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Private International Law

Assignment N 1

In matters relating to a contract the defendant can be sued in the courts of the place of performance of the obligation in question. Discuss critically the concepts involved in this provision, and the interpretational difficulties the courts have faced.

1. Introduction

In the time of globalization of the international market, an increase of the circulation of goods, the participants of the market face the need of unification of law. The uncertainties, which exist in Private International Law, create the obstacles in free movement of goods. The purpose of the Private International Law is to remove these uncertainties via unification of the law. The living tools of the unification of the Private International Law are doctrines, i.e. resolution of the disputes.

The purpose of the doctrine is regulation of contractual relations with international element. The party may be situated in any country and the performance of the obligations may be provided by the law of the different countries.

In the case of the dispute arising from the breach of the contract the court should identify the relevant jurisdiction of the dispute. Sometimes the particular case may be governed by several jurisdictions. Thus, the court should resolve the conflict of law and consider in accordance with the rules and principals of the Private International Law.

In the other words the court should consider which jurisdiction is the most suitable for the case. There are several doctrines which may determine the jurisdiction: lex situs (the law of the place where land is situated), lex domicilii (the law of the party's domicile), lex loci solutionis (the law of place of performance), lex actus (the law governing a transaction), lex loci actus (the law of place where transaction was concluded), lex loci delicti commissi (where tort was committed).

The subjects of this research are doctrine of the place of performance of the obligation, the problems, which court can meet, interpretational difficulties of the doctrine.

The doctrine pursuant to which in the matter relating to the performance of the obligation the defendant can be sued in the courts is represented in the Roman Law (Civil or Continental Law) as well as in Common Law.

2. The concepts of the doctrine in the legislation

In the EU legislation the doctrine of the place of performance is represented by three essential Acts:

1. 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”);

2. Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter “Brussels Convention”);

3. The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter “Lugano Convention”).

The doctrine of the place of performance is provided by Article 5.1 of the Brussels I Regulation.

‘A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;'[1]

In the Brussels Convention this doctrine is represented in the article 5, which provide the general jurisdiction in the matter related to contract:

'A person domiciled in a Contracting State may, in another Contracting State, be sued:

1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, the employer may also be sued in the courts for the place where the business which engaged the employee was or is now situated

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.'[2]

The other Act which represents the doctrine of the place of performance is Lugano Convention signed in Lugano on 30 October 2007. The signatories are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway and the Republic of Iceland. It is the successor to the Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters.

[1] Council Regulation 44/2001 EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters avaible from □http://europa.eu /legislation_summaries/justice _freedom_security/judicial_cooperation _in_civil_matters/l33054 _en.htm.□ accessed 24 May 2012

[2] Convention On Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 aviable from □http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm□ accessed 25 May 2012

Outside of Brussels regime the doctrine of the place of performance is represented by Civil Jurisdiction and Judgments Act, which regulates the jurisdiction among overseas countries, England, Wales, Scotland and Nothern Ireland.

The UK as the member of European Union recognized the jurisdiction of the Brussels Convention by the Civil Jurisdiction and Judgment Act[3] (excluding the regulation in the matter of intellectual property rights, insurance contract and jurisdiction agreement.)

In Civil Jurisdiction and Judgments Act the doctrine of the place of performance represented in the articles -7-12 in the matters relating to insurance, and in the articles 13-15 concerning consumers' contracts. The Article 5 provides that a 'persons domiciled in a contracting State may, in another Contracting state may be sued in matters relating to a contract, in the courts for the place of performance of the obligation in question'.[4] The counterclaim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending.

In my country – Ukraine - this doctrine is represented in the Article 44 in the Law Act 'On the International Private Law' in the matters of the contracts on joint activities and performance of the work the jurisdiction where such performance takes place.

3. Interpretational difficulties

Observing the issue in the scope of Brussels I Regulation, in my point of view, the interpretational difficulties may rise before the court in relation of determination: the contractual obligation, the place of performance of the obligation, the place of performance if the parties have not agreed.

The main question rose before the court is what obligation should be performed under the contract in order to determine the place of performance.

