *Bier v. Mines de Potasse d'Alsace S.A.* [1976] ECR 1735 \Rightarrow Does it refer to the place where the damage occurred or the place where the event causing the damage originated?
 - Case C-68/93 *Shevill v Presse Alliance* [1995] ECR 415 \Rightarrow Does it cover reputational damages? In case it does, must the victim sue in the country where the publisher's establishment is located or in the country of distribution?
 - Case C-220/88 *Dumez France & Tracoba v Hessische Landesbank* [1990] ECR 49 \Rightarrow Does it pertain to the location where the harmful event directly caused its effects on the immediate victim, or does it also include the location where the event indirectly resulted in such effects?
 - Case C-364/93 *Marinari v Lloyd's Bank* [1995] ECR 2719 \Rightarrow Does it include the location where financial losses were felt as a result of a harm originating elsewhere?
 - (c) Weaker parties:
 - i. Insurance (arts. 10-16);
 - ii. Consumers (arts. 17-19); and,
 - iii. Employment (arts. 20-23).
 - (d) Exclusive fora (art. 24):

- i. Rights *in rem*;
 - ii. Corporate matters: *"In proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law."*
 - iii. Intellectual property rights requiring registration;
 - iv. Validity of entries in public registers; and,
 - v. Enforcement of judgments *"In proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced"*.
- (e) Prorogation of jurisdiction:
- i. Introduction \Rightarrow Guarantees the freedom of parties to choose where their disputes shall be litigated, but such freedom is subject to certain limits: It cannot oust the jurisdiction under art. 24 and arts. 15, 19 and 23.
 - ii. Features \Rightarrow *"If the parties, (1) regardless of their domicile, have agreed that (2) a court or the courts of a Member State are to have jurisdiction to settle (3) any disputes which have arisen or which may arise (4) in connection with a particular legal relationship, (5) that court or those courts shall have jurisdiction, (6) unless the agreement is null and void as to its substantive validity under the law of that Member State. (7) Such jurisdiction shall be exclusive unless the parties have agreed otherwise."*
 - iii. Substantive validity \Rightarrow Panoply of laws
 - iv. Formal validity \Rightarrow *"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**"*.
 - v. Separability & Effects:
 - A. Separability \Rightarrow *"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"* \Rightarrow *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254.
 - B. Effects:
 - Positive \Rightarrow It confers jurisdiction to a Court which would otherwise lack jurisdiction to hear the case.
 - Negative \Rightarrow It precludes parties from litigating in another forum, save in the case of **non-exclusive agreements**.
 - Loss of effectiveness \Rightarrow New agreement / Defendant's submission (art. 26) / Insolvency?
 - vi. Methods to protect the agreement (Torpedo Action)
 - A. Stay \Rightarrow See, e.g., Art. 63 of the Spanish Procedural Civil Rules.
 - B. Anti-suit injunctions \Rightarrow Not allowed under the Regulation: Case C-159/02 *Turner v Grovit & Others* [2004] ECR 3578 and Case C-185/07 *Allianz SpA & Generali Assicurazioni Generali SpA v West Tankers Inc* [2009] ECR 686.
 - C. Damages \Rightarrow e.g. STS 263/2009, 12 January.
 - vii. Types of agreements:
 - A. Jurisdiction and submission agreements \Rightarrow Potential (*"Any dispute arising from this Bill of Lading shall be referred to the Courts of Tokyo"*) or actual disputes (*"The parties hereby agree that the dispute concerning the Contractor's remuneration and/or special compensation shall be determined by the Courts of London"*).
 - B. Jurisdiction agreement and jurisdiction clause \Rightarrow Independent document or a clause forming part of the contract.

- C. Escalation agreements \Rightarrow Potestative (*"If any dispute arises out of or in connection with this Contract, the parties agrees that, prior to a reference to litigation, they may seek to have the Dispute resolved amicably by mediation"*) or compulsory agreements (*"If any dispute arises out of or in connection with this Contract, the parties agrees that, prior to a reference to litigation, they may seek to have the Dispute resolved amicably by mediation"*).
- D. Floating agreements \Rightarrow Election of several potential fora, being so the Claimant able to choose any of them (*"Any dispute arising under this Contract shall be determined by the Courts of Madrid or Italy"*) \Rightarrow Don't confuse with the agreements where the forum depends upon which party triggers the action:
"Any controversy or claim arising out of or relating to this Agreement, including any controversy or claim relating to the validity, interpretation or performance of this Agreement, shall be settled by the Courts the State of Michigan, if the proceeding is initiated by [the Defendant], and in London if the proceeding is initiated by [the Plaintiff], and in each case under the substantive law applying in the country, county, or state where the actual dispute or breach of this Agreement occurred" [based on *Kwasny Company v Acrylicon International Ltd* E.D. Michigan (No. 09-13357, 11 June 2010)].
- E. Symmetric agreements \Rightarrow Both parties have the option either to choose between litigation or arbitration.
- F. Asymmetric agreements \Rightarrow Only one of the parties has the faculty to choose between litigation or arbitration.

4 Application to our tasks

1. Design and engineering contract:
 - (a) Analysis of the case \Rightarrow Default position of the parties.
 - (b) Analysis of ENGIN's jurisdiction clause.
2. Leasing contract:
 - (a) Analysis of the case \Rightarrow Default position of the parties in relation to the three potential actions.
 - (b) Issues at determining the potential fora \Rightarrow Where did the harmful event occurred? When is a Company vicariously liable?
3. Joint venture agreement:
 - (a) Analysis of the case
 - (b) Could a Spanish court hear these cases?