Concept of obligation in the scope of Article 5(1) (a) of Brussels Convention was observed by the European Court of Justice (hereinafter "ECJ") in the case *Falco*

[3] Civil Jurisdiction and Judgment Act [1982] available from □http://www.legislation.gov.uk/ ukpga/1982/27/□ accessed 24 Jan 2012
[4] Civil Jurisdiction and Judgment Act [1982] available from □http://www.legislation.gov.uk/ ukpga/1982/27/pdfs/ ukpga _19820027_en.pdf□ accessed 24 Jan 2012

Privatstiftung, Thomas Rabitch v. Gisela Weller-Lindhorst. In this case the national court asked '… whether Article 5(1)(a) of Regulation No 44/2001 must be interpreted to the effect that, first, the concept of 'obligation' used in that Article refers to the obligation which arises under the contract and the non-performance of which is relied upon in support of the action and, secondly, the place where that obligation has or should be performed is to be determined in accordance with the law governing that obligation according to the conflict rules of the court before which the proceedings have been brought…'[5]

I suppose that the case *Falco Privatstiftung, Thomas Rabitch v. Gisela Weller-Lindhorst* will have significant influence in interpretation of the doctrine. The ECJ made a few important conclusions in this case, which can help to remove obstacles in interpretation of the doctrine.

First of all the ECJ created the formula, which define the place of performance if the parties have not agreed it. The ECJ stated:

'If jurisdiction cannot be based on the second indent of Article 5(1)(b) of Regulation No 44/2001, the referring court considers that, by virtue of Article 5(1)(c) of that regulation, the rule set out in Article 5(1)(a) should be applied. According to the referring court, in matters involving Article 5(1)(a) of Regulation No 44/2001, the decisive factor is the place of performance of the contested obligation, pursuant to Case 14/76 De Bloos [1976] ECR 1497; the place of performance must be determined in accordance with the law applicable to the contract at issue in the main proceedings, in accordance with Case 12/76 Industrie Tessili Italiana Como [1976] ECR 1473.'[6]

It means that subparagraph b) is special rule; the subparagraph a) is general norm. Considering the case the court should decide whether subparagraph may be applied. If the answer is negative the subparagraph a) should be applied, under the subparagraph c) which make reference to subparagraph a). In this way, the subparagraph a) consist on to basic elements: the place of performance should be the Member State and the place of the performance must be provided by agreement.

[5] Case C-533/07 *Falco Privatstiftung, Thomas Rabitch v. Gisela Weller-Lindhorst* 2009 aviable from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0533:EN:HTML accessed 25 May 2012

[6] In the *Falco Privatstiftung, Thomas Rabitch* case

Another question arising from the disputes where the several places of performance of the obligation are situated in the same Member State. In the case *Color Drack GmbH v. Lexx International Vetriebs GmbH* the ECJ made important conclusion how to determine the jurisdiction. 'In that regard it is necessary to take account of the fact that the special jurisdiction under the first indent of Article 5(1)(b) of Regulation No 44/2001 is warranted, in principle, by the existence of a particularly close linking factor between the contract and the court called upon to hear the litigation, with a view to the efficient organization of the proceedings. It follows that, where there are several places of delivery of the goods, place of performance' must be understood, for the purposes of application of the provision under consideration, as the place with the closest linking factor between the contract and the court having jurisdiction. In such a case, the closest linking factor will, as a general rule, be at the place of the principal delivery, which must be determined on the basis of economic criteria.'[7]

Some difficulties of interpretation may result from the obligations, which have elements of the few obligations. For example, the common problem met in the case law of the ECJ how to distinguish the contract of service from the contract of delivery. On the opinion of the ECJ 'Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that where the purpose of contracts is the supply of goods to be manufactured or produced and, even though the purchaser has specified certain requirements with regard to the provision, fabrication and delivery of the components to be produced, the purchaser has not supplied the materials and the supplier is responsible for the quality of the goods and their compliance with the contract, those contracts must be classified as a 'sale of goods' within the meaning of the first indent of Article 5(1)(b) of that regulation'.[8] In this case the ECJ made the conclusion in the matter of determination of the place of delivery. 'The first indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that, in the case of a sale involving carriage of goods, the place where, under the contract, the goods sold were delivered or should have been

[7] Case C-386/05 *Color Drack GmbH v Lexx International Vetriebs GmbH* [2007] par. 40 aviable from http://curia.europa.eu/juris/liste.jsf?language=en&num=C-386/05 accessed 25 May 2012

[8] Case C-381/08 *Car Trim GmbH v KeySafety Systems Srl* [2010] ECR I-01255 aviable from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0381:EN:NOT accessed 25 May 2012

delivered must be determined on the basis of the provisions of that contract. Where it is impossible to determine the place of delivery on that basis, without reference to the substantive law applicable to the contract, that place is the place where the physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction.'[9] But another problem, which may occur in determination of the place of delivery is multiplicity of the places of delivery, '…where there are several places of delivery of the goods in a single Member State, the Court took the view that the place with the closest linking factor between the contract and the court having jurisdiction is that of the principal delivery, which must be determined on the basis of economic criteria, and that, if it is not possible to determine the place of the principal delivery, each of the places of delivery has a sufficiently close link of proximity to the material elements of the dispute, in which case the applicant may sue the defendant in the court for the place of delivery of his choice'.[10]

In some cases the dispute arises from the performance of the number of obligations. In this case the court should determine the main or principal obligation and the place of performance of this obligation is considered as a place of jurisdiction.

In the Case 266/85 *Shenavai v Kreicher* the ECJ held: 'However, in such a case the court before which the matter is brought will, when determining whether it has jurisdiction, be guided by the maxim *accessorium sequitur principale;* in other words, where various obligations are at issue, it will be the principal obligation which will determine its jurisdiction' [11]

The contracts of delivery of goods is the most spread transaction in the international market. The majority disputes are related to the obligation of delivery or payment. The issues of the jurisdiction arising from the place of delivery of goods or the place of payment.

The Article 57 of the Vienna Convention on the international sales of goods set force the parties obligation relating to payment under the contract of sale of goods,

[9] In the *Car Trim GmbH* case
[10] In the *Color Drack GmbH* case
[11] Case 266/85 *Shenavai v Kreicher* [1987] available from <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=94147&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=511154> accessed on 25 Jan 2012

according to which the payment should be performed 'at the seller's place of business; or if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place' if the parties did not agree the other.' In the question of determining of the obligation the ECJ in the *De Bloos* case stated: 'It follows that for the purposes of determining the place of performance within the meaning of Article 5, quoted above, the obligation to be taken into account is that which corresponds to the contractual right on which the plaintiff's action is based.' [12]

In some disputes the courts may face the problem how to distinguish the equal obligations. For example in the *Leathertex Divisione Sintetici SpA v. Bodetex BVBA '* question was raised in proceedings between Leathertex Divisione Sintetici SpA (hereinafter 'Leathertex'), whose registered office is in Montemurlo, Italy and Bodetex BVBA (hereinafter 'Bodetex'), whose registered office is in Rekkem-Menen, Belgium, concerning the payment of arrears of commission and of compensation in lieu of notice, which Bodetex, the commercial agent of Leathertex in the Belgian and Netherlands markets, is claiming from Leathertex.'[13]

'Two separate obligations formed the basis of the action. It held that the first, namely the obligation to give a reasonable period of notice on termination of a commercial agency agreement and, in the event of failure to give such notice, to pay compensation in lieu, was to be performed in Belgium, whereas the second, namely the obligation to pay commission, was to be performed in Italy under the principle that debts are payable where the debtor is resident.'[14]

'By its question, the national court is essentially asking whether, on a proper construction of Articles 2 and 5(1) of the Convention, the same court has jurisdiction to hear the whole of an action founded on two obligations of equal rank arising from the same contract even though, according to the conflict rules of the State where that

[12] Case 14/76 *A. De Bloos, SPRL v Société en commandite par actions Bouyer* [1976] ECR 01497 available from <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEX numdoc&numdoc =61976J0014&lg=en > accessed on 26 May 2012

[13] Case C-420/97 *Leathertex Divisione Sintetici SpA v. Bodetex BVBA* [1999] ECR I-06747 available from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61997CJ0420:EN:HTML accessed 26 May 2012

[14] In the *Leathertex Divisione Sintetici SpA* case

court is situated, one of those obligations is to be performed in that State and the other in another Contracting State.'[15]

In the case *Custom Made Commercial Ltd v Stawa Metallbau GmbH* the ECJ considered the matter of conflict rules of domestic law and international law in determination of the place of performance. In Custom Made Commercial Ltd case the ECJ stated: 'With regard to the 'place of performance', the Court has ruled that it is for the court before which the matter is brought to establish under the Convention whether the place of performance is situate within its territorial jurisdiction and that it must for that purpose determine in accordance with its own rules of conflict of laws what is the law applicable to the legal relationship in question and define, in accordance with that law, the place of performance of the contractual obligation in question (see *Tessili,* cited above, paragraph 13, as referred to in paragraph 7 of *Shenavai,* cited above). That interpretation must also be accepted in the case where the conflicts rules of the court seized refer to the application to contractual relations of a 'uniform law' such as that in issue in the main proceedings.'[16]

In applying the doctrine of action at the place of performance the court may face the question of applying the doctrine to disputes that are not directly relating to the execution of contracts but naturally are contractual. In this area the significant is the case *Zuid Nederlandse Aannemers Vereniging v Martin Peters Bauunternehmung GmbH* which concerned the person's membership in professional organizations and the liability based upon this membership. Considering the case the ECJ stated: 'Obligations in regard to the payment of a sum of money which have their basis in the relationship existing between an association and its members by virtue of membership are "matters relating to a contract" within the meaning of Article 5 (1) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. It makes no difference in that regard whether the obligations in

[15] In the *Leathertex Divisione Sintetici SpA* case
[16] Case C-288/92 *Custom Made Commercial Ltd v Stawa Metallbau GmbH* [1994] ECR I-02913 available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61992CJ0288:EN:HTML> accessed 26 May 2012

question arise simply from the act of becoming a member or from that act in conjunction with one or more decisions made by organs of the association.'[17]

The other issue that may be encountered by court in settling disputes is the interpretation of Article 5, paragraph B of the Brussels regulation, which includes the right of parties to settle the jurisdiction of the contract at their discretion, particularly in interpretation of the phrase «unless otherwise agreed». How to settle the dispute if the parties entered into a contract verbally or by exchanging of the letters or telegrams? In my point of view the court should take into account the meaning or the nature of the obligation depending on obligation which caused the dispute. In other words if the parties entered into delivery agreement and the dispute is related to payment the court should seek whether the parties determined the place of payment. If the parties did not agree it the Article 5 (a) Brussels Regulation should be applied.

The other case which demonstrates the difficulties in interpretation of the doctrine is the case *MSG v. Graviers Rhenanes*. The issue arose in proceedings concerning compensation of the damage caused to aninland-waterway vessel which SG owned and had chartered to Gravières Rhénanes by a time charter concluded orally between the parties.[18] When the contractual negotiations had been completed, MSG sent Gravières Rhénanes a commercial letter of confirmation containing the following pre-printed statement: 'The place of performance is Würzburg and the courts for that place have exclusive jurisdiction.'[19] The question was whether such clause may be considered as agreed by parties. The ECJ '…considered that the fact that one of the parties to the contract did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or

[17] Case 34/82 *Zuid Nederlandse Aannemers Vereniging v Martin Peters Bauunternehmung GmbH* [1968] ECR 00987 available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61982J0034:EN:HTML> accessed 26 May 2012

[18] Case C-106/95 *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL ECR I-00911 available from <http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg =fr&numdoc=61995CJ0106> accessed 26 May 2012*

[19] In the *MSG* case

commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice.'[20]

I suppose this conclusion of the ECJ is doubtful because the invoice is the document of payment thus it should not include the provision of jurisdiction, it is not arbitration clause in the meaning of the Article 2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York Convention".

The important question considered by the ECJ in the *MSG* case was the influence of the trade customs in the determination of the place of performance of the obligation. Answering this question the Court stated that 'The fact that the contracting parties were aware of that practice is made out in particular where they had previously had trade or commercial relations between themselves or with other parties operating in the branch of trade or commerce in question or where, in that branch, a particular course of conduct is generally and regularly followed when concluding a certain type of contract, with the result that it may be regarded as being a consolidated practice.'[21]

There are some items arising from the disputes relating to connected agreements. For example credit agreement and mortgage agreement, the obligation of guarantee, the agreement of incurrence an reinsurance. I consider in such cases arising from these agreements the place of performance of the obligation should be determined by the relevant obligation. For example if dispute is raised from the obligation foreclosure of the subject of mortgagee the place of performance of the obligation is where real estate is situated.

4. Conclusion

In my work I have described the most common problems which may be come up in the different types of disputes. Commonly these disputes arose from identification of: the contractual obligation, the place of performance of the obligation, the place of performance if the parties have not agreed. The majority of these difficulties were reviewed by ECJ and the other courts of international jurisdiction and the answers were given. The new items in the matter may be raised with adoption of

[20] In the *MSG* case
[21] In the *MSG* case

new conventions or appearance of the new forms of the trade and new types of transaction.

